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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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¹ *INS v. Chadha*, 462 U.S. 919 (1983).

² *Clinton v. City of New York*, 524 U.S. 417 (1998).

³ *Bowsher v. Synar*, 478 U.S. 714 (1986).

⁴ Professor Calabresi has been a leading participant in these debates. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L. J. 541 (1994); Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

⁵ See, e.g., David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 31-36; Geoffrey Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 608-23 (1989); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Paul R. Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779; Symposium, *The Independence of Independent Agencies*, 1988 DUKE L.J. 215; Symposium, *The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 277 (1987).

counsels.⁶ The Supreme Court upheld the constitutionality of the independent counsel statute in *Morrison v. Olson*⁷ notwithstanding Justice Scalia's dire warnings that special prosecutors could be manipulated for political purposes.⁸ The years that followed appeared to bear out Justice Scalia's predictions,⁹ 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 text¹⁰ and ratification history¹¹ to determine whether it rejected of the plural executive employed by the Articles of the Confederation and many state constitutions in favor of a structure in

⁶ For early commentary on the constitutionality of independent counsels, see TERRY EASTLAND, *ETHICS, POLITICS AND THE INDEPENDENT COUNSEL* (1989); Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988); Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313 (1989); Shane, *supra* note 5, at 598-608; Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Legislative Power*, 63 B.U. L. REV. 59 (1983).

⁷ 487 U.S. 654 (1988).

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

⁹ See Archibald Cox & Philip B. Heymann, *After the Counsel Law*, N.Y. TIMES, Mar. 10, 1999, at A19; Benjamin Ginsberg & Martin Shefter, *Ethics Probes as Political Weapons*, 11 J.L. & POL. 497 (1995). For an analysis of the impact of the political abuse of independent counsels for the separation of powers, see Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 90-95 (1995) [hereinafter Calabresi, *Some Normative Arguments*]; Steven G. Calabresi, *Some Structural Consequences of the Increased Use of Ethics Probes as Political Weapons*, 11 J.L. & POL. 521 (1995).

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 Fromkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994) (same).

¹¹ Compare, e.g., Calabresi & Prakash, *supra* note 4, at 603-05 (arguing that the preratification history supports the unitary executive); and Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 753-89, 808-12 (same); with Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1755-1810 (1996) (drawing the opposite conclusion); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 138-53 (1994) (same).

which all administrative authority was concentrated in a single person.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.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.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 *Humphrey's Executor v. United States*.¹⁵ Some of those offering such arguments have candidly acknowledged the incompleteness of the current literature and

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 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* 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* Strauss, *supra* note 5, at 599-601; Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 432-33 (1987).

¹³ *See* Calabresi & Prakash, *supra* note 4, at 635-63; Gerhard Casper, *An Essay in Separation of Powers; Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211 (1989); Gerhard Casper, *Executive-Congressional Separation of Power During the Presidency of Thomas Jefferson*, 47 STAN. L. REV. 473 (1995); Kent Greenfield, *Original Penumbra: Constitutional Interpretation in the First Year of Congress*, 26 CONN. L. REV. 79, 82-111 (1993); Lessig & Sunstein, *supra* note 10, at 5-84; Prakash, *supra* note 11, at 789-800.

¹⁴ *See* 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, *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, *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, *supra* note 5, at 83-86 (finding past presidents' failure to consistently oppose independent agencies problematic, but ultimately insufficient to constitute acquiescence).

¹⁵ 295 U.S. 602 (1935). *See* Strauss, *supra* note 5, at __; Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1236 (2000).

have recognized the need for a more complete assessment of the historical record of presidential control over the execution of the law.¹⁶

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 *The Unitary Executive During the First Half-Century*,¹⁷ 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.¹⁸ Writing in 1997, when the institution of independent counsels still enjoyed broad support among both politicians and academic commentators,¹⁹ we called for and predicted the demise of the independent counsel statute.²⁰

We continued our project in *The Unitary Executive During the Second Half-Century*,²¹ 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

¹⁶ 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").

¹⁷ Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997).

¹⁸ *Id.* at 1538-59.

¹⁹ See Ken Gormley, *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).

²⁰ Calabresi & Yoo, *supra* note 17, at 1462.

²¹ Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 668 (2003).

impeachment of Andrew Johnson for violating the Tenure of Office Act.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 1887.²³

In *The Unitary Executive During the Third Half-Century*,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.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.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 *Myers v. United States*.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

²² *Id.* at 746-58.

²³ *Id.* at 788-89, 795-99.

²⁴ Christopher S. Yoo, Steven G. Calabresi, & Laurence Nee, *The Unitary Executive During the Third Half-Century* (forthcoming 2004).

²⁵ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2274-75 (2001); Lessig & Sunstein, *supra* note 10, at 84 n.334; Miller, *supra* note 5, at 79, 85.

²⁶ See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 105-08 (1991); Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801, 845-96 (1995).

²⁷ 272 U.S. 52 (1926).

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*.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.²⁹

²⁸ 295 U.S. 602 (1935). For our discussion of *Humphrey's Executor*, see Yoo et al., *supra* note 24, at —.

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).

³² 462 U.S. 919 (1983).

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.³⁴ 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.³⁵ 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.³⁶ 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.

³⁴ *Id.* at 1458.

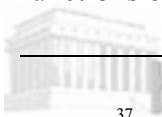
³⁵ See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 252-65 (2001); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1676-68 (2002).

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



³⁷

See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1989).

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

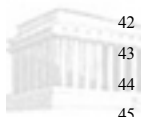
⁴¹ Calabresi & Yoo, *supra* note 17, at 1462.

⁴² DONALD R. MCCOY, THE PRESIDENCY OF HARRY S. TRUMAN 34 (1984).

⁴³ *Id.* at 15.

⁴⁴ *Id.* at 22.

⁴⁵ *Id.* at 39.



gets high marks as “a supremely tough, decisive leader”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.”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”⁴⁸ and had a Cabinet that was “in entire sympathy with what I wanted to do”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.”⁵⁰

Truman relied “more heavily on his top subordinates than had Roosevelt,”⁵¹ and he “had daily meetings with his chief White House aides and at least weekly meetings with cabinet members.”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

⁴⁶ *Id.* at 65.

⁴⁷ *Id.* at 16.

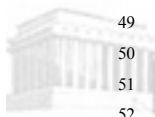
⁴⁸ *Id.* at 17.

⁴⁹ *Id.* at 18.

⁵⁰ *Id.* at 19.

⁵¹ *Id.*

⁵² *Id.*



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

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⁵⁵

Id. Quoting Harry S. Truman.

Id. at 236.

Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2330-31 (1998).

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.”⁵⁶ 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.⁵⁷

As befitting a person with a plate on his desk proclaiming “The buck stops here,”⁵⁸ 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.”⁵⁹ Truman also “created the institution of the presidency”⁶⁰ 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

⁵⁶ Quoted in *id.* at 2331.

⁵⁷ See generally KATY J. HARRIGER, INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS 15 (1992).

⁵⁸ MCCOY, *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.

⁶⁴ CHESTER J. PACH, JR., & ELMO RICHARDSON, *THE PRESIDENCY OF DWIGHT D. EISENHOWER* 17 (1991).

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).

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

The Truman Administration's brief goes on to claim that in England the "power to remove executive officers was vested in the Crown"⁷¹ and the brief specifically cites the Vesting Clause of Article II as the source of the President's removal power.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.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.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

⁷⁰ Brief for the Petitioner at 15, *United States v. Lovett* (Nos. 809 to 811).

⁷¹ *Id.* at 19.

⁷² *Id.* at 21.

⁷³ *Id.* at 32-48.

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, *supra* note 67, at 10 n.32, 31 n.93.

arbitrarily changing the qualifications for their positions.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.”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.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.⁷⁸ Again Truman objected in much the same terms.⁷⁹ Perhaps chastened by their defeat in *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.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

⁷⁵ Interior Department Appropriation Act, Pub. L. No. 80-841, 62 Stat. 1112, 1126 (1948).

⁷⁶ Harry S. Truman, Statement by the President on the Interior Department Appropriation Act (June 30, 1948), *in* 1948 PUB. PAPERS 390, 390.

⁷⁷ *Id.*

⁷⁸ Temporary Appropriations Act of 1949, ch. 101, 63 Stat. 67.

⁷⁹ Harry S. Truman, Statement by the President Upon Signing the Temporary Appropriations Bill (May 12, 1949), *in* 1949 PUB. PAPERS 250.

⁸⁰ Act of Oct. 12, 1949, ch. 680, § __, 63 Stat. 765, __; *see also* Note, 1949 PUB. PAPERS 250.

authority,⁸¹ Congress refused to comply and instead followed the pattern established in the Reorganization Act of 1939⁸² by specifically exempting certain specified agencies from the Act altogether and by strictly limiting the degree to which certain other agencies could be reorganized.⁸³ 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.⁸⁴ Congress of course took Truman at his word and included a two-house legislative veto into the 1945 Act.⁸⁵ Truman also tolerated the enactment of other legislative vetoes throughout his first term.⁸⁶

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,⁸⁷

⁸¹ 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).

⁸² See Yoo et al., *supra* note 24, at .

⁸³ Reorganization Act of 1945, Pub. L. No. 70-263, § 5, 59 Stat. 613, 615-16; see also H.R. REP. NO. 971, 79th Cong., 1st Sess 6, 10-11 (1945); S. REP. NO. 638, 79th Cong., 1st Sess. 4-5 (1945).

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)).

⁸⁶ For a discussion of other legislative vetoes accepted during Truman’s first term, see Ginnane, *supra* note 85, at 583-86, 603-04. See generally H. Lee Watson, Comment, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983, 1019-21 (1975); Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, LAW & CONTEMP. PROBS., Aut. 1993, at 273, 283 [hereinafter Fisher, *Legislative Veto*]; Louis Fisher, *Separation of Powers: Interpretation Outside the Courts*, 18 PEPP. L. REV. 57, 80 (1990) [hereinafter Fisher, *Interpretation Outside the Courts*].

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."⁸⁸ 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."⁸⁹

the bottom, and a return line of responsibility and accountability from the bottom to the top.

Id. Far from posing a threat to free and responsible government, "strength and unity in an executive make clear who is responsible for faults in administration and thus enable the legislature better to enforce accountability to the people." *Id.* at 2 (citing THE FEDERALIST NO. 70 (Alexander Hamilton)). However, such lines of authority and accountability "has been weakened, or actually broken in many places and in many ways." As the Commission found:

That line of responsibility still exists in constitutional theory, but it has been worn away by administrative practices, by political pressures, and by detailed statutory provisions. Statutory powers often have been vested in subordinate officers in such a way as to deny authority to the President or a department head.

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.

⁸⁸ Message from President Harry S. Truman to the Congress (Jan. 17, 1949), *reprinted in* S. REP. NO. 232, *supra* note 87, at 4, 5.

⁸⁹ *Id.* at 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 unmingled 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).

⁹² Reorg. Plan No. 6 of 1949, 3 C.F.R. 1001 (1948-1953 compilation). Another plan 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* Itzhak Zamir, *Administrative Control of Administrative Action*, 57 CAL. L. REV. 866, 903 n.180 (1969).

⁹³ Reorg. Plan No. 7 of 1950, H.R. DOC. NO. 511, 81st Cong., 2d Sess. (1950) (ICC); Reorg. Plan No. 8 of 1950, 3 C.F.R. 1005 (1948-1953 compilation) (FTC); Reorg. Plan No. 9 of 1950, 3 C.F.R. 1005 (1948-1953 compilation) (FPC); Reorg. Plan No. 10 of 1950, 3 C.F.R. 1006 (1948-1953 compilation) (SEC); Reorg. Plan No. 11 of 1950, H.R. DOC. NO. 515, 81st Cong., 2d Sess. (1950) (FCC); Reorg. Plan No. 12 of 1950, H.R. DOC. NO. 516, 81st Cong., 2d Sess. (1950) (NLRB); Reorg. Plan No. 13 of 1950, 3 C.F.R. 1006 (1948-1953 compilation) (Civil Aeronautics Board).

⁹⁴ *Id.*; *see also* Angel M. Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. AM. U. 461, 486 (1994) (citing MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 134-37 (1955)).

decades earlier⁹⁵ requiring that government publications be subject to the prior approval of the Joint Committee on Printing.⁹⁶ Truman signed this legislation, but objected to it as an “invasion of the rights of the Executive branch by a legislative committee.”⁹⁷

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.”⁹⁸ Although Truman did propose substitute legislation to eliminate this problem, Congress took no action on it.⁹⁹

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 tolerated¹⁰⁰ 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.”¹⁰¹ The House voted 312 to 68 to override the veto.¹⁰² The Senate, however, took no action, and the veto stood. Four months later, however, Congress was

⁹⁵ See Yoo et al., *supra* note 24, at .

⁹⁶ Act of July 5, 1949, ch. 296, 63 Stat. 405, 406.

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 .

¹⁰¹ Harry S. Truman, Veto of Bill Relating to Land Acquisition and Disposal Actions by the Army, Navy, Air Force, and Federal Civil Defense Administration (May 15, 1951), *in* 1951 PUB. PAPERS 280, 282.

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

¹⁰³ Ch. 434, § 601, 65 Stat. 336, 365.

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.

¹¹² Exec. Order 9980, 3 C.F.R. (1943-48 compilation).

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.”¹¹⁵ Black Americans saw these executive orders as “unprecedented since the time of Lincoln.”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.”¹¹⁷ One of the Truman administration’s final actions as it left office was to file in December of 1952 an amicus brief in *Brown v. Board of Education*.¹¹⁸

One of the most famous controversies of the Truman Administration came over the President’s decision to seize the steel mills which led to the U.S. Supreme Court’s famous *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”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.’”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.”¹²¹

¹¹⁵ McCoy, *supra* note 42, at 109.

¹¹⁶ *Id.*

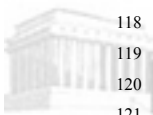
¹¹⁷ *Id.* at 170.

¹¹⁸ *Id.* at 307.

¹¹⁹ *Id.* at 290.

¹²⁰ *Id.* at 291.

¹²¹ *Id.* at 292.



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.¹²²

In its brief in the *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.¹²³

The brief also pointed to the Take Care Clause as construed in *Cunningham v. Neagle*¹²⁴ and in *In re Debs*¹²⁵ as justifying President Truman's seizure of the steel mills.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."¹²⁷ And, it also cited *Inland Waterways Corp. v. Young*¹²⁸ and *United States v. Midwest Oil Co.*¹²⁹ for the

¹²² *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 569 (D.D.C.), *aff'd*, 343 U.S. 579 (1952).

¹²³ Brief for Petitioner at 96-97, *Youngstown* (Nos. 744 and 745) (citations omitted; citing *Myers v. United States*, 272 U.S. 52 (1926); THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 388-89 (1913); CHARLES THACH, THE CREATION OF THE PRESIDENCY, 1775-1789, chs. 4-5 (1922); THE FEDERALIST, NOS. 70 AND 71; Letter from Alexander Hamilton to George Washington (Sept. 15, 1790), in 4 THE WORKS OF ALEXANDER HAMILTON 313, 338 (Henry Cabot Lodge ed., 1904); THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 388-89 (1913)).

¹²⁴ 135 U.S. 1 (1890). For our review of the *Neagle* case, see Yoo et al., *supra* note 24, at __.
¹²⁵ 158 U.S. 564 (1895). For our review of the *Debs* case, see Yoo et al., *supra* note 24, at __.
¹²⁶ Brief for Petitioner at 98, *Youngstown* (Nos. 744 and 745).

¹²⁷ *Id.* at 103-05.

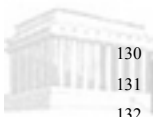
¹²⁸ 309 U.S. 517, 525 (1940).

¹²⁹ 236 U.S. 459, 472-73 (1915).

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.



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Brief for Petitioner at 121, *Youngstown* (Nos. 744 and 745).
343 U.S. at 640-41 (Jackson, J., concurring in the judgment).
Id. at 610-11 (Frankfurter, J., concurring).

Nonetheless, as McCoy observes, “Seldom had the Supreme Court so soundly rebuffed a president.”¹³³ Truman “had gambled badly, and he had lost badly.”¹³⁴ Truman “did not, however, defy the Supreme Court, for the government immediately relinquished control of the steel mills.”¹³⁵

Truman’s foreign policy was led Secretary of State George C. Marshall who had been army chief of staff during World War II.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.”¹³⁷ As 1936 Republican presidential nominee Alf Landon said, “We are in European power politics up to our necks, and in it to stay.”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.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.¹⁴⁰ The Truman Doctrine and Marshall Plan marked “the end of the *Pax Britannica*, and the establishment

¹³³ McCoy, *supra* note 42, at 293.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 115.

¹³⁷ *Id.* at 123.

¹³⁸ *Id.*

¹³⁹ *Id.* at 125.

¹⁴⁰ *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

¹⁴¹

Id. at 129.

¹⁴²

See, e.g., Act of July 15, 1952, ch. 758, § 1413, 66 Stat 637, 661. *See generally* Ginnane, *supra* note 85, at 604; Watson, *supra* note 86, at 1020.

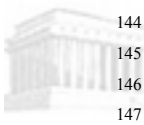
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CHESTER J. PACH, JR., & ELMO RICHARDSON, *THE PRESIDENCY OF DWIGHT D. EISENHOWER* xii (1991).

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.”¹⁴⁴ 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.”¹⁴⁵ 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.”¹⁴⁶ 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.¹⁴⁷

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



144
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Id.
Id. at 41.
Id. at 42.
Id.

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need for clear lines of authority, an abhorrence of partisanship—that shaped his presidency.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.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.¹⁵⁰ He was also the first president to “accord[] cabinet status to the director of the Bureau of the Budget, Joseph M. Dodge”¹⁵¹—an office created under the Harding administration and moved to the White House by FDR.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.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

¹⁴⁸ *Id.* at 29.

¹⁴⁹ *Id.* at xi.

¹⁵⁰ *Id.* at 34.

¹⁵¹ *Id.* at 37.

¹⁵² See Yoo et al., *supra* note 24, at _ (detailing the creation of the Bureau of the Budget under Harding and FDR).

¹⁵³ *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,

¹⁵⁴ Defense Reorganization Act of 1958, Pub. L. No. 85-599, § 3, 72 Stat. 514, 515.

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)).

¹⁵⁷ 334 U.S. 1 (1948). For Eisenhower's role in drafting the brief, see Devins, *supra* note 156, at 284 (citing Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV., 817, 817-19 (1987)).

¹⁵⁸ Quoted in CHESTER J. PACH & ELMO RICHARDSON, THE PRESIDENCY OF DWIGHT D. EISENHOWER 142 (rev. ed. 1991).

Eisenhower asked the Board of Commissioners of the District of Columbia to set an example of peaceful desegregation.”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.”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.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.’”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.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.”¹⁶⁴ Eisenhower further opposed racial discrimination by renewing and extending the executive orders first initiated during

¹⁵⁹

Id.

¹⁶⁰

Id. at 153.

¹⁶¹

Id.

¹⁶²

Id. at 154.

¹⁶³

Id.

¹⁶⁴

Id. at 157.



the FDR and Truman Administrations¹⁶⁵ prohibiting discrimination in federal contracting and employment. Unlike his predecessors, Eisenhower explicitly based his orders on statutory rather than constitutional grounds.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.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."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.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.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

¹⁶⁵ See *supra* notes 112-114 and accompanying text; Yoo et al., *supra* note 24, at __.

¹⁶⁶ Exec. Order No. 10,479, 3 C.F.R. 961 (1949-53 compilation) (invoking the president's authority under the Act of May 3, 1945, ch. 106, § 214, 59 Stat. 106, 134); Exec. Order No. 10,577, pmb. & § 4.2, 3 C.F.R. 218, 218, 220-21 (1949-53 compilation) (invoking the president's authority under the 5 U.S.C. § 631; the Civil Service Act of 1883, ch. 27, 22 Stat. 403; and 3 U.S.C. § 301); see also *Contractors Ass'n v. Sec'y of Labor*, 442 F.2d 159, 170 (3d Cir. 1971); Note, *supra* note 114, at 388.

¹⁶⁷ See Maheshwar Nath Charturvedi, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 NW. U. L. REV. 287, 309 (1968); Richard A. Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196, 199 (1973).

¹⁶⁸ Lloyd-LaFollette Act of 1912, ch. 389, § 6, 37 Stat. 539, 555.

¹⁶⁹ See Yoo et al., *supra* note 24, at __.

¹⁷⁰ Veterans' Preference Act of 1944, ch. 359, § 14, 58 Stat. 387, 390.

exercise of the president's removal authority.¹⁷¹ For example, in *Bailey v. Richardson*,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."¹⁷³ The Civil Service Commission was thus limited to conducting informal investigations to ensure compliance with procedural requirements,¹⁷⁴ even decisions with respect to procedural compliance were not made binding on agencies until 1948.¹⁷⁵

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.¹⁷⁶ Such a limitation was concededly quite narrow¹⁷⁷ 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.¹⁷⁸ Most importantly, the Court would subsequently make clear that the doctrine prohibiting removals for the exercise of

¹⁷¹ See *Levy v. Woods*, 171 F.2d 145 (D.C. Cir. 1948); *Asher v. Forrestal*, 71 F. Supp. 470, 471 (D.D.C. 1947); *Culligan v. United States*, 107 Ct. Cl. 222, 223 (1946). See generally *Yoo et al.*, *supra* note 24, at _.

¹⁷² 182 F.2d 46 (D.C. Cir. 1950).

¹⁷³ *Id.* at 58.

¹⁷⁴ See Egon Guttman, *The Development and Exercise of Appellate Powers in Adverse Action Appeals*, 19 AM. U.L. REV. 323, 331 (1970).

¹⁷⁵ Act of June 22, 1948, ch. 604, § __, 62 Stat. 575, __. See *Merrill*, *supra* note 167, at 213.

¹⁷⁶ The seminal case is *Wieman v. Updegraff*, 343 U.S. 183 (1952). See also *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Slochower v. Bd. of Educ.*, 350 U.S. 551 (1956); *Bailey v. Richardson*, 182 F.2d 46, 69 (D.C. Cir. 1950) (Edgerton, J., dissenting), *aff'd mem. by an equally divided Court*, 341 U.S. 918 (1951).

¹⁷⁷ See Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 972-74 (1976). For example, it does not bar the limits on federal employees' political activities by the Hatch Act. See *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548 (1973); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1946).

¹⁷⁸ See *Yoo et al.*, *supra* note 24, at _.

constitutionally protected activity did not apply to removals related to job performance.¹⁷⁹ This would be demonstrated most eloquently by the Court's decision in *Cafeteria and Restaurant Workers Local 473 v. McElroy*,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."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.¹⁸²

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

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. But, if he does not, he may be unable to substantiate his action judicially because he has not waited to accumulate documentary evidence.¹⁸⁴

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

¹⁷⁹ *Pickering*, 391 U.S. at 573 n.5; *Slochower*, 350 U.S. at 559.

¹⁸⁰ 367 U.S. 886 (1961).

¹⁸¹ *Id.* at 896.

¹⁸² *Id.* at 899.

¹⁸³ See 48 U.S. CIV. SERV. COMM'N ANN. REP. 41 (1931); Guttman, *supra* note 174, at 332.

¹⁸⁴ TASK FORCE ON PERSONNEL AND CIVIL SERVICE OF THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT, PERSONNEL AND CIVIL SERVICE 96 (1955)

the recommendations of the Second Hoover Commission¹⁸⁵ 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,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.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.”¹⁸⁸ Although the Eisenhower Administration did not completely ignore the agencies supposed independence,¹⁸⁹ there can be little question that it asserted sufficient control over them to

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. *Id.*; *see also* Moreno, *supra* note 94, at 487 (citing HERBERT EMMERICH, FEDERAL ORGANIZATION AND ADMINISTRATIVE MANAGEMENT 101-28 (1971)).

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.” Emmette S. Redford, *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.” *Id.* at *id.* 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. *Id.* at *id.*

¹⁸⁷ *See* Redford, *supra* note 186, at 303-04

¹⁸⁸ Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1410 (1975).

¹⁸⁹ One of Eisenhower’s Solicitors General observed that he knew of no case in which the Administration “ha[d] 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, *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.”¹⁹⁰

Wiener brought suit in the Court of Claims challenging his removal, and the case eventually reached the Supreme Court.¹⁹¹ In its brief, the Eisenhower Administration defended its actions primarily on unitariness grounds.¹⁹² 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

¹⁹⁰ Letter from Dwight D. Eisenhower to Myron Wiener (Dec. 10, 1953), *quoted in* Wiener v. United States, 357 U.S. 349, 350 (1958).

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

¹⁹³ *Id.* at 15-16.

¹⁹⁴ 295 U.S. 602 (1935).

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.

¹⁹⁹ War Claims Act of 1948, ch. 826, § 2(d), 62 Stat. 1240, 1241. The filing deadline was eventually postponed until March 31, 1952. Act of Apr. 5, 1951, ch. 27, 65 Stat. 28; Act of May 27, 1949, ch. 145, 63 Stat. 112.

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.²⁰⁰ Instead, the Court inferred Congress's desire to impose such limits from the fact that War Claims Commissioners were quasi-judicial officers.²⁰¹ 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,²⁰² *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.²⁰³ What matters

²⁰⁰ *Wiener*, 357 U.S. at 350, 352.

²⁰¹ *Id.* at 353-54.

²⁰² Yoo et al., *supra* note 24, at __.

²⁰³ A parallel claim filed by Commissioner Lusk was settled without litigation. *Lusk v. United States*, 173 Ct. Cl. 291, 294-95 (1965), *cert. denied*, 383 U.S. 967 (1966). Eisenhower eventually abolished the War Claims Commission in 1954. Reorg. Plan No. 1 of 1954, § 4(a), 3 C.F.R. 442, 443 (1954-58 compilation). See generally Jonathan L. Entin, *The Removal Power and the Federal Deficit*:

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

Form, Substance, and Administrative Independence, 75 KY. L.J. 699, 750 (1987).

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.”²⁰⁶ 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 o them a power to approve or disapprove a contract which an executive officer proposes to make.²⁰⁷

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.”²⁰⁸

²⁰⁶ Dwight D. Eisenhower, Veto Message (May 25, 1954), *reprinted in* 100 CONG. REC. 7135 (1954).

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 execute.’” 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 1956.²⁰⁹ 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.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."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."²¹² In so observing, Eisenhower embraced a strongly formalist vision of the separation of powers: "The Constitution of the United States divides the

²⁰⁹ Defense Appropriations Act of 1956, ch. 157, 69 Stat. 301.

²¹⁰ § 638, 69 Stat. at 321.

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. Att'y Gen. 230, 231 (1955). Brownell also anticipated the Supreme Court's decision in *Chadha* by noting that the provision raised problems under Article I as well. *Id.* See generally Fisher, *Legislative Veto*, *supra* note 86, at 283-84.

²¹² Eisenhower, Defense Authorization Signing Statement, *supra* note 211, at 689.

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.”²¹³ 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.”²¹⁴ 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.”²¹⁵

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.²¹⁶ 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.²¹⁷

²¹³ *Id.* at 688-89.

²¹⁴ *Id.* at 689.

²¹⁵ *Id.*

²¹⁶ Porter Hardy, Jr., No. B-124985, 1955 WL 1368, 1955 WL 2073 (Comp. Gen. Aug. 17, 1955).

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.²¹⁸ As before, Eisenhower indicated that such committee vetoes “would destroy the clear lines of responsibility which the Constitution provides.”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.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

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. *Id.* at 596-97.

²¹⁹ *Id.* at 597. Eisenhower further noted:

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.

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

²²⁰ Act of Aug. 3, 1956, ch. 939, § 419, 70 Stat. 991, 1018-19; see also Watson, *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.
²²² Dwight D. Eisenhower, Statement by the President upon Signing the Small Reclamation Projects Act of 1956 (Aug. 6, 1956), *in* 1956 PUB. PAPERS 648, 649.

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 650.

²²⁵ *Id.* at 649.

remove or revise the objectionable section.²²⁶ As Eisenhower predicted, Congress replaced the committee veto with a “no appropriation” provision the next session.²²⁷

Although Eisenhower did accede without objection to a few legislative vetoes,²²⁸ Eisenhower subsequently objected to a provision providing a two-house legislative veto over TVA power projects,²²⁹ successfully called for the repeal of the provision enacted during the Truman Administration giving a legislative veto to a single member of Congress,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 veto²³¹ that would eventually give rise to the decision in *INS v. Chadha*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

²²⁶ *Id.* at 650.

²²⁷ Act of June 5, 1957, Pub. L. No. 85-47, § __, 71 Stat. 48, 49; *see also* Watson, *supra* note 86, at 1024.

²²⁸ Notably, Congress included a one-house veto in the Reorganization Act of 1957, Pub. L. No. 85-286, 71 Stat. 611, and the Defense Reorganization Act of 1958, Pub. L. No. 85-599, § 3, 72 Stat. 514, 514-58. In 1960, at the request of the General Services Administration, Congress also restored a committee veto provision to the Public Buildings Act of 1959, Pub. L. No. 86-249, § 7, 73 Stat. 479, 480; *see also* Act of July 12, 1960, Pub. L. No. 86-626, 74 Stat. 425, 431; Act of Sept. 8, 1960, Pub. L. No. 86-722, 74 Stat. 821, 826. *See generally* Watson, *supra* note 86, at 1014. n.143, 1025 & nn.214-15.

²²⁹ Dwight D. Eisenhower, Statement by the President Upon Singing a Bill Amending the Tennessee Valley Authority Act (Aug. 6, 1959), in 1959 PUB. PAPERS 566 (objecting to Act of Aug. 14, 1959, Pub. L. No. 86-157, 73 Stat. 338); *see also* Joseph Cooper & Ann Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467, 471 n.11 (1962).

²³⁰ *See* Watson, *supra* note 86, at 1020 (citing HARRIS, *supra* note 99, at 1020).

²³¹ Eisenhower noted:

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.

Dwight D. Eisenhower, Statement by the President upon Signing Bill Providing for the Admission of Refugees (July 14, 1960), 1960 PUB. PAPERS 579, 579. As the *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.

²³² 462 U.S. 919 (1983).

which Truman had acceded²³³) subjecting all major military real estate transactions to the approval of the Armed Services Committees.²³⁴ Bolstered by the recommendations of the second Hoover Commission²³⁵ 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.

²³⁴ Military Construction Act of 1951, ch. 434, § 601, 65 Stat. 336, 365.

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), _.

²³⁷ DWIGHT D. EISENHOWER, THE BUDGET OF THE UNITED STATES GOVERNMENT FOR THE FISCAL YEAR ENDING JUNE 30, 1961, H.R. DOC. NO. 255, 86th Cong., 2d Sess. pt. I, at M18 (1960).

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.”²³⁹ 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.”²⁴⁰ 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.”²⁴¹ Pach and Richardson call this “the boldest assertion of executive privilege in the history of the republic.”²⁴²

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.”²⁴³ “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.’”²⁴⁴ 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.²⁴⁵

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,

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.*

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.”²⁴⁶ Like those individuals, “[h]e sought to be a strong, active president.”²⁴⁷ 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”²⁴⁸—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.²⁴⁹

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JAMES N. GIGLIO, *THE PRESIDENCY OF JOHN F. KENNEDY* 29 (1991).

²⁴⁷

Id.

²⁴⁸

John F. Kennedy, Inaugural Address (Jan. 20, 1961), *in* 1961 PUB. PAPERS 1, 3.

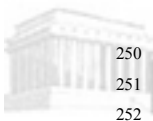
²⁴⁹

GIGLIO, *supra* note 246, at 255.

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.”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.”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.”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,



²⁵⁰
²⁵¹
²⁵²

Id. at 21
Id. at 30.
Id.

berkeley press Legal Repository

many of them still in their thirties. They remained completely devoted to Kennedy and knew exactly what he wanted.”²⁵³

Kennedy was reluctant to meet regularly with the cabinet, “preferr[ing] to communicate in less direct ways.”²⁵⁴ 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.²⁵⁵ 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.”²⁵⁶ 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.²⁵⁷ Bowles was summarily handed a press release indicating that George Ball would replace him.²⁵⁸

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.²⁵⁹ 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.

²⁵⁹

Exec. Order No. 10,925, §§ 101-204, 3 C.F.R. 448, 448-49 (1959-63 compilation); Exec.

government contractors undertake “affirmative action to ensure that . . . employees are treated during their employment, without regard to their race, creed, color, or national origin.”²⁶⁰ 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.”²⁶¹ 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.”²⁶² 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.²⁶³ 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).

²⁶⁰ Exec. Order No. 10,925, §§ __, 3 C.F.R. at __; Exec. Order No. 11,114, § __, 3 C.F.R. at __.

²⁶¹ Exec. Order No. 10,925, pmbl., 3 C.F.R. at pmbl.; Exec. Order No. 11,114, pmbl., 3

C.F.R. at __.

²⁶² 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))).

²⁶³ 42 Op. Att’y Gen. 97, 106-07 (1961) (citing *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-75 (1915)); William H. Speck, *Enforcement of Nondiscrimination Requirements for Government Contract Work*, 63 COLUM. L. REV. 243, 245-46 & n.17 (1963) (same). *But see* *Farkas v. Tex. Instruments, Inc.*, 375 F.2d 629, 632 n.1 (5th Cir. 1967) (concluding that “Executive Order No. 10925 was issued pursuant to statutory authority”); *Farmer v. Phila. Elec. Co.*, 329 F.2d 3, 8 (3d Cir. 1964) (noting that the defendant did not “maintain that the executive orders . . . were issued without statutory authority”); Blumstein, *supra* note 114, at 927-29 (arguing against a constitutional foundation for the orders); James L. Moeller, Comment, *Executive Order No. 11,246: Presidential Power to Regulate Employment Discrimination*, 43 MO. L. REV. 451, 481-82 (1978) (same); Robert P. Schuwerk, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 726-32 (1972) (same).

“Kennedy federalized the Alabama National Guard, signaling Wallace that he intended to enforce the court order militarily if necessary.”²⁶⁴

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.²⁶⁵ Although some lower court decisions offered some halting moves towards limits on the removal power,²⁶⁶ such protections would not emerge in Supreme Court cases until the 1970s.²⁶⁷ Indeed, decisions from this era continued to reaffirm that a supervisor’s lack of confidence in a subordinate was sufficient grounds for removal.²⁶⁸ Veterans, who comprised roughly half of the federal workforce,²⁶⁹ did enjoy a greater degree of procedural protection than nonveterans.²⁷⁰ 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.²⁷¹ 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*).

²⁶⁸ *See Leonard v. Douglas*, 321 F.2d 749 (D.C. Cir. 1963).

²⁶⁹ PAUL P. VAN RIPER, *HISTORY OF THE UNITED STATES CIVIL SERVICE* 436 (Greenwood Press 1976) (1958).

²⁷⁰ *See supra* notes 170-171 and accompanying text.

²⁷¹ Exec. Order No. 10988, 3 C.F.R. 527 (1959-63 compilation). The executive order largely adopted the recommendations of a presidential task force. PRESIDENT’S TASK FORCE ON EMPLOYEE-MANAGEMENT RELATIONS IN THE FEDERAL SERVICE, *A POLICY FOR EMPLOYEE-MANAGEMENT*

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

COOPERATION IN THE FEDERAL SERVICE 24 (1951).

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.

²⁷⁴ STAFF OF THE SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 24-31 (Comm. Print 1960) (authored by James Landis).

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."²⁷⁶ Therefore, Landis recommended that the informal controls that the President possessed over the independent agencies²⁷⁷ should be strengthened.²⁷⁸ 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.

²⁷⁶ 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.

²⁷⁷ 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.

²⁷⁸ 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

²⁷⁹ JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1-2 (1938).

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).

²⁸¹ John F. Kennedy, Special Message to Congress on the Regulatory Agencies (Apr. 13, 1961), *in* PUB. PAPERS 267.

²⁸² See Redford, *supra* note 186, at 314-18.

²⁸³ Brief for the United States at 10, *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961) (No. 47), *quoted in* Devins, *supra* note 156, at 270-71.

²⁸⁴ Kennedy failed to object to a provision subjecting reorganization plans to a one-house veto. Arms Control and Disarmament Act, Pub. L. No. 87-297, § 47, 75 Stat 638 (1961). President Kennedy did tolerate “no appropriation” provisions, *see, e.g.*, Act of Aug. 1962, Pub. L. No. 87-578, 76 Stat. 335, 338; Act of Sept. 27, 1962, Pub. L. No. 87-703, § 103, 76 Stat. 605, 608, as well as a provision

income support program be subject to a committee veto.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.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.”²⁸⁷ In signing the bill despite these objections, Kennedy relied upon similar practices undertaken by Presidents Roosevelt, Truman, and Eisenhower.²⁸⁸ Accordingly, Kennedy directed the Administrator of the Agency for International Development “to treat this provision as a request for information.”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. *See generally* Watson, *supra* note 86, at 1010 n.115, 1026.

²⁸⁵ John F. Kennedy, Special Message to the Congress on Agriculture (Mar. 16, 1961), in 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. *Id.* at 195. Congress did not enact the proposal. Watson, *supra* note 86, at 988 n.12, 1026 (citing HARRIS, *supra* note 99, at 205).

²⁸⁶ Foreign Aid and Related Agencies Appropriation Act of 1963, Pub. L. No. 87-872, 76 Stat. 1163, 1164.

²⁸⁷ John F. Kennedy, Memorandum on Informing Congressional Committees of Changes Involving Foreign Economic Assistance Funds (Jan. 8, 1963), in 1963 PUB. PAPERS 6.

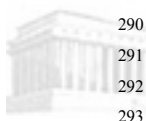
²⁸⁸ *Id.*

²⁸⁹ *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: Hearings on H.R. 9499 Before the Sen. Comm. on Appropriations*, 88th Cong., 1st Sess. 312-13 (1963). *See generally* Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 944 (1994); Watson, *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,²⁹⁰ 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.²⁹¹ He added that in the free world of his day the proudest boast a man could make was "Ich bin ein Berliner."²⁹²

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."²⁹³ Although evidence would later surfaced regarding the personal indiscretions of the president and his brother with respect



²⁹⁰ GIGLIO, *supra* note 246, at 216.

²⁹¹ *Id.* at 219.

²⁹² *Id.* at .

²⁹³ *Id.* at 287.

to their private sex lives, such matters have more to do with Kennedy's place in history²⁹⁴ 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 led 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.²⁹⁵ Johnson was respectfully slow to make significant

²⁹⁴ Interestingly, a recent survey of political scientists, legal academics, and historians overwhelmingly designated Kennedy the most overrated president in U.S. history. See James Lindgren & Steven G. Calabresi, *Rating the Presidents of the United States, 1789-2000: A Survey of Scholars in Political Science, History, and Law*, 18 CONST. COMM. 583, 594 (2001).

²⁹⁵ VAUGHN DAVIS BORNET, *THE PRESIDENCY OF LYNDON B. JOHNSON* 25-27 (1983).

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 1961²⁹⁹ 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

²⁹⁶ *Id.* at 25.
²⁹⁷ Department of Agriculture and Related Agencies Appropriation Act, Pub. L. No. 89-556, 80 Stat. 689, 690 (1966).

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 —, Pub. L. No. 89-797, § 304, 80 Stat. 1479, 1497

which the Export Control Act is to be administered.”³⁰¹ 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.³⁰²

The following year, Johnson objected that three provisions of the Military Construction Authorization Act of 1968³⁰³ were “inconsistent with the sound management of America’s military establishment and raise questions concerning the constitutional separation of powers.”³⁰⁴ First, the Act prohibited Johnson from closing the Naval Academy’s dairy farm.³⁰⁵ Second, the Act froze the present geographic boundaries and headquarters of the eleven Naval Districts.³⁰⁶ Third, the Act prohibited the Department of the Army from closing a particular installation in Hawaii.³⁰⁷ 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.”³⁰⁸ In the end, however, the dairy remained open.³⁰⁹

³⁰¹ Lyndon B. Johnson, Statement by the President Expressing Disapproval of Appropriation Act Provision Relating to Export Control of Hides, Skins, and Leather (Nov. 8, 1966), *in* 1966 PUB. PAPERS 1351, 1351.

³⁰² *Id.*

³⁰³ Pub. L. No. 90-110, 87 Stat. 279.

³⁰⁴ Lyndon B. Johnson, Statement by the President Upon Signing the Military Construction Authorization Act, 1968 (Oct. 21, 1967), *in* 1967 PUB. PAPERS 935, 935 [hereinafter Johnson, Military Construction Authorization Act Signing Statement].

³⁰⁵ § 81 Stat. at __.

³⁰⁶ § 81 Stat. at __.

³⁰⁷ § 81 Stat. at __.

³⁰⁸ Johnson, Military Construction Authorization Act Signing Statement, *supra* note 304, at

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.³¹⁰ 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."³¹¹ Courts and commentators have

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.

³¹¹ *Id.* As noted earlier, the jurisdictional basis of the nondiscrimination executive orders has traditionally been construed as resting on the executive power vested in the President by Article II. *See supra* notes 112-114, 261-262 and accompanying text. Some courts nonetheless persisted in viewing Executive Order 11,246 as being based on the procurement statute. *United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459, 466-67 (5th Cir. 1977), *vacated and remanded on other grounds*, 436 U.S. 942 (1978); *Northeast Constr. Co. v. Romney*, 485 F.2d 752, 760-671 (D.C. Cir. 1973); *Contractors Ass'n v. Sec'y of Labor*, 442 F.2d 159, 171 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); *Legal Aid Soc'y v. Brennan*, 381 F. Supp. 125, 130 (N.D. Cal. 1974); *United States v. Papermakers Local 189*, 282 F. Supp. 39, 43 (E.D. La. 1968); *Weiner v. Cuyahoga Cmty. Coll. Dist.*, 249 N.E.2d 907 (Ohio 1969). *See generally* Blumstein, *supra* note 114, at 930-32; James A. Hardgrove, Note, *The Philadelphia Plan*, 45 NOTRE DAME LAW. 678, 685 (1970); Moeller, *supra* note 263, at 477-78; Note, *supra* note 114, at 383.

Enactment of the Civil Rights Act of 1964 raised a whole new round of questions about the propriety of these executive orders. Opponents of the executive order argued that in passing Title VII of the Act, Congress had explicitly prohibited the use of quotas and that that policy preempted the President's authority and that the House's failure to pass an amendment explicitly authorizing the executive antidiscrimination program suggested that it was unauthorized. The order's supporters pointed out that the failure of the Senate to pass an amendment that would have explicitly provided that Title VII constituted the exclusive remedy for discrimination supported the imposition of additional antidiscrimination protection. *See, e.g.*, James E. Jones, Jr., *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341, 388-94; Earl M. Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84, 102-09 (1970); Blumstein, *supra* note 114, at 939-49; Hardgrove, *supra*, at 687-95; Moeller, *supra* note 263, at 482-87; Schuwerk, *supra* note 263, at 733-38; Karen Ann Sindelar, Note, *Employment Discrimination—Weber v. Kaiser Aluminum & Chemical Corp.: Does Title VII Limit Executive Order 11246?*, 57 N.C. L. REV. 695 (1979); ___, [Note], *The Philadelphia Plan: Equal Employment Opportunity in the Construction Trades*, 6 COLUM. J.L. & SOC. PROBS. 187, 224-29 (1970); ___, Note, *Executive Order 11246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U. L. REV. 590, 596-600 (1969). 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 the laws.

struggled to determine whether Johnson issued the order pursuant to statutory authority or under his implied powers as president.³¹²

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.³¹³ 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.³¹⁴ 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

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).

³¹³ Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1, 9 (1984).

³¹⁴ Lyndon B. Johnson, Remarks at a Meeting with the Heads of Independent Regulatory Agencies in Cabinet Room (Dec. 3, 1963), in 1963-64 PUB. PAPERS 18.

Budget circular also established guidelines on the responsibilities of the FPC and other executive agencies in the acquisition of water data.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.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.³¹⁷ Similar signing statements followed.³¹⁸

³¹⁵ Circular No. A-67 (Bur. of Budget Aug. 28, 1964). *See generally* Redford, *supra* note 186, at 318-19.

³¹⁶ Public Works Appropriations Act, Pub. L. No. 88-257, 77 Stat. 844, 847 (1963).

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.

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.

Later that same month, Johnson signed legislation that required that the rules and regulations prescribed by the Director of Central Intelligence for the establishment and maintenance of the retirement system not take effect until approved by the chairmen and ranking minority members of the Armed Services Committees. Act of Oct. 13, 1964, Pub. L. No. 88-643, 78 Stat. 1043. Johnson noted that “[s]uch

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.³¹⁹ When confronted with such a provision in the Water Resources Research Act of 1964,³²⁰ 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.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."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

a provision attempts to confer executive powers on the members of the legislative branch, in violation of the constitutional principle of separation of powers." Accordingly, Johnson instructed the Director to "treat the provision as a request for consultation with the named committee members." Lyndon B. Johnson, Statement by the President Upon Approving Bill Authorizing a Retirement System for Certain Employees of the Central Intelligence Agency (Oct. 14, 1964), in 1963-64 PUB. PAPERS 1336. See generally Watson, *supra* note 86, at 1026-27.

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.

³²⁰ Pub. L. No. 88-379, § 200, 78 Stat. 329, 331.

³²¹ Lyndon B. Johnson, Statement by the President Upon Signing the Water Resources Research Act (July 17, 1964), in 1963-64 PUB. PAPERS 861, 862. The provision was deleted by Act of Apr. 19, 1966, Pub. L. No. 89-404, 80 Stat. 129. See generally May, *supra* note 289, at 939-40; Watson, *supra* note 86, at 1027.

³²² Lyndon B. Johnson, _ (June 5, 1965), in 1965 PUB. PAPERS _ , _

removed.³²³ Johnson entered similar objections throughout the balance of his Administration.³²⁴

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.”³²⁵ 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

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.

³²⁵ Lyndon B. Johnson, Veto of the Military Authorization Bill (Aug. 21, 1965), *in* 1965 PUB. PAPERS 907, 907.

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.

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Id.

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Id. at 908.

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Id.

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Military Construction Authorization Act of 1966, Pub. L. No. 89-188, 79 Stat. 793, 818-19; 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.

³³¹

Military Construction Authorization Act, Pub. L. No. 89-568, § __, 80 Stat. 739, __ (1966).

³³²

Lyndon B. Johnson, Statement by the President Upon Signing the Military Construction Authorization Bill (Sept. 12, 1966), in 1966 PUB. PAPERS 1008, 1008.

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.³³³ 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.³³⁴ Nixon complained that "[t]his legislation would require the forced removal by an unconstitutional procedure of two officers now serving in the executive branch."³³⁵ The President's "power and authority to remove, or retain, executive officers" was "deeply rooted in our system of government."³³⁶ 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."³³⁷ 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,³³⁸ Congress amended the legislation the next year to require Senate confirmation only of future OMB Directors and Deputy Directors.³³⁹

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 appeal adverse employment actions to the Civil Service Commission³⁴⁰ and revoking the agency review process established by Kennedy in favor of exclusive review by the Civil Service Commission³⁴¹ 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.³⁴² In addition, the fact that the president had the power to remove Civil Service Commissioners at will³⁴³ 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

³³⁸ Although the Senate voted _ to _ to override the veto, _ CONG. REC. _ (May 22, 1973), the House failed to follow suit, voting _ to _ to sustain the veto, *id.* at _ (May 23, 1973).

³³⁹ Act of _, Pub. L. No. 93-250, 88 Stat. 11 (1974). *See generally* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 78 (3d ed. rev., 1991) [hereinafter FISHER, CONSTITUTIONAL CONFLICTS]; LOUIS FISHER, PRESIDENTIAL SPENDING POWER 51-55 (1975).

³⁴⁰ Exec. Order No. 11,491, § 22, 3 C.F.R. 254, 266 (1974 compilation).

³⁴¹ Exec. Order No. 11,787, 3A C.F.R. 151 (1974).

³⁴² *See supra* notes 167-175, 265-272 and accompanying text.

³⁴³ *See* Calabresi & Yoo, *supra* note 21, at 788; Frug, *supra* note 177, at 955.

protections.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.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 *INS v. Chadha*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.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,³⁴⁸ Secretary of Labor George Shultz issued a revised version known as the Philadelphia Plan that providing more specific guidance on what was required.³⁴⁹ After the Comptroller General ruled that the additional guidance provided by the Philadelphia Plan imposed quotas in violation of

³⁴⁴ See *Arnett v. Kennedy*; 416 U.S. 134 (1974). *Arnett* followed from the Court's decisions in *Board of Regents v. Roth*, 408 U.S. 564 (1972); and *Perry v. Sinderman*, 408 U.S. 593 (1972), regarding the dismissal of state employees.

³⁴⁵ Frug, *supra* note 177, at 977-89. As Professor Frug notes, both *Roth* and *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 *Wieman* and *Pickering* without having to resort to judicial innovation. *Id.* at 977-78.

³⁴⁶ 462 U.S. 919, 942 n.13 (1983).

³⁴⁷ See *supra* note 310 and accompanying text.

³⁴⁸ —

³⁴⁹ —

Title VII of the Civil Rights Act of 1964,³⁵⁰ Attorney General John Mitchell issued an opinion clarifying that the Plan involved mere goals, not quotas,³⁵¹ and Shultz accepted that construction.³⁵² 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.³⁵³ 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.³⁵⁴ Nixon's program was initially restricted to the Environmental Protection Agency (EPA), which Nixon created by executive order in 1970,³⁵⁵ 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

³⁵⁰ 49 Comp. Gen. 59 (1969).

³⁵¹ 42 Op. Att'y Gen. 405 (1969); John W. Mitchell, Legal Memorandum: Authority Under Executive Order 11246 (June 24, 1969), reprinted in *The Philadelphia Plan—Congressional Oversight of Administrative Agencies (The Department of Labor): Hearings on the Philadelphia Plan and S. 931 Before the Subcomm. on Separation of Powers of the Sen. Comm. on the Judiciary*, 91st Cong., 1st Sess. (1970). The conflict between the Comptroller General and the Attorney General raised an interesting question “whether the Executive branch of the Government has the right to act upon its own interpretations of the laws enacted by Congress, and to expend and obligate funds approved by Congress in a manner which the [Comptroller General's] Office, as the designated agent of the Congress has found to be contrary to law.” SENATE HEARINGS, [*supra* note 85, at 139 (Staats statement)], *quoted in* Note, *supra* note 311, at 229; Schuwerk, *supra* note 263, at 748. Clearly, under the unitary executive theory, subordinate executive officials are responsible only to the President for their execution of the laws, not to the Comptroller General of Congress.

³⁵² Jones, *supra* note 311, at 358-61, 364-73; Thomas D. Morgan, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process*, 1974 WIS. L. REV. 301, 311-12; Schuwerk, *supra* note 263, at 745-46.

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.

³⁵⁵ Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (1966-1970 compilation), reprinted in 42 U.S.C. § 4321 (1994), and 84 Stat 2086 (1970).

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.³⁵⁶ Nixon later expanded this initiative into a larger program into termed “Quality of Life” review,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.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.³⁵⁹ Nixon further

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).

³⁵⁷ Memorandum from George P. Shultz, Agency Regulations, Standards, and Guidelines Pertaining to Environmental Quality, Consumer Protection, and Occupational and Public Health and Safety (Oct. 5, 1971), *cited in* Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, LAW & CONTEMP. PROBS., Aut. 1991, at 127, 128 n.4. For general descriptions of Quality of Life Review, see Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 221 (1993); Moreno, *supra* note 94, at 488-89; James T. O’Reilly & Phyllis E. Brown, *In Search of Excellence: A Prescription for the Future of OMB Oversight of Rules*, 39 ADMIN. L. REV. 421, 424-25 (1987); Percival, *supra*, at 133-38; Caroline DeWitt, Comment, *The President’s Council on Competitiveness: Undermining the Administrative Procedure Act with Regulatory Review*, 6 ADMIN. L.J. AM. U. 759, 769-70 (1993).

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

³⁵⁹ Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 988-89 (2001).

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.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.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.³⁶² Such threats are properly regarded as being consistent with the unitary executive, rather than evidence of agency independence as some of suggested,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."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."³⁶⁵

³⁶⁰ See Percival, *supra* note 357, at 137.

³⁶¹ *Id.* at 989 n.154 (citing JOHN QUARLES, CLEANING UP AMERICA: AN INSIDER'S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY 119 (1976)).

³⁶² See Percival, *supra* note 359, at 988-89 (citing *Implementation of the Clean Air Act Amendment of 1970—Part I: Hearings Before the Subcomm. on Air and Water Pollution of the Sen. Comm. on Public Works*, 92d Cong. 325 (1972) (statement of EPA Administrator William Ruckelshaus); and QUARLES, *supra* note 361, at 119).

³⁶³ See *id.*

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.

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.”³⁶⁶ 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.³⁶⁷ The adjudicative-type review previously performed by the commissions would be conducted by the Administrative Court of the United States.³⁶⁸ Only in that way could the President fulfill his constitutional duty to “take care that the laws be faithfully executed”³⁶⁹ 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 14-15.

³⁶⁶ *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.”).

³⁶⁷ *Id.* at 4-5, 20.

³⁶⁸ *Id.* at 6, 22.

³⁶⁹ The Ash Council noted, “The President is responsible under article I[I] 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.”³⁷⁰

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.³⁷¹ 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 Congress³⁷² and granting independent litigating authority to the FTC.³⁷³

Congress even considered a proposal to turn the Department of Justice into an independent agency.³⁷⁴ 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.*

³⁷⁰ *Id.* at 16.

³⁷¹ Percival, *supra* note 357, at 133 & n.28.

³⁷² See FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 339, at 191-92.

³⁷³ Trans-Alaska Oil Pipeline Authorization Act, Pub. L. No. 93-153, § 408, 87 Stat. 576, 591-92 (1973). Nixon approved of this provision in return for the authorization of the Trans-Alaska Oil Pipeline. See Devins, *supra* note 156, at 270-71.

³⁷⁴ 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.”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.”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.”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.”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 relieved of it—or of the consequences of default.”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.”³⁸⁰

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).

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 152-53.

³⁷⁹ *Id.* at 209.

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,³⁸¹ 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.³⁸² Such committee vetoes "infring[ed] on the fundamental principle of the separation of legislative and executive powers."³⁸³ After Congress persisted in its efforts to include a committee veto,³⁸⁴ Nixon announced that he would disregard it.³⁸⁵

The following months Nixon objected that a committee veto contained in the Public Buildings Amendments of 1972,³⁸⁶ 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

³⁸¹ 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.

³⁸² Second Supplemental Appropriations Act of 1972, Pub. L. No. 92-306, 86 Stat. 163, 175.

³⁸³ Nixon, Second Supplemental Appropriation Act, 1972, *supra* note 381, at 627.

³⁸⁴ Act of June 14, 1972, Pub. L. No. 92-313, § __, 86 Stat. 216, 220.

³⁸⁵ Richard M. Nixon, Statement About Signing the Public Buildings Amendments of 1972 (June 17, 1972), in 1972 PUB. PAPERS 686, 687; *see also* Watson, *supra* note 86, at 1025 n.215.

³⁸⁶ §§ 5(f), 7, 86 Stat. at 220, 221.

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

³⁸⁷ Nixon, Statement About Signing the Public Buildings Amendments of 1972, *supra* note 385, at 687-88.

³⁸⁸ Richard M. Nixon, Veto of the War Powers Resolution (Oct. 24, 1973), in 1973 PUB. PAPERS 893, 893, 895 (objecting that the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973), violated the Constitution). Congress overrode Nixon’s veto. 119 CONG. REC. H9641-61, S20093-116 (daily ed. Nov. 7, 1973). See generally Robert G. Dixon, Jr., *The Congressional Veto and Separation of Powers: The Executive on a Leash?*, 56 N.C. L. REV. 423, 428 & n.21 (1978); Watson, *supra* note 86, at 1016 n.160.

³⁸⁹ E.g., Act of Mar. 24, 1972, Pub. L. No. 92-261, § 5, 86 Stat 103, 107 (1972); Act of Oct. 21, 1972, Pub. L. No. 92-520, § 3, sec. 18(d)(4), 86 Stat. 1019, 1021; Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627. Nixon even proposed a legislative veto provision, but eventually vetoed the underlying legislation on other grounds. See Watson, *supra* note 86, at 1016 n.160. See generally *id.* at 1009, 1016 n.160, 1026 n.215, 1029.

³⁹⁰ *Nomination of Elliot L. Richardson to Be Attorney General: Hearings Before the Sen. Judiciary Comm.*, 93d Cong., 1st Sess. 5-6 (1973).

prosecutions as defined by the law are executive branch functions.”³⁹¹ 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.”³⁹²

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.”³⁹³ 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



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Id. at 132-33.

Id. at 139. *See generally* EASTLAND, *supra* note 6, at 31-34.

38 Fed. Reg. 14688 (1973).

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prosecutions brought before the courts.”³⁹⁴ Giving such authority to another branch “is simply not our system of government.”³⁹⁵ 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.”³⁹⁶

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.³⁹⁷ 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

³⁹⁴ *Provision for Special Prosecutor: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 94th Cong. 451 (1976).

³⁹⁵ *Id.*

³⁹⁶ *Special Prosecutor and Watergate Grand Jury Legislation: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong. 1st Sess. 253 (1973). See generally EASTLAND, *supra* note 6, at 40-41.

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



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JOHN ROBERT GREENE, THE PRESIDENCY OF GERALD R. FORD xii (1995).

Id. at 24.

Id. at 25.

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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.

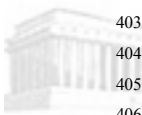
⁴⁰² *Id.* at 29.

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,

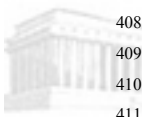
⁴⁰⁷ *Id.* at 52.

⁴⁰⁸ *See* SCHLESINGER, *supra* note 37.

⁴⁰⁹ GREENE, *supra* note 398, at 54-55.

⁴¹⁰ *Id.* at 58.

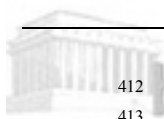
⁴¹¹ *Id.* at 88-89.



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



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Id. at 89.
Id. at 110.

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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.⁴¹⁴

In May 1975, Ford presided as Commander in Chief over the rescue of American passengers and crew on the *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.”⁴¹⁵ Ford felt he had a duty as president to rescue the captured Americans and he fulfilled that duty.⁴¹⁶ Ford took military action without consulting Congress under the War Powers Act,⁴¹⁷ 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.”⁴¹⁸ Ford lived up to that responsibility and rescued the *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

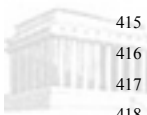
⁴¹⁴ *Id.* at 140.

⁴¹⁵ *Id.* at 145.

⁴¹⁶ *Id.* at 144.

⁴¹⁷ *Id.* at 150.

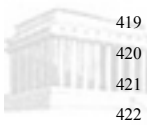
⁴¹⁸ *Id.* at 148.



job as White House National Security Advisor.⁴¹⁹ 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.⁴²⁰ 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.⁴²¹ 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.’”⁴²²

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.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.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.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.”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

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).

⁴²⁴ Exec. Order No., 11,821, 3 C.F.R. 926 (1971-75 compilation); OMB Circular A-107 (Jan. 28, 1975); *see also* Exec. Order No. 11,949, 3 C.F.R. 161 (1976 compilation) (extending Exec. Order No. 11,821).

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.

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”).

‘executive functions.’⁴²⁷ 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.”⁴²⁸

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.⁴²⁹ 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.⁴³⁰ 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,⁴³¹ Ford began to challenge the legislative veto as an impermissible invasion of the unitary executive. At first, Ford was only willing to

⁴²⁷ *Watergate Reorganization and Reform Act of 1975: Hearings Before the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. 3 (1975). See LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 146 (1992).

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.

⁴²⁹ H.R. DOC. NO. 550, 94th Cong. 2 (1976).

⁴³⁰ See EASTLAND, *supra* note 6, at 54-56; Ken Gormley, *An Original Model of the Independent Counsel Statute*, 97 MICH. L. REV. 601, 621-23 (1998).

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.”⁴³² Two months later, Ford’s opposition to these provisions stiffened when he vetoed a bill because it contained a two-house legislative veto.⁴³³

Ford objected twice more in 1975, calling the legislative veto “an unconstitutional exercise of Congressional power.”⁴³⁴ 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

⁴³² Gerald R. Ford, Statement on the Education Amendments of 1974 (Aug. 21, 1974), *in* 1974 PUB. PAPERS 35, 37.

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.

⁴³⁴ Gerald R. Ford, Statement on Signing a Bill Amending Child Support Provisions of the Social Security Act (Aug. 11, 1975), *in* 1975 PUB. PAPERS 1148, 1149; Gerald R. Ford, Statement on Signing the Amtrak Improvement Act of 1975 (May 26, 1975), *in* 1975 PUB. PAPERS 724, 724. Ford nonetheless signed the Amtrak Improvement Act of 1975, Pub. L. No. 94-25, § 8, sec. 404(c)(3), 89 Stat. 90, 91, “because the Nation needs the important passenger rail service it will provide.” Ford, Statement on Signing the Amtrak Improvement Act of 1975, *supra*, at 724.

promulgation.”⁴³⁵ Assistant Attorney General Antonin Scalia tirelessly testified before Congress in opposition to the legislative veto.⁴³⁶

But it was not until 1976 that Ford offered his boldest criticisms of the legislative veto.⁴³⁷ Ford entered no fewer than six vetoes⁴³⁸ and five signing statements⁴³⁹ criticizing the legislative veto. Ford based many of his objections on the unitariness of the executive branch.⁴⁴⁰ As Ford at one point noted:

⁴³⁵ Ford, Statement on Signing a Bill Amending Child Support Provisions of the Social Security Act, *supra* note 434, at 1149.

⁴³⁶ Dixon, *supra* note 388, at 428 n.22 (citing *Congressional Review of Administration Rulemaking: Hearings on H.R. 3658, H.R. 8231, and related Bills Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 373 (1975); *Congressional Oversight of Executive Agreements—1975: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 167, 173-74, 183-87 (1975); *Improving Congressional Oversight of Federal Regulatory Agencies: Hearings on S. 2258, S. 2716, S. 2812, S. 2878, S. 2903, S. 2925, S. 3318, and S. 3428 Before the Sen. Comm. on Government Operations*, 94th Cong., 2d Sess. 80-81, 124 (1976); *Congressional Review of International Agreements: Hearings on H.R. 4438 Before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 2d Sess. 182 (1976)); Symposium, *Oversight and Review of Agency Decisionmaking Part II, Morning Session*, 28 ADMIN. L. REV. 661, 684-95, 700-01 (1976) (remarks of Antonin Scalia)).

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.

⁴³⁸ Gerald R. Ford, Veto of the Hatch Act Amendments Bill (Apr. 12, 1976), in 1976-77 PUB. PAPERS 1114; Gerald R. Ford, Veto of the Foreign Assistance Bill (May 7, 1976), in 1976-77 PUB. PAPERS 1481, 1482; Gerald R. Ford, Veto of the Federal Fire Prevention and Control Bill (July 7, 1976), in 1976-77 PUB. PAPERS 1984; Gerald R. Ford, Veto of the Federal Insecticide, Fungicide, and Rodenticide Extension Bill (Aug. 14, 1976), in 1976-77 PUB. PAPERS 2144; Gerald R. Ford, Memorandum of Disapproval of the International Navigational Rules Act of 1976 (Oct. 10, 1976), in 1976-77 PUB. PAPERS 2481; Gerald R. Ford, Memorandum of Disapproval of the Agricultural Resources Conservation Bill (Oct. 20, 1976), in 1976-77 PUB. PAPERS 2583. See generally BOLTON, *supra* note 223, at 10 n.24; Dixon, *supra* note 388, at 429-30 n.24.

⁴³⁹ Gerald R. Ford, Statement on Signing the Department of Defense Appropriation Act, 1976 (Feb. 10, 1976), in 1976-77 PUB. PAPERS 241, 242; Gerald R. Ford, Statement on Signing the Federal Election Campaign Act Amendments of 1976 (May 11, 1976), in 1976-77 PUB. PAPERS 1529, 1530; Gerald R. Ford, Statement on Signing the International Security Assistance and Arms Export Control Act of 1976 (July 1, 1976), in 1976-77 PUB. PAPERS 1936, 1937; Gerald R. Ford, Statement on Signing the National Emergencies Act (Sept. 14, 1976), in 1976-77 PUB. PAPERS 2249; Gerald R. Ford, Statement on Signing the Veterans’ Education and Employment Assistance Act of 1976 (Oct. 15, 1976), in 1976-77 PUB. PAPERS 2538, 2539. See generally Dixon, *supra* note 388, at 429 nn.23-24.

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

⁴⁴¹ Ford, Statement on Signing the Department of Defense Appropriation Act, 1976, *supra* note 434, at 242.

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,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. 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.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 1978,⁴⁴⁶ which

⁴⁴⁴ See BOLTON, *supra* note 223, at 10 n.24; FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 339, at 142-43; May, *supra* note 289, at 942 & n.354.

⁴⁴⁵ In fact, Carter has subsequently indicated that he actively sought to reduce the imperial status of the Presidency. JIMMY CARTER, KEEPING FAITH 2 (1982).

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.⁴⁴⁷ The statute also required that the president communicates the reasons for removing any Inspector General to both houses of Congress.⁴⁴⁸

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."⁴⁴⁹ 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.⁴⁵⁰

⁴⁴⁷ § 5(a), (b), 92 Stat. at __, *reprinted in* 5 U.S.C. app. at 400 ().

⁴⁴⁸ § 3(b), 92 Stat. at __, *reprinted in* 5 U.S.C. app. at 399 (Supp. V 1981).

⁴⁴⁹ 1 Op. Off. Legal Counsel 16, 17 (1977).

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.”⁴⁵¹ 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.”⁴⁵² 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.⁴⁵³

The second piece of legislation was the Civil Service Reform Act of 1978,⁴⁵⁴ 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.⁴⁵⁵ While this legislation was pending before Congress, Carter issued a reorganization plan⁴⁵⁶ and an executive order⁴⁵⁷ largely implementing his legislative proposals.

⁴⁵¹ *Id.* at 18.

⁴⁵² *Id.*; see also FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 339, at 78.

⁴⁵³ See Charles J. Williams III, Comment, *The New Separation of Powers Jurisprudence and the Controller General: Does He “Execute the Law” Under the Federal Employees’ Retirement Act?*, 9 GEO. MASON U. L. REV. 35, 41 (1986) (citing H.R. REP. NO. 584, 95th Cong., 1st Sess. 12 (1977)).

⁴⁵⁴ Pub. L. No. 95-454, 92 Stat. 1111.

⁴⁵⁵ CONG. REC. (1978).

⁴⁵⁶ Reorg. Plan No. 2 of 1978, 3 C.F.R. 323 (1978 compilation), *reprinted in* 5 U.S.C. app. at 1577 (1994), *and* 92 Stat. 3783 (1978).

⁴⁵⁷ Exec. Order No. 12107, 3 C.F.R. 264 (1978 compilation), *reprinted in* 5 U.S.C. § 1101

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.”⁴⁵⁸ It added a list of prohibited personnel practices, including among other things discrimination, political coercion, nepotism, and retaliation against whistleblowers.⁴⁵⁹ In an apparent desire to limit the range of adverse action that would be reversed on appeal,⁴⁶⁰ the Civil Service Reform Act also scaled back some of the procedural protections promulgated by the Civil Service Commission in the aftermath of *Arnett v. Kennedy*.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.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.”⁴⁶³ By exempting all policymaking personnel, this provision in effect limited the scope of the Civil Service Reform Act to purely ministerial officials.

app. at .⁴⁵⁸

5 U.S.C. § 7513(a). As was the case with the predecessor statutes, the legislative history provides no help in interpreting this provision. See Stephen G. Vaskov, *Judicial Review of Dismissals of Civil Service Employees for Off-Duty Misconduct: The Approach of the Federal Circuit*, 34 AM. U. L. REV. 439, 458 (1985).

⁴⁵⁹ 5 U.S.C. § 2302(b)(1)-(3), (6)-(7).

⁴⁶⁰ See S. REP. NO. 95-969, at 55 (1978) reprinted in 1978 U.S.C.C.A.N. 2723 2777; Brewer v. United States Postal Serv., 647 F.2d 1093, 1097 (Ct. Cl. 1981).

⁴⁶¹ 416 U.S. 134 (1974). For an review of these expanded protections, see Buffon, *supra* note 272, at 212-23.

⁴⁶² *Id.* § 7703(c).

⁴⁶³ *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."⁴⁶⁴ In addition, the statute extended the same removal protections to the Office of Special Counsel charged with investigating wrongful terminations.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."⁴⁶⁶

Most importantly, Harmon suggested that the provision of the Ethics in Government Act⁴⁶⁷ that vested the power to remove special prosecutors in a special panel of the D.C. Circuit raised "serious constitutional questions."⁴⁶⁸ In addition, there seemed

⁴⁶⁴ 5 U.S.C. § 1202(d).

⁴⁶⁵ 5 U.S.C. § 1204.

⁴⁶⁶ Letter from John Harmon, Assistant Attorney General, Office of Legal Counsel, to Sen. Abraham Ribicoff, Chairman of the Senate Committee on Governmental Affairs 6 (June 14, 1978), *quoted in* Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 *CARDOZO L. REV.* 337, 340 (1993).

⁴⁶⁷ Pub. L. No. 95-521, 92 Stat. 1824 (1978).

⁴⁶⁸ *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.

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.⁴⁶⁹ Indeed, Carter's Attorneys General would emerge as leading critics of the Ethics in Government Act.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.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.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.⁴⁷³

1869; see also EASTLAND, *supra* note 6, at 145 n.6; FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 339, at 77; FISHER & DEVINS, *supra* note 427, at 146.

⁴⁶⁹ See S. REP. NO. 97-496, at 5 (1982), reprinted in 1982 U.S.C.C.A.N. 3537, 3541.

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).

⁴⁷¹ See Jimmy Carter, Ethics in Government Act of 1978: Remarks on Signing S. 555 into Law (Oct. 26, 1978), in 1978 PUB. PAPERS 1854; Jimmy Carter, Ethics in Government: Message to the Congress (May 3, 1977), in 1977 PUB. PAPERS 786, 788.

⁴⁷² *Nomination of Elliot L. Richardson to Be Attorney General: Hearings Before the Sen. Judiciary Comm.*, 93d Cong., 1st Sess. 13-14 (1973).

⁴⁷³ *Public Officials Integrity Act of 1977; Blind Trusts and Other Conflicts of Interest Matters: Hearings Before the Sen. Comm. on Governmental Affairs*, 95th Cong., 1st Sess. 15-17 (1977). See generally EASTLAND, *supra* note 6, at 57-58.

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 *Bakke*⁴⁷⁷ 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

⁴⁷⁴ Jimmy Carter, Veto of the Sikes Act Amendments of 1978: Message to the House of Representatives Returning H.R. 10882 Without Approval (July 10, 1978), in 1978 PUB. PAPERS 1250, 1250; see also FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 339, at 192.

⁴⁷⁵ Act of Aug. 15, 1979, Pub. L. No. § 108, 93 Stat. 395, 397.

⁴⁷⁶ Jimmy Carter, Department of State, International Communication Agency, and Board of International Broadcasting Appropriations Bill: Statement on Signing H.R. 3363 into Law (Aug. 15, 1979), in 1979 PUB. PAPERS 1434, 1434. Carter closed seven of the ten protected consulates by early the following year. 126 CONG. REC. 21515-16, 28513 (1980); see also May, *supra* note 289, at 967.

⁴⁷⁷ See Devins, *supra* note 156, at 285 (citing *inter alia* GRIFFIN B. BELL & RONALD J. OSTROW, TAKING CARE OF THE LAW 29-32 (1982); FISHER & DEVINS, *supra* note 427, at 286).

⁴⁷⁸ See Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 449 (1993) (citing BELL & OSTROW, *supra* note , at 24-28).

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.”⁴⁸⁰ 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.”⁴⁸¹ 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.”⁴⁸² 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.”⁴⁸³ Moreover, the Court made clear in *Myers v. United States*⁴⁸⁴ that “the President’s freedom to remove executive officials cannot be altered by legislation.”⁴⁸⁵ 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 obviously 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

⁴⁸⁰ Exec. Order 12,146, 3 C.F.R. 409, 410 (1980 compilation); *see also* Devins, *supra* note 156, at 266, 268-69; Harvey, *supra* note 156, at 1584; Kristen A. Norman-Major, *The Solicitor General: Executive Policy Agendas and the Court*, 57 ALB. L. REV. 1081, 1085 (1994).

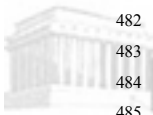
⁴⁸¹ 1 Op. Off. Legal Counsel 75, 75 (1977).

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.

⁴⁹⁰ For a summary of President Carter’s positions on legislative vetoes, see Peter E. Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 829-31 (1984); Fisher, *Legislative Vetoes*, *supra* note 86, at 284-85; Dixon, *supra* note 388, at 431-32 nn.27-29. For lists of President Carter’s signing statements opposing the legislative veto, see William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 701 n.7, 718-19 (1991); May, *supra* note 289, at 934-35.

⁴⁹¹ Jimmy Carter, International Security Assistance Act of 1977: Statement on Signing H.R. 6884 into Law (Aug. 5, 1977), in 1977 PUB. PAPERS 1431, 1432.

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

⁴⁹² Jimmy Carter, Presidential War Powers Bill: Statement on Signing H.R. 7738 into Law (Dec. 28, 1977), in 1977 PUB. PAPERS 2186, 2187 (emphasis added). President Carter also repeated his objection based on Article I, Section 7, of the Constitution. *Id.* For other protests based on Article I, Section 7, see Jimmy Carter, International Navigational Rules Act of 1977: Statement on Signing H.R. 186 into Law (July 28, 1977), in 1977 PUB. PAPERS 1374, 1375; Statement on Signing S. 791 into Law (Nov. 10, 1978), in 1978 PUB. PAPERS 1999, 2000; Jimmy Carter, Department of State, International Communication Agency, and Board for International Broadcasting Appropriations Bill: Statement on Signing H.R. 3363 into Law (Aug. 15, 1979), in 1979 PUB. PAPERS 1434, 1434-35; Jimmy Carter, Civil Rights of Institutionalized Persons Act: Statement on Signing H.R. 10 into Law (May 23, 1980), in 1980-81 PUB. PAPERS 965; Jimmy Carter, International Security and Development Cooperation Act of 1980: Statement on Signing H.R. 6942 into Law (Dec. 16, 1980), in 1980-81 PUB. PAPERS 2813; *see also* Jimmy Carter, Nuclear Non-Proliferation Act of 1978: Statement on Signing H.R. 8638 into Law (Mar. 10, 1978), in 1978 PUB. PAPERS 500, 502 (challenging whether Congress could “overturn authorized executive actions through procedures not provided in the Constitution”).

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.”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.”⁴⁹⁵

As promised, Carter thereafter determinedly opposed the legislative vetoes, refusing to sign at least two bills because they contained legislative vetoes⁴⁹⁶ and announcing in numerous signing statements thereafter his intention to treat legislative vetoes as “report and wait” requirements.⁴⁹⁷ Moreover, the Carter Administration, like

Reorganization Act of 1971, Pub. L. No. 95-17, § 2, 91 Stat. 29, 29. *See generally* FISHER & DEVINS, *supra* note 427, at 126-27, 136-37; Quint, *supra* note 490, at 830 n.233.

⁴⁹⁴ Carter, Legislative Vetoes: Message to the Congress, *supra* note 493, at 1147.

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.

⁴⁹⁶ *E.g.*, Jimmy Carter, Veto of the Navajo and Hopi Relocation Bill: Memorandum of Disapproval of H.R. 11092 (Nov. 2, 1978), *in* 1978 PUB. PAPERS 1925; Jimmy Carter, Veto of Legislation Requiring a Study of Health Effects of Dioxin Exposure: Message to the Senate Returning S. 2096 Without Approval (Jan. 2, 1980), *in* 1980-81 PUB. PAPERS 4.

⁴⁹⁷ Jimmy Carter, Outer Continental Shelf Lands Act Amendments of 1978: Statement on Signing S. 9 into Law (Sept. 18, 1978), *in* 1978 PUB. PAPERS 1530, 1531; Amtrak Improvement Act of 1978: Statement on Signing S. 3040 into Law (Oct. 5, 1978), *in* 1978 PUB. PAPERS 1718; Jimmy Carter, International Development and Food Assistance Act of 1978: Statement on Signing H.R. 12222 into Law (Oct. 6, 1978), *in* 1978 PUB. PAPERS 1721; Jimmy Carter, Marine Protection, Research, and Sanctuaries Appropriations Bill: Statement on Signing S. 1140 into Law (Aug. 29, 1980), *in* 1980-81 PUB. PAPERS 1592; Jimmy Carter, Coastal Zone Management Improvement Act of 1980: Statement on Signing S. 2622 into Law (Oct. 18, 1980), *in* 1980-81 PUB. PAPERS 2335; Jimmy Carter, National Historic Preservation Act Amendments of 1980: Statement on Signing H.R. 5496 into Law (Dec. 12, 1980), *in* 1980-81 PUB. PAPERS 2802, 2803; Jimmy Carter, Federal Insecticide, Fungicide and Rodenticide Act Extension: Statement on Signing H.R. 7018 into Law (Dec. 17, 1980), *in* 1980-81 PUB. PAPERS 2814, 2815; *see also* Jimmy Carter, National Parks and Recreation Act Amendments: Statement on Signing H.R. 3757 into Law (Mar. 5,

the Ford Administration, challenged the constitutionality of the legislative veto in court.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.⁴⁹⁹ Moreover, after the Ninth Circuit struck down the legislative veto,⁵⁰⁰

1980), in 1980-81 PUB. PAPERS 432, 433 (instructing Secretary of the Interior to regard committee veto “as advisory only”); Carter, Presidential War Powers Bill, *supra* note 492, at 2187 (issued prior to June 21, 1978, Message) (indicating that legislative would be treated as a “notify and wait” provision). In three statements, President Carter specifically stated that congressional attempts to exercise a legislative veto would be given serious consideration, but not regarded as legally binding. Carter, Marine Protection, Research, and Sanctuaries Appropriations Bill, *supra*, at 1592; Jimmy Carter, Coastal Zone Management Improvement Act of 1980, *supra*, at 2335; Carter, Federal Insecticide, Fungicide and Rodenticide Act Extension, *supra*, at 2815.

Four other signing statements effectively took the same position without referring directly to the June 21, 1978, Message. Carter, National Parks and Recreation Act of 1978, *supra* note 498, at 2000 (directing the Secretary of Agriculture to report actions to Congress and “listen to any concerns which may be expressed by the specified congressional committees” with the understanding that the Secretary may consummate any actions without committee approval); Carter, Civil Rights of Institutionalized Persons Act, *supra* note 492, at 965 (directing Attorney General to “carefully consider any congressional views that are expressed” without “treat[ing] any resolution of ‘disapproval’ as binding”).

⁴⁹⁸ Although the Carter Administration challenged the constitutionality of the legislative veto before the Supreme Court, Brief of the United States at __, *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977) (No. 75-1606), the Court declined to reach the question, noting only that “[w]hatever are the future possibilities for constitutional conflict in the promulgation of regulations respecting public access to particular documents, nothing in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face.” 433 U.S. at 444-45. The Carter Administration also backed challenges to the legislative veto in several courts of appeals with mixed results. *Compare* *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980), *aff’d*, 462 U.S. 919 (1983) (striking down legislative veto), *and* *McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977) (same); *with* *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977) (upholding legislative veto). *See also* Fisher, *Interpretation Outside the Courts*, *supra* note 86, at 82; Fisher, *Legislative Vetoes*, *supra* note 86, at 284.

The Carter Administration did face some problems framing the legislative veto as an issue in a justiciable controversy. Even though President Carter instructed the Secretary of Agriculture in 1978 that he should proceed without following a certain legislative veto provision, Carter, National Parks and Recreation Act of 1978, *supra*, at 2000, the Justice Department concluded that “in spite of the President’s direction, the Department [of Agriculture] and the Forest Service should cooperate with . . . the Congress” and advised the Department of Agriculture that it could voluntarily comply with the legislative veto provision as a matter of policy. The Department of Agriculture ordered the Forest Service “to proceed as if [the legislative veto provision] were applicable,” the President’s instructions notwithstanding. The Forest Service complied with the Departments orders. May, *supra* note 289, at 944-45 (quoting *Additions to the National Wilderness Preservation System: Hearings Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 96th Cong., 1st Sess. 244-45 (1979)).

⁴⁹⁹ Carter, *Legislative Vetoes*, *supra* note 493, at 1147; Jimmy Carter, Federal Trade Commission Improvement Acts of 1980: Statement on Signing H.R. 2313 into Law (May 28, 1980), in 1980-81 PUB. PAPERS 982, 983.

⁵⁰⁰ *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980), *aff’d*, 462 U.S. 919 (1983).

Carter issued a statement applauding the decision and urging the Attorney General to “seek[] Supreme Court review of the decision as soon as possible.”⁵⁰¹

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.⁵⁰² 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.”⁵⁰³ Civiletti concluded, “only the executive branch can execute the statutes of the United States.”⁵⁰⁴ 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.”⁵⁰⁵ 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.”⁵⁰⁶

⁵⁰¹ Jimmy Carter, Chadha v. Immigration and Naturalization Service: Statement on the Ninth Circuit Court of Appeals Decision (Dec. 24, 1980), in 1980 PUB. PAPERS 2836.

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.

⁵⁰³ 4A Op. Off. Legal Counsel 21, 22 (1980).

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,⁵⁰⁷ the Secretary followed Civiletti's advice and implemented the regulations.⁵⁰⁸ Therefore, although the Carter Administration did tolerate the enactment of a few legislative vetoes without comment,⁵⁰⁹ 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.⁵¹⁰ 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"⁵¹¹ that far exceeded previous regulatory review efforts. This program required that executive agencies include a "Regulatory Analysis"

⁵⁰⁷ May, *supra* note 289, at 978 n.541 (citing Letter from Benjamin R. Civiletti to Sen. Max Baucus (July 30, 1980), reprinted in *Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 745 (1985)).

⁵⁰⁸ 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).

⁵⁰⁹ *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))).

⁵¹⁰ 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.

⁵¹¹ Exec. Order No. 12,044, 3 C.F.R. 152 (1979 compilation).

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.⁵¹² The order also required that “agencies . . . publish at least semiannually an agenda of significant regulations under development or review.”⁵¹³ The order cited no specific authority as its basis, relying simply on his authority as President of the United States.⁵¹⁴ Although the initial draft of the order clearly contemplated that it would apply to the independent agencies as well as the executive departments,⁵¹⁵ Carter decided in the end to avoid a “confrontation with Congress over the applicability of the order to the independent regulatory agencies”⁵¹⁶ and opted instead to simply ask the chairmen of the commissions to comply with the Order’s procedures voluntarily.⁵¹⁷

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.⁵¹⁸ The

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.

⁵¹⁶ 43 Fed. Reg. 12,670 (1978).

⁵¹⁷ Jimmy Carter, Improving Government Regulations: Letter to the Heads of Independent Regulatory Agencies (Mar. 23, 1978), 1978 PUB. PAPERS 563, 564; *see also* Frank B. Cross, *The Surviving Significance of the Unitary Executive*, 27 HOUS. L. REV. 599, 706 (1990).

⁵¹⁸ Jimmy Carter, Memorandum for the Heads of Executive Departments and Agencies, Subject: Strengthening Regulatory Management (Oct. 31, 1978), in 1978 PUB. PAPERS 1905; *see also* LAWRENCE J. WHITE, REFORMING REGULATION: PROCESSES AND PROBLEMS 21-22 (1981).

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.

⁵²⁰ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980).

⁵²¹ Paperwork Reduction Act, Pub. L. No. 96-51, 94 Stat. 2812 (1980).

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.⁵²⁵ Nonetheless, commentators have generally acknowledged that Carter's regulatory review program did enable the President to increase his control over regulatory policy.⁵²⁶

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.⁵²⁷ 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."⁵²⁸ 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.⁵²⁹

In support of Smith's criticism, other scholars have pointed out that President Reagan never vetoed a bill on the grounds that it infringed upon the President's authority.⁵³⁰

⁵²⁷ See Miller, *supra* note 333, at 410-12; Rosenberg, *supra* note 278, at 628-34; Shane, *supra* note 5, at 596-97.

⁵²⁸ CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION -- A FIRSTHAND ACCOUNT 133 (1991).

⁵²⁹ WILLIAM FRENCH SMITH, LAW AND JUSTICE IN THE REAGAN ADMINISTRATION 222 (1991), *quoted in* Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 B.Y.U. L. REV. 17, 38.

⁵³⁰ Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1245-46 (1994); Lund, *supra* note 529, at 42. *But see supra* notes 543-551 and accompanying text (arguing that Reagan pocket vetoed the Whistleblower Protection Act of 1988 in part to protect the unitariness of the executive).

As with many things, the truth may well lie somewhere in between.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.⁵³² That said, Reagan "could be ruthless when necessary" on personnel actions,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.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.

⁵³¹ Miller, *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 id.* at 410-12.

⁵³² EDMUND MORRIS, *DUTCH: A MEMOIR OF RONALD REAGAN* 419 (1999).

⁵³³ *Id.* at 420.

⁵³⁴ *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.⁵³⁵ 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.⁵³⁶ 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.⁵³⁷ 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.⁵³⁸ 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 1983⁵³⁹ and numerous other officials thought to be insulated from presidential control.⁵⁴⁰ Although the courts did not always approve of Reagan's removals,⁵⁴¹ 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.

⁵⁴⁰ For other examples of removals instigated by Reagan, see FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 339, at 78-79; Miller, *supra* note 333, at 411 & n.63, 414n.82; 6 Op. Off. Legal Counsel 1 (1982); 5 Op. Legal Counsel 337 (1981).

⁵⁴¹ A district court enjoined Reagan from removing the Civil Rights Commissioners. On appeal, the D.C. Circuit subsequently vacated the injunction as moot, since the statutory authorization for the Commission had expired. *Berry v. Reagan*, 32 Empl. Prac. Dec. (CCH) ¶ 33,898 (D.D.C. Nov. 14, 1983), *vacated as moot*, 732 F.2d 949 (D.C. Cir. 1983) (per curiam). Congress later reconstituted the

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

Commission, this time requiring specific cause for the removal of its members. United States Commission on Civil Rights Act of 1983, Pub. L. No. 98-183, § 2(d), 97 Stat. 1301, 1301; *see also* *Borders v. Reagan*, 518 F. Supp. 250, 268 (D.D.C. 1981) (blocking Reagan’s attempted removal of a member of the D.C. Judicial Nomination Commission). *But see* *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir. 1983.) (upholding removals); *Nat’l Treasury Employees Union v. Reagan*, 663 F.2d 239 (D.C. Cir. 1981) (same).

⁵⁴² Ronald Reagan, Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Inspector general Appointees of Certain Executive Agencies (Jan. 20, 1981), in 1981 PUB. PAPERS 24, 25; *see also* FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 339, at 78.

⁵⁴³ 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.

⁵⁴⁴ S. 508, 100th Cong., § 1211, *reprinted in* 134 CONG. REC. S15,330 (daily ed. Oct. 7, 1988).

⁵⁴⁵ *Id.* § 1212.

⁵⁴⁶ *Id.* § 1217.

⁵⁴⁷ *See supra* notes 466 and accompanying text.

subordinates from office.”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.”⁵⁴⁹ These provisions clearly raised “serious constitutional concerns.”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.”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 1983,⁵⁵² 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

⁵⁴⁸ Ronald Reagan, Memorandum of Disapproval on a Bill Concerning Whistleblower Protection (Oct. 26, 1988), in 1988-89 PUB. PAPERS 1391, 1392.

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.*

⁵⁵¹ *Id.* For a complete description of the Act and particularly sharp criticism of Reagan’s pocket veto, see Rosenberg, *supra* note 278, at 662-88; see also Devins, *supra* note 156, at 267-68. For a more sympathetic assessment of Reagan’s actions, see Kmiec, *supra* note 466, at 342-43.

⁵⁵² 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.⁵⁵³

Assistant Attorney General Charles Cooper sounded similar themes..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.”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”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 *Morrison v. Olson*.⁵⁵⁷ In his brief in the *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:

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

⁵⁵⁴ Letter from Assistant Attorney General Charles Cooper to Leon Silverman (), *reprinted in 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 ().

⁵⁵⁵ Ronald Reagan, Statement on Signing the Independent Counsel Reauthorization Act of 1987 (Dec. 15, 1987), *in* 1987 PUB. PAPERS 1524, 1524.

⁵⁵⁶ *Id.*

⁵⁵⁷ 487 U.S. 654 (1988). For the Reagan Administration’s support for the unitary executive, see Brief for the United States as Amicus Curiae Supporting Appellees at 5-16, 29-41, *Morrison v. Olson* (No. 87-1279); Brief on Behalf of Amicus Curiae United States, *In re Sealed Case*, 838 F.2d 476 (D.C. Cir. 1988) (Nos. 87-5261, 87-5264 and 87-5265), *rev’d sub nom.* *Morrison v. Olson*, 487 U.S. 654 (1988), *reprinted in* 16 HOFSTRA L. REV. 97, 101-02, 104, 112-16, 126-30 (1987).

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.”⁵⁵⁸

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.”⁵⁵⁹ 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.⁵⁶⁰ 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.⁵⁶¹ 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*,

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.
⁵⁶⁰ 487 U.S. 654 (1988).

⁵⁶¹ *Id.* at 688-91.

which itself did not purport to apply to core executive functions like prosecution.⁵⁶² The Reagan Administration lost the battle in the *Morrison* case.⁵⁶³ 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.⁵⁶⁴ Although Reagan primarily based his attacks on the bicameralism and presentment requirements of Article I, section 7,⁵⁶⁵ 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."⁵⁶⁶ As Reagan further noted:

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.

⁵⁶⁵ *See* Ronald Reagan, Statement on Signing International Security and Foreign Assistance Legislation (Dec. 29, 1981), in 1981 PUB. PAPERS 1202, 1203; Ronald Reagan, Statement on Signing a Bill Concerning the Establishment of Alcohol Traffic Safety Programs (Oct. 25, 1982), in 1982 PUB. PAPERS 1378; Ronald Reagan, Statement on Signing the Union Station Redevelopment Act of 1981 (Dec. 29, 1981), in 1981 PUB. PAPERS 1207; Ronald Reagan, Statement on Signing a Student Aid Bill (Oct. 14, 1982), in 1982 PUB. PAPERS 1312; Ronald Reagan, Statement on Signing a Bill Amending the Indian Judgment Funds Act (Jan. 12, 1983), in 1983 PUB. PAPERS 44.

⁵⁶⁶ Reagan, Statement on Signing International Security and Foreign Assistance Legislation, *supra* note 565, at 1203.

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

⁵⁶⁷ *Id.*; see also Reagan, Statement on Signing a Bill Concerning the Establishment of Alcohol Traffic Safety Programs, *supra* note 565, at 1378 (objecting that the legislative veto “unconstitutionally involves the Congress in the executive functions of promulgating regulations under authority previously conferred, in violation of the principle of separation of powers”); 5 Op. Off. Legal Counsel 294, 297, 301-03 (1981). The Reagan Administration did occasionally allow a legislative veto to be enacted without registering any protest. __, Pub. L. No. __, § __, 96 Stat. __, 1870 (1982); see also FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 339, at 143.

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

⁵⁶⁹ 462 U.S. 919 (1983).

⁵⁷⁰ See Ronald Reagan, Statement on Signing the Land Remote-Sensing Commercialization Act of 1984 (July 17, 1984), in 1984 PUB. PAPERS 1052, 1053; Ronald Reagan, Statement on Signing the Department of Housing and Urban Development—Independent Agencies Appropriation Act, 1985 (July 18, 1984), in 1984 PUB. PAPERS 1056, 1057; Ronald Reagan, Statement on Signing a Nuclear Regulatory Commission Appropriations Bill (Oct. 30, 1984), in 1984 PUB. PAPERS 1686; Ronald Reagan, Statement on Signing the Department of Housing and Urban Development—Independent Agencies Appropriation Act, 1986 (Nov. 25, 1985), in 1985 PUB. PAPERS 1419, 1420; Ronald Reagan, Statement on Signing the National Defense Authorization Act for Fiscal Year 1987 (Nov. 14, 1986), in 1986 PUB. PAPERS 1557,

The Reagan Administration even revived the objections raised by Wilson and Franklin Roosevelt⁵⁷¹ 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

1558; Ronald Reagan, Statement on Signing the Federal Triangle Development Act (Aug. 22, 1987), *in* 1987 PUB. PAPERS 973, 973-74; Ronald Reagan, Statement on Signing the Department of the Interior and Related Agencies Appropriations Act, Fiscal Year 1989 (Sept. 27, 1988), *in* 1988-89 PUB. PAPERS 1228; Ronald Reagan, Statement on Signing the Indian Self-Determination and Education Assistance Act Amendments of 1988 (Oct. 5, 1988), *in* 1988-89 PUB. PAPERS 1284, 1285-86; Ronald Reagan, Statement on Signing a Bill Providing for the Leasing of Property to the District of Columbia Chapter of the American National Red Cross (Nov. 8, 1988), *in* 1988-89 PUB. PAPERS 1485.

After *Chadha*, the Reagan Administration did enter into some informal agreements with Congress which served much of the same purpose as legislative vetoes. See Fisher, *Legislative Veto*, *supra* note 86, at 286-90; Fisher, *Interpretation Outside the Courts*, *supra* note 86, at 84-91. The fact that the executive branch at times may *voluntarily* choose to keep Congress informed, however, is not in any way inconsistent with the unitary executive or any other provision of the Constitution. See *City of Alexandria v. United States*, 737 F.2d 1022, 1026 (Fed. Cir. 1984); Fisher, *Interpretation Outside the Courts*, *supra* note 86, at 86.

⁵⁷¹ See Yoo et al., *supra* note 24, at __.

⁵⁷² Ronald Reagan, Statement on Signing the Bill Increasing the Public Debt Limit and Enacting the Balanced Budget and Emergency Deficit Control Act of 1985 (Dec. 12, 1985), *in* 1985 PUB. PAPERS 1471, 1471. Reagan also harbored constitutional concerns about a provision in the Act requiring Comptroller General approval of all presidential terminations and modifications of defense contracts. Reagan noted, “Under our constitutional system, an agent of congress may not exercise such supervisory authority over the President.” *Id.*

⁵⁷³ *Id.* at 1472. See generally FISHER & DEVINS, *supra* note 427, at 143-45, 148-53.

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.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.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.”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.⁵⁷⁷ Although the courts did not ultimately accept Reagan's objections to CICA,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.

⁵⁷⁴ Brief for the United States at __, *Bowsher v. Synar*, 478 U.S. 714 (1986) (Nos. 85-1377, 85-1378, 85-1379). These arguments, of course, ultimately prevailed. *Bowsher*, 478 U.S. at __.

⁵⁷⁵ CICA was enacted as part of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, tit. VII, 98 Stat. 494, 1199.

⁵⁷⁶ 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).

⁵⁷⁷ 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.

⁵⁷⁸ See *Ameron, Inc. v. United States Army Corps of Eng'rs*, 787 F.2d 875 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988); *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988); *Parola v. City of Monterey [Weinberger?]*, 848 F.2d 956 (9th Cir. 1988); *Universal Shipping Co. v. United States*, 652 F. Supp. 668 (D.D.C. 1987), *vacated as moot*, No. 87-5120 (D.C. Cir. Jan. 9, 1989).

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,⁵⁷⁹ and even assuming a role in the positions that his Administration would take before the Supreme Court.⁵⁸⁰ The Reagan Administration also repudiated several informal, nonstatutory understandings regarding the division of responsibility between the executive departments and the independent agencies⁵⁸¹ and even challenged one such agency's efforts to file amicus brief in federal appellate court.⁵⁸² In fact, the Reagan Administration went so far as to question the very constitutionality of these agencies supposed "independence."⁵⁸³

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.⁵⁸⁴ Executive Order 12,291 directed all executive agencies to employ cost-benefit analysis in implementing their regulations. The order

⁵⁷⁹ Devins, *supra* note 156, at 266 (citing 6 Op. Off. Legal Counsel 47, 61-62 (1982); 6 Op. Off. Legal Counsel 180, 187-88 (1982)).

⁵⁸⁰ *Id.* at 284; Harvey, *supra* note 156, at 1585.

⁵⁸¹ Devins, *supra* note 156, at 268.

⁵⁸² Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 *Cardozo L. Rev.* 273, 285-98 (1993) (describing the Reagan Administration's efforts to prevent the Equal Employment Opportunity Commission from filing an amicus brief in *Williams v. City of New Orleans*, 729 F.2d 1554 (5th Cir. 1984)).

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).

⁵⁸⁴ 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.”⁵⁸⁵

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.⁵⁸⁶ 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.⁵⁸⁷ 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”⁵⁸⁸ as had so

⁵⁸⁵ Exec. Order 12,291, 3 C.F.R. 127 (1981 compilation).

⁵⁸⁶ Exec. Order 12,498, 3 C.F.R. 323 (1985 compilation).

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).

⁵⁸⁸ Exec. Order 12,291, pmb., 3 C.F.R. at _; Exec. Order 12,498, pmb., 3 C.F.R. at _. Courts reviewing these orders apparently agreed. See *Prof'l Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216 (D.C. Cir. 1983) (affirming application of cost/benefit requirement of Executive Order 12,291); *Env'tl. Def. Fund v. Thomas*, 627 F. Supp. 566, 570 (D.D.C. 1986) (“A certain degree of

many of his predecessors.⁵⁸⁹ 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.”⁵⁹⁰ 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.⁵⁹¹

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.⁵⁹² 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.⁵⁹³ Meese’s so-called Tulane speech defending

deference must be given to the authority of the President to control and supervise executive policy making.”); *see also* Nat’l Fed’n of Fed. Employees, Local 1622 v. Brown, 645 F.2d 1017, 1022 (D.C. Cir. 1981) (“Within the range of choice allowed by statute, the President may direct his subordinates’ choices.”).

⁵⁸⁹ *See supra* notes 112, 261, 311 and accompanying text; Yoo et al., *supra* note 24, at _.

⁵⁹⁰ 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).

⁵⁹¹ *See* Percival, *supra* note 359, at 990-93; Rosenberg, *supra* note 524, at 1200-01.

⁵⁹² 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.

⁵⁹³ Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).

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

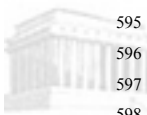
⁵⁹⁴ Calabresi & Yoo, *supra* note 21, at 719-20.

⁵⁹⁵ MORRIS, *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.”⁵⁹⁹ 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.⁶⁰⁰ 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.

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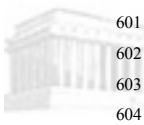
Id. at 624.

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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."⁶⁰¹ 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,"⁶⁰² 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."⁶⁰³ 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."⁶⁰⁴

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



⁶⁰¹ JOHN ROBERT GREENE, THE PRESIDENCY OF GEORGE BUSH 48 (2000).
⁶⁰² *Id.* at 49.
⁶⁰³ *Id.* at 50.
⁶⁰⁴ *Id.*

nomination to fail since the last years of the Eisenhower administration in 1959.⁶⁰⁵ 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.⁶⁰⁶

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."⁶⁰⁷ 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.⁶⁰⁸ For example, Bush

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.”⁶⁰⁹

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.”⁶¹⁰ 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.”⁶¹¹ Bush raised similar objections to statutes that attempted to guide the manner in which he controlled the executive branch.⁶¹² As Bush noted, “When a member

⁶⁰⁹ George Bush, Statement on Signing the Federal Deposit Insurance Corporation Improvement Act of 1991 (Dec. 19, 1991), *in* 1991 PUB. PAPERS 1649, 1650.

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 1962, 1963; *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

concerning regulatory review by OMB could be interpreted to interfere with my authority under the Constitution to supervise the decision-making process within and management of the executive branch).

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 grounds. *United States v. Instruments, S.A., Inc.*, 807 F. Supp. 811 (D.D.C. 1992); see also May, *supra* note 289, at 979 n.549.

⁶¹⁶ Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16. See generally Kmiec, *supra* note 466, at 343-44.

⁶¹⁷ George Bush, Statement on the Signing of the Whistleblower Protection Act of 1989 (Apr. 10, 1989), in 1989 PUB. PAPERS 391, 392 [hereinafter Bush, Whistleblower Protection Act Signing 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.

⁶¹⁹ Bush, Whistleblower Protection Act Signing Statement, *supra* note 617, at 392.

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.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."⁶²² Indeed, when Deputy Chief of Staff Bob Zoellick informed Kessler of the final outcome, he flatly stated, "This is the President's decision."⁶²³ It is true that Bush found himself unable to mandate OMB's preferred solution. Bush noted somewhat surprisedly, "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."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.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.⁶²⁶

⁶²¹ *Id.* at 71.

⁶²² DAVID KESSLER, A QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY 67 (2001).

⁶²³ *Id.* at 70.

⁶²⁴ *Id.* at 68.

⁶²⁵ See Percival, *supra* note 359, at 994-95.

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.

⁶³¹ Pub. L. No. 102-385, 106 Stat. 1460.

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.”⁶³³ 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.⁶³⁴ 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.⁶³⁵ 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.⁶³⁶

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.

In addition, Bush continued to oppose the legislative veto as an impermissible violation of the separation of powers.⁶³⁷ Accordingly, Bush announced that he would

⁶³³ *Id.*

⁶³⁴ George H.W. Bush, Remarks to the Federalist Society of Philadelphia in Philadelphia, Pennsylvania (Apr. 3, 1992), in 1992 PUB. PAPERS 532, 535.

⁶³⁵ See Sharon LaFraniere, *Barr Urges “Fundamental Changes” in Independent Counsel Statute*, WASH. POST, Apr. 8, 1992, at A5.

⁶³⁶ See Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL’Y REV. 361, 390 (1993).

⁶³⁷ See George Bush, Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1990 (Nov. 3, 1989), in 1989 PUB. PAPERS 1448, 1449; George Bush, Statement on Signing the Intelligence Authorization Act, Fiscal Year 1990 (Nov. 30, 1989), in 1989 PUB.

“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,

PAPERS 1609, 1611; George Bush, Statement on Signing the International Narcotics Act of 1989 (Dec. 13, 1989), *in* 1989 PUB. PAPERS 1698, 1699; George Bush, Statement on Signing the Omnibus Budget Reconciliation Act of 1990 (Nov. 5, 1990), *in* 1990 PUB. PAPERS 1553, 1555; George Bush, Statement on Signing the Department of the Interior and Related Agencies Appropriations Act, 1991 (Nov. 5, 1990), *in* 1990 PUB. PAPERS 1558, 1559; George Bush, Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1992 (Oct. 28, 1991), *in* 1991 PUB. PAPERS 1349, 1350; George Bush, Statement on Signing the Department of the Interior and Related Agencies Appropriations Act, 1993 (Oct. 5, 1992), *in* 1992 PUB. PAPERS 1756, 1757; Bush, Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1993, *supra* note 612, at 1767; *see also* 16 Op. Off. Legal Counsel 18 (1992) (preliminary print); 14 Op. Off. Legal Counsel 38 (1990) (preliminary print). Despite Bush’s attempt to object to every legislative veto, Reagan and Bush reportedly signed more than two hundred new legislative vetoes into law after *Chadha* and often complied with them. *See* Fisher, *Legislative Vetoes*, *supra* note 86, at 288; Lund, *supra* note 529, at 65.

⁶³⁸ *See* Bush, Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1990, *supra* note 637, at 1449; *see also* Bush, Statement on Signing the Department of the Interior and Related Agencies Appropriations Act, 1991, *supra* note 637, at 1559; Bush, Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1992, *supra* note 637, at 1350; Bush, Statement on Signing the Department of the Interior and Related Agencies Act, 1993, *supra* note 637, at 1757; Bush, Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1993, *supra* note 612, at 1767.

⁶³⁹ In 1989, Secretary of State James A. Baker, III, agreed to give four congressional committees the right to approve the release of \$50 million in humanitarian aid to the Nicaraguan Contras. FISHER & DEVINS, *supra* note 427, at 130, 141-42; Fisher, *Legislative Veto*, *supra* note 86, at 291; Lund, *supra* note 529, at 64-65.

⁶⁴⁰ *See* Fisher, *Interpretation Outside the Courts*, *supra* note 86, at 86; Lund, *supra* note 529, at 65.

⁶⁴¹ *See* Lund, *supra* note 529, at 70-79.

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.⁶⁴² 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,⁶⁴³ 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

⁶⁴² Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 275-76 (1991).

⁶⁴³ 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).

Democratic administration in a very long time; Clinton was the first Democrat to win reelection to a second term since Franklin Roosevelt.⁶⁴⁴

Klein adds that Clinton “seemed to know everything there was to know about domestic social policy.”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.”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.”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.”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

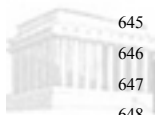
⁶⁴⁴ JOE KLEIN, *THE NATURAL* 3-4 (2002).

⁶⁴⁵ *Id.* at 26.

⁶⁴⁶ *Id.*

⁶⁴⁷ *Id.* at 188-89.

⁶⁴⁸ *Id.* at 216.



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 not 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

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.”⁶⁵² 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.⁶⁵³ 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.⁶⁵⁴

After the criticism leveled by Democrats at OMB involvement in the regulatory process,⁶⁵⁵ 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,⁶⁵⁶ it broadened the inquiry to allow consideration of other factors, such as “equity,” “distributive impacts,” and “qualitative measures.”⁶⁵⁷ In addition, the Clinton program regularized many of the procedures surrounding regulatory review, requiring disclosure

⁶⁵² *Id.* at 73.

⁶⁵³ See Kagan, *supra* note 25.

⁶⁵⁴ Executive Order 12866, 3 C.F.R. 638 (1993 compilation), *reprinted in* 5 U.S.C. § 601.

⁶⁵⁵ See Devins, *supra* note 156, at 256; Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 17, 27 (1995); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 174 (1995).

⁶⁵⁶ §§ 1(b)(5)-(6), 6(a)(3)(B)(ii), 6(a)(3)(C), 3 C.F.R. 639, 645.

⁶⁵⁷ § 1(a), 3 C.F.R. at 639.

of all ex parte contacts and written communications between OIRA and the agency⁶⁵⁸ and placing limits on the time available for OMB review.⁶⁵⁹ 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.”⁶⁶⁰

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.⁶⁶¹ “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.”⁶⁶² 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.”⁶⁶³ 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.

⁶⁵⁸ § 6(b)(4), 3 C.F.R. at 647-48.

⁶⁵⁹ § 6(b)(2), 3 C.F.R. at 646-47.

⁶⁶⁰ Pmb1., 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,⁶⁶⁴ Clinton required the independent agencies to participate in the regulatory planning process.⁶⁶⁵ 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.”⁶⁶⁶ 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.”⁶⁶⁷ When signing the bill into law, Clinton noted that the removal provisions raised significant constitutional questions.⁶⁶⁸ 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.⁶⁶⁹ 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.⁶⁷⁰

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.

⁶⁶⁷ 42 U.S.C. § 902(a)(3).

⁶⁶⁸ William J. Clinton, President’s Statement on Signing the Social Security Independence and Program Improvements Act of 1994 (Aug. 15, 1994), *in* 1994 PUB. PAPERS 1471, 1472.

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, "[g]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 "sa[id] 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.⁶⁷⁸

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”⁶⁷⁹ Indeed, so great was Clinton's domination of his administration that one Senator accused Clinton of “debasing the constitutional structure.”⁶⁸⁰ Using language reminiscent of similar criticisms leveled at Andrew Jackson, Abraham Lincoln, and Andrew Johnson,⁶⁸¹ Congressman J.C. Watts criticized Clinton for “pretty much . . . acting as the king of the world.”⁶⁸²

Another major initiative launched by Clinton was the attempt to reinvent government to be smaller and more efficient. Vice President Albert Gore was charged

⁶⁷⁸ *Id.* at 2301.

⁶⁷⁹ *Id.* at 2302.

⁶⁸⁰ John J. Fialka, *Clinton is Likely to Leave the Presidency with Record of Having Protected Lands*, WALL ST. J., Dec. 29, 2000, at A18 (quoting Senator Larry Craig), *quoted in* Kagan, *supra* note 25, at 2314.

⁶⁸¹ *See* Calabresi & Yoo, *supra* note 17, at 1529, 1543; Calabresi & Yoo, *supra* note 21, at 733, 744

⁶⁸² *News Hour with Jim Lehrer* (PBS television broadcast, Jan. 22, 2001), http://www.pbs.org/newshour/bb/politics/jan-june01/abortion_1-22.html, *quoted in* Kagan, *supra* note 25, at 2314.

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.



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KLEIN, *supra* note 644, at 65

Id. at 66.

Id. at 67.

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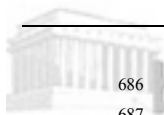
And the Marc Rich pardon, at once incomprehensible and instructive, was the worst of all.⁶⁸⁶

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 independent 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.



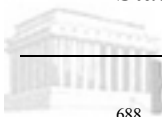
⁶⁸⁶
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Id. at 204, 196.
President's News Conference (Dec. 8, 1999).

While the investigation was underway, Congress repassed the Ethics in Government Act, which had lapsed during the Bush Administration.⁶⁸⁸ 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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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.⁶⁸⁹

The Supreme Court ruled unanimously against Clinton,⁶⁹⁰ although Justice Stephen Breyer wrote what can best be described as a Clinton-friendly concurrence.⁶⁹¹ 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."⁶⁹²

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,⁶⁹³ other scholars have pointed out that such arguments overlook a fundamental difference between the two impeachments.⁶⁹⁴ Although there was certainly a partisan

⁶⁸⁹ Brief for the United States as Amicus Curiae in Support of Petitioner at 4, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95-1853).

⁶⁹⁰ *Clinton v. Jones*, 520 U.S. 681 (1997).

⁶⁹¹ *Id.* at 710 (Breyer, J., concurring in the judgment).

⁶⁹² *Id.* at 702.

⁶⁹³ See R.W. Apple Jr., *The Fallout of the Trial*, N.Y. TIMES, Feb. 13, 1999, at A1 (quoting Schlesinger).

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,”⁶⁹⁵ particularly with respect to which branch would control Reconstruction⁶⁹⁶ and Johnson’s conception of the president as the direct spokesperson for the people and the sole head of a unitary executive branch.⁶⁹⁷ 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.⁶⁹⁸ 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.”⁶⁹⁹ 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.⁷⁰⁰ As a result, it is unlikely to have

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 Bush v. Gore*, 4 THEORETICAL INQ. L. 579, 602 (2003) (“In fact, Clinton’s impeachment bore few parallels to Johnson’s.”).

⁶⁹⁵ Whittington, *supra* note 694, at 426.

⁶⁹⁶ *Id.* at 427-31.

⁶⁹⁷ *Id.* at 438-39.

⁶⁹⁸ *Id.* at 443.

⁶⁹⁹ *Id.* at 459.

⁷⁰⁰ *Id.* at 455.



significant implications for the distribution of power between the legislative and executive branches.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.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.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

⁷⁰¹ *Id.* at 450-59.

⁷⁰² *Id.* at 88.

⁷⁰³ Reauthorization of the Independent Counsel Statute, Part I: Hearings Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 61 (1999) [hereinafter House Subcommittee Hearings].

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

⁷⁰⁴ *The Future of the Independent Counsel Act: Hearings Before the Comm. on Sen. Governmental Affairs Comm.*, 106th Cong. 242, 245-46 (1999) (testimony of Attorney General Janet Reno), reprinted in PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 675-76 (2000) [hereinafter Senate Committee Hearings].

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

⁷⁰⁶ See *id.* at 26 (testimony of former Senate Majority Leader Howard H. Baker, Jr.); ROBERT DOLE & GEORGE J. MITCHELL, AMERICAN ENTERPRISE INSTITUTE AND THE BROOKINGS INSTITUTION, PROJECT ON THE INDEPENDENT COUNSEL STATUTE, REPORT AND RECOMMENDATIONS 1999)

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).

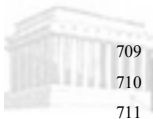
lapse, and subsequent regulations gave the attorney general the authority to appoint and supervise special counsels charged with investigating top government officials.

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



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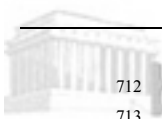
See Gormley, *supra* note 19, at 101-03.

See Calabresi & Yoo, *supra* note 17, at 1462.

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*⁷¹² 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*,⁷¹³ 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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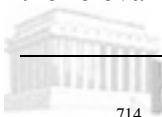
462 U.S. 919, 942 n.13 (1983).
487 U.S. 654 (1988).

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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.



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



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