

The Unitary Executive During the Third Half-Century, 1889-1945

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INTRODUCTION

The 1980s bore witness to a dramatic upsurge in interest in the proper roles of the President and Congress in controlling the execution of the law. Much of the initial scholarship 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.¹ Interest was fanned still further by the Supreme Court's decisions in *INS v. Chadha*² striking down the legislative veto, as well as its decision in *Bowsher v. Synar*³ invalidating the Gramm-Rudman-Hollings Act's attempt to lodge executive authority in an agent of Congress. The proper scope of presidential power also arose in *Clinton v. City of New York*,⁴ which invalidated Congress's attempt to give the president the power to make line item vetoes.

But the importance of this issue has been underscored most spectacularly by the controversy surrounding the use of independent counsels, who are permitted to enforce federal

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¹ 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).

² 462 U.S. 919 (1983).

³ 478 U.S. 714 (1986).

⁴ 524 U.S. 417 (1998).

law outside of presidential control.⁵ The Supreme Court upheld the constitutionality of the independent counsel statute in *Morrison v. Olson*⁶ despite a powerful dissent by Justice Scalia warning of the dangers of politically motivated investigations.⁷ The years that followed appeared to bear out Justice Scalia's dire predictions, as accusations mounted that the independent counsel process had been subverted for political purposes,⁸ climaxing in the barrage of recriminations prompted by the role of the independent counsel in the impeachment of President Clinton. Further controversy was forestalled when the statute authorizing independent counsels was allowed to lapse in 1999.

The scholarly commentary largely centers on whether the Constitution created a "unitary executive," in which all executive authority is centralized in the president. Participants in the debate have examined the text⁹ and ratification history¹⁰ of the Constitution to determine whether the Constitution rejected of the plural executive employed by the Articles of the Confederation

⁵ 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 1, at 598-608; Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Legislative Power*, 63 B.U. L. REV. 59 (1983).

⁶ 487 U.S. 654 (1988).

⁷ *Id.* at 712-14, 727-30 (Scalia, J., dissenting).

⁸ See 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 (1995); Steven G. Calabresi, *Some Structural Consequences of the Increased Use of Ethics Probes as Political Weapons*, 11 J.L. & POL. 521 (1995).

⁹ Compare, e.g., Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377 (1994) (arguing that the Article II Vesting Clause, bolstered by other constitutional provisions, represents a substantive grant of constitutional power); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (same); and Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992) (same); with Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 47-55, 119 (1994) (disagreeing with Professor Calabresi's views); and A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994) (same).

¹⁰ Compare, e.g., Calabresi & Prakash, *supra* note 9, 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).

and many state constitutions in favor of a structure in which all administrative authority was concentrated in a single person.¹¹ To the extent that commentators have focused on the post-ratification practices with respect to this issue, they have tended to focus primarily on the practices during the presidential administrations immediately following the Founding.¹²

Increasingly, commentators have looked beyond the Founding era and have begun to assess the implications of the broader sweep of history. Some scholars, including most notably Lawrence Lessig and Cass Sunstein, have argued that the increase in discretionary, policymaking authority wielded by administrative agencies has strengthened the case in favor of the unitary executive.¹³ Others have drawn the opposite conclusion, arguing that the increased policymaking functions of the modern administrative state justify allowing Congress more latitude in insulating agencies from presidential control.¹⁴ Still others 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.¹⁵ In making these arguments, some of these scholars have acknowledged the incompleteness of the current historical literature and have recognized the

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

¹² *See* Calabresi & Prakash, *supra* note 9, 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 9, at 5-84; Prakash, *supra* note 10, at 789-800.

¹³ *See* Lessig & Sunstein, *supra* note 9, at 93-106.

¹⁴ *See* Flaherty, *supra* note 10, at 1816-21; Greene, *supra* note 10, at 153-95; Strauss, *supra* note 1.

¹⁵ *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 10, 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 5, 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 1, at 83-86 (finding past presidents’ failure to consistently oppose independent agencies problematic, but ultimately insufficient to constitute acquiescence).

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 We continued our project in *The Unitary Executive During the Second Half-Century*,¹⁹ beginning with Martin Van Buren's presidency in 1837 up through the end of Grover Cleveland's first term in 1889. In the process, we offered an extended discussion of the second great conflict over the unitary executive: the impeachment of Andrew Johnson for violating the Tenure of Office Act.²⁰

Our analysis employs the interpretive method known as "departmentalism" or "coordinate construction," which 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.²¹ This approach asks whether a long-standing and unbroken practice exists in which both Congress and the presidents have

¹⁶ See Lessig & Sunstein, *supra* note 9, 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 Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 668 (2003).

²⁰ *Id.* at 746-58.

²¹ See Calabresi & Yoo, *supra* note 17, at 1463-72.

acquiesced. If so, that practice may be justifiably regarded as part of the structure of our government.²² In this respect, our methodology is the same as the one followed by the Supreme Court in *INS v. Chadha*,²³ 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 established practice in which all three branches had acquiesced.²⁴

Toward this end, we seek to examine and disprove the claim implicit in many attacks on the unitary executive that a custom, tradition, and practice has grown up over the last 215 years which “amounts to a presidential acquiescence in the existence of a congressional power to (at times) limit the President’s removal power and curtail his other constitutionally guaranteed mechanisms of control over the Executive Branch.”²⁵ 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 which subordinate officials exercise discretionary executive power, and the president’s power to veto or nullify such officials’ exercises of discretionary executive power.²⁶ 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.²⁷ We do not claim that there is consensus among all three

²² 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); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

²³ 462 U.S. 919 (1983).

²⁴ *Id.* at 942 n.13.

²⁵ Calabresi & Yoo, *supra* note 17, at 1457.

²⁶ *Id.* at 1458.

²⁷ See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111

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 anti-unitarian custom, tradition, or practice that *presidents have acquiesced in* that trumps the constitutional text and the original design."²⁸

Our first two articles demonstrated that the twenty-two American presidents from George Washington through Grover Cleveland strongly believed in the president's sole authority to control execution of the law and did not hesitate to wield the mechanisms essential to any theory of the unitary executive. In particular, we proved that from 1789 to 1889, each president 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 twenty-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.

We now pick up the historical account where we left off in the two prior articles and examine the views of the presidencies during the third half-century of our constitutional history, beginning with Benjamin Harrison and ending with Franklin Delano Roosevelt. In the process, we offer an extended analysis of FDR's failed attempt in 1937 and 1938 to implement the Brownlow Committee's proposal to reorganize the executive branch, an event that is typically acknowledged as the next key battle between the President and Congress over control of the execution of the law.²⁹

YALE L.J. 231, 252-65 (2001); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1676-68 (2002).

²⁸ *Id.*

²⁹ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2274-75 (2001); Lessig & Sunstein, *supra* note 9, at 84 n.334; Miller, *supra* note 1, at 79, 85.

The period covered by this Article represents the crux of the debate over whether our history under the Constitution has given rise to an established practice vitiating the unitary executive. It is during this period that two institutions generally assumed to be inconsistent with the unitary executive—the emergence of independent agencies³⁰ and the extension civil service protections to federal employees³¹—were thought to become more widespread. This period also bore witness to the appointment of special prosecutors on three occasions, as well as the rapid expansion of the federal bureaucracy spurred by the New Deal. Many constitutional theorists, led by Bruce Ackerman, regard these changes to be so sweeping as to constitute a “constitutional moment” that implicitly ratified major changes in the allocation of power within the federal government.³²

Although many scholars assert that these developments effectively foreclose any arguments in favor of the unitary executive as a matter of history, the closer examination of the historical record laid out in this Article reveals that such assertions are too blithe. Instead, what

³⁰ See, e.g., Strauss, *supra* note 1, at 578 (“Almost fifty years of experience has accustomed lawyers and judges to accepting the independent regulatory commissions, in the metaphor, as a ‘headless “fourth branch”’ of government.”); Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1236 (2000) (arguing that independent agencies have a sufficient historical pedigree to justify regarding them as an established constitutional practice). It is a common misconception that the history of independent agencies began with the creation of the Interstate Commerce Commission (ICC) in 1887. This conclusion is wrong in two respects: First, there was precedent for entities, such as the Second Bank of the United States, that enjoyed a degree of autonomy from the federal government. As we have noted earlier, however, the president’s ability to remove federal funds from the Bank provided him with a mechanism with which to retain control of the execution of federal law. Calabresi & Yoo, *supra* note 17, at 1539 n.309. Second, the original ICC was placed in the Department of the Interior and does not appear to have been regarded as independent by either the president or Congress. See Calabresi & Yoo, *supra* note 19, at 797-99. As this Article demonstrates, the ICC did not become even arguably independent until well after 1887.

³¹ See, e.g., Strauss, *supra* note 1, at 582 (“The civil service . . . may appropriately be regarded as the fourth effective branch government . . .”). It is another common misconception that limits on the power to remove federal employees began with the Civil Service Act of 1883. As we have pointed out, the original Act did not provide federal employees with any protection against removal aside from prohibiting the firing employees for refusing to make political contributions. See Calabresi & Yoo, *supra* note 19, at 788-89. As we shall see, the civil service system did not place limits on the president’s removal power until well after the end of the period covered by this Article.

³² 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); Flaherty, *supra* note 10, at 1819-21.

emerges is a largely consistent pattern of presidential insistence on the unitariness of the executive branch and a general willingness by presidents to defend their sole authority to control the execution of the law.

This period also bore witness to a fundamental shift in the balance of power between Congress and the President. At the commencement of the era addressed by this Article, Congress had clearly emerged as the victor in its battle with the presidency over Reconstruction.³³ It would not be until the early part of the twentieth century that the presidency (particularly in the figures of Theodore Roosevelt, Woodrow Wilson, and Franklin Roosevelt) would reemerge from the shadow of congressional dominance in the aftermath of the Civil War.

Furthermore, a number of external forces began to transform the basic relationship between Congress and the president. Domestically, the rise of large industrial corporations sparked, for the first time, calls for strong central regulation, which in turn provided the impetus for a concomitant expansion of the federal bureaucracy. America's emergence as an international power also strengthened the case for stronger centralized control. As a result, Americans in general began to look to the president not simply as an administrator, but rather as the locus of political leadership and the predominant voice in shaping public policy.

As a result of these changes, the character of America changed as well. The country became more national and international in its focus and more homogenous in its character. As the country changed, so too did the presidency. As America became more imperial, her presidents took on an imperial persona as well. One might say that much of the potential for presidential power that existed implicitly in the first two periods comes to be actualized in the

³³ See LEONARD D. WHITE, *THE REPUBLICAN ERA: 1869-1901*, at 45-48 (1958); Keith E. Whittington, *Bill Clinton Was No Andrew Johnson*, 2 U. PA. J. CONST. L. 422, 447-49 (2000).

dominant figures of this third period. These figures thereby set the tone for the executive that will be seen in the fourth and final period.

Thus, with the onset of the twentieth century, the presidency underwent a dramatic transformation. The nation's increasing industrialization and the emergence of the U.S. as a world power made a strong Chief Executive more important than ever. With the increasing influence of the mass media, the president also began to emerge as a leader of public opinion. The presidency expanded to fill these new roles and, in the process, continued to defend its power to control the execution of the laws.

We begin in Parts I through X below with a discussion of the ten presidencies between 1889 and 1945. We conclude in Part XI below with a discussion of the Brownlow Commission and of President Franklin Roosevelt's unsuccessful effort to abolish the independent agencies and merge them into the executive branch.

I. BENJAMIN HARRISON

When Benjamin Harrison became the first and only grandson of a president to be elected to the presidency, many Americans were uncertain how much to expect from him. Harrison had been selected by the Electoral College after losing the popular vote to Grover Cleveland. Moreover, Harrison had had only a short career in national politics before assuming the presidency.

Any doubts about Harrison's willingness to take responsibility for executing the law would prove short lived. As Harrison's biographers, Homer Socolofsky and Allan Spetter report:

Benjamin Harrison lacked experience as an administrator and had had only six years in Washington as a United States senator by the time he became president. Thus, political observers concluded that he would defer on many issues to

members of his cabinet who had long been in the public eye. Halfway through his presidency the skepticism about Harrison's ability to lead his own administration had changed. By then it was recognized that *he was absolutely the head in his administration*. Harrison was sure of his position. While he did not interfere in the departmental work of members of his cabinet, neither would he permit any encroachment on his overall presidential power.³⁴

Thus, Harrison took charge of his administration and directed the actions of his subordinates. He recognized that as president he possessed the executive power, and accordingly he told his subordinates what to do. Socolofsky and Spetter report that "Harrison would be sensitive about his executive and administrative authority as president and would not tolerate any challenges to his power."³⁵

Harrison offered the most definitive statement of his attitude regarding the president's sole authority to execute the law in the memoirs that were published after he left office. Harrison specifically noted that the president "is responsible for all executive action."³⁶ Although "[r]outine matters proceed without the knowledge or interference of the president; . . . if any matter of major importance arises the Secretary presents it for the consideration and advice of the President."³⁷ The chief executive may make some effort to accommodate the views of one of his cabinet members. However, "when the President has views that he feels cannot yield, those views must prevail, for the responsibility is his, both in a Constitutional and popular sense."³⁸ Allowing cabinet members to exercise authority inconsistent with the views of the president "would be a framing out of his Constitutional powers" to "eight Presidents" that would be

³⁴ HOMER E. SOCOLOFSKY & ALLAN B. SPETTER, *THE PRESIDENCY OF BENJAMIN HARRISON* 84 (1987) (emphasis added).

³⁵ *Id.* at 47-48.

³⁶ BENJAMIN HARRISON, *THIS COUNTRY OF OURS* 105 (1897).

³⁷ *Id.*

³⁸ *Id.* at 106.

inconsistent with the Framers’ rejection of an executive counsel in favor of an executive branch headed by a single figure.³⁹

During Harrison’s presidency, there were generally two cabinet meetings a week as well as individual weekly cabinet meetings with each individual member of the cabinet.⁴⁰ “Before signing a bill passed by Congress, Harrison always consulted the cabinet member who was most likely to be involved.”⁴¹ Harrison vigorously exercised his appointment power as a way of supervising the executive branch. Harrison “ignored the bosses,” against whom he waged a continuing battle “over the spoils of victory—patronage.”⁴² Harrison personally oversaw many civil service matters in a somewhat impractical attempt to keep personal control over appointments⁴³ and appointed a young Theodore Roosevelt to the Civil Service Commission.⁴⁴ He changed some seventy-five percent of the post officers and twenty-seven percent of the postmasters, numbers comparable to those of his predecessor, Cleveland.⁴⁵

Harrison also took a number of other key actions in domestic policy that demonstrated his vigor as an executor of federal law. Under Harrison, a number of new federal statutes were passed that delegated substantial new powers to the executive branch. These statutes included the Sherman Antitrust Act;⁴⁶ the McKinley Tariff Bill, which delegated significant powers to the president to grant exemptions;⁴⁷ and the Land Revision Act of 1891, which delegated to the

³⁹ *Id.* at 70. See Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 977-78 (2001).

⁴⁰ SOCOLOFSKY & SPETTER, *supra* note 34, at 85.

⁴¹ *Id.*

⁴² *Id.* at 29.

⁴³ *Id.* at 43.

⁴⁴ *Id.* at 40.

⁴⁵ *Id.* at 39.

⁴⁶ *Id.* at 53.

⁴⁷ *Id.* at 51.

president the power to set aside public lands as national forests.⁴⁸ Thus, the amount of delegated power that the president could control the execution of increased dramatically during the Harrison years.

Another matter involving the unitary executive that arose during the Harrison Administration was the extraordinary series of events surrounding the attempted assassination of Supreme Court Justice Stephen Field by David S. Terry.⁴⁹ Terry and his wife were litigants in a case heard by Field and two other federal judges while the justice was riding circuit in California. The justice ruled against Terry's wife, after which Terry attempted to assault Field in open court. In the wake of that attempt and after Terry and his wife had been overheard making threats to kill Field, Attorney General William Henry Harrison Miller assigned U.S. Marshal David Neagle to accompany Field on his travels in California and to protect the justice from the Terrys. While riding a train in California, David Terry encountered Field on the train and attacked him. Neagle came to Justice Field's defense and shot Terry dead when he refused to cease and desist.

California officials took Neagle into custody for Terry's murder, and Neagle sought habeas corpus relief under a federal statute that allowed release if Neagle had killed Terry "in pursuance of a law of the United States."⁵⁰ No statute had been enacted under which Neagle was safeguarding Justice Field, but Neagle was assigned to protect Field on the orders of the Attorney General, who had assumed there was implied executive power to protect the officers and instrumentalities of the United States even in the absence of a statutory mandate. *Cunningham v. Neagle* thus presented the question whether the constitutional grant of the executive power to the

⁴⁸ *Id.* at 71.

⁴⁹ *See* *Cunningham v. Neagle*, 135 U.S. 1, 5-6, 42-54 (1890) (reviewing the facts of the case).

⁵⁰ *Id.* at 41.

president authorized the president to take action despite the absence of any statutory mandate, the same issue that would arise in the *Steel Seizure Case*⁵¹ a half-century later. Related to this was the question of whether Neagle had killed Terry “in pursuance of a law of the United States” because the president was validly acting under his implied presidential powers.

The Harrison Administration was in charge of arguing this case before the Supreme Court. Attorney General Miller argued the case himself, maintaining:

It was the duty of the Executive Department of the United States to guard and protect, at any hazard, the life of Mr. Justice Field in the discharge of his duty: 1. Because such protection is essential to the existence of the government; 2. Because it is enjoined upon the President, as the executive, he being require to “take care that the laws be faithfully executed;” 3. The marshal was merely the hand of the executive, and unless protected by the marshal the courts and judges have no protection.

The reason why I say it is the duty of the Executive Department to protect the judicial, and why I say it has the authority so to do, is because the power of self-preservation is essential to the very existence of the government.⁵²

Miller mentioned Abraham Lincoln’s extraordinary actions without statutory authority as support for the Harrison Administration’s extra-statutory protection of the life of Justice Field. He also pointed out that the presidential oath of office requires the president to defend the government, its officers, and its instrumentalities. He observed that after Washington was inaugurated but before Congress had met to pass any laws, the president surely had the authority to defend the U.S. government. Continuing in that vein, the Attorney General told the Court that

the President, in like manner, by the very fact that he is made the chief executive of the nation, and is charged to protect, preserve, and defend the Constitution, and to take care that the laws are faithfully executed, is invested with necessary and implied executive powers which neither of the other branches of government can either take away or abridge; that many of these powers, pertaining to each branch

⁵¹ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

⁵² 135 U.S. at 13.

of government, are self-executing, and in no way dependent, except as to ways and means, upon legislation.⁵³

Miller specifically argued that the Vesting Clause of Article II grants the president the executive power of the nation and that the Constitution further enjoins upon him the duty to take care that the laws be faithfully executed. Together those two clauses give the president implied powers.⁵⁴ If the president could not protect courts with the U.S. marshals, they would not be able to protect even themselves against assassination attempts. Finally, he concluded Neagle's federal acts in protection of Justice Field trumped state law under the principles of *Cohens v. Virginia*,⁵⁵ *Ableman v. Booth*,⁵⁶ and *McCulloch v. Maryland*.⁵⁷

These arguments to the Court by Harrison's Attorney General constitute a complete acceptance by the Harrison Administration of a number of key tenets of the theory of the unitary executive. Miller endorses the Lincolnian view that the Vesting Clause of Article II, taken together with the Take Care Clause, vests the president with the whole executive power of the nation and gives the president broad, implied powers to execute both the Constitution and laws. These implied, nonstatutory powers are broad enough to support Neagle's taking of Terry's life. While the Attorney General makes no mention of the implied presidential power of removal and direction per se, that power is narrower in scope than the protective power he finds implicit in Article II. It is inconceivable that an Administration that endorsed Miller's Lincolnian interpretation of Article II would not also believe that the president had the authority to control subordinate executive officials in their execution of federal law. Indeed, the Attorney General exercised precisely those powers of direction and control when he specifically told subordinates

⁵³ *Id.* at 16.

⁵⁴ *Id.*

⁵⁵ 19 U.S. (6 Wheat.) 264 (1821).

⁵⁶ 62 U.S. (21 How.) 506 (1859).

⁵⁷ 17 U.S. (4 Wheat.) 316 (1819).

in California to take steps to protect Justice Field by giving him a body guard. If Harrison had the inherent authority to order David Terry to be killed then surely he had the lesser inherent power to remove and direct subordinates.

The Supreme Court's decision in *Cunningham v. Neagle* enthusiastically endorsed the Harrison Administration's position, over the spirited dissent of Justice Lamar joined by Chief Justice Fuller. The Court said it did not matter that there was no statute being executed here by the president, reasoning that "any obligation fairly and properly inferable from [the Constitution] . . . is a 'law' within the meaning of this phrase."⁵⁸ The Court added that it would be absurd if the Constitution did not allow presidents to protect judges in the ordinary exercise of their duties,⁵⁹ and the Court pointed out that it was dependent on the marshals to execute federal judgments.⁶⁰ The Court added:

If we turn to the executive department of the government, we find . . . [that] the Constitution, section 3, Article II, declares that the President "shall take care that the laws be faithfully executed." . . . He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the constitution, and the creation by acts of congress, of executive departments . . .⁶¹

The Court concluded by saying that federal law authorized Neagle to do whatever California law would have authorized a marshal to do in keeping the peace.⁶² The Court therefore affirmed the lower court in granting habeas relief to Neagle.

The scope and nature of the majority's ruling is underscored by the arguments made in Justice Lamar's dissent. It may be noteworthy here that Justice Lamar was a southerner who may not have liked the Lincolnian arguments of the majority with respect to executive and

⁵⁸ 135 U.S. at 59.

⁵⁹ *Id.*

⁶⁰ *Id.* at 61 (citing *Ex parte Siebold*, 100 U.S. 371, 394 (1879)).

⁶¹ *Id.* at 63.

⁶² *Id.* at 68-69.

federal power. Justice Lamar argued that the habeas statute would only protect Neagle if he had acted pursuant to a federal statute and not if he was acting under some claim of implied presidential power.⁶³ Lamar denied that the executive could act without a statute, arguing that under the Necessary and Proper Clause, Congress alone has the power to legislate to protect judges.⁶⁴ Lamar's dissenting view was that Congress was the depository of all the federal government's implied law-making powers. The majority ruled ringingly in favor of implied presidential power, which is surely helpful to those of us who believe in an implied presidential power to remove, direct, or nullify.

Another case arose in the Supreme Court during the Harrison years that has tangential relevance to our thesis. In *McAllister v. United States*,⁶⁵ the Court ruled six to three that the president had the statutory authority to remove a judge appointed for the territory of Alaska before the territorial judge's four-year statutory term of office expired. Since it was clear that the 1869 amendment to the Tenure of Office Act, which was still in force at the time the dispute arose, acknowledged the president's right to suspend and replace any civil officer so long as the new office holder's nomination was submitted to the Senate within thirty days of the commencement of its next session.⁶⁶ Because the statute on its face recognized the president's right to remove McAllister,⁶⁷ the case did not present an occasion for the Court to address the constitutionality of congressional attempts to restrict the removal power. The fact that the Tenure of Office Act had subsequently been repealed suggested that a case directly presenting

⁶³ *Id.* at 78-79 (Lamar, J., dissenting).

⁶⁴ *Id.* at 82-84.

⁶⁵ 141 U.S. 174 (1891).

⁶⁶ Act of Apr. 5, 1869, ch. 10, § 2, 16 Stat. 6, 7. *See generally* Calabresi & Yoo, *supra* note , at 760-63 (describing the history of this provision).

⁶⁷ The statute contained an exception for judges of the courts of the United States." 141 U.S. at 177. A long line of precedents clearly holding that territorial judges are not courts of the United States rendered this exception inapplicable. *Id.* at 180-84.

the president's power to remove might arise in the future. The Court discreetly declined to discuss the issue in advance.⁶⁸

One major question hanging over the Harrison Administration was the president's role in foreign policy given the presence of James G. Blaine as Secretary of State. Blaine was a towering figure in national politics who had been the GOP candidate for president in 1884, as well as a leader of the GOP going back to the 1880 national convention. Fortunately for Harrison, Blaine was constantly ill between 1889 and 1893. In 1891, when Blaine was completely incapacitated, Harrison seized the opportunity to put his imprint on the nation's foreign policy.⁶⁹ In fact, Socolofsky and Spetter claim:

Since the 1960's, various studies have asserted Harrison's importance in late-nineteenth-century foreign policy—placing Blaine in proper perspective—and have acknowledged these accomplishments among others: his major contribution to the development of the new navy, the establishment of the first American protectorate in Samoa, participation in the first Pan-American Conference, and a most successful commercial reciprocity policy.⁷⁰

In addition, Socolofsky and Spetter give Harrison personal credit for “the attempt to obtain a first naval base in the Caribbean, the encouragement of the construction of a Central American canal, and, of course, the effort to annex Hawaii—not so much a failure as a final step toward the events of 1898.”⁷¹ After Harrison dictated the nation's policy in unresolved disputes with Chile, Great Britain, and Italy,⁷² Blaine was reduced to a minimal role in the face of which he finally resigned.⁷³

⁶⁸ *Id.* at 178 (“What may be the powers of the president over territorial judges, now that section 1768 is repealed, is a question we need not now discuss.”).

⁶⁹ SOCOLOFSKY & SPETTER, *supra* note 34, at 125.

⁷⁰ *Id.* at 206-07.

⁷¹ *Id.* at 207.

⁷² *Id.* at 129-30, 136-52.

⁷³ *Id.* at 130.

In sum, Harrison was an active, involved president who was in every sense the head of his Administration. He directly supervised the affairs of his administration and made large numbers of removals. And, in *Cunningham v. Neagle*, his Administration argued for and obtained a Supreme Court ruling that was the Court's broadest statement of implied executive power up to that time. In *McAllister v. United States*, the Harrison Administration sought a got a broad ruling on the president's statutory authority to remove territorial judges. The Harrison Administration was thus a good one for proponents of the theory of the unitary executive.

II. GROVER CLEVELAND'S SECOND TERM: 1893-1897

The presidential election of 1892 represented the first contest between candidates who had both seen presidential service at the time of the election.⁷⁴ Grover Cleveland was “well aware that only one other Democrat had ever run in three consecutive presidential elections: his hero, Andrew Jackson.”⁷⁵ Like Jackson, Cleveland was destined to win a popular majority three times in a row—a feat that was not exceeded until the administration of Franklin Delano Roosevelt.⁷⁶

Richard Welch, Cleveland's biographer, emphasizes that Cleveland was “a later day Jacksonian”⁷⁷ who

wished to be seen as a president like Andrew Jackson, a man who was a tribune of the people. He appreciated that the American public was wearied of the personal quarrels and bickering that had characterized American politics since the Civil War and would look with favor upon a candidate and a president who appeared to stand tall and independent, an example of rugged individualism and political courage.⁷⁸

⁷⁴ RICHARD E. WELCH, JR., *THE PRESIDENCIES OF GROVER CLEVELAND* 106 (1988).

⁷⁵ *Id.*

⁷⁶ *Id.* at 111.

⁷⁷ *Id.* at 118.

⁷⁸ *Id.* at 214.

Cleveland had “a conception of the presidency that if not imperial, was vaguely monarchical. Convinced that the president was the sole officer of the national government who was elected by ‘all the people,’ he felt an obligation jealously to safeguard and protect the prerogatives of the presidential office for his successors.”⁷⁹ For this reason, Welch reports that “Republican cartoons often portrayed Cleveland in the toga of a Roman emperor, and there was a general belief that Cleveland was exerting the authority of the presidential office and intervening in legislative policy in an unprecedented manner.”⁸⁰ Welch concludes, “There can be little dispute that Cleveland dominated the executive branch of the government during both of his administrations.”⁸¹ He adds that “Cleveland was successful in asserting the autonomy of the presidency, and he was unsuccessful in achieving executive-legislative collaboration.”⁸²

As a good Jacksonian Democrat, Grover Cleveland was a staunch defender of the president’s removal power and of the unitary executive. In fact, as we described in *The Unitary Executive During the Second Half-Century*, Cleveland had obtained the actual repeal of the revised Tenure of Office Act during his first term and took a wide range of other measures to defend the president’s authority to execute the law.⁸³ Cleveland thus took office for the second time in 1893 as a committed friend of the unitary executive.

For our purposes, the most important domestic issue of Cleveland’s second term was his use of federal troops in Chicago in July 1894 to assure the free movement of railroad traffic and the end the Pullman strike.⁸⁴ This strike was a major labor action caused by the extraordinary wage cuts enacted by the Pullman Car Company, which led to a strike of its employees and a

⁷⁹ *Id.* at 215.

⁸⁰ *Id.* at 218.

⁸¹ *Id.* at 217.

⁸² *Id.* at 219.

⁸³ Calabresi & Yoo, *supra* note 19, at 790-801.

⁸⁴ WELCH, *supra* note 84, at 141-47.

sympathy strike by members of the American Railway Union led by the socialist Eugene V. Debs. Debs persuaded the railway union to boycott all Pullman cars effective June 26 such that the union workers would refuse to work on any train that carried a Pullman car.⁸⁵ Richard Welch reports that by “the early days of July, rail traffic to and from Chicago was at 10% of its usual volume, the federal mails were seriously obstructed, and the *Chicago Tribune* was denouncing Debs as an anarchist who had dictatorial ambitions.”⁸⁶

The Cleveland Administration responded to these developments by having Attorney General Richard Olney get a sweeping court injunction barring any efforts to interfere with rail traffic in and out of Chicago. Cleveland then dispatched federal troops to Chicago with orders to make sure that the injunction was obeyed. Welch reports that by “July 10, Debs, with seventy other union members, had been indicted and arrested for violating the judicial injunction, and federal troops had secured the safe passage of rail traffic through Chicago. Strikes and disorders in states west of the Mississippi were ended by means of other injunctions and the dispatch of other units of the United States Army.”⁸⁷ It was in all a very dramatic show of executive and federal power by Cleveland. He was not the first president to send federal troops to restore order during a strike; he was, however, the first “to do so at his own initiative and not at the application of a state governor.”⁸⁸

The controversy over the Pullman strikes of July 1884 became the subject of litigation when the Cleveland Administration went into federal court and sought an injunction against the strikers not for violating any statute, but for obstruction interstate commerce and the U.S. postal service. The Cleveland Administration’s claim was that the Constitution gave the federal

⁸⁵ *Id.* at 142.

⁸⁶ *Id.*

⁸⁷ *Id.* at 142-43.

⁸⁸ *Id.* at 145.

government an implied power to keep interstate commerce and the mails free of any obstructions and that the executive could do this either on its own or with the aid of a court order. The injunction issued, and Debs and others were imprisoned for six months for violating it.

Debs sought habeas relief and pursued his claim up to the U.S. Supreme Court, which ruled unanimously for Cleveland in a sweeping opinion by Justice Brewer.⁸⁹ The Court found that the national government had jurisdiction over this local Illinois disturbance because the disturbance was clogging interstate commerce and the passage of the mails.⁹⁰ Thus, even though Debs was not tried by a jury for violating any federal statute, he and his cohorts had nonetheless created a public nuisance that was interfering with valid federal powers and from which Debs could be enjoined by a court of equity.⁹¹ In essence, the Court found an implied federal power in the absence of legislation, and the Court held the executive could execute (and litigate under) that implied federal power in the absence of any federal statute. In fact, the Court suggested in dicta that the president could have dispatched troops to clear away the strikers even in the absence of any court injunction.⁹²

In short, the Court, egged on by the Cleveland Administration, took a Lincolnian view of the breadth of the president's protective executive power. Consonant with the unitary executive thesis, *In re Debs* supports the notion that, notwithstanding the *Steel Seizure Case*, the president has broad implied power to act in the absence of statute even if doing so deprives individual citizens of their liberty. If the president has that implied power, as *Debs* suggests he does, then it would be hard to imagine he does not have authority to control his subordinates in the execution of the laws and remove them at will.

⁸⁹ *In re Debs*, 158 U.S. 564 (1895).

⁹⁰ *Id.* at 581-84.

⁹¹ *Id.* at 594-98.

⁹² *Id.* at 599.

Cleveland's biographer Richard Welch nicely sums up the ironies of Cleveland's role in breaking the strikes of 1894:

For a student of the American presidency, the most interesting feature of Cleveland's actions during the Pullman strike is the witness they offer to his evolving conception of presidential authority. In the campaign of 1884, Cleveland had run on a Democratic platform calling for renewed respect for the rights and sovereignty of the individual states, and for many years thereafter he had given periodic warning against undue centralization of power in the federal government. In 1894 he claimed for the chief executive of the national government the authority to supersede the state of Illinois as the protector of law and order within its boundaries. Brushing aside the objections of Governor Altgeld, Cleveland assumed the police powers traditionally reserved to state and local governments as he authorized the use of federal military power in a labor-management dispute. Like his hero Andrew Jackson, Cleveland could simultaneously speak against the centralization of power in the federal government and expand the power of the federal executive. . . . He quoted Jefferson when denouncing federal interference in local elections, but he acted like Jackson when he overrode Governor Altgeld and claimed supremacy for the federal government and its chief executive during the Chicago railroad strike.

He asserted presidential power more successfully than had any president since Lincoln, and "in his role as 'the national sheriff of public law and order,'" he extended "the authority of the federal government despite his repeated warnings against the evils of undue centralization of power."⁹³

The second Cleveland Administration also litigated a noteworthy case that implicated the presidential removal power even more directly.⁹⁴ The case arose when Cleveland fired Lewis Parsons from his job as a district attorney for no reason other than that he was a holdover from the Harrison Administration. The governing statute provided that the terms of district attorneys "shall be appointed for four years." This provision grew out of an 1820 statute that established a four-year term for many civil officers while explicitly providing that these officers "shall be removable from office at pleasure."⁹⁵ The language explicitly authorizing removal was deleted

⁹³ WELCH, *supra* note 84, at 224.

⁹⁴ Although the Cleveland Administration was responsible for litigating the case, the Supreme Court would not issue its ruling until the opening months of the McKinley Administration. *See Parsons v. United States*, 167 U.S. 324 (1897).

⁹⁵ Tenure of Office Act, ch. 102, § 1, 3 Stat. 582, 582 (1820). For an analysis of this statute, *see Calabresi & Yoo, supra* note 17, at 1516-18.

by the Tenure of Office Act of 1867. It was unclear, however, whether the subsequent repeal of the Tenure of Office Act reinstated the provision recognizing the president's right to remove district attorneys before their four-year terms expired.

In *Parsons v. United States*,⁹⁶ a unanimous Court, speaking through Justice Peckham, issued what amounts to a paean to the unitary executive. He discussed the full history of the removal power from the Decision of 1789⁹⁷ up through the repeal of the Tenure of Office Act, mentioning that such leading figures as John Adams, Justice Story, Chancellor Kent, Attorney General Clifford, and Attorney General Crittenden had all regarded it settled as a matter of both interpretation and practice that the removal power was vested in the president alone.⁹⁸ Justice Peckham's opinion basically gives an abbreviated history of the removal power from 1789 up to the 1890s that is thoroughly consistent with the thesis of this series of articles. He describes the Tenure of Office Act as an aberration from the well established practice of the government that was best explained by the extraordinarily poor relations between President Andrew Johnson and Congress in the wake of the Civil War.⁹⁹ Justice Peckham leaves no doubt that he believes the repeal of the Tenure of Office Act restored the pre-1867 practice of an unlimited presidential power of removal, and he construes the repeal statute as authorizing Cleveland's firing of

⁹⁶ 167 U.S. 324 (1897).

⁹⁷ In our previous article on the unitary executive, we described the Decision of 1789 as follows:

Briefly stated, the initial draft of the bill to establish the Department of Foreign Affairs provided that the Secretary of Foreign Affairs was "to be removable from office by the President of the United States." Concerned that this language suggested that the power to remove the Secretary was conferred by congressional rather than constitutional grant, Representative Egbert Benson offered an amendment to this language to remove this implication. This amended language was subsequently incorporated into the statutes creating the War Department (without much controversy) as well as the Treasury Department (by the narrowest of margins: the casting vote of Vice President Adams). Congress's action has been thereafter regarded as recognizing the constitutional basis of the President's removal power.

Calabresi & Yoo, *supra* note 17, at 1472 n.53

⁹⁸ 167 U.S. at 328-38.

⁹⁹ *Id.* at 339-40.

Parsons.¹⁰⁰ The *Parsons* case is thus a resounding victory for a broad presidential power of removal. The fact that the Cleveland fired Parsons and then litigated the case up to the Supreme Court establishes that the second Cleveland Administration was just as devoted to the theory of the unitary executive as was the first.

A final area of domestic policy during Cleveland's second term where he made an important contribution was the expansion of the number of federal employees covered by the civil service system.¹⁰¹ Cleveland expanded the classified service from sixteen thousand to twenty-seven thousand in 1889 and then by another forty-four thousand positions in 1895-96. In sum, Cleveland expanded the civil service system in percentage terms by a larger degree than any other president.¹⁰²

Although the expansion of the civil service is often perceived as inconsistent with the unitariness of the executive branch, the opposite is actually true. As we have noted earlier, it is a common misapprehension that the Civil Service Act of 1883 place substantive limits on the president's removal power. In fact, the Act left the president's removal power largely unfettered, aside from preventing him from discharging a federal employee for refusing to make political contributions.¹⁰³ Indeed, some of the most ardent supporters of civil service stridently opposed using civil service system to impose limits on the president's power to remove. As noted by George William Curtis, who was the former Chairman of the Civil Service Commission under Grant and perhaps the foremost advocate of civil service reform:

¹⁰⁰ *Id.* at 342-43.

¹⁰¹ WELCH, *supra* note 84, at 61

¹⁰² *Id.*

¹⁰³ See Calabresi & Yoo, *supra* note 19, at 788-89. For similar acknowledgments, see *Arnett v. Kennedy*, 416 U.S. 134, 149 (1974); Gerald E. Frug, *Does the Constitution Prevent the Discharge of Civil Service Employees?*, 124 U. PA. L. REV. 942, 954-55 (1976).

Having annulled all reason for the improper exercise of the power of dismissal, we hold that it is better to take the risk of occasional injustice from passion and prejudice, which no law or regulation can control, than to seal up incompetency, negligence, insubordination, insolence, and every other mischief in the service, by requiring a virtual trial at law before an unfit or incapable clerk can be removed.¹⁰⁴

Cleveland helped to protect the integrity of the removal power by rejecting a request from the Civil Service Commission, which for a time included Theodore Roosevelt as a holdover member from the Harrison Administration, that he issue an executive order requiring a written statement of reasons for each and every removal.¹⁰⁵ Thus, aside from preventing officials from dunning federal employees into paying political assessments, the original Civil Service Act did not purport to place any limits on the removal power. Its effect was instead to weaken the patronage influence of the Senate. Leonard White quotes one Senator complaining that “[t]he reform of the civil service has doubtless shorn the office of Senator of a good deal of power.’ Conversely, it tended to add authority to the office of Chief Executive.”¹⁰⁶ The expansion of the civil service is more properly regarded as a mechanism that presidents employed to enhance, rather than weaken, their control over the administration of the law. Cleveland’s policies of expanding the classified service while refusing to permit any restrictions on the president’s power to remove thus tended to reinforce the unitariness of the executive.

In sum, Cleveland was thus a vigorous defender of the theory of the unitary executive who secured repeal of the Tenure of Office Act during his first term and who won two important Supreme Court victories for broad inherent executive power during his second. There was certainly no acceptance of any diminution in the president’s powers over removal or law execution during Grover Cleveland’s second term as president.

¹⁰⁴ Quoted in PAUL VAN RIPER, HISTORY OF THE U.S. CIVIL SERVICE 102 (1958).

¹⁰⁵ H.R. REP. NO. 4038, 51st Cong., 2d Sess. 59 (DATE); see WHITE, *supra* note 33, at 343-44; Frug, *supra* note 103, at 956.

¹⁰⁶ WHITE, *supra* note 33, at 27.

III. WILLIAM MCKINLEY

William McKinley became president in 1897 after having been elected as the candidate of the Republican party—a party torn between its Whiggish roots and its recent Lincolnian past. Lewis Gould, McKinley’s biographer, reports that the “Whiggish heritage of the Republicans made them suspicious of a strong executive; a powerful Congress was the appropriate vehicle for their nationalism.”¹⁰⁷ The heritage of Lincoln, however, pointed in the direction of greater executive power.

In the end, McKinley turned out to be another strong president in the mold of Lincoln or Cleveland. In the process he laid the foundations of the modern presidency, anticipating many innovations associated more today with Theodore Roosevelt. Gould further observes, “Imperceptibly but inexorably, the power of the presidency expanded under McKinley’s deft direction. He left no overt statement that he intended to restore the prestige and authority of his office, but his actions during his first year reveal a president with an instinct for power and a clear purpose of augmenting it.”¹⁰⁸ So transformed was the office that McKinley “surrounded the presidency with a dignity that became almost imperial.”¹⁰⁹

In domestic affairs, McKinley quietly retained firm control of this administration. He was a conscientious chief executive who met with his cabinet twice a week.¹¹⁰ One contemporary reports, “Sometimes he led discussions [but] quite as often he first elicited the views of his counselors.”¹¹¹ McKinley also “left the operations of the Justice Department to [his]

¹⁰⁷ LEWIS GOULD, *THE PRESIDENCY OF WILLIAM MCKINLEY 2* (1980).

¹⁰⁸ *Id.* at 56.

¹⁰⁹ *Id.* at 9.

¹¹⁰ *Id.* at 39.

¹¹¹ *Id.*

attorney general.”¹¹² It would be a mistake, however, to construe McKinley’s willingness to consider the views of his department heads as passivity. Lewis Gould reports, “Whatever their experience with McKinley, the cabinet members knew who ran the administration.”¹¹³ In particular, McKinley successfully asserted “[t]he primacy of the President in foreign affairs.”¹¹⁴ He did this not only by strengthening the president’s control of foreign policy as compared with the Congress, but also by asserting his control over what his Secretaries of State were able to do. John Sherman—who accepted the position of Secretary of State at age seventy-three as a capstone for his distinguished career in public service, only to prove too past his prime to be effective in the job—offered some telling remarks when stepping down. Lewis Gould reports:

When John Sherman resigned [as Secretary of State], he wrote that McKinley “evinced a disposition to assume all the functions of the members of his Cabinet and especially the duties of the State Department.” The outgoing secretary of state added that McKinley’s “cabinet counsels were not a free exchange of opinions but rather the mandates of a paramount ruler.”¹¹⁵

McKinley also asserted his authority over Sherman’s successor, John Hay, such that McKinley “supervised and controlled the overall outline of what Hay did.”¹¹⁶

McKinley confronted a more difficult situation when controversy emerged regarding Secretary of War Russell Alger’s inability to manage the logistics of supporting the Spanish-American War.¹¹⁷ McKinley tried in various subtle ways to induce Alger to resign, but when Alger made a public statement saying he would not leave, McKinley dispatched Vice-President Garret A. Hobart to tell Alger the president wanted him to submit his resignation.¹¹⁸ Alger promptly resigned, in one of the more public removals of the McKinley Administration. As the

¹¹² *Id.* at 161.

¹¹³ *Id.* at 39.

¹¹⁴ *Id.* at 88.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 130.

¹¹⁷ *Id.* at 123-26.

¹¹⁸ *Id.* at 174-76.

Alger and Sherman departures indicate, McKinley was not shy about triggering the resignations of top aides in whom he had lost confidence.

William McKinley made at least one removal from office during his tenure as president which was to trigger an important case in the history of the removal power: *Shurtleff v. United States*.¹¹⁹ Ferdinand Shurtleff was nominated, confirmed, and then appointed to be a general appraiser of merchandise under the Customs Administrative Act, which provided cryptically that he could be removed for inefficiency, neglect, or malfeasance in office.¹²⁰ On May 3, 1899, McKinley removed Shurtleff without citing any of those grounds of removal and without any notice or hearing. McKinley instead relied exclusively on the general power of removal possessed by all presidents going back to the Decision of 1789. Shurtleff sued, seeking back pay on the grounds that the Customs Administrative Act had limited the president's power to remove him. The McKinley Administration, and later the administration of Theodore Roosevelt, defended the validity of the removal.

The Court upheld the executive branch's claim of power. Justice Peckham was the author of *Shurtleff*, just as he had been the author of the *Parsons* decision under Cleveland. Assuming *arguendo* that the Constitution permitted Congress to limit the removal power,¹²¹ Peckham concluded that it would have to do so by "very clear and explicit language."¹²² Peckham concluded that life tenure was a rare condition under the Constitution intended only for judges and that limiting the removal power "would involve the alternation of the universal

¹¹⁹ 189 U.S. 311 (1903).

¹²⁰ Customs Administrative Act, ch. 407, § 12, 26 Stat. 131, 136 (1890), repealed by Act of Aug. 5, 1909, ch. 6, 36 Stat. 11.

¹²¹ 189 U.S. at 314.

¹²² *Id.* at 315.

practice of the government for over a century.¹²³ Accordingly, Peckham construed the Act narrowly as only giving general appraisers a right to a hearing when they were removed for inefficiency, neglect, or malfeasance. The Act did not protect general appraisers from the president's general removal power, which could be used for any reason whatsoever.¹²⁴

It is hard to know precisely what to make of the language in *Shurtleff* assuming for the purposes of that decision that Congress might be able to restrict the president's power to remove. At least three plausible interpretations come to mind. First, this language could represent dicta acknowledging that limitations on the removal power might be constitutional. Second, the Court could simply have intended to reserve for another day an issue that was not properly presented. Third, *Shurtleff* might be regarded as an early example of the principle that courts will not deviate from the traditional distribution of authority unless Congress employs unmistakably clear language clearly signifying that that is its intent,¹²⁵ an interpretation that implicitly affirms the constitutional foundation of the removal power.

Two considerations favor one of the interpretations which regard *Shurtleff* as being consistent with the unitary executive. The first is the fact that the opinion was authored by Justice Peckham, who also authored the ringing endorsement of the unitary executive in *Parsons*. The second is that subsequent Supreme Court cases following *Shurtleff* regarded the constitutionality of congressionally imposed limits to the removal power to be an open question.¹²⁶

¹²³ *Id.* at 316.

¹²⁴ *Id.* at 314.

¹²⁵ See Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991); Atascadero State Hosp. v Scanlon, 473 U.S. 234, 242-43 (1985).

¹²⁶ See Wallace v. United States, 257 U.S. 541, 545 (1922).

McKinley's willingness to enforce federal law is further demonstrated by his willingness to send federal troops to restore order during a labor dispute in the Coeur d'Alene mining district of Idaho in the spring of 1899.¹²⁷ Despite the superficial similarity between McKinley's actions and Cleveland's use of federal troops to quell the Pullman strike, McKinley maintained good relations with organized labor, and there was no repetition during his term of the problems that had plagued the second Cleveland Administration. McKinley's vigorous use of the bully pulpit of the presidency "is still one of his least recognized contributions to the emergence of the modern presidency."¹²⁸

McKinley's willingness to assert control of the administration of the law is also evident in his policies with respect to the civil service. While McKinley had long supported civil service reform, he faced calls from his own party to make more positions available for patronage by scaling back the expansion of the classified service promulgated during the waning days of the Cleveland Administration. In the end, McKinley attempted to steer a middle course, pulling back somewhat from the position adopted by Cleveland, but stopping short of the wholesale reversal desired by many of his fellow Republicans. On July 27, 1897, McKinley took the step that Cleveland refused to take and issued an executive order requiring that "[n]o removal shall be made from any position subject to competitive examination except for just cause and upon written charges . . . and of which the accused shall have full notice and an opportunity to make defense."¹²⁹ The Civil Service Commission would later clarify that requiring removals to be based on "cause" was not intended to impose a general limit on the power to remove. It was instead intended to ensure that the executive had not acted out of political motives barred by the

¹²⁷ GOULD, *supra* note 107, at 165.

¹²⁸ *Id.* at 137.

¹²⁹ 14 U.S. CIV. SERV. COMM'N ANN. REP. 24 (1898); *see also* GOULD, *supra* note 107, at 54.

statute. The Commission later emphasized the importance of not misconstruing the “cause” requirement as imposing any substantive limits on the removal power, since doing so “would not only involve enormous labor, but would give a permanence of tenure in the public service quite inconsistent with the efficiency of that service.”¹³⁰ The Supreme Court gave its approval to this position in *Keim v. United States*,¹³¹ in which the Court held that “the action of the Secretary of the Interior in removing the petitioner from office on account of inefficiency is beyond review in the courts.”¹³² Citing its previous decisions in *Ex parte Hennen*¹³³ and *Parsons v. United States*,¹³⁴ the Court concluded:

[I]f courts should not be called upon to supervise the results of a civil service examination equally inappropriate would be an investigation of the actual work done by the various clerks, in comparison of one with another as to competency, attention to duty, etc. These are matters peculiarly within the province of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers.¹³⁵

Lower courts would similarly reject attempts to turn McKinley’s executive order into a basis for judicial review of removals on the grounds that “[a]ny other conclusion would, encourage inefficiency and incompetency in office, and be fruitful of insubordination.”¹³⁶ McKinley later modestly reduced the scope of civil service protection by expanding the number of federal employees who were exempt from competitive examinations. McKinley took a characteristically

¹³⁰ 19 U.S. CIV. SERV. COMM’N ANN. REP. 18-19 (1902); *see also* Frug, *supra* note 103, at 956.

¹³¹ 170 U.S. 290 (1900).

¹³² *Id.* at 294.

¹³³ 38 U.S. (13 Pet.) 230 (1839). *See* Calabresi & Yoo, *supra* note 19, at _ (discussing *Hennen*).

¹³⁴ 167 U.S. 324 (1897). *See supra* notes 94-100 and accompanying text (discussing *Parsons*).

¹³⁵ *Keim*, 170 U.S. at 295-96.

¹³⁶ *United States ex rel. Taylor v. Taft*, 24 App. D.C. 95, 99 (Sup. Ct. 1904), *appeal dismissed*, 203 U.S. 461 (1906); *accord* *Page v. Moffett*, 85 F. 38, 39 (C.C.D.N.J. 1898). *See generally* Frug, *supra* note 103, at 969-70.

direct role in setting these policies. There can be little question that the key decisions were made by him and him alone.¹³⁷

But the clearest example of presidential control was McKinley's supervision of the conduct of the Spanish-American War, which represents the single most significant event of his presidency. Not only did the war liberate Cuba from Spanish; when combined with the earlier annexation of Hawaii, the acquisition of Puerto Rico and the Philippines as American territory also marked the United States' arrival on the scene as an imperial and colonial power.

All men close to the White House agreed that McKinley "ran the war on the American side."¹³⁸ According to one contemporary, "In all the movements of the army and navy the President's hand is seen."¹³⁹ Another contemporary commented, "From the first, President McKinley assumed a close personal direction, not only of the organization of the forces but of the general plan of operations. He was Commander-in-Chief not merely in name but in fact."¹⁴⁰

By using the telephone and telegraph, McKinley was able to use "remote voice communication for the first time to project presidential presence into the battle zone on a near real time basis while he remained in Washington."¹⁴¹ McKinley would often check in at the War Room headquarters to see how things were going, and "[b]y the President's orders, he was to be awakened at any hour of the night if important intelligence should come in."¹⁴² Gould adds, "Day by day, and sometimes on an hour-to-hour basis, the president oversaw the war. In doing so, he laid the foundation for the modern presidency."¹⁴³ When the war was easily won,

¹³⁷ GOULD, *supra* note 107, at 167-68.

¹³⁸ *Id.* at 91.

¹³⁹ *Id.* (internal quotation marks omitted).

¹⁴⁰ *Id.* (internal quotation marks omitted).

¹⁴¹ *Id.* at 92-93.

¹⁴² *Id.* at 93 (internal quotation marks omitted).

¹⁴³ *Id.*

McKinley was just as involved in the peace negotiations as he had been in battlefield strategy. The “president’s guiding hand [was to be] seen at every point in the negotiations.”¹⁴⁴

In short, the vigor with which McKinley prosecuted the war greatly strengthened the presidency. Gould reports:

In conducting the Spanish-American War, McKinley had expanded the powers and authority of his office. Some months later, signing an order to shift American installations that lay outside the United States, he observed: “It seems odd to be directing the transfer of navy yards, naval stations & c in Cuba.” . . . In bearing and manner, in action and policy, [McKinley] would become something of an imperial tutor to the American people.¹⁴⁵

McKinley relied upon the War Power in administering Puerto Rico and Cuba after they were conquered and in suppressing an insurrection in the Philippines.¹⁴⁶ He also sent troops to China during the Boxer Rebellion without congressional authorization.¹⁴⁷ His skillful use of the War Power “facilitated the accretion of power in the executive and in the federal government generally,” and he showed how “broadly and creatively” his office could be used.¹⁴⁸

Gould concludes that “By 1901 the nation had an empire and a president whose manner and bearing anticipated the imperial executive of six decades later.”¹⁴⁹ In the process, McKinley “transformed the presidential office from its late-nineteenth-century weakness into a recognizable prototype of its present day form.”¹⁵⁰ By the time McKinley died in office of an assassin’s bullet, a contemporary journalist was able to write that “in the legislative branch of the Government, it is the executive which influences, if it does not control, the action of Congress;

¹⁴⁴ *Id.* at 118.
¹⁴⁵ *Id.* at 121.
¹⁴⁶ *Id.*
¹⁴⁷ *Id.*
¹⁴⁸ *Id.* at viii.
¹⁴⁹ *Id.*
¹⁵⁰ *Id.* at 152.

while the power originally vested in the executive alone has increased to an extent of which the framers of the Constitution had no prophetic vision.”¹⁵¹

IV. THEODORE ROOSEVELT

Theodore Roosevelt assumed the presidency on September 14, 1901, after the assassination of McKinley. The take-charge style that would become the hallmark of his administration did not immediately appear. Roosevelt held his first cabinet meeting on September 20th, during which he immediately asked all members of McKinley’s cabinet to stay on and received reports on the varied business of their departments.¹⁵² Secretary of State Hay, who had worked for Lincoln and been close to Garfield, was devastated when his friend McKinley became the third president to fall to an assassin’s bullet. He tried to resign, but Roosevelt asked him to stay on.¹⁵³ As time passed, however, there were “frequent shifts in cabinet personnel.”¹⁵⁴ After Hay’s health failed in 1905, Roosevelt asked the exceptionally able Secretary of War, Elihu Root, to assume the position.¹⁵⁵

Roosevelt came to office at a time when the presidencies of Grover Cleveland and William McKinley had produced “a gradual rise in presidential power . . . culminating in the emergence of the modern office under McKinley.”¹⁵⁶ Roosevelt took this condition and supplemented it with the personal presidency: the people’s attachment to the person and not the constitutional office of the presidency. He was “visible and controversial in a personalized

¹⁵¹ *Id.* at 243 (quoting Litchfield West, *The Growing Powers of the President*, FORUM, at 31 (1901)).

¹⁵² LEWIS L. GOULD, *THE PRESIDENCY OF THEODORE ROOSEVELT* 1 (1991).

¹⁵³ *Id.* at 17.

¹⁵⁴ *Id.* at 16.

¹⁵⁵ *Id.* at 174.

¹⁵⁶ *Id.* at 10.

way,¹⁵⁷ and his personal appeal and that of his family gave him a “capacity to keep the nation entertained and involved in his conduct.”¹⁵⁸

Through his charisma, he made the presidency the voice of the nation and the government, and he led people to think that as president, he was protecting them from a do-nothing, status quo Congress. His biographer says that Roosevelt “personalized the office in a way that had not occurred since Andrew Jackson.”¹⁵⁹ It is no accident that Roosevelt’s role models were Jackson and Lincoln, and he repeatedly expressed his belief in “the Jackson-Lincoln theory of presidential power.”¹⁶⁰ As Roosevelt said, the course he “followed, of regarding the executive as subject only to the people, and, under the Constitution, bound to serve the people affirmatively in cases where the Constitution does not explicitly forbid him to render services, was substantially the course followed by both Andrew Jackson and Abraham Lincoln.”¹⁶¹ Roosevelt rejected the opposite course, which he denigrated as the “narrowly legalistic view that the President is the servant of Congress rather than the people, and can do nothing, no matter how necessary it be to act, unless the Constitution explicitly commands the action.”¹⁶² Roosevelt chose to follow the path of Old “King Andrew,” as he “had never hesitated ‘to cut any red tape that stood in the way of executive action.’”¹⁶³ Roosevelt also greatly admired Alexander Hamilton, who believed in strong executive and national power. He thus saw his vision of the presidency as going back to the beginnings of the nation.¹⁶⁴ Unsurprisingly,

¹⁵⁷ *Id.* at 19.

¹⁵⁸ *Id.* at 225.

¹⁵⁹ *Id.* at ix.

¹⁶⁰ THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 479 (1913).

¹⁶¹ *Id.* at 378.

¹⁶² *Id.* Roosevelt alluded here to presidents like Buchanan and Taft whose principle of governance “represents not well-thought-out devotion to an unwise course, but simple weakness of character and desire to avoid trouble and responsibility.” *Id.* at 380.

¹⁶³ EDMUND MORRIS, THEODORE REX 278 (2001).

¹⁶⁴ ROOSEVELT, *supra* note 160, at 67.

Roosevelt had a very low opinion of Congress as an institution regarding it as “indecisive and irresolute,” and “he distrusted the motives of his opponents in both houses.”¹⁶⁵ Roosevelt liked to

appeal[] over the heads of the Senate and House leaders to the people, who were masters of us both. I continued in this way to get results until almost the close of my terms; and the Republican party became once more the progressive and indeed the fairly radical progressive party of the Nation.”¹⁶⁶

As president, Roosevelt expanded the scope of presidential power beyond what anyone had theretofore imagined. In his view, the executive branch was the dominant and not merely a coordinate branch of the federal government. Like Lincoln before him, Roosevelt believed that the president’s role was not limited to seeing to it that the laws passed by Congress were faithfully executed. As Roosevelt later explained in his autobiography, he regarded the president as “a steward of the people bound actively and affirmatively to do all he could for the people.”¹⁶⁷ Under this stewardship theory, “it was not only his right but his duty to do anything that the needs of the Nation.”¹⁶⁸ Theodore Roosevelt’s biographer, Lewis Gould, describes Roosevelt’s stewardship theory of presidential power as follows:

His authority “was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its constitutional powers.” There was no need to wait for “some specific authorization” to take a needed action in the public interest. Instead, the chief executive should act, “unless such action was forbidden by the Constitution or by the laws.” As Roosevelt phrased it in his autobiography, “I did not usurp power, but I did greatly broaden the use of executive power.”¹⁶⁹

Gould goes on to note that in “his autobiography, Roosevelt asserted that he had been prepared to act under ‘the Jackson-Lincoln theory of the presidency’ because ‘occasionally great

¹⁶⁵ GOULD, *supra* note 152, at 11.

¹⁶⁶ ROOSEVELT, *supra* note 160, at 367.

¹⁶⁷ *Id.* at 372.

¹⁶⁸ *Id.*

¹⁶⁹ GOULD, *supra* note 152, at 197 (quoting ROOSEVELT, *supra* note 160, at 371-72).

crises arise which call for immediate and vigorous executive action.”¹⁷⁰ Roosevelt was to accuse his successor, William Howard Taft, of subscribing to the James Buchanan theory of the presidency because of Taft’s apostasy in disagreeing with Roosevelt’s stewardship theory. Taft admired Roosevelt’s goals, but “thought a president should observe the law strictly and not construe his authority as broadly as Roosevelt had done.”¹⁷¹ It turned out that during “the time they had worked together, [Roosevelt and Taft] had few occasions to sit down and go over their contrasting philosophies of the presidency.”¹⁷²

A believer in the Progressive faith in expert administration, Roosevelt’s style was “to select qualified subordinates and let them exercise their own judgment.”¹⁷³ A contemporary English observer said that Roosevelt had “gathered around him a body of public servants who are nowhere surpassed, I question whether they are anywhere equaled, for efficiency, self-sacrifice, and an absolute devotion to their country’s interests.”¹⁷⁴ Gould reports:

Theodore Roosevelt a gifted and often effective presidential administrator. He usually evoked a high morale from his immediate subordinates, who relished the chance to work for such an inspiring executive. His men admired Roosevelt for his willingness to consult them and for his support when they faced a crisis or criticism. Roosevelt handled a great deal of business each day with speed and thoroughness. His ability to read quickly and his retentive mind enabled him to move through large amounts off information easily. He also possessed the capacity to make up his mind promptly and decisively. He did not spend time reconsidering the actions he had taken. When the president’s interest was engaged, his administrative talents were impressive.¹⁷⁵

In sum, Roosevelt was a hands-on administrator who was very much in control of the executive branch.

¹⁷⁰ *Id.* at 69-70.
¹⁷¹ *Id.* at 272.
¹⁷² *Id.*
¹⁷³ *Id.* at 197.
¹⁷⁴ *Id.*
¹⁷⁵ *Id.* at 222.

Given the expansiveness of his views on presidential power, it is no surprise that Roosevelt's actions indicate strong support for the unitary theory of the presidency. Roosevelt maintained strict control of his cabinet, reducing them to mere "echoes and adulators."¹⁷⁶ Roosevelt also wielded the removal power freely, on several occasions summarily discharging several companies of troops.¹⁷⁷ Furthermore, and of greatest relevance to this series of articles, Roosevelt's Eighth Annual Message specifically proposed "that all existing independent bureaus and commissions . . . be placed under the jurisdiction of appropriate executive departments," arguing that it was "unwise from every standpoint, and results only in mischief, to have any executive work done save by the purely executive bodies, under the control of the President; and each such executive body should be under the immediate supervision of a Cabinet Minister."¹⁷⁸

Roosevelt was also not afraid as president to take decisive action. In the area of law enforcement, Roosevelt personally directed investigations into government scandals, naming lawyers to serve as special assistants to the Justice Department.¹⁷⁹ For example, in 1902, he directed that a lawsuit be brought under the Sherman Act to stop a railroad combination,¹⁸⁰ and he "directed that suitable action should be taken to have the question judicially determined."¹⁸¹ In a legal investigation regarding rebates, Roosevelt told his Attorney General, "Please do not

¹⁷⁶ Frank B. Cross, *Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies*, 4 J.L. & POL. 483, 490 n.34 (1988) (quoting MARY LOUISE HINSDALE, *A HISTORY OF THE PRESIDENT'S CABINET* 272 (1911)).

¹⁷⁷ Theodore Roosevelt, Special Message to the Senate (Dec. 19, 1906), in 15 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 7329 (James D. Richardson ed., 1925) [hereinafter *MESSAGES & PAPERS*]; Theodore Roosevelt, Special Message to the Senate (Jan. 14, 1907), in 15 *MESSAGES & PAPERS*, *supra*, at 7337; see also NORMAN J. SMALL, *SOME PRESIDENTIAL INTERPRETATIONS OF THE PRESIDENCY* 100 n.39(1932).

¹⁷⁸ Theodore Roosevelt, Eighth Annual Message (Dec. 8, 1908), in 15 *MESSAGES & PAPERS*, *supra* note 177, at 7198, 7229; see also ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 681 (1941); Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. AM. U. 461, 482 (1994) (citing MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 110 (1955)).

¹⁷⁹ GOULD, *supra* note 152, at 114.

¹⁸⁰ *Id.* at 51.

¹⁸¹ *Id.*

file the suit until I hear from you.”¹⁸² The White House later told the Attorney General that the suit “should be abandoned.”¹⁸³ In 1903, Roosevelt took vigorous action in response to allegations that postal officials were taking bribes and kickbacks in exchange for promotions, instructing the official initially assigned to look into the scandal “that I wished nothing but the truth and that I wished the whole truth and care not a rap who is hit.”¹⁸⁴ Eventually Roosevelt appointed Democrat Holmes Conrad and Republican Charles J. Bonaparte as special prosecutors to pursue the matter. Eventually the investigation implicated Assistant Attorney General John Tyner as well as Charles Emory Smith and Perry S. Heath, who had been the Postmaster General and First Assistant Postmaster General during the McKinley Administration.¹⁸⁵

In 1905, Roosevelt’s Attorney General, Philander Knox, appointed Democrat Francis J. Heney to investigate a land fraud scandal implicating former Commissioner of the General Land Office Binger Hermann.¹⁸⁶ Roosevelt’s use of special prosecutors does not pose the same problem for the unitary executive as the independent counsels appointed during the post-Watergate era, since these special prosecutors were subject to presidential control.¹⁸⁷

The stewardship theory found particularly strong expression in Roosevelt’s actions on conservation issues. Roosevelt and his chief of the Bureau of Forestry, Gifford Pinchot, concluded that they could place enormous amounts of western land to the nation’s forest reserves

¹⁸² *Id.* at 218.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 113.

¹⁸⁵ *Id.* at 113-14.

¹⁸⁶ *See* EASTLAND, *supra* note 5, at 8; Donald C. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2313-14 (1998). Tyner was acquitted. *See* Smaltz, *supra*, at 2314. Although Hermann was forced to resign, he was ultimately exonerated. *See* Vi Lewis, *Into the Sunshine: The Controversial Binger Hermann*, OR. ST. B. BULL., July 2002, at 29, 29-30.

¹⁸⁷ *See* Joshua M. Perttula, *The Political Price of the Independent Counsel Law*, 25 HASTINGS CONST. L.Q. 257, 262 (1998) (“Unlike the current independent counsel, . . . the federal prosecutors of the past were appointed and controlled by the executive.”). Indeed, presidents both preceding and succeeding Roosevelt removed special prosecutors. Although the removals were politically controversial, no one challenged the president’s legal authority to effect them. *See* EASTLAND, *supra* note 5, at 14, 16 (describing the dismissal of special prosecutors by Presidents Grant and Truman); Smaltz, *supra* note 186, at 2312-13, 2317 (same).

despite the absence of any statutory authority for doing so. Roosevelt created eighteen national monuments during his presidency, and he withdrew sixty-six million acres from public entry in 1906 alone.¹⁸⁸ Ultimately, Congress adopted an amendment “to limit the president’s power to create forest reserves.”¹⁸⁹ This “was more than just a sign of western impatience over conservation policy; it also demonstrated a general congressional dislike for the president’s assertion of executive power.”¹⁹⁰

Edmund Morris says of Roosevelt that “he understood better than any President before him . . . the executive order.”¹⁹¹ Roosevelt would use an executive order to circumvent Congress if it “[p]ersisted in depriving” him of what he needed or wanted.¹⁹² Roosevelt also admired vigorous executive actions taken by others. In the summer of 1903, he read of how the governor of Indiana had ended a race riot, and he wrote the governor to praise him for “the admirable way in which you have vindicated the majesty of the law by your recent action in reference to lynching.”¹⁹³ On another occasion, the president became enchanted with the idea of telling the Nicaraguans that an 1846 treaty gave the U.S. the right to go ahead with the building of a canal across the isthmus: this “thesis appealed to Roosevelt’s broad concept of executive power.”¹⁹⁴

Another aspect of Roosevelt’s support for the unitary executive was his policy with respect to the civil service. T.R. was a long-time advocate of civil service reform, having served as a Civil Service Commissioner during under both the Harrison and the second Cleveland Administrations. Like McKinley, Roosevelt had to balance the public’s desire for civil service reform with GOP demands for patronage hiring. Gould reports:

¹⁸⁸ *Id.* at 202.

¹⁸⁹ *Id.* at 245.

¹⁹⁰ *Id.*

¹⁹¹ MORRIS, *supra* note 163, at 477.

¹⁹² *Id.* at 518.

¹⁹³ GOULD, *supra* note 152, at 118 (internal quotation marks omitted).

¹⁹⁴ *Id.* at 95.

During his presidency, the classified civil service—positions that were subject to competitive examination—grew from just over 46 percent of the total government service to 66 percent by the time he stepped down. The number of classified positions increased by more than 116,000, and Roosevelt broadened the number of agencies and bureaus that were under civil service rules. In general, Roosevelt issued and enforced regulations to curb federal employees from direct involvement in partisan affairs or political campaigns.¹⁹⁵

As noted earlier, because the Civil Service Act did not purport to limit the removal power, expanding the classified service enhanced, rather than restricted, the president’s control over the administration of the law by insulating executive officials from senatorial courtesy.

In addition, Roosevelt issued an executive order clarifying that the previous order issued by McKinley requiring that removals only be made for “just cause” was only meant to guard against the type of politically motivated removals prohibited by the statute and not to impose any other substantive limits on the removal power. The order stated that “for the purpose of preventing all such misunderstandings and improper constructions of said section, it is hereby declared that the term ‘just cause,’ as used in section 8, Civil Service Rule II, is intended to mean any cause, other than one merely political or religious, which will promote the efficiency of the service.”¹⁹⁶ This was in complete accord with the position advanced by the Civil Service Commission¹⁹⁷ and made crystal clear that limiting removals to “just cause” did not substantially impinge upon the president’s power to remove.¹⁹⁸ This conclusion was further bolstered by the Supreme Court’s decision in *Shurtleff*, which, although begun during the McKinley years, was handed down during Roosevelt’s presidency.

Another distinctive feature of the Roosevelt Administration was the president’s penchant for appointing commissions to advise him on various subjects, often without statutory authority.

¹⁹⁵ *Id.* at 199.

¹⁹⁶ 19 U.S. CIV. SERV. COMM’N ANN. REP. 76 (1902).

¹⁹⁷ See *supra* note 130 and accompanying text.

¹⁹⁸ See Frug, *supra* note 103, at 956-67.

The most important of these commissions became known as the Keep Commission after its chair, Charles Keep. This commission “addressed the issue of how well the federal government functioned.”¹⁹⁹ Gould reports:

The Keep Commission did accomplish worthwhile results on its own, and it established an important precedent for future efforts to make the federal government more efficient. The commission saved public money through its exposure of lax practices, it reformed some procedures, and it introduced order into the routine business of the bureaucracy. The panel began an examination into how supplies were acquired, and it raised the question of salaries and pensions for governmental employees. *Above all, it asserted the principle that the president should be in control of the management of the executive agencies. In that sense the Keep Commission was a notable forerunner of the reforms that created the modern structure of the presidency.*²⁰⁰

Obviously, Theodore Roosevelt was a hands-on administrator who maintained close control over his subordinates in the executive branch. Congress certainly understood that these commissions represented Roosevelt’s effort to reduce Congress’s “control over appointments and key departments.”²⁰¹

Roosevelt’s take-charge-style can be perhaps best encapsulated in one symbolic act that his cabinet took at the start of T.R.’s second term. The entire cabinet resigned before the second term began as if to embody through this act where the true authority for their positions rested. By “returning to Roosevelt the power of appointment, or reappointment,” his cabinet demonstrated that he had ultimate authority not only over their offices but also over their agencies and employees.²⁰²

We saw in *The Unitary Executive During the First Half-Century* how the Monroe Doctrine, like Washington’s Neutrality Proclamation before it, was a broad exercise of the

¹⁹⁹ *Id.* at 220.

²⁰⁰ *Id.* at 222.

²⁰¹ *Id.*

²⁰² MORRIS, *supra* note 163, at 368.

executive power conferred on the President by the Vesting Clause of Article II.²⁰³ The Roosevelt Administration was to engage in a similar use of “the executive Power” when it proclaimed the famous Roosevelt Corollary to the Monroe Doctrine. Under the Roosevelt Corollary, not only did the United States take it upon itself to say hands off the Americas to all European powers; the U.S. also asserted the responsibility to keep order in the Americas itself.²⁰⁴ Roosevelt described the doctrine the following way: “if the United States sought to say ‘Hands Off’ to the powers of Europe, then sooner or later we must Keep order ourselves.”²⁰⁵ Roosevelt elaborated that “What we will not permit the great Powers of Europe to do, we will not permit any American republic to make it necessary for the great Powers of Europe to do.”²⁰⁶ Gould notes that as “an idea, the Roosevelt Corollary suggested the United States had a greater innate political capacity than did its Latin neighbors, and it did so in the context of a strong assertion of presidential power.”²⁰⁷ The Roosevelt corollary, together with Roosevelt’s work in laying the foundation for the digging of the Panama Canal²⁰⁸ and his vigorous assertion of U.S. rights in the *Perdicaris* affair,²⁰⁹ combined to give his Administration’s foreign policy a distinctively assertive air.

We have seen that Theodore Roosevelt greatly admired presidents Andrew Jackson and Abraham Lincoln, and like them he believed firmly that the Executive Branch was an independent interpreter of the Constitution and not bound meekly to follow the Supreme Court.

Roosevelt said:

I grew to realize that all that Abraham Lincoln had said about the *Dred Scott* decision could be said with equal truth and justice about the numerous decisions which in our own day were erected as bars across the path of social reform, and

²⁰³ Calabresi & Yoo, *supra* note 17, at 1513-14.

²⁰⁴ GOULD, *supra* note 152, at 80, 175, 179.

²⁰⁵ *Id.* at 175.

²⁰⁶ *Id.* at 174.

²⁰⁷ *Id.* at 179.

²⁰⁸ *Id.* at 212

²⁰⁹ *Id.* at 136.

which brought to naught so much of the effort to secure justice and fair dealing for workingmen and workingwomen, and for plain citizens generally.²¹⁰

In sum, the Administration of Theodore Roosevelt went far beyond the theory of the unitary executive in the claims it made of presidential power. Not only did T.R. claim a presidential power to remove and direct subordinates; Roosevelt's stewardship theory of presidential power also claimed an inherent authority to act in the absence of statute wherever action was not forbidden. As a result, Roosevelt's vision of the presidency far exceeded the claim of inherent presidential power made during the Truman Administration in the *Steel Seizure Case*, which was, we believe, justifiably rejected by the Supreme Court. Although Lincoln was allowed to wield such powers in the spring of 1861,²¹¹ that exercise of power was justified, if at all, only in light of the crisis that confronted the nation. As a result, the stewardship theory of presidential power has properly been consigned to the dustbin of history. The powers Roosevelt was claiming cannot be safely vested in the hands of any one individual.

One can reject the excesses of the stewardship theory while still praising the Roosevelt Administration's contribution to asserting and maintaining the unitariness of the executive. The fact that Roosevelt may have overreached should not obscure the fact that under Roosevelt there certainly was no acquiescence to any diminution of the president's powers of removal and control over law execution.

V. WILLIAM H. TAFT

William Howard Taft's view of presidential power was considerably more modest than Roosevelt's, and Taft did not follow Roosevelt at all in appealing "over the head of Congress to

²¹⁰ ROOSEVELT, *supra* note 160, at 378 or at 83.

²¹¹ See Calabresi & Yoo, *supra* note 19, at 722-26.

the people.”²¹² Taft attacked the stewardship theory as “an unsafe doctrine,” and he disagreed with Roosevelt’s view “that the Executive is charged with responsibility for the welfare of all the people in a general way, that he is to play the part of a Universal Providence and set all things right, and that anything that in his judgment will help the people he ought to do, unless he is expressly forbidden not to do it.”²¹³ Taft was appalled that Roosevelt

had, for example, appointed a number of extralegal, unsalaried commissions and denied the right of Congress to limit him in seeking advice from them. [Roosevelt had also] used executive agreements with abandon and denied the right of the Senate to advise him on his executive duties, although it of course must approve nominations and treaties.²¹⁴

Taft believed that “[t]he true view of the Executive functions is . . . that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise” appearing “either in the Federal Constitution or in an act of Congress passed in pursuance thereof.”²¹⁵ Critically, Taft goes on to say, “There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest.”²¹⁶

Taft’s biographer, Paolo Coletta, argues that Taft had “a juridical rather than political conception of the presidency.”²¹⁷ Taft revealed this in a letter he sent to William Kent where he said:

[W]e have a government of limited power under the Constitution, and we have got to work out our problems on the basis of law. Now if that is reactionary, then I am a reactionary. . . . Pinchot is not a lawyer and I am afraid he is quite willing to camp outside the law to accomplish his beneficent purposes. I have told him so

²¹² PAOLO COLETTA, *THE PRESIDENCY OF WILLIAM HOWARD TAFT* 10 (1973).

²¹³ *Id.* at .

²¹⁴ *Id.* at 12.

²¹⁵ WILLIAM H. TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 139-40 (1925).

²¹⁶ *Id.* at 140.

²¹⁷ COLETTA, *supra* note 212, at 12.

to his face. . . . I do not undervalue the great benefit that he has worked out, but I do find it necessary to look into the legality of his plans.²¹⁸

Taft expressed his belief in “following a limited, legal concept of presidential leadership”²¹⁹ in a letter of January 22, 1912, that he sent to Otto T. Bannard, an old friend. Taft alluded to his upcoming battle for reelection against Theodore Roosevelt and Woodrow Wilson and said:

I am afraid I am in for a hard fight without any knowledge of military strategy, and with very little material for organization, but I am going to stay in anyhow. . . . *I believe I represent a safer and saner view of our government and its Constitution than does Theodore Roosevelt, and whether beaten or not I mean to continue to labor in the vineyard for those principles.*²²⁰

Taft thought his role as president was “to consolidate and to put upon a sound legal modification the changes Roosevelt had made.”²²¹ Taft “construed congressional conservation statutes more narrowly than did the courts, took a limited view of the power of the presidency itself, and was determined to regularize what he considered to be Roosevelt’s extralegal methods regardless of the results for conservation.”²²² He thus “regularized and legitimized the work begun under Roosevelt” while repudiating his method and the spirit in which his actions were taken.²²³

Coletta contrasts Taft with Roosevelt by saying that

If Roosevelt could not achieve his purpose on the basis of some constitutional or legal power, he would ask if a contemplated move were anywhere prohibited. If it was not, he would act. Trained in the law, Taft took a conservative and legalistic approach to government. He must find authority in the Constitution or in law prior to acting. There was no undefined residuum of power which he could use merely because the public interest required it.²²⁴

Taft argued that Roosevelt should not be elected to a third term in 1912 because “one who so little regards Constitutional principles, especially the independence of the judiciary; and

²¹⁸ *Id.* at 88-89 (internal quotation marks omitted).

²¹⁹ *Id.* at 223.

²²⁰ *Id.* at 223 (emphasis added).

²²¹ *Id.* at 17.

²²² *Id.* at 81-82.

²²³ *Id.* at 83.

²²⁴ *Id.* at 263.

one who is so naturally impatient of legal restraints and of due legal procedure, and who has so misunderstood what liberty regulated by law is, could not be safely trusted with successive Presidential terms.”²²⁵ Before long, “Taft was calling Roosevelt a ‘dangerous egotist’ and a ‘demagogue’” while Roosevelt was calling the man he made president a “puzzlewit” and “fathead.”²²⁶

It would be a mistake, however, to construe Taft’s criticism of Roosevelt’s stewardship theory as indicating any lack of support for the unitary theory of the executive. Once a power was delegated to the president, Taft acknowledged that “[t]he grants of Executive power are necessarily in general terms in order not to embarrass the Executive within a field of action plainly marked for him.”²²⁷ Thus, once power was delegated to the Chief Executive, the president should be given broad and plenary control over those powers.

Although Taft never had the opportunity to comment directly on the removal power or the unitary executive while he was president, the defenses of the president’s power to remove expressed afterwards in his book, *Our Chief Magistrate and His Powers*,²²⁸ and later in his masterful and scholarly opinion in *Myers v. United States*²²⁹ leave no doubt whatsoever that given the opportunity, he would have indicated his strong support. Taft’s opinion in *Myers* is the Bible

²²⁵ Quoted *id.* at 233.

²²⁶ *Id.*

²²⁷ *Id.* at 140.

²²⁸ As Taft eloquently stated:

It was settled, as long ago as the first Congress, at the instance of Madison, then in the Senate, and by the deciding vote of John Adams, then Vice-President, that even where the advice and consent of the Senate was necessary to the appointment of an officer, the President had the absolute power to remove him without consulting the Senate. This was on the principle that the power of removal was incident to the Executive power and must be untrammelled. In the administration of Andrew Johnson, the Republican Congress regarded the President as an apostate and a traitor to Republican principles. With a two-thirds majority in each House, it thought to reverse this as to the power of removal by the tenure of office act.

TAFT, *supra* note 107, at 56.

²²⁹ 272 U.S. 52 (1926) (Taft, C.J.).

of unitary executive scholarship, and there can be no question but that the author of *Myers* was a vigorous defender of the unitary executive. In *Myers*, Taft explicitly asserts that “[t]he vesting of the executive power in the president was essentially a grant of the power to execute the laws,” and he further notes that “the natural meaning of the term ‘executive power’ granted the President included appointment *and removal* of executive subordinates.”²³⁰ *Myers* is a masterpiece of judicial craftsmanship, and its author fully appreciated and supported the legal and historical arguments in favor of the unitary executive.

The manner in which Taft exercised removal power manifests its importance in unifying the execution of the law. One of the most politically costly episodes was the squabble between Forestry Bureau Chief Gifford Pinchot and Interior Secretary Richard Ballinger. As a holdover from the previous administration, Pinchot still supported Roosevelt’s willingness to bring under lands within the national forest system despite the absence of authorizing legislation. Ballinger’s background as an attorney led him to favor Taft’s belief that such actions were improper without statutory sanction.²³¹ When Taft resolved this rift in federal policy by siding with Ballinger, Pinchot, who was an idealist²³² with a penchant for martyrdom,²³³ attempted to take the matter to Congress and the people. The crux of Pinchot’s allegations was that Ballinger had given preferential treatment to a former client in recognizing homestead claims to certain coal-bearing lands. Taft had no choice but to remove him from office, saying:

[I]f I were to pass over this matter in silence, it would be most demoralizing to the discipline of the executive branch of government. By your own conduct you have destroyed your usefulness as a helpful subordinate of the government, and it

²³⁰ *Id.* at 117 (emphasis added).

²³¹ *See* COLETTA, *supra* note 212, at 82-98 (detailing the Ballinger-Pinchot affair).

²³² *See id.* at 87 (noting that Pinchot had been called “Sir Galahad of the woodlands” and a “fanatic”), 91-92 (noting Taft’s recognition that Pinchot’s “zeal was so great he tended to think that any man who differed as to method was corrupt”).

²³³ *Id.* at 92; *see also id.* at 94 (describing Pinchot’s unabashed and almost gleeful reaction upon being removed).

therefore now becomes my duty to direct the secretary of agriculture to remove you from your office as the forester.²³⁴

The furor became so great that the controversy became known as the “American Dreyfus case.”²³⁵ A congressional investigation ensued that ultimately exonerated Ballinger.²³⁶

Congressional supporters of conservation attempted to pass a resolution calling for Ballinger’s removal, but it failed to receive the support of either the committee or the full Senate. Ballinger eventually resigned, citing health reasons.²³⁷

Taft’s support for the unitary executive is also evident in his policies towards the civil service. His belief in efficiency made him a modest supporter of civil service reform. He began in 1910 by extending the classified service to cover consular officers, subordinate diplomatic officials, and first-class and second-class assistant postmasters and clerks. He followed that in 1912 by extending civil service protection to twenty thousand skilled workers in navy yards and thirty-five thousand third-class and fourth-class postmasters.²³⁸

Even more importantly, Taft reaffirmed the position taken by McKinley and Roosevelt emphasizing that the executive orders limiting removals to “just cause” did not impose any substantive limits on the president’s power to remove.²³⁹ This requirement was ultimately codified by the Lloyd-LaFollete Act, which limited removals to “such cause as will promote the

²³⁴ *Id.* at 94.

²³⁵ *Id.* at 95.

²³⁶ *Id.* Interestingly, the affair was prolonged by a rather curious set of circumstances. The special agent who initially leveled the charges against Ballinger had published his claims in *Collier’s Weekly*. *Id.* at 90. *Collier’s* hired future Supreme Court Justice to defend against a potential libel suit. Brandeis was able to show that Taft could not have based his decision to fire Pinchot on a report prepared by Attorney General George Wickersham, as Taft claimed. Instead relied upon a preliminary report prepared by a subcabinet official in the Department of the Interior who was a well-known Ballinger loyalist. This revelation was publicly regarded as vindicating Pinchot. *Id.* at 96-97.

²³⁷ 2 GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES 809-111 (1938).

²³⁸ COLETTA, *supra* note 212, at 137-38. In accordance with the recommendations of the Civil Service Commission, Taft declined Attorney General Wickersham’s request to extend the classified service to cover all assistant attorneys. *Id.* at 138.

²³⁹ 29 U.S. CIV. SERV. COMM’N ANN. REP. 132-33 (1913).

efficiency of [the civil] service.”²⁴⁰ The legislative history provides little insight into what this standard required.²⁴¹ Most notably, nothing in the legislative history questioned the president’s power to remove for any reason,²⁴² and the Civil Service Commission would construe the provision as not placing any limits on the president’s removal power. As the Civil Service Commission explained:

The rules are not framed on a theory of life tenure, fixed permanence, nor vested right in office. It is recognized that subordination and discipline are essential, and that therefore dismissal for just cause shall be not unduly hampered. . . . Appointing officers, therefore, are entirely free to make removals for any reasons relating to the interests of good administration, and they are made the final judges of the sufficiency of the reasons. . . .
. . . The rule is merely intended to prevent removals upon secret charges and to stop political pressure for removals. . . . No tenure of office is created except that based upon efficiency and good behavior; and it remains as much the duty of an appointing officer to remove a classified employee for inefficiency as it is not to discriminate against him in any way for political or religious reasons.²⁴³

Thus even after codification by the Lloyd-Lafollette Act, the clause limiting removals for “cause” continued not to impose any substantive limits on the removal power.²⁴⁴ Courts during this period repeatedly held that the executive has unlimited discretion in determining what constitutes adequate cause for removal,²⁴⁵ an outcome that some condemned as judicial

²⁴⁰ Act of Aug. 24, 1912, ch. 389, § 3, 37 Stat. 555 (codified as amended at 5 U.S.C. § 7513(a)). This language was borrowed from the Postal Service Appropriations Act of 1912, ch. 389, § 6, 37 Stat. 539, 555.

²⁴¹ See Richard A. Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 VA. L. REV. 196, 236 (1973); Stephen G. Vaskov, Comment, *Judicial Review of Dismissals of Civil Service Employees for Off-Duty Misconduct: The Approach of the Federal Circuit*, 34 AM. U. L. REV. 439, 459 (1985).

²⁴² Frug, *supra* note 103, at 958.

²⁴³ 29 U.S. CIV. SERV. COMM’N ANN. REP., *supra* note 74, at 21-22.

²⁴⁴ See 42 U.S. CIV. SERV. COMM’N ANN. REP. 71 (1925); Frug, *supra* note 103, at 958.

²⁴⁵ See *Keim v. United States*, 170 U.S. 290, 295-96 (1900); *United States ex rel. Taylor v. Taft*, 24 App. D.C. 95, 99 (Sup. Ct. 1904), *appeal dismissed*, 203 U.S. 461 (1906); *Page v. Moffett*, 85 F. 38 (C.C.D.N.J. 1898); see also Maheshwar Nath Charturvedi, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 NW. U. L. REV. 287, 312-13 (1968); Vaskov, *supra* note 241, at 445, 449-50.

abnegation.²⁴⁶ Hints of substantive limits to removals would not emerge until after the period covered by this Article.²⁴⁷

Taft's interest in executive reorganization provides further evidence of his support for presidential control over the administration of the law. Taft "lamented the proliferation of departments and . . . asserted the need for a thorough reorganization of the executive structure."²⁴⁸ He hoped that "[b]y similarly grouping . . . related functions he could thus control the administrative agencies of the government."²⁴⁹

The Taft Administration enjoyed some modest success in undertaking administrative reorganizations of the Departments of State, War, and the Navy as well as the reorganization of the Customs Service by executive order.²⁵⁰ He launched a broader initiative in 1910 when he obtained funding for a Commission on Economy and Efficiency.²⁵¹ Taft was appalled by the overlap in agency responsibilities and the use of inconsistent record keeping and accounting systems. Taft was thus the first president "to have the federal administration studied in detail as one mechanism."²⁵²

A related problem was the president's inability to control the budget process. Until 1909, each executive agency submitted its own budget proposal which the Treasury Secretary would compile into a "Book of Estimates." The inaccuracy of these estimates and the lack of coordination in the budget process had forced Congress to enact a seemingly incessant stream of

²⁴⁶ Charturvedi, *supra* note 245, at 309.

²⁴⁷ *See* Levy v. Woods, 171 F.2d 145 (D.C. Cir. 1948); Love v. United States, 108 F.3d 43, 49 (8th Cir. 1939); Levine v. Farley, 107 F.2d 186, 190-91 (D.C. Cir. 1939); Asher v. Forrester, 71 F. Supp. 470, 471 (D.D.C. 1947); Culligan v. United States, 107 Ct. Cl. 222, 223 (1946); Golding v. United States, 78 Ct. Cl. 682, 685 (1934). *See also infra* note 496 and accompanying text.

²⁴⁸ COLETTA, *supra* note 212, at 132.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ Sundry Civil Appropriations Act of 1910, ch. 384, 36 Stat. 703, 703.

²⁵² *Id.* at 130.

supplemental appropriations. Frustrated with this situation, Congress enacted an appropriations rider directing the Treasury Secretary to transmit a detailed statement of the Book of Estimates to the president so that “he may . . . advise the Congress how in his judgment the estimated appropriations could with the least injury to the public service be reduced so as to bring the appropriations within the estimated revenues, or, that he may recommend to Congress such loans or new taxes as may be needed to cover the deficiency.”²⁵³ Budget reform also became a major agenda item for the Commission on Economy and Efficiency.

The Commission’s report recommended a sweeping reorganization of the executive branch, standardization of the federal government’s accounting practices, significant decreases in the number of federal employees, and a marked reduction in public works projects. It also proposed that the current budget system be abolished and that instead each executive department submit its estimates to the president, who would integrate the proposals into a coherent national budget.²⁵⁴ Taft forwarded the Commission’s recommendations to Congress and ordered the department heads to prepare budget estimates in the manner recommended by the Commission in addition to the traditional one to be forwarded directly to Congress.²⁵⁵

The Commission’s proposal met with a frosty reception on Capitol Hill. As Coletta notes, “Congress spurned Taft’s recommendations largely because they weakened its power over the purse and reduced the areas of control its committees had over federal finances and administrative policies.”²⁵⁶ Rather than act on the report’s recommendations, Congress responded by attaching a rider to a pending appropriations bill directing executive officials to submit budget estimates “only in the form and at the time now required by law, and in no other

²⁵³ Sundry Civil Appropriations Act of 1909, ch. 299, § 7, 35 Stat. 945, 1027.

²⁵⁴ H.R. DOC. NO. 854, 62d Cong., 2d Sess. (1912).

²⁵⁵ *Id.*

²⁵⁶ COLETTA, *supra* note 212, at 131.

form and at no other time.”²⁵⁷ Taft signed the measure, but ignored its provisions and attached to the traditional Book of Estimates a presidential budget of the type recommended by the Commission.²⁵⁸ In defense of his actions, Taft pointed out that “[t]he President is the constitutional head of an organization that is continental in scope” who bore the constitutional duty to send to Congress “a regular statement and account of the receipts and expenditures” and to make such recommendations to Congress as “he shall judge necessary and expedient.”²⁵⁹ Congress essentially nullified Taft’s actions by ignoring his budget proposal.²⁶⁰

Despite their lack of success, Taft’s efforts to strengthen the president’s control over the administration of the law were important steps in the long process of protecting consolidating the president’s authority to execute the law. As Leonard White notes:

The work of the Keep Committee and of President Taft’s Commission on Economy and Efficiency . . . are visible symbols not only of a transfer of initiative for administrative reform from the legislative to the executive branch, but also of the tipping of the constitutional balance from Congress to the President of the United States. This shift was momentous and not reversed.²⁶¹

In sum, William Howard Taft was more a lawyer and a judge at heart than he was a vigorous executive. In his book, *Our Chief Magistrate and His Powers*, and in his scholarly and masterful opinion in *Myers v. United States*, Taft made his name as the president who wrote at the greatest length and in the most depth to defend the president’s possession of the removal power and the theory of the unitary executive. His support for the Commission on Economy and

²⁵⁷ Act of Aug. 23, 1912, ch. 350, § 9, 37 Stat. 360, 415.

²⁵⁸ S. DOC. NO 1113, 62d Cong., 3d Sess. (1913).

²⁵⁹ *Id.* at _.

²⁶⁰ 3 WILLIAM M. GOLDSMITH, *THE GROWTH OF PRESIDENTIAL POWER 1471-78* (1974); LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 189 (3d ed. rev., 1991) [hereinafter FISHER, *CONSTITUTIONAL CONFLICTS*]; LOUIS FISHER, *PRESIDENTIAL SPENDING POWER 29-30* (1975) [hereinafter FISHER, *SPENDING POWER*]; JOSEPH P. HARRIS, *CONGRESSIONAL CONTROL OF ADMINISTRATION* 56-58 (1964); Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 954-55(1994)..

²⁶¹ WHITE, *supra* note 33, at 92.

Efficiency also represents an important assertion of the president's authority to execute the law. Thus, despite his relatively modest vision of presidential power, neither Taft's words nor deeds are properly regarded as acquiescing in any diminution of the unitary executive.

VI. WOODROW WILSON

Presidential support for the unitary executive continued during the administration of Woodrow Wilson. That Wilson would emerge as a major champion of presidential power came as something of a surprise. His doctoral thesis, which became a well known and widely acclaimed 1885 book entitled *Congressional Government*,²⁶² remains one of the classic endorsements of parliamentary government. Written in the wake of a series of relatively weak presidents that had been dominated by the Reconstruction Congresses, *Congressional Government* dismisses the presidency as a weak office, concerned with "mere administration" and with the chief executive reduced to little more than "the first official of a carefully-graded and impartially regulated civil service system."²⁶³ Beneath the president were arrayed the various executive departments, each operating with relative independence such that "the President cannot often be really supreme in matters of administration."²⁶⁴ In short, "Our latter-day Presidents live by proxy; they are executive in theory, but the Secretaries are the executive in fact."²⁶⁵ Even the cabinet secretaries "are not in fact the directors of the executive policy of the government."²⁶⁶

²⁶² WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* (Meridian 1956) (1885). See generally Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679, 684-88, 691-92 (1993) (providing concise overview of the evolution of Wilson's views on the proper roles for the President and Congress).

²⁶³ WILSON, *supra* note 262, at 170.

²⁶⁴ *Id.* at 173.

²⁶⁵ *Id.* at 49.

²⁶⁶ *Id.* at 174.

True control of the administration lay with Congress.²⁶⁷ And congressional policy with respect to administration was dictated by the standing committees,²⁶⁸ which were vulnerable to special interest pressures and unresponsive to the popular will.²⁶⁹

In addition, *Congressional Government* asserted that the constitutional commitment to the separation of powers was a “grievous mistake” and a “radical defect in our constitutional system” that prevented either the president and Congress from emerging as the “supreme ultimate head . . . which can decide at once and with conclusive authority what shall be done at those times when some decision there must be.”²⁷⁰ Under the best of circumstances, the division of authority led to deadlock; in times of duress, it led to a “paralysis in moment of emergency” that can be “fatal.”²⁷¹ At this point, Wilson thought that the best way to make the federal government more responsive to the public will would be to adopt a more parliamentary style of government, in which members of Congress also served as heads of executive departments and the government was subject to votes of no confidence.²⁷² Under such a vision, Congress would clearly emerge as the locus of federal power, and administrative head was no longer the primary part of the presidential portfolio.

Over time, however, Wilson’s views on the proper allocation of power between the presidency and Congress evolved. The examples of a vigorous presidency set by Grover Cleveland, William McKinley, and especially Theodore Roosevelt changed Wilson’s thinking. Kendrick Clements, Wilson’s biographer, notes that

²⁶⁷ *Id.* at 177 (“In so far as the President is an executive officer he is the servant of Congress; and the members of the Cabinet, being confined to executive functions are altogether the servants of Congress.”).

²⁶⁸ *Id.* at 170, 174, 179-80.

²⁶⁹ *Id.* at 70-72.

²⁷⁰ *Id.* at 186-87.

²⁷¹ *Id.* at 186.

²⁷² *Id.* at 79-79, 188-89.

By 1908, after his own experience of executive power at Princeton and after seven years of Theodore Roosevelt's vigorous national leadership, Wilson was ready to find in the presidency the possibilities of leadership and national unification that he had so long sought. "We have grown more inclined," he said that year in a series of published lectures delivered at Columbia University, "to look to the President as the unifying force in our complex system, the leader both of his party and of the nation."

The president's leadership of his party gave him influence over Congress, Wilson argued in 1908, but more importantly his standing as the interpreter of the country's instinctive wishes and desires made him a unique national figure . . .²⁷³

The transformation of Wilson's views are manifest in the rather striking shift in tone and focus taken in Wilson's second master work, which was published in 1908: *Constitutional Government in the United States*.²⁷⁴ Wilson noted that the country "ha[d] grown more and more inclined . . . to look to the President as the unifying force in our complex system."²⁷⁵ Wilson elaborated:

His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single voice can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people.²⁷⁶

Wilson continued:

If he rightly interpret the national thought and boldly insist upon it, he is irresistible; and the country never feels the zest of action so much as when its President is of such insight and caliber. It is for this reason that it will often prefer to choose a man rather than a party. A President whom it trusts can not only lead it, but form it to his views.²⁷⁷

Wilson's change in heart can best be explained by his desire for vigor in government. Simply put, by 1908 he had concluded that the president was better institutionally situated than Congress to provide the necessary leadership. Although Wilson had previously viewed administration as

²⁷³ KENDRICK A. CLEMENTS, *THE PRESIDENCY OF WOODROW WILSON* 7 (1992).

²⁷⁴ See WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (1908).

²⁷⁵ *Id.* at 60.

²⁷⁶ *Id.* at 68.

²⁷⁷ *Id.*

essentially a mechanical process of carrying out political decisions made by Congress, he came to appreciate that administrative actions were themselves an important source of public law.²⁷⁸

As such, all administration needed to be subject to presidential control.²⁷⁹

Clements describes Wilson's attitude as one of "glorification of the presidency," in which the chief executive possessed "extraordinary potential power deriving from his triple functions as party leader, symbol of national unity, and interpreter of the wishes of the people."²⁸⁰ These views would only strengthen during Wilson's service as Governor of New Jersey, which set the stage for his election as president. It was "a remarkable change from Wilson's earlier belief that leadership should be lodged in the legislature and was a slightly ominous foretaste of the 'imperial presidency' of half a century later."²⁸¹

These commitments were evident in the way that Wilson conducted his administration. Wilson had long recognized the constitutional foundations of the president's removal power. Even Wilson's early, pro-parliamentary writings condemned the Tenure of Office Act as "repugnant . . . to the original theory of the Constitution."²⁸² The manner in which Wilson wielded the removal power manifests that this belief was no mere paper commitment. Wilson did not hesitate to dismiss cabinet officials or put them in a situation where they felt they needed to resign. Secretary of State William Jennings Bryan resigned believing that Wilson was

²⁷⁸ CLEMENTS, *supra* note 273, at 6-7.

²⁷⁹ In fact, Wilson went so far as to suggest the sole purpose of the cabinet was to relieve the president of the burdens of day-to-day administration. WILSON, *supra* note 274, at 76. If Cabinet members did their jobs properly, their departments "may proceed with their business for months and even years without demanding the president's attention." *Id.* at 67. Wilson's views in this regard no doubt reflected the Progressive Era's faith in technocracy and the feasibility of separating politics from administration. Regardless of the ultimate merits of this approach, there can be little doubt that it embraces the belief that the bureaucracy must be highly responsive to presidential control.

²⁸⁰ CLEMENTS, *supra* note 273, at 8.

²⁸¹ *Id.* at 8.

²⁸² WILSON, *supra* note 262, at 52; *see also* WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 260 (1992).

unnecessarily pushing America into World War I. William C. Redfield, the first Secretary of the Department of Commerce, resigned, believing Wilson was not supportive enough of business. And, most dramatically, Wilson fired Secretary of State Robert Lansing.²⁸³ Indeed, Wilson was to fight with his cabinet for acting independently of him even when he was incapacitated by his stroke.²⁸⁴ **CHECK EBERLEIN V. U.S., 257 U.S. 82, 84 (1921) REMOVED THEN REINSTATED AFTER CHARGES OF MISCONDUCT PROVED UNFOUNDED. SOUGHT SALARY. Called it “settled” that removals are “not subject to revision in the courts.” 257 US. at 84. SIMILARLY KELLOM v. United States, 55 Ct. Cl. 174 (CT CL 1920) (holding that determination of whether the evidence supported removal “belongs to the proper officials of the proper department and not to the court”). CHARTURVEDI 309-10; Merrill 199 & sources cited (Westwood; Mayers).** And perhaps most importantly, Wilson directed his Postmaster General to dismiss Frank S. Myers as Postmaster First Class. Although the removal of a fairly minor federal official would not ordinarily be noteworthy, in this case it would provide the basis for the Supreme Court’s most important decision regarding the removal power: *Myers v. United States*.²⁸⁵

In addition, Wilson opposed numerous congressional attempts to infringe upon his authority to execute the laws. For example, on May 13, 1920, Wilson vetoed an appropriations bill which subjected the printing of magazines by executive agencies to the prior approval of the Joint Committee on Printing as “an invasion of the province of the Executive.”²⁸⁶ As Wilson further asserted:

²⁸³ CLEMENTS, *supra* note 273, at 94-95.

²⁸⁴ *Id.* at 198-99.

²⁸⁵ 272 U.S. 52 (1926).

²⁸⁶ Woodrow Wilson, Veto Message (May 13, 1920), *reprinted in* 59 CONG. REC. 7026 (1920).

The Congress and the Executive should function within their respective spheres. . . . The Congress has the power and the right to grant or deny an appropriation, or to enact or refuse to enact a law; but once an appropriation is made or a law is passed, the appropriation should be administered or the law executed by the executive branch of the Government. In no other way can the Government be efficiently managed and responsibility definitely fixed.²⁸⁷

This same veto message also criticized a provision of a previous appropriations act giving the Public Buildings Commission, a body that included four members of Congress, absolute control of and the allotment of all space in federal buildings in the District of Columbia.²⁸⁸

Even more significant was Wilson's veto of the Budget and Accounting Act the following month. This Act would have largely implemented the recommendations of Taft's Commission on Economy and Efficiency by authorizing presidential coordination of the budget process through the newly created Bureau of the Budget. The Act would also have established a General Accounting Office (GAO) headed by the Comptroller General, which would have had the power to conduct audits to verify that the administration allocated federal funds in accordance with the appropriations legislation enacted by Congress. To insure that the Comptroller General and the GAO possessed the independence from the executive branch needed to conduct a proper audit, the Act would have made the Comptroller General removable only by concurrent resolution, a legislative device that merely required the assent of both houses of Congress and did not require the president's signature. Had the Act stopped there, it might not have drawn Wilson's ire. Unfortunately, the Act also assigned to the Comptroller General the responsibilities of pre-approving all expenditures and of adjusting accounts that were

²⁸⁷ *Id.*

²⁸⁸ *Id.* (criticizing Legislative, Executive, and Judicial Appropriation Act of 1920, ch. 88, § 10, 40 Stat. 1213, 1270 (1919)); see also Robert W. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569, 600 (1953).

previously assigned to the Comptrollers and the auditors of the Treasury Department—responsibilities that were clearly executive in nature.²⁸⁹

Despite his avid support for the proposal, Wilson nonetheless vetoed this measure on the grounds that it shielded an officer wielding executive power from direct presidential removal. As Wilson noted in his veto message, “the Congress is without constitutional powers to limit . . . the power of removal derived from the Constitution.” Wilson reasoned, “[i]t has . . . always been the accepted construction of the Constitution that the power to appoint officers of this kind carries with it, as an incident, the power to remove.”²⁹⁰ Consequently Wilson concluded, “Regarding as I do the power of removal from office as an essential incident to the appointing power, I cannot escape the conclusion that the vesting of this power of removal in the Congress is unconstitutional and therefore I am unable to approve the bill.”²⁹¹ Thus even in a situation such as this, where adopting the contrary position would have had the practical effect of greatly enhancing the president’s power, Wilson remained true to the unitary theory of the executive.

Wilson made other efforts to centralize his control of the execution of the laws. His initial efforts to reorganize the government foundered in the face of strong congressional opposition. However, the exigencies of World War I finally led to the passage of the Overman Act of 1918, which authorized Wilson to coordinate and consolidate executive agencies by executive order.²⁹² Armed with this authority, Wilson issued twenty-four executive orders that,

²⁸⁹ See FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 260, at 643; 3 GOLDSMITH, *supra* note 260, at 1478-79; 2 HAYNES, *supra* note 237, at 809-11; GEORGE W. PEPPER, FAMILY QUARRELS: THE PRESIDENT, THE SENATE, THE HOUSE 120 (1931); SMALL, *supra* note 177, at 137; Cornelius P. Cotter & J. Malcolm Smith, *Administrative Accountability to Congress: The Concurrent Resolution*, 9 W. POL. Q. 955, 958 (1956); Louis Fisher, *Congress and the Removal Power*, 10 CONG. & PRESIDENCY 63, 66-67 (1983); Ginnane, *supra* note 288, at 575; Charles Warren, *Presidential Declarations of Independence*, 10 B.U. L. REV. 1, 29-30 (1930).

²⁹⁰ Woodrow Wilson, Veto Message (June 4, 1920), in 17 MESSAGES & PAPERS, *supra* note 177, at 8851, 8852.

²⁹¹ *Id.*

²⁹² Overman Act, ch. 78, §§ 1, 2, 4, 5, 40 Stat. 556, 556-57 (1918).

among other things, placed the work of all law officers under the supervision of the Attorney General and centralized control of all health activities under the Secretary of the Treasury.²⁹³ Although the Overman Act limited the reorganization power to war-related agencies and prohibited the abolition of any agency, it did lay the foundation for the reorganization proposals which were to follow.²⁹⁴

The Wilson Administration also bore witness to the birth of three additional independent agencies: the Federal Reserve Board, the Federal Trade Commission (FTC), and the U.S. Shipping Board.²⁹⁵ The members of each of these bodies were protected by the same removal restrictions contained in the amended Interstate Commerce Act, limiting removals to “inefficiency, neglect of duty, or malfeasance.”²⁹⁶ Interestingly, the statute establishing the Federal Reserve Board failed to include any removal limits whatsoever.²⁹⁷

Like Cleveland, Wilson offered no objections to the creation of these independent agencies or the inclusion of the restrictions on his removal power. As during the Cleveland Administration, however, it would be dangerous to read too much into Wilson’s failure to object. As we have noted earlier, it is doubtful that Congress intended the language in the original Interstate Commerce Act to preclude the president from removing commissioners over

²⁹³ S. REP. NO. 1236, 75th Cong., 1st Sess. 5 (1937).

²⁹⁴ BARRY D. KARL, EXECUTIVE REORGANIZATION AND REFORM IN THE NEW DEAL 190 (Midway reprint 1979); DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 184 (1966); Barry D. Karl, *Executive Reorganization and Presidential Power*, 1977 SUP. CT. REV. 1, 3.

²⁹⁵ Congress also created a Water Power Commission that would be the predecessor to the Federal Power Commission (FPC) and the Federal Energy Regulatory Commission (FERC). Unlike the successor agencies, which were created as independent agencies, the original Water Power Commission was comprised entirely of cabinet officers and thus was without question an executive agency. *See* Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063.

²⁹⁶ Shipping Act of 1916, ch. 451, § 3, 39 Stat. 728, 729; Federal Trade Commission Act of 1914, ch. 311, § 1, 38 Stat. 717, 718.

²⁹⁷ *See* Federal Reserve Act of 1913, ch. 5, § 10, 38 Stat. 250, 261 (establishing the Federal Reserve Board without specifying any removal restrictions).

disagreements over policy.²⁹⁸ As Robert Cushman, the leading early commentator on the history of the independent regulatory commissions, has noted, the for-cause removal protections of the Interstate Commerce Act were regarded “more as a protection to the public by providing a way to get rid of objectionable commissioners than as a limitation on Presidential authority.”²⁹⁹ In addition, the removal provisions prompted little discussion, suggesting that Congress did not view these restrictions as a key to determining the commissions’ independence.³⁰⁰ The scant legislative history that does exist suggests that Congress probably did not have any clear idea of the relationship between the independent agencies and the president.³⁰¹ If anything, the legislative history suggests that Congress regarded the removal provisions in the FTC Act as a check on the Commission’s power, not the president’s, and that Congress thought about the FTC’s independence in terms of freedom from bipartisanship rather than freedom from presidential control.³⁰²

In fact, during consideration of the FTC Act, Wilson insisted that the commission remain relatively weak, reflecting his view that the Commission was “an executive agency charged with executive and administrative duties” and that “the commission was merely to supplement existing law-enforcement agencies.”³⁰³ Wilson’s theory seems to have won the day, as he

²⁹⁸ Calabresi & Yoo, *supra* note 19, at 797-99. Even commentators who are somewhat more skeptical of the unitary executive agree with this conclusion. See Lessig & Sunstein, *supra* note 9, at 110-12.

²⁹⁹ CUSHMAN, *supra* note 178, at 62.

³⁰⁰ *Id.* at 196 (FTC); *id.* at 240 (U.S. Shipping Board).

³⁰¹ *Id.* at 153 (noting that the independence of the Federal Reserve Board was “never clearly settled”); *id.* at 222 (noting that “Congress has never worked out any clear idea” regarding “the relations between the Federal Trade Commission and the President”); *id.* at 239 (noting that the legislative history sheds “little light upon the President’s relation to the proposed [Shipping] Board”).

³⁰² *Id.* at 195-96, 198-99.

³⁰³ *Id.* at 196-97.

“secured the inclusion in the Federal Trade Commission Act [of] the clause authorizing the President to direct the commission to make certain investigations.”³⁰⁴ Cushman goes on to note:

Throughout the discussions of this whole period there runs an underlying assumption that the commission’s policy, if not actually directed from the White House, at least conforms to the President’s wishes, that the President cannot escape responsibility for the commission’s policy, and that an incoming President objecting to such policy should change it, if not by the actual issuance of orders to the Commission, at least by making of suitable appointments.³⁰⁵

The conclusion that Congress intended these new commissions to operate subject to presidential control is further reinforced when the removal provisions are read in light of the statutes’ other provisions. For example, the Federal Reserve Board as constituted in 1914 included both the Secretary of the Treasury and the Comptroller of the Treasury as ex officio members specifically to insure that the executive branch would be able to exert an appropriate degree of control over monetary policy.³⁰⁶ Similarly, the FTC Act specifically authorized the president to direct the FTC’s investigatory activities.³⁰⁷ Moreover, the act creating the U.S. Shipping Board clearly envisaged that the Board would exercise important managerial duties under the direction of the president. In fact, the year after the U.S. Shipping Board was established, the exigencies of World War I led Congress to enact legislation giving the president new powers to control shipbuilding,³⁰⁸ authority which he promptly delegated to the Board.³⁰⁹ The Board acknowledged that it would exercise “solely as the agent of the President,”³¹⁰ and it

³⁰⁴ *Id.* at 223.

³⁰⁵ *Id.* at 226.

³⁰⁶ Federal Reserve Act of 1913, ch. 5, § 10, 38 Stat. 250, 261; *see also* CUSHMAN, *supra* note 178, at 153-55, 683; LOUIS FISHER, *THE POLITICS OF SHARED POWER* 124 (1981). The Treasury Secretary and Comptroller of the Currency were not removed from the Board until 1935. *See infra* note 480 and accompanying text.

³⁰⁷ Federal Trade Commission Act of 1914, ch. 311, § 6(d), 38 Stat. 717, 721; *see also* CUSHMAN, *supra* note 178, at 192-94, 199, 222; FISHER, *supra* note 306, at 124.

³⁰⁸ Urgent Deficiencies Appropriation Act of 1917, ch. 28, 40 Stat. 182.

³⁰⁹ CUSHMAN, *supra* note 178, at 241.

³¹⁰ FIRST ANN. REP. OF THE U.S. SHIPPING BD. 6 (1917), *quoted in* CUSHMAN, *supra* note 178, at 241.

was universally regarded as such throughout the conduct of World War I.³¹¹ After the war ended, Congress would transfer some of the president's authority back to the board.³¹² The clear role for presidential involvement in these commission's operations vitiates any suggestion that they were intended to be independent of presidential control.

Moreover, Wilson's treatment of these new institutions underscored that he did not regard them as independent of his authority. As Cushman has concluded, "There is no doubt that Wilson . . . felt that he was entitled to impress his policies on the independent commissions and to expect their conformity to those policies."³¹³ Accordingly, Wilson did not hesitate to use his power to direct FTC investigations, launching many of the FTC's major initiatives.³¹⁴ Wilson also threatened to remove the entire Federal Reserve Board for disagreeing with his policies, despite the statutory restrictions that purported to limit his removal authority.³¹⁵

But the most compelling explanation for why Wilson failed to object to these provisions is the Supreme Court's decision in *Shurtleff*. The removal language included in these new statutes was identical to the language held in *Shurtleff* as not placing any limits on the president's power to remove. Therefore, Congress was doubtless aware that under Supreme Court precedent, including the same language in the FTC Act and the Shipping Act appears to made the members of the bodies created by those statutes removable at will. This conclusion is

³¹¹ CUSHMAN, *supra* note 178, at 248.

³¹² Merchant Marine Act of 1920, ch. 250, § 2(a)(1), 41 Stat. 988, 988. Although Congress at that time considered transferring control of the Shipping Board to a Cabinet Secretary, it retained the Board as an independent agency, complete with the attendant restrictions on removal. Congress did amend the law so that the Board's Chairman would thereafter be selected by the President rather than the Board itself. § 3(a), 41 Stat. at 989. Unfortunately, the debates surrounding this reorganization shed precious little light on what Congress perceived to be the proper relationship between the Board and the President. See CUSHMAN, *supra* note 178, at 245, 247-49.

³¹³ CUSHMAN, *supra* note 178, at 681.

³¹⁴ *Id.* at 222-23. In fact, both Wilson and the Congress appeared to regard the FTC in many ways as an adjunct to the Department of Justice, *id.* at 196-98, and that he possessed a general power to direct FTC activity above and beyond his statutory authority, *id.* at 223.

³¹⁵ *Id.* at 681, 685; Moreno, *supra* note 178, at 482 & n.109.

reinforced by the fact that in 1908, five years after *Shurtleff*, Congress amended the statute at issue in *Shurtleff* to make explicit that general appraisers of customs could be removed for cause *and for no other reason*. The decision to employ language identical to that used in *Shurtleff* rather than the language used in the amended customs statute would thus appear to be no accident and raises the strong inference that Congress did not intend to limit the president's power to remove members of the FTC or the U.S. Shipping Board.³¹⁶ In light of *Shurtleff*, the FTC was not truly an independent agency and would not become one until the Supreme Court's 1935 activist decision in *Humphrey's Executor v. United States*.³¹⁷

The eventual emergence of Wilson's views regarding the centrality of the institution of the presidency and his strong opposition to repeated congressional attempts to interfere with his authority to execute the laws appear to provide strong support for the unitary executive. Although three new independent agencies were created under his administration without his objection, the evidence that neither Congress nor Wilson regarded these commissions to be independent of presidential control is more than sufficient to overcome any suggestion that Wilson acquiesced to any derogation of his authority to control the execution of the law.

VII. WARREN G. HARDING

The presidency of Warren Harding is consistently ranked as one of the worst, if not *the* worst, in our nation's history.³¹⁸ A congenial man who abjured conflict, Harding was by nature most comfortable remaining outside the fray and conciliating divergent interests. This outlook

³¹⁶ See CUSHMAN, *supra* note 178, at 240.

³¹⁷ 295 U.S. 602 (1935).

³¹⁸ EUGENE P. TRANI & DAVID L. WILSON, *THE PRESIDENCY OF WARREN G. HARDING 189-90* (1977). For a review of past presidential rankings and the presentation of an updated ranking of presidencies (in which Harding tied for next-to-last), 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 (2001).

made him deeply suspicious of strong presidential power, which he believed could only lead troubled relations with Congress, as it had during the Wilson Administration. As a result, he attempted to pay respect to Congress's prerogatives by adopting a narrow conception of presidential power. This vision turned the presidency into a largely ceremonial office whose main purpose was to serve as a beloved source of national pride. There was little room in it for political leadership.³¹⁹ Harding's legacy was ultimately consumed by a series of scandals, which culminated in the conviction and imprisonment of one of his cabinet secretaries for accepting bribes for the oil leases in Teapot Dome.³²⁰ If ever there were a president who might have been expected to abandon the unitary executive, it was Harding.

Viewed in this light, Harding's record in defending the president's authority to execute the laws may be regarded as something of a pleasant surprise. Harding did not hesitate to take steps to ensure the independent agencies acted in accord with the administration's policy agenda. His actions included communicating his preferred policy positions to members of the ICC³²¹ and the Shipping Board,³²² requiring commissioners to submit their undated resignations before receiving their appointments,³²³ and ignoring the statutory provisions purporting to limit presidential removal authority and threatening to remove Shipping Board members who disagreed with his policies.³²⁴ Even more important were his efforts to reconstitute the independent agencies with members more in tune with his pro-business orientation. Harding

³¹⁹ *Id.* at 37. The few occasions during which Harding attempted to exercise leadership on policy issues were typically ill conceived and ended in disaster. *See id.* at 59 (describing Harding's reluctance to push for the vision he described in his initial address to Congress), 76-78, 80-81 (discussing Harding's failed attempt to push ship building subsidies through Congress).

³²⁰ *Id.* at 179-85.

³²¹ Moreno, *supra* note 178, at 482 & n.111 (citing 2 ISAIAH L. SHARFMAN, THE INTERSTATE COMMERCE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 455 (1931)).

³²² CUSHMAN, *supra* note 178, at 249-50, 254; WILSON K. DOYLE, INDEPENDENT COMMISSIONS IN THE FEDERAL GOVERNMENT 17 (1939).

³²³ Moreno, *supra* note 178, at 482 & n.111 (citing 2 SHARFMAN *supra* note 321, at 458 n.209).

³²⁴ CUSHMAN, *supra* note 178, at 252, 254, 685.

made a number of transformative appointments to the ICC, the Federal Reserve Board, the U.S. Tariff Commission, and the FTC that effectively brought the regulatory program of the progressive era to an end.³²⁵

Believing that promoting efficiency would make the government more responsive to business, Harding also embraced efforts to reorganize the executive branch.³²⁶ He appointed his good friend Walter F. Brown as the Chair of the joint congressional committee on reorganization established at the end of the Wilson Administration. The plan Brown developed called for wholesale consolidation of the federal bureaucracy into ten departments.³²⁷ Most importantly for our purposes, the proposal reiterated the position first advanced by Teddy Roosevelt and recommended that the independent agencies be consolidated into the executive departments.³²⁸ This plan prompted a spate of bureaucratic infighting that rendered its enactment a practical impossibility. Although some cabinet members were able to achieve some limited success in modernizing the operations of their departments, plans to impose more extensive changes were eventually ended by Harding's untimely death and the advent of the Coolidge Administration, which did not share Harding's interest in executive branch reorganization.³²⁹

But the most important step Harding took to bolster the unitary executive was the completion of the effort to establish a Bureau of the Budget initiated by Taft and continued by Wilson. Under the Budget and Accounting Act of 1921,³³⁰ “[t]he Bureau of the Budget was made part of the executive branch, reporting to the president. The budget director was not to take instruction from cabinet officers but only from the president, which gave the director the

³²⁵ TRANI & WILSON, *supra* note 318, at 49-50, 86-87.

³²⁶ See ROBERT K. MURRAY, *THE HARDING ERA* 413-16 (1969).

³²⁷ TRANI & WILSON, *supra* note 318, at 83-84.

³²⁸ S. REP. NO. 1236, *supra* note 293, at 5; Moreno, *supra* note 178, at 483 nn.112-13 (citing TYRUS G. FAIN ET AL., *FEDERAL REORGANIZATION: THE EXECUTIVE BRANCH* xxix (1977)).

³²⁹ TRANI & WILSON, *supra* note 318, at 84-85.

³³⁰ Ch. 8, §§ 207-211, 42 Stat. 20, 22.

authority to plan a responsible budget without constant interference.”³³¹ The impact on the president’s ability to control his administration was palpable and immediate. Under the leadership of the very able Charles Dawes, the Bureau of the Budget was able to save over \$1 billion during its first year of operation.³³² Even more importantly, the Bureau allowed the president to exert far more control over federal spending than ever before.³³³

Ironically, Harding’s greatest achievement in asserting the president’s authority to execute the law was simultaneously his greatest failure. Attached to the legislation creating the Bureau of the Budget was a provision creating the General Accounting Office headed by a Comptroller General appointed to a fifteen-year term and removable by joint resolution, rather than by concurrent resolution as proposed during the Wilson Administration.³³⁴ Because a joint resolution necessarily requires the president’s signature to be effective, this provision guaranteed presidential participation in any removals. The use of a joint resolution, however, prevented the president from initiating the removal of the Comptroller General and from exercising the removal power without congressional consent. These were precisely the problems that induced Wilson to veto the previous version of the Budget and Accounting Act, notwithstanding his avid support for the bill. Harding failed to follow suit and signed the Act into law.³³⁵

Harding’s failure to object to the limits on the president’s power to remove the Comptroller General undeniably constitutes a blow to the unitary executive. At worst, however, Harding’s approval of the Budget and Accounting Act represents something of a mixed bag. The case can be made that the simultaneous creation of the Bureau of the Budget greatly enhanced

³³¹ TRANI & WILSON, *supra* note 318, at 62.

³³² *Id.* at 47-48, 64.

³³³ *Id.* at 47.

³³⁴ § 303, 42 Stat. at 23-24.

³³⁵ See FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 260, at 64; 2 HAYNES, *supra* note 237, at 811; Fisher, *supra* note 291, at 67; Warren, *supra* note 291, at 30.

the president's ability to execute the laws and control the executive branch. To his credit, Harding did use the full capabilities of the Bureau of the Budget to assert his control over executive agencies, establishing firm control over the budget process and requiring agencies to submit all legislative proposals that might involve presidential spending to the Bureau of the Budget for clearance.³³⁶ Harding's reorganization proposal also recommended that the newly created General Accounting Office be transferred into the Treasury Department.³³⁷ This initiative was ultimately doomed by Congress's failure to embrace any aspect of Harding's reorganization plan.

Ultimately, Harding's legacy would be undone by his decision to include in his cabinet two personal friends who subsequently became enmeshed in scandal. Ironically, most of Harding's major executive and judicial nominees were men of outstanding talent and ability. Harding appointed the very talented Charles Evans Hughes to be Secretary of State, and he named the brilliant Andrew W. Mellon Secretary of the Treasury. Rising star Herbert Hoover was named Secretary of Commerce, and the formidable William Howard Taft was nominated to be Chief Justice of the Supreme Court. Harding's biographers, Eugene Trani and David Wilson, observe, "For quality it would be hard to surpass men such as Hoover, Hughes, and [Agriculture Secretary Henry] Wallace."³³⁸ It is thus ironic that two bad appointments—Albert Fall as Secretary of the Interior and Harry Daugherty as Attorney General—would forever besmirch the reputation of an administration led by an otherwise distinguished cabinet. Mercifully, Harding died unaware of the damage that his friends' improprieties would do to his reputation.³³⁹

³³⁶ 3 GOLDSMITH, *supra* note 260, at 1489-95; Cross, *supra* note 176, at 490.

³³⁷ S. REP. NO. 1236, *supra* note 293, at 5.

³³⁸ TRANI & WILSON, *supra* note 318, at 43.

³³⁹ *Id.* at 185.

On the whole, Harding's record in defending the unitariness of the executive is somewhat equivocal. Notwithstanding his rather constrained vision of the proper scope of presidential power, Harding did take a number of steps to defend the president's authority to execute the law, as evidenced by his willingness to dominate the independent agencies and to populate the executive branch with an able cabinet staffed by giants like Charles Evans Hughes and Andrew Mellon. Even more important is Harding's role in creating the Bureau of the Budget, which is regarded by many as one of his administration's more significant achievements³⁴⁰ and which represents the precursor to the agency that has become the presidency's primary mechanism for centralizing control of the administration of the law: the Office of Management and Budget (OMB).

At the same time, it is undeniable that Harding's failure to maintain Wilson's objections to the restrictions on the removal of the Comptroller General constitutes a clear failure of a president to defend the unitariness of the executive branch. Also somewhat troublesome is Harding's reluctance to enforce the mandates of the Eighteenth Amendment and the Volstead Act of 1919. Harding was the first president burdened with having to balance the political unpopularity of Prohibition and the obligation to enforce the law. The contradiction between his public support for Prohibition on the one hand and the implications of his personal habits and the almost farcical level of enforcement on the other hand do not do Harding much credit.³⁴¹ When viewed in light of the overall historical record, however, these episodes provide at most modest support for the claim that Harding acquiesced to a non-unitary executive branch. Unfortunately, what little good Harding was able to accomplish has largely been eclipsed by the Teapot Dome scandal, which surfaced after his death and which is described in the next section.

³⁴⁰ *Id.* at 106.

³⁴¹ *Id.* at 179.

VIII. CALVIN COOLIDGE

Warren Harding's death elevated Calvin Coolidge to the presidency. A reticent man who reflected many of the values of his rural New England roots, "Silent Cal" was the antithesis of the activist president. On the contrary, Walter Lippmann reported that his "political genius" was "his talent for effectively doing nothing."³⁴²

Coolidge's reluctance to assume national leadership or to impose his will on Congress, however, did not translate into reluctance to defend the president's prerogatives. Coolidge was more than willing to fight to assert the president's sole right to control of the execution of the federal laws. For instance, the degree of influence Coolidge exerted over the independent agencies indicates that he envisioned them as being subject to his will. Reportedly believing that the FTC and other commissions "should subordinate their judgment to the opinions of the executive" and that "they properly were mere agencies to register the policies of the administration,"³⁴³ Coolidge attempted to dominate the independent agencies by influencing the rediscount policy of the Federal Reserve Board, dictating policy to the U.S. Shipping Board, requiring that commissioners submit undated letters of resignation before appointing them, and threatening to remove commissioners who disagreed with his policies.³⁴⁴ The fact that the threatened removal of these commissioners failed to evoke any congressional protests suggests that Congress also did not regard the statutory removal restrictions as vitiating any of the

³⁴² See Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 59 n.249 (2002) (internal quotation marks omitted) (citing the biography of Calvin Coolidge on the White House's official website, at <http://www.whitehouse.gov/history/presidents/cc30.html>).

³⁴³ See 69 CONG. REC. 3031 (1928) (statement of Sen. Carter Glass), *quoted in* SHARFMAN *supra* note 322, at 459 n.209; *see also* CUSHMAN, *supra* note 178, at 681; Moreno, *supra* note 178, at 483.

³⁴⁴ CUSHMAN, *supra* note 178, at 172, 252, 254-55, 463, 685; DOYLE, *supra* note 322, at 18; 2 HAYNES, *supra* note 237, at 765; Moreno, *supra* note 178, at 483.

president's constitutional powers.³⁴⁵ He moved carefully but firmly to create a protectionist majority on the Tariff Commission, removing one commissioner and appointing another to be an ambassador to give himself a vacancy to fill.³⁴⁶ A third low-tariff commissioner was driven to resign in 1928 as Coolidge established complete control over the commission.³⁴⁷ The fact that from 1927 to 1929 Congress made expenditures of appropriations with respect to the merchant marine conditional on approval by the president and not the U.S. Shipping Board further contradicts any suggestion that Congress thought that the independent agencies should exercise their authority completely independently of executive control.³⁴⁸

Coolidge further exerted control over the independent agencies by appointing commissioners who were sympathetic to his pro-business policies. These efforts culminated with the appointment of William E. Humphrey to the Chairmanship of the FTC.³⁴⁹ Humphrey bragged about the impact of his appointment, noting that “[i]f [the FTC] was going east before, it is going west now.”³⁵⁰ He added, “Do you think I would have a body of men working here under me that did not share my ideas about these matters? Not on your life. I would not hesitate a minute to cut their heads off if they disagreed with me. What in the hell do you think I am here for?”³⁵¹

These rather extreme statements by Humphrey are important because they reveal the extent to which the independent agencies were in tune with Coolidge's basic policies. It is clear that both Harding and Coolidge moved very aggressively to turn the direction of the independent agencies around 180 degrees. While the merits of the laissez-faire policy they pursued are open

³⁴⁵ CUSHMAN, *supra* note 178, at 255.

³⁴⁶ ROBERT H. FERRELL, *THE PRESIDENCY OF CALVIN COOLIDGE* 70 (1998).

³⁴⁷ *Id.*

³⁴⁸ CUSHMAN, *supra* note 178, at 258-59.

³⁴⁹ FERRELL, *supra* note 346, at 71.

³⁵⁰ *Id.* at 72.

³⁵¹ *Id.*

to dispute, there can be no question but that Harding and Coolidge ensured that these agencies acted in accordance with the vision determined by the president notwithstanding the supposed statutory guarantees of independence. Humphrey's aggressive statements about his own role in implementing Coolidge's laissez-faire policies certainly help to explain why FDR was so eager to remove him in the litigation that ultimately became *Humphrey's Executor v. United States*.³⁵²

Coolidge also used his control over the executive branch and the new powers vested in the president by Harding's creation of the Bureau of the Budget to rein in the federal debt. As president, he saw the federal debt drop from \$22.3 billion in 1923 when he took office to \$16.9 billion in 1929 when he left office, a dramatic reduction indeed.³⁵³ Robert Ferrell, Coolidge's biographer, reports:

In holding down government expenditures and saving enough money to retire the debt, Coolidge employed several devices, one of which was the Bureau of the Budget. The very fact that the Bureau's statisticians and accountants were screening the proposed expenses of cabinet departments and the independent agencies gave comfort to the parsimonious president. The bureau's experts also could watch for special proposals by those well-known spendthrifts, the members of Congress. When the president presented his annual budget he could feel fairly sure that it was as low as he properly should go, and not a crazy quilt of special interest propositions.³⁵⁴

Thus, the Bureau of the Budget proved its usefulness to the presidency from its inception thus compensating for Harding's agreement to removal limits for the Comptroller General.

The most significant step that the Coolidge Administration took to defend the unitary executive was its role in briefing and arguing *Myers v. United States*,³⁵⁵ which is the most important case ever decided on the scope of the president's removal power. The Coolidge Administration's role in *Myers* began when the administration continued to defend Wilson's

³⁵² 295 U.S. 602 (1935).

³⁵³ FERRELL, *supra* note 346, at 167.

³⁵⁴ *Id.* at 168.

³⁵⁵ 272 U.S. 52 (1926).

removal of Lois Myers in defiance of the statutory restriction on the removal of postmasters.³⁵⁶ In the brief and oral argument presented to the U.S. Supreme Court, Solicitor General James M. Beck offered a series of ringing statements on the very exact controversy that is the subject of these articles. Beck's brief argued that "[f]rom the Beginning of the Government removal has been recognized as essentially an executive function."³⁵⁷ The Constitutional Convention did not discuss the removal power because its members thought it was "axiomatic that the power to remove was an executive power and that it was included within the grant of 'executive power' to the president and the special grant that he should 'take care that the laws be faithfully executed.'"³⁵⁸ Beck further observed:

There is however, a very significant difference between the first sections of Art. I and Art. II, respectively. Art. I, Sect. 1, provides: "All legislative Powers *herein granted* shall be vested in a Congress of the United States." Art. II, Sect. 1, provides: "The executive Power shall be vested in a President." It does not use the words "herein granted," nor does it speak of a class of powers as the preceding section, but it speak of the "executive power", and the executive power, as understood at that time always included both the power to appoint and the power to remove.³⁵⁹

Beck's brief goes on to recount the whole history of the removal power from the Decision of 1789 of the First Congress up through the controversy in the Jackson and Johnson Administrations, and it quotes the many Attorney General opinions defending a unilateral presidential power of removal.³⁶⁰ The brief is a ringing defense of the unitary executive that makes every constitutional argument for that outcome that can be made.

³⁵⁶ Substitute Brief for the United States on Reargument at 20-22, 33, 41-71, 78-85, *Myers* (No. 2); *see also* Oral Arguments at 63-65, 75-78, *Myers* (No. 2).

³⁵⁷ 272 U.S. at 99.

³⁵⁸ *Id.* at 100.

³⁵⁹ *Id.* at _.

³⁶⁰ *Id.* at _.

Beck reiterated many of these positions during oral argument. He said, “In my judgment, the President can remove any one in the Executive Department of the Government.”³⁶¹ Beck went on to say that the executive power was

not granted to an Executive Department. That is, again, a very significant thing. They might have limited it. But they said: “The executive Power shall be vested in a President of the United States”—distinguishing him from all the other servants of the Executive Department, and making him the repository of this vast, undefined grant of power called “the executive power.” Then they went on to say what that power was—not in any way attempting to classify or enumerate it; but they simply gave its objective, and that was “to take care that the laws be faithfully executed.

It was common sense in the days of the Fathers, when our country was a little one; it is common sense today, when we are the greatest nation in the world; when we have as I say 800,000 employees of the State—that the President can not take care that the laws be faithfully executed, unless he has the power of removal, and the summary power of removal, without any interference or curb upon him. And that has been shown again and again in our history.³⁶²

In sum, Beck’s brief and oral argument before the Court in *Myers* was a paean to the theory of the unitary executive as set out in this series of articles. One could not have asked for a more ringing reaffirmation of the theory than was provided by the Coolidge Administration. At a few points Beck hinted at narrower grounds of decision, but he provided all of the raw material needed to construct a great opinion defending the constitutional basis of the removal power.

The majority opinion in *Myers* was written by Chief Justice and former President William Taft, over the powerful dissents submitted by Justices McReynolds, Brandeis, and Holmes. The consistency of previous presidents’ refusal to accept congressionally-imposed limits on presidential removals played a large role in Taft’s opinion. In light of the opposition offered by Presidents Jackson, Grant, Cleveland, Wilson, and Coolidge, any limits on “the independent power of the President to remove . . . cannot be said really to have received the

³⁶¹ *Id.* at 92.

³⁶² *Id.* at 93-94.

acquiescence of the executive branch of government,³⁶³ just as this series of articles claims. The whole *Myers* episode is undoubtedly the Coolidge Administration's defining moment with respect to the theory of the unitary executive, and it can fairly be said that the administration ranks up there with Andrew Jackson's and Grover Cleveland's as one of the staunchest defenders of the president's removal power in history.

Another major controversy of the Coolidge years came as a result of the administration's need to address the burgeoning Teapot Dome scandal, which had broken out during the Harding Administration. Coolidge responded by appointing two special prosecutors to try the cases that arose from the scandal: one a Republican, future Supreme Court Justice Owen J. Roberts, and the other a Democrat, Atlee Pomerene.³⁶⁴ These two individuals were presidential appointees and fully removable by Coolidge,³⁶⁵ although this episode represents the only instance in history in which a special prosecutor was confirmed by the Senate.³⁶⁶

Roberts and Pomerene ably prosecuted the scandal, with no impairment of Coolidge's powers of control over the executive branch. Because one special prosecutor was from each major political party, public trust in the government was restored. The prosecution would eventually culminate in the conviction of Secretary of the Interior Albert Fall, who became the first cabinet officer ever sentenced to prison for malfeasance in office.³⁶⁷ Coolidge's handling of the Teapot Dome scandal was thus a model of what a strong president with integrity could do to clean up a government scandal that had not happened on his watch. Future presidents might do

³⁶³ *Id.* at 172.

³⁶⁴ FERRELL, *supra* note 346, at 46. Pomerene was not Coolidge's first choice. He first appointed Thomas W. Gregory, who had been Attorney General during the Wilson Administration. Gregory disqualified himself after it came to light that he had previously been on the payroll of one of the targets of the investigation. *Id.*

³⁶⁵ See Act of Feb. 8, 1924, ch. 16, 43 Stat. 5, 6; KATY J. HARRIGER, *INDEPENDENT JUSTICE: THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* 14 (1992).

³⁶⁶ See EASTLAND, *supra* note 5, at 8.

³⁶⁷ FERRELL, *supra* note 346, at 47; TRANI & WILSON, *supra* note 318, at 185.

well to emulate his example of two executive branch co-prosecutors, one from each major political party.³⁶⁸

Unfortunately for Coolidge, Congress was not content to let him prosecute these cases. It also wanted to become involved in the removal of the executive branch officers implicated by the scandal.³⁶⁹ Thus, the Senate debated a series of resolutions calling for the president to demand the resignation of Secretary of the Navy Edwin Denby for his role in the Teapot Dome affair, which consisted solely of his decision to transfer jurisdiction over the oil reserves to Fall. Although several Senators objected that the Senate had no right “to require the President to accede to [the Senate’s demand] and dismiss the man,” the Senate adopted a resolution calling for Denby’s removal by a vote of forty-seven to thirty-four.³⁷⁰

Coolidge rebuffed the Senate resolution, announcing that “[n]o official recognition can be given to the passage of the Senate resolution relative to their opinion concerning members of the Cabinet or other officers under executive control.” Coolidge regarded it “as a vital principle of our Government” that “[t]he dismissal of an officer of the Government, . . . other than by impeachment, is exclusively an executive function,” supporting his argument by quoting both Cleveland’s statement regarding the Duskin suspension and the seminal statements offered by Madison in the Decision of 1789.³⁷¹ This annexing of the “opinions of Presidents James Madison and Grover Cleveland” gave a bipartisan ring to Coolidge’s claim of a unilateral

³⁶⁸ See Smaltz, *supra* note 186, at 2326 (offering a similar recommendation).

³⁶⁹ Indeed, it was the tenacity of the congressional investigation that produced the information that led to the conviction of Secretary Fall. See TRANI & WILSON, *supra* note 318, at 184-85.

³⁷⁰ See 65 CONG. REC. 2223-45 (1924); see also FERRELL, *supra* note 346, at 44, 46-47; FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 260, at 81; 2 HAYNES, *supra* note 237, at 817-18; Warren, *supra* note 291, at 33.

³⁷¹ Calvin Coolidge, Statement on Passage of Resolution in the Senate Calling for the Resignation of Secretary of the Navy Denby (Feb. 11, 1924), in SUPPLEMENT TO THE MESSAGES AND PAPERS OF THE PRESIDENTS COVERING THE TERM OF WARREN G. HARDING AND THE FIRST TERM OF CALVIN COOLIDGE 9366, 9366 (1925).

presidential removal power.³⁷² Ultimately, despite Coolidge's support, both Denby and Daugherty resigned because, as Denby indicated, their continuance in the Cabinet was proving an embarrassment to the president. While continuing to challenge the constitutionality of the Senate's resolutions, Coolidge regretfully accepted their resignations for purely prudential reasons, assuring Denby, "You will go with the knowledge that your honesty and integrity have not been impugned."³⁷³

Coolidge responded in a similar fashion to the Senate's March 12, 1924, resolution calling for an investigation of the Bureau of Internal Revenue. Although Coolidge acknowledged "[w]hatever may be necessary for the information of the Senate or any of its Committees in order better to enable them to perform their legislative or other constitutional functions ought always to be furnished willingly and expeditiously by any Department," he complained that "the attack which is being made on the Treasury goes beyond any of these legitimate requirements" and threatened to upset the "comity between the Executive Departments and the Senate."³⁷⁴ Coolidge emphasized:

The Constitutional and legal rights of the Senate ought to be maintained at all times. Also the same must be said of the Executive Departments. But these rights ought not to be used as a subterfuge to cover unwarranted intrusion. It is the duty of the Executive to resist such intrusion and to bring to the attention of the Senate its serious consequences. That I shall do in this instance.³⁷⁵

The Coolidge Administration also had to defend itself against a special Senate committee investigating Jess W. Smith, a confidant of Attorney General Harry Daugherty who had taken bribes, only to commit suicide as his transgressions began to come to light. The committee never

³⁷² FERRELL, *supra* note 346, at 46.

³⁷³ 2 HAYNES, *supra* note 237, at 819-21. *See generally* FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 260, at 81; Warren, *supra* note 291, at 33-34.

³⁷⁴ Calvin Coolidge, Special Message to Senate (Apr. 11, 1924), in 18 MESSAGES & PAPERS, *supra* note 177, at 9390, 9390-91.

³⁷⁵ *Id.* at 9391; *see also* Warren, *supra* note 291, at 34; 2 HAYNES, *supra* note 237, at 821-24.

secured any concrete evidence against Daugherty, who was acquitted in both of his trials (albeit in the second by a single vote). Coolidge stood by Daugherty for a time, but became increasingly concerned by the mounting evidence that Daugherty was on the verge of a nervous breakdown. Coolidge eventually demanded Daugherty's resignation, and after Daugherty somewhat pugnaciously refused to resign, Coolidge summarily dismissed him.³⁷⁶ This was in essence a presidential removal, and it was to be the most spectacular removal of the Coolidge years.

The fact the resignations of Denby and Daugherty precluded further conflict with Congress over control of the removal power does nothing to dissipate the significance of Coolidge's opposition to Congress's action. Particularly when combined with his assertion of control over the independent regulatory agencies, his administration's opposition to congressional attempts to limit the removal power clearly represents another link in the chain of presidential defenses of the unitary executive.

There was another, somewhat idiosyncratic issue during the Coolidge years with respect to the president's power and duty to take care that the laws be faithfully executed: the enforcement of the Eighteenth Amendment and the Volstead Act of 1919 implementing Prohibition. Ferrell reports, "Curiously, many contemporary and later Americans described Prohibition as the most outrageous example of government intrusion into the social lives of citizens, but in reality, enforcement of Prohibition was so light as to have been virtually nonexistent."³⁷⁷ In short, "Federal enforcement [of Prohibition] was a joke."³⁷⁸ In this regard, Coolidge was no worse than the vast majority of politicians. Members of Coolidge's cabinet,

³⁷⁶ FERRELL, *supra* note 346, at 48-50.

³⁷⁷ *Id.* at 101-02.

³⁷⁸ *Id.* at 106.

such as Secretary of State Kellogg and Treasury Secretary Mellon, were known to drink illegally, and stories of violations by members of Congress were legion.³⁷⁹ The states, for their part, “behaved shamelessly,” simply “pass[ing] the task of enforcement to the federal government.”³⁸⁰ Most political leaders were ambivalent about enforcement. They had only supported Prohibition out of political expediency and were more than happy to abandon it if convenient. As a result, they were content to follow “an exquisitely inattentive course toward enforcement, sensing that Prohibition would either gather support and make itself effective or lose support and go down to defeat.”³⁸¹ Eventually, the latter would prove to be the case, eventually rendering the willingness or lack of willingness to enforce Prohibition moot.

The Coolidge Administration also bore witness to the creation of another independent agency was created in 1927: the Federal Radio Commission (FRC).³⁸² The Act creating the FRC represented a compromise between the House, which favored a regime in which the commission and the Secretary of Commerce shared authority, and the Senate, which preferred vesting all of the regulatory responsibilities in an independent agency. The legislation ultimately adopted gave the FRC the initial authority to allocate frequencies, set technical standards, and issue licenses.³⁸³ After one year, those responsibilities were to be transferred to the Secretary of Commerce, after which time the FRC would turn into a part-time appellate body to review the Secretary’s decisions.³⁸⁴ The interim nature of the FRC’s authority raises serious questions as to the agency’s independence. Congress extended the initial division of authority through the end of

³⁷⁹ *Id.* at 104-05.

³⁸⁰ *Id.* at 106.

³⁸¹ *Id.*

³⁸² Radio Act of 1927, ch. 169, 44 Stat. 1162. On the history of the FRC’s creation, see CUSHMAN, *supra* note 178, at 299-310; John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Regulation of Technology*, 71 U. COLO. L. REV. 1071, 1103-09 (2000).

³⁸³ § 4, 44 Stat. at 1163-64.

³⁸⁴ § 5, 44 Stat. at 1164.

the Coolidge Administration by granting a pair of one-year extensions³⁸⁵ and eventually gave the FRC permanent status during the initial year of the Hoover Administration.³⁸⁶ In the wake of the landmark decision in *Myers*, Congress did not even maintain the pretense of including any restrictions on the president's power to remove commissioners.

Finally, the Coolidge years saw Secretary of State Kellogg disavowing the Roosevelt Corollary of the Monroe Doctrine. Ferrell reports that Kellogg stated outright that "the United States had no right to use the Monroe Doctrine to enforce Latin American good behavior."³⁸⁷ Kellogg "explained that under the Monroe Doctrine, the rights and interests of the United States were 'against Europe and not against the Latin Americas.' The Doctrine 'is not a lance; it is a shield.'"³⁸⁸ The Coolidge Administration thus effected a significant change of direction in U.S. foreign policy. The fact that Coolidge could superintend such a change of course attests to the strength of the president's authority, not its weakness.

In sum, the Coolidge Administration took a wide range of steps to defend the unitariness of the executive, most importantly by litigating and winning the great case of *Myers v. United States*. There can be no question that an administration which litigated and won *Myers* did not acquiesce in any diminution of the unitary executive for purposes of this article.

IX. HERBERT C. HOOVER

Herbert Hoover reached the White House after lengthy service as Secretary of Commerce and Labor to Presidents Harding and Coolidge. Although Hoover shared Coolidge's reticence about interfering with the prerogatives of Congress, that reticence did not stop him from

³⁸⁵ See Act of Mar. 4, 1929, ch. 701, 45 Stat. 1559; Act of Mar. 28, 1928, ch. 263, 45 Stat. 373.

³⁸⁶ Act of Dec. 18, 1929, ch. 7, 46 Stat. 50.

³⁸⁷ FERRELL, *supra* note 346, at _.

³⁸⁸ *Id.* at 142.

continuing his predecessors' defense of the president's prerogatives. In fact, his opposition to infringements upon the unitariness of the executive branch began long before his inauguration. While a member of the Coolidge Administration, Hoover had questioned the constitutional propriety of conferring executive powers upon independent agencies, arguing that "there should be single-headed responsibility in executive and administrative functions."³⁸⁹ Hoover elaborated:

The necessarily divided minds of the best board in the world had always resulted in failure in executive work. Every member must have a four-way independent responsibility. He is responsible for every act of the board to the country as a whole, to his particular constituency, to his political party and finally to Congress. There is only one responsibility that he does not have and that is to *the President of the United States, who, at least under the spirit of the Constitution, should be vested with all administrative authority.*³⁹⁰

Hoover reiterated these views after assuming the Presidency. Addressing the problem of departmental reorganization in his First Annual Message, Hoover urged that all executive administrative activities should be placed under single-headed responsibility. "Indeed," Hoover concluded, "these are the fundamental principles upon which our Government was founded, and they are the principles which have been adhered to in the whole development of our business structure, and they are the distillation of the common sense of generations."³⁹¹ Consistent with these views, Hoover assumed full responsibility for all executive policies, issuing directives to the ICC regarding passenger rates and railroad consolidation.³⁹² Hoover's biographer, Martin Fausold, reports that Hoover asserted his authority over Andrew Mellon, the strong-willed Secretary of the Treasury, by ordering Mellon's department "to publish all large governmental refunds of gift, estate, and income taxes[, which] was an important repudiation of the secretary's

³⁸⁹ *Hearings Before the House Committee on Merchant Marine and Fisheries on H.R. 5369, H.R. 5395, H.R. 8052, 69th Cong., 1st Sess. 13 (1926)*

³⁹⁰ *Id.* (emphasis added); *see also* CUSHMAN, *supra* note 178, at 262-64, 707-08.

³⁹¹ Herbert Hoover, First Annual Message (Dec. 3, 1929), *reprinted in* 72 CONG. REC. 27 (DATE); *see also* CUSHMAN, *supra* note 178, at 703.

³⁹² CUSHMAN, *supra* note 178, at 681-82, 685; DOYLE, *supra* note 322, at 18.

earlier policies.”³⁹³ There was no question but that Hoover was a hands-on administrator fully in charge of his own administration.

Even Congress appears to have concurred in the view that presidents should be the head of the administrative system. Following the Supreme Court’s decision in *Myers v. United States*,³⁹⁴ Congress deliberately omitted any removal restrictions when it replaced the original Federal Power Commission (FPC) with a five-member commission.³⁹⁵ When asked why the removal provisions first enacted in the Interstate Commerce Act were deleted from the bill, the House sponsor of the legislation replied that such a provision was unnecessary because the Supreme Court had already decided that the president “can remove any public official at any time for malfeasance in office.”³⁹⁶

Hoover again defended the removal power when the Senate “reconsidered” its votes to confirm three nominees to the FPC because of intervening allegations of corruption. Hoover denounced the Senate’s action as an attempt “to encroach upon the Executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination.”³⁹⁷ The Senate ignored Hoover’s protestations and, upon reconsideration, reconfirmed two of the nominees, but rejected the nomination of George Otis Smith.³⁹⁸ In the end, Hoover prevailed when the Supreme Court invalidated the Senate’s action, holding that the

³⁹³ MARTIN L. FAUSOLD, *THE PRESIDENCY OF HERBERT C. HOOVER* 56 (1985).

³⁹⁴ 272 U.S. 52 (1926).

³⁹⁵ Water Power Act of 1930, ch. 572, 46 Stat. 797, 797. The original FPC was composed entirely of cabinet secretaries. *See supra* note 295.

³⁹⁶ 72 CONG. REC. 10332 (1930); *see also* CUSHMAN, *supra* note 178, at 292-95.

³⁹⁷ Herbert Hoover, Message to the Senate of the United States (Jan. 10, 1931), *reprinted in* *United States v. Smith*, 286 U.S. 6, 28 (1932); *see also* CUSHMAN, *supra* note 178, at 294-95; 2 HAYNES, *supra* note 237, at 826.

³⁹⁸ 74 CONG. REC. 3939-40 (1931). Congress also considered appropriations legislation which would have withheld salary payments to any official whose nominations were being reconsidered by the Senate. *Id.* at 2140 (proposal by Sen. Wheeler); *id.* at 3320-23 (amendment by Rep. LaGuardia). However, neither of these proposals were enacted into law. 2 HAYNES, *supra* note 237, at 827; Fisher, *supra* note 291, at 70.

Senate's rules did not permit such reconsiderations.³⁹⁹ But even had the Court ruled otherwise, it would not have weakened the moment of Hoover's opposition for the purposes of coordinate construction.

Hoover did temporarily accede to Congress's attempt to involve itself in the execution of the laws when he signed the Economy Act of 1932.⁴⁰⁰ This Act permitted Hoover to reorganize any administrative agency, including the independent regulatory commissions, by executive order.⁴⁰¹ Hoover was an avid supporter of executive reorganization. Fausold reports that while Hoover had trouble in handling electoral politics, "he was in his element in the world of administration. The Hoover presidency would accommodate twentieth-century ideas of executive reorganization and the managerial presidency."⁴⁰² Hoover embraced the Progressive vision of expert, nonpolitical administration and he sought to make that a reality,⁴⁰³ and he was eager to continue the work begun by Teddy Roosevelt's Keep Commission and William Howard Taft's Commission on Economy and Efficiency.⁴⁰⁴ His experience reorganizing the Commerce Department under Presidents Harding and Coolidge gave Hoover confidence in his ability to bring the same benefits to the entire executive branch.⁴⁰⁵

However, in accordance with Hoover's suggestions,⁴⁰⁶ the Act provided that executive reorganization orders were subject to a one-house legislative veto, whereby either house could

³⁹⁹ See *United States v. Smith*, 286 U.S. 6 (1932). It should be emphasized that because the Court found the Senate's actions improper as matter of statutory construction, it did not reach the constitutional issues surrounding the President's removal power. See generally CUSHMAN, *supra* note 178, at 683; FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 260, at 80-81; 2 HAYNES, *supra* note 237, at 824-27; PEPPER, *supra* note 291, at 101-03; Fisher, *supra* note 291, at 69-70.

⁴⁰⁰ The Economy Act of 1932 was enacted as a rider to the Legislative Appropriations Act, ch. 314, 47 Stat. 382 (1932); see also Karl, *supra* note 294, at 3.

⁴⁰¹ § 403(1), 47 Stat. at 413.

⁴⁰² FAUSOLD, *supra* note 393, at 54.

⁴⁰³ *Id.* at 56.

⁴⁰⁴ *Id.* at 54.

⁴⁰⁵ *Id.* at 55.

⁴⁰⁶ Herbert Hoover, Annual Message to the Congress on the State of the Union (Dec. 3, 1929), *in*

overturn the order by passing a resolution within sixty days of their issuance.⁴⁰⁷ In fact, when Hoover submitted a series of reorganization proposals to Congress after his defeat in the 1932 elections, the Democratically-controlled Congress vetoed every one of them, ostensibly on the grounds that the incoming president ought to have the latitude to effect his own reorganization.⁴⁰⁸

Hoover's tolerance for the legislative veto proved to be short lived. Just before leaving office, Hoover vetoed a bill requiring that a Joint Committee of Congress approve all refunds in excess of \$20,000 as an improper infringement of the president's power to execute the laws.⁴⁰⁹ As the opinion authored by Attorney General William D. Mitchell that Hoover attached to his veto message intoned, "The Constitution of the United States divides the functions of the Government into three great departments--the legislative, the executive, and the judicial--and establishes the principle that they shall be kept separate, and that neither the legislative, executive, nor judicial branch may exercise functions belonging to the others."⁴¹⁰ The legislative veto provision contained in this legislation, however, "violates this constitutional principle" by "attempt[ing] to entrust to members of the legislative branch, acting ex officio, executive functions in the execution of the law."⁴¹¹ Anticipating the bicameralism requirement acknowledged in *INS v. Chadha*,⁴¹² Mitchell alternatively argued that that even if the approval of tax refunds were regarded as a legislative function, "the proviso in this bill is equally obnoxious

1929 PUB. PAPERS 404, 432; Herbert Hoover, Special Message to the Congress on the Reorganization of the Executive Branch (Feb. 17, 1932), in 1932-33 PUB. PAPERS 56, 58.

⁴⁰⁷ § 407, 47 Stat. at 414.

⁴⁰⁸ 76 CONG. REC. 2125-26 (1933). See generally FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 260, at 136; FISHER, *supra* note 306, at 125, 130; LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 123-25 (1992); KARL, *supra* note 294, at 190; MORGAN, *supra* note 294, at 184; Karl, *supra* note 294, at 3.

⁴⁰⁹ Herbert Hoover, Veto of a Bill to Supply Deficiency and Supplemental Appropriations (Jan. 24, 1933), in 1932-33 PUB. PAPERS 968, 969.

⁴¹⁰ 37 Op. Att'y Gen. 56, 58 (1933).

⁴¹¹ *Id.*

⁴¹² 462 U.S. 919 (1983).

to the Constitution because a joint committee has not power to legislate, and legislative power can not be delegated to it.”⁴¹³ Mitchell extended this reasoning to criticize the one-house legislative veto contained in the Economy Act of 1932, charging that “[t]he attempt to give to either House of Congress, by action which is not legislation, power to disapprove administrative acts, raises a grave question as to the validity” of that provision as well.⁴¹⁴ Although this one legislative veto provision “may not be important itself,” Mitchell recognized that “the principle at stake [was] vital,”⁴¹⁵ because “[t]o acquiesce in legislation having a tendency to encroach upon the executive authority in establishing dangerous precedents.”⁴¹⁶ No president since Washington had acquiesced in such encroachments, Mitchell noted, and Hoover would not be the first.⁴¹⁷

Congress apparently acceded to these concerns. When it reenacted the president’s reorganization authority during the closing days of the Hoover Administration, Congress again authorized the president to transfer or abolish any executive agency or independent agency, prohibiting only the complete abolishment of a department. In so doing, it discarded the legislative veto provided by the 1932 Act, substituting the less restrictive requirement that the reorganization orders lie before Congress for sixty days before they became active.⁴¹⁸

In addition, Hoover faced the same issue with the faithful execution of the laws and Prohibition faced by his predecessors. By 1931, it appeared there had been a complete

⁴¹³ 37 Op. Att’y Gen. at 58.

⁴¹⁴ *Id.* at 63-64.

⁴¹⁵ *Id.* at 65.

⁴¹⁶ *Id.* at 64.

⁴¹⁷ *Id.* at 61-65 (noting examples in which Presidents Washington, John Adams, Jefferson, Madison, John Quincy Adams, Jackson, Buchanan, Grant, Hayes, and Wilson had resisted congressional encroachments upon the executive power and citing the other examples found in Warren, *supra* note 291). See generally Ginnane, *supra* note 288, at 600-01; H. Lee Watson, Comment, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983, 1014-15 (1975).

⁴¹⁸ Treasury and Post Office Appropriations Act, ch. 210, § 16, 47 Stat. 1489, 1517-19 (1933). Presumably, such an order could only be overridden by formal legislation, passed by both houses and either signed by the President over passed over his veto. See generally FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 260, at 137; FISHER, *supra* note 306, at 130; FISHER & DEVINS, *supra* note 408, at 125, 132; MORGAN, *supra* note 294, at 185; Karl, *supra* note 294, at 3.

breakdown in the enforcement of Prohibition by both the federal government and the states.⁴¹⁹ In stark contrast to Harding and Coolidge, Hoover met this challenge by dutifully attempting to enforce the law. Fausold observes:

The president dealt conscientiously with the issue of prohibition. He increased the number of federal enforcement personnel and upgraded their qualifications. He transferred the federal supervision of prohibition from the Treasury to the Justice Department. He implored states to assume proper concurrent enforcement responsibility. Most important, however, was the president's appointing the Wickersham Commission of distinguished Americans to critically consider . . . the more effective organization of our agencies of investigation and prosecution.⁴²⁰

One major question is why Hoover chose to stick with support of Prohibition even when he knew it was not working. Fausold reports:

Hoover's explanation of his commitment to prohibition, even as it failed during his administration, was *his constitutional responsibility as president*. The great lawyer Elihu Root told him the president's mere suggestion of repeal would undermine the enforcement of the amendment in those places where it had been successful. More important, the Constitution provided no role for the president in the amendment process.⁴²¹

Other factors in Hoover's retention of Prohibition were undoubtedly political motivations, his austere Quaker background, and the fact that prohibition for Hoover was a social ordering device with a noble motive that appealed to the president's conservative temperament.⁴²²

Thus, it was Hoover's fate that he would only "fan the fires of the prohibition debate among Republicans by standing firm on the enforcement of the amendment, even when most Republicans and the vast majority of Americans favored its drastic revision, if not its repeal."⁴²³

Regardless of the political advisability of his position, there can be no doubts as to the faithfulness with which Hoover faithfully executed the laws on Prohibition.

⁴¹⁹ FAUSOLD, *supra* note 393, at 125.

⁴²⁰ *Id.* at 125-26.

⁴²¹ *Id.* at 126.

⁴²² *Id.* at 127-29

⁴²³ *Id.* at 195.

Finally, just as the Monroe and Roosevelt Administrations invoked “the executive Power” to formulate U.S. foreign policy, so too did the Hoover Administration become known for the Stimson Doctrine, named after Hoover’s eminent Secretary of State, Henry L. Stimson, which was directed at the ongoing conflict between China and Japan. The Doctrine announced that the United States would not recognize any treaty that inconsistent with any existing treaties, such as the Kellogg and Nine Power pacts.⁴²⁴ Vigorous presidential direction of foreign affairs represents another confirmation of Hoover’s willingness to assert his authority over the execution of federal law.

In retrospect, it is clear that Hoover believed in a hierarchical administrative structure for the executive branch with the president at the top. He had opposed independent agencies prior to becoming president, and in his actions as president he asserted control over the whole of the executive branch. He appears to have prevailed in his battle with Congress over the legislative veto, just as he had prevailed in his conflicts with Congress over the independent agencies and the removal power. Whenever Hoover was confronted with congressional attempts to intrude upon the unitariness of the executive branch, he offered his strong opposition. Even with respect to the nation’s ill-fated experiment with Prohibition, Hoover faithfully discharged his constitutional duty. Therefore, by the end of the Hoover Administration, no president had yet acquiesced in any encroachment upon his sole authority to execute the laws.

X. FRANKLIN DELANO ROOSEVELT

The scope of presidential power exploded during the presidency of Franklin Delano Roosevelt. One of the first critical issues facing FDR was how to deal with the crisis of the

⁴²⁴ *Id.* at 180.

Great Depression when he assumed office on March 4, 1933. What followed was a burst of activity during the first one hundred days of FDR’s administration that was the quintessence of “executive energy rapidly applied.”⁴²⁵ Roosevelt augmented his formal legislative program with weekly press conferences and regular national radio addresses, which would later become known as fireside chats.⁴²⁶ Although he offered few definitive statements on the issue, his aggressive actions to combat the Depression left little doubt that his vision of presidential power was expansive.⁴²⁷ “The hectic pace of the Hundred Days . . . left many breathless,” but it established Roosevelt’s leadership and put the presidency in the spotlight where he wanted it to be.⁴²⁸ FDR’s presidency was to demonstrate “the indispensable ingredient of political leadership.”⁴²⁹ By mobilizing the country, Roosevelt greatly augmented his power and placed presidency at center stage in national politics.

In the process, Roosevelt pioneered a revolutionary new vision of administration that rejected the vision of the Progressive movement, which idealized expert administrators who were insulated from politics.⁴³⁰ Instead, the Roosevelt envisioned a more pluralist vision of administration, in which “[t]he key to effective administration was less its expertise than its ability to connect with the public.”⁴³¹ His goal is to make administration more political, rather than less.⁴³² The primacy of politics over technocracy is evident in Roosevelt’s decision to employ a special session of Congress rather than a series of executive orders as the vehicle for

⁴²⁵ GEORGE MCJIMSEY, THE PRESIDENCY OF FRANKLIN DELANO ROOSEVELT 36 (2000).
⁴²⁶ *Id.* at 36.
⁴²⁷ PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS 9
1996).
⁴²⁸ MCJIMSEY, *supra* note 425, at 54.
⁴²⁹ *Id.* at 288.
⁴³⁰ For the classic statement of this perspective, see JAMES LANDIS, THE ADMINISTRATIVE PROCESS
(1938).
⁴³¹ MCJIMSEY, *supra* note 425, at 292.
⁴³² *See id.* at 286-87, 289-93.

implementing the first hundred days, which Professor Barry Karl, a major student of administrative history, regards as “perhaps the most crucial decision of Roosevelt’s presidency and the most characteristic.”⁴³³ Leonard D. White, whose books this series of articles have relied upon, was another one of the administrative law scholars inspired by FDR’s radically new approach to problems of public administration. Under this new vision, the ideal administrators are “permanent officials . . . who are able by the personal leadership to mediate between the technician, the politician, and the public.”⁴³⁴

The administrative structure that Roosevelt used to employ his pluralist vision was chaotic. Roosevelt often set up administrators in competition with one another in contrivances that “baffled his contemporaries and puzzled scholars, who came up with the term ‘competitive bureaucracy’ to describe his work.”⁴³⁵ FDR’s administrative systems worked well by encouraging subordinates to compete with one another to solve the problems Roosevelt had put before them. Roosevelt was something of an administrative genius, and this pluralist approach to administration, coupled with his keen eye for picking able subordinates, allowed FDR to get a great deal done. At the same time, the open structure of the administration allowed FDR to keep “the power of decision for himself. One searches the record of Roosevelt’s presidency in vain to find a major issue that ‘got away’ from him. The failures of his presidency resulted from bad judgment, not inattention.”⁴³⁶ Roosevelt’s biographer, George McJimsey, reports, “Even by the end of his second term, there had developed a kind of celebration of executive leadership and government by administration” such that “[b]ureaucracy seemed the wave of the future” and the

⁴³³ BARRY D. KARL, *THE UNEASY STATE: THE UNITED STATES FROM 1915 TO 1945*, at 232 (1983), cited in MCJIMSEY, *supra* note 425, at 286.

⁴³⁴ LEONARD D. WHITE, *INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION* 17 (1939), cited in MCJIMSEY, *supra* note 425, at 291.

⁴³⁵ MCJIMSEY, *supra* note 425, at 122; *accord id.* at 286-87.

⁴³⁶ *Id.* at 287.

task of the president “was to employ pluralistic methods to make bureaucracy the instrument of democracy.”⁴³⁷ In the end, however, Roosevelt was never to “create a political-administrative structure that would securely and predictably achieve his vision.”⁴³⁸ FDR’s administrative style remained susceptible to all of the classic vulnerabilities and complexities of pluralism.

Mobilizing citizen constituencies often simply provided them with the opportunity to redirect government resources toward their own purposes.⁴³⁹ FDR might receive low marks for rational management and political maneuvering in administration, but he kept a steady flow of information and options that allowed him always to reserve the power of decision for himself.⁴⁴⁰

Roosevelt wasted little time in centralizing his control over the execution of the laws. During the opening months of his administration, Roosevelt issued an executive order transferring all of the government’s legal authority to the Justice Department.⁴⁴¹ As we will subsequently discuss at some length,⁴⁴² Roosevelt also transferred the Bureau of the Budget from the Treasury Department to the newly created Executive Office of the President so that it could become the president’s principal means for asserting his control over the entire executive branch. Accordingly, Roosevelt directed the Bureau to keep him informed about the various agencies’ activities, to advise the agencies on administrative organization and practice, and to review agencies’ substantive policy proposals and congressional testimony.⁴⁴³ These moves were of

⁴³⁷ *Id.* at 290-91.

⁴³⁸ *Id.* at 295.

⁴³⁹ *Id.* at 293-95.

⁴⁴⁰ *Id.* at 286-87.

⁴⁴¹ Exec. Order No. 6166 (June 10, 1933), *reprinted as amended in* 5 U.S.C.A. § 901 note (West 1996), available at http://www.archives.gov/federal_register/codification/executive_order/06166.html; see also Griffin Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1056 (1978)); 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).

⁴⁴² See *infra* note 583 and accompanying text.

⁴⁴³ Exec. Order 8248, 3 C.F.R. 576, 577 (1932-43); see also Cross, *supra* note 176, at 491 & n.44.

monumental importance in increasing presidential control over the administration of the law. Both the Bureau of the Budget and the Justice Department were to become key agencies by which the president controlled the executive branch.

Roosevelt also issued a series of Executive Orders banning racial discrimination in government procurement. As Frank Cross has observed, in so doing Roosevelt “issued a direct order to members of the executive branch regarding their administration of federal law.”⁴⁴⁴ The initial order, which required that a specific nondiscrimination provision be included in all defense contracts, was somewhat vague as to its legal basis, citing “the authority vested in [the President] by the Constitution and the statutes.”⁴⁴⁵ Although a later order allowing this provision to be incorporated by reference relied on other grounds,⁴⁴⁶ Roosevelt’s third and final nondiscrimination order, which extended the requirement to all government contracts, again invoked his authority under “the authority vested in [the President] by the Constitution and the statutes,” as well his power as Commander-in-Chief.⁴⁴⁷ As one commentator has noted, “[e]ven the most adventuresome commentators have been unable to unearth the statutes upon which President Roosevelt claimed to have based his antidiscrimination orders.”⁴⁴⁸ It thus seems clear that Roosevelt based these executive orders on the constitutional authority conferred upon him by Article II.⁴⁴⁹

⁴⁴⁴ Cross, *supra* note 176, at 492.

⁴⁴⁵ Exec. Order No. 8802, 3 C.F.R. 957, 957 (1938-43).

⁴⁴⁶ Exec. Order No. 9001, tit. II, pmb. & § 2, 3 C.F.R. 1055, 1056 (1938-43) (invoking the statutory authority conveyed by the first War Powers Act of 1941 as well as the president’s authority as the Commander-in-Chief).

⁴⁴⁷ See Exec. Order No. 9346, 3 C.F.R. 1280 (1938-43).

⁴⁴⁸ Robert P. Schuwerk, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 729 (1972).

⁴⁴⁹ See William H. Speck, *Enforcement of Nondiscrimination Requirements for Government Contract Work*, 63 COLUM. L. REV. 243, 244-49 (1963) (concluding that Executive Order No. 8802 was primarily based on the constitutional authority given to the president by the Article II Vesting Clause, bolstered by the Commander-in-Chief and Take Care Clauses); *cf.* *United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459, 466 (5th Cir. 1977) (concluding that Roosevelt issued these orders pursuant to his “war mobilization powers”); *Contractors Ass’n v.*

Roosevelt also rebuffed congressional attempts to interfere directly with the execution of the laws. On May 19, 1937, Congress passed a joint resolution to establish a commission to control the United States' participation in the 1939 New York World's Fair because it was composed of six Members of Congress and three Cabinet members. Roosevelt vetoed the legislation, citing an Attorney General opinion concluding that permitting a commission composed largely of members of Congress to appoint executive staff and to administer public expenditures constituted "an unconstitutional invasion of the province of the executive."⁴⁵⁰

Four years later, Roosevelt reacted strongly when the House Un-American Activities Committee attempted to force the President to remove three "crackpot, radical bureaucrats" it believed were unfit for continued government employment⁴⁵¹ when it attached a rider to the Urgent Deficiency Appropriation Act prohibiting the use of federal funds to pay their salaries.⁴⁵²

Secretary of Labor, 442 F.2d 159, 168-69 (3d Cir. 1971) (noting that Executive Order 8802 "contained no specific statutory reference" and also concluding that Roosevelt issued these orders pursuant to his "war mobilization powers"); Robert S. Pasley, *The Nondiscrimination Clause in Government Contracts*, 43 VA. L. REV. 837, 861-62 (1957) (supporting the constitutional foundation of the orders without specifying any particular basis); 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 Roosevelt's order was issued under his constitutional national defense power rather than under any statutory authority). *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 Roosevelt based the executive orders on the War Powers and Defense Production Acts).

⁴⁵⁰ Franklin D. Roosevelt, A Veto of a New York World's Fair Appropriation as an Invasion of the Province of the Executive (May 19, 1937), in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 206 (Samuel I. Rosenman ed., 1941) [hereinafter PUB. PAPERS OF FDR] (quoting 39 Op. Att'y Gen. 61, 62 (1937)); *see also* Ginnane, *supra* note 288, at 601-02.

⁴⁵¹ 89 CONG. REC. 474, 479, 486 (1943). The Chairman, Representative Martin Dies, had submitted a list of thirty-nine suspected subversives to Attorney General Biddle in 1941, but the Roosevelt Administration ignored it. Dies's original list was pared down to three after a series of hearings before a Special Subcommittee of the House Committee on Appropriations. H.R. REP. NO. 448, 78th Cong., 1st Sess. (1943). The House debated for two months over the propriety of using its control of appropriations to effect a removal, but in the end voted 318 to 62 in favor of the rider. 89 CONG. REC. 4605 (1943). The Senate initially objected to the rider, but finally yielded to the House's intransigence by a vote of 48 to 32. *Id.* at 7014. *See generally* John Hart Ely, *United States v. Lovett: Litigating the Separation of Powers*, 10 HARV. C.R.-C.L. L. REV. 1, 2-4 (1975).

⁴⁵² Specifically, this rider provided:

No part of any appropriation . . . shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the

Given the importance of the supplemental appropriations provided under the bill, Roosevelt had little choice but to sign the bill. Roosevelt nonetheless registered his objections in a signing statement condemning the rider as “not only unwise and discriminatory, but unconstitutional.”⁴⁵³ Since “[t]his rider is an unwarranted encroachment upon the authority of both the executive and judicial branches,” Roosevelt concluded that “[i]t is not, in my judgment binding upon them.”⁴⁵⁴ Not wanting to dignify Congress’s intrusion upon his removal power any further, Roosevelt declined to submit these officials’ names for confirmation as suggested by the rider. The disbursing officers stopped paying them, however, and within six months, all three had left government service.⁴⁵⁵ Moreover, when the three affected officials brought an action in the Court of Claims complaining, among other things, that the rider “attempts to effect legislative removal of plaintiff, and is therefore an unconstitutional encroachment on executive power,”⁴⁵⁶ Attorney General Biddle declined to defend the constitutionality of the statute, and Congress was forced to employ special counsel to argue its position.⁴⁵⁷ The Court of Claims sided with the officials, resolving the case on nonconstitutional grounds⁴⁵⁸ The suit would not ultimately be resolved until the Truman Administration, when the Supreme Court issued its decision in *United States v. Lovett*.⁴⁵⁹ The prolonged nature of the proceedings should not obscure the fact that the

President, by and with the advice and consent of the Senate.

Urgent Deficiency Appropriation Act, ch. 218, § 304, 57 Stat. 431, 450 (1943).

⁴⁵³ Franklin D. Roosevelt, Statement of the President Condemning Rider Prohibiting Federal Employment of three Named Individuals (Sept. 14, 1943), in 12 PUB. PAPERS OF FDR, *supra* note 450, at 385, 386.

⁴⁵⁴ *Id.*

⁴⁵⁵ Ely, *supra* note 451, at 4.

⁴⁵⁶ *Id.* at 16 (citing Record at 5-6, 19-11, 15-16, *United States v. Lovett*, 328 U.S. 303 (1946)). The damages they suffered being almost insignificant, they were primarily interested in clearing their own names. *Id.* at 5, 8.

⁴⁵⁷ H.R. REP. NO. 1117, 78th Cong., 2d Sess. 3-4 (1943); *see also* Ely, *supra* note 451, 10-11.

⁴⁵⁸ *United States v. Lovett*, 66 F. Supp. 142, 146 (Ct. Cl. 1945), *aff’d*, 328 U.S. 303 (1946).

⁴⁵⁹ 328 U.S. 303 (1946).

Roosevelt Administration strongly defended the president's power to remove throughout the litigation.⁴⁶⁰

Roosevelt also asserted his control over the independent agencies as well as the executive departments. Despite the fact that the Water Power Act clearly provided that after the President designated the first Chairman of the FPC, the Commission would select its own chairman, Roosevelt successfully pressured George Otis Smith into resigning and designated Frank R. McNinch as his successor in order to make the FPC fully responsive to his policies.⁴⁶¹ Roosevelt further dominated the FPC when he instructed it to cooperate with other branches the executive department.⁴⁶² Moreover, just as Congress did not include any restrictions on the presidential removals when it created the FPC in 1927, it also failed to include any such restrictions when it created the Securities and Exchange Commission⁴⁶³ and the Federal Communications Commission.⁴⁶⁴ Apparently, in the aftermath of the Supreme Court's decision in *Myers*, Congress did not believe that such restrictions were worth the effort.

Franklin Roosevelt's most important assertion of control over an independent agency came with his attempted removal of the by-now notorious, right-wing FTC Chairman, William E. Humphrey. Humphrey refused several requests from Roosevelt that he resign. As FDR said in the final such request, "You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and frankly, I think it is best for the people of this country that I should have a full

⁴⁶⁰ Moreover, the constitutional issues would arise again when the Supreme Court reviewed the Court of Claims's decision during the Truman Administration. See Christopher S. Yoo & Steven G. Calabresi, *The Unitary Executive in the Modern Era, 1945-2003* (unpublished work in progress on file with the authors).

⁴⁶¹ CUSHMAN, *supra* note 178, at 295-96, 682; DOYLE, *supra* note 322, at 18. Thus ended the tenure of the official whom Hoover had so staunchly defended during the Senate's attempt to reconsider his confirmation. See *supra* notes 397-398 and accompanying text.

⁴⁶² CUSHMAN, *supra* note 178, at 686.

⁴⁶³ Securities Exchange Act of 1934, ch. 404, § 4, 48 Stat. 881, 885.

⁴⁶⁴ Communications Act of 1934, ch. 652, § 4, 48 Stat. 1064, 1066-67.

confidence.”⁴⁶⁵ When Humphrey still refused Roosevelt’s request that he resign, FDR finally informed him on October 7, 1933, that “[e]ffective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission.”⁴⁶⁶ Roosevelt’s summary removal of Humphrey made clear that the Roosevelt Administration had no doubts as to the president’s power to remove any official exercising executive authority. Evidently, Congress agreed, offering not a single word of protest to Roosevelt’s actions, and the Senate confirmed Humphrey’s replacement without incident.⁴⁶⁷

The reactionary Humphrey was not to go quietly, however. Humphrey sued for his salary, and his law suit was litigated after his death by his executor, Samuel F. Rathbun, all the way up to the Supreme Court. The Roosevelt Administration briefed and argued *Humphrey’s Executor*, taking a very strong pro-unitary executive line. Relying heavily the Supreme Court’s sweeping opinion in *Myers*, the Roosevelt Administration’s Supreme Court brief argued that the restrictions on the removal power in the FTC Act constituted “a substantial interference with the constitutional duty of the President to ‘take care that the laws be faithfully executed.’”⁴⁶⁸

The administration reinforced its basic points in its oral arguments. First, the administration argued the case was directly controlled by *Shurtleff v. United States*. The administration noted that the removal provisions of the FTC Act were identical to the removal provisions held in *Shurtleff* not to impose any restrictions on the president’s power to remove. The cases were claimed to be almost exactly alike.⁴⁶⁹

⁴⁶⁵ Letter from Franklin D. Roosevelt to William Humphrey (Aug. 31, 1933), *reprinted in Humphrey’s Ex’r*, 295 U.S. at 619.

⁴⁶⁶ Letter from Franklin D. Roosevelt to William Humphrey (Oct. 7, 1933), *reprinted in Humphrey’s Ex’r*, 295 U.S. at 619.

⁴⁶⁷ See CUSHMAN, *supra* note 178, at 226, 682; DOYLE, *supra* note 322, at 18

⁴⁶⁸ Brief for the United States at 23, *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (No. 667).

⁴⁶⁹ 295 U.S. at _ (argument of Solicitor General Reed).

The administration bolstered its argument by noting that in 1908, five years after *Shurtleff* was decided, Congress had amended the statute at issue in *Shurtleff* so that it would clearly state that general appraisers could be removed for “inefficiency, neglect of duty, or malfeasance in office *and no other cause*.”⁴⁷⁰ Congress had extended similar protection to six other minor offices.⁴⁷¹ These amendments provided the clear statement that *Shurtleff* held necessary before a statute would be construed as limiting the removal power. The failure to include the words “and no other cause” in the FTC Act meant that under *Shurtleff*, the FTC Act should not be construed as interfering with the president’s generalized power of removal. The administration relied here upon the following statement of Chief Justice Taft in *Myers*:

Since the provision for an Interstate Commerce Commission, in 1887, many administrative boards have been created whose members are appointed by the president, by and with the advice and consent of the Senate, and in the statutes creating them have been provisions for the removal of the members for specified causes. Such provisions are claimed to be inconsistent with the independent power of removal by the President. This, however, is shown to be unfounded by the case of *Shurtleff v. United States*, 189 U.S. 311 (1903). . . . This is an indication that many of the statutes cited are to be reconciled to the unrestricted power of the President to remove, if he chooses to exercise his power.⁴⁷²

The administration was thus on strong ground in contending that, under the construction given in *Shurtleff* to statutory language identical to that contained in the FTC Act, Federal Trade Commissioners could be removed at will.⁴⁷³

The administration’s second argument in its brief and oral argument was that if the FTC Act were read as restricting Roosevelt’s authority to dismiss Humphrey, then the Act was

⁴⁷⁰ *Id.* at 612.

⁴⁷¹ *Id.* at __ (noting Congress’s attempt to give statutory removal protection to members of the Commissioner of Mediation and Conciliation, the Board of Tax Appeals, the Railroad Labor Board, the United States Coal Commission, the Board of Mediation, and the National Mediation Board).

⁴⁷² 272 U.S. at 171-72.

⁴⁷³ Brief of the United States in Humphrey’s Executor; Argument of Solicitor General Reed in Humphrey’s Executor, *reprinted in* 295 U.S. 612-618.

unconstitutional under *Myers v. United States*. This was a relatively straight forward application of *Myers*, a mere nine years after that great case had been decided.

Astonishingly, the Supreme Court ruled unanimously against the Roosevelt Administration in a fourteen-page opinion that confined *Myers* to purely executive agencies, of which the Court said the FTC was not one.⁴⁷⁴ Justice Sutherland, writing for the Court, distinguished *Shurtleff* by noting that the statute at issue in that case did not provide for a specific term of years for general appraisers. The Court's decision holding that general appraisers were removable at will was thus driven by the fear that had the Court decided otherwise, general appraisers would enjoy what amounted to life tenure. Such concerns would not arise, however, with respect to the FTC Act, which combined a provision stating that an official could only be removed for cause with a provision limiting that official's term of office to a specified term of years. When that was the case, the Court deemed it more appropriate to presume that the relevant officials were entitled to hold their offices for the entire statutory term unless they were removed for cause.⁴⁷⁵

This limitation of *Shurtleff* seems highly suspect. It is especially strained as an interpretation of congressional intent underlying FTC Act, since when that act was enacted in 1914, the 1903 decision in *Shurtleff* suggested that the mere presence alone of for-cause removal provisions did not deprive the president of his general power to remove at will.

The second part of *Humphrey's Executor*, distinguishing *Myers v. United States*, was even more remarkable. Here the Court distinguished *Myers* as applying only to purely executive branch offices life that of a first-class postmaster. The FTC, according to Justice Sutherland, was not a purely executive entity, because it also exercised quasi-legislative and quasi-judicial

⁴⁷⁴ *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).
⁴⁷⁵ *Id.* at _.

functions. Such entities could be insulated according to the Court from presidential exercises of the removal power, and the Court promised in future cases to explain which entities were purely executive and governed by *Myers* and which were quasi-legislative and quasi-judicial and governed by *Humphrey's Executor*.⁴⁷⁶

All in all, *Humphrey's Executor* was a shocking and poorly reasoned repudiation of the decision nine years earlier in *Myers* and thirty-two years earlier in *Shurtleff*. It seems inconceivable that either the *Myers* or *Shurtleff* Courts would have decided *Humphrey's Executor* the same way. *Humphrey's Executor* seems clearly wrong as a matter of statutory interpretation and as a matter of constitutional law. The most likely explanation is that

⁴⁷⁶ *Id.* at ___. Interestingly, the author of *Humphrey's Executor* apparently did not believe that it definitively resolved the constitutionality of the independent agencies. No friend of the independent regulatory commissions, Justice Sutherland had previously opposed the independence of the FTC on constitutional grounds while a Senator, joined in the majority in *Myers v. United States*, 272 U.S. 52 (1926), and authored the formalist opinion in *Springer v. Philippine Islands*, 277 U.S. 189 (1928). Justice Sutherland added to the confusion during the oral argument in *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139 (1936), a subsequent case involving the U.S. Shipping Board. As Robert Cushman reports:

Mr. James W. Ryan . . . was urging upon the Court the argument . . . that the United States Shipping Board could not constitutionally be put by executive order or by act of Congress *in* the executive branch. The Shipping Board, he argued was not an “executive” agency and could not be an “executive” agency because it was not *in* the executive branch of the government.

Justice Sutherland, who had been sitting back in his chair . . . leaned forward quickly when he heard this.

“Did you say that the Shipping Board was not in the executive branch of the government?” He spoke as though he did not believe he had heard correctly, and several other Justices smiled condescendingly at counsel as though he were making a farfetched proposal.

“Yes, your Honor,” Mr. Ryan replied.

“What makes you think that? Where do you find any legal basis for such a conclusion?” the Justice wished to know.

“Why, in your Honor’s opinion in the Humphrey case, this Court held that the Federal Trade Commission and similar regulatory agencies were not in the executive branch of the government. The Shipping Board fell within the same general category as the Federal Trade Commission and the Interstate Commerce Commission.” Mr. Ryan then proceeded to read certain portions of that opinion.

“What branch of the Government do you think the Shipping Board was in, if it was not in the executive branch?” the Justice wanted to know.

“In the legislative branch, your Honor.”

Justice Sutherland shook his head, as though he disagreed, and seemed to be thinking the question over as the discussion went on to other points.

CUSHMAN, *supra* note 178, at 445-48 (emphasis in original).

Humphrey's Executor represents another example of the hostility towards the Roosevelt Administration exhibited by many Supreme Court decisions of that period.

Naturally, Congress's interest in imposing removal restrictions revived after *Humphrey's Executor*. After the announcement of that decision, Congress subsequently included removal restrictions in the legislation establishing the National Labor Relations Board,⁴⁷⁷ the U.S. Maritime Commission,⁴⁷⁸ and the Civil Aeronautics Board.⁴⁷⁹ In addition, the legislation that removed the Treasury Secretary and the Comptroller of the Currency from the Federal Reserve Board imposed removal restrictions on the Federal Reserve Board for the first time.⁴⁸⁰ The enactment histories of these bills underscore the importance of the Supreme Court's decision. The initial version of the National Labor Relations Act did not include any removal restrictions, and Congress ignored the issue until after the issuance of the opinion in *Humphrey's Executor*.⁴⁸¹ The Senate specifically postponed consideration of a proposal to restore the removal restrictions to the Federal Reserve Board pending the Supreme Court's resolution of the issue. In return for the loss of presidential control represented by these changes, the president gained right to designate the Governor of the Federal Reserve Board as well as the power to remove him from the Governorship at pleasure.⁴⁸² The debates regarding the Civil Aeronautics Board are perhaps the most revealing. A number of legislators, including future President Harry S. Truman, objected that executive duties could not be given to a body that was independent of presidential

⁴⁷⁷ National Labor Relations Act, ch. 372, § 3(a), 49 Stat. 449, 451 (1935) (giving members five-year terms subject to removal for "neglect of duty or malfeasance in office, but for no other cause").

⁴⁷⁸ Merchant Marine Act of 1936, ch. 858, § 201(a), 49 Stat. 1985, 1985 (giving members six-year terms subject to removal for "neglect of duty or malfeasance").

⁴⁷⁹ Civil Aeronautics Authority Act of 1938, ch. 601, § 201, 52 Stat. 973, 981 (giving members six-year terms subject to removal for "inefficiency, neglect of duty, or malfeasance in office").

⁴⁸⁰ Banking Act of 1935, ch. 614, § 203(b), 49 Stat. 684, 704 (giving board members fourteen-year terms "unless sooner removed for cause by the President").

⁴⁸¹ CUSHMAN, *supra* note 178, at 363, 366.

⁴⁸² *Id.* at 169, 174-76.

direction.⁴⁸³ Although their efforts were initially unsuccessful, they eventually prevailed when Roosevelt used his reorganization power to consolidate the Civil Aeronautics Board back into Commerce Department.⁴⁸⁴

FDR regarded his defeat in *Humphrey's Executor* as a personal affront. Even more importantly, it threatened his ability to coordinate the execution of the law.⁴⁸⁵ His subsequent conduct reveals that the decision did not alter his belief in the president's power to remove independent regulatory commissioners. In March of 1938, despite the belief of many in Congress that Tennessee Valley Authority (TVA) Act shielded Board members from presidential removal,⁴⁸⁶ Roosevelt removed Dr. Arthur E. Morgan as TVA Chairman after Morgan questioned the integrity of his fellow board members and insisted that he was answerable only to Congress. Although Roosevelt conceded that "[o]bviously the Congress has full power of investigation," Morgan's claim that he was not answerable to the president contradicted the provision of "the Constitution of the United States declar[ing] that 'the executive power shall be vested in a President of the United States.'"⁴⁸⁷ Roosevelt also relied on the Take Care Clause, contending:

It would violate my constitutional duty to take care that the laws are faithfully executed if I should leave unsupported charges hanging indefinitely over the heads of two officials who have cooperated in the difficult task of divided authority and thereby permit a recalcitrant non-cooperative officials further freedom to sabotage Government operations at a crucial time.⁴⁸⁸

⁴⁸³ See *id.* at 409-15.

⁴⁸⁴ Reorganization Plan No. 4 of 1940, 3 C.F.R. 1301, 1302-03 (1938-1943 compilation).

⁴⁸⁵ See WILLIAM E. LEUCHTENBERG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 78-81 (1995); REXFORD G. TUGWELL, *THE DEMOCRATIC ROOSEVELT* 392 & n.6 (1957).

⁴⁸⁶ See, e.g., 83 CONG. REC. 4196 (1938) (statement of Sen. Johnson of California); see also Edward S. Corwin, *The President as Administrative Chief*, 1 J. POL. 17 (1939), reprinted in *PRESIDENTIAL POWER AND THE CONSTITUTION* 72, 107 (Richard Loss ed., 1976).

⁴⁸⁷ Franklin D. Roosevelt, *The President Transmits to the Congress the Record of the Removal of the Chairman of the Tennessee Valley Authority* (Mar. 23, 1938), in 7 *PUB. PAPERS OF FDR*, *supra* note 450, at 162-63.

⁴⁸⁸ *Id.*; see also *id.* at 151-52 ("I cannot . . . abdicate my constitutional duty to take care that the laws be faithfully executed."); *id.* at 153 ("Under the Constitution of the United States, the Chief Executive is directly charged to 'take care that the laws be faithfully executed.'"); *id.* at 156 ("As Chief Executive constitutionally

Roosevelt also drew support from an Attorney General opinion concluding that Morgan could be removed under *Myers* and *Humphrey's Executor* because TVA was neither quasi-legislative nor quasi-judicial and because the TVA Act did not disclose any congressional intent to restrict the removal of TVA board members.⁴⁸⁹ Therefore, Roosevelt consistently asserted his constitutional authority to control the independent agencies and remove their members even in the face of judicial authority to the contrary. This time, however, the courts would uphold Roosevelt's actions.⁴⁹⁰

The Roosevelt Administration also bore witness to the enactment of the Veterans' Preference Act of 1944,⁴⁹¹ which provided veterans with preferred access to federal employment. It also provided for expanded procedural safeguards with respect to removal, requiring that removals be made in writing with a chance for employee reply and giving veterans the right to appeal adverse actions to the Civil Service Commission.⁴⁹² Although some have suggested that the Act provided the impetus for more searching judicial scrutiny of the substance of the removal decision,⁴⁹³ such a conclusion is belied by the fact that the Act employed the same standard for

responsible for the faithful execution of the Tennessee Valley Authority Act, I could not ignore charges of dishonesty, bad faith and conspiracy in administration.”)

⁴⁸⁹ *Id.* at 151 (citing 39 Op. Att’y Gen. 145 (1938)). See generally FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 260, at 67-69; 2 HAYNES, *supra* note 237, at 833-35; Fisher, *supra* note 291, at 67.

⁴⁹⁰ The courts upheld Roosevelt's removal of Morgan on the grounds that the TVA Act did not limit removals of Board members to specified causes. *Morgan v. TVA*, 28 F. Supp. 732 (E.D. Tenn. 1939), *aff'd*, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941). The TVA Act provided that any Board member “found by the President of the United States” to have applied a “political test or qualification” or otherwise have made “appointments and promotions . . . on the basis” of any other criteria except “merit and efficiency” “shall be removed from office by the President of the United States.” Tennessee Valley Authority Act, ch. 32, § 6, 48 Stat. 58, 63 (1933) (codified at 16 U.S.C. § 831e). The courts held that this language did not indicate with sufficient clarity that Congress intended to limit the President's power of removal to that specified cause. 28 F. Supp. at 736-37 (citing *Shurtleff*); 115 F.2d at 992-93 (same). Subsequent judicial and executive authority has reaffirmed this holding. See *TVA v. Kizer*, 142 F.2d 833, 837 (6th Cir. 1944); Dwight D. Eisenhower, Statement by the President Upon Signing a Bill Amending the Tennessee Valley Authority Act (Aug. 6, 1959), in 1959 PUB. PAPERS 566; 11 Op. Off. Legal Counsel 90 (1987).

⁴⁹¹ ch. 359, 58 Stat. 387.

⁴⁹² § 14, 58 Stat. at 390-91.

⁴⁹³ See Frug, *supra* note 103, at 976, 982; Kathleen V. Buffon, Comment, Removal for *Cause from the Civil Service; The Problem of Disproportionate Discipline*, 28 AM. U. L. REV. 207, 224 (1979).

dismissal as the Lloyd-Lafollette Act, which was previously recognized as not limiting the substantive removal power.⁴⁹⁴ The legislative history of the Veterans' Preference Act shed no additional light on how this language should be construed and gave no indication that Congress intended to adopt a different standard.⁴⁹⁵ As a result, after the enactment of the Veterans' Preference Act, courts continued to limit their review to procedural compliance and decline to review the underlying substance.⁴⁹⁶ Courts subsequently held that insubordination represented sufficient cause under the Veterans' Preference Act to justify removal.⁴⁹⁷ Since the freedom to discharge officers who fail to carry out the president's instructions is the very essence of the removal power,⁴⁹⁸ the Veterans' Preference Act appears to be completely consistent with the unitary executive. These considerations suggest that the additional protections provided by the Act were driven by a desire to help returning veterans reintegrate into society rather than a desire to limit executive discretion over removals.⁴⁹⁹

Finally, Roosevelt intermittently resisted Congress's attempt to encroach upon the president's executive authority through the use of the legislative veto. At various points during his tenure, Roosevelt signed legislation containing legislative vetoes without entering any objections to the practice.⁵⁰⁰ However, when facing the legislative veto provision in the Lend

⁴⁹⁴ See *supra* note – and accompanying text.

⁴⁹⁵ See Merrill, *supra* note 241, at 236; Vaskov, *supra* note 241, at 459.

⁴⁹⁶ See Asher v. Forrestal, 71 F. Supp. 470, 471 (D.D.C. 1947); Culligan v. United States, 107 Ct. Cl. 222, 223 (1946). More searching review would not begin until *Gadsden v. United States*, 78 F. Supp. 126 (Ct. Cl. 1948). See Vaskov, *supra* note 241, at 445-47.

⁴⁹⁷ See DeBusk v. United States, 132 Ct. Cl. 790 (1950). See generally Annotation, *What Is a "Cause as Will Promote the Efficiency of the Service," as a Basis, under 5 U.S.C. § 7512, of Adverse Action Against a Preference Eligible Government Employee or His Disbarment for Future Appointment*, 25 A.L.R. FED. 443, 464-65 (DATE) (collecting cases holding insubordination sufficient cause for removal).

⁴⁹⁸ David P. Currie, *President Harrison and the Hatch Act*, 6 GREEN BAG 2D 7, 10 n.24 (2002).

⁴⁹⁹ See Frug, *supra* note 103, at 959.

⁵⁰⁰ For example, Roosevelt signed legislation the legislation that would eventually provide the basis for the decision in *INS v. Chadha*, 462 U.S. 919 (1983), subjecting the Attorney General's decisions to suspend deportation proceedings to a legislative veto. Alien Registration Act of 1940, ch. 439, § 20, 54 Stat. 670, 672; see also Louis Fisher, *Separation of Powers: Interpretation Outside the Courts*, 18 PEPP. L. REV. 57, 80 (1990); Louis

Lease Act,⁵⁰¹ Roosevelt entered his constitutional objections in an unpublished legal opinion entrusted to the care of Attorney General (and future Supreme Court Justice) Robert H. Jackson.⁵⁰² Roosevelt offered a more public protest when confronted with legislation requiring that all naval real estate acquisitions be submitted to the Naval Affairs Committees for approval.⁵⁰³ FDR warned that permitting such committee vetoes would “disregard principles basic to our form of government.”⁵⁰⁴ Although Roosevelt signed the bill, in his view, “[e]fficient and economical administration can be achieved only by vesting authority to carry out the laws in an independent executive and not in legislative committees. This act, in my opinion impinges deeply upon this fundamental principle of good government embodied in the Constitution.”⁵⁰⁵

Thus, while Roosevelt’s opposition to the legislative veto was not absolute, when viewed in light of his centralization of control over the executive branch, his drive to dominate the independent agencies, his defenses of the removal power, and his veto of the 1937 New York World’s Fair Commission, it becomes clear that Roosevelt offered strong enough resistance to Congress’s attempts to invade the proper province of the presidency to foreclose any inference of acquiescence. At times, such as in signing the Lend Lease Act discussed above and in the

Fisher, *The Legislative Veto: Invalidated, It Survives*, LAW & CONTEMP. PROBS., Aut. 1993, 273, 282 [hereinafter Fisher, *Legislative Veto*]; Ginnane, *supra* note 288, at 582-83.

⁵⁰¹ Ch. 11, § 3(c), 55 Stat. 31, 32 (1941).

⁵⁰² Franklin D. Roosevelt, Memorandum for the Attorney General (Apr. 7, 1941), *reprinted in* Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1357-59 (1953) (objecting to the legislative veto as a violation of U.S. CONST. art. I, § 7); *see also* FISHER & DEVINS, *supra* note 408, at 125, 134-35; Fisher, *Legislative Veto*, *supra* note 500, at 281-82; Watson, *supra* note 417, at 1015-16. Roosevelt’s rejection of the legislative veto represents a particularly strong defense of the unitary executive in that in issuing this opinion he apparently overruled the position taken by his Attorney General. *See* Douglas W. Kmiec, *OLC’s Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 348 (1993) (citing DOUGLAS W. KMEIC, THE ATTORNEY GENERAL’S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT 53-57 (1992)); Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 B.Y.U. L. REV. 17, 28 n.24; Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 449 n.23 (1993).

⁵⁰³ Act of Jan. 28, 1944, ch. 5, § 1, 58 Stat. 7, 8; Act of Apr. 4, 1944, ch. 165, § 1, 58 Stat. 189, 190; *see also* Fisher, *Legislative Veto*, *supra* note 500, at 282; Ginnane, *supra* note 288, at 602-03.

⁵⁰⁴ *See* 90 CONG. REC. 6154 (1944) (quoting N.Y. TIMES, June 18, 1944), *cited in* Watson, *supra* note 417, at 1018-19.

⁵⁰⁵ *Id.* For a discussion of Roosevelt’s eventual assent to the use of a legislative veto in the Reorganization Act of 1939, *see infra* note 581 and accompanying text.

debates surrounding the Reorganization Act of 1939 discussed below, political necessity forced Roosevelt to blunt the force of his constitutional objections. Nonetheless, such practical concessions do not properly form the basis for inferring presidential capitulation to deviations from the unitary executive for the purposes of coordinate construction.

Equally important is the manner in which Roosevelt transformed the presidency as an institution. FDR was the quintessential activist president, and the American people were forever after to view of the presidency in a different light. Although later presidents would expand presidential authority still further, as McJimsey notes, “Roosevelt started the momentum.”⁵⁰⁶ Indeed, his views on presidential power became even more expansive following the onset of World War II. Roosevelt followed Lincoln’s example and adopted a prerogative theory of the Presidency in which the President could act without specific authorizing legislation during times of emergency.⁵⁰⁷

XI. THE BROWNLOW COMMITTEE AND THE REORGANIZATION ACT OF 1939

The event during the Roosevelt Administration with the greatest significance for the unitary executive was the debate over the Brownlow Committee’s proposal to reorganize the executive branch, which, as Elena Kagan has pointed out, “established the infrastructure underlying all subsequent attempts by the White House to supervise administrative policy.”⁵⁰⁸ When Roosevelt announced his intention to reorganize the executive branch in January of 1937, few expected that he would face significant opposition. Politically, Roosevelt seemed almost invincible. His recent electoral college landslide appeared to be a ringing endorsement of both

⁵⁰⁶ MCJIMSEY, *supra* note 425, at 296.

⁵⁰⁷ Franklin D. Roosevelt, [Message to Congress] (__, 1942), in 11 PUB. PAPERS OF FDR, *supra* note 450, at __; *see also* Cross, *Executive Orders 12,291 and 12,498*, *supra* note 176, at 491.

⁵⁰⁸ Kagan, *supra* note 29, at 2275.

his leadership and his New Deal policies.⁵⁰⁹ By 1937, the need for executive reorganization was also apparent. The explosion of agencies spawned by the New Deal, driven in large part by Roosevelt's own improvisational style of management, had made an already unwieldy executive branch virtually unmanageable.⁵¹⁰

Despite his desire to make broader use of his reorganization authority under the 1933 Act during his first term, concerns about the economy made it impossible for him to focus his attention on the task. Consequently, Roosevelt was only able to use the power sparingly before it expired on March 3, 1935, submitting only twenty-seven reorganization orders consolidating a number of agencies.⁵¹¹ This relative inattention did not reflect lack of interest. Roosevelt feared that the bureaucrats were combining with key members of Congress to pursue their own ambitions by catering to special interest groups to the detriment of national policy.⁵¹²

In order to address these concerns, Roosevelt created a Committee on Administrative Management, commonly known as the Brownlow Committee, to develop a new proposal to reorganize the executive branch,⁵¹³ while also encouraging both Houses of Congress to establish Select Committees on Government.⁵¹⁴ Consisting of “distinguished political scientists and public

⁵⁰⁹ See KENNETH S. DAVIS, *FDR: INTO THE STORM, 1937-1940*, at 3, 33, 213 (1993); KARL, *supra* note 294, at 247-49; KARL, *supra* note 433, at 132-33, 156; WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932-1940*, at 195-96 (1963); Ellis W. Hawley, *The New Deal State and the Anti-Bureaucratic Tradition*, in *THE NEW DEAL AND ITS LEGACY* 77, 87-88 (Robert Eden ed., 1989); Barry D. Karl, *Constitution and Central Planning: The Third New Deal Revisited*, 1988 SUP. CT. REV. 163, 186; Karl, *supra* note 294, at 26.

⁵¹⁰ S. REP. NO. 1236, *supra* note 293, at 4-6; DAVIS, *supra* note 509, at 19-20; FISHER, *supra* note 306, at 156; KARL, *supra* note 294, at 182-83; Karl, *supra* note 294, at 10.

⁵¹¹ S. REP. NO. 1236, *supra* note 293, at 7; FISHER, *supra* note 306, at 131.

⁵¹² DAVIS, *supra* note 509, at 20; KARL, *supra* note 294, at 195-99; *see also* Karl, *supra* note 294, at 30, 32.

⁵¹³ Franklin D. Roosevelt, White House Statement on the Appointment of a Committee to Formulate a Plan for the Reorganization of the Executive Branch of the Government (Mar. 22, 1936), in 5 PUB. PAPERS OF FDR, *supra* note 450, at 144; *see also* 3 GOLDSMITH, *supra* note 260, at 1496-99; KARL, *supra* note 294, at 204-09; T.H. WATKINS, *RIGHTEOUS PILGRIM* 556 (1990); Karl, *supra* note 509, at 182-83.

⁵¹⁴ Franklin D. Roosevelt, Letters to the Vice President and the Speaker of the House in Reference to the Foregoing Plan (Mar. 22, 1936), in 5 PUB. PAPERS OF FDR, *supra* note 450 at 145; *see also* MORGAN, *supra* note 294, at 185.

administrators,⁵¹⁵ the Brownlow Committee commenced its work in 1936. After nearly a year of intensive analysis and the active input of Roosevelt,⁵¹⁶ the Brownlow Committee issued its recommendations on January 8, 1937.⁵¹⁷

Laying out a vision aptly described as “Jacksonian,”⁵¹⁸ the Report, in the words of one commentator, sounded “a clarion call for exclusive presidential control of government reorganization.”⁵¹⁹ As the Report observed

It was . . . not by accident but by deliberate design that the founding fathers set the American Executive in the Constitution on a solid foundation. Sad experience under the Articles of Confederation, with an almost headless Government and committee management, had brought the American Republic to the edge of ruin. . . . Consequently, there was grim purpose in resolutely providing for a Presidency which was to be a national office. *The President is indeed the one and only national officer representative of the entire nation.* There was hesitation on the part of some timid souls in providing the President with [the powers enumerated in the Constitution]. . . . But this reluctance was overcome in the face of need and a democratic executive established.⁵²⁰

Only by adhering to this vision of “a responsible and effective chief executive as the center of energy, direction, and administrative management” could the benefits of a strong and

⁵¹⁵ MCJIMSEY, *supra* note 425, at 172.

⁵¹⁶ DAVIS, *supra* note 509, at 27; KARL, *supra* note 294, at 206-12, 244-46; Karl, *supra* note 509, at 184.

⁵¹⁷ PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES (1937) [hereinafter BROWNLOW REPORT].

⁵¹⁸ EDWARD S. CORWIN, THE PRESIDENT 111 (Randall W. Bland et al. eds., 1984); *see also* Corwin, *supra* note 486, at 89; John A. Rohr, *Constitutional Legitimacy and the Administrative State: A Reading of the Brownlow Commission Report*, in THE NEW DEAL AND ITS LEGACY, *supra* note 509, at 93, 97. It is interesting to note that a contemporary pamphleteer compared Roosevelt and Jackson and found them to be largely similar. *See* CASIMIR W. RUSKOWSKI, IS ROOSEVELT AN ANDREW JACKSON? (1939).

⁵¹⁹ Rohr, *supra* note 518, at 94.

⁵²⁰ BROWNLOW REPORT, *supra* note 517, at 1 (emphasis added). The Report elaborated:

As an instrument for carrying the judgment and will of the people of a nation, the American Executive occupies an enviable position among the executives of the states of the world, combining as it does the elements of popular control and the means for vigorous action and leadership--uniting stability and flexibility. The American Executive as an institution stands across the path of those who mistakenly assert that democracy must fail because it can neither decide promptly nor act vigorously.

Id. at 2. So constituted, the Brownlow Committee stated, “the American Executive must be regarded as one of the very greatest contributions made by our Nation to the development of modern democracy.” *Id.*

vigorous president be preserved.⁵²¹ As McJimsey notes, “The plan was designed for a ‘strong’ president who could master political situations but would need strong management tools to follow through.”⁵²²

Four of the Report’s various recommendations had particularly strong implications for the unitariness of the executive branch. First, the Report recommended that the White House staff and the Bureau of the Budget be expanded so that they may provide better coordination of the execution of the laws.⁵²³ In particular, the Report envisioned that the Bureau of the Budget could serve as a central clearing house for all administrative policies, departmental regulations, and legislative proposals.⁵²⁴

Second, the Report recommended that the independent agencies be integrated into the executive departments. The independent agencies, the Report concluded, were inconsistent with the principle of the separation of powers. In particular, the Article II Vesting Clause, in conjunction with the Take Care Clause and the other sections of the Constitution, “places in the President, and in the President alone, the whole executive power of the Government of the United States.”⁵²⁵ Consistent with this vision, the early practice was to place all executive officials in departments, all of which were “directly under the President in accordance with the constitutional principle of separation of powers.”⁵²⁶ Independent agencies, however, possessed wide power to execute the laws without being subject to executive or even legislative supervision, effectively impairing “the responsibility of the President for ‘the executive

⁵²¹ *Id.* at 2. In fact, the Brownlow Committee defined its purpose as investigating and reporting on “the organization of the duties imposed upon the President in exercising the executive power vested in him by the Constitution of the United States” so that the President could better fulfill his role as “Chief Executive and administrator within the Federal system and service.” *Id.*

⁵²² MCJIMSEY, *supra* note 425, at 182.

⁵²³ BROWNLOW REPORT, *supra* note 517, at 5-6, 16-20.

⁵²⁴ *Id.* at 19.

⁵²⁵ *Id.* at 29.

⁵²⁶ *Id.*

Power.”⁵²⁷ As such, they had become “a headless ‘fourth branch’ of government, a haphazard deposit of irresponsible agencies and uncoordinated powers” that did “violence to the basic theory of the American Constitution that there should be three major branches of the Government.”⁵²⁸

The problems posed by the independent agencies were more than just theoretical: “Not only by constitutional theory, but by the steady and mounting insistence of public opinion, the President is held responsible for the wise and efficient management of the Executive Branch of the Government. The people look to him for leadership.”⁵²⁹ However, independent agencies were increasingly “vested with duties of administration and policy determination with respect to which they ought to be clearly and effectively responsible to the President.”⁵³⁰ Therefore, the

⁵²⁷ *Id.* The Report further complained that independent agencies

leave the President with responsibility without power. Placed by the Constitution at the head of a unified and centralized Executive Branch, and charged with the duty to see that the laws are faithfully executed, he must detour around powerful administrative agencies which are in no way subject to his authority and which are, therefore, both actual and potential obstructions to his effective over-all management of national administration.

Id. at 36.

⁵²⁸ *Id.* at 36; *see also id.* at 29, 46 (also referring to independent agencies as a “headless ‘fourth branch’ of government”). The Report continued:

The multiplication of these [independent regulatory] agencies cannot fail to obstruct the effective over-all management of the Executive Branch of the Government . . . Every bit of executive and administrative authority which [independent regulatory agencies] enjoy means a relative weakening of the President, in whom, according to the Constitution, “the executive Power shall be vested.” As they grow in number his stature is bound to diminish. He will no longer in reality *the Executive*, but only one of many executives, threading his way around obstacles which he has no power to overcome.

Id. at 37.

⁵²⁹ *Id.* at 36.

⁵³⁰ *Id.* The Report elaborated:

We speak of the “independent” regulatory commissions. It would be more accurate to call them the “irresponsible” regulatory commissions, for they are areas of unaccountability. Power without responsibility has no place in a government based on the theory of democratic control, for responsibility is the people’s only weapon, their only insurance against abuse of power.

Id.

Report concluded, the government should return to the department-based organization of 1789 by incorporating all of the various independent agencies into an executive department.⁵³¹

Third, reiterating the concerns that led Wilson to veto the original Budget and Accounting Act, the Report condemned the combination of legislative and executive functions in the Comptroller General. The Committee acknowledged that “[t]o establish strict accountability of the Executive Branch for the faithful execution of the laws enacted by the Congress, there must be an independent audit of financial transactions by an independent officer reporting directly to the Congress who does not exercise any executive authority.”⁵³² Separation of powers principles nonetheless required a clear segregation of legislative and executive responsibilities:

The general theory underlying the Constitution is that the Congress shall be responsible for the determination and approval of the fiscal policies of the Nation and that the Executive shall be responsible for their faithful execution. . . . The Congress, as representative of the people, enacts the laws; the duty of executing them is placed by the Constitution on the President.⁵³³

The Comptroller General, however, was “inconsistent with Executive responsibility and efficient administration,” because many of the Comptroller General’s duties, such as the mechanics of spending appropriated money, the responsibility of making sure all expenditures are made in compliance with the applicable laws, the settlement of accounts, and the establishment of federal accounting systems, were quintessentially executive duties that should

⁵³¹ *Id.* at 31-38, 41-42. See generally CORWIN, *supra* note 518, at 111; 3 GOLDSMITH, *supra* note 260, at 1522-23; KARL, *supra* note 294, at 229, 237-42; WATKINS, *supra* note 513, at 556; Corwin, *supra* note 486, at 96; Karl, *supra* note 509, at 184-85; 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, 698 (1989). Professor Karl has called this the most important recommendation of the Report. KARL, *supra* note 433, at 157.

⁵³² BROWNLOW REPORT, *supra* note 517, at 15. As the Report further recognized, “the trust residing in the Congress does not end with the enactment of appropriation measures; its responsibility requires also that it possess suitable means with which to hold the Executive accountable for the faithful and effective execution of revenue and appropriation laws.” *Id.*

⁵³³ *Id.* at 15. In support of this conclusion, the Report quoted President Wilson’s May 13, 1920, veto message objecting to a previous congressional attempt to control federal expenditures after enactment of the relevant appropriations act. *Id.* (citing Wilson, *supra* note 286).

be exercised by an officer answerable to the president.⁵³⁴ When the Comptroller General exercises his executive authority to control expenditures, settle accounts and claims, and prescribe administrative accounting systems outside of presidential direction, “he is improperly removed from any executive direction and responsibility,” and the president was “depriv[ed] . . . of [the] essential power needed to discharge his major executive responsibility.”⁵³⁵ Therefore, “the vesting of such authority in an officer independent of direct responsibility to the President for his acts, is clearly in violation of the constitutional principle of the division of authority between the Legislative and Executive Branches of the Government.”⁵³⁶ Only by if the executive functions exercised by the Comptroller General were returned to the Treasury Department could the federal government come back into line with the unitary structure erected by the Framers.

Fourth and finally for our purposes, to accomplish all of these goals and to guard against the emergence of similar problems in the future, the Report also suggested that the president have continuing responsibility for reorganization.⁵³⁷

⁵³⁴ “The settlement of accounts and the supervision of administrative accounting systems are executive functions; under the Constitution they belong to the Executive Branch of the Government.” *Id.* at 21.

⁵³⁵ *Id.* at 20-21. The Brownlow Committee also maintained that the Comptroller General’s preaudit power violated the Take Care Clause as well:

The removal from the Executive of the final authority to determine the uses of appropriations, conditions of employment, the letting of contracts, and the control over administrative decisions, as well as the prescribing of accounting procedures and the vesting of such authority in an officer independent of direct responsibility to the President for his acts . . . is contrary to article II, section 3, of the Constitution, which provides that the President “shall take Care that the Laws be faithfully executed.”

Id. at 22.

⁵³⁶ *Id.* at 21 (citing *Springer v. Philippine Islands*, 277 U.S. 189, 202-03 (1928)). It also avoided the practical problem of permitting a public officer to audit his own accounts, financial acts, and decision, a situation inconsistent with sound management and accounting principles. *Id.* at 20. See generally FISHER, *supra* note 306, at 121; KARL, *supra* note 294, at 234-35; Karl, *supra* note 509, at 184. The Comptroller General must have sensed the threat that the Brownlow Committee posed to his position. He initially refused to acknowledge its existence and delayed disbursing funds for several weeks. See KARL, *supra* note 294, at 164-65.

⁵³⁷ The Report also recommended that the White House staff be enlarged; that the civil service be expanded cover more federal employees; that a National Resources Planning Board and Departments of Social Welfare and Public Works be created. BROWNLOW REPORT, *supra* note 517, at 5-6, 8-9, 19-20, 27, 32-36; see also

Roosevelt warmly endorsed the Report and its historic espousal of the unitariness of the executive branch in his message transmitting it to Congress on January 12, 1937, calling it “a great document of permanent importance.”⁵³⁸ Referring to himself “as one on whom . . . the constitutional responsibility for the whole of the Executive Branch of the Government has lain,”⁵³⁹ Roosevelt called on Congress to return to the structure of “the Executive Branch as it is established under the Constitution.”⁵⁴⁰

In particular, Roosevelt agreed with the Committee’s view that the independent agencies had become a “‘fourth branch’ for which there is no sanction in the Constitution”⁵⁴¹ and which had begun to “defeat the Constitutional intent that there be a single responsible Chief Executive to coordinate and manage the departments and activities in accordance with the laws enacted by Congress.”⁵⁴² Therefore, Roosevelt specifically embraced the Report’s recommendation that the independent agencies be consolidated into the executive departments.⁵⁴³

KARL, *supra* note 294, at 228-44; 3 GOLDSMITH, *supra* note 260, at 1521; WATKINS, *supra* note 513, at 556.
⁵³⁸ Franklin D. Roosevelt, A Recommendation for Legislation to Reorganize the Executive Branch of the Government (Jan. 12, 1937) [hereinafter Roosevelt, Reorganization Recommendation], in 5 PUB. PAPERS OF FDR, *supra* note 450, at 668, 670.

⁵³⁹ *Id.* at 668. His reliance on the Article II Vesting Clause became more explicit later in his message:

[T]he Presidency was established as a single, strong Chief Executive office in which was vested the entire executive power of the National Government. . . . What I am placing before you is the request not for more power, but for the tools of management and the authority to distribute the work so that the President can effectively discharge those powers which the Constitution now places upon him. Unless we are prepared to abandon this important part of the Constitution, we must equip the President with authority commensurate with his responsibilities under the Constitution.

Id. at 672-73; *see also* Karl, *supra* note 509, at 185 (noting that Roosevelt in his December 22, 1936, press conference maintained that the President was the only constitutional executive and that independent agencies might represent an unconstitutional usurpation of executive authority).

⁵⁴⁰ Roosevelt, Reorganization Recommendation, *supra* note 538, at 669.

⁵⁴¹ *Id.* at 671; *see also* Franklin D. Roosevelt, Summary of the Report of the Committee on Administrative Management Transmitted with the Preceding Message (Jan. 12, 1937), in 5 PUB. PAPERS OF FDR, *supra*, at 674, 678-79 [hereinafter Roosevelt, Reorganization Summary] (quoting Report’s conclusion that independent commissions threat to become “‘a headless fourth branch of the Government, not contemplated by the Constitution, and not responsible administratively either to the President, to the Congress, or to the Courts’”).

⁵⁴² Roosevelt, Reorganization Recommendation, *supra* note 538, at 670.

⁵⁴³ *Id.* at 670-72; *see also* Roosevelt, Reorganization Summary, *supra* note 541, at 675-76.

Roosevelt also adopted the Report's condemnation of the office of the Comptroller General as an "unconstitutional assumption of Executive power."⁵⁴⁴ As Roosevelt observed, "The Presidency was established as a single, strong Chief Executive in which was vested the entire Executive power of the national Government, even as the legislative power was placed in the Congress and the judicial in the Supreme Court and inferior courts."⁵⁴⁵ Permitting an officer who was primarily accountable to Congress to exercise part of that power was inconsistent with the Constitution.⁵⁴⁶

If Congress were to centralize the executive power in the president, Congress would not be giving the president an undue amount of power: it would do nothing more than "go[] back to the Constitution" and return to what the Framers intended.⁵⁴⁷ As Roosevelt observed

In spite of timid souls in 1787 who feared effective government the Presidency was established as a strong single Chief Executive office. . . . What I am placing before you is the request not for more power, but for the tools of management and the authority to distribute the work so that the President can effectively discharge those powers which the Constitution now places upon him.⁵⁴⁸

Therefore, Roosevelt called upon Congress to give its immediate and expeditious consideration to the Brownlow Committee's Report and even called a special session of Congress during the usual recess period between November 1937 and January 1938 so that the reorganization bill and other key pieces of legislation could receive more rapid consideration.⁵⁴⁹

⁵⁴⁴ Roosevelt, Reorganization Recommendation, *supra* note 538, at 671 (quoting the BROWNLOW REPORT, *supra* note 517, at _); *see also* Roosevelt, Reorganization Summary, *supra* note 541, at 680 (criticizing the Comptroller General for "his unconstitutional usurpation of power").

⁵⁴⁵ Roosevelt, Reorganization Recommendation, *supra* note 538, at 673.

⁵⁴⁶ *Id.* at 671-73.

⁵⁴⁷ *Id.* at 674.

⁵⁴⁸ *Id.* at 673.

⁵⁴⁹ Franklin D. Roosevelt, A "Fireside Chat" Discussing Legislation to be Recommended to the Extraordinary Session of the Congress (Oct. 12, 1937), in 6 PUB. PAPERS OF FDR, *supra* note 450, at 429, 429, 434 (1941). *See generally* DAVIS, *supra* note 509, at 35; 3 GOLDSMITH, *supra* note 260, at 1499-1500; Hawley, *supra* note 509, at 77, 87; Karl, *supra* note 509, at 185; Rohr, *supra* note 518, at 94-95.

At first the reorganization bill faced little opposition. The House acted first, passing bills providing for the additional White House staff and restoring the president's reorganization authority by wide margins.⁵⁵⁰ As Roosevelt requested, the House bill did not include a legislative veto provision, requiring only that the reorganization orders lay before Congress for sixty days.⁵⁵¹ The House bill failed to accommodate the President's request that all agencies be subject to the reorganization authority, exempting the independent agencies as well as four other agencies.⁵⁵² McJimsey notes that "conservatives disliked the proposal to do away with the office of comptroller general, which in the hands of a Republican appointee, had held up various New Deal projects."⁵⁵³

The debate began to heat up when the Senate considered all of the Brownlow Committee's recommendations as one bill.⁵⁵⁴ Coming out of committee, the Senate version, like the House version, exempted the independent agencies from the president's reorganization authority and made no provision for a legislative veto.⁵⁵⁵ Senators from various states banded together in an attempt to shield their pet programs from the president's reorganization power, but

⁵⁵⁰ For the bill providing for six additional presidential assistants, see 81 CONG. REC. 7701-02 (1937) (passing the bill 260 to 88); *see also* H.R. REP. NO. 1177, 75th Cong., 1st Sess. (1937). For the bill restoring the President's reorganization authority, see 81 CONG. REC. 8875-76 (1937). Two other related bills, H.R. 8276, 75th Cong., 1st Sess. (1937) (making the Comptroller General subject to presidential supervision while transferring his audit functions to a newly established Auditor General), and H.R. 8277, 75th Cong., 1st Sess. (1937) (broadening the civil service and replacing the Civil Service Commission with a Civil Service Administrator), were reported out of Committee, H.R. REP. 1587, 75th Cong., 1st Sess. (1937) (accompanying H.R. 8277); H.R. REP. 1606, 75th Cong., 1st Sess. (1937) (accompanying H.R. 8276), but were never debated or brought to a vote on the House floor. However, their terms were incorporated when the House debated the Senate's version of the bill.

⁵⁵¹ *See* MORGAN, *supra* note 294, at 189. A floor amendment to add a legislative veto was defeated 63 to 104. 81 CONG. REC. 8869 (1937).

⁵⁵² H.R. 8202, 75th Cong., 1st Sess. (1937). The House rejected floor amendments to add exemptions for three additional agencies. 81 CONG. REC. 8666-67 (1937) (Rural Electrification Administration) (voice vote); *id.* at 8867-68 (Forest Service) (voting 34 to 130); *id.* at 8868-69 (Civil Service Commission) (voice vote). *See generally* KARL, *supra* note 294, at 247; MORGAN, *supra* note 294.

⁵⁵³ MCGIMSEY, *supra* note 425, at 182.

⁵⁵⁴ S. 2970, 75th Cong., 1st Sess. (1937). This bill was later superseded by S. 3331, 75th Cong., 3d Sess. (1938).

⁵⁵⁵ S. REP. NO. 1236, *supra* note 293, at 8.

their efforts were unsuccessful.⁵⁵⁶ The Senate also rejected a floor amendment to reinstate the legislative veto⁵⁵⁷ before finally passing its version on March 28, 1938, by a vote of forty-nine to forty-two.⁵⁵⁸ However, a procedural blunder prevented the floor manager from substituting the House bill so that it could go to conference.⁵⁵⁹ The reorganization bill would have to pass the House a second time before if it were to have any chance of becoming law.

The closeness of the Senate vote revealed how much the political climate had changed since the House vote in 1937. Moreover, even though the economy had taken a downturn in mid 1937, the sense of emergency which prevailed in 1933 when Roosevelt was first granted the reorganization power was missing.⁵⁶⁰ The failure of several of the President's key legislative proposals, such as the Fair Labor Standards Act, revealed deep divisions in the Democratic

⁵⁵⁶ The closest call came when the Senate voted 41 to 41 and 38 to 38 to reject Senator Bennett Champ Clark's amendments to exempt the Veterans Administration and then tabled the motion to reconsider by the bare margin of 38 to 36. *Id.* at 3823-27. The Senate also voted 33 to 50 to reject Senator Key Pittman's proposed exemption of the Forest Service, *id.* at 3818, and voted 21 to 42 to reject Senator Clark's amendment to exempt the Bureau of Biological Survey, *id.* at 3844. After the failure of these amendments, Senator Clark and his supporters recognized there was little chance of attaching any additional exemptions to the bill, and he allowed his amendments to exempt the United States Employees' Compensation Commission, National Mediation Board, Railroad Retirement Board, Bureau of Animal Industry, National Park Service, United States Tariff Commission, Bureau of Reclamation, Bureau of Public Roads, Bureau of Investigation, Soil Conservation Service, Tennessee Valley Authority, Bureau of Chemistry and Soils, and Bureau of Agricultural Economics to be rejected by voice votes with virtually no debate. *Id.* at 3844-46.

⁵⁵⁷ *Id.* at 3645 (voting 39 to 43).

⁵⁵⁸ *Id.* at 4204. The closeness of the vote was surprising. Despite frenzied efforts by the Administration to ensure its passage, a number of President Roosevelt's staunchest supporters voting against the bill. See also JAMES M. BURNS, ROOSEVELT: THE LION AND THE FOX 344 (1956); DAVIS, *supra* note 509, at 213-14; LEUCHTENBURG, *supra* note 509, at 279; MORGAN, *supra* note 294, at 192.

⁵⁵⁹ The unanimous consent decree which closed debate provided that no further amendments would be allowed after 3 o'clock on March 28, 1938, and that after voting on the pending amendments, "the Senate shall proceed to vote upon the bill (S. 3331) without further debate." 83 CONG. REC. 4204 (1938). As Professor Karl noted, "Someone pulled [Senator Byrnes's] coattail to ask a question in the midst of debate and by the time his attention could be returned to the discussion, it was too late." See KARL, *supra* note 294, at 249. Although Senator Byrnes tried to call up the House bill in order to substitute the language of the Senate bill immediately after the vote, he knew he lacked the votes needed to close debate. With his political capital already drained, Senator Byrnes withdrew his motion after receiving assurances that the Senate bill would receive expedited consideration in the House. 83 CONG. REC. 4205-07 (1938).

⁵⁶⁰ BURNS, *supra* note 559, at 344; DAVIS, *supra* note 509, at 36; KARL, *supra* note 433, at 157-58; MORGAN, *supra* note 294, at 185; Hawley, *supra* note 509, at 88; Karl, *supra* note 294, at 4.

party.⁵⁶¹ But most importantly, the fight over the court packing bill wasted valuable political resources and badly damaged the FDR's prestige.⁵⁶² In short, Roosevelt had lost control of Congress.⁵⁶³ Public interest in the reorganization bill was also running sky high, fanned by the efforts of Father Charles Coughlin and Frank Gannett's Committee to Uphold Constitutional Government.⁵⁶⁴ The rise of dictatorships in Europe had made the public wary about granting broad powers to the president.⁵⁶⁵ McJimsey notes that "as with the Supreme Court reorganization plan, executive reorganization seemed to threaten the institutional balance within the government. This was just the kind of issue that could break down barriers between 'liberals' and 'conservatives.'"⁵⁶⁶ Finally, the reorganization bill's opponents were also aided by large numbers of agency bureaucrats who feared that reorganization might cost them their power bases or even their jobs.⁵⁶⁷

To make matters worse, the two gambits Roosevelt used to try to turn the tide backfired badly. First, Roosevelt offered that the reorganization bill's close victory in the Senate "proves that the Senate cannot be purchased by organized telegrams based on direct

⁵⁶¹ KARL, *supra* note 433, at 132-33; BURNS, *supra* note 559, at 344; DAVIS, *supra* note 509, at 102-04. Professor Davis also cited the failure of the farm bill and the proposal for seven regional planning authorities. *Id.* at 102-03.

⁵⁶² Many commentators have argued that it was merely bad fortune that the reorganization plan came up for a vote so soon after the failure of the court packing plan and that under different circumstances the plan would have passed easily. DAVIS, *supra* note 509, at 100; KARL, *supra* note 294, at 248;-49; LEUCHTENBURG, *supra* note 509, at 277; MORGAN, *supra* note 294, at 184-85; Rohr, *supra* note 518, at 95. Other commentators have suggested that it was no accident that executive reorganization and the court packing plan arose at the same time, arguing that both were, along with the National Resources Planning Board proposal and Roosevelt's unsuccessful attempt to influence congressional primaries, parts of a larger plan to concentrate power in the President. Hawley, *supra* note 509, at 87-88; Karl, *supra* note 509, at 186, 192. This Article need not resolve the question, because scholars on both sides of the question agree that the court packing fight all but doomed the reorganization proposal.

⁵⁶³ BURNS, *supra* note 559, at 346; DAVIS, *supra* note 509, at 104.

⁵⁶⁴ DAVIS, *supra* note 509, at 213; KARL, *supra* note 433, at 146; LEUCHTENBURG, *supra* note 509, at 279; MORGAN, *supra* note 294, at 192.

⁵⁶⁵ BURNS, *supra* note 559, at 344; KARL, *supra* note 433, at 158; LEUCHTENBURG, *supra* note 509, at 278; MORGAN, *supra* note 294, at 184-85, 192; Karl, *supra* note 294, at 4. Even if the concern about dictatorship was groundless and based on irrational fear, the public's belief in it undeniably undercut the reorganization bill. LEUCHTENBURG, *supra* note 509, at 278-79.

⁵⁶⁶ MCJIMSEY, *supra* note 425, at 183.

⁵⁶⁷ DAVIS, *supra* note 509, at 24; LEUCHTENBURG, *supra* note 509, at 278.

misrepresentations.”⁵⁶⁸ The comment impugned the integrity and sincerity of both the Senators who voted against reorganization bill and the citizens who had made their sentiments known to their representatives.⁵⁶⁹

Second, the President called a press conference at two o’clock in the morning to release a copy of a letter to an anonymous friend disavowing any intention of becoming a dictator. The letter emphasized:

A: I have no inclination to be a dictator.

B: I have none of the qualifications which would make me a successful dictator

C: I have too much historical background and too much knowledge of existing dictatorships to make me desire any form of dictatorship for a democracy like the United States of America.⁵⁷⁰

Roosevelt also took the opportunity to criticize the legislative veto. Although he acknowledged that he would go accede to Congress’s wishes “in the overwhelming majority of cases,” he still felt that the legislative veto was unconstitutional.⁵⁷¹ Reorganization orders had the force of law and as such must be repealed by conventional legislation, passed by both houses of Congress and signed by the president. Concurrent resolutions, which do not require the president’s signature, were “only an expression of Congressional sentiment. Such a resolution cannot repeal executive action taken in pursuance of a law.”⁵⁷² Unfortunately, Roosevelt’s reassurances did little to quiet the fears of the people and Congress.⁵⁷³

⁵⁶⁸ See 83 CONG. REC. 4505 (1938) (statement of Rep. Hoffman); see also MORGAN, *supra* note 294, at 192.

⁵⁶⁹ TED MORGAN, FDR 493 (1985).

⁵⁷⁰ Franklin D. Roosevelt, The President Refutes Dictatorship Charges Connected with the Pending Reorganization Bill (Mar. 29, 1938) [hereinafter Roosevelt, Dictator Letter], in 7 PUB. PAPERS OF FDR, *supra* note 450, at 179, 179; see also BURNS, *supra* note 559, at 345-46; DAVIS, *supra* note 509, at 220-21

⁵⁷¹ Roosevelt, Dictator Letter, *supra* note 570, at 181.

⁵⁷² *Id.*; see also FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 260, at 137; MORGAN, *supra* note 294, at 192.

⁵⁷³ DAVIS, *supra* note 509, at 221; BURNS, *supra* note 559, at 346.

These factors made the second House debate on the Senate bill one of the hottest debates in years.⁵⁷⁴ Representative John O'Connor, Chairman of the House Rules Committee and a staunch opponent of the bill, blocked all attempts to pass a rule to govern the debate,⁵⁷⁵ and the House leadership's attempt to close debate on the bill failed.⁵⁷⁶ Roosevelt began scrambling to avoid defeat, dropping his opposition to the legislative veto and offering exemptions to the pet agencies of key constituencies.⁵⁷⁷ Despite the Roosevelt Administration's best efforts, however, the House voted 204 to 196 to recommit the bill to committee, effectively killing it until the following year.⁵⁷⁸ Bowing to the inevitable, Roosevelt sent a message to the House leaders thanking them for "the fine fight."⁵⁷⁹

The following year, after the furor had died down, Roosevelt submitted a watered-down version of the reorganization bill. The Reorganization Act of 1939 provided for the additional White House staff recommended by the Brownlow Committee, but conceded the most contentious issues of the year before, exempting a laundry list of agencies from reorganization,⁵⁸⁰ dropping the provision abolishing the Comptroller General, and reinstating the two-house legislative veto.⁵⁸¹ Even with these changes, the administration needed to put forth extraordinary efforts to get it passed.⁵⁸²

⁵⁷⁴ MORGAN, *supra* note 569, at 493.

⁵⁷⁵ BURNS, *supra* note 559, at 345; DAVIS, *supra* note 509, at 214.

⁵⁷⁶ 83 CONG. REC. 4616 (1938) (voting 149 to 191).

⁵⁷⁷ BURNS, *supra* note 559, at 345; FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 260, at 137; FISHER, *supra* note 306, at 93; MORGAN, *supra* note 294, at 192-93.

⁵⁷⁸ 83 CONG. REC. 5123-24 (1938); *see also* FISHER, *supra* note 306, at 131-32; LEUCHTENBURG, *supra* note 509, at 279; MORGAN, *supra* note 294, at 192.

⁵⁷⁹ Franklin D. Roosevelt, A Message on the Defeat of the Reorganization Bill (Apr. 9, 1938), in 7 PUB. PAPERS OF FDR, *supra* note 450, at 206.

⁵⁸⁰ Reorganization Act of 1939, ch. 36, § 3(b), 53 Stat. 561, 561. Although exempt from reorganization, the independent agencies were brought within the President's budgetary control. § 201, 53 Stat. at 565.

⁵⁸¹ § 5, 53 Stat. at 561-62. *See generally* DAVIS, *supra* note 509, at 419-20; FISHER, *supra* note 306, at 132, 164; KARL, *supra* note 294, at 257; Karl, *supra* note 294, at 4.

⁵⁸² The Senate added a crippling amendment by a vote of 46 to 43 before Presidential promises to

Roosevelt completed the administrative reform process in September 1939 by issuing an executive order forming the Executive Office of the President, which was divided into six departments, including the Bureau of the Budget brought over from the Treasury Department.⁵⁸³ The creation of the Executive Office of the President was an important legacy of the Roosevelt Administration and one which would greatly enhance presidential control over the by-now sprawling executive branch.

The fact that the Brownlow Committee's proposal ended in compromise does nothing to change the implications of this debate for the existence of a constitutional custom regarding the unitary executive. Even though the Roosevelt eventually yielded on each of the major issues, he did begin by vigorously asserting the president's right to control all executive functions of the federal government and saw his views accepted to some extent by both the House and the Senate. Under the principles of coordinate construction, the mere fact that Roosevelt in the end bowed to political realities does not dissipate the force of his initial opposition. Particularly when viewed along with Roosevelt's other efforts to defend the unitariness of the executive branch, Roosevelt's abandonment the Brownlow Committee's initial recommendations does not represent the type of acquiescence needed to give rise to an established practice permitting congressional-imposed restrictions on the president's power to execute the laws.

CONCLUSION

Our systematic examination of the practices with respect to the unitary executive during the third half-century of our Republic thus leads to a conclusion that is quite at odds with the

Senator Dennis Chavez and an all-night flight through a snowstorm by Senator Harry S. Truman permitted it to be rejected 44 to 46 on reconsideration. See DAVIS, *supra* note 509, at 419-20; FISHER, *CONSTITUTIONAL CONFLICTS*, *supra* note 260, at 138; FISHER, *supra* note 306, at 132; MORGAN, *supra* note 294, at 194-96; WATKINS, *supra* note 513, at 587.

⁵⁸³ MCJIMSEY, *supra* note 425, at 183.

conventional wisdom. Far from supporting an established practice demonstrating that arguments in favor of the unitary executive are foreclosed as matter of history, as some scholars have suggested,⁵⁸⁴ the record shows that presidents throughout this period consistently asserted and defended the president's sole authority to execute the law. To the extent that the historical evidence supports the existence of an established practice in either direction, it would tend to favor those supporting, rather than those opposing, the unitariness of the executive branch.

The briefest review of the major events between 1889 and 1945 bearing on the unitary executive confirms this conclusion. As noted earlier, one of the signature developments of this period is the increasing reliance on the so-called independent agencies, such as the ICC, FTC, and the Federal Reserve Board. Robert Cushman's classic study of the independent regulatory commissions demonstrated how each of the presidents during this period exerted their authority over those agencies to ensure that they executed the law in accordance with administration policy.⁵⁸⁵ Our own review of the historical record confirms Cushman's conclusion. Backed by the Supreme Court's decisions in *McAllister*, *Parsons*, *Shurtleff*, and especially *Myers*, every president during this era treated these agencies in the same manner as purely executive agencies, directing their operations and removing commissioners who disagreed with the president's vision for the enforcement of the law. It was not until the Supreme Court's 1935 decision in *Humphrey's Executor* was their even a colorable claim that these commissions were in any way independent of the president. And even after *Humphrey's Executor*, FDR continued to assert his authority over the independent agencies and to remove members as he saw fit. Roosevelt further attempted to resolve the issue by pushing through the recommendations of the Brownlow committee that the independent agencies should be integrated into the executive departments,

⁵⁸⁴ See *supra* note 15 and accompanying text.

⁵⁸⁵ CUSHMAN, *supra* note 178, at 680-82, 685.

only to see that effort derailed by the change in political winds caused by the failure of FDR's court-packing plan.

Another development of this period that is often cited as precluding arguments in favor of the unitary executive is the advent of the civil service system. As we have shown, the history of civil service reform during this period is completely consistent with the unitary executive. Until 1897, the civil service laws did not even purport to place any substantive restrictions on the president's removal power, aside from prohibiting removals for refusing to contribute to political campaigns. Although subsequent executive orders and statutes provide that members of the classified service could only be removed for "cause," this requirement was consistently construed by the presidents, the Civil Service Commission, and the courts as simply reflecting the statutory requirement mentioned above and not as creating any substantive limits on the removal power. Although such limits would eventually arise, they would not appear until after this period had run its course.

In addition, it was during the years between 1889 and 1945 that Congress attempted to expand the use of the legislative veto as a means for controlling the execution of the law. As the Court explicitly recognized in *INS v. Chadha*,⁵⁸⁶ presidents during this period opposed the legislative veto with enough consistency to foreclose any suggestion that they acquiesced to this particular derogation of the unitary executive. The institution of the special prosecutor made an occasional appearance. In each instance, however, the special prosecutors were subject to presidential direction and removal.

Throughout this period, presidents also asserted their authority in other myriad ways to ensure that federal officials executed the law in accordance with their wishes. They freely

⁵⁸⁶ 462 U.S. 919, 942 n.13 (1983).

exercised the removal power and opposed efforts to lodge executive functions in officials answerable only to Congress. They widely supported executive reorganization and created the Bureau of the Budget and the Executive Office of the President to centralize control of federal spending. There can be little doubt that all of the presidents from Benjamin Harrison to Franklin Roosevelt were committed defenders of the theory of the unitary executive. Thus, contrary to what some have asserted, the historical record does not serve as a trump that obviates consideration of the broader range of constitutional arguments regarding the president's authority to execute the law.

Perhaps most importantly, the period between 1889 and 1945 saw a tremendous growth in presidential power, as strong presidents like the two Roosevelts and Wilson (and to a lesser extent Cleveland and McKinley) helped remake the institution of the presidency into the primary institution for mobilizing and implementing political will. Their administrations set the stage for the imperial presidency that would dominate modern times.