Spring 5-20-2023

The Unitary Executive Theory: Benefits and Dangers

Dani Heba
CUNY Bernard M Baruch College

The Unitary Executive Theory: Benefits and Dangers

By: Dani Heba

Table of Contents

I. Introduction

The unitary executive theory claims that the President of the United States has sole control of the executive branch. In Steven G. Calabresi and Christopher S. Yoo's "The Unitary Executive," the pair trace the theory in terms of the Vesting Clause of Article II of the U.S. Constitution[1], which reads "the executive Power shall be vested in a President of the United States of America," as giving a "grant to the president of all of the executive power, which includes the power to remove and direct all lower-level officials."[2] In their book, Calabresi and Yoo revolve their argument around the president's removal power, arguing that the president should have the power to remove all appointed officials in the Executive Branch.

Calabresi and Yoo proceed with their argument by citing in-depth examples of how each of the first 43 presidents[3] had taken action consistent with the unitary executive theory, and how they haven't acquiesced to Congress in doing so. The book offers an in-depth look at the challenges faced by presidents, including the Ethics in Government Act and the Tenure of Office Act. Calabresi and Yoo make an effort to specifically look at only the actions taken by presidents due to the fact that Congress and the courts have generally been inconsistent in their interpretations of the president's removal power, as the pair discuss in their book, while they argue that all of the presidents have been consistent in that they all have used the power in some way. This suggests that every president, regardless of party, believes in the theory.

---

[1] U.S. Constitution, Article II, Section 1.
[2] Calabresi, & Yoo, C.S. (2008). *The Unitary Executive: Presidential Power from Washington to Bush*. Yale University Press.
[3] George W. Bush, the 43rd President of the United States, was in office at the time of their book's publication. Thus, their work obviously does not touch upon the Obama, Trump and Biden presidencies, as this paper aims to do.

This work doesn't seek to disprove the president's removal power as part of the unitary executive. Calabresi and Yoo's efforts have demonstrated that the president does indeed have this power. However, Calabresi and Yoo's efforts fail to safeguard against an important exception: presidents' intepretations of the unitary executive theory, which have "far surpassed"[4] the classical unitary executive theory, in Calabresi and Yoo's own words. Although the pair seek to distance their interpretation from interpretations like George W. Bush's, who viewed the executive very broadly, the distinction does not seem to matter to presidents. As a result, unconstitutional and dangerous measures have sprung from broader interpretations, and will likely continue to occur. Contemporary reliance on such a broad interpretation of the theory has produced policies that are both negative and violate the Constitution.

In her article "Helping Ideas Have Consequences," Amanda Hollis-Brusky gives a good overview of the unitary executive theory in the modern era. She argues that as a whole, the theory gained prominence in the 1980s under President Ronald Reagan's Administration. She says that while the theory was originally used argue in the government's favor in separation of powers cases, it has been broadly expanded and has been used to justify other executive actions, including with regards to presidential signing statements. Hollis-Brusky presents statistics to support her point on the relevance of the theory. One of the most notable statistics contains the number of Executive Branch papers containing mentions of the "unitary executive." Hollis-Brusky shows that the Reagan Administration had twelve mentions of it, the George H.W. Bush Administration had thirteen, the Bill Clinton Administration had two, and the George W. Bush Administration had ninety mentions.[5] Additionally, she shows that the number of U.S. law

[4] *Id*, p. 18.
[5] Hollis-Brusky, A. (2011). Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory. 89 Denv. U.L. Rev. 197.

reviews that mentioned the "unitary executive" skyrocketed post-1984. From the span of 1981-84, only two law reviews mentioned the unitary executive, but from 1985-88, thirty-four mentioned it, ands by 1993-96, 165 mentioned it. Between 2005-08, 311 mentioned it. From the statistics, there is no denying that the unitary executive theory has gained prominence.

In the past twenty years, Article II has been interpreted especially broadly. With the evolution of the Internet and other technological breakthroughs, presidents have wasted no time claiming powers that trample on peoples' privacy, like President George W. Bush's warrantless wiretapping program. With the advent of the Internet, it has never been easier for people to communicate with each other, but it has also never been easier for the government to intercept that communication illegally. Additionally, a broad interpretation of Article II can provide a president with dangerous claims to wartime powers. One needs to look no further than the Bush presidency to see the damages a broadly construed unitary executive theory can do. Former Deputy Assistant Attorney General John Yoo declared in his now-infamous torture memos that "Congress cannot interfere with the President's exercise of his authority as Commander in Chief to control the conduct of operations during a war."[6] President Bush accepted these memos and implemented torture tactics in interrogation, demonstrating Bush and his administration's broad view of executive power. These wide-ranging alleged "executive powers" were used in justifying warrantless surveillance and signing statements that diverged from Congress's interpretations of laws passed, both of which will be touched upon in further detail later in this paper. In addition to Bush's damage to the privacy of Americans, there have been numerous instances of presidents

[6] Memorandum for William J. Haynes II, General Counsel of the Department of Defense. (2003). American Civil Liberties Union. https://www.aclu.org/sites/default/files/pdfs/safefree/yoo_army_torture_memo.pdf

empowered with intrusive and unconstitutional wartime powers under the guise of those powers being inherent to a unitary executive, all of which will be detailed later as well.

Calabresi and Yoo argue in their book that "…claims of broad, inherent, implied powers were rare and were generally either rejected at the time or remained outliers that were abandoned by subsequent administrations."[7] However, the modern record especially shows that these claims to power were not so rare. Presidents have continued to issue signing statements, have pressed on with electronic surveillance of their citizens, and have continued to engage in wartime acts without explicit declarations of war, arguing that Congress implicitly consents to the wars by continuously funding them.

In his paper "Unitary Executive Theory and Exclusive Presidential Powers," Julian Ku argues that while Calabresi and Yoo attempt to separate their definition of the unitary executive theory from the Bush Administration's definition, their distinction will not stop presidents from overstepping their boundaries. Ku argues that this is because of moments when presidents have declared powers that Congress cannot check. "In my view, the most troubling and potentially dangerous claims by the executive occur not when Presidents make claims of inherent executive power. Rather, the most difficult claims arise from cases where the President is claiming exclusive presidential power; that is to say, cases where the President argues that he has a constitutional power that cannot be trumped or limited by congressional action."[8] Ku delivers his argument by using presidential signing statements as a major example of exclusively claimed executive powers, which this paper will aim to expand upon as well.

---

[7] Calabresi, & Yoo, C.S. (2008). *The Unitary Executive: Presidential Power from Washington to Bush*. Yale University Press. P. 20.

[8] Ku, J.G. (2010). Unitary Executive Theory and Exclusive Presidential Powers. University of Pennsylvania Journal of Constitutional Law, 12(2), 615-622.

However, Michael Stokes Paulsen takes a slightly different route in his piece "The Constitution of Necessity." In his thesis, Paulsen argues that the president does have the power to step above the Constitution at particular times, but says that Congress and the courts have the authority to check the president. "There simply *must* be power in the national government to preserve the constitutional order; it is inconceivable that the Framers would have neglected such considerations,"[9] Paulsen wrote. Paulsen acknowledges that this is a "valuable and dangerous arrangement,"[10] valuable because it gives the president the ability to preserve the American government, but also dangerous because presidents have, and are arguably currently (referencing President Bush at the time of his writing), stepping over the laws. However, he concludes that the trade-off is worth it in the long-run, and cites President Abraham Lincoln's suspension of habeas corpus as evidence as to how it could save the country. He also cites the Presidential Oath Clause as giving the president a duty to preserve the constitutional order of the country. Particularly, the part where the president swears to "preserve, protect, and defend the Constitution of the United States" is of interest to Paulsen, as he argues that would seem to give the president the power to uphold the country that the Constitution seeks to govern.

Calabresi, in his own work "Some Normative Arguments for the Unitary Executive" discusses why he believes in a strong, unitary executive, arguing that government is more efficient and transparent when the executive power is solely vested in a president. He justifies his argument by claiming that the Framers had three main goals for the executive: energy, accountability, and separation of powers, and that these goals would serve to counteract the ambitions of factions. "Executive unitariness promotes faction control in the same way the whole

[9] [9] Paulsen, M.S. (2004). The Constitution of Necessity. 79 Notre Dame L. Rev. 1257.
[10] *Id*, p. 3.

system of checks and balances promotes faction control. It guards against 'a gradual concentration of the several powers in the same department' by ensuring that 'ambition [will] be made to counteract ambition,"[11] Calabresi writes. Calabresi goes even farther than Paulsen, arguing that the president should have powers including a line-item veto over any legislation and argues against independent counsels and agencies, claiming that they take away executive power that belongs to the president alone, bring unimportant issues to the table, and risk losing accountability because they are out of the public's sight. "What I think this [his argument that there is no truly independent agency in Washington, D.C.] means is that agency independence today creates not only a risk of industry or interest group capture of the law execution function, it creates as well the risk of *geographic* congressional committee interests capturing the law execution function."[12]

The argument will proceed first by analyzing the Framers' insights into a unitary executive. A look into the debates surrounding the establishment of the Constitution, including the Federalist Papers, the Constitution itself, the debates at the Constitutional Convention and the Decision of 1789, and the practices of America's first presidents will help gain insight into the thoughts of what a unitary executive meant to the Framers. This part of the work will also analyze the Framers' thoughts on what power a president should have, based on the powers granted to the king of England. It will use these thoughts that presidents do not have a broad unitary executive power, and that they were never intended to.

Next, this paper will look at how the powers of the unitary executive have been used in a manner within the parameters of the theory as set out by Calabresi and Yoo. Unlike previous

[11] Calabresi, S.G. (1995). Some Normative Arguments for the Unitary Executive. Arkansas Law Review, 48(1), 23-104.
[12] *Id* p. 63.

works, this paper aims to focus on the modern period in this section, including during the presidencies of Obama, Trump, and Biden. In this section, this paper will argue in favor of these specific and limited powers, and demonstrate why they are efficient and necessary in constitutional government.

The final section will cite historical examples of a broad interpretation of the theory having poor policy effects that have led to a deprivation of Americans' rights. It will look at various topics, including the dangers of emergency powers, independent counsel, and signing statements, one of the broadest interpretations of the unitary executive to date. This section will argue that these powers have often been abused in the name of the unitary executive theory, and concludes that Congress and the courts must do a better job at checking the president in certain cases.

II. The Founders' Thoughts and Practices on the Removal Power in the Republic's Early Days

To provide some context to the issue at hand, it would be useful to look at the Founders' thoughts on the Constitution using an originalist perspective. The originalist perspective will help understand what the Founders were thinking at the time of ratification, which can point some clues into the more vague aspects of the Constitution, like Article II. The originalist perspective, most notably advocated by the late Justice Antonin Scalia, asserts that the Constitution should be interpreted as it was intended to be by the Founders, though acknowledging its difficulty. "But what *is* true is that is that it is often exceedingly difficult to plumb the original understanding of an ancient text. Properly done, the task requires the consideration of an enormous mass of material – in the case of the Constitution and its Amendments, for example, to mention only one element, the records of the ratifying debates in all the states."[13] Scalia had high praise for this method and often applied it in his own decisions. This section will follow Scalia's definition of originalism in interpreting the Founders' thoughts on the president's powers by interpreting the original public meaning of the Constitution: what the Framers and ordinary people at the time would have understood it to mean.

Scalia's originalism can be used to provide some context as to what the Framers thought about both the president's removal power, and the overall scope of what power a president should have. The first and foundational element of the argument will be to consider how the Founders and common citizens in the late eighteenth century would have understood the language in the Constitution's Vesting Clause.

[13] Scalia, A. Originalism: The Lesser Evil. University of Cincinnati Law Review, 57(3), 849-866.

The Vesting Clause is the opening sentence of Article II and reads, "the executive Power shall be vested in a President of the United States of America."[14] This one-line clause is a major source of controversy with regards to the unitary executive theory due to conflicting views on what this clause was meant to do.

Some scholars believe that the Founders wrote the Vesting Clause to be merely a designation of power. Robert G. Natelson is one scholar who believes this to be such, claiming that "Founding-Era life was replete with documents by which one or more persons conferred enumerated powers on each other."[15] He goes through a variety of documents, including powers of attorney, corporate and colonial charters, and diplomatic commissions, to emphasize his point that this is how many documents which delegated responsibility started off in the colonial era. Natelson goes on to explain that most of the Framers, including George Washington, who wasn't a lawyer, understood that this was the method by which powers were laid out and defined.

However, there are also scholars who believe the Vesting Clause does more than just designate, believing it to be a grant of power to the president instead. Gary Lawson and Guy Seidman argue for the latter, claiming that the idea that the Vesting Clause as a designation of office is redundant[16], in part because provisions in Article I mention the President of the United States. "Second, as Professors Calabresi and Prakash have also responded, it is easy to overstate the weight of arguments from redundancy in constitutional interpretation," Lawson and Seidman write in defense of their position. They further argue that Sections 2 and 3 of the Constitution aren't meant to add on to the president's power as understood in the Vesting Clause; they are

[14] U.S. Constitution, Article II, Section 1.
[15] Natelson, R.G. (2009). The Original Meaning of the Constitution's Executive Vesting Clause Evidence From Eighteenth-Century Drafting Practice. Whittier Law Review, 31(1), 1-[vi].
[16] Lawson, G. & Seidman, G. (2006). The Jeffersonian Treaty Clause. University of Illinois Law Review, 2006(1), 1-70.

instead meant to limit the president's powers within that clause. "… we maintain that *none* of the apparent enumerations of presidential power in Sections 2 and 3 of Article II grant *any* powers that the President does not otherwise possess. Instead, they serve to *limit, clarify, or qualify* the President's 'executive Power" in order to avoid misconstruction of that power, Congress's constitutional powers, or both."

Based on analysis of the Constitution's wording and the Framers' dialogue, it seems that there is some merit to both views: while the Vesting Clause does designate the President of the United States as the sole executor of the country's laws, it also does delegate the executive power to the President of the United States. In his work criticizing the unitary executive theory, Julian Davis Mortenson went out of his way to gather eighteenth century dictionary definitions of the word "executive" as both a noun and an adjective. He found that "when used as a noun, 'executive' meant 'the person or body in the administration of a country who puts the laws in force.'"[17] For the latter, Mortenson found that the dictionary definitions were mostly along the lines of describing someone who has the power to act or do something.[18] Therefore, it seems that by vesting "the executive Power" in one President of the United States, the Founders were conveying that it was the president's power to execute the laws, which is what Mortenson argues in his paper. "When a moderately educated eighteenth-century reader – or really any literate American with access to a dictionary – saw the phrase 'executive power,' they would have understood it as the power to execute plans, instructions, and above all else the laws," Mortenson writes.[19] By definition of the word executive, it seems that the Framers did indeed intend not

[17] Mortenson, J. (2019). Article II Vests the Executive Power, Not the Royal Prerogative. Columbia Law Review 119(5), 1169-1272.
[18] *Id* p. 100.
[19] *Id* p. 102.

only to assign the president as the executor of the laws, but to possess that specific power in the president.

Historical context from some of the Founding Fathers would seem to corroborate this interpretation. Alexander Hamilton makes this argument in his Pacificus No. 1, arguing that Section 1 of Article II does indeed give the president executive powers, with some particular examples and some exceptions. "The general doctrine then of our constitution is, that the Executive Power of the Nation is vested in the President; subject only to the *exceptions* and *qu*[a]*lifications* which are expressed in the instrument,"[20] Hamilton wrote.

A look at the rest of Article II would seem to confirm this. Included as other powers of the president are the delegation of responsibility to being Commander in Chief[21], the ability to grant pardons[22], to make treaties with the consent of the Senate[23], to make appointments with the consent of the Senate[24], and to give a State of the Union[25]. Requiring the consent of the Senate to make appointments is an example of the president's inherent executive power being limited, while the rest were given as clear examples of certain executive powers that the president had; though these do not necessarily encompass all of his powers.

The design of Article II as it is known today can be credited to Gouverneur Morris, a delegate to the Constitutional Convention who served on the Committee of Style. He is credited with making subtle changes that have significantly impacted the way the Constitution is viewed today, with particular respect to Article II. Per the Michigan Law Review, the original reading of

[20] Hamilton, A. Pacificus No. 1, 29 June 1793. National Archives.
[21] U.S. Constitution, Article II, Section 2.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id*, Article I, Section 3.

the president's power was "The Executive power of the United States shall be vested in a single person. His stile shall be, 'The President of the United States of America;" and his title shall be, "His Excellency."[26] The original reading of Congress's power was "The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives, and a Senate."[27] As the Treanor points out, Morris' implementing the Vesting Clause in Article II while inserting the "herein granted" clause in Article I has had significant ramifications in the debate over the unitary executive theory. The language is significantly different, as Morris seems to qualify Congress's powers, but broadly define the president's powers. Morris was highly skeptical of legislatures and believed in a very powerful executive, Donald L. Robinson writes in his article "Gouverneur Morris and the Design of the American Presidency," so it can be safely assumed that these changes were purposely done to reflect Morris's views in a subtle but effective way. "Legislative tyranny, he [Morris] said, was far worse than monarchy, because its abuses were harder to expose,"[28] Robinson writes. "Morris looked to the executive to articulate and act for the public weal. The president was the 'great protector of the masses.' He must guard the people, even the lower classes, against the great and wealthy who were certain to dominate the legislature," Robinson continues.

With the many powers that are designated to the President of the United States, there is notably one missing: the power to remove Executive Branch employees. It has been the center of much debate, considering the fact that the Constitution explicitly grants the president the right to

---

[26] Treanor, W.M. (2021). The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution. Michigan Law Review.
[27] *Id*.
[28] Robinson, D.L. (1987). Gouverneur Morris and the Design of the American Presidency. Presidential Studies Quarterly Vol. 17, No. 2, Bicentennial Issue: The Origins and Invention of the American Presidency (Spring 1987), p. 319-328.

appoint Executive Branch officials, with the "advice and consent" of the Senate.[29] To better get an understanding of the Framers' thoughts on the matter, it is necessary to look at their writing and dialogue to understand their perspectives.

James Wilson, a close confidant and ideological ally of Morris's on the presidency, was one of the most influential framers on the subject of the presidency, with his proposals baring close similarities to the president's powers today. The Journal of the Constitutional Convention provides significant insight into Wilson's thoughts, at a time where the nature of the executive was incredibly unknown, to the point where it wasn't even clear whether there would be one person serving as an executive, or whether there would be multiple people. Wilson was very clear about his belief that the executive power should be vested in one president. "Mr. Wilson preferred a single magistrate, as giving most energy, dispatch, and responsibility to the office. He did not consider the prerogatives of the British monarch as a proper guide in defining the executive powers. Some of these prerogatives were of a legislative nature; among others, that of war and peace, and c. The only powers he considered strictly executive were those of executing the laws and appointing officers, not appertaining to, and appointed by, the legislature."[30] Wilson again spoke about the importance of the president's appointment power when discussing the appointment of judges. "A principal reason for unity in the Executive was, that officers might be appointed by a single, responsible person."[31] Wilson clearly considered the power to appoint to be within the hands of the executive.

The Decision of 1789, the infamous debate in the first Congress about whether the president has the removal power or not in light of a proposal to create the Department of Foreign

[29] U.S. Constitution, Article II, Section 2.
[30] Journal of the Constitutional Convention, Friday, June 1, 1787.
[31] *Id*, Tuesday, June 4, 1787.

Affairs, shed some light onto the Founders' thoughts on it. The Founders were deeply divided, with some arguing that this power is vested in the president alone, some arguing that the Senate should play a role in it as well, some arguing that because the Constitution was silent that it was up to Congress to make the decision, and some arguing that the officials should outright be impeached.

In a letter to Edmund Pendleton, James Madison, who was originally wary of Wilson's position but grew to embrace the unitary executive, argued that because the president, as the executive, was given the authority to make appointments to the Senate, the president should therefore have the authority to remove the employees from their posts, unless otherwise stated by the Constitution or subsequent laws. "That the executive power being in general terms vested in the president, all power of an executive nature, not particularly taken away must belong to that department."[32] This reinforces the notion that the president, as the executive, should be able to use all the powers granted to him within Article II of the Constitution.

Madison again spoke in depth about this in a speech he gave in 1789 regarding a clause in a bill establishing a department of foreign affairs that declared the secretary of the department "to be removable from office by the President of the United States." In his speech, Madison argued that removal is inherently an executive power, as is appointment. "If the constitution had not qualified the power of the president in appointing to office, by associating the senate with him in that business, would it not be clear that he would have the right by virtue of his executive power to make such appointment?"[33] Here, Madison argues that the Constitution lays out exceptions to the president's executive power; therefore, when the Constitution is silent

[32] From James Madison to Edmund Pendleton, 21 June 1789. National Archives.
[33] Madison, J. (1789). Removal Power of the President. National Archives. https://founders.archives.gov/documents/Madison/01-12-02-0140

regarding the power, as it is when it comes to the removal power, the people should assume that it is already within his power.

In the same letter to Pendleton, Madison once again expressed support for this position. "That the power of appointment only being expressly taken away, the power of removal so far as it is of an executive nature must be reserved," he writes, arguing that this opinion is the prevailing opinion with regards to a president's removal power. Here, Madison argues that because the Constitution is silent on this inherently executive authority, it means the power must be delegated to the president to remove, as this executive power is vested in the President of the United States.

Oliver Ellsworth went even further in defending this position, according to the Diary of John Adams. "We are sworn to the Constitution. There is an explicit grant of Power to the President, which contains the Powers of Removal. The Executive Power is granted – not the Executive Powers hereinafter enumerated and explained. The Senate is not an Executive Council – has no Executive Power. The Grant to the President expresses, not by Implication,"[34] Adams noted Ellsworth saying. What Ellsworth brings up here is a key distinction between Article I and Articles II and III: only Article I uses the words "hereinafter" in granting Congress power. This has been taken by Ellsworth and many others to mean that while that clause in Article I states that the rest of the Article will designate power, the Vesting Clauses in Articles II and III specifically vest the named powers in the President of the United States and the judiciary, respectively.

[34] Adams, J. Notes of Debates in the United States Senate, July 15, 1789. National Archives.

However, this interpretation did have its opponents, especially from Anti-Federalists/Democratic-Republicans, who were particularly afraid of having a President of the United States in the first place, much less giving the president more power. Adams notes in his diary that Pierce Butler was fiercely opposed to a removal power for the president, arguing that it violated the balance that the Constitution provided. "This Power of Removal would be unhinging the equilibrium of Power in the Constitution."[35] William Grayson agreed with this sentiment, calling it "an Absurdity to admit this Idea into our Government"[36] and that the removal of officers was "unpallatable,"[37] according to Adams. "We should not risk any Thing for nothing. Come forward like Men, and reason openly, and the People will hear more quietly than if you attempt any side Winds. This Measure will do no good and will disgust,"[38] Adams notes Grayson as saying.

Ultimately, when the decision came around, the Framers of the Constitution did create the Department of Foreign Affairs, along with the Department of War and the Department of the Treasury, using similar language for the legislation creating all three. In the law was a grant of power to the president to remove the secretaries of the departments. Rep. Egbert Benson aimed to strike down this provision, as it would seem to indicate that Congress would give the president removal power, not the Constitution; Madison agreed with this amendment to the legislation. However, the amendment did not pass, but the legislation as a whole did. In his work "New Light on the Decision of 1789," Saikrishna Prakash aims to emphasize the importance of the decision and draw more attention to its importance. He notes that this decision was just as

[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*

important to the Founders. “Even at the time, James Madison noted the gravity of the issue and that the ultimate decision would serve as a precedent for future cases,”[39] he writes.

In his Pacificus No. I, Alexander Hamilton argues that by passing the aforementioned legislation with the delegation of the removal power of the secretaries to the president, Congress has given its stamp of approval to recognizing the removal power as an executive power granted by the Constitution. “With these exceptions, the Executive Power of the Union is completely lodged in the President. This mode of construing the Constitution has indeed been recognized by Congress in formal acts, upon full consideration and debate. The power of removal from office is an inportant instance.”[40]

Past practices of former presidents seem to confirm this, as Calabresi and Yoo discuss at length in their book. The pair start off by discussing the nation’s first president, George Washington, and his use of the executive power, which they argue derived from his experiences during the Revolutionary War. “In particular, Washington’s views on the subject were greatly shaped by his experiences during the Revolutionary War, when several committees of the Continental Congress served as the army’s plural executive head.”[41] Washington echoed Alexander Hamilton in his Federalist 70 when he called for a unitary military executive to act with energy, which the pair argue reflects on how he governed. When Washington assumed the presidency, the pair argue that he wasted no time in assuming full control of the Executive Branch. “Washington’s determination to take control of the entire administration was demonstrated immediately after swearing in, when he asserted control over the executive

[39] Prakash, S. (2006). New Light on the Decision of 1789. Cornell Law Review, 91(5), 1021-1078.
[40] Hamilton, A. Pacificus No. I, 29 June 1793. National Archives.
[41] Calabresi, & Yoo, C.S. (2008). The Unitary Executive: Presidential Power from Washington to Bush. Yale University Press.

structures that were left over from the government set up under the Articles of Confederation."[42] Along with familiarizing himself with the affairs of each department of the executive branch by demanding written reports and consultation on major decisions, Washington exercised the removal power in removing foreign ministers and military officers, among other Executive Branch officials, as the pair discuss in their book.

John Adams, the second President of the United States, continued in President Washington's footsteps, per Calabresi and Yoo. "It must be noted that although Adams used the removal power sparingly, he did not hesitate to use it to maintain his control of the executive branch," the pair said.[43] Even Thomas Jefferson, the third President of the United States who had been heavily against sweeping executive power in fear of tyranny, assumed broad powers when he took office. Jefferson had to make plenty of removals during his time in office, due to executive offices being filled with Federalists following the Washington and Adams administrations. Thus, he removed many Federalist appointees, including U.S. attorneys; Calabresi and Yoo estimate that he removed between one-third and one-half of all presidentially appointed officers. The pair argue that this justifies the idea that Jefferson believed the removal power to be an inherent executive authority. "Because there was no statutory authorization to remove district attorneys, Jefferson must have understood his power to make these removals as stemming from the Constitution itself, and no one at the time contested his power to remove the district attorneys in question."[44]

[42] *Id* p. 40.
[43] *Id* p. 61.
[44] *Id* p. 68.

III. The Supreme Court's Interpretation of the Removal Power

In general, the Supreme Court has upheld the view that the removal power is an inherent element of the executive authority of the president. This view was first firmly held in the 1926 case of *Myers v. United States*.[45] Myers, a postmaster in Oregon who was appointed with the advice and consent of the Senate in 1917, was told to resign by the Postmaster General of the United States upon the direct request of the President of the United States. An 1876 law by Congress required the President of the United States to receive the advice and consent of the Senate if he wanted to remove postmasters of the first, second and third class; Myers was of the first. Chief Justice William Howard Taft, who also happened to be the 27th President of the United States prior to his time on the Court, emphasized that the removal power was within the president's ability. "The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible," Taft wrote in his opinion. He continued, "If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood." As such, the Court struck down that 1876 law, declaring that it intruded upon the president's power vested in him as the executive by Article II.

President Taft reaffirmed this belief shortly after the conclusion of his presidency in his book "Our Chief Magistrate and His Powers." In the book, Taft argues that there is no question that it is within the president's right to appoint executive officers with the advice and consent of

[45] 272 U.S. 52.

the Senate and remove them without the Senate's advice or consent. In fact, he even goes above and beyond this and argues that the Senate should waive its right to advice and consent in cases of local Federal officers. To make his point, Taft examined the 10,000 presidential employees at the time. He argued that because they were local Federal officers scattered throughout the United States, it would not be reasonable for the president to have to sit and examine each one, then get the advice and consent of the Senate to proceed. He argued that it was more efficient for the Senate to waive their right of advice and consent in these matters so that the president could incorporate them into the merit system. With this change, such officers would reach higher posts via promotions. This change, according to Taft, would save the government millions of dollars and make it more efficient due to continuity of certain employees in every administration. The president would also be less susceptible to congressmen trying to promote lesser qualified candidates simply because they are from their district. "I cannot exaggerate the waste of the President's time and the consumption of his nervous vitality involved in listening to Congressmen's intercession as to local appointments. Why should the President have his time taken up in a discussion over the question who shall be postmistress at the town of Devil's Lake in North Dakota? How should he be able to know, with confidence, who is best fitted to fill such a place?"[46]

Justice Antonin Scalia wrote the majority opinion of *Edmond v. United States*[47], arguing in favor of the appointment power being a fully executive one, with the advice and consent of the Senate of course. This case concerned whether Congress had the ability to authorize the Secretary of Transportation to appoint civilian members of the Coast Guard Court of Criminal

[46] Taft, W.H. (1915). "Our Chief Magistrate and His Powers." Columbia University Lectures. George Blumenthal Foundation.
[47] 520 U.S. 651.

Appeals and if it did, whether the authorization was valid under the Appointments Clause of Article II. At question was whether the civilian judges' appointments were those of "princip[al] officers," those of which must be appointed by the president with the advice and consent of the Senate. The Court ruled that Congress did authorize the Secretary of Transportation to make such an appointment and that the appointment was indeed valid. "Under the Appointments Clause, Congress could not give the Judge Advocates General power to 'appoint' even inferior officers of the United States; that power can be conferred only upon the President, department heads, and courts of law,"[48] Scalia wrote. Thus, these officers were deemed "inferior officers," whom the Secretary of Transportation could appoint constitutionally.

In 2010, the Court upheld the president's removal power in the case *Free Enterprise Fund V. Public Company Accounting Oversight Board*.[49] The Public Company Accounting Oversight Board was created by Congress in 2002 as part of a series of reforms in the Sarbanes-Oxley Act, and constituted five members appointed by the Securities and Exchange Commission. However, the Court took issue with the "two layers of tenure protection" that the board members had: the board members could only be removed by the SEC for good cause, but the president could not remove the commissioners but for good cause. As a result, "inferior officers" could not be removed at will, and there was nothing the president could do about it. Chief Justice John Roberts wrote in the Court's majority opinion that "by granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed – as well as the public's ability to pass judgment on his efforts." As a result, the Court struck down the two-layer removal measures and required that these inferior

[48] *Id* at 658.
[49] 561 U.S. 477.

officers be able to be removed at will, a decision cementing the idea that the president should have direct influence in hirings and firings in the Executive Branch.

Most recently, the Court reaffirmed the president's right to the removal power in the 2020 case of *Selia Law LLC v. Consumer Financial Protection Bureau*.[50] This case debated whether the Consumer Financial Protection Bureau, which was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 in order to create more transparency in the financial world following the 2008 Recession, violated the separation of powers act. Congress created the bureau as an independent agency; however, unlike previous independent agencies, it did not consist of a board of multiple people of various parties. It was headed by one director, who was to be appointed by the president with the advice and consent of the Senate and could be removed by the president only for cause. The Court did not approve of this arrangement by Congress, arguing that it violated the separation of powers doctrine. "The President's removal powers has long been confirmed by history and precedent,"[51] as Chief Justice Roberts plainly stated, citing the decision in *Free Enterprise Fund* and *Myers* as backing for his statement. However, instead of fully throwing away the Dodd-Frank Act, the Court instead opted to keep the act, instead giving the president the power to remove the director at will.

However, the Courts have found that the president's removal power is not in fact unlimited. In *Humphrey's Executor v. United States*,[52] the Court made distinctions between purely executive departments and "quasi-judicial and quasi-legislative" departments. William E. Humphrey's executor had sued the United States because he was removed as a commissioner of the Federal Trade Commission by President Franklin Roosevelt, as Roosevelt felt that his ideas

[50] 140 S.Ct. 2183
[51] *Id* at 2197.
[52] 295 U.S. 602

were not compatible with his administration's initiatives. Humphrey's executor had to sue, as Humphrey died shortly after being fired. The executor sued for Humphrey's salary of $10,000 as a result of this removal, which he argued was unconstitutional, as Congress said in the Federal Trade Commission act that "any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." The Court agreed with the executor's argument, finding that the decision in *Myers* was not applicable to this case because Myers' role as a postmaster was a role that was solely executive, while Humphrey's role in the Federal Trade Commission was quasi-legislative and quasi-judicial, therefore not subjecting him to the control of the Executive Branch, citing the separation of powers doctrine. "The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime," Justice George Sutherland wrote in the majority opinion. "The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question," he continued.

Finally, in the 1988 case of *Morrison v. Olson,*[53] the Supreme Court ruled that the Ethics in Government Act of 1978, which created an independent counsel to investigate executive wrongdoing and only allowed for the removal of the counsel with "good cause," did not breach the separation of powers doctrine or unduly trample on the president's executive powers. "Rather, because the independent counsel may be terminated for 'good cause,' the Executive,

[53] 487 U.S. 654.

through the Attorney General, retains ample authority to assure that the competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act," Chief Justice William Rehnquist said in the Court's majority opinion. The Court argued that Congress thought the independence of the counsel was of high importance, but that still doesn't prevent the president from using his executive powers of removal. Scalia wrote the lone dissent in this case, arguing that the power to prosecute was a "purely executive" power that was intended to be in the hands of the president alone. He argued that the law therefore deprived the president of the purely executive power to prosecute, and would thus violate the separation of powers doctrine. Scalia did acknowledge that giving the president this exclusive power with regards to the Ethics in Government Act could invoke abuse; however, he said that "a system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused,"[54] and that "while the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty."[55]

Parts II and III dealt with solely the removal power. However, while the Framers and the Court both saw the removal power as within the president's authority as the Executive, that didn't mean they thought he had unlimited power. In fact, many Framers were highly skeptical of creating the office of the President of the United States, fearing that the president would be able to overstep the law and become like the king of England.

[54] *Id* at 711.
[55] *Id*.

IV. Examples of Government from the British and the Ancients, and how These Examples Influence the Framers' Views on the Presidency and Government

In keeping with the originalist approach taken in Chapter II, it is important to consider the Founders' views on the British monarchy, what measures they took, and why they would demonstrate an unwillingness to concede to an overly broad unitary executive theory, one that goes farther than simply the removal power.

The British crown possessed a high level of power, much of which was very vague and often subject to change. Forrest McDonald discusses the crown's powers in his book, "The American Presidency: An Intellectual History," where he demonstrates that the powers of the crown were oftentimes broad and unchecked. McDonald uses Jean Louis de Lolme's "Constitution of England" to emphasize the powers of the king, including administering justice by appointing judges and prosecutors, granting pardons, and distributing titles to people.[56] Additionally, the king had the ability to regulate commerce (which included the ability to coin money), govern the Church of England, and finally, possess all the wartime powers, including making contracts and alliances, declaring war and making peace, and sending and receiving ambassadors.[57]

However, following the Glorious Revolution of 1688, Parliament seized many of the king's powers, including the power to suspend laws. King James II had retreated to France following William of Orange's invasion of Britain. Lawmakers in the Parliament, which had not met often at the time due to the king's ability to call and dismiss sessions, were worried about what would come next and desired stability. However, they did not want the new king to abuse

[56] McDonald, F. (1994). The American Presidency: An Intellectual History. University Press of Kansas.
[57] *Id* p. 29-35.

all of the powers that James had, in addition to not wanting the king to be Catholic. The lawmakers thus accepted William as king in order to ensure that the king would be a Protestant, but began initiating a series of reforms, including a Bill of Rights when he took office. The Bill of Rights declared that Parliament would have to be held frequently following free elections.[58] The king was also removed of the powers to establish a standing army and levy taxes by force of the royal prerogative.[59] By the early 1700s, Parliament had enacted laws prohibiting the king from leaving the country without their consent, preventing a war on behalf of the possessions of a foreign king of Britain, and requiring general elections to be held every three years.[60] Parliament had engaged in all of these actions not only due to William being from the Netherlands, but in order to finally establish their position in comparison to the king, the executive.

While McDonald noted that these powers were "subject to law," he also noted emphasized that the laws were out of date. "Making sure that they remained under the control of the law was a delicate matter, precisely because the instruments at Parliament's disposal were so draconian."[61] The king also was not accountable to Parliament himself. "The king personally was beyond the reach of the law, but his ministers were subject to attainder and to impeachment," McDonald wrote.[62] As a result, the king had broad powers. The Framers did not want a repeat of these powers in their new, republican method of government.

---

[58] O'Gorman, F. (1925). The Long Eighteenth Century: British Political and Social History 1688-1832. Bloomsbury Publishing.
[59] *Id* p. 39.
[60] *Id* p. 43-45.
[61] *Id* p. 63.
[62] *Id*.

In addition to the British crown's power, the framers drew from ancient sources as well, particularly ancient Greek and Roman examples. McDonald emphasizes two cases in Greek history that the Founders drew heavily from: Lycurgus's constitution in Lacedaemonia, and Solon's in ancient Athens.[63] Lycurgus established Lacedaemonia's constitution at some point around the end of ninth century BCE; this constitution was special because it was the first one known to humankind that established a mixed form of government, containing an executive consisting of two kings, a senate, and an assembly divided into two parts. This was unique because up until this point in history, all governments had been forms of monarchy. On the other hand, Solon attempted to enact a form of government vesting power in a senate and an assembly, but it did not last for even 100 years due to corruption and anarchial tendencies, especially during times of peace. The Framers were well-educated in ancient Greek and Roman history, and sought to use this historical knowledge to strike a balance in forming a government that could sufficiently operate without being dominated by the majority or by a monarch.

Additionally, McDonald points to the Roman example in the Founders' studies. Legend has it that Rome's first king was Romulus, who took the crown around 753 BCE.[64] While Romulus was a monarch, he went missing after 35 years of rule for an unknown reason, although it is speculated senators took him out after being displeased with him. Roman society was in somewhat of a chaotic period at this point, but after several centuries, Rome began to stabilize and come to a mixed form of government, encapsulating the monarchy through the consuls, the aristocracy through the Senate, and democracy via elections and public gatherings of assemblies. Per McDonald, the consensus is that 350 through 200 BCE was the golden age of the Roman

[63] *Id* p. 74-75.
[64] *Id* p. 80-81.

republic. “During this time executive power was sufficiently diffused as to pose no serious danger to liberty but sufficiently specialized so as to provide effective administration.”[65] However, per McDonald, the republic began to collapse due to a lack of “public and private morality.”[66] Although it was a bad collapse, the republic lasted for around 400 years, which was no small accomplishment especially given the time period.

In their takeaways from these events, the Founding Fathers understood the importance of the systems of separation of powers and of checks and balances. Their first attempt at doing away with the monarchial system of the British came with the Articles of Confederation; however, it did not accomplish the separation of powers doctrine very well and provided for a very weak federal government. The Articles established no executive, and only a unicameral Congress. The country came to the brink of collapse due to the federal government not being able to tax or settle disputes between the states, which led to high inflation and a depleted treasury. George Washington in 1785, four years prior to his ascension to the presidency, wrote a letter to James Warren regarding his concerns about the Articles of Confederation. “In a word, the confederation appears to me to be little more than a shadow without the substance; and Congress a nugatory body, their ordinances being little attended to.”[67]

Following the failures of the Articles of Confederation, the Founding Fathers knew there had to be an executive of some sort, but also did not want the United States to be governed by a king. Even Alexander Hamilton, one of the staunchest supporters of a powerful executive, knew the executive in the United States had to be governed within stricter bounds than the king of

---

[65] *Id* p. 86.
[66] *Id* p. 87.
[67] *The Writings of George Washington from the Original Manuscript Sources, 1745-1799*. University of Chicago Press.

England. He wrote, "In England, the king is a perpetual magistrate; and it is a maxim which has obtained for the sake of the public peace, that he is unaccountable for his administration, and his person sacred."[68]

However, there were many Framers who were also wary of giving the president powers they felt were too similar to a king's power. George Bryan and John Smilie, politicians of the revolutionary era, expressed their concerns about the powers of the presidency being proposed at the Constitutional Convention in their "An Old Whig" articles. "In the first place the office of President of the United States appears to me to be clothed with such powers as are dangerous. To be the fountain of all honors in the United States, commander in chief of the army, navy and militia, with the power of making treaties and of granting pardons, and to be vested with an authority to put a negative upon all laws, unless two thirds of both houses shall persist in enacting it, and put their names down upon calling of the yeas and nays for that purpose, is in reality to be a king as much *a King as the King of Great Britain*, and a King too of the word king – an elective King," the pair wrote in "An Old Whig V."[69] The Anti-Federalist view was one very wary of a king's power, and one very wary of any one executive at all. They were hesitant to do away with the Articles of Confederation for this new office of the presidency – one that was unlike any office ever created before.

The Fathers accounted for these concerns by introducing the system we have now, which includes the separation of powers into three branches: the legislative, executive, and judicial, and providing each branch with a means of checking the other ones, but working independently, so that government is held accountable and is transparent and efficient, while not overpowering

[68] *Federalist Papers No. 70.*
[69] Hogan, M.; Kaminski, J; Leffler, R.; Schoenleber, C.; Saladino, G. The Documentary History of the Ratification of the Constitution Digital Edition. University of Virginia Press, 2009.

minority groups. James Madison outlined this school of thought in the Federalist Papers No. 47, where he said "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny."[70] From this system comes a government that relies on certain English concepts, but also deviates from it in providing specifications about what powers each branch of government has. Additionally, the Framers came up with our Bill of Rights, an agreement reached with the Anti-Federalists to secure ratification of the Constitution.

The lessons of history taught the Founders that a mixed government is necessary. However, the Founders did not want a repeat of the English monarchy, and as a result, took all of the aforementioned precautions to guard against the newly established president overstepping his powers and becoming a dictator. For this reason, George Washington became the almost unilateral choice to be the first president. Washington's significance is so much that McDonald argues "it is no exaggeration to say that Americans were willing to venture the experiment with a single, national republican chief executive only because of their unreserved trust in George Washington."[71] Such thoughts make it hard to believe that the Founders would approve of an overly broad unitary executive theory that grants powers to the president that would not ordinarily be within his/her reach.

[70] *Federalist Papers No. 47*.
[71] McDonald, F. (1994). The American Presidency: An Intellectual History. University Press of Kansas.

V. The Growth in Size of the Executive Branch since the Nation's Founding

The next topic this paper will aim to cover is how the removal power and executive orders, two constitutionally acceptable powers in this paper's argument, have been used in practice in the modern era, and to evaluate their usages. Before going through an in-depth analysis of that, it is important to touch upon an important phenomenon that took place in the Twentieth Century: the growth of the Executive Branch. This does not refer to the growth in *power* of the Executive Branch, which will be outlined later in the article. This only refers to the growth in the literal size of the Executive Branch.

It is undeniable that the Executive Branch is significantly larger today than the Framers could have ever imagined it to be. Following the Debate of 1789, three departments were established: the State Department, which handles matters relevant to foreign affairs (it was initially called the Department of Foreign Affairs), the Treasury department, which handles the nation's finances, and the War Department, which as the name suggests, handled matters relevant to war; this agency was succeeded by the Defense Department in 1947. Shortly after these three departments emerged, two more departments emerged: the Post Office in 1792, and the Navy in 1798. The Post Office became a quasi-independent agency known today as the United States Postal Service in 1971, and the Navy became part of the Defense Department in 1947. Together, these five departments were what the Founding Fathers knew and imagined as being the essential cabinets of the Executive Branch.

In 1802, at the beginning of President Thomas Jefferson's first term, the federal government employed 3,905 people, not including military servicemembers.[72] In 2022, this

[72] Kastor, P. (2018). The Early Federal Workforce. Brookings Institution.

number has jumped to nearly three million people, excluding military personnel.[73] This exponential increase can be tied to not only the growth of the country, but through the many new agencies and commissions developed by Congress that the president has direct influence over.

The growth continued steadily, but not dramatically, in the Nineteenth century. The Interior Department was created on March 3, 1849, in an attempt by Congress to secure a separate executive department to manage the internal affairs of the country. Originally, the Interior Department had a significant number of tasks, including exploration of the western United States, regulation of territorial governments, management of hospitals and universities, and regulation of the Native American tribes and other lands.[74] Today, the Interior Department employs roughly 70,000 people.[75] Just thirteen years later, in the midst of the Civil War, President Abraham Lincoln singed a law creating the Agriculture Department, which serves the purpose of helping preserve and provide guidance on America's farmland, natural resources, food, and nutrition. The Agriculture Department now employs nearly 100,000 people.[76] Just a few years later in 1870, President Ulysses S. Grant signed a law creating the Justice Department. The department was originally created in an effort to prosecute those in the South who refused to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments, including terrorist groups like the Ku Klux Klan. The creation of this department gave the president and his appointees the ultimate power over handling the legal affairs and prosecution on behalf of the United States. The attorney general, who had existed since the Judiciary Act of 1789, was now to be included in the

---

[73] U.S. Bureau of Labor Statistics, All Employees, Federal [CES9091000001], retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/CES9091000001, December 11, 2022.
[74] History of the Department of the Interior. U.S. Department of the Interior. https://www.doi.gov/whoweare/history
[75] *Id*, "About Our Employees."
[76] About the U.S. Department of Agriculture. U.S. Department of Agriculture. https://www.usda.gov/our-agency/about-usda#:~:text=On%20May%2015%2C%201862%2C%20President,economic%20development%2C%20science%2C%20natural%20resource

Justice Department, along with all other federal attorneys. The Justice Department currently employs around 115,000 people.[77] The nineteenth century proved to be formidable years in the creation of the modern executive branch.

However, the majority of the growth in the executive branch came in the twentieth century through the creation of new departments and agencies beneath them. The Department of Commerce, initially known as the Department of Commerce and Labor, was created at the turn of the century in 1903, upon legislation signed by President Theodore Roosevelt during the height of the progressive movement. Aside from promoting economic development and trade, the Department of Commerce also handles the census. The Department of Commerce currently employs about 47,000 people.[78] Ten years later, President William Howard Taft signed a law creating the Department of Labor as a separate entity from the Department of Commerce. The Department of Labor's responsibility is to regulate the workplace and to improve working conditions across the country. It currently employs about 17,000 people.[79]

The real growth, though, began to take off in the New Deal period, as a result of significant government intervention in the Great Depression by President Franklin Delano Roosevelt. While there were no new executive departments created in his presidency, President Roosevelt oversaw the creation of numerous agencies deemed the "alphabet agencies" throughout the duration of his unprecedented four terms in office. These agencies regulate daily aspects of life. Among them are the Securities and Exchange Commission, created to prevent market manipulation in the aftermath of the crash of 1929, the Social Security Administration,

[77] Why Justice. The United States Department of Justice. https://www.justice.gov/careers/why-justice#:~:text=The%20Department%20of%20Justice%20employs,meet%20its%20mission%20and%20goals.
[78] U.S. Department of Commerce. About Commerce. https://www.commerce.gov/about
[79] U.S. Department of Labor. About Us. https://www.dol.gov/general/aboutdol

created in an attempt to prevent poverty among seniors, and the Tennessee Valley Authority, which aims to modernize rural parts of the country. What all of these agencies have in common is that they are in some way, shape, or form directed by the President of the United States. Every one of these agencies have commissioners who are all appointed by the president, with the advice and consent of the Senate.

In his book "New Democracy: The Creation of the Modern American State," William J. Novak argues that this burst was not sudden, but rather it was a buildup of gradual progressive ideals from the late nineteenth and early twentieth centuries. "This modern revolution in American governance was rooted in the new functions demanded of modern democratic states – the new jobs that the new state was constantly being asked to perform in the service of ever-growing public needs."[80] Novak argues that new legislation such as child labor prohibition, anti-monopoly policy, and infrastructure such as highways, railways, and aviation, all required a gradual build-up in the services of the federal government that required the creation of new agencies and, ultimately, departments.

A great deal of new executive departments were created between the 1950s and 1970s, oftentimes organizing the many new agencies that were formed during the twentieth century. This spree was kicked off by the Department of Health and Human Services, which was created in 1953 upon President Dwight D. Eisenhower and was originally called the Department of Health, Education, and Welfare. It has the goal of providing essential human services and protecting the health of Americans and currently employs just under 60,000 people.[81] In 1965 and 1966, as part of efforts advancing President Lyndon B. Johnson's Great Society plan, the

[80] Novak, W.J. (2022). "New Democracy: The Creation of the Modern American State." Harvard University Press.
[81] U.S. Equal Employment Opportunity Commission. Department of Health and Human Services (HHS). https://www.eeoc.gov/federal-sector/department-health-and-human-services-hhs-0

Department of Housing and Urban Development and the Department of Transportation, respectively were created. The Department of Housing and Urban Development was created to address the country's housing needs, foster urban growth, and enforce fair housing laws, including the Fair Housing Act, while the Department of Transportation aims to bolster the country's transportation infrastructure and connect urban and rural areas. The former employees nearly 10,000 employees[82], while the latter employs about 57,000.[83] In 1977, the Department of Energy was created under President Jimmy Carter's administration and spans a broad range of interests, including setting energy policy and advancing nuclear research. It employs roughly 16,000 people.[84] In 1979, the Department of Education was made its own department upon separation from the Department of Health and Human Services, with its goal to make the U.S. education system competitive in comparison to the rest of the world while ensuring equal fair access. It currently employs 4,000 people.[85]

In 1989, toward the close of the twentieth century, the Department of Veteran Affairs was established at the beginning of President George H.W. Bush's term. The purpose of this department is to distribute veterans' benefits and provide care and other resources for the country's veterans. It employs just over 300,000 people.[86] The most recent executive department arrived at the turn of the twenty-first century, shortly after the September 11th attacks. In 2002, the Department of Homeland Security was created by bringing together previous agencies, including the U.S. Customs Service and the Immigration and Naturalization Service. The

[82] *Id*, Department of Housing and Urban Development (HUD).
[83] *Id*, Department of Transportation (DOT).
[84] *Id*, Department of Energy (DOE).
[85] *Id*, Department of Education (ED).
[86] *Id*, Department of Veterans Affairs (VA).

department is tasked with protecting the country from terrorist attacks, assisting when there are natural disasters, and regulating immigration. It employs nearly 200,000 people.[87]

With the existence of fifteen executive departments, up from five in the first decade of the republic, it is reasonable to conclude that the president has significantly more influence over more areas of life today than the president did in the early days of the republic. Rather than presiding over 3,905 people, that number has increased nearly 1,000-fold to give the president control of about three million employees, and if including military servicemembers, around four million. The power to appoint, remove, and direct these employees has become more important than ever due to the substantial area of daily life they are accountable for.

It is also worth noting the number, and significance, of subagencies created through these executive departments. For example, the Justice Department houses the Federal Bureau of Investigation (FBI), the Drug Enforcement Agency (DEA), and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). The Defense Department houses the National Security Agency (NSA) and the Defense Intelligence Agency (DIA), while the Department of Homeland Security houses Immigrations and Customs Enforcement (ICE). Some agencies, like the Central Intelligence Agency (CIA), are independent of any executive department, but have leaders who are directly appointed by the president with the consent of the Senate, giving the president substantial influence over the agency anyway. These are all significant agencies and subagencies that play a significant role in policing in modern America, but many times, find themselves exceeding bounds that shock ordinary Americans when they find out, which will be discussed later on in this piece.

---

[87] *Id*, Department of Homeland Security (DHS).

Finally, there are also those executive employees who do not require confirmation by the Senate. Many of these employees serve on the Executive Office of the President, which helps the president on matters from economic policy, security policy, and environmental policy, for example. These consist of just under about 2,000 employees, many of whom have very significant roles in the federal government.[88] The White House chief of staff monitors the EOP and manages the president's schedule and information flow. Through these advisors, the president receives information that is deemed relevant to him.

An interesting paradox is created as a result of this: while the growth of the executive branch over the course of the years has greatly expanded the president's powers and scope of influence, it has also made him more dependent on his employees for relevant information and day-to-day activities. This paradox became especially problematic during the Bay of Pigs invasion, when President John F. Kennedy was debating how to invade Cuba to overthrow Fidel Castro. His advisors were too afraid to present information that might be perceived as dissent, and oftentimes went along with whatever Kennedy was saying. As a result, the invasion was a massive failure.

The size and history of executive departments are worth noting to fully understand the grasp the president has over the Executive Branch, and to understand just how many people are impacted by the president's power to appoint and remove, and direct via executive order. Rather than a few thousand people, as the Framers saw it, there are millions of people who work in dozens of agencies and hundreds of subagencies, all of whom the president can directly influence.

---

[88] The American Presidency Project. "Size of the Executive Office of the President." https://www.presidency.ucsb.edu/statistics/data/size-the-executive-office-the-president-eop

VI. How the Unitary Executive Theory is Used in Practice, and the Necessity of the Unitary Executive Theory in the Modern Day

The growth of the executive branch has been tied to the establishment of the Civil Service Commission, which hires federal employees via merit examination. The original Civil Service Commission was established in 1871 by President Ulysses Grant. However, Congress did not renew the Commission and it expired in 1874. Following President James Garfield's assassination in 1881 by a dissatisfied job seeker, Congress felt the need to pass the Pendleton Act to re-establish the Civil Service Commission. The Civil Service Commission sought to end the spoils system, where the president's allies and friends would gain employment based on their support and acquaintance with the president. Instead, this law provided that federal employees would be hired based on merit via exams, and is the basis of hiring for federal employees today.

The Civil Service Commission consists of three commissioners, with no more than two from the same political party allowed. The president is given the sole authority to remove any commissioner and to appoint one with the advice and consent of the Senate, building on the fundamental concept of the unitary executive theory that the president bears the sole power of removal. "The President may remove any commissioner; and any vacancy in the position of commissioner shall be so filled by the President, by and with the advice and consent of the Senate, as to conform to said conditions for the first selection of commissioners," the law reads.[89]

Thus, due to the Civil Service Commission's prohibition of employees' removal on the basis of politics, the jobs of federal employees have been relatively stable. From 1982 through 2021, the lowest number of federal civilian employees came in 2001, with 2.71 million

[89] National Archives. "Pendleton Act (1883)." https://www.archives.gov/milestone-documents/pendleton-act

employees hired at the time, while the highest number was in 1989, with 3.15 million employees (excluding military).[90] Although the president does technically have the authority to remove all executive branch employees, who consist of more than 98% of the federal workforce per White House statistics, the president usually does not end up removing these employees.[91] The Pendleton Act does not explicitly state whether the president can remove a civil service employee or not, but it is generally accepted that the president does have the ability to do so. In his work "Does the Constitution Prevent the Discharge of Civil Service Employees," Gerald E. Frug cites George William Curtis, Chairman of President Ulysses Grant's Civil Service Commission, who argued that the president's removal power with respect to the Civil Service should not be in doubt. "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 now 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."[92] However, the Pendleton Act ensures that the president, head of the department, or any other superior cannot remove civil service employees for political reasons. Additionally, employees have the right to appeal their decisions. Plus, the president simply doesn't know all of the millions of these employees, and thus cannot accurately assess how they perform. Their performance is thus more efficiently monitored by their bosses within the respective department they work in.

---

[90] Statista. (2022). "Number of governmental employees in the U.S. from 1982 to 2021." https://www.statista.com/statistics/204535/number-of-governmental-employees-in-the-us/
[91] The White House. (2021). "Strengthening the Federal Workforce." https://www.whitehouse.gov/wp-content/uploads/2021/05/ap_5_strengthening_fy22.pdf
[92] Frug, G.E. (1976). "Does the Constitution Prevent the Discharge of Civil Service Employees?" University of Pennsylvania Law Review, Vol. 124, p. 949.

While federal civilian employees have typically been safe from the president's use of the removal power in their capacities, there was a notable exception recently. In October 2020, President Donald Trump created "Schedule F" via executive order, which would give the president power to re-classify thousands of employees in "positions of a confidential, policy-determining, policy-making, or policy-advocating character."[93] Re-assigning these employees would give them the status of political hires, which would allow the president to fire them for any reason. President Joe Biden rescinded the order upon taking office in January 2021, but Trump, who is keen on making a return to the White House and has launched his re-election campaign, has hinted at reinstating the order. "We will pass critical reforms making every Executive Branch employee fireable by the President of the United States," Trump said at a rally in 2022.[94] Schedule F's return has the potential to remove 50,000 employees from the civil service, which could be one of the largest shake-ups of the civil service in years. An expansion of Schedule F could raise challenges concerning the separation of powers doctrine, questioning whether the president has the authority to interpret the Pendleton Act in such a manner without Congress's consent. It would further raise questions regarding political firings, which the Pendleton Act prohibits.

Aside from the particular exception of Schedule F, presidents have historically used their removal power on political positions more than anything else. Typically, this relates to cabinet positions and the president's cabinet-level employees, called by some his "A-team." When a president takes office, he usually removes all cabinet officers with significant political influence and creates a new "A-team." This is particularly true since the start of the twenty-first century,

[93] Trump White House Archives. (2020). "Executive Order on Creating Schedule F In The Excepted Service." https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-creating-schedule-f-excepted-service/
[94] Wagner, E. "Trump Is Threatening the Return and Expansion of Schedule F." Government Executive. https://www.govexec.com/workforce/2022/03/trump-threatening-return-and-expansion-schedule-f/363145/

where each party has held the White House under two presidents; the Republicans having George W. Bush and Donald Trump and the Democrats having Barack Obama and Joe Biden. From Bush to Biden, every new president has removed the former president's cabinet heads and has installed their own.

The power to remove those in political positions, including cabinet heads, is incredibly important to the success of a president's administration and cannot be taken for granted. Due to the nature of Congress in recent years, presidents have faced extraordinary challenges to any policy they desire, and as a result, typically fail to keep campaign promises. As a result, the president has a pressing need to push his agenda via executive action. The Senate requires 60 senators to break a filibuster, which therefore means 60 senators are needed to pass a law in the Senate. The last time a Congress had a unified government, including the ability to overcome a Senate filibuster, was in the Ninety-Fifth Congress, where President Jimmy Carter and Democrats held the majority. In the 111th Congress, the Democrats had a sixty-seat majority for just about two months until Sen. Ted Kennedy passed away. Republican Scott Brown won the special election to that seat, which ruined the Democrats' majority.

This is when the president's cabinet comes into play. Presidents issue executive orders, directives by the president to agencies telling them how to operate and what actions to take, in order to advance as much of their agendas as possible. Executive orders are a regular occurrence in American society, with every president except William Henry Harrison, who died a month into his term, issuing them. However, their usage became more common toward the late nineteenth century and early twentieth century. President Ulysses S. Grant was the first president to issue more than 100 executive orders, issuing 217 during his terms, and President Theodore

Roosevelt was the first to issue more than 1,000, passing 1,081 in his terms.[95] However, the president to issue the most executive orders is unsurprisingly Franklin D. Roosevelt, who issued 3,721 during his unprecedented four terms.[96] Roosevelt was the last president to mass more than 1,000 executive orders during his time in office, but every president since then has issued hundreds.[97]

Via executive orders, presidents have managed to score among their most significant achievements, manage notable crises, and swiftly take action in times of controversy or danger. Among the most notable recently include President Trump's COVID-19 response that launched Operation Warp Speed. Operation Warp Speed was a plan devised by the Trump Administration that directed the Department of Health and Human Services to ensure the swift creation, approval, and distribution of COVID-19 vaccines to protect against the virus. By the end of Trump's term in 2021, more than sixty million COVID-19 vaccine doses had been released – and people were beginning to get vaccinated with shots that had taken under a year to be released.[98] Additionally, Trump was able to issue executive orders that included extending unemployment benefits, deferring student loan payments, and reinforcing federal evictions protections.[99]

Most recently, President Biden has utilized executive orders to mobilize the federal government's response to abortion being sent back to the states after the landmark *Dobbs v. Jackson Women's Health Organization* case which eliminated the constitutional right to an abortion established by *Roe v. Wade* in 1973 and sent the decision back to the states. In the wake

---

[95] The American Presidency Project. (2023). "Executive Orders." https://www.presidency.ucsb.edu/statistics/data/executive-orders#eotable
[96] *Id.*
[97] *Id.*
[98] U.S. Government Accountability Office. (2021). "Operation Warp Speed: Accelerated COVID-19 Vaccine Development Status and Efforts to Address Manufacturing Challenges." https://www.gao.gov/products/gao-21-319
[99] Newburger, E. & Pramuk, J. (2020). "Trump signs orders aimed at extending some pandemic relief after Congress fails to reach a deal." https://www.cnbc.com/2020/08/08/trump-signs-executive-order-on-coronavirus-relief.html

of dozens of states banning abortion, with many banning the procedure without exceptions considering the mother's health, rape, or incest, the Biden administration has taken executive action to make it easier for women in such states to find alternative options. In July, Biden signed his first executive order on the matter, which directed the Justice Department to legally protect abortion seekers and to ensure access abortion pills approved by the FDA.[100] Biden's Department of Health and Human Services further told hospitals that they have to provide abortion services to mothers if their lives are at risk.[101] This January, Biden's FDA made the decision to allow abortion pills to be accessible to many more pharmacies and removed the requirement for women to have to pick up the drugs in person.[102]

Also in recent news, President Biden passed an executive order that directed the Department of Education to forgive up to $20,000 for student loan borrowers receiving Pell Grants and up to $10,000 for other loan borrowers. The individual must make no more than $125,000 per year or have a $250,000 annual household income.[103] However, the program has been put on pause by the U.S. Court of Appeals for the Eighth Circuit. Legal scholars have predicted that the Supreme Court, which is scheduled to take up arguments surrounding the case

[100] CBS News. (2022). "Biden signs executive order on abortion access." https://www.cbsnews.com/news/biden-abortion-access-executive-order/
[101] Miller, Z. (2022). "Biden admin: Docs must offer abortion if mom's life at risk." The Associated Press. https://apnews.com/article/abortion-health-government-and-politics-4221f9306a596904b9af2e0d1fad23b9
[102] Perrone, M. (2023). "The FDA just finalized a Biden rule change to make abortion pills much more widely available at pharmacies nationwide." Fortune Magazine and The Associated Press. https://fortune.com/2023/01/04/fda-abortion-pills-rule-change-pharmacies-mail-order/
[103] The White House. (2022). "FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most." https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/

soon, will ultimately strike the program down, predicting the justices will argue that the loan relief violates the separation of powers doctrine.[104]

In his terms, President Barack Obama took significant executive action as well, with his most notable executive order being the Deferred Action for Childhood Arrivals, better known as DACA. The order, which has been the subject of plenty of controversy, arose following Congress's inability to take action on illegal immigration into the United States. President Obama's order allowed hundreds of thousands of people who were brought into the United States illegally as children to remain in the United States and seek a path to citizenship, including those who are working, in school, and who are or have been in the military.[105]

Additionally, presidents have the power of issuing an executive agreement, which enters the country into contracts with other nations with the same force and effect of treaties, but do not require the authorization of the Senate. However, these agreements can be withdrawn between two administrations with differing views on the subject. A notable occurrence of this was in the Paris Climate Agreement, which President Obama brought the United States into with the intention of lowering greenhouse gas emissions. However, President Trump withdrew the United States from the agreement upon taking office, while President Biden brought the United States back into it upon his ascension to the presidency. A similar situation occurred with the Joint Comprehensive Plan of Action, in which the United States and its western allies aimed to prevent Iran from manufacturing nuclear weapons. President Obama brought the United States into the agreement in 2015, though it was not via executive agreement nor was it via treaty, while

[104] Nova, A. (2022). "Supreme Court likely to rule that Biden student loan plan is illegal, experts say. Here's what that means for borrowers." CNBC. https://www.cnbc.com/2022/12/05/supreme-court-tackles-biden-student-loan-plan.html

[105] Shabad, R. (2014). "Obama's key executive actions." The Hill. https://thehill.com/regulation/court-battles/211303-obamas-key-executive-actions/

President Trump removed the United States from the deal in 2017. Though presidents can easily remove the nation from executive agreements upon taking office, the efficiency with which a president can negotiate and come to a resolution with another country make executive agreements an important tool in the president's disposal in utilizing his executive powers to the fullest extent.

As seen by the examples of the three most recent presidents, executive orders and agreements have taken on a role of substantial importance in a president's ability to face situations that arise. When Congress is in a stalemate, as it often is, the president must be able to make important decisions to keep the country functioning. It is also the easiest and most plausible way for a president to get portions of his agenda enacted and to let the American people know where he stands on the key issues of the day. In his autobiography, President Theodore Roosevelt wrote of his stewardship theory, which suggested the president should be able to do anything he wants to protect and advance the interests of the people, so long as neither Congress nor the Constitution prohibits it. "I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws."[106]

This raises the issue of the separation of powers. Many presidents, in line with Roosevelt's thought, have simply taken action. In fact, Calabresi and Yoo argue in their book "The Unitary Executive" that every president has taken some sort of action without Congress's

[106] Roosevelt, T. (1913). "An Autobiography."

approval in order to get their job done.[107] Other times, Congress will simply delegate legislative authorities to the president or other governmental branches. Throughout history, the courts have been reluctant to take a harsh stance against this power. However, as the Supreme Court has become more conservative over the past few decades, it has become stricter on enforcing the separation of powers doctrine and the nondelegation doctrine. The Court demonstrated its thought with the latter in the 1998 landmark case of *Clinton v. City of New York*. Congress had passed the Line-Item Veto Act, allowing the president to veto individual portions of bills without vetoing the whole bill. New York City challenged the law, and ultimately the Court agreed with New York that the bill violated the separation of powers doctrine by giving him legislative power to amend the law in front of him. "If the Line-Item Veto Act were valid, it would authorize the president to create a different law – one whose text was not voted on by either House of Congress or presented to the President for signature," Justice John Paul Stevens wrote for the majority.[108]

With regards to the separation of powers doctrine, the Supreme Court recently heard arguments regarding the Biden administration's plan to eliminate hundreds of billions of dollars of student loan debt and raised concern regarding the president's ability to engage in such. "I think most casual observers would say if you're going to give up that much amount of money, if you're going to affect the obligations of that many Americans on a subject that's of great controversy, they would think that's something for Congress to act on," Chief Justice John Roberts said as the Court heard arguments regarding the plan.[109]

---

[107] Calabresi, & Yoo, C.S. (2008). *The Unitary Executive: Presidential Power from Washington to Bush*. Yale University Press.
[108] 524 U.S. 417
[109] Liptak, A. (2023). "Supreme Court Appears Skeptical of Biden's Student Loan Forgiveness Plan." The New York Times. https://www.nytimes.com/2023/02/28/us/politics/student-loan-supreme-court-biden.html

The president's ability to appoint (with the Senate's approval) and remove cabinet heads is one of the most significant aspects of the unitary executive theory in the modern day due to the president's ability to pass significant orders without Congress. It has brought out intense debate, such as on the separation of powers and nondelegation issues, but nonetheless proves to be an efficient means of getting the agenda pushed.

VII. How Presidents Claiming War-Time Powers and National Security Interests have led to Abuses of the Unitary Executive

The Constitution lays out the president's powers as commander in chief of the armed forces in very broad terms. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."[110] This power clearly gives the president power to lead the military in times of war, but it doesn't say what exactly the president's duties are as commander in chief, nor does it provide any limitations on the president's power. While it is important to have one person, the president, making the final decision on a matter like this for efficiency and accountability purposes, this power has been abused to intrude on Americans' fundamental constitutional rights many times with no accountability.

Probably the most notable example of a president aggressively acting as commander in chief was President Abraham Lincoln in 1861, when he first suspended the writ of habeas corpus, initially between Philadelphia and Washington, D.C. despite the invasions not occurring in these provinces. Habeas corpus, meaning "show me the body" in Latin, prevents people from being detained indefinitely without legal justification. Its origins date back to Britain in the Magna Carta, when the British nobility demanded the right due to the king's indefinite imprisonments. In the United States, the Constitution says that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[111] The writ was suspended by Lincoln due to the Civil War, a justifiable reason. However, the Framers placed the clause concerning habeas corpus in Section 1 of the

[110] U.S. Constitution, Section 2, Clause 1.
[111] *Id,* Section 1, Clause 9.

Constitution, which outline Congress's powers. As a result, it is implied that it is within Congress's prerogative to suspend habeas corpus, not the president's.

This was the argument Chief Justice Roger Taney laid forth in the case of *Ex parte Merryman*.[112] This case concerned a southerner with Confederate sympathies, John Merryman, who was detained and sought a writ of habeas corpus. Taney, a Confederate sympathizer, saw this as an opportunity to rebuke the president. Taney argues in his opinion that there is no evidence that the president can suspend the writ of habeas corpus. "This article [Article I] is devoted to the legislative department, and has not the slightest reference to the executive department," Taney argued. However, he acknowledged that there was nothing in his power he could do to stop Lincoln from exercising this power. "I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome," Taney said. Surely enough, Lincoln explicitly rebutted Taney's order, saying, "are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated? Even in such a case, would not the official oath be broken if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it?"

While Lincoln's action worked – suspending the writ of habeas corpus to allow the Union to engage in war with the treasonous Confederacy and their sympathizers like Taney with the fullest efficiency – one can't help but wonder what would happen if a president with malicious intentions were to declare the same power in a different context. Would Congress stop him? Would the armed forces stop him? Would federal courts stop him? What action would be taken to prevent the president from becoming a dictator? There is no doubt Lincoln's actions

[112] 17 F. Cas. 144.

throughout the Civil War served a noble end-game purpose in freeing Black Americans from slavery, but it is also true that this cannot be taken lightly. The President of the United States simply waiving a constitutional guarantee, and ignoring the Supreme Court's order to recognize it, is an extraordinary display of power that most presidents would likely be incapable of handling with competency and respect for restoring order. Such is why the Constitution does not allow presidents to declare an emergency period and give the president dictatorial powers, as the ancient Roman government did, even if it is the right course of action.

The Supreme Court recognized the president's limits in the case of *Ex parte Milligan*. Lambden P. Milligan, a Confederate sympathizer, had been sentenced to death by a military tribunal in Indiana. The Court questioned whether it was constitutional for Milligan to be tried in a military tribunal in his situation. In its unanimous opinion, the Court ruled that it was unconstitutional. "It is difficult to see how the safety of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for the their trail, when the courts were open and ready to try them," the opinion read.[113] However, the majority made it clear that martial law can be declared and citizens can be tried in military court, but this would only be if the war forced all courts to be closed and made it necessary for a military tribunal to occur. "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction," Justice David Davis, who was Lincoln's friend, wrote.[114] Davis also emphasized the importance of the president respecting Congress's power and not overstepping his boundaries. "But neither can the

[113] 71 U.S. 2.
[114] *Id* at 127.

President, in war more than in peace, intrude upon the proper authority of Congress, nor can Congress upon the proper authority of the President."[115]

Not even 100 years later, President Franklin Delano Roosevelt issued the infamous Executive Order 9066, which forced Japanese-Americans into internment camps. This order authorized Henry Lewis Stimson, the Roosevelt's secretary of war, and military commanders with his approval, to designate certain areas of the United States "military areas," which would control the right of people to enter, remain, and exit the zones.[116] It then directed the military leaders to set up food, transportation, and shelter for those included in the plan. General John DeWitt was largely considered the mastermind behind the internment camps and led the way with this task. DeWitt issued Public Proclamation Nos. 1 and 2 soon after this order was passed, which cumulatively designated all of Washington, Oregon, California, and Arizona military areas. Uncoincidentally, approximately 74% of Japanese-Americans at the time lived in California.[117] The rest were mostly scattered around the aforementioned west coast states. DeWitt thus had the authority to place almost all Japanese-Americans in internment camps via this executive order, and that is exactly what he did.

DeWitt ordered the internment of the Japanese, accusing them of being disloyal to the United States government and instead loyal to the Japanese government, who had recently bombed Pearl Harbor. Dewitt gave them a few days at best to gather their belongings and dispose of their property. The conditions at the camps were prison-like, with people being exposed to the hot desert sun constantly. People slept in barracks or otherwise small

---

[115] *Id* at 140.
[116] National Archives. "Executive Order 9066: Resulting in Japanese-American Incarceration (1942)." https://www.archives.gov/milestone-documents/executive-order-9066
[117] Fresno State University Library. "Japanese Americans in World War II." https://guides.library.fresnostate.edu/c.php?g=636720

compartments that oftentimes had no running war.[118] The people being detained had not committed any crimes, and were not loyal to the Japanese government; however, the U.S. military didn't need to prove their loyalty or danger to society to remove them. In fact, two-thirds of the Japanese detained were American citizens, while older Japanese people who had immigrated to the United States were prohibited from obtaining citizenship.[119]

With the stroke of a pen, President Roosevelt, via executive order, was able to upend the lives of more than 120,000 people without due process. Their liberty was violated and their properties were seized. Roosevelt was able to direct his presidential cabinet to commit such an atrocity in an instant. In *Korematsu v. United States*, the Supreme Court majority decided in favor of Roosevelt's executive order, arguing that it would be impossible to distinguish which Japanese were loyal and which weren't, and that the nature of the emergency would substantiate the necessity of the order.[120] The American public also favored Japanese internment when surveyed in March 1942, just after Roosevelt passed his order. 93% of Americans thought the Japanese people who were not citizens should be "moved away" from the Pacific Coast, while 59% thought the same for the Japanese who were American citizens.[121]

In 1952, during the Korean War, Roosevelt's successor, President Harry S. Truman, attempted to seize the country's steel mills following a strike by their labor union, the United Steelworkers of America. The laborers weren't able to get enough of an increase in their wages, and the steel companies argued that if they did increase their wages, which they were reluctant to

---

[118] Library of Congress. "Behind the Wire." https://www.loc.gov/classroom-materials/immigration/japanese/behind-the-wire/
[119] The National WWII Museum New Orleans. "Japanese American Incarceration." https://www.nationalww2museum.org/war/articles/japanese-american-incarceration
[120] 323 U.S. 214 (1944).
[121] The United States Holocaust Memorial Museum. "Public Opinion Poll on Japanese Internment, March 1942." https://exhibitions.ushmm.org/americans-and-the-holocaust/main/us-public-opinion-on-japanese-internment-1942

do, they would need approval to raise their steel prices from the Office of Price Stabilization. Truman could have invoked the recently passed Taft-Hartley Act of 1947, which would have allowed for the president to force the laborers back into work for eighty days while the unions negotiated with the companies. However, Democrats enjoyed strong support from labor unions, so angering them was not a smart idea politically. Plus, Truman's approval rate was already far underwater at the time – under 30%.[122] In the name of national defense, but in reality a political decision, Truman issued his Executive Order 10340, which directed Secretary of Commerce Charles Sawyer to seize the steel mills so that production would not stop in the face of the war.

To his credit, President Truman did notify Congress immediately. However, Congress did not choose to authorize his action, which led to the showdown that resulted in the landmark Supreme Court case *Youngstown Sheet & Tube Company v. Sawyer* after the owners of steel companies complained about Sawyer and Truman's seizure of their businesses. On the other hand, Truman argued that this order was necessary to protect the well-being and safety of the nation and claimed that seizing the mills in a time of national emergency came as an "inherent power" of the president.[123] The Court found that President Truman did not have the power to seize the steel mills, neither constitutionally nor congressionally. "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times," Justice Hugo Black wrote for the Court majority, dealing the final blow to Truman's steel mill seizure.

In his landmark concurring opinion, Justice Robert Jackson separated presidential actions into three categories, ranked by the degree of authority the president has in each. The first category is when the president acts according to an express or implied authorization on behalf of

[122] "Harry S. Truman Public Approval." The American Presidency Project. University of California Santa Barbara. https://www.presidency.ucsb.edu/statistics/data/harry-s-truman-public-approval
[123] 343 U.S. 579.

Congress. It is only in this circumstance when the president can personify federal sovereignty. The president's authority is at its peak in this scenario. The second occurs when the president acts in absence of a congressional grant or denial of authority. However, Jackson acknowledges that there is a grey area in this scenario. If the president's actions were to be challenged, the context of the situation would be what is largely at stake, not the legal theories. Finally, the third scenario, the one which the president's authority is at its lowest, is when he acts in express or implicit denial of Congress. The only way the president's power can be sustained by the courts is if they rule Congress cannot act on it, per Jackson.

Of these three categories, Truman's steel seizure was deemed to be falling in the third. Jackson argued that if the Court were to allow Truman's power to proceed, then who knows what would be next. "No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance and the parties affected cannot learn the limit of their rights," Jackson said, emphasizing the need for the president's power to be checked.[124] This was one of the notable times the Supreme Court rebuked a president attempting to use the unitary executive to his advantage, but it would be far from the last.

More recently, President George W. Bush and his administration engaged in a series of acts that went extraordinarily beyond his realm of authority under a balanced unitary executive theory. The Bush Administration was found to have been engaged in unwarranted wiretapping. While previous administrations had conducted wiretapping operations on people in foreign countries, which is constitutional, the Bush Administration went the extra mile to conduct unwarranted wiretapping in the United States. This raised major Fourth Amendment concerns,

[124] *Id* at 655.

which prevents against unreasonable searches and seizures and requires probable cause of one committing a crime for a warrant to be issued.

The Bush Administration, like the previously discussed presidential administrations that used these powers under the war-time guise, justified its wiretapping as a counter-terrorism measure necessary in the wake of the September 11 attacks. Shortly after the attacks in 2001, John Yoo of the Bush Department of Justice's Office of Legal Counsel argued in a declassified (though mostly redacted) memo that the president has the authority to engage in this kind of behavior when a military operation justifies it. "… we do not believe that Congress may restrict the President's inherent constitutional powers, which allow him to gather intelligence necessary to defend the nation from direct attack," Yoo Wrote.[125] "… intelligence gathering in direct support of military operations does not trigger constitutional rights against illegal searches and seizures," Yoo wrote.[126] In 2002, Bush issued a secret executive order authorizing the National Security Agency to wiretap communications between foreign citizens and people inside the United States. This information did not become public until the New York Times published it in December of 2005.[127]

Presidents, as seen in the examples above, sometimes use national security interests and wartime powers to justify their questionable actions. Wartime powers can be used for noble purposes, as seen in Lincoln's actions to free Black Americans from slavery and hold the union together. However, President Roosevelt also thought he was using his power for a noble purpose; winning World War II. However, Roosevelt's internment of Japanese-Americans was a

---

[125] American Civil Liberties Union. "John Yoo NSA Wiretapping OLC Memo (November 2, 2001)." https://www.aclu.org/legal-document/john-yoo-nsa-wiretapping-olc-memo-november-2-2001
[126] *Id*, p. 17.
[127] Lichtblau, E. and Risen, J. (2005). "Bush Lets U.S. Spy on Callers Without Courts." https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html

discriminatory means of what he considered a noble intention, demonstrating that intentions aren't always a good enough justification for using such powers. The president's power becomes even more dangerous when the people don't even know what he's doing, as with Bush's wiretapping order. While the unitary executive theory serves the benefit of providing for more efficient government in many cases, including the removal power, abusing it can prove to be dangerous and invasive to the American people.

VIII. How Executive Sub-Agencies have Taken on Policy-Making Roles, Sometimes to the Detriment of the Public

Executive subagencies, the agencies within the major agencies listed earlier, have enormous powers to implement policy in this country. The Administrative Procedure Act of 1946 governs how agencies act and was passed by Congress in order to set down uniform, reasonable, and fair rules governing the bureaucracy that had recently grown under President Franklin D. Roosevelt's creation of a plethora of agencies. The APA requires rules – defined as any part of an agency statement or application of the law – be published in the Federal Register for the public to see and comment on. However, rules that encompass military, naval, and foreign affairs functions or agency management/personnel are not required to be published. Additionally, the agencies exempted from this requirement if giving public notice of the rule is "impracticable, unnecessary, or contrary to the public interest." [128]

Oftentimes, these agencies implement significant executive initiatives without needing to consult Congress for its advice. Federal courts are allowed to strike down rule changes, but many typically defer to the agencies' judgments. This precedent was established in the landmark case *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* This case concerned a regulation on emissions passed under the Environmental Protection Agency's interpretation of the Clean Air Act's "stationary source" provision. The Clean Air Act had not specifically defined what a stationary source was, which the EPA used to make its own regulations on the matter.

When Congress is does not explicitly address a particular question or term at issue through its legislation, the Court cannot simply input its own opinion in a case, per Justice John

[128] Administrative Procedure Act (1946).

Paul Stevens in his majority opinion. Rather, it is for the courts to determine whether the interpretation provided by the executive agency is reasonable. Usually, the Court will defer to the agency unless its action is severely unreasonable. "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer," Stevens wrote.[129] While executive agencies' intentions are usually good-hearted, and their policymaking tends to ensure that government and American society is functioning smoothly and safely, there have been instances when this power has gone unchecked, whether via rogue leaders or misguided policy. These initiatives have sometimes drastically impacted Americans' lives – and have been conducted with and without the knowledge of presidents and Congress.

One of the most powerful, and well-known, executive subagencies is the Federal Bureau of Investigation (FBI). Operating under the Justice Department, the FBI is charged with being the top federal law enforcement agency and helps collect security intelligence as well. In the modern day, the FBI's top priorities include investigating terrorism, cybercrime, and counterintelligence. However, both in the past and present, the FBI has been one of the agencies used by the executive to accomplish its goals without Congress's intervention, a key agency in the president's utilization of the unitary executive.

Notably, the FBI utilized its powers during the civil rights era in order to dissuade leaders like Dr. Martin Luther King, Jr., from continuing their movements. In a notable example, the FBI wrote Dr. King an anonymous letter urging him to kill himself. The letter accused King of being

[129] 467 U.S. 837.

a "colossal fraud and an evil, vicious one at that."[130] It also called him an "evil, abnormal beast" before saying "King, there is only one thing left for you to do. You know what it is."[131]

The FBI had been continuously illegally surveilling Dr. King, beginning in 1963 following his famous "I Have a Dream" speech at the March on Washington. The FBI bugged his hotel rooms and attempted to get photographic surveillance of him, including recordings of his extra-marital affairs.[132] The FBI attempted to leak the recordings and files from its surveillance of Dr. King, but it never became the huge story that the FBI hoped it would.

The FBI's letter to Dr. King was a part of a larger FBI operation from 1956-1971 to disrupt political organizations in the United States called COINTELPRO, not discovered until years after its actions through the Church Committee, a Senate select committee organized in the 1970s to investigate power abuses. Members targeted as part of this plot included Dr. King and Malcolm X. The domestic groups the program covered were the Communist Party USA (1956-1971), Socialist Workers Party (1961-1969), White Hate (1964-1971), Black Nationalist-Hate Group (1967-1971), and New Left (1968-1971).[133] However, these categories were very broadly designated and came to include a variety of other institutions, including the Southern Christian Leadership Conference and Black Student Unions. The Church Committee found that "Bureau witnesses admit that many of the targets were nonviolent and most had no connections with a foreign power."[134] The Church Committee explicitly found that the FBI's actions interfered with the First Amendment. "The acts taken interfered with the First Amendment rights of citizens.

---

[130] Gage, B. (2014). "What an Uncensored Letter to M.L.K. Reveals." The New York Times. https://www.nytimes.com/2014/11/16/magazine/what-an-uncensored-letter-to-mlk-reveals.html
[131] *Id*.
[132] U.S. Senate. "Intelligence Activities and the Rights of Americans: Book II."
[133] *Id* p. 213.
[134] *Id*, p. 213.

They were explicitly intended to deter citizens from joining groups, 'neutralize' those who were already members, and prevent or inhibit the expression of ideas."[135] It went even further, saying "the FBI was not just 'chilling' free speech, but squarely attacking it."[136] With all of its undercover actions, the FBI was actively working against the will of the people, as Congress had already passed the Civil Rights Act of 1964 and the Voting Rights Act of 1965 as it continued its surveillance. An unelected division of the executive branch, the FBI was attempting not only to work against the public will, but was willing to kill and sabotage in order to do so.

Presidents overseeing the FBI have been blamed for abuses of not only the FBI, but other agencies' powers. The Church Committee found that "until recently, the Executive branch has neither delineated the scope of permissible activities nor established procedures for supervising intelligence agencies."[137] It also acknowledged that courts have not heard many cases and that when they have, they were "reluctant to grapple with them."[138] The committee made it clear that presidents were in the loop on surveillance activities, saying flatly "each administration from Franklin D. Roosevelt's to Richard Nixon's permitted, and sometimes encouraged, government agencies to handle essentially political intelligence."[139] This was especially true during the civil rights movement, where Attorney General Robert Kennedy is known to have personally authorized and sent to President John F. Kennedy a report on Dr. Martin Luther King Jr.'s personal life.[140] While the depth of each president's knowledge on the FBI's state of affairs can

[135] *Id*, p. 214-215.
[136] *Id*, p. 216.
[137] *Id* p. 6.
[138] *Id* p. 6.
[139] *Id* p. 9.
[140] *Id* p. 52.

never be definitively stated, it is clear that presidents had at least some idea of COINTELPRO and other relevant FBI abuses.

Subagencies' behaviors do not have to be as drastic as the FBI's behavior in the civil rights era, though, in order to have a significant effect on peoples' lives. A major example in the modern day came during the COVID-19 pandemic, when much of the country waited eagerly for instructions from the Food and Drug Administration (FDA) and the Centers for Control and Disease Prevention (CDC), subagencies of the Department of Health and Human Services, on what to do to keep themselves safe from what was a new and emerging virus.

From March 2020 onward, the CDC issued regular updates to its mask guidance. This guidance directed the country on when it had to wear a face mask in public. Particularly, it required people to wear a face mask on planes, trains, buses, and other public locations within federal jurisdiction, well into 2022, when many were already immunized against the COVID-19 virus. This order was challenged, and eventually struck down by a Florida judge, for overstepping the CDC's authority.[141]

More invasive to many people, though, were COVID-19 vaccine mandates issued by federal agencies under the guidance of the CDC's recommendations. The Office of Safety and Health Administration (OSHA) which provides federal labor guidelines, mandated employers with 100 or more employees to require their workers to be vaccinated against COVID-19. For those with valid exceptions, weekly resting was required. This action was done unilaterally by OSHA, without any congressional insight or approval. Ultimately, the Supreme Court rejected

[141] Brennan, D. (2022). "Federal judge in Florida voids mandate." CBS News. https://www.cbsnews.com/newyork/live-updates/mask-mandate-changes-on-planes-trains-uber-lyft/#post-update-ebdf58b0

this mandate in early 2022, arguing that the mandate exceeded the executive power and would require congressional approval to be upheld.[142] However, this did not strike down the military's vaccine mandate, issued by Secretary of Defense Lloyd Austin. The mandate required all military servicemembers to be vaccinated or lose their jobs. The mandate was officially rescinded in January 2023 on Congress's orders.

The discussion of COVID-19 mandates is not intended to serve as a debate regarding the efficacy of mask or vaccine mandates. Rather, it is to show that the actions that subagencies like the CDC and FDA take can drastically impact the lives of people in the country without the need to refer to Congress by allowing these agencies to take the power of policymaking.

Major examples of the FBI, CDC, and OSHA's initiatives have shown the power of presidential subagencies. These subagencies do not have to get their actions approved by Congress, but these initiatives can often have major impacts on peoples' lives. These actions also essentially allow subagencies the task of policymaking. The FBI, through its consistent involvement in trying to shut down the movements of the 1960s, attempted to stifle discussion about major issues that people were demanding Congress look into, and that Congress was taking action on, like civil rights. The CDC and OSHA, through their vaccine and mask mandates, literally implemented policy, without Congress's approval, that regulated what people have to wear or put into their bodies.

In recent years, many scholars, particularly conservative scholars, have raised doubts on the *Chevron* doctrine's constitutionality. One of the leading scholars on the subject, Philip Hamburger, argues that the standard established in *Chevron* causes what he calls "Chevron bias."

[142] National Academy for State Health Policy. (2022). "Federal Vaccine Mandates and Legal Challenges." https://nashp.org/federal-vaccine-mandates-and-legal-challenges/

He argues that following *Chevron* deprives judges of their judicial independence because of the precedent that they must adhere to the rulings of agencies per *Chevron*, depriving them of the ability to make their own judgments. Hamburger also argues that the *Chevron* doctrine results in a "systematically biased" judgment contrary to the Fifth Amendment's due process clause.[143] He argues that by deferring to the government's agencies, even when the government is a party, resulting in a precommitment to one of the parties on a case. "When they defer to administrative interpretation, they [judges] systematically favor executive and other governmental interpretations over the interpretations of other parties" Hamburger wrote.[144]

Current Supreme Court Justice Neil Gorsuch, during his time on the U.S. Court of Appeals for the Tenth Circuit, made a similar argument to Hamburger. "But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."[145] House Republicans attempted to pass the Separation of Powers Restoration Act in 2016 that would reverse the *Chevron* doctrine, but still allow courts to come to the same conclusions as the agencies. However, this bill did not become law.

Criticism of the *Chevron* doctrine has led to the establishment of the "Major Questions Doctrine." This doctrine, alluded to in the early 2000s but formally recognized by the Supreme Court in the 2022 in the case *West Virginia v. EPA*, defers to Congress for questions of "economic and political significance."[146] "Under this body of law, known as the major questions

---

[143] Hamburger, P.A. (2016). "Chevron Bias." George Washington University Law Review. 84 Geo. Wash. L. Rev. 1187.
[144] *Id* p. 1212.
[145] 834 F.3d 1142 (Tenth Cir. 2016).
[146] 142 S. Ct. 2587.

doctrine, given both the separation of powers principles and a practical understanding of legislative intent, the agency must point to 'clear congressional authorization' for the authority it claims," Chief Justice John Roberts wrote for the majority in the *EPA* case.[147] This curbs the scope of the *Chevron* case slightly by not automatically deferring to agency regulation in cases that lack clarity, but does not overturn it.

Others argue that even if *Chevron* is not perfect, it does not have to go in its entirety. In his essay "*Chevron* is Dead; Long Live Chevron," Michael Herz asserts that *Chevron* should be revised to respect separation of powers while truly deferring to the executive agency only when Congress is not clear about its intentions. "*Chevron* is not a revolutionary shift of authority from the judiciary to the executive. That *Chevron* is dead. Rather, *Chevron* is an appropriate allocation of decisionmaking responsibility among the three branches, relying on the judiciary to enforce congressional decisions, but protecting agency authority and discretion where Congress has left the decision to the executive."[148]

However, there is also the view that the *Chevron* decision was the right decision and does not unduly trample on the separation of powers doctrine. In his speech "The Enduring Nature of the *Chevron* Doctrine," John C. Cruden argues in favor of the *Chevron* doctrine's predictability in approach. Prior to the *Chevron* doctrine's acceptance, courts would decide on a case-by-case basis whether Congress had intended the conclusion that the agency came to. However, with *Chevron*, a clear path forward is followed: judges are to heed to the discretion of executive agencies, and unless the executive agency oversteps its bounds. Cruden also rebukes the argument that the separation of powers doctrine is violated by demonstrating Congress's role.

---

[147] *Id* at 2595.
[148] Herz, M. (2015). "*Chevron* is Dead; Long Live Chevron." Columbia Law Review. Vol. 115, No. 7.

"As *Chevron* is grounded in the concept that when courts give agencies deference to their interpretation of ambiguous statutory terms they are doing so under an implied grant of authority from Congress, Congress can also narrow or even eliminate that discretion."[149]

In addition to Cruden's argument, there is a key issue of practicality underlying Chevron: courts do not have access to scientific experts in the same way that the agencies do. Though agencies are partisan in nature, as presidents usually shift who is in charge based on their particular views and their party's views, most of the workers in each agency are ordinary people who are experts in their fields. To use the Environmental Protection Agency as an example: its director is appointed by the president with the approval of the Senate. However, it consists of more than 17,000 employees who are hired via civil service.[150] These are 17,000 experts at the president and agency's disposals. Courts do not have this privilege, and therefore, might be limited in making decisions on matters they do not fully understand. Such circumstances make it reasonable to suggest the *Chevron* doctrine is correct in calling for executive deference.

It is also true that when elected, the president has been given the mandate to govern the country by the people. The president is the only official on every person's ballot in the country. When elected, the majority of voters in the country virtually consent to the president's agenda and thereby give him permission to implement the initiatives he promised on the campaign trail. Executive agencies, a key part of the unitary executive theory, allow the president to utilize the tools at his disposal to the greatest degree possible.

---

[149] Cruden, J.C. & Oakes, M.R. (2016). "The Enduring Nature of the *Chevron* Doctrine." Harvard Environmental Law Review. Vol. 40, 2016, 189-209.

[150] U.S. Equal Employment Opportunity Commission. (2023). "Environmental Protection Agency (EPA)." https://www.eeoc.gov/federal-sector/environmental-protection-agency-epa-0

Like all forms of government, executive subagencies are prone to acting out of line, as the FBI so notably did in its COINTELPRO campaign. This happens in every government. When this happens, it is up to Congress to pass legislation to hold these subagencies accountable for trespassing on their powers, or simply to remove the officials responsible. If these actions are challenged in federal court, the courts have a responsibility, even under the *Chevron* doctrine, to guard against unreasonable policy initiatives by the executive branch.

IX. Signing Statements – A Modern Tool for a Modern Executive

Signing statements are written statements issued by a president upon his signature of a law that provide his interpretation of the law. Though discussion surrounding signing statements has gained traction over the past twenty years due to President George W. Bush's extensive – and constitutionally questionable – use of them, they are not a new phenomenon. (USCAAN – US Code Congressional and Administrative News) There has historically been a general consensus that James Monroe, the fifth president, was the first to introduce the signing statement with his objection to a law concerning his appointment of military officials, according to Christopher Yoo.[151] However, as Yoo points out in his work, there is a new debate regarding whether Thomas Jefferson issued the first signing statement when he issued an interpretation challenging the constitutionality of his own power when signing the Embargo Act of 1807, thereby limiting his power.[152] Regardless of whether Jefferson or Monroe issued the first statement, the point stands that the signing statement has been a presidential tool since the Founding Era.

However, the signing statement became a more notable presidential tool during President Ronald Reagan's administration. Reagan's attorney general, Edwin Meese III, is widely credited among scholars for developing the signing statement into the tool it is today. Meese made sure the importance of the signing statement was such that it would appear in the "legislative history"

[151] Yoo, C.S. (2016). "Presidential Signing Statements: A New Perspective." Faculty Scholarship at Penn Law. 1700. https://scholarship.law.upenn.edu/faculty_scholarship/1700

[152] Mashaw, J.L. (2007). "Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829." The Yale Law Journal. Vol. 116, No. 8, p. 1636-1740.

section of the United States Code, Congressional and Administrative News, which thus places the signing statement in the Federal Register.

In his notable work on the signing statement, Christopher Kelley distinguishes between three kinds of signing statements.[153] The first group he categorizes the statements into is constitutional signing statements. When issuing this kind of signing statement, a president will typically address whether he believes a certain provision of the legislation at hand is constitutional and whether his administration will enforce the provision at issue. The second group he categorizes them into are political signing statements, which although may be structured the same as constitutional ones, are done with a different purpose: to engage his political base. The third group he categorizes signing statements into is the rhetorical signing statement. This kind of statement does not raise any constitutional or political challenges, nor is it intended to interpret the law in a different kind of way. It is mostly done for political reasons, per Kelley, and is the most common signing statement.

Opponents of the signing statement argue that it is an abuse of presidential power and violates the system of separation of powers. The American Bar Association's Task Force, in criticizing the Bush Administration's use of the signing statement, said "the Task Force concluded that if the President believes part of a bill presented for his consideration is unconstitutional, he should either sign or veto the measure – he should not follow the approach adopted by his predecessors of signing the bill while announcing his belief that a provision is

[153] Kelley, C.S. (2003). "The Unitary Executive and the Presidential Signing Statement." Doctoral dissertation, Miami University. OhioLINK Electronic Theses and Dissertations Center. http://rave.ohiolink.edu/etdc/view?acc_num=miami1057716977

unconstitutional and that the administration will interpret it, if possible, to avoid constitutional showdowns."[154]

Indeed, there have been arguments that the presidential signing statement is a *de facto* line-item veto, which was held to be unconstitutional by the Supreme Court in the 1998 case *Clinton v. City of New York*, where the Court ruled that Congress could not give Bill Clinton the power of a line-item veto due to the separation of powers clause.[155] Legal scholar Philip J. Cooper argued that the signing statement is a line-item veto to a certain degree, as it allows for presidential administrations to "act in the manner that the administration considers appropriate as compared to the way the legislation sets forth the policy."[156]

However, proponents of the signing statement believe that it is within the president's power as the executive to determine how legislation is implemented. Curtis A. Bradley and Eric A. Posner argue that much of the criticism toward signing statements stems not from the idea that the statements themselves are bad, but from the Bush administration's misuse of the tool, arguing that they promote presidential transparency. "Signing statements provide public information about a president's views of a statute and thus would seem to promote dialogue and accountability," the pair wrote.[157] Some scholars, including Yoo, argue that the Court has

[154] Cooney, J.F. (2006). "Signing Statements: A Practical Analysis of the ABA Task Force Report." Administrative Law Review. https://www.administrativelawreview.org/wp-content/uploads/2014/04/Signing-Statements-A-Practical-Analysis-of-the-ABA-Task-Force-Report.pdf
[155] 524 U.S. 417.
[156] Cooper, P.J. (2005). "George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements." Portland State University. Presidential Studies Quarterly 35, no. 3 (September).
[157] Bradley, C.A. & Posner, E.A. (2006). "Presidential Signing Statements and Executive Power." University of Minnesota. 23 Const. Comment. 307.

recognized the president's role in the legislative process via an "equal dignity principle" that gives the president respect similar to that of both houses of Congress in the legislative process.[158]

Constitutionally, the signing statement seems to be a valid executive power. Article II of the Constitution grants the president the power to "take care that the laws be faithfully executed," which gives the president the responsibility to execute the laws that Congress passes.[159]

As a practical matter, the signing statement usually does not have an exorbitant amount of influence, although the Supreme Court has never directly addressed the issue. In the case *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, Justice John Paul Stevens, writing for the majority, argued that "if Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation," thereby giving executive agencies, but not explicitly the president himself, the power to interpret legislation specifically when it is unclear.[160] He additionally wrote "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[161] When Congress's intent isn't clear, the executive has significant leeway in interpreting statues.

Rhetorical signing statements, which do not raise any constitutional objections, are an effective and restrained exercise of the signing statement. Two years into his first term, President Joe Biden has only issued seven signing statements, with five of them being rhetorical. Most recently, Biden signed the COVID-19 Origin Act of 2023, which aims to release declassify information regarding COVID-19's origins. Biden simply stated his administration's view on the

---

[158] Yoo, C.S. (2016). "Presidential Signing Statements: A New Perspective." Faculty Scholarship at Penn Law. 1700. https://scholarship.law.upenn.edu/faculty_scholarship/1700
[159] U.S. Constitution, Article II, Section 3.
[160] 467 U.S. 837.
[161] *Id* at 844.

matter, saying "we need to get to the bottom of COVID-19's origins to help ensure we can better prevent future pandemics," among other similar remarks aimed to score him political points.[162]

However, signing statements, when unchecked by Congress or the courts, can lead to a raucous executive branch, as it did in the Bush administration, which justified its actions through the unitary executive theory. "The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limits on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks."[163] When reauthorizing the PATRIOT Act in 2006, Bush said laid out a similar sentiment. "The executive branch shall construe section 756(e)(2) of H.R. 3199, which calls for an executive branch official to submit to the Congress recommendations for legislative action, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as he judges necessary and expedient."[164] While the ABA and congressmen attacked Bush's interpretations, they did not pass legislation denouncing the president's interpretations or do anything of substance to challenge it. As a result, the practice has been similarly used by all of Bush's successors.

---

[162] The White House. (2023). "Statement by the President on S. 619, the COVID-19 Origin Act of 2023." https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/20/statement-by-the-president-on-s-619-the-covid-19-origin-act-of-2023/

[163] The White House President George W. Bush Archives. "President's Statement on Signing of H.R. 2863, the 'Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006.'" https://georgewbush-whitehouse.archives.gov/news/releases/2006/03/20060309-8.html

[164] *Id*. "President's Statement on H.R. 199, the 'USA PARIOT Improvement and Reauthorization Act of 2005.'" https://georgewbush-whitehouse.archives.gov/news/releases/2006/03/20060309-8.html

Signing statements can be an efficient way for a president to discuss his interpretation of legislation that is passed. It can be used as a device to be transparent with the public about his intentions, and help guide his agencies' work. However, Congress and the courts must be more diligent in policing the president's use of the signing statement. While the president can raise constitutional challenges, as presidents have done in the past, the president should not simply be given free reign to effectively nullify parts of a bill passed by Congress, as held unconstitutional by the Supreme Court in *Clinton v. City of New York*.[165] Congress and federal courts must be more diligent in ensuring that a repeat of the Bush administration's interpretations do not become the norm if the country values its separation of powers.

[165] 524 U.S. 417

X. Independent Counsel – The Debate Around its Standing in the Unitary Executive Theory

With the Trump presidency, debates surrounding the role of the special counsel has been reignited. Modern controversy surrounding the special counsel dates back to the Ethics in Government Act of 1978.[166] Section VI of the EIGA governed the appointment of special counsel, largely in response to President Richard Nixon's Watergate scandal. The special counsel was not to be someone who "holds or recently held any office of profit or trust in the United States."[167] Additionally, the act ensured that the special counsel had the same prosecutorial authorities as the attorney general and any other employee of the Justice Department.[168] Congress was allowed to impeach and convict the special prosecutor. The attorney general was also allowed to remove a special prosecutor, but had to be for good cause. Examples included "extraordinary impropriety, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such special prosecutor's duties."[169]

In 1988, the Supreme Court heard a challenge to the EIGA in the case *Morrison v. Olson*.[170] This case concerned the validity of section VI of the act. Alexia Morrison was the special counsel assigned to investigate Theodore Olson, who was the assistant attorney general for the Office of Legal Counsel at the time, for giving false and misleading testimony to Congress about withholding Environmental Protection Agency documents. Olson argued that section VI was unconstitutional because, among other reasons, it violated the separation of

---

[166] S.555 - 95th Congress (1977-1978): Ethics in Government Act. (1978, October 26). https://www.congress.gov/bill/95th-congress/senate-bill/555
[167] *Id* at § 593(d).
[168] *Id* at § 594.
[169] *Id* at § 596(a)(1).
[170] 487 U.S. 654.

powers doctrine. In a 7-1 decision, the Supreme Court rejected Olson's argument, arguing that the separation of powers doctrine was not violated. Chief Justice William Rehnquist authored the majority opinion, splitting the separation of powers issue into two parts: 1) whether the portion of the law limiting the attorney general's power to remove the special counsel except for "good cause" trampled on executive authority and 2) whether the act as a whole violated the separation of powers doctrine by removing fundamental prosecutorial powers from the president and placing them in the hands of the special counsel.[171] Rehnquist and the Court's majority found that neither violated the separation of powers doctrine. With regards to the first point, Rehnquist argued that the president still had the ability to remove, though the president's ability had its limitations. However, Rehnquist noted that it is within Congress's authority to establish that limitation for the "necessary independence" of the office.[172] With regards to the second part of the issue, Rehnquist noted that Congress does not give itself powers it does not already have. Congress is already able to impeach and convict any U.S. government employee. Additionally, requesting reports from the special counsel from time to time is well within its function, Rehnquist said. With regards to judicial usurpations of executive authority, Rehnquist argued that while the special court was granted power to appoint a special counsel, it could only do so upon the attorney general's request, ensuring the executive power is still in the executive branch.[173] As a result, section VI was upheld.

In his widely famed opinion, Scalia argues against the majority's "balancing test," as he calls it, claiming that the Constitution lays the executive power solely in the president's hands. "It is not for us to determine, and we have never presumed to determine, how much of the purely

[171] *Id* at 685.
[172] *Id* at 693.
[173] *Id* at 695.

executive powers of government must be within full control of the President. The Constitution prescribes that they *all* are," Scalia wrote.[174] Scalia acknowledges the appearance of a conflict of interest, as the president would have the power to not prosecute crimes against himself under his opinion, but argues that it is liberty at stake. "While the separation of powers might prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty," he wrote.[175] Scalia argues that such a law like the EIGA would have the potential to allow Congress to relentlessly attack the president for political differences, and threatens the president and his staff's confidentiality, security, and public support.[176]

Despite the Court upholding its legality, section VI of the EIGA was allowed to sunset in 1999. Concerns about over-investigation arose, as over twenty special prosecutors had been appointed in the twenty years between the law's enactment in 1978 and its sunset in 1999.[177] Notable investigations included the Iran-Contra Affair scandal during President Ronald Reagan's administration and Kenneth Starr's investigation into the Whitewater scandal of Bill Clinton's presidency, which ultimately led to Clinton's impeachment due to his lying about his affair with Monica Lewinsky, who was a White House intern at the time.

Attorney General Janet Reno, who held office in the Clinton administration, established the procedure for appointing special counsels following section VI's sunset. Though it is not federal law as passed by Congress, the Justice Department follows its own set of procedures governing special counsel jurisdiction, noted in the Code of Federal Regulations.[178] The current

---

[174] 487 U.S. 654.
[175] *Id* at 711.
[176] *Id* at 713-714.
[177] Mokhiber, J. (1998). "A Brief History of the Independent Counsel Law." PBS. https://www.pbs.org/wgbh/pages/frontline/shows/counsel/office/history.html
[178] 28 CFR Part 600.

regulations allow the attorney general to directly appoint the special counsel, in a break from EIGA requirements that the special court select the special counsel.[179] However, the special counsel cannot be someone who currently works in the U.S. government in any capacity, including the Justice Department.[180] Similar to the EIGA, though, the special counsel has the same prosecutorial authority as the attorney general or any other U.S. attorney in the Justice Department.[181] The CFR also has a for cause removal procedure similar to the EIGA's, allowing the attorney general to remove the special counsel for "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies."[182]

However, these guidelines are not binding federal law. They are merely guidelines, set out by federal procedure. Theoretically, it is possible the president could fire the special counsel at will. The Mueller investigation from 2017-19 highlighted a significant threat that this could become reality. Special Counsel Robert Mueller III was appointed by Deputy Attorney General Rod Rosenstein to investigate Russian interference in the 2016 U.S. presidential election, an investigation former President Donald Trump repeatedly deemed a "witch hunt"[183] against him despite Mueller finding Russia had interfered in "sweeping and systematic" fashion.[184] Additionally, Mueller investigated whether Trump and his campaign obstructed justice during his investigation. As such, there were fears that Trump would fire Mueller, creating a constitutional showdown. In his report, Mueller found that the president had actually ordered

[179] *Id* at § 600.2.
[180] *Id* at § 600.3.
[181] *Id* at § 600.4.
[182] *Id* at § 600.7.
[183] https://twitter.com/realDonaldTrump/status/865173176854204416?s=20
[184] Mueller III, R.S. (2019). "Report On The Investigation Into Russian Interference In The 2016 Presidential Election." U.S. Department of Justice.

him to be fired, but his personal counsel, Don McGahn, never followed through on the president's orders.[185]

These fears led to a bipartisan group of senators proposing the Special Counsel Independence and Integrity Act of 2018, which would have effectively codified the existing regulations regarding special counsel into law.[186] Then-Senate Majority Leader Mitch McConnell refused to bring the bill up to the floor for a vote, despite it being introduced by fellow Republican Lindsey Graham, which killed the bill. While many Senate Republicans were trying to save face in a midterm election year from Former President Trump, whose endorsement they felt was needed to win their elections, they also alleged constitutional concerns regarding the *Morrison* precedent that legalized the EIGA's special counsel provisions.

Several senators noted that they felt Justice Antonin Scalia's lone dissent in *Morrison* was binding and should be considered the law. For obvious reasons, Scalia's dissent is not actually binding nor is it currently law.

There was also legal opposition to Robert Mueller's appointment to be special counsel. Steven G. Calabresi and Gary Lawson argued that there are three reasons that the Mueller investigation should not have happened and that the criminal convictions sustained should therefore be void: 1) the office of special counsel has not been "established by Law," 2) there is no statute authorizing the attorney general to appoint such a position, and 3) the special counsel is a superior officer rather than an inferior officer and therefore the only way to appoint him would have been through presidential appointment and senatorial confirmation.[187] In reaching

---

[185] *Id* at 289-302.
[186] S.2644 - 115th Congress (2017-2018): Special Counsel Independence and Integrity Act. (2018, April 26). https://www.congress.gov/bill/115th-congress/senate-bill/2644
[187] Calabresi, S.G. & Lawson, G. (2019). "Why Robert Mueller's Appointment As Special Counsel Was Unlawful." 95 Notre Dame Law Review 87.

their conclusion, Calabresi and Lawson acknowledge that there are times when a special counsel is necessary and should be appointed. They argue that the constitutionally and statutorily correct way to appoint these officials is to assign one of the Senate-confirmed U.S. attorneys to take on the role of the special counsel. Calabresi and Lawson argue that there have been numerous examples of U.S. attorneys serving as special counsels with independence. They cite Patrick Fitzgerald's investigation into Vice President Richard Cheney's Chief of Staff, Scooter Libby, and Rod Rosenstein's investigation into former Vice Chairman of the Joint Chiefs of Staff, General James Cartwright, as notable examples of prosecutorial independence on behalf of U.S. attorneys.[188]

While Calabresi and Lawson are correct that there are numerous examples of prosecutorial independence, and that most prosecutors have political ties tend to be to their home-state senators, who helped them land their positions. However, their position doesn't account for the possibility of future partisanship. Just because these attorneys have acted independently in the past does not mean they will do so in future cases. This would be especially true if, under the pair's suggestions for how special counsel appointments should proceed, a hyper-partisan attorney general was to appoint a likewise partisan U.S. attorney to investigate the president who appointed him. It also does not account for the removal power's effect. Historic precedent, as demonstrated throughout this paper, shows that the president has the sole power of removing officials who he appoints and confirms with the advice and consent of the Senate. Should one of these U.S. attorneys investigate the president, there would be nothing stopping a

[188] *Id* at p. 91.

president from removing the attorney if the current regulations are deemed invalid simply because Congress has not authorized them.

Opponents of Scalia's dissent who support the majority view in *Morrison* argue that Scalia's argument is misleading. Victoria Nourse of the American Constitution Society argued that Scalia misconstrued Article II's vesting clause. In his opinion, Scalia argued that the Vesting Clause provides the president with "all" of the executive power.[189] Nourse correctly argues that the Founders did not give the president all executive powers.[190] She cites the Appointments Clause in Article II as a providing Congress with a significant degree of authority over the executive branch. "But the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments," the clause reads.[191] This clause allows Congress to delegate the appointment authority, known as an inherently executive authority, to separate entities than the president, including federal courts that are part of an entirely different branch than the president. Nourse also cites Article I's Necessary and Proper Clause as another example of the Framers giving Congress some degree of authority over the executive. She cites the part of the clause that gives Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[192] Finally, Nourse cites the president's veto power, an inherently legislative power, that allows him to be a key part

[189] *Id* at 705.
[190] Nourse, V. (2018). "The Special Counsel, Morrison v. Olson, and the Dangerous Implications of the Unitary Executive Theory." American Constitution Society. Issue Brief, June 2018.
[191] U.S. Constitution, Article II, Section 2.
[192] *Id,* Article I, Section 8.

of the lawmaking process, as evidence that the separation of powers doesn't necessarily give each branch exclusivity over its authorities.

XI. Conclusion

This paper explored the unitary executive theory and its history. It explored how presidents have used the theory within constitutional bounds, such as through executive orders and the removal power, and how they have attempted to use the theory to expand their powers – sometimes constitutionally and sometimes not.

The president's removal power is one of the strongest executive authorities under the unitary executive. From the debates of 1789 to the *Myers* case, it is clear that the president's unilateral removal power is a constitutionally acceptable mechanism of the theory. It is also true that the removal power makes for a more efficient presidency. The president, especially in the past several decades, has often been faced by hostile Congresses, whether it be from opposition control or simply lacking the votes to overcome a filibuster. In order for a president to fulfill his promises to voters as best he can, it is necessary that he be able to remove executive officials at his will to accomplish as much of his agenda as possible.

However, with a government that relies on a separation of powers between the executive, legislative, and judicial branches, a key aspect of this form of government succeeding is a diligent system of checks and balances. On numerous occasions, Congress and the courts have failed to halt the president when he exceeds his presidential authority. Most recently, it was seen with President Bush and his warrantless wiretapping program. The American Civil Liberties Union challenged Bush's wiretapping program, but U.S. Court of Appeals for the Sixth Circuit dismissed its challenge, arguing that the ACLU had no standing to sue.[193] Congress did nothing to challenge Bush's order, either. During World War II, it was seen when President Roosevelt's

[193] 493 F.3d 644 (6th Cir. 2007).

executive order putting Japanese-Americans into internment camps was sustained in the *Korematsu* case while Congress did nothing to act. Finally, signing statements, when stating constitutional objections to the extent that Bush's did, can prove to be *de facto* line-item vetoes that were held unconstitutional by the *Clinton* case.

James Madison once wrote that "if men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[194] If all our country's presidents were angels, as Madison said, the debates on the unitary executive theory would be meaningless. Debates surrounding issues like independent counsels, war-time powers, and removal powers would be meaningless because we'd all know the president was making the correct decision. However, no president or person is an angel, and therefore the president must be constrained to ensure the safety of the American people. As the Stanford prison experiment demonstrated, when ordinary, decent people get a grip on unchecked power, they tend to run away with it and abuse others.[195] The unitary executive theory in its purest form, ensuring the president has full control of the executive branch, is constitutionally sound and key to ensuring an efficient presidency. However, as we've seen, presidents will justify power grabs under the guise of the unitary executive. Congress and federal courts must remain diligent on the president's actions when it comes to matters such as war-time powers and signing statements to ensure he does not overstep his bounds under the guise of the unitary executive theory.

[194] Federalist No. 51.
[195] Stanford Libraries. "Stanford Prison Experiment August 15-21, 1971." https://exhibits.stanford.edu/spe

Bibliography

1. 140 S.Ct. 2183

2. 142 S. Ct. 2587

3. 17 F. Cas. 144

4. 272 U.S. 52

5. 28 CFR Part 600.

6. 295 U.S. 602

7. 323 U.S. 214

8. 343 U.S. 579.

9. 467 U.S. 837.

10. 467 U.S. 837.

11. 487 U.S. 654

12. 487 U.S. 654.

13. 493 F.3d 644 (6th Cir. 2007).

14. 520 U.S. 651.

15. 524 U.S. 417

16. 524 U.S. 417

17. 524 U.S. 417

18. 561 U.S. 477

19. 71 U.S. 2

20. 834 F.3d 1142 (Tenth Cir. 2016).

21. About the U.S. Department of Agriculture. U.S. Department of Agriculture. https://www.usda.gov/our-agency/about-usda#:~:text=On%20May%2015%2C%201862%2C%20President,economic%20development%2C%20science%2C%20natural%20resource

22. Adams, J. Notes of Debates in the United States Senate, July 15, 1789. National Archives.

23. Administrative Procedure Act (1946).

24. American Civil Liberties Union. “John Yoo NSA Wiretapping OLC Memo (November 2, 2001).” https://www.aclu.org/legal-document/john-yoo-nsa-wiretapping-olc-memo-november-2-2001

25. Bradley, C.A. & Posner, E.A. (2006). “Presidential Signing Statements and Executive Power.” University of Minnesota. 23 Const. Comment. 307.

26. Brennan, D. (2022). “Federal judge in Florida voids mandate.” CBS News. https://www.cbsnews.com/newyork/live-updates/mask-mandate-changes-on-planes-trains-uber-lyft/#post-update-ebdf58b0

27. Calabresi, & Yoo, C.S. (2008). The Unitary Executive: Presidential Power from Washington to Bush. Yale University Press.

28. Calabresi, & Yoo, C.S. (2008). The Unitary Executive: Presidential Power from Washington to Bush. Yale University Press. P. 20.

29. Calabresi, & Yoo, C.S. (2008). The Unitary Executive: Presidential Power from Washington to Bush. Yale University Press.

30. Calabresi, S.G. & Lawson, G. (2019). “Why Robert Mueller’s Appointment As Special Counsel Was Unlawful.” 95 Notre Dame Law Review 87.

31. Calabresi, S.G. (1995). Some Normative Arguments for the Unitary Executive. Arkansas Law Review, 48(1), 23-104.

32. CBS News. (2022). “Biden signs executive order on abortion access.” https://www.cbsnews.com/news/biden-abortion-access-executive-order/

33. Cooney, J.F. (2006). “Signing Statements: A Practical Analysis of the ABA Task Force Report.” Administrative Law Review. https://www.administrativelawreview.org/wp-content/uploads/2014/04/Signing-Statements-A-Practical-Analysis-of-the-ABA-Task-Force-Report.pdf

34. Cooper, P.J. (2005). “George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements.” Portland State University. Presidential Studies Quarterly 35, no. 3 (September).

35. Cruden, J.C. & Oakes, M.R. (2016). “The Enduring Nature of the Chevron Doctrine.” Harvard Environmental Law Review. Vol. 40, 2016, 189-209.

36. Federalist Papers No. 51.

37. Federalist Papers No. 47.

38. Federalist Papers No. 70.

39. Fresno State University Library. “Japanese Americans in World War II.” https://guides.library.fresnostate.edu/c.php?g=636720

40. From James Madison to Edmund Pendleton, 21 June 1789. National Archives.

41. Frug, G.E. (1976). “Does the Constitution Prevent the Discharge of Civil Service Employees?” University of Pennsylvania Law Review, Vol. 124, p. 949.

42. Gage, B. (2014). “What an Uncensored Letter to M.L.K. Reveals.” The New York Times. https://www.nytimes.com/2014/11/16/magazine/what-an-uncensored-letter-to-mlk-reveals.html

43. Hamburger, P.A. (2016). “Chevron Bias.” George Washington University Law Review. 84 Geo. Wash. L. Rev. 1187.

44. Hamilton, A. Pacificus No. 1, 29 June 1793. National Archives.

45. “Harry S. Truman Public Approval.” The American Presidency Project. University of California Santa Barbara. https://www.presidency.ucsb.edu/statistics/data/harry-s-truman-public-approval

46. Herz, M. (2015). “Chevron is Dead; Long Live Chevron.” Columbia Law Review. Vol. 115, No. 7.

47. History of the Department of the Interior. U.S. Department of the Interior. https://www.doi.gov/whoweare/history

48. Hogan, M.; Kaminski, J; Leffler, R.; Schoenleber, C.; Saladino, G. The Documentary History of the Ratification of the Constitution Digital Edition. University of Virginia Press, 2009.

49. Hollis-Brusky, A. (2011). Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory. 89 Denv. U.L. Rev. 197.

50. https://twitter.com/realDonaldTrump/status/865173176854204416?s=20

51. Journal of the Constitutional Convention, Friday, June 1, 1787 & Tuesday, June 4, 1787.

52. Kastor, P. (2018). The Early Federal Workforce. Brookings Institution.

53. Kelley, C.S. (2003). "The Unitary Executive and the Presidential Signing Statement." Doctoral dissertation, Miami University. OhioLINK Electronic Theses and Dissertations Center. http://rave.ohiolink.edu/etdc/view?acc_num=miami1057716977

54. Ku, J.G. (2010). Unitary Executive Theory and Exclusive Presidential Powers. University of Pennsylvania Journal of Constitutional Law, 12(2), 615-622.

55. Lawson, G. & Seidman, G. (2006). The Jeffersonian Treaty Clause. University of Illinois Law Review, 2006(1), 1-70.

56. Library of Congress. "Behind the Wire." https://www.loc.gov/classroom-materials/immigration/japanese/behind-the-wire/

57. Lichtblau, E. and Risen, J. (2005). "Bush Lets U.S. Spy on Callers Without Courts." https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html

58. Liptak, A. (2023). "Supreme Court Appears Skeptical of Biden's Student Loan Forgiveness Plan." The New York Times. https://www.nytimes.com/2023/02/28/us/politics/student-loan-supreme-court-biden.html

59. Madison, J. (1789). Removal Power of the President. National Archives. https://founders.archives.gov/documents/Madison/01-12-02-0140

60. Mashaw, J.L. (2007). “Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829.” The Yale Law Journal. Vol. 116, No. 8, p. 1636-1740.

61. McDonald, F. (1994). The American Presidency: An Intellectual History. University Press of Kansas.

62. McDonald, F. (1994). The American Presidency: An Intellectual History. University Press of Kansas.

63. Memorandum for William J. Haynes II, General Counsel of the Department of Defense. (2003). American Civil Liberties Union. https://www.aclu.org/sites/default/files/pdfs/safefree/yoo_army_torture_memo.pdf

64. Miller, Z. (2022). “Biden admin: Docs must offer abortion if mom’s life at risk.” The Associated Press. https://apnews.com/article/abortion-health-government-and-politics-4221f9306a596904b9af2e0d1fad23b9

65. Mokhiber, J. (1998). “A Brief History of the Independent Counsel Law.” PBS. https://www.pbs.org/wgbh/pages/frontline/shows/counsel/office/history.html

66. Mortenson, J. (2019). Article II Vests the Executive Power, Not the Royal Prerogative. Columbia Law Review 119(5), 1169-1272.

67. Mueller III, R.S. (2019). “Report On The Investigation Into Russian Interference In The 2016 Presidential Election.” U.S. Department of Justice.

68. Natelson, R.G. (2009). The Original Meaning of the Constitution’s Executive Vesting Clause Evidence From Eighteenth-Century Drafting Practice. Whittier Law Review, 31(1), 1-[vi].

69. National Academy for State Health Policy. (2022). “Federal Vaccine Mandates and Legal Challenges.” https://nashp.org/federal-vaccine-mandates-and-legal-challenges/

70. National Archives. “Executive Order 9066: Resulting in Japanese-American Incarceration (1942).” https://www.archives.gov/milestone-documents/executive-order-9066

71. National Archives. “Pendleton Act (1883).” https://www.archives.gov/milestone-documents/pendleton-act

72. Newburger, E. & Pramuk, J. (2020). “Trump signs orders aimed at extending some pandemic relief after Congress fails to reach a deal.” https://www.cnbc.com/2020/08/08/trump-signs-executive-order-on-coronavirus-relief.html

73. Nourse, V. (2018). “The Special Counsel, Morrison v. Olson, and the Dangerous Implications of the Unitary Executive Theory.” American Constitution Society. Issue Brief, June 2018.

74. Nova, A. (2022). “Supreme Court likely to rule that Biden student loan plan is illegal, experts say. Here’s what that means for borrowers.” CNBC. https://www.cnbc.com/2022/12/05/supreme-court-tackles-biden-student-loan-plan.html

75. Novak, W.J. (2022). “New Democracy: The Creation of the Modern American State.” Harvard University Press.

76. O’Gorman, F. (1925). The Long Eighteenth Century: British Political and Social History 1688-1832. Bloomsbury Publishing.

77. Paulsen, M.S. (2004). The Constitution of Necessity. 79 Notre Dame L. Rev. 1257.

78. Perrone, M. (2023). “The FDA just finalized a Biden rule change to make abortion pills much more widely available at pharmacies nationwide.” Fortune Magazine and The Associated Press. https://fortune.com/2023/01/04/fda-abortion-pills-rule-change-pharmacies-mail-order/

79. Prakash, S. (2006). New Light on the Decision of 1789. Cornell Law Review, 91(5), 1021-1078.

80. Robinson, D.L. (1987). Gouverneur Morris and the Design of the American Presidency. Presidential Studies Quarterly Vol. 17, No. 2, Bicentennial Issue: The Origins and Invention of the American Presidency (Spring 1987), p. 319-328.

81. Roosevelt, T. (1913). “An Autobiography.”

82. S.2644 - 115th Congress (2017-2018): Special Counsel Independence and Integrity Act. (2018, April 26). https://www.congress.gov/bill/115th-congress/senate-bill/2644

83. S.555 - 95th Congress (1977-1978): Ethics in Government Act. (1978, October 26). https://www.congress.gov/bill/95th-congress/senate-bill/555

84. Scalia, A. Originalism: The Lesser Evil. University of Cincinnati Law Review, 57(3), 849-866.

85. Shabad, R. (2014). “Obama’s key executive actions.” The Hill. https://thehill.com/regulation/court-battles/211303-obamas-key-executive-actions/

86. Stanford Libraries. “Stanford Prison Experiment August 15-21, 1971.” https://exhibits.stanford.edu/spe

87. Statista. (2022). “Number of governmental employees in the U.S. from 1982 to 2021.” https://www.statista.com/statistics/204535/number-of-governmental-employees-in-the-us/

88. Taft, W.H. (1915). “Our Chief Magistrate and His Powers.” Columbia University Lectures. George Blumenthal Foundation.

89. The American Presidency Project. (2023). “Executive Orders.” https://www.presidency.ucsb.edu/statistics/data/executive-orders#eotable

90. The American Presidency Project. “Size of the Executive Office of the President.” https://www.presidency.ucsb.edu/statistics/data/size-the-executive-office-the-president-eop

91. The National WWII Museum New Orleans. “Japanese American Incarceration.” https://www.nationalww2museum.org/war/articles/japanese-american-incarceration

92. The United States Holocaust Memorial Museum. “Public Opinion Poll on Japanese Internment, March 1942.” https://exhibitions.ushmm.org/americans-and-the-holocaust/main/us-public-opinion-on-japanese-internment-1942

93. The White House President George W. Bush Archives. “President’s Statement on Signing of H.R. 2863, the ‘Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006.’” https://georgewbush-whitehouse.archives.gov/news/releases/2006/03/20060309-8.html

94. The White House President George W. Bush Archives. “President’s Statement on H.R. 199, the ‘USA PARIOT Improvement and Reauthorization Act of 2005.’” https://georgewbush-whitehouse.archives.gov/news/releases/2006/03/20060309-8.html

95. The White House. (2021). “Strengthening the Federal Workforce.” https://www.whitehouse.gov/wp-content/uploads/2021/05/ap_5_strengthening_fy22.pdf

96. The White House. (2022). “FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most.” https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/

97. The White House. (2023). “Statement by the President on S. 619, the COVID-19 Origin Act of 2023.” https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/20/statement-by-the-president-on-s-619-the-covid-19-origin-act-of-2023/

98. The Writings of George Washington from the Original Manuscript Sources, 1745-1799. University of Chicago Press.

99. Treanor, W.M. (2021). The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution. Michigan Law Review.

100. Trump White House Archives. (2020). “Executive Order on Creating Schedule F In The Excepted Service.” https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-creating-schedule-f-excepted-service/

101. U.S. Bureau of Labor Statistics, All Employees, Federal [CES9091000001], retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/CES9091000001, December 11, 2022.

102. U.S. Constitution, Article I, Section 8.

103. U.S. Constitution, Article II, Section 1.

104. U.S. Constitution, Article II, Section 2.

105. U.S. Constitution, Article II, Section 3.

106. U.S. Department of Commerce. About Commerce. https://www.commerce.gov/about

107. U.S. Department of Labor. About Us. https://www.dol.gov/general/aboutdol

108. U.S. Equal Employment Opportunity Commission. (2023). “Environmental Protection Agency (EPA).” https://www.eeoc.gov/federal-sector/environmental-protection-agency-epa-0

109. U.S. Equal Employment Opportunity Commission. https://www.eeoc.gov/federal-sector

110. U.S. Government Accountability Office. (2021). “Operation Warp Speed: Accelerated COVID-19 Vaccine Development Status and Efforts to Address Manufacturing Challenges.” https://www.gao.gov/products/gao-21-319

111. U.S. Senate. “Intelligence Activities and the Rights of Americans: Book II.”

112. Wagner, E. “Trump Is Threatening the Return and Expansion of Schedule F.” Government Executive. https://www.govexec.com/workforce/2022/03/trump-threatening-return-and-expansion-schedule-f/363145/

113. Why Justice. The United States Department of Justice. https://www.justice.gov/careers/why-justice#:~:text=The%20Department%20of%20Justice%20employs,meet%20its%20mission%20and%20goals.

114. Yoo, C.S. (2016). “Presidential Signing Statements: A New Perspective.” Faculty Scholarship at Penn Law. 1700. https://scholarship.law.upenn.edu/faculty_scholarship/1700