

THE UNITARY EXECUTIVE AND INHERENT EXECUTIVE POWER

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The unitary executive model, if reasonably applied, has much to commend it. The Framers experienced first-hand the administrative problems of the Continental Congress from 1774 to 1787 and brought with them to the Philadelphia Convention a determination to structure government in a manner that would better assure accountability and efficiency. A single executive in the form of the President was a key step toward improved management. When Congress created three executive departments in 1789, it expressed a similar commitment to accountability by placing authority in a secretary, not in a board. At the same time, the principle of a unitary executive has had to compete with other important values. The purpose of my Article is to examine some of the compromises with the unitary executive model, beginning in 1789. I then will move to analyzing the concept of “inherent executive power” and its dangers to constitutional government. The model of a unitary executive, if properly understood, is compatible with the Constitution. Inherent executive power is not.

I. THE SEARCH FOR A UNITARY EXECUTIVE

The Framers had plenty of strong executive models from which to choose. They could look to John Locke, who emphasized the need for independent executive action. He understood that the legislature could not always be in sitting, nor could it provide laws to cover every contingency: “It is not necessary—no, nor so much as convenient—that the legislative should be always in being; but absolutely necessary that the executive power should, because there is not always need of new laws to be made, but always need of execution of the laws that are made.”¹ Although Locke divided government into legislative and

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¹ JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT § 153, at 194 (Aldine Press 1924) (1690).

executive institutions to provide for checks and balances, he placed what he called the federative power (foreign policy) solely with the executive. His federative power included “the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth.”² The federative power was “always almost united” with the executive.³ Separating the executive and federative powers, he warned, would invite “disorder and ruin.”⁴

William Blackstone, in his *Commentaries*, agreed that in external affairs the King was the sole authority. The British Constitution placed those powers in the hand of the executive “for the sake of unanimity, strength, and dispatch.”⁵ In the “exertion of lawful prerogative, the king is and ought to be absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him.”⁶ In the exercise of those prerogatives the King “is irresistible and absolute.”⁷ With regard to foreign policy, the King “is the delegate or representative of his people.”⁸ Individuals of a state, even in a collective capacity, could not possibly “transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strengths to the execution of their counsels.”⁹

The concept of the executive as a channel for foreign communications later would take the form of the President as “sole organ,” a doctrine badly misconstrued over the years to vest exclusive power in the President in the fields of foreign affairs and national security. Justice Sutherland popularized the sole-organ theory in dicta included in his *United States v. Curtiss-Wright Export Corp.* decision.¹⁰ The dicta included a speech by John Marshall on March 7, 1800, during his service with the House of Representatives, when he called the President “the sole organ of the nation in its external relations, and its sole representative with foreign nations.”¹¹ The full context of the speech, however, makes it clear that Marshall meant that after the two branches had decided national policy, either by statute or by treaty, it was the President’s duty to inform other nations of our policy and to

2 *Id.* § 146, at 191.

3 *Id.* § 147, at 191.

4 *Id.* § 148, at 192.

5 1 WILLIAM BLACKSTONE, COMMENTARIES *250.

6 *Id.*

7 *Id.* at *251.

8 *Id.* at *252.

9 *Id.*

10 *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936).

11 *Id.*; see also 10 ANNALS OF CONG. 613 (1800).

execute the law. Nothing in Marshall's long career as Secretary of State, member of Congress, or Chief Justice of the Supreme Court ever advocated exclusive, plenary, or extra-constitutional powers for the President in the field of foreign affairs or the war power.¹²

Locke argued that the executive had to be free in time of emergency to act in the absence of law and sometimes even against it, for the legislature was not always capable of acting effectively in such moments. The power to act "according to discretion for the public good, without the prescription of the law and sometimes even against it, is that which is called prerogative."¹³ Locke imposed a few conditions on the prerogative. It had to be used for the good of the people "and not manifestly against it."¹⁴ But what would happen if an executive abused the power? Locke saw no possible secular check. In such disputes "there can be no judge on earth."¹⁵ For their grievances the people had no other remedy "but to appeal to Heaven."¹⁶ The American Framers did not look to the skies for help. They sought structural checks in a written constitution.

II. UNITARY EXECUTIVE AND WAR

The delegates at the Philadelphia Convention debated the differences between the British model and the American alternative. The power of peace and war associated with the monarchy would not be given to the President. Charles Pinckney said he was for "a vigorous Executive but was afraid the Executive powers of <the existing> Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one."¹⁷ John Rutledge was comfortable with placing the executive power in a single person, "tho' he was not for giving him the power of war and peace."¹⁸ James Wilson backed a single executive but "did not consider the Prerogatives of the British Monarch as a proper guide in de-

12 See generally Louis Fisher, *Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRESIDENTIAL STUD. Q. 139 (2007) (arguing that Marshall actually made no such claim). For a more thorough analysis of the sole-organ doctrine, see Louis Fisher, *The "Sole Organ" Doctrine*, L. LIBR. CONGRESS, Aug. 28, 2006, available at <http://www.loc.gov/law/help/usconlaw/pdf/SoleOrgan-Aug06.pdf>.

13 LOCKE, *supra* note 1, § 160, at 199.

14 *Id.* § 161, at 200.

15 *Id.* § 168, at 203.

16 *Id.*

17 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 64–65 (Max Farrand ed., 1911) (1787) [hereinafter Farrand].

18 *Id.* at 65.

fining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c.”¹⁹

Edmund Randolph expressed his concerns about executive power, calling it “the fœtus of monarchy.”²⁰ His colleagues, he said, had “no motive to be governed by the British Governmt. as our prototype.”²¹ If there were no other alternative, he might be inclined to adopt the British model, but “the fixt genius of the people of America required a different form of Government.”²² Wilson agreed that the British model “was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it.”²³ The words “republic” and “republican government” may mean little to Americans today. To the Framers, republican government expressed the central values of self-government and popular sovereignty.

At the Philadelphia Convention, Alexander Hamilton expressed his admiration for the British model. In his “private opinion he had no scruple in declaring . . . that the British Govt. was the best in the world.”²⁴ He nonetheless discarded the Lockean and Blackstonian models and proposed that the President would have “with the advice and approbation of the Senate” the power of making treaties.²⁵ The extent of the break with English precedents is set forth clearly in Hamilton’s *Federalist No. 69*, where he explained that the President has “concurrent power with a branch of the legislature in the formation of treaties,” whereas the British King “is the *sole possessor* of the power of making treaties.”²⁶ He noted that the power over foreign affairs was deliberately shared between the President and Congress. He compared the war power in England and America. The power of the King “extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies.”²⁷ Unlike the King of England, the President “will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union.”²⁸ The British King was not similarly constrained.

19 *Id.* at 65–66.

20 *Id.* at 66.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.* at 288.

25 *Id.* at 292.

26 THE FEDERALIST NO. 69, at 450 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) (emphasis in original).

27 *Id.* at 446 (emphasis in original).

28 *Id.*

With regard to the war power, the Framers recognized that the President needed limited defensive powers in times of emergencies, but the decision to take offensive action—to take the country from a state of peace to a state of war—was reserved to Congress alone. Initially, delegates at the Philadelphia Convention gave Congress the power to “make war.”²⁹ As the debate proceeded, they worried that Congress might not be in session during an emergency or would not be able to respond quickly and effectively. The language was changed to give Congress the power to “declare” war, leaving to the President “the power to repel sudden attacks.”³⁰ The President was never given a general power to move the country into full-scale war or mount an offensive attack against another country. Roger Sherman agreed that the President “shd. be able to repel and not to commence war.”³¹ Elbridge Gerry said he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”³² George Mason spoke “agst giving the power of war to the Executive, because [the executive was] not <safely> to be trusted with it He was for clogging rather than facilitating war.”³³

Similar remarks appear at the state ratifying conventions. James Wilson said that the system of checks and balances

[W]ill not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large³⁴

The Framers empowered Congress to initiate war because they feared that Presidents, in their search for fame and glory, possessed a natural appetite for war. John Jay warned in *The Federalist No. 4* that

[A]bsolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.³⁵

Jay’s sentiments were echoed by others. James Madison, writing in 1793, called war

29 2 Farrand, *supra* note 17, at 318.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at 319.

34 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 2d ed. 1836).

35 THE FEDERALIST NO. 4 (John Jay), *supra* note 26, at 101.

[T]he true nurse of executive aggrandizement. . . . In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace.³⁶

Five years later, writing to Thomas Jefferson, Madison remarked that the Constitution “supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl.”³⁷

III. THE UNITARY MODEL IN PRACTICE

When the First Congress assembled in 1789, lawmakers had to decide a number of constitutional questions not resolved by the Framers. Drawing on their experience with the Continental Congress, it was understood that the new executive departments being created (Foreign Affairs, Treasury, and War) should be run by a single executive, not an unaccountable board of multiple officials. At the head of each department would be a Secretary appointed by the President with the advice and consent of the Senate, but the bill added: “and to be removable by the President.”³⁸ The Constitution did not expressly provide for a presidential removal power. Was it somehow implied? Lawmakers had to decide that question on the basis of first principles of government, with no assistance from the courts. It would be many years before the federal judiciary would provide guidance on the type of constitutional issues that the members of Congress debated and resolved in 1789.

A. *The Removal Power*

From May 19 through June 24, 1789, the House of Representatives explored the scope of the removal power in great detail, with lawmakers divided on the legitimate sources of presidential power.³⁹ Some argued that the removal power would make the President re-

³⁶ James Madison, *Letters of Helvidius No. 4* (Sept. 14, 1793), reprinted in 6 THE WRITINGS OF JAMES MADISON 171, 174 (Gaillard Hunt ed., 1906).

³⁷ Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in THE WRITINGS OF JAMES MADISON, *supra* note 36, at 311, 312.

³⁸ 1 ANNALS OF CONG. 371 (1789).

³⁹ LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 48 (5th rev. ed. Univ. Press of Kan. 2007) (1978).

sponsible for the conduct of department heads, consistent with the President's constitutional duty to see that laws be faithfully executed; others wanted the removal power shared with the Senate.⁴⁰ Unable to reconcile these conflicting positions, the House decided to treat the removal power by implication, not declaration. The words "and to be removable by the President" were stricken in favor of language providing that the chief clerk in the department would take charge of all records whenever the Secretary "shall be removed from office" by the President.⁴¹

The Senate was closely divided on the President's removal power, producing tie votes and requiring Vice President John Adams to cast a vote to protect presidential interests.⁴² In the end, Congress passed legislation to adopt the identical procedure for the three executive departments. Subordinate officers would have charge and custody of all records whenever the Secretary "shall be removed from office by the President of the United States."⁴³

Agreement on the President's power to remove department heads did not include a freedom to remove every official in the executive branch. During debate on the Treasury Department and the office of the Comptroller, Madison intervened to protect that individual from presidential removal. He explained that the properties of the Comptroller were not "purely of an Executive nature" but embodied "a Judiciary quality as well as Executive; perhaps the latter obtains in the greatest degree."⁴⁴ Because of the mixed nature of this position, "there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government."⁴⁵

It may seem odd for Madison to speak with such command about the nature of an office that was being created. How did he know, in looking forward, that the Comptroller would be exercising quasi-judicial duties? The answer is that Madison need only look backward at the actions of the Continental Congress in 1781 when it created a Superintendent of Finance, auditors, and a Comptroller. The latter

40 *See id.* at 48–53 (describing the issues and options debated by Congress regarding the removal power).

41 *See* 1 ANNALS OF CONG. 580–85 (1789) (transcribing the Congressional debate on the removal power).

42 *See* 1 JOURNAL OF THE SENATE 42, 51 (D.C., Gales & Seaton 1820) (recording the votes held on July 18 and August 4, 1789).

43 Act of Sept. 2, 1789, ch. 7, § 7, 1 Stat. 65, 67; Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 49, 50; Act of July 27, 1789, ch. 4, § 2, 1 Stat. 29, 29.

44 1 ANNALS OF CONG. 611 (1789).

45 *Id.* at 612.

was responsible for the settlement of public accounts.⁴⁶ On all appeals, he “shall openly and publicly hear the parties, and his decision shall be conclusive.”⁴⁷

B. Adjudicatory Duties

The precedent of the Comptroller’s office, a modest one, would be later extended to cover any type of adjudicatory work done in federal agencies, including decisions by administrative law judges or executive officials in matters involving various claims and benefits. Here is a central claim by Steven Calabresi and Christopher Yoo:

[A]ll forty-three presidents, from George Washington to George W. Bush, have insisted on the view that the Constitution gives them the power to remove and direct subordinates as to law execution. All forty-three presidents have refused to acquiesce in repeated congressional efforts to sabotage the unitary executive bequeathed to us by the framers.⁴⁸

This claim reaches too far. To Madison and his colleagues in the First Congress, the Comptroller was immune from the removal power, either by the President or the department head, unless the Comptroller’s actions prevented the law from being faithfully carried out. Otherwise, he was independent and not subject to presidential influence or control. Many other examples can be cited of executive branch employees carrying out statutory duties free of presidential interference.

C. Ministerial Duties

The heads of executive departments exercise two kinds of duties. In part they are political agents of the President and answerable to him. If he objects to their performance, he can remove them. A second duty, however, is not to the President but to the law. Department heads have a legal obligation to carry out the functions assigned to them by Congress. Obviously a conflict can arise when the department head is making a good-faith effort to carry out a law, and the President directs the official to do something else.

In *Marbury v. Madison*, Chief Justice John Marshall spoke about these two types of duties: discretionary (subject to presidential con-

46 See Louis Fisher, *The Administrative World of Chadha and Bowsher*, 47 PUB. ADMIN. REV. 213, 215 (1987).

47 *Id.*

48 STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 418 (2008).

trol) and “ministerial” (subject to statutory commands).⁴⁹ For the latter, the duty of a public officer extends to the nation and its citizens. For the former, the duty is to the President alone. Chief Justice Marshall explained that when a Secretary of State performs as “an officer of the United States,” he is “bound to obey the laws.”⁵⁰ In this capacity the Secretary acts “under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.”⁵¹ A number of court cases decided a few decades after *Marbury* recognized that neither the President nor department heads possess any authority to deny or control a ministerial act of a subordinate.⁵²

The binding, non-discretionary nature of ministerial duties was recognized not only by federal courts but by Attorneys General. In 1854, Attorney General Caleb Cushing stated that when laws

[D]efine what is to be done by a given head of department, and how he is to do it, there the President’s discretion stops; but if the law require an executive act to be performed, without saying how or by whom, it must be for him to supply the direction.⁵³

Calabresi and Yoo discuss Cushing’s opinions, but only in terms of positions that appear to give the President total control over all subordinates in the agencies.⁵⁴ They make no mention of Cushing’s very clear opinion in 1854 that recognized broad autonomy to ministerial decisions by executive employees.

On many occasions, an Attorney General has told the President that the White House has no *legal* right to interfere with administrative decisions. Neither the President nor a department head could “revise and correct all the acts of his subordinates. And if he could, as the law now stands, it would be as illegal as unwise.”⁵⁵ Calabresi and Yoo are aware of this line of judicial rulings and opinions issued by Attorneys General.⁵⁶ They say these precedents are “limited to

49 5 U.S. (1 Cranch) 137 (1803).

50 *Id.* at 158.

51 *Id.*

52 *E.g.*, *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838) (holding that Congress could create executive officer duties of a ministerial nature). For other ministerial acts to be carried out in conformance of law, see also *United States v. Louisville*, 169 U.S. 249 (1898); *United States v. Price*, 116 U.S. 43 (1885); *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50 (1884); *United States v. Schwyz*, 102 U.S. 378 (1880); *United States v. Guthrie*, 58 U.S. (17 How.) 284 (1854); *Reeside v. Walker*, 52 U.S. (11 How.) 272, 290 (1850); *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 516 (1840).

53 6 Op. Att’y Gen. 326, 341 (1854).

54 CALABRESI & YOO, *supra* note 48, at 154–55.

55 11 Op. Att’y Gen. 14, 15 (1864).

56 CALABRESI & YOO, *supra* note 48, at 421.

purely ministerial duties and would not apply to functions involving a degree of executive discretion.”⁵⁷ Of course that is true, but to concede that courts can direct executive officials to perform ministerial duties is to concede that the President may not direct and control all actions by executive branch subordinates. Calabresi and Yoo further note: “The case for a presidential power to direct subordinates is only slightly less strong as a matter of practice than is the case for a presidential removal power.”⁵⁸ *Slightly less?* Such a concession repudiates their claim that all forty-three presidents “have insisted on the view that the Constitution gives them the power to remove and direct subordinates as to law execution.”⁵⁹

According to Calabresi and Yoo, the Supreme Court “has sometimes supported the unitary executive, as it did in *Myers v. United States*.”⁶⁰ That is incorrect. In *Myers*, the Court broadly supported the President’s removal power but at the same time recognized large areas of agency activities that lay beyond the President’s control.⁶¹ The decision by Chief Justice William Howard Taft upheld presidential power over officials who carried out purely executive duties.⁶² The passage below demonstrates that Taft understood that ministerial and adjudicatory duties, as exercised by agency employees, were not subject to presidential supervision and control:

[T]here may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer’s interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.⁶³

At the end of their book, Calabresi and Yoo conclude that “none of the presidents has accepted any diminution in the unity of the ex-

57 *Id.*

58 *Id.* at 422.

59 *Id.* at 418.

60 *Id.* at 419.

61 *Myers v. United States*, 272 U.S. 52, 132–35 (1926).

62 *Id.* at 132–34.

63 *Id.* at 135.

ecutive branch.”⁶⁴ To the extent that they accept, as Taft did, that the President’s power of removal is limited by ministerial and adjudicatory duties performed by executive officials, the authors must accept that Presidents and their Attorneys General understand that all subordinates are not directly controllable by the President. The unity of the executive branch is diminished to that extent, which is substantial. Calabresi and Yoo further assert: “There is thus nothing in the practices of our forty-three chief executives that would foreclose the conclusion that the Constitution gives the president sole authority over the execution of the law.”⁶⁵ On the contrary, there is everything in the “practices” of forty-three Presidents to demonstrate that the President’s authority to carry out the law is shared with other branches.

Two other issues will underscore that fundamental point: the Court’s decision in *INS v. Chadha*⁶⁶ invalidating the “legislative veto” and the independent counsel statute that began under the Carter administration and continued, with several interruptions, into the Clinton years.

D. The Legislative Veto

In their concluding chapter, Calabresi and Yoo analyze six key topics: the removal power, direction of subordinates, the civil service, independent agencies, independent counsels, and centralized review of agency regulations.⁶⁷ For some reason, they do not discuss the continuation of legislative vetoes after *Chadha*. It would be difficult to find a clearer repudiation of the unitary executive model than the practice of congressional committees and subcommittees sharing with executive agencies certain administrative decisions. *Chadha* put an end to Congress exercising a legislative veto in two forms: control by a single chamber (simple resolutions adopted by either house) or by the two chambers working jointly (concurrent resolutions). Neither resolution goes to the President for his signature or veto. It was on that ground that the Court declared those types of legislative vetoes unconstitutional because they violate the Presentment Clause.⁶⁸ One-house and two-house legislative vetoes were highly visible; they were taken up on the floor, debated, and put to vote.

64 CALABRESI & YOO, *supra* note 48, at 431.

65 *Id.*

66 462 U.S. 919, 946–58 (1983).

67 CALABRESI & YOO, *supra* note 48, at 417–31.

68 *Chadha*, 462 U.S. at 946–58.

Almost invisible are the committee and subcommittee vetoes that persist after *Chadha*. In 1982, I predicted that regardless of what the Court decided about the constitutionality of the legislative veto, committee/subcommittee vetoes would continue because the accommodation met critical needs for the executive and legislative branches.⁶⁹ For many decades, it had been the practice of agencies to present for committee or subcommittee approval the shifting of funds within an appropriations account (the “reprogramming” process).⁷⁰ When these committee/subcommittee vetoes survived *Chadha* year after year, I published an article in 1993 to explain their durability.⁷¹

No one reading the book by Calabresi and Yoo would be aware that congressional committees and subcommittees are regularly involved in agency decisions and have the capacity to approve and disapprove their actions. An alert reader would note this sentence: “Despite [George H. W.] Bush’s attempt to object to every legislative veto, Reagan and Bush reportedly signed more than two hundred new legislative vetoes after *Chadha* and often complied with them.”⁷² Calabresi and Yoo say that “the power to direct executive branch subordinates is an interpretation that is long settled and followed in the executive branch,” and that “Congress has from time to time tried to unsettle this interpretation, but our book demonstrates that Congress’s efforts in this regard have always failed.”⁷³ That is not true. Many of these congressional efforts have succeeded.

The book contains another misconception about the legislative veto. After citing some of the objections to the legislative veto by such Presidents as Woodrow Wilson and Herbert Hoover, Calabresi and Yoo claim that in *Chadha* the Court “specifically relied on these presidents’ consistent objections to this interference with their power over the execution of the law.”⁷⁴ The objections were hardly consistent. Presidents went back and forth on the merits and demerits of the legislative veto. They understood the benefit that would come from additional delegations of legislative authority to the executive branch. It was President Hoover who first proposed that Congress delegate to him the authority to reorganize the executive branch,

69 Louis Fisher, *Congress Can’t Lose On Its Veto Power*, WASH. POST, Feb. 21, 1982, at D1.

70 *Id.*

71 See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273 (1993).

72 CALABRESI & YOO, *supra* note 48, at 389 (citing Fisher, *supra* note 71, at 288 (analyzing why legislative vetoes of the committee variety survived after *Chadha*)).

73 *Id.* at 4.

74 *Id.* at 12.

subject to some type of legislative veto (even a committee veto).⁷⁵ Calabresi and Yoo admit that the one-house veto in the Economy Act of 1932 was the result of “Hoover’s suggestions.”⁷⁶

According to Calabresi and Yoo, the Court in *Chadha* “noted that the fact that presidents dating back to Woodrow Wilson had consistently questioned whether the constitutionality of the legislative veto was sufficient to preclude regarding the issue as being settled by history.”⁷⁷ Notice the softening of language, from “consistent objections” to “consistent questioning.” Many Presidents who “questioned” the legislative veto accepted it.⁷⁸ Although Calabresi and Yoo frequently describe Presidents as consistent in their defense of the unitary executive model, there has been much inconsistency. They note, “[E]very single one of our presidents has believed in the classic vision of the unitary executive to at least some degree and defended it from congressional incursions as best he could.”⁷⁹ Here the defense amounts to a belief “to at least some degree . . . as best he could.” And later: “eleven of thirteen presidents from Woodrow Wilson to Ronald Reagan had objected” to the legislative veto.⁸⁰ Objections are of little weight if Presidents accept the legislative veto, as they did time after time. As another admission of wavering executive policy, from 1889 to 1945, “presidents during this period opposed the legislative veto with *enough* consistency.”⁸¹

Hundreds of committee vetoes appeared in statutes after *Chadha*.⁸² On a regular basis, Presidents used their signing statements to object that these provisions are unconstitutional, implying that agencies are free to ignore them.⁸³ What is interesting is that not only do agencies comply with committee-veto provisions, they include that requirement in agency budget manuals that instruct executive employees

75 See FISHER, *supra* note 39, at 139 (discussing President Hoover’s recommendation that Congress delegate reorganization authority, contingent on the approval of a joint committee); see also *id.* at 134–44, 152–53 (noting other presidential accommodations of the legislative veto).

76 CALABRESI & YOO, *supra* note 48, at 275.

77 *Id.* at 16.

78 See FISHER, *supra* note 39, at 139–40 (explaining how President Franklin D. Roosevelt accepted legislative vetoes despite his constitutional misgivings).

79 CALABRESI & YOO, *supra* note 48, at 16.

80 *Id.* at 26.

81 *Id.* at 300 (emphasis added).

82 Louis Fisher, *Signing Statements: Constitutional and Practical Limits*, 16 WM. & MARY BILL RTS. J. 183, 196 (2007).

83 *Id.* at 195–96 (exploring the theoretical and practical impacts of signing statements on agency responses to post-*Chadha* committee and subcommittee vetoes).

how to handle reprogramming actions.⁸⁴ We have an interesting routine: Presidents challenge the constitutionality of committee vetoes; agencies seek committee approval.⁸⁵ Under the theory of a unitary executive, Presidents could direct all agencies to rewrite their budget manuals to delete any requirement for committee vetoes. That has not happened yet, and there is little reason to think it will. It is useful to think of not one executive but two. There is a macro executive consisting of the President, White House, Justice Department, and the Office of Management and Budget. They look at government comprehensively and address overarching principles. There is also the micro executive of all the departments and agencies seeking to take budgetary actions throughout the fiscal year, often working in tandem with congressional committees and subcommittees.

E. Independent Counsel

Calabresi and Yoo discuss the decision of Congress in 1978 to create an independent counsel as part of post-Watergate reforms. They say that President Jimmy Carter “had little choice but to sign the law,” despite “the severe misgivings of senior Carter administration officials about the act’s constitutionality.”⁸⁶ If the unitary executive model has been defended as consistently as Calabresi and Yoo contend, Carter had a choice (as do all Presidents) in protecting his office. If Carter capitulated because of a range of political calculations, that is understandable. His performance, however, undermines the notion that the model of the unitary executive is a type of lodestar that unerringly guides all Presidents.

The constitutionality of the independent counsel, Calabresi and Yoo point out, “was opposed (albeit not with complete consistency) by every President that followed Carter.”⁸⁷ Of what value is it for Presidents to “oppose” and “object” to incursions into their office if, in the end, they throw in the towel? There were plenty of analyses in the Ford, Carter, and Reagan administrations that found serious con-

84 See, e.g., OFFICE OF THE UNDER SEC’Y OF DEF., DEP’T OF DEF., *Reprogramming of DOD Appropriated Funds*, in DOD FINANCIAL MANAGEMENT REGULATION 6-1 to -20 (2000), available at http://defenselink.mil/comptroller/fmr/03/03arch/03_06.pdf (delineating Department of Defense procedures for submitting, approving and processing programming actions).

85 See LOUIS FISHER, CONG. RES. SERV., COMMITTEE CONTROLS OF AGENCY DECISIONS, at C-1 (2005), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-7932:1>.

86 CALABRESI & YOO, *supra* note 48, at 426.

87 *Id.*

stitutional deficiencies with the office of independent counsel, even after the Supreme Court in *Morrison v. Olson*⁸⁸ declared it constitutional.⁸⁹ Yet President Reagan chose to sign the independent counsel bill in 1983 and 1987, and President Clinton signed another extension in 1994. Nothing in this record provides any evidence of Presidents upholding the unitary executive. Certainly it is an overstatement for Calabresi and Yoo to write, “The historical record thus shows Ronald Reagan to be a steadfast proponent and supporter of the unitary executive.”⁹⁰ Steadfast means firm in belief, determination, and adherence. Someone who is *unfaltering*. A different word is needed to describe Reagan’s record with the independent counsel.

F. Independent Commissions

Calabresi and Yoo assert that “no president has acquiesced in a congressional power to create independent agencies.”⁹¹ It would be hard to find an independent agency that came into existence without the active and enthusiastic backing of Presidents. Certainly Woodrow Wilson supported the independent agencies that appeared during his administration (Federal Reserve System and Federal Trade Commission). The same can be said of Franklin D. Roosevelt (Federal Communications Commission, Securities and Exchange Commission, National Labor Relations Board, Federal Maritime Commission, and Civil Aeronautics Board).⁹² There was not only support from Presidents but clear advocacy and the drafting of legislation presented to Congress.

It is true, as Calabresi and Yoo note, that the Interstate Commerce Commission “was not originally an independent agency when it was created in 1887.”⁹³ The agency had various ties to the Secretary of the Interior; decisions by the commission regarding employment and fixing of salaries were subject to the approval of the Secretary. Expenditures were approved by the head of the commission and the Secretary. The commission reported to the Secretary each year.⁹⁴

88 487 U.S. 654 (1988).

89 CALABRESI & YOO, *supra* note 48, at 359, 365–66, 376–77, 386.

90 *Id.* at 383.

91 *Id.* at 16.

92 See LOUIS FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE 149 (4th ed. 1998).

93 CALABRESI & YOO, *supra* note 48, at 423.

94 See FISHER, *supra* note 92, at 152.

However, Congress severed those links two years later.⁹⁵ Calabresi and Yoo observe that members of Congress “consistently referred to the ICC as part of the executive branch.”⁹⁶ True. It could not be in the legislative branch or the judicial branch because it functioned to carry out the law. Location does not minimize independent status. Similarly, Calabresi and Yoo point out that Presidents regarded the FTC “as an executive agency charged with executive and administrative duties.”⁹⁷ True also. Independent agencies carry out executive and administrative duties but possess an element of autonomy not present in other executive agencies, including multimember bodies that have terms of office staggered to insulate them from presidential transitions.⁹⁸ Calabresi and Yoo do not discuss the multimember status or the staggered terms.

G. Removal of U.S. Attorneys

In 2006, the Bush administration removed nine U.S. Attorneys, supposedly for poor performance. Calabresi and Yoo say that President Bush “removed several U.S. attorneys for their failure to execute the law in the manner that Bush thought it should be executed.”⁹⁹ Had Bush done that, it would be a good example of a President upholding the theory of a unitary executive, which is “to promote accountability by making it crystal clear who is to blame for maladministration.”¹⁰⁰ Repeated congressional hearings in the House and the Senate, however, could not locate in these firings any explicit actions or decisions by Bush, Attorney General Alberto Gonzales, or other top executive officials. Mid-level officials in the White House and the Justice Department, most of them in their thirties, were called to testify about their involvement. One would think the removal and appointment of U.S. Attorneys would be a quintessential presidential matter, closely monitored by the Chief Executive and the White House. One should be able to trace the firings of the U.S. Attorneys to presidential policy, assuring accountability and control. But Bush

95 See Act to Regulate Commerce, ch. 104, §§ 18, 21, 24 Stat. 379, 386–87 (1887), amended by Act of Mar. 2, 1889, ch. 382, §§ 7–8, 25 Stat. 855, 861–62 (1889) (providing that the commission could independently decide matters involving employment, fixed compensation and reimbursable expenses, and also make annual reports directly to Congress).

96 CALABRESI & YOO, *supra* note 48, at 423.

97 *Id.* at 424.

98 See FISHER, *supra* note 92, at 151, 153, 155.

99 CALABRESI & YOO, *supra* note 48, at 12.

100 *Id.* at 3.

seemed absent and unengaged, as did Gonzales and other high executive officials.

According to Calabresi and Yoo, it “gradually became apparent that the White House had played a major role in the dismissals, and some evidence emerged that Karl Rove, Bush’s senior political adviser, had been involved.”¹⁰¹ Rove’s involvement, whatever it was, hardly offers support for the model of a unitary executive. The person directed by the Constitution to see that the laws are faithfully executed is the President, not his political adviser. At the top levels of the Bush administration there was no accountability.

Calabresi and Yoo are correct that U.S. Attorneys “serve at the pleasure of the president and can be removed at will at any time. This is a basic axiom of the unitary executive.”¹⁰² It is also an axiom of the unitary executive that the accountable official is the President. No one can reasonably argue that a senior political adviser in the White House may remove U.S. attorneys at will. Calabresi and Yoo understand the political (and constitutional) damage done by the firings. They explain, “[r]emoving U.S. attorneys or directing prosecutions to accomplish partisan goals, for example, to help Republicans win elections, would be an unconstitutional act. It would violate the First Amendment and would be an abuse of the executive power.”¹⁰³ Further, a President or Attorney General who used “[the] power of prosecution for political ends has committed a high crime and misdemeanor,” meriting impeachment and removal.¹⁰⁴ Congress attempted to learn more about these dismissals by calling Rove and former White House Counsel Harriet Miers to testify and sought documents from White House Chief of Staff Joshua Bolten. In response to this effort to determine accountability, the Bush administration issued legal advice that blocked testimony by Rove and Miers and prevented the release of further White House documents to Congress.¹⁰⁵

101 *Id.* at 413.

102 *Id.* at 414.

103 *Id.*

104 *Id.*

105 See David Nather, *The Democrats’ Privilege Problem: Overseers Have a Tough Fight Ahead, in Courts of Law and Public Opinion, as the White House Ignores Subpoenas*, 65 CQ WKLY. 2256, 2256–57 (discussing the controversy surrounding the Bush administration’s claims of executive privilege for congressional subpoenas); Keith Perine, *Panel Votes for Contempt Citations: Administration Stands by Claim of Executive Privilege*, 65 CQ WKLY. 2280, 2280–81 (considering the claims invoking executive privilege following House Judiciary Committee recommendations for contempt citations). For an analysis of the firings of U.S. Attorneys, see HOUSE COMM. ON THE JUDICIARY MAJORITY STAFF, *REINING IN THE IMPERIAL*

IV. INHERENT POWERS

Throughout the book, Calabresi and Yoo treat implied powers and inherent powers as equivalent and interchangeable. Their review of presidential practice over more than two centuries “reveals that the historical support for a sustained tradition of presidential assertion of implied, inherent executive power during times of national emergency is modest, in stark contrast to the strong support for a tradition of inherent presidential power of direction, nullification, and removal.”¹⁰⁶ The record across forty-three presidential administrations “shows that claims of broad, inherent, implied powers were rare.”¹⁰⁷ They offer support to a President who exercises “a narrow implied, inherent power to protect the instrumentalities of government even in the absence of specific statutory authorization.”¹⁰⁸ They claim that the “most sweeping assertion of inherent executive power was Abraham Lincoln’s claim of emergency powers during the spring of 1861.”¹⁰⁹

It is misleading to mix the terms of implied, inherent, and emergency powers. They need to be kept separate and distinct. First, an implied power can be reasonably drawn from an express power. Because it is an express duty of the President to see that the laws are faithfully executed, any executive officer who prevents a law from being carried out can be removed by the President. The implied power to remove is derived from an express power. Congress is granted the express power to legislate. To legislate in an informed manner, it has an implied power to investigate, issue subpoenas, and hold in contempt those who interfere with a proper investigation. All three branches have implied powers. They are necessary to the Constitution and consistent with it.

Lincoln exercised emergency powers after the start of the Civil War but never regarded them as either “implied” or “inherent.” He made no claim that his actions were fully constitutional or that they could be justified by some language within Article II. When Congress returned after its recess, Lincoln sent a message explaining that his emergency actions, “whether strictly legal or not,” were taken as a public necessity, “trusting then, as now, that Congress would readily

PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH 10–11, 33–46, 57–62, 252–53, 255–56 (2009).

106 CALABRESI & YOO, *supra* note 48, at 20.

107 *Id.*

108 *Id.* at 430.

109 *Id.* at 19.

ratify them.”¹¹⁰ With those words Lincoln signaled two facts: he was not claiming full legality for what he did, and for that reason he needed Congress to authorize what he had done, even if retroactively. The superior lawmaking body was Congress, not the President. Lincoln underscored that point by admitting that he had exercised both Article I and Article II powers, advising Congress that his actions were not “beyond the constitutional competency of Congress.”¹¹¹ He did not invoke express, implied, or inherent powers to justify his actions, which were emergency measures requiring legislative approval. After debating his request, Congress passed the necessary legislation.¹¹²

According to Calabresi and Yoo, the decision by President George W. Bush to rely “on the advice of Berkeley law professor John Yoo to make sweeping claims of implied, inherent presidential power in the War on Terror are best seen as following in the tradition established by Jefferson, Lincoln, the two Roosevelts, and Nixon.”¹¹³ That is a shallow argument. Those Presidents did not claim, as Bush did, that they could violate statutes and treaties in pursuit of national security policies. They either came to Congress for statutory authority or, in the case of Nixon, claimed “inherent” power to impound appropriated funds or conduct domestic surveillance until Congress and the courts invalidated those initiatives.¹¹⁴

Having apparently defended Bush’s reliance on John Yoo and others in his administration who advocated unchecked presidential power, Calabresi and Yoo next argue:

Although Bush deserves a lot of credit for his steps to safeguard the country, the cost of the bad legal advice that he received is that Bush has discredited the theory of the unitary executive by associating it not with presidential authority to remove and direct subordinate executive offi-

110 Abraham Lincoln, Special Session Message (Jul. 4, 1861), in 7 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3221, 3225 (James D. Richardson ed., 1897).

111 *Id.*

112 *See Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 326, 326* (legalizing acts, proclamations, and orders of the President regarding the army, navy, militia, or volunteers after March 4, 1861).

113 CALABRESI & YOO, *supra* note 48, at 429.

114 *See FISHER, supra* note 39, at 200–01 (describing Impoundment Control Act requirement of special presidential messages when appropriations are rescinded or deferred, and district and Supreme Court rulings denying presidential power to withhold Office of Economic Opportunity, mental health, and Clean Water Act funds); LOUIS FISHER, THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA’S FREEDOMS 288–91 (2008) (discussing Supreme Court ruling that executive officers may not order surveillance without warrant, and creation of House and Senate Intelligence Committees and Foreign Intelligence Surveillance Court to oversee intelligence agency activities).

cially but with implied, inherent foreign policy powers, some of which, at least, the president simply does not possess.¹¹⁵

If the unitary executive means anything, the blame falls entirely on Bush, not his legal advisers. Otherwise there is no accountability in the presidency and the model of a unitary executive is a sham.

I partly agree with Calabresi and Yoo that “[a]ccepting the theory of the unitary executive does not necessarily require accepting the claims of inherent executive power advanced by the Bush administration.”¹¹⁶ It was not necessary, but the theory of the unitary executive became a handy model to be used repeatedly and crudely by the Bush administration to claim broad presidential powers in the field of national security that could not be restrained by Congress or the courts.¹¹⁷ When Congress in 2005 passed legislation to prohibit (once again) torture of detainees, in his signing statement President Bush dismissed the binding nature of the statutory prohibition with these words: “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 limitations on the judicial power.”¹¹⁸

Calabresi and Yoo propose that their theory of the unitary executive can be preserved by adopting “a limited view of inherent executive power.”¹¹⁹ I will argue why that is not possible. The Constitution is protected when Presidents act under express and implied powers. It was protected when Lincoln exercised emergency powers and then publicly expressed the need for Congress to sanction by statute what he had done. Now consider inherent power, which has been defined in this manner: “An authority possessed without its being derived from another. . . . [P]owers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express grants.”¹²⁰ It is clearly set apart from express and implied powers. That definition remained in the sixth edition of *Black’s Law Dictionary*

115 CALABRESI & YOO, *supra* note 48, at 429.

116 *Id.*

117 FISHER, *supra* note 114, at 190, 219, 220–24, 237, 293–94 (discussing administration claims that treaties and federal laws do not apply to, and that courts could not review, detention of U.S. citizens deemed “enemy combatants” or non-citizens at Guantánamo; interpretations of anti-torture statutes; and justifications of warrantless surveillance programs).

118 Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1919 (Dec. 30, 2005).

119 CALABRESI & YOO, *supra* note 48, at 430.

120 BLACK’S LAW DICTIONARY 703 (5th ed. 1979).

but dropped out of the current eighth edition, which carries this explanation of inherent power: “A power that necessarily derives from an office, position, or status.”¹²¹

A constitution protects individual rights and liberties by specifying and limiting government. Express and implied powers serve that purpose. The claim of “inherent” powers ushers in a range of vague and abstruse sources of authority. What “inheres” in the President? The standard collegiate dictionary explains that “inherent” describes the “essential character of something: belonging by nature or habit.”¹²² How would citizens, Congress, or the courts know what is essential or part of nature? The dictionary makes a cross-reference to “intrinsic,” which can mean within a body or organ (as distinct from extrinsic) but also something “belonging to the essential nature or constitution of a thing[,]” such as the “[intrinsic] worth of a gem” or the “[intrinsic] brightness of a star.”¹²³ Nebulous words such as “inherent,” “essential,” “nature,” and “intrinsic” invite political abuse and endanger individual liberties.

“Inherent” can imply superior, exclusive, and enduring. The verb “inhere” is used to describe a fixed element, including the belief that “all virtue *inhered* in the farmer” or the “excellence *inhering* in the democratic faith.”¹²⁴ “Inherence” may imply a power that has “permanent existence as an attribute.”¹²⁵ “Inherence” is associated with a quality that is settled or established, as “belonging by nature or settled habit.”¹²⁶ Presidents who claim inherent powers move a nation from one of limited powers to boundless and ill-defined authority, undermining the doctrine of separated powers and the system of checks and balances. Assertions of inherent powers in the last six decades include President Truman’s initiation of war in Korea in 1950 and his seizure of steel mills two years later. President George W. Bush and his legal advisers claimed he had inherent power to create military tribunals, issue “torture memos” by the Justice Department, adopt the policy of “extraordinary rendition” to send detainees to other countries for interrogation and torture, and authorize NSA surveillance after 9/11.¹²⁷ Through such actions, justified at every

121 BLACK’S LAW DICTIONARY 1208 (8th ed. 2004).

122 MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 601 (10th ed. 1993).

123 *Id.* at 614.

124 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1163 (1965).

125 *Id.*

126 *Id.*

127 See Louis Fisher, *Invoking Inherent Powers: A Primer*, 37 PRESIDENTIAL STUD. Q. 1, 1, 14–15 (2007).

turn by inherent authority, the administration functioned as an unconstitutional government.

V. CONCLUSIONS

Much of *The Unitary Executive* consists of a rich framework filled with detailed accounts of Presidents seeking to protect their administrative duties. Anyone reading the book will discover material that is of great interest to contemporary debates over executive prerogatives, separation of powers, and constitutional law. Calabresi and Yoo often exaggerate the purity of the unitary executive model, conceding at points that presidential behavior has not been consistent and ignoring at other times evidence that would show the behavior even more inconsistent than they admit. They say their book “shows that all of our nation’s presidents have believed in the theory of the unitary executive.”¹²⁸ Whatever the “beliefs” of the forty-three Presidents, clearly they were often willing to set aside theory for pragmatic accommodations with Congress.

To Calabresi and Yoo, the Constitution “gives presidents the power to control their subordinates by vesting all of the executive power in one, and only one, person: the president of the United States.”¹²⁹ The President can control subordinates to the extent of assuring that they are faithfully carrying out the law. If they are, he has no business interfering and no authority to ask his department heads or White House staff to intervene. Otherwise, agency employees handling social security payments and veterans’ claims, among other administrative tasks, would have their professional, ministerial work interrupted by political officials who probably have political and partisan agendas. Any administration that functioned in that manner would be justifiably condemned. Much of the work of subordinates in the Executive Branch is off-limits to the President and for very good reason. Calabresi and Yoo appear to acknowledge that point, pointing out that “[a]ll subordinate nonlegislative and nonjudicial officials exercise executive power, and they do so only by implicit or explicit delegation from the president.”¹³⁰ Adjudicatory duties within the executive power are carried out to satisfy the explicit direction of Congress through statutorily assigned tasks.

There is much to learn from *The Unitary Executive*. It is an ambitious project that has taken years to complete, building on highly de-

128 CALABRESI & YOO, *supra* note 48, at 4.

129 *Id.*

130 *Id.*

tailed articles initially published in law journals. The model presented by Calabresi and Yoo appears to be based on an incontrovertible principle: the need to vest power in the President to assure that laws are faithfully executed. Any limitations on that core duty, they argue, would interfere with power vested in the President by Article II and put at risk the individual liberties that depend on the rule of law. There is a basic problem with this argument. The Constitution does not empower the President to carry out the law. That would be an impossible assignment. It empowers the President to see that the law is faithfully carried out. The great bulk of that work is done by Executive Branch employees who remain legitimately outside the President's direct control provided they faithfully discharge their assigned tasks.

The unitary executive model became a convenient framework to justify constitutional and legal violations by the Bush II administration. The rule of law depends on more than strong, centralized, well-motivated Presidents. It requires Presidents to understand that they are under the law like every other person. Justice Robert Jackson put it well: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."¹³¹

131 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).