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### The Unitary Executive During the Second Half-Century

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# THE UNITARY EXECUTIVE DURING THE SECOND HALF-CENTURY

STEVEN G. CALABRESI<sup>\*</sup>  
CHRISTOPHER S. YOO<sup>\*\*</sup>

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## I. INTRODUCTION

In *The Unitary Executive During the First Half-Century*,<sup>1</sup> we surveyed the first seven presidencies under the Constitution to determine the view of presidential power held by the incumbents during that period. We found that from 1789 to 1837, American presidents from Washington to Jackson strongly believed in a unitary executive of the kind defended by many scholars in recent years, including Professor Calabresi.<sup>2</sup> In particular, we established that the first seven presidents vigorously defended the president's unitary authority over the execution of federal law. We also concluded that many of these presidents believed the Vesting Clause of Article II was a direct grant of power to the president, as Professor Calabresi has previously argued in a debate with Professors Lawrence Lessig and Cass Sunstein.<sup>3</sup>

We now pick up our survey where we left off in the prior article and examine the presidencies during the second half-century of our nation's history to see what view these men held on the scope of the president's power to execute the law. In so doing, we focus primarily on three mechanisms generally viewed as essential to any theory of the unitary executive: the president's power to remove subordinate policy-making officials at will, the president's power to direct the manner in which subordinate officials exercise discretionary executive power, and the president's power to veto or nullify such officials' exercises of discretionary executive power.<sup>4</sup> We also employ the interpretive methodology known as "departmentalism" or "coordinate construction," which is based on the principle that all three branches of the federal government have the competency and

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

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

3. Compare Calabresi, *supra* note 2, at 1378-1400, 1403-05 (arguing that the Article II Vesting Clause represents a substantive grant of constitutional power); Calabresi & Prakash, *supra* note 2, at 563-64, 570-81, 612-13 (same); Calabresi & Rhodes, *supra* note 2, at 1165-70, 1175-81, 1186-1206 (same), with Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 47-55, 119 (1994) (disagreeing with Professor Calabresi's views).

4. See Calabresi & Yoo, *supra* note 1, at 1458.

responsibility to interpret the Constitution and that the meaning of the Constitution is determined through the dynamic interaction of all three branches.<sup>5</sup>

As we shall see, presidential power ebbed and flowed several times during the second fifty years under the Constitution. Congress reasserted itself and remained ascendant in the years following Andrew Jackson's presidency until the crisis of the Civil War, which led the country to look to the president for leadership once again. Throughout these various shifts in the relative power of the branches and regardless of which party was in power, presidents generally defended their sole authority to execute the federal laws. Although some deviations from the unitary executive model did occur during this period, they were not so significant as to constitute presidential acquiescence to congressional interference with presidential execution of the laws.

We begin in Part I with the history of the unitary executive in the years leading up to and including the Civil War and trace in Part II the pivotal presidencies of Abraham Lincoln and Andrew Johnson. These years culminated with a remarkable but ultimately unsuccessful attack on the unitary executive when Congress impeached but failed to remove Johnson from office because of his decision to fire Secretary of War Stanton in violation of the Tenure of Office Act. We turn in Part III to the reclamation of presidential power during the years following Johnson's disastrous presidency. All told, our survey covers the years from 1837 to 1889, during which the Tenure of Office Act was repealed after Congress finally saw it as the constitutional monstrosity it truly was.

## II. THE UNITARY EXECUTIVE DURING THE JACKSONIAN PERIOD, 1837-1861

By modern standards, the eight presidential administrations between the Jackson and Lincoln administrations were generally unremarkable, both in terms of historical significance and executive effectiveness. Nevertheless, historical review convincingly demonstrates that the actions and words of these presidents reflected a consistent desire to protect the constitutional powers of the presidency against incursions by Congress. Indeed, several presidents during this period actually succeeded in *expanding* the constitutional powers of

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5. For a more complete discussion of coordinate construction and its particular applicability to separation of powers disputes, see *id.* at 1463-72.

the presidency in a number of important ways.

But perhaps the best direct evidence that the presidents of this period consistently protected their unitary constitutional powers from Congress can be found in the words of one of the executive branch's greatest antagonists throughout this period, Henry Clay of Kentucky, who commented:

The executive branch of the government . . . was eternally in action; it was ever awake; it never slept; its action was continuous and unceasing, like the tides of some mighty river, which continued flowing and flowing on, swelling, and deepening, and widening, in its onward progress, till it swept away every impediment, and broke down and removed every frail obstacle which might be set up to impede its course.

The presidential history from this period would ultimately underscore the truth underlying Clay's words.

#### A. *Martin Van Buren*

President Martin Van Buren was not as outspoken as Andrew Jackson on the great questions of presidential power that form the topic of this series of articles. However, this relative silence was not necessarily indicative of a passive view of executive power on Van Buren's part. Rexford Tugwell suggests that Van Buren was as responsible as Jackson himself for the development of the spoils system and of the powerful Jacksonian national political machine.<sup>7</sup> Indeed, as a New York senator in the 1820s, Van Buren had orchestrated the use of lobbying for the removal and appointment of federal officials to support the creation of local political machines.<sup>8</sup> He used his tenure in the Jackson administration to nationalize these practices, which was one of the chief reasons why Van Buren succeeded Jackson to the presidency, despite his lack of popularity with much of the Democratic leadership in Congress.<sup>9</sup>

Van Buren was generally a loyal follower and implementer of Jackson's views, which is significant given Jackson's enthusiastic embrace of the theory of the unitary executive during the Bank War.<sup>10</sup>

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6. LEONARD D. WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829-1861*, at 109 (Macmillan 1967) (1954) (quoting 6 HENRY CLAY, *WORKS* 309 (Jan. 24, 1842)).

7. REXFORD G. TUGWELL, *THE ENLARGEMENT OF THE PRESIDENCY* 105-07 (1960).

8. CARL RUSSELL FISH, *THE CIVIL SERVICE AND THE PATRONAGE* 63-65 (1905).

9. See TUGWELL, *supra* note 7, at 105-07.

10. See Calabresi & Yoo, *supra* note 1, at 1531.

Van Buren's biographer, Major L. Wilson, describes Van Buren's close affinity with Jackson as follows:

In a public letter accepting the nomination of the Democratic party to succeed Andrew Jackson as president, Martin Van Buren pictured himself "the honored instrument" of the administration party and vowed "to tread generally in the footsteps of President Jackson." Friends welcomed the statement as a pledge to defend the work of Jackson . . . . When divested of partisan rhetoric, Van Buren's statement, and others of like tenor, have been taken by historians as texts for the persistent interpretation of his presidency as the "third term" of Jackson.<sup>11</sup>

During his four years in office, Van Buren governed much as Andrew Jackson had as the leader of his political party. Van Buren held "regular cabinet meetings" but "took no votes in the cabinet and, as usual, reserved final decisions for himself."<sup>12</sup> At least two cabinet members probably favored a national bank, "[y]et they readily deferred to Van Buren's views of party and presidential power."<sup>13</sup> Wilson discusses Van Buren's approach to leadership:

In regard to key questions in foreign affairs, President Van Buren took a direct and active part. He also remained involved in the affairs of the Treasury Department, particularly in the aspects of its operations that bore upon his proposal[s]. On other and more routine matters of administration, by contrast, Van Buren allowed virtual autonomy to department heads.<sup>14</sup>

Van Buren's support for the unitary executive is reflected in his continuation of Jackson's policy towards the Treasury Department, which, as we have noted earlier, represented perhaps the most dramatic conflict over the president's authority to control the execution of the law to take place during the first fifty years of the Republic.<sup>15</sup> Van Buren adamantly believed that the "keeping and disbursing of Treasury funds without congressional safeguards . . . gave the president an unchecked control over the nation's purse and

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11. MAJOR L. WILSON, *THE PRESIDENCY OF MARTIN VAN BUREN* xi (1984); *see also id.* at 94 (noting that Daniel Webster also assailed Van Buren for "rejecting a national bank solely on the ground of a 'party pledge' to follow in Jackson's footsteps"); JAMES C. CURTIS, *THE FOX AT BAY: MARTIN VAN BUREN AND THE PRESIDENCY, 1837-1841*, at 45 (1970) (noting that Van Buren pledged during the election of 1836 to continue Jackson's policies).

12. WILSON, *supra* note 11, at 70.

13. *Id.*

14. *Id.* at 171.

15. *See* Calabresi & Yoo, *supra* note 1, at 1538-59.

an enormous engine of spoils.”<sup>16</sup> This provoked the ire of the Whig opposition, who criticized Van Buren for carrying

to the ultimate limit that tendency under Jackson—with his bank veto, his removal of deposits, his ‘Specie Circular’—to wrest the control of the Treasury from Congress and to place the nation’s purse exclusively under executive power . . . . The forms of republican government [would] remain[], but its substance would flow to a Treasury Caesar.<sup>17</sup>

The Whigs would repeat the cry of “Treasury Caesarism” many times.<sup>18</sup>

Van Buren’s adherence to the theory of the unitary executive is also manifest in his use of the power of removal. Van Buren exercised this removal power sparingly at first, since many of the continuing appointees were as much his as they were Jackson’s. Leonard White, who often uses the heavily patronage-influenced postal service as a barometer for presidential removal activity during this period, notes that Van Buren removed only 364 of 12,000 postmasters during his first two years in office.<sup>19</sup> As Van Buren began positioning himself within his party for a second term, however, he became more aggressive in his use of the removal power, looking beyond mere party affiliation and instead emphasizing personal political loyalty to his own faction of the Democratic Party.<sup>20</sup> Wilson reports that, “[a]s if responding to earlier criticisms that he was too passive and fatalistic, [Van Buren] began to act in a more vigorous and ‘political’ way. For one thing, he surrendered his initial policy of making no outright removals from office and began to brandish the ‘pruning knife.’”<sup>21</sup> Van Buren enjoyed the full support of his predecessor in this regard. Wilson notes:

[Andrew Jackson] welcomed and justified the new policy. Arguing that the opinions of all officeholders “ought to correspond with the Executive in all of his important measures,” Jackson urged [Maj. William B.] Lewis to resign as second auditor in the Treasury before he was removed. “Rotation in office must from the great pressure of public opinion be adopted by the President,” he

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16. WILSON, *supra* note 11, at 114.

17. *Id.* at 95.

18. *See id.* at 99, 114, 197.

19. WHITE, *supra* note 6, at 309.

20. *See id.*; *see also* FISH, *supra* note 8, at 75; 2 WILLIAM M. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 981-82 (1974).

21. WILSON, *supra* note 11, at 130-31.

explained.<sup>22</sup>

The Van Buren administration's reliance on the theory of the unitary executive as the basis for its authority is reflected in an opinion authored by Attorney General Benjamin Butler denying that Congress had the right to require collectors of the revenue to disclose their reasons for any removals of subordinate officers appointed by them. Butler concluded that "constitutional power of removal exercised by the President" prevented Congress from forcing the president to disclose the reasons underlying his removals and that, by analogy, the same principle protected collectors from being required to do so.<sup>23</sup> Van Buren did accede to two resolutions asking him to provide the House with a list of all executive removals since the adoption of the Constitution in 1787,<sup>24</sup> a resolution with which Van Buren complied the following year.<sup>25</sup> Passage of this resolution prompted no objection from Van Buren, since requiring a list of past removals did not in any way purport to limit the president's ability to make further removals in the future.<sup>26</sup> An earlier resolution that would have established a select committee to inquire into all dismissals and to consider restrictions on patronage<sup>27</sup> would have been more problematic. The House's failure to pass this resolution obviated any need for comment from Van Buren.

The Van Buren administration did litigate a landmark Supreme Court case on the scope of the executive power, *Kendall v. United States ex rel. Stokes*,<sup>28</sup> that some scholars have erroneously suggested undercuts the unitariness of the executive.<sup>29</sup> The case arose when a group who had contracted with the post office to transport the mail asserted a claim for an additional payment that Postmaster General Amos Kendall, a close confidant of Van Buren and Jackson,<sup>30</sup> refused to pay. The contractors then successfully obtained enactment of

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22. *Id.* at 131.

23. 3 Op. Att'y Gen. 325, 326 (1838).

24. CONG. GLOBE, 25th Cong., 3d Sess. 225 (1839).

25. H.R. DOC. NO. 26-130 (1840).

26. See DARRELL H. SMITH, *THE UNITED STATES CIVIL SERVICE COMMISSION* 4-6 (1928).

27. CONG. GLOBE, 25th Cong., 2d Sess. 189 (1838).

28. 37 U.S. (12 Pet.) 524 (1838).

29. Lessig and Sunstein discuss the *Kendall* case at some length. Lessig & Sunstein, *supra* note 3, at 55-61.

30. The Postmaster General was a key figure in the patronage machine that Jackson and Van Buren set up. Kendall was a close ally of Jackson and Van Buren. See CURTIS, *supra* note 11, at 58-60. Kendall had helped Jackson draft his message vetoing the rechartering of the Bank of the United States. *Id.* at 38.



private legislation directing the solicitor of the treasury to settle the claim in the contractors' favor. After Kendall continued to refuse to honor the award even after the solicitor of the treasury had ruled otherwise, the contractors went to court and obtained a writ of mandamus from Judge William Cranch of the circuit court of the District of Columbia against Kendall obliging him to pay the additional money.<sup>31</sup> The Supreme Court upheld the issuance of the writ of mandamus by a vote of six to three on the grounds that the solicitor's award had left Kendall only to perform a purely ministerial act in paying Stokes.<sup>32</sup> The Court found Kendall had no executive discretion to decline to perform that ministerial act.<sup>33</sup> Kendall ultimately bowed to the Court's ruling and paid the additional \$40,000.

The case is of landmark significance because it establishes that executive branch officials can be ordered by courts to perform ministerial duties. Although the Van Buren administration was skeptical about the propriety of this conclusion, modern proponents of the unitary executive have readily conceded its validity.<sup>34</sup> It would be a mistake, however, to conclude that *Kendall* represents acquiescence to any limitation of presidential authority to execute the laws. Van Buren's reaction to the pressure from party leaders to pay the contractors the additional money is quite telling in this regard:

Van Buren turned back this pressure, however, and stood by the postmaster general. He also supported Kendall's decision to reject a writ of mandamus, which was issued . . . by the circuit court in the District of Columbia, ordering the payment of the award. In a letter to Judge William Cranch, Kendall based his refusal on a sweeping Jacksonian concept of executive power, at once unitary in nature and independent of the other branches. The act of any executive officer was ultimately the act of the president, he argued, and therefore was not liable to direction from the judiciary. He wrote: "The Executive is ONE—*one* in principle, *one* in object. Its object is *the execution of the laws*. It is not susceptible of subdivisions and nice distinctions as to its duties and responsibilities."<sup>35</sup>

Attorney General Butler echoed the same themes when arguing the case before the Supreme Court when he based his argument on the

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31. *Kendall*, 37 U.S. (12 Pet.) at 527-35.

32. *Id.* at 613.

33. *Id.* at 614.

34. See Calabresi & Prakash, *supra* note 2, at 1502-03.

35. WILSON, *supra* note 11, at 174.

celebrated Decision of 1789.<sup>36</sup> Butler told the Court:

This doctrine [of the unitary executive] was also announced and established by the congress of 1789, in the debates relative to the power of removal . . . [The theory flowed from] that clause which declares that the “executive power shall be vested in the President.” From that provision, and from the direction that the President “shall take care that the laws be faithfully executed,” [James Madison] deduced the conclusion, that it was “evidently the intention of the constitution, that the first magistrate should be responsible for the executive department.” He showed that this principle of unity and responsibility was necessary to preserve that equilibrium which the constitution intended . . . But, whether the particular question as to the power of removal was correctly decided or not; no one, in that debate, disputed the position of Mr. Madison and his associates, that the constitution had actually vested in the President the whole executive power . . . The whole course of this debate, independently of the conclusion to which it came, is, therefore, utterly irreconcilable with the recent suggestion adopted and maintained by our learned adversaries; that when the constitution says “the executive power shall be vested in a President,” it only gives a name to the department, and merely means that he shall possess such<sup>37</sup> executive power as the legislature shall choose to confer upon him.

Even after having lost before the Supreme Court, the administration attempted to have the last word by trying to get Congress to enact legislation stripping the circuit court of its mandamus power. Van Buren made clear that the bill was intended to take away “from the judiciary at the seat of government the power to interfere with the executive in the performance of its duties, even those of a ‘ministerial’ sort.”<sup>38</sup> Although the bill passed the Senate, the effort

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

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

Calabresi & Yoo, *supra* note 1, at 1472 n.53.

37. *Kendall*, 37 U.S. (12 Pet.) at 597-98 (argument of Attorney General Benjamin F. Butler) (citation omitted).

38. WILSON, *supra* note 11, at 175.

died when the House refused to take any action upon it.<sup>39</sup>

Any claim that *Kendall* marked any large-scale derogation of the president's authority to execute the law is further belied by dicta in the Court's opinion drawing a distinction between executive acts and "mere ministerial act[s]," which do not involve any exercise of discretion.<sup>40</sup> The *Kendall* Court elaborated as follows:

We do not think the proceedings in this case interfere[] in any respect whatever with the rights or duties of the executive . . . . The mandamus does not seek to direct or control the Postmaster-general in the discharge of any official duty, partaking in any respect of an executive character, but to enforce the performance of a mere ministerial act, which neither he nor the President had any authority to deny or control.<sup>41</sup>

The Supreme Court turned this dicta into a holding two years later in *Decatur v. Paulding*.<sup>42</sup> That case arose after the Secretary of the Navy denied a claim for a general pension asserted by the widow of Stephen Decatur after she had already collected a special pension granted to her by private legislation. The circuit court refused to issue a writ of mandamus ordering the Secretary to pay the pension. In affirming the circuit court, the Supreme Court adopted the arguments advanced by Attorney General Henry Gilpin<sup>43</sup> and based its decision squarely on the distinction drawn in *Kendall* "between executive duties and ministerial acts."<sup>44</sup> Officials exercising executive powers are "continually required to exercise judgment and discretion," in contrast to "mere ministerial duties," which do not involve any discretion whatsoever.<sup>45</sup>

Finally, the Van Buren years saw the Supreme Court issue an important ruling in *Ex parte Hennen*,<sup>46</sup> a case in which the administration appears not to have participated. In *Hennen*, the Court held that a district court clerk could be removed by the judges who appointed him at any time because inferior officers in the judicial and executive branch serve not for life but at the pleasure of the official who appointed them.<sup>47</sup> In so holding, the Court specifically noted that

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39. *Id.*

40. *Kendall*, 37 U.S. (14 Pet.) at 614.

41. *Id.* at 610.

42. 39 U.S. (14 Pet.) 497 (1840).

43. *Id.* at 509-10.

44. *Id.* at 515; *see also id.* at 514, 516 (citing *Kendall*).

45. *Id.* at 515.

46. 38 U.S. (13 Pet.) 230 (1839).

47. *Id.* at 259-60.

it was the “practical construction of the Constitution that [the removal power] was vested in the President alone” and not in the president and the Senate jointly.<sup>48</sup> Dicta in *Hennen* thus accept the Decision of 1789 as having construed the Constitution as giving the president unlimited removal power. Indeed, the point was considered so well established that all of the attorneys arguing the case before the Supreme Court conceded as much.<sup>49</sup>

When it came time in 1840 to seek re-election, Van Buren, “[h]aving shaped his administration in the steps of Jackson, [looked] to reelection on the same basis.”<sup>50</sup> Van Buren’s critics attacked him for the same monarchical tendencies that they discerned in Jackson. They argued that “the greatest threat to liberty was Democratic Caesarism—that is, the encroachment of executive power, supported by a drilled and disciplined party that was bent on spoils rather than the public good.”<sup>51</sup> James Barbour of Virginia proclaimed, as had Henry Clay during the Bank War, “We are indeed in the midst of a revolution . . . . The forms of the Constitution are retained, but its spirit is gone—your President is a monarch almost absolute.”<sup>52</sup> William Henry Harrison, the Whig candidate for president in 1840, “evoked thunderous applause with the declaration that ‘the Government is now a practical monarchy.’ The true issue was not democracy versus aristocracy—the people against a privileged few—as the Democrats claimed, but democracy versus monarchy.”<sup>53</sup> Van Buren was tagged as a would-be monarch, just as Jackson had been, revealing the extent to which Van Buren’s philosophy of executive power followed Jackson’s. Democrats responded in the 1840 campaign by stressing “the continuity of Van Buren’s administration with that of Jackson,”<sup>54</sup> thus accepting the Whig thesis that Van Buren was just an extension of Old Hickory himself.

Van Buren was as staunch a proponent of the theory of the unitary executive as his mentor, Andrew Jackson. Van Buren’s willingness to exercise strong presidential authority, particularly against the Treasury Department; his increasing use of his power of removal;<sup>55</sup>

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48. *Id.* at 258.

49. *See id.* at 233-35, 238 (argument of Mr. Coxe); *id.* at 246 (argument of Mr. Gilpin); *id.* at 255 (argument of Mr. Jones).

50. WILSON, *supra* note 11, at 191.

51. *Id.* at 197.

52. *Id.*

53. *Id.* at 198.

54. *Id.* at 202.

55. *See* FISH, *supra* note 8, at 75; 2 GOLDSMITH, *supra* note 20, at 981-82.

the opinion authored by Attorney General Butler reiterating that Congress has no right to require the president to disclose the reasons underlying his removals; and the positions advanced by his administration before the Supreme Court each suggest that had Van Buren was as committed a defender of the unitary executive as Jackson.

*B. William H. Harrison*

The Whig presidency of William Henry Harrison saw the same aggressive defense of executive power often associated with the Jacksonian Democrats. This was surprising since the Whig Party's self-proclaimed *raison d'être* was belief in a limited and weak executive branch. Many observers had assumed that the election of Harrison would mark a sharp reversal in the president's position with regard to the unitary executive. Surely given the vehement opposition of the Whigs to presidential removals during the Jackson and Van Buren administrations and Harrison's pre-election dedication to strict limitations on presidential power,<sup>56</sup> the Harrison administration would have little choice but to forego the transient political advantage of displacing twelve years worth of Democratic appointees to federal office and instead adhere to the limited vision of the executive power it had previously so vigorously espoused. However, despite the best efforts of Whig luminaries Henry Clay and Daniel Webster, Harrison clung steadfastly to a belief in the assertive use of the executive power.

Harrison started out by pleasing Whigs with an inaugural address that pledged to curtail the perceived trend toward presidential despotism.<sup>57</sup> He vowed to limit himself to a single term and promised caution in using the veto power.<sup>58</sup> At the same time, however, Harrison's inaugural address had made it clear that he believed that the Constitution conferred the removal power upon the president. As Harrison commented, "It was certainly a great error in the framers of the Constitution not to have made the head of the Treasury Department entirely independent of the Executive. He should at least

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56. In 1838, Harrison had espoused a program that would confine presidential service to a single term, establish a Treasury independent of presidential control, and strictly limit the use of the veto power. See Letter from William Henry Harrison to Harmar Denny (Dec. 2, 1838), reprinted in 2 GOLDSMITH, *supra* note 20, at 637-41.

57. William H. Harrison, Inaugural Address (Mar. 4, 1841), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1860, 1863 (James D. Richardson ed., 1897) [hereinafter MESSAGES & PAPERS]. See generally WHITE, *supra* note 6, at 46-47.

58. Harrison, Inaugural Address, *supra* note 57, at 1863-66.

have been removable only upon the demand of the popular branch of the Legislature.”<sup>59</sup> To Harrison, “it appear[ed] strange indeed that anyone should doubt that the entire control which the President possesses over the officers who have the custody of the public money, by the power of removal with or without cause, does for all mischievous purposes at least, virtually subject the treasure . . . to his disposal.”<sup>60</sup> Although Harrison believed the decision to confer the removal power upon the president to be a mistake, he nonetheless implied that he regarded the issue to be settled, a conclusion supported by the opinions issued by his Attorney General.<sup>61</sup> Therefore, Harrison could only offer his assurances to the people that, as a matter of policy, he would “never . . . remove a Secretary of the Treasury without communicating all the circumstances attending such removal to both Houses of Congress.”<sup>62</sup>

Harrison’s qualms about broad exercises of presidential removal power ultimately proved short-lived. Although at one point he seemed to be willing or compelled to “yield his will to a majority vote in his Cabinet,”<sup>63</sup> an anecdote in Leonard White’s *The Jacksonians* shows that Harrison ultimately believed that broad presidential power also extended to appointment of inferior officers, independent of consultation with Congress or the cabinet:

At a Cabinet meeting, so the story is told, [Secretary of State] Webster informed the President that the Cabinet had decided on

59. *Id.* at 1868.

60. *Id.* at 1867.

61. As Attorney General Hugh S. Legare noted:

Whatever I might have thought of the power of removal from office, if the subject were *res integra*, it is now too late to dispute the settled construction of 1789. It is according to that construction, from the very nature of executive power, absolute in the President, subject only to his responsibility to the country (his constituent) for a breach of such a vast and solemn trust.

4 Op. Att’y Gen. 1, 1-2 (1842). Legare had previously opined:

If any authority were needed to enforce considerations which seem so obvious and conclusive in themselves, I think the celebrated debate on the power of removal in the first Congress would furnish it. The whole country seems to have acquiesced in the argument of Mr. Madison, in favor of that power drawn from the character of executive power and responsibility, and from the irresistible necessity of the case.

3 Op. Att’y Gen. 673, 676 (1841); *see also* 4 Op. Att’y Gen. 165 (1843) (reasoning that even assuming *arguendo* that Congress may restrain cabinet secretaries’ exercise of the removal power, “the power of the President as head of the government, under the constitutional injunction to see the laws faithfully executed, stands, I incline to think, in a different category”).

62. Harrison, Inaugural Address, *supra* note 58, at 1868; *see also* 2 GOLDSMITH, *supra* note 20, at 649; WILFRED E. BINKLEY, PRESIDENT AND CONGRESS 90 (1947).

63. WHITE, *supra* note 6, at 47.

James Wilson to be governor of [the] Iowa [Territory]. Harrison wrote a few words on a slip of paper and asked Webster to read them aloud: "William Henry Harrison, President of the United States." The President then rose to his feet and said, "And William Henry Harrison, President of the United States, tells you gentlemen, that . . . John Chambers shall be Governor of [the] Iowa [Territory]."<sup>64</sup>

Norma Peterson, Harrison's biographer, paints a similar picture of an active chief executive who was willing to assert his authority over the execution of the law. She notes that Harrison "visited every department to observe operations [and he] then called for reports detailing the activities and responsibilities of each office."<sup>65</sup>

Nor did the Whigs exhibit much restraint in effecting removals. In a March 1841 cabinet meeting that took place shortly after the election, the Whig leaders agreed to wield the removal power in the same partisan manner as Jackson had.<sup>66</sup> Harrison proceeded to remove executive officials at a rate far exceeding that of either Jackson or Van Buren.<sup>67</sup> Peterson adds:

[I]nnumerable removals were made for political reasons. All the leading Whigs, as well as lesser members of the party, had countless friends to reward. Because his department controlled more positions than any of the others, Postmaster General Granger probably held the record for dismissals. During his six months in office, he ousted seventeen hundred postmasters and boasted that had he remained in the cabinet another two or three weeks, three thousand more would have been gone. For the time being, at least, the creation of a nonpartisan civil service was impossible. The Democrats had been in command for a long period, and the Whigs were hungry.<sup>68</sup>

In filling positions, Harrison repeatedly annoyed powerful Whig Senator Henry Clay who unsuccessfully tried to control administration appointments. To Clay's immense irritation, Harrison rejected Clay's candidate for Secretary of the Treasury and for the collectorship of the port of New York (a key patronage position that

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64. *Id.* at 47-48 (quoting Parmelee, *Recollections of an Old Stager*, 47 HARPER'S NEW MONTHLY MAGAZINE 753, 754 (1873)).

65. NORMA LOIS PETERSON, *THE PRESIDENCIES OF WILLIAM HENRY HARRISON & JOHN TYLER* 39 (1989).

66. See PAUL P. VAN RIPER, *HISTORY OF THE UNITED STATES CIVIL SERVICE* 41 (Greenwood Press 1976) (1958).

67. See 2 GOLDSMITH, *supra* note 20, at 981-82; FISH, *supra* note 8, at 73-76.

68. PETERSON, *supra* note 65, at 39-40.

controlled possibly five hundred jobs).<sup>69</sup> Harrison and Clay's argument over the composition of the cabinet ultimately became so heated that Harrison ended his final meeting with Clay by declaring, "Mr. Clay, you forget that *I* am the President."<sup>70</sup>

Although the Whigs' sudden conversion could cynically be attributed to the triumph of political necessity over principle, it can just as easily be attributed to structural factors: the Whigs' return to the White House brought home the simple truth that presidents must have the power of removal if they are to ensure the proper execution of the laws. The Democrats, having endured Whig criticism of presidential removals for twelve years, could not let this abrupt reversal in Whig constitutional philosophy pass unchallenged. Therefore, on June 17, 1841, Senator (and future President) James Buchanan introduced a resolution requesting that the President provide a list of all removals made during the current administration.<sup>71</sup> Buchanan freely admitted that the resolution was introduced not to articulate a particular constitutional theory, but rather to embarrass the Whigs by showing "the beautiful consistency between Whig professions and Whig practice; between promises made before the election, and the performance afterwards."<sup>72</sup> The Buchanan resolution eventually passed the Senate,<sup>73</sup> and a similar resolution passed the House on July 16, 1841.<sup>74</sup> However, since neither of these resolutions did anything more than request a list of those officers removed, as during the Van Buren administration, the eventual passage of such a resolution did not have any particular precedential significance. More far-reaching resolutions that would have required the President to present Congress with the reasons

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69. *See id.* at 34, 37.

70. *Id.* at 34; *see also* WILFRED E. BINKLEY, *THE POWERS OF THE PRESIDENT* 89-91 (1937); 2 GOLDSMITH, *supra* note 20, at 651-54.

71. CONG. GLOBE, 27th Cong., 1st Sess. 63-64 (1841); S. RES. 25, 27th Cong. (1841).

72. Buchanan reportedly charged:

[T]he ruthless proscription which was now progressing so directly at variance with all the professions and pledges of the Whig party, was the most glaring and signal example in the history of any Government, ancient or modern, of the opposition, between professions before an election, and practice afterwards. No popular Government had ever existed . . . in which a political party had so recklessly and so suddenly violated their most solemnly professed principles as the Whig party of the present day had done. It was no wonder that they should endeavor to shroud their conduct in mystery, and to conceal their removals from the world.

CONG. GLOBE, 27th Cong., 1st Sess. 102 (1841).

73. *Id.* at 230.

74. *See* H.R. DOC. NO. 27-48, at 1 (1841). *See generally* SMITH, *supra* note 26, at 5.



underlying the removals of certain officers were submitted but never enacted.<sup>75</sup>

### C. John Tyler

The obvious dismay that these incidents inspired in the congressional Whig leadership deepened when Harrison died at the end of his first month in office. Despite Harrison's apostasy in many areas of Whig presidential doctrine, most congressional Whigs accepted him as a "birthright" Whig whose other party loyalties were basically secure.<sup>76</sup> Vice President John Tyler, a traditional states' rights Democrat who had joined the Whig ticket in the spirit of anti-Jackson coalition, did not inspire similar confidence among the Whigs.<sup>77</sup> Because of doubts about Tyler and general Whig hostility to presidential power, many congressional Whig leaders, upon learning of Harrison's death,<sup>78</sup> immediately attempted to undermine Tyler's nascent presidency. They did this by advancing the textually plausible claim that the Constitution did not permit a vice president actually to become president but instead only allowed the vice president to adopt the role of "acting president" while continuing in the official title of vice president.<sup>79</sup>

To his credit, Tyler refused to accept this Whig interpretation of constitutional law. Tyler immediately assumed the title of president, rather than acting president, and he went on to take the presidential oath of office specified by the Constitution and collect the presidential

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75. On June 17, 1841, Representative Alford introduced a resolution requesting that the President furnish the names of all officers removed along with the reasons for their removals. H.R. DOC. NO. 27-48, *supra* note 74, at 65-66. On July 1, 1841, Senator Benton offered a resolution requesting that the President communicate to the Senate his reasons for removing five named officers. *Id.* at 133. On July 27, 1842, Representative Garrett Davis reported a resolution requesting the reasons for the removal of H.H. Sylvester. SMITH, *supra* note 26, at 6. Also in 1842, a House committee reported a proposal that would require the President to present to Congress the causes of all removals made in the future. H.R. REP. NO. 27-945 (1842). The Senate Committee on Retrenchment reported a similar bill on June 15, 1844. S. DOC. NO. 28-399 (1844); *see also* 2 GEORGE H. HAYNES, THE SENATE OF THE UNITED STATES 799 n.1 (1938); WHITE, *supra* note 6, at 323-24. Finally, in 1845, Henry Grider and William P. Thomasson proposed instructing the Judiciary Committee to develop legislation requiring that the executive branch assign reasons for all removals or placing other restrictions on removals. CONG. GLOBE, 28th Cong., 2d Sess. 40 (1845) (Grider resolution); CONG. GLOBE, 28th Cong., 1st Sess. 99 (1844) (Thomasson resolution). *See generally* SMITH, *supra* note 26, at 4-6.

76. *See* 2 GOLDSMITH, *supra* note 20, at 654-55.

77. *See id.* at 669.

78. *See id.* at 657.

79. *See* PETERSON, *supra* note 65, at 45-48; *see also* 2 GOLDSMITH, *supra* note 20, at 654.

salary. Ultimately, both houses of Congress voted to recognize Tyler as president rather than acting president.<sup>80</sup> This incident marked the beginning of Tyler's jealous protection of his executive powers from Congress for the remainder of his combative term.<sup>81</sup>

In his inaugural address, however, Tyler committed one horrible mistake that forever brands him as something of a pariah to unitary executives. Tyler, in a fit of anti-Jackson indiscretion, said:

I deem it of the most essential importance that a complete separation should take place between the sword and the purse. No matter where or how the public moneys shall be deposited, so long as the President can exert the power of appointing and removing at his pleasure the agents selected for their custody the Commander in Chief of the Army and Navy is in fact the treasurer.<sup>82</sup> A permanent and radical change should therefore be decreed.

Tyler went on to propose the creation of a five-person "Independent Board of Exchequer," the majority of whose members would be appointed by the president with the consent of the Senate and who could be removed "only for physical inability, incompetency, or neglect or violation of duty, with reasons laid before the Senate. The Exchequer Board was to become the sole agency to receive, hold, and disburse all public money—'safe from Executive control.'"<sup>83</sup> This wild scheme outdid anything ever previously proposed and can only be understood if one recollects the charges of Caesarism and Napoleonism leveled against Andrew Jackson.<sup>84</sup> Happily, Tyler's idea sank without a trace as other "issues pushed aside one so academic in nature. No President followed Tyler's lead."<sup>85</sup>

In all matters other than the proposed Independent Board of Exchequer, Tyler was a paragon of virtue in defending presidential prerogatives. Tyler's son and private secretary reported that Tyler's first cabinet meeting gave him a striking opportunity to show his belief in a strong unitary presidency. After being told by Secretary of State Daniel Webster that all matters discussed in cabinet meetings should be decided by majority vote with each secretary and the

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80. PETERSON, *supra* note 65, at 49-50.

81. *See id.* at 45-48.

82. *See* WHITE, *supra* note 6, at 43.

83. *Id.*

84. *See id.* at 43-44.

85. *Id.* at 44; *see also id.* at 44 n.62 ("In 1841, Congressman Millard Fillmore was committed to 'the separation of the purse and the sword from the hands of the executive.' . . . As President he forgot the issue.").

President having only one vote, Tyler is said to have responded:

I beg your pardon, gentlemen; I am very glad to have in my Cabinet such able statesmen as you have proved yourselves to be. And I shall be pleased to avail myself of your counsel and advice. But I can never consent to being dictated to as to what I shall or shall not do. I, as President, shall be responsible for my administration. I hope to have your hearty cooperation in carrying out these measures. So long as you see fit to do this, I shall be glad to have you with me. When you think otherwise, your resignations will be accepted.<sup>86</sup>

Tyler's unofficial press organ, *The Madisonian*, expressed the administration's commitment to a unitary executive branch, describing what it saw as "the proper relationship between the president and his cabinet":

The executive branch, it declared, should be a whole unit, with the department heads acting as sincere and willing exponents of the president's deliberate convictions. Otherwise the administration would present to the world the "absurd spectacle" of a power divided against itself. Taking issue with this point of view, the *National Intelligencer* [Henry Clay's press organ] called it an "odious Jacksonian pretension."<sup>87</sup>

Tyler's extensive correspondence with his first secretary of state, Daniel Webster, indicates "[his] close attention to detail and the time he spent reading documents and considering what should be done."<sup>88</sup> He was a hands-on chief executive who sometimes bypassed even his secretary of state in communicating directly with the U.S. ambassador to Great Britain. On December 30, 1842, he announced the Tyler Doctrine, whereby the Monroe Doctrine was extended to the "Sandwich Islands," today known as Hawaii. This type of broad proclamation of foreign policy, like the Monroe Doctrine itself or like George Washington's Neutrality Proclamation, suggests a willingness to exercise vigorous control over all matters involving the state department.<sup>89</sup>

Perhaps the most striking example of Tyler's belief in the assertive use of executive power was his aggressive defense of the presidential

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86. *Id.* at 86 (quoting *Interview with John Tyler, Jr.*, 41 LIPPINCOTT'S MONTHLY MAG. 417, 417-418 (1888)); see also OLIVER PERRY CHITWOOD, JOHN TYLER: CHAMPION OF THE OLD SOUTH 270 (1964); BINKLEY, *supra* note 70, at 95-96.

87. PETERSON, *supra* note 65, at 71.

88. *Id.* at 145.

89. See Calabresi & Yoo, *supra* note 1, at 1513.

veto power.<sup>90</sup> In a confrontation that echoed the earlier Bank War of the Jackson administration,<sup>91</sup> Tyler vetoed numerous pieces of Whig-sponsored legislation during his tenure. Most notably, Tyler twice vetoed bills attempting to recharter the Bank of the United States on the Jacksonian grounds that they were unconstitutional.<sup>92</sup> Tyler also vetoed a number of proposed tariffs that he thought were excessive.<sup>93</sup>

These vetoes caused outrage among the leaders of the Whig party, most notably Henry Clay, who unsuccessfully argued that the presidential veto power should be narrowly constrained by constitutional amendment.<sup>94</sup> On several occasions, Clay unsuccessfully sought a constitutional amendment “that would allow presidential vetoes to be overturned by a simple majority in each house, rather than by the current constitutional stipulation of a two-thirds vote of the House and the Senate.”<sup>95</sup> Clay also implied in a famous Senate speech that Tyler’s repeated use of the veto power suggested that he was out of touch with the contemporary political consensus and, like a latter-day prime minister, should consider resignation from the presidency.<sup>96</sup> Tyler stubbornly refused to yield to these Whig arguments. In fact, the rude manner in which one of his veto messages was received prompted him to file a “Protest”<sup>97</sup> that was somewhat reminiscent of the similarly named document lodged by Andrew Jackson.<sup>98</sup> As happened to Jackson, Congress refused to receive Tyler’s Protest.<sup>99</sup> Tyler’s course of action ultimately prompted his expulsion from the Whig Party, congressional criticism, and political acrimony that undermined the remainder of his presidency.<sup>100</sup>

Turnover in the cabinet was common during the Tyler administration. Including the holdover cabinet members appointed by

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90. See WHITE, *supra* note 6, at 31.

91. See Calabresi & Yoo, *supra* note 1, at 1538-39.

92. John Tyler, Veto Message (Aug. 16, 1841), in 3 MESSAGES & PAPERS, *supra* note 57, at 1916; John Tyler, Veto Message (Sept. 9, 1841), in 3 MESSAGES & PAPERS, *supra* note 57, at 1922.

93. John Tyler, Veto Message (June 29, 1842), in 3 MESSAGES & PAPERS, *supra* note 57, at 2033; John Tyler, Veto Message (Aug. 9, 1842), in 3 MESSAGES & PAPERS, *supra* note 57, at 2036.

94. TUGWELL, *supra* note 7, at 118.

95. PETERSON, *supra* note 65, at 78; see also *id.* at 90, 100, 104.

96. See 2 GOLDSMITH, *supra* note 20, at 668; BINKLEY, *supra* note 62, at 99-100; PETERSON, *supra* note 65, at 95-112.

97. John Tyler, Protest (Aug. 30, 1842), in 3 MESSAGES & PAPERS, *supra* note 57, at 2043.

98. See Calabresi & Yoo, *supra* note 1, at 1545-54.

99. See Tyler, Protest, *supra* note 97, at 2043.

100. See 2 GOLDSMITH, *supra* note 20, at 676, 705-06.

Harrison, the Tyler administration featured four secretaries of state, four secretaries of the treasury, five secretaries of the navy, four secretaries of war, three attorneys general, and two postmasters general.<sup>101</sup> Tyler even suffered the mass resignation of all the holdover cabinet secretaries Harrison appointed in 1841, except for Daniel Webster, to protest his second veto of legislation that would have rechartered the Bank of the United States. Even the strong-willed Whig Daniel Webster eventually resigned as Secretary of State, both because Tyler was determined to push forward with the annexation of Texas and because Tyler was trying to run for re-election as a Democrat. The one constant in Tyler's administration was Tyler himself, and he was indisputably in control of all aspects of his administration's foreign and domestic policy.

In his use of the removal power, Tyler continued the trend towards partisan removal of office holders originally authorized by Harrison. In fact, historian Carl Russell Fish, after a comprehensive comparison of the removal behavior of the Harrison and Tyler administrations with the Jackson administration, found the difference between the so-called "sweep of 1829" and the "sweep of 1841" to be merely one of degree, with the Whig administrations making a total of 304 politically-motivated removals from a potential total of 924.<sup>102</sup> Tyler became particularly aggressive in partisan use of the removal power as his political future became progressively bleaker during his term in office. He commented to his Treasury Secretary, "[W]e have numberless enemies in office and they should forthwith be made to quit . . . in short the changes ought to be rapid and extensive and numerous . . . we must be cautious and never appoint any other than a well known friend."<sup>103</sup>

Tyler also "made the strongest statement made thus far by a chief executive on the president's right to use discretion in complying or refusing to comply with congressional requests or demands for information from the executive branch."<sup>104</sup>

The President, Tyler pointed out, was directed by the Constitution to "take care that the laws be faithfully executed." This included an obligation to inquire into the manner in which all public agents

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101. PETERSON, *supra* note 65, at 146.

102. See FISH, *supra* note 8, at 150.

103. PETERSON, *supra* note 65, at 147 (quoting Letter from John Tyler, President, to John Spencer, Treasury Secretary, (May 13, 1843 and Sept. 2, 1843) (on file in Manuscripts Division, Library of Congress)).

104. *Id.* at 170.

performed their duties. If the president were not able to use discretion in the dissemination of information collected in investigations, an inquiry could be arrested in its first<sup>105</sup> stage, and those who were under suspicion could elude detection.

The Whig fury at Tyler, which commenced during the second round of bank wars in 1841 and continued unabated for the rest of his tempestuous term, thus stemmed from Tyler's near-Jacksonian conception of presidential power. The Whigs had been formed as a party to oppose the Jacksonian conception of the presidency, and so they came to consider Tyler a traitor to their cause. Peterson reports:

[Tyler's] undermining of the creation of a national bank was harmful, but what really angered the congressional Whigs was Tyler's thwarting of their determination to control the chief executive and to destroy, for all time, presidential usurpation. Therefore, to secure the nation against future abuses, encroachments, and usurpations by the chief magistrate, the Whig caucus reiterated many of the points voiced during the 1840 campaign: a single term for the incumbent in the president's office, the right of Congress to appoint the secretary of the treasury, severe restrictions on the president's power to dismiss from office, the establishment of a fiscal agent (a national bank), and the adoption of an amendment to the Constitution which would limit the chief executive's use of the veto. Tyler had to be brought to heel; otherwise, there would be three more years of "the same kind of suffering inflicted during the last twelve years by the maladministration of the Executive Department of the government."<sup>106</sup>

When Tyler refused to bend to the Whig caucus, he was not only expelled from the Whig Party, but he was also threatened with impeachment, making him the first president to be so threatened.<sup>107</sup> Impeachment went nowhere, but Tyler governed for the remainder of his term with minimal support in Congress, and the support he did have was from Jacksonian Democrats, not his fellow Whigs.

As Tyler was preparing to leave office in the winter of 1845, he succeeded, with the help of President-elect James K. Polk, in pushing through<sup>108</sup> the annexation of Texas and its admission to the Union as a state. This was an extraordinarily important action for an embattled chief executive to take. He also secured adoption of a major treaty with Great Britain that settled a disputed boundary along the U.S.-

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105. *Id.* at 172.

106. *Id.* at 89-90.

107. *See id.* at 102, 169.

108. *See id.* at 201-59.

Canadian border in a manner that presaged the Polk administration's settlement of the Oregon boundary line.<sup>109</sup> In sum, Tyler's belief in a strong, assertive, and unitary executive branch always remained firm. This prompted Wilfred Binkley to note that, "Tyler saved the presidency from suffering a backset," even in the face of unimaginable personal political damage.<sup>110</sup>

#### D. James K. Polk

Presidential support for the unitary theory of the executive branch did not waver when the Jacksonian Democrats returned to power under James K. Polk. A Jacksonian Democrat from Tennessee, Polk was often called "Young Hickory," and his assertive philosophy of presidential power mirrored that of his colloquial namesake, Andrew Jackson.<sup>111</sup> Polk's biographer, Paul Bergeron, reports:

Polk did not conform to the Whiggish notions about weak or limited presidents who yielded to a vigorous and dominant legislative branch. Imitating the model established by his mentor, Andrew Jackson, Polk set out to dominate the nation's capital in just about every respect possible. He knew, as all effective presidents have known, that the office is more than an enumeration of constitutional duties and prerogatives. Indeed, the presidency is whatever the occupant can make of it (within constitutional bounds, of course).<sup>112</sup>

Bergeron adds that Polk "follow[ed] Jackson's concept of the [presidential] office. Regardless of how one responds to Polk's policies and programs, there is no question that he was a strong executive. The nation would not see such again until the administration of Abraham Lincoln, an old Whig who essentially abandoned Whiggish ideas about the presidency."<sup>113</sup> Charles Sellers adds that "Polk was to display a brand of presidential legislative leadership that the country would not see again until the time of Theodore Roosevelt and Woodrow Wilson."<sup>114</sup>

Polk himself once made the following comment on presidential power as it related to Whig views of presidential subservience to other branches of government:

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109. *See id.* at 113-31.

110. BINKLEY, *supra* note 70, at 104.

111. *See* TUGWELL, *supra* note 7, at 117; PAUL H. BERGERON, THE PRESIDENCY OF JAMES K. POLK 144 (1987).

112. BERGERON, *supra* note 111, at xi.

113. *Id.* at xi-xii.

114. CHARLES SELLERS, JAMES K. POLK: CONTINENTALIST 310 (1966).

Any attempt to coerce the President to yield his sanction to measures which he cannot approve would be a violation of the spirit of the Constitution . . . and if successful would break down the independence of the Executive department and make the President clothed by the Constitution with the power to defend their rights the mere instrument of the majority of Congress.<sup>115</sup>

Polk articulated another Jacksonian notion that had infused the unitary executive arguments of Jackson's protest message vis-à-vis the Bank of the United States. This was the argument that the president was the only true representative of the whole people of the United States since he alone had been elected by the whole people:

Polk felt confident in his attitude toward and his relationship with Congress, for he believed that he was the true representative of the people of the United States. Jackson had been the first to express such a startling notion; Polk reiterated it and refined it.<sup>116</sup>

"More boldly and more cogently than Jackson had done earlier, Polk declared that the president was the representative of the whole people of the United States, whereas congressmen were relegated to lesser roles of representing only portions of the people."<sup>117</sup> Polk was committed to the Jacksonian notion that the president was uniquely a spokesman of the whole people of the United States. Polk, like Jackson, was thus unquestionably a believer in a strong and independent presidency.

As one historian has noted, Polk "undertook to make reality of the principle sought to be established by Washington, that the executive branch of the government was one whole to be managed by the President alone."<sup>118</sup> Paul Bergeron reports:

Polk effectively seized control of the governmental bureaucracy. Upon occasion he boasted, and justifiably so, of his mastery of the details of the functioning of the various executive departments. Because he kept such close scrutiny over them, he was able to control them. This was particularly noteworthy with regard to the Treasury Department, which, since the days of Alexander Hamilton, had been accustomed to functioning more or less independently of the president. But Polk did not permit his secretary of the Treasury to stray from presidential policy or to exhibit independence. One of the chief consequences of Polk's domination was that his administration produced what could truly

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115. BINKLEY, *supra* note 70, at 106.

116. BERGERON, *supra* note 111, at xiii.

117. *Id.* at 183.

118. TUGWELL, *supra* note 7, at 134-35.



be called an executive budget, the first such in the nation's experience.<sup>119</sup>

Bergeron adds that “[c]ombing through [Polk’s] diary, one is able to account for at least 364 cabinet meetings during [his] four years” in office,<sup>120</sup> an incredible average of one cabinet meeting every four days. The diary goes on to indicate that the President met with cabinet visitors during parts of 1079 days in a period of three and a half years.<sup>121</sup> “Having an apparently prodigious mind for minute details and an accurate memory, the president astounded his cabinet members and others with his knowledge of the bureaucracy of the federal government.”<sup>122</sup> In September 1848, while four of his six cabinet members were absent from Washington on trips, Polk handled the details of governance in the absence of his departmental secretaries. Polk bragged after a month of this work:

Indeed, I have become so familiar with the duties and workings of the Government, not only upon general principles, but in most of its minute details, that I find but little difficulty in doing this. I have made myself acquainted with the duties of the subordinate officers, and have probably given more attention to details than any of my predecessors.<sup>123</sup>

Polk’s boast indicates that he was the ultimate hands-on president of his day, a figure comparable to Jimmy Carter or Bill Clinton in his willingness to become immersed in the details of governance and public policy. Another example of this tendency was Polk’s aggressive management of individual Cabinet members, including a requirement that all secretaries read status reports to him regularly and verbatim.<sup>124</sup> Leonard White quotes Polk: “If [the President] entrusts the details and smaller matters to subordinates constant errors will occur. I prefer to supervise the whole operations of the Government myself rather than entrust the public business to subordinates, and this makes my duties very great.”<sup>125</sup> Polk was also the first president to manage the flow of information between his

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119. BERGERON, *supra* note 111, at xii.

120. *Id.* at 36.

121. *Id.* at 39.

122. *Id.* at 45.

123. *Id.* at 46; *see also* WHITE, *supra* note 6, at 69; TUGWELL, *supra* note 7, at 133-34 (recounting Polk’s personal management of several cabinet departments when his secretaries left Washington).

124. WHITE, *supra* note 6, at 76; TUGWELL, *supra* note 7, at 135.

125. WHITE, *supra* note 6, at 69 (quoting 4 JAMES K. POLK, THE DIARY OF JAMES K. POLK DURING HIS PRESIDENCY, 1845-1849, at 261 (Milton Milo Quaife ed., 1910)).

subordinates and Congress, explicitly prohibiting cabinet members from communicating with members of Congress without his permission.<sup>126</sup>

Perhaps the most striking illustration of Polk's belief in a strong executive branch was seen in Polk's groundbreaking use of the commander-in-chief powers of the presidency during the Mexican War. During this conflict, Polk used his military powers under the Constitution vigorously. Deferring to the practical advice of his Secretary of War, Polk refrained from aggressively removing military officers whose political motivations he questioned, but nevertheless subjected their actions to a high degree of direct supervision.<sup>127</sup> Polk also used the appointment power to create new positions within the military, in part to counter the influence of Zachary Taylor and Winfield Scott, whom he correctly suspected of having Whig political sympathies. Just as he managed all other aspects of war policy, Polk managed most of these appointments personally and without congressional or military input.<sup>128</sup> As Polk's Secretary of the Navy George Bancroft was later to observe, Polk "insisted on being [his administration's] center and in overruling and guiding all his secretaries to act as to produce unity and harmony."<sup>129</sup> Unsurprisingly, Polk's assertive and occasionally partisan management of the Mexican War drew heavy criticism from his opponents in the Whig Party, who often referred to the conflict as "Polk's War."<sup>130</sup> Regardless of the merits of such criticism of Polk, it seems unquestionable that his management of state affairs during this conflict was one of the strongest examples of the use of presidential power to direct specifically the conduct of subordinate officers since the Jackson administration.

Polk was even less restrained in his use of the removal power with respect to civilian positions. Polk made wide use of his removal power specifically to sweep out Whig loyalists appointed by Harrison and Tyler.<sup>131</sup> In the Postal Service alone, Polk used induced resignations to replace as many as 13,000 federal employees.<sup>132</sup> Paul Bergeron observes:

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126. TUGWELL, *supra* note 7, at 135.

127. See WHITE, *supra* note 6, at 60-61.

128. See generally *id.* at 55-57.

129. BINKLEY, *supra* note 70, at 105.

130. 2 GOLDSMITH, *supra* note 20, at 834.

131. VAN RIPER, *supra* note 66, at 41; WHITE, *supra* note 6, at 311-12.

132. WHITE, *supra* note 6, at 312.

Polk launched his removal policy in a fashion befitting the days of Andrew Jackson's presidency. He apparently decided to make extensive removals, but in the words of one observer, he "would not tomahawk beyond what might be considered Christian ferocity." The first removal notices hit the desks of Washington clerks on 29 March; the new broom intended to sweep clean. The president ordered all department heads to submit to him detailed lists of all employees, with information about their political loyalties, the circumstances of their original appointment, and recommendations to retain or dismiss said employees. With that available data, the president would be able to proceed with a systematic realignment of personnel in the Washington offices. Federal employees who were located elsewhere would happily have a bit more time before the new administration would reach them. All in all, it was a truly serious business that the Polk crowd set about doing. Once the president had launched removal procedures during the very first month, office seekers began to descend upon Washington like the plague of locusts in Biblical Egypt.<sup>133</sup>

Bergeron adds with reference to Polk's removals in the post office that "by the end of the administration, there had been an astounding 13,500 appointments as postmasters," and he notes that "[o]ne marvels that the mail was ever delivered in those days of disruption and turmoil in the post offices."<sup>134</sup> Most of these removals were without significant debate or protest because, by the ascension of Polk to the presidency, "the country was by this time so used to the practice [of partisan removal] that little complaint [was] heard."<sup>135</sup>

Polk consulted with individual members of Congress in making local executive appointments, but always made clear that such consultations were purely advisory and that Congress should not abuse his courtesy. Polk observed that "I have treated [members of Congress] with great civility and have yielded to their wishes about appointments in their respective States until they seem to come to the conclusion that I must administer the Government precisely as they may direct. In this they will find themselves mistaken."<sup>136</sup>

The Polk administration's support for the unitary executive theory can also be seen in the opinions of his attorneys general espousing the view that the Constitution granted the power of removal to the president. In the eyes of Attorney General John Young Mason, the

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133. BERGERON, *supra* note 111, at 139.

134. *Id.*

135. FISH, *supra* note 8, at 160.

136. WHITE, *supra* note 6, at 122 n.47.

removal power stemmed from “the constitutional duty of the President to take care that the laws be faithfully executed.”<sup>137</sup> Mason’s successor, Nathan Clifford, similarly maintained that the president possessed the power to remove civil officers “at pleasure in all cases under the constitution where the term of office is not specially declared.”<sup>138</sup> Although Clifford recognized that Hamilton in *The Federalist No. 77* had suggested otherwise, the issue “was distinctly settled by the Congress of 1789 in favor of the power of the President” after “one of the ablest discussions in the history of the country” upon the ground that the power to remove “was clearly in its nature a part of the executive power, and was indispensable for a due execution of the laws and a regular administration of the public affairs.”<sup>139</sup> Clifford further noted that the decision received the sanction of every department of the government, as well as Justice Story, Chancellor Kent, and the Supreme Court.<sup>140</sup>

Polk’s attorneys general, however, stopped short of arguing that the president possessed the plenary power to direct his subordinates. Relying on the previous opinions offered by Attorneys General William Wirt and Roger Taney,<sup>141</sup> Mason concluded that the president “has the power of removal, but not the power of correcting, by his own official act, the errors of judgment of incompetent or unfaithful subordinates.”<sup>142</sup> Thus, despite the Polk administration’s firm support for the president’s power to remove, its position on the president’s power to direct represented another swing in the pendulum that began during the Monroe and Jackson administrations. This minor deviation hardly represents the degree of acquiescence required to establish a particular constitutional construction under the methodology of

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137. 4 Op. Att’y Gen. 515, 516 (1846).

138. 4 Op. Att’y Gen. 603, 609 (1847).

139. *Id.* at 609.

140. *Id.* (citing in part *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839)). Clifford noted that even though “several commentators on the constitution” did “not entirely admit the correctness of the construction adopted,” those commentators felt “nevertheless constrained to regard the question as closed.” *Id.*

141. See Calabresi & Yoo, *supra* note 1, at 1519, 1536 n.298. We have previously shown that these opinions do not stand for the broad proposition for which Mason cites them. See *id.* at 1520-21, 1536, 1561.

142. 4 Op. Att’y Gen. 515, 516 (1846). The opinion rejected such power of direction out of hand, reasoning that the president could not feasibly “undertake to review the decisions of subordinates *on the weight or effect of evidence in cases* appropriately belonging to them.” *Id.* at 516 (emphasis added). Thus, it is arguable that Mason would have condoned presidential intercession to correct subordinates’ erroneous determinations of general federal policy. Even so read, Mason’s opinion would represent a substantial deviation from the unitary executive model.

departmental or coordinate construction. It does not alter the overriding fact that Polk was a committed Jacksonian and an ardent believer in the theory of the unitary executive. He was also by any measure a strong and effective president.

*E. Zachary Taylor*

Zachary Taylor was a genuine war hero in the mold of Presidents George Washington, Andrew Jackson, and William Henry Harrison. He was narrowly elected in 1848, largely because of public admiration for his role in helping to win the Mexican War, where he earned the nickname “Old Rough and Ready.” Taylor was selected as the Whig candidate for president because, like the previous Whig victor, William Henry Harrison, Taylor was a former general. Unfortunately for the Whigs, who elected only these two presidents, Taylor, like Harrison, was to die in office. Taylor’s term in office lasted only sixteen months, from March 4, 1849, to July 9, 1850, and his reputation has suffered from his brief service as well as the repeated derision of his presidency by elite nineteenth-century historians who treated him with disdain as a general-turned-president.<sup>143</sup>

Taylor had some genuinely Whiggish ideas about the presidency and presidential power. A supportive newspaper once went so far as to say:

Taylor . . . had taken office against “the Executive influence, Executive patronage, Executive dictation, and the Executive veto.” Under Jackson these elements had “resolved the Government into the one-man power and almost annihilated the Legislature.” Congress under the Democrats had “ceased to be what it was intended to be under the Constitution, the independent and only legitimate organ for the expression of the public will.” To correct this great evil had been a major reason for electing General Taylor.<sup>144</sup>

Taylor was most obviously a Whig in his aversion to use of the presidential veto, which he had often denounced “as a tool of presidential tyranny.”<sup>145</sup> Notwithstanding his opposition to use of the veto, Taylor was happy to threaten a veto of the Compromise of

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143. ELBERT B. SMITH, *THE PRESIDENCIES OF ZACHARY TAYLOR AND MILLARD FILLMORE* 257 (1988).

144. *Id.* at 144.

145. *Id.* at 146.

1850,<sup>146</sup> and Taylor believed in the use of the veto against constitutionally suspect legislation.

While Taylor may have had Whiggish ideas about the use of the veto, he was far from being passive and meek during his sixteen months as president, owing no doubt in part to his experience as a military commander.<sup>147</sup> British chargé d'affaires John F. Crampton emphasized Taylor's strong will and remarked upon the "fearless and determined manner" with which Taylor pursued a course of conduct.<sup>148</sup> Taylor had a "well-known reputation for bold and decisive action,"<sup>149</sup> and his biographer Elbert Smith reports:

During most of his presidency, Taylor bore insults and condemnations with equanimity and angry defiance. He had often been a center of controversy during his long military career, and he took the presence of enemies for granted. Indeed, like Andrew Jackson, he seemed almost to enjoy quarrels over principle. He had never been reluctant to make up his own mind and to stand firm against overwhelming pressures, and this trait did not desert him in the White House.<sup>150</sup>

Smith further reports that Taylor dominated his cabinet and set all the major policies of his administration, which opposed the spread of slavery to California and New Mexico and which opposed Texas's territorial designs on much of present day New Mexico. Cabinet meetings were held but no votes were taken, and Taylor made all the important policy decisions himself. Some Taylor critics accused the President of being under the influence of William H. Seward, the free soil Whig Senator from New York, or of his cabinet, but Taylor's biographer reports:

Long before he had been elected president, Taylor had stated the basic convictions from which he did not deviate during his brief term in office. If he and most of his cabinet were a harmonious group on important policies, it was because they agreed on what should be done and not because strong advisors had captured the mind of a weak and ignorant president. Indeed, on the subject of Texas and New Mexico, Taylor's belligerence went far beyond that of his advisers. No one had to let Taylor be Taylor; no one could have kept Taylor from being Taylor. He was neither weak

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146. See BINKLEY, *supra* note 70, at 128.

147. "As a military commander, Taylor was not accustomed to take votes on important decisions, although he was always open to advice." SMITH, *supra* note 143, at 55-56.

148. *Id.* at 75.

149. *Id.* at 128.

150. *Id.* at 66.

nor modest, and *no* had always been one of his favorite words.<sup>151</sup>

Taylor actually went so far as to threaten to protect New Mexico from any invasion by Texas over the disputed boundary,<sup>152</sup> and he volunteered to lead the U.S. Army himself in defending New Mexico's territorial integrity. Taylor "minced no words. When he announced that he would defend New Mexico, in person if necessary, no one doubted it."<sup>153</sup>

Taylor and Secretary of State John M. Clayton enjoyed a relatively successful foreign policy, much to Taylor's credit:

The question naturally arises of whether the bulk of the credit should go to Taylor or to Clayton. The answer must be that Taylor selected Clayton in the first place, approved and took full responsibility for every policy, clearly played an important role in the formulation of some of the policies, and actually took a stronger stand than Clayton did when dealing with the British and Nicaragua. Because Taylor bore the brunt of the incessant attacks by opposing politicians and newspapers on each of his policies, it is only fair that he should receive much credit for his firmness, good sense, decisiveness, clarity of expression, and patriotism. In each case, it is difficult to imagine an alternative policy that would have served American interests better.<sup>154</sup>

With regard to use of the removal power, Taylor pledged circumspection and stated in his inaugural address: "So far as it is possible to be informed, I shall make honesty, capacity, and fidelity indispensable prerequisites to the bestowal of office, and absence of either of these qualities shall be deemed sufficient cause for removal."<sup>155</sup> It should be noted that in pledging to use the removal power sparingly, Taylor was acknowledging that the president had the power to remove. In any event, Taylor removed subordinates from office with great vigor. The Democrats' legacy left almost no Whigs in federal positions by 1849, and the Whigs were keenly aware of the missed opportunities.<sup>156</sup> Smith reports, "Of 17,180 governmental employees in 1849, 3,400 were removed and 2,800 resigned. The Whigs, who had previously held virtually none of the 929 presidential appointments, received 540 of these prizes, while Democratic leaders

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151. *Id.* at 62-63.

152. DAVID M. POTTER, *THE IMPENDING CRISIS: 1848-1861*, at 106 (1976).

153. SMITH, *supra* note 143, at 191.

154. *Id.* at 89.

155. Zachary Taylor, Inaugural Address (Mar. 5, 1849), in 4 *MESSAGES & PAPERS*, *supra* note 57, at 2542, 2544.

156. SMITH, *supra* note 143, at 58-59.

and press screamed to high heaven about the injustice of it all.”<sup>157</sup> In other words, upon returning to office, the Whigs embraced the Jacksonian spoils system and removed subordinate executive branch officials freely and at will, just as they had done in 1841.<sup>158</sup>

Again, senators in the opposing party could not resist the temptation to needle the Whigs for their wide-scale removals.<sup>159</sup> Congressional actions on these proposals generally failed to shed much light on the constitutional issues, since these resolutions were offered primarily to score political points and not to challenge the president’s power to remove. Senator Bradbury candidly acknowledged that his resolution was intended to point out “the inconsistency between the professions and practice of the party in power” and not to call into question “the policy of making removals.”<sup>160</sup>

There is also strong anecdotal support in the historical record that Taylor, despite his public claims to the contrary, acknowledged the necessity for partisan use of the removal and appointment powers. Leonard White offers support for this contention in a story in which Taylor personally approached the Secretary of the Treasury—of all departments!—to ensure that Whigs were receiving “their share of the offices” in the department, noting that “[r]otation in office, provided good men are appointed, is sound republican doctrine.”<sup>161</sup> Thus, despite his urging of circumspection in the making of removals, Taylor in practice used the removal power vigorously and for partisan purposes, even in the supposedly “independent” Treasury Department.<sup>162</sup> There was no deviation from the theory of the unitary

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157. *Id.* at 66; see also VAN RIPER, *supra* note 66, at 41 (noting that Taylor removed thirty percent of all civil officers during his first year alone); 2 GOLDSMITH, *supra* note 20, at 981-82.

158. See FISH, *supra* note 8, at 163-65.

159. On December 24, 1849, Senator Bradbury offered a resolution requesting that the President provide the charges underlying his administration’s removals. CONG. GLOBE, 31st Cong., 1st Sess. 74-75 (1849). Bradbury subsequently amended the resolution to require only a list of persons removed, dropping the request for the reasons for the removals. CONG. GLOBE, 31st Cong., 2d. Sess. 37 (1850). In 1850, Senator Dickinson introduced a similar resolution calling upon the postmaster general to report the removals or attempted removals of assistant postmasters. CONG. GLOBE, 31st Cong., 1st Sess. 111 (1850). Lastly, in 1850, Senator Whitcomb submitted resolutions calling upon the President to transmit copies of the charges made in support of the removal of two civil officials. CONG. GLOBE, 31st Cong., 1st Sess. 601 (1850) (regarding the removal of J.D.G. Nelson and John Webster).

160. CONG. GLOBE, 31st Cong., 1st Sess. app. at 51 (1850).

161. WHITE, *supra* note 6, at 312 (quoting THURLOW WEED BARNES, MEMOIRS OF THURLOW WEED 177-176 (1884)).

162. See Lessig & Sunstein, *supra* note 3, at 30.



executive during Taylor's brief sixteen months in the White House.

Indeed, there is one area in which the Taylor administration surpassed its immediate predecessor in its defense of the unitary executive. On the issue of presidential direction of subordinates, Taylor's talented attorney general, Reverdy Johnson of Maryland, contradicted the conclusion of Polk's administration<sup>163</sup> and took the position that the department heads had the power to direct accounting officers in their settlement of accounts. Johnson acknowledged that such had "been the practice of the government from its origin, and [was] well authorized by the laws organizing the departments, as it is absolutely necessary to the proper operation of the government."<sup>164</sup>

Taylor's contribution to the theory of the unitary executive is unequivocal. He was a strong president who controlled his administration down to the smallest details, and he was not afraid to take on Henry Clay and other leading members of Congress, despite his party's doctrine of presidential submission to Congress. Taylor's strength as president is illustrated by the fact that two days before he died, an opposition newspaper "demanded his impeachment 'for usurping kingly powers and for trampling on the rights of a sovereign state.'"<sup>165</sup> As Taylor's vigorous and partisan use of the removal power attests, the unitary executive survived his administration quite intact.

#### F. Millard Fillmore

Millard Fillmore was the last in a long series of presidents genuinely committed to a policy of compromise between the interests of the North and the South, which began under the Monroe administration with the Missouri Compromise of 1820 and continued through the Compromise of 1850. As a congressman in 1841, Fillmore had been committed to the separation of the purse and the sword, but as president he forgot the issue.<sup>166</sup> Fillmore succeeded Zachary Taylor as president on July 10, 1850, and like John Tyler, he immediately assumed the title of president (rather than acting president) and proceeded to exercise the full powers of the presidential office. His first acts in office were to fire and replace all of Taylor's cabinet,<sup>167</sup> which had been tarred by a minor scandal, and

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163. See *supra* notes 141-142 and accompanying text.

164. 5 Op. Att'y Gen. 87 (1849).

165. SMITH, *supra* note 143, at 157 (quoting DAILY UNION, July 7, 1850).

166. See WHITE, *supra* note 6, at 44 n.62.

167. POTTER, *supra* note 152, at 110.

to throw his enthusiastic support behind the Compromise of 1850, which was then pending in Congress. This marks the only time a succeeding vice president has ever fired his predecessor's entire cabinet.<sup>168</sup> Both actions are important to us. The firing and replacing of Taylor's whole cabinet indicates Fillmore's desire to control his own administration and his belief in the removal power. Fillmore's active legislative support for the Compromise of 1850 indicates his desire, as a Northerner with Southern sympathies, to mediate the sectional conflict and put it behind him.

Today, Fillmore is remembered as one of America's most forgettable presidents,<sup>169</sup> but he was by no means a cipher while in office. Fillmore's biographer Elbert Smith reports:

Millard Fillmore was neither quarrelsome nor vindictive by nature, but his bland exterior and impeccable manners concealed a fighting spirit in its own way just as tough as that of Zachary Taylor. Fillmore had not risen from dire poverty to the nation's second highest office without a driving ambition, enormous energy, and a shrewd eye for his own best interests.<sup>170</sup>

Fillmore selected very high quality men for his cabinet, which was perhaps most distinguished by the presence of Daniel Webster as secretary of state. Fillmore was not afraid of being overshadowed by the great Webster, and he worked effectively with Webster during their time together in office. At one point, when Webster was near death, Fillmore handled a crisis involving Cuba entirely on his own.<sup>171</sup> Elbert Smith reports that Fillmore's leadership was admirable:

Like Taylor, Millard Fillmore deserves high praise for his leadership as a maker of foreign policy. His decisions and actions were clear and unequivocal and were marked by imagination, moderation, and firmness. He followed his own judgments with but little regard for public or political pressures, although he did allow [Edward] Everett [Webster's successor as secretary of state] to soften his Cuban policy with some harmless rhetoric. Webster, before he was overtaken by illness, and Everett, after Webster's death, were able secretaries of state, but the president was the final arbiter and accepted full responsibility. In appointing Webster, Fillmore, unlike some presidents, did not hesitate to give the top cabinet post to a man whose national reputation far exceeded his own. Everett, a brilliant scholar, was an equally wise choice.

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168. *Id.*

169. See SMITH, *supra* note 143, at 257.

170. *Id.* at 162.

171. *Id.* at 230.

Fillmore worked closely with both of them, participated fully in the making of virtually every decision, and did not hesitate to countermand Webster over the incident with Peru.<sup>172</sup>

Fillmore was thus personally involved in the details of his administration's foreign policy, and he deserves credit for its successes, which included the launching of Commodore Mathew Perry's expedition to open up Japan. In sum, Fillmore was an involved and conscientious executor of the presidential office.

Fillmore repeated Taylor's pledge to defend the federal territory of New Mexico from Texas by military force if necessary.<sup>173</sup> The determination of these two Whig presidents to prevent Texas from seizing big chunks of New Mexico was absolutely critical to preventing a civil war from breaking out and was essential to laying the groundwork for the final Compromise. "Any show of weakness or indecision by the president that could [have] lead the Texans to believe they would be fighting only against New Mexicans might well have invited the fatal attack."<sup>174</sup>

Fillmore's defense of New Mexico's territorial integrity was an appeal to the North, for New Mexico seemed destined to be a free state while Texas, which had designs on New Mexican land, was of course a slave state. But the Compromise of 1850, which Fillmore shepherded through Congress, had in it one big sop to the South, and that was the passage of the Fugitive Slave Act.<sup>175</sup> In the wake of the Supreme Court's decision in *Prigg v. Pennsylvania*,<sup>176</sup> the onus for recovering fugitive slaves fell on the federal government, and Southerners demanded the Fugitive Slave Act as their price for admitting new free states like California and giving up the parity they had enjoyed between free and slave states in the Senate. The Fugitive Slave Act thus represented a key part of the Compromise of 1850. It passed with the support of northern Whigs like Daniel Webster, but was hated by most Northerners. A key question of presidential power loomed: To what extent would Fillmore "faithfully execute" the Fugitive Slave Act in the North, where the law was bitterly opposed by much of the population?

Fillmore was relentless in vigorously executing the Fugitive Slave Act. In one instance in Pennsylvania he "instructed the Marine

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172. *Id.* at 233.

173. *Id.* at 192.

174. *Id.*

175. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

176. 41 U.S. (16 Pet.) 536 (1842).

commander at Philadelphia to assist the marshal or deputy if he was supported by a federal judge.”<sup>177</sup> In another prominent instance in Boston, “Fillmore, with no other legal alternative, announced that he would use troops, if necessary, to enforce the law.”<sup>178</sup> Fillmore told an ally that he would “enforce the laws of the land at all hazards, and put down, with the whole power of the government, if need be, any illicit or violent attempt to counteract or overturn them.”<sup>179</sup> Elbert Smith reports, “In each of the prominent fugitive-slave cases in which he could not escape responsibility, Fillmore [spoke] and acted decisively in support of the law.”<sup>180</sup> The Fugitive Slave Act *was* a hateful law, but Fillmore fully, vigorously, and faithfully executed it as the president was bound by oath to do.<sup>181</sup> Fillmore’s personal willingness to execute the Fugitive Slave Act in the face of enormous opposition in the North reveals him to be a proponent of the unitary executive theory, under which the president himself is responsible for the vigorous execution of the nation’s laws.

It bears noting that Fillmore was no more willing to tolerate law-breaking activities when the South tried them either. In November 1850, Fillmore received reports that Southern radicals were “planning to seize the federal forts at Charleston [South Carolina] as the first step toward secession. The United States attorney and other federal officers in South Carolina resigned, and Fillmore had great difficulty replacing them.”<sup>182</sup> Fillmore reacted to this crisis with firm resolution, including General Winfield Scott, a Mexican War hero, in cabinet meetings to develop a response to a potential insurrection:

On Scott’s advice, Fillmore strengthened the Charleston forts and stationed additional troops in both South and North Carolina. When the governor of South Carolina demanded an explanation, Fillmore replied that it was his duty as commander in chief of the armed forces to station troops wherever he thought it would serve the public interest and that he owed no explanation to the governor of South Carolina.<sup>183</sup>

With respect to removal policy, Fillmore began his term in office

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177. SMITH, *supra* note 143, at 211.

178. *Id.* at 212.

179. *Id.* at 213 (quoting HENRY S. FOOTE, *CASKET OF REMINISCENCES* 162-65 (Chronicle Publ’g 1880)).

180. *Id.* at 216.

181. *Id.* at 239, 241 (“Fillmore could point to a consistent record of supporting the compromise and trying to enforce the Fugitive Slave Act.”).

182. *Id.* at 217.

183. *Id.*

by firing all of Taylor's cabinet, as noted above, even though both he and President Taylor were loyal members of the Whig Party.<sup>184</sup> Fillmore publicly echoed Taylor's policy of being willing to remove anyone who misbehaved in office. In his first annual message to Congress, issued in December 1850, Fillmore observed:

In so extensive a country . . . where few persons appointed to office can be known to the appointing power, mistakes will sometimes unavoidably happen and unfortunate appointments be made notwithstanding the greatest care. In such cases the power of removal may be properly exercised; and neglect of duty or malfeasance in office will be no more tolerated in individuals appointed by myself than in those appointed by others.<sup>185</sup>

It should be noted that in pledging to use the removal power sparingly, Fillmore, like Taylor before him, was implicitly acknowledging that the president possessed the constitutional power to remove. Fillmore's very able attorney general, John J. Crittenden, made this point explicit in opinions that adopted the position advanced by every preceding administrations up to that time and confirmed the constitutional foundation of the president's removal power.<sup>186</sup> Fillmore's partisan use of the removal power was striking in one sense because he employed it against members of rival factions within his own party as well as against Democrats. Early in his term, Fillmore directed one of his cabinet members to "turn out [disloyal Whigs] and put good competent Whigs in their places wherever it could be done without prejudice to the public service . . ." <sup>187</sup> Elbert Smith also reports that Fillmore ordered "a general housecleaning of [Thurlow] Weed's [Whig] friends holding federal offices."<sup>188</sup>

The Fillmore administration, following Taylor, adopted a rather curious position regarding the power of direction. Attorney General Crittenden maintained that the president lacked the authority to direct accounting officers in their settlement of accounts,<sup>189</sup> while at the

184. See *supra* note 168 and accompanying text.

185. Millard Fillmore, First Annual Message (Dec. 2, 1850), in 4 MESSAGES & PAPERS, *supra* note 57, at 2612, 2616.

186. See 5 Op. Att'y Gen. 287, 288 (1851) (opining that subordinate executive officials remain "subject . . . to removal from office for every neglect or abuse of their public trust"); 5 Op. Att'y Gen. 275, 278 (1850) (opining that the president may superintend the conduct of subordinate officers by removing them).

187. WHITE, *supra* note 6, at 313 (quoting 1 MILLARD FILLMORE, PAPERS 341 (Frank H. Severance ed., 1907)).

188. SMITH, *supra* note 143, at 207.

189. See 5 Op. Att'y Gen. 635, 635-36 (1852). Crittenden's previous opinions on this subject were arguably based on prudential grounds. 5 Op. Att'y Gen. 287, 288 (1851)

same time maintaining that the department heads possessed such authority.<sup>190</sup> Close analysis of Crittenden's position reveals it to be somewhat problematic. First, it ignored the fact that many of the authorities he cited for the principle that the heads of departments could direct subordinate executive officials also recognized that the president could direct those subordinate officials as well.<sup>191</sup> Second, although Crittenden's opinion noted the absurdity of "a theory which would make the heads of the departments and the President of the United States, who are responsible for the due and efficient administration of the executive government, . . . dependent for supplies of money . . . on the subordinate members of the Treasury Department,"<sup>192</sup> Crittenden inexplicably failed to carry this reasoning through to its logical conclusion by limiting its implications to the heads of departments. Finally, Crittenden himself appeared to recognize that the president might be reluctant to accept his views as the administration's policy when he conceded that "[i]f the President, however, should take a different view of his duty, I am prepared, most respectfully and cheerfully, to give him my opinion of the merits of each of these cases."<sup>193</sup> In any event, even if these isolated, subpresidential disavowals of the president's power to direct subordinate federal officials are read for all that they are worth, they are not a significant enough departure from the unbroken line of presidential statements in favor of the unitary executive to constitute presidential acquiescence.

Fillmore left office in 1853 with the nation prosperous and at peace and the sectional conflict largely under control, at least for the time being. Fillmore was a faithful executor of the laws of the United States—for good and for ill—and he, like his fellow Whig Zachary Taylor, was an enthusiastic exerciser of the removal power. The unitary executive was alive and well when Fillmore left office in March 1853 and the anti-presidential power Whigs lost power for the

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(opining that it would be "judicious" for the President not to interfere with the functions of subordinate public officers); 5 Op. Att'y Gen. at 277 (opining that presidential interference with the particular duties of subordinate officers would be "exceedingly injudicious" and would embroil the president in "an endless and invidious task").

190. 5 Op. Att'y Gen. at 636 (opining that although the President lacks the authority to intervene in the settlement of accounts, "the rightful authority of the head of the department to interfere 'a priori or a posteriori,' is well established as binding on the Auditor and Comptroller"); *see also* 5 Op. Att'y Gen. 386, 387 (1851) (opining that the Secretary of War's decision to promote to command officers to brevet ranks was binding on the accounting officers of the treasury).

191. *See* 2 Op. Att'y Gen. 463, 464-65 (1831); 2 Op. Att'y Gen. 302, 303 (1829).

192. 5 Op. Att'y Gen. at 641.

193. 5 Op. Att'y Gen. at 278.

last time.

### G. Franklin Pierce

Franklin Pierce and his successor, James Buchanan, were two of the worst presidents in American history. Pierce was a weak man who wanted to please everybody, as well as an alcoholic. He was totally dominated by his Southern cabinet members, especially his vocal and very visible secretary of war, Jefferson Davis, future president of the Confederacy.<sup>194</sup> “The result was government by cabinet,” a disastrous result except with respect to foreign policy, where the able secretary of state, William Marcy, was able to rescue a few limited successes.<sup>195</sup>

Notwithstanding his weaknesses both as a man and as president, Pierce was a committed Jacksonian who, as a matter of political philosophy, subscribed to the broad views of executive power espoused by the Democratic Party for the previous twenty years. He believed in the presidential removal power, opposed a national bank and internal improvements, and maintained all the other elements of the Jacksonian creed with great fervor. The Democrats, for their part, began trying to associate Pierce with Andrew Jackson as early as the election campaign of 1852.<sup>196</sup> This period of adulation was short lived. “Though his supporters labeled him ‘Young Hickory of the Granite Hills,’ after the election no one ever compared Pierce to Andrew Jackson” again.<sup>197</sup>

Pierce’s biographer, Larry Gara, reports that “Pierce’s poor record with a Congress that was dominated by his own party underlined his weakness and ineptitude.”<sup>198</sup> In addition, “Pierce was perceived as an inept administrator incapable of carrying out his own policies.”<sup>199</sup> His appointments rapidly became “a part of the problem in Kansas” as controversy over that state, fanned by Pierce’s own actions, began to tear the Union apart.<sup>200</sup> “In the 1850s, Democrats were still living in Jackson’s shadow, though none of them could hope to equal him in dynamism and popularity.”<sup>201</sup> The problem, as Gara notes, was that “Jacksonian democracy had run its course. The fundamental changes

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194. See LARRY GARA, *THE PRESIDENCY OF FRANKLIN PIERCE* 53-54 (1991).

195. *Id.* at 183.

196. *Id.* at 38.

197. *Id.* at 75.

198. *Id.* at 100.

199. *Id.* at 51-52.

200. *Id.* at 113.

201. *Id.* at 157.

at work in all aspects of American life required a degree of political adjustment that the president from New Hampshire could neither understand nor implement.”<sup>202</sup>

As best he could, Pierce tried to govern as president following the Jacksonian creed. He vetoed some bills providing for internal improvements and spending on the grounds they were beyond the Constitution’s enumerated powers.<sup>203</sup> In a series of opinions issued by his capable but pro-Southern attorney general, Caleb Cushing, he backed strict enforcement of the Fugitive Slave Act, which had come to be hated in the North.<sup>204</sup> Pierce was thus, like Fillmore, a vigorous and faithful executor of that iniquitous law. Pierce and his attorney general also pressed a vigorous defense of executive privilege. Cushing declared that “Congress had no right to make changes in rank mandatory on the president, nor did it have a right to prescribe qualifications for diplomats. With Cushing’s opinion to back him up, Pierce refused to implement some of the objectionable provisions [of a bill that Congress passed].”<sup>205</sup> The best that can be said for Pierce is that he was personally involved in the matters his departments handled, and, while his cabinet was far from harmonious, none of its members resigned during Pierce’s term.<sup>206</sup>

Backed by three opinions authored by Attorney General Cushing supporting the president’s power to remove,<sup>207</sup> Pierce did occasionally make use of the removal power, such as when he fired a governor of the Kansas territory<sup>208</sup> and when he ordered a purge of every federal official with Know-Nothing sympathies.<sup>209</sup> Although the presidency had switched parties once again with the election of Pierce as a Democrat, the change in partisan control did not elicit any change in

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202. *Id.* at 126.

203. See Franklin Pierce, Veto Message (Aug. 14, 1856), in 4 MESSAGES & PAPERS, *supra* note 57, at 2921; Franklin Pierce, Veto Message (Aug. 11, 1856), in 4 MESSAGES & PAPERS, *supra* note 57, at 2921; Franklin Pierce, Veto Message (May 19, 1856), in 4 MESSAGES & PAPERS, *supra* note 57, at 2919; Franklin Pierce, Veto Message (Dec. 30, 1854), in 4 MESSAGES & PAPERS, *supra* note 57, at 2790; Franklin Pierce, Veto Message (May 22, 1856), in 4 MESSAGES & PAPERS, *supra* note 57, at 2920; Franklin Pierce, Veto Message (Aug. 4, 1854), in 4 MESSAGES & PAPERS, *supra* note 57, at 2789; Franklin Pierce, Veto Message (May 3, 1854), in 4 MESSAGES & PAPERS, *supra* note 57, at 2780. See generally GARA, *supra* note 194, at 86-87.

204. GARA, *supra* note 194, at 70.

205. *Id.* at 57.

206. See *id.* at 71.

207. See 6 Op. Att’y Gen. 87 (1853); 7 Op. Att’y Gen. 242 (1855); 8 Op. Att’y Gen. 223 (1856).

208. See GARA, *supra* note 194, at 115.

209. *Id.* at 163.



presidential policy regarding the removal power. In fact, by the time Pierce took office, the power of removal had been so firmly entrenched that Pierce's clean sweep of the previous appointees no longer elicited any significant political interest.<sup>210</sup> Indeed, most debate in this extremely factional period of American history revolved around *how* those appointments would be distributed based on officeholder, region, party faction, and view on the subject of slavery.<sup>211</sup> Thus, to a significant extent, a practice had been established and reflected the general acceptance of the president's control of the executive branch through the removal power.

*United States ex rel. Goodrich v. Guthrie*,<sup>212</sup> a case that tangentially involved the President's removal power, reached the Supreme Court during the Pierce Administration. *Guthrie* involved the issue of whether a Minnesota territorial judge, who had been removed by the President, could sue for a writ of mandamus commanding the Secretary of the Treasury to pay his salary for the unexpired portion of his four year term of office. Attorney General Cushing, in his argument of the case before the Supreme Court, asserted that the President has had the removal power ever since the Decision of 1789<sup>213</sup> and that the power of removal was essential to fulfilling the president's constitutional duty to "take care that the laws be faithfully executed."<sup>214</sup> The Court elided over the removal question and held that no court had the power to order the disbursement of money from the Treasury and that mandamus could only issue as to a ministerial act, which was not the nature of the act here.<sup>215</sup> *Guthrie* thus implies tangential support for the theory of the unitary executive and for the notion that the President has a broad removal power.

The Pierce administration did not simply support the unitariness of the executive branch by asserting its removal power. It also strongly endorsed the president's power to direct subordinate executive officials. In a strident opinion, Cushing joined Attorneys General Berrien, Taney, Butler, Johnson, and Crittenden in rejecting Wirt's assertion that the president could direct the department heads, but not lower-level executive officials.<sup>216</sup> Such a doctrine was nonsensical

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210. See VAN RIPER, *supra* note 66, at 42.

211. See FISH, *supra* note 8, at 164-65; see also GARA, *supra* note 194, at 50.

212. 58 (17 Howard) U.S. 284 (1854).

213. *Id.* at 286-87.

214. *Id.* at 287.

215. See *id.* at 303-05.

216. See 6 Op. Att'y Gen. 326, 342-43 (1854) (citing 1 Op. Att'y Gen. 624 (1823)).

and contrary to “settled constitutional theory,” which requires that executive discretion be exercised in accordance with the “unity of executive action, and, of course, unity of executive decision; which by the inexorable necessity of the nature of things, cannot be obtained by means of a plurality of persons, unduly independent of one another, without corporate conjunction, and released from subjection to one determining will.”<sup>217</sup> Although the president was not under any *obligation* to intervene in every possible decision, there was no question that he had the *authority* to do so.<sup>218</sup>

Cushing embraced the president’s power to direct even more forcefully in a subsequent opinion. Cushing noted that in setting up the various executive departments, Congress recognized that “in the President is the executive power vested by the Constitution, and also because the Constitution commands that HE shall take care that the laws be faithfully executed: thus making him not only the depository of the executive power, but the responsible executive minister of the United States.”<sup>219</sup> Although the attorneys general had fluctuated on the question,<sup>220</sup> Cushing concluded that “no Head of Department can lawfully perform an *official* act against the will of the President; and that will is by the Constitution to govern the performance of all such acts.”<sup>221</sup> As Cushing reasoned, “If it were not thus, Congress might by statute so divide and transfer the executive power as utterly to subvert the Government, and to change it into a parliamentary despotism, like that of Venice or Great Britain, with a nominal executive Chief utterly powerless.”<sup>222</sup> Armed with these opinions, Pierce took control of his

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(Wirt); 2 Op. Att’y Gen. 302 (1829) (Berrien); 2 Op. Att’y Gen. 507 (1831) (Taney); 2 Op. Att’y Gen. 652 (1834) (Butler); 5 Op. Att’y Gen. 87 (1849) (Johnson); 5 Op. Att’y Gen. 630 (1852) (Crittenden)). For a more complete discussion of these earlier opinions, see Calabresi & Yoo, *supra* note 1, at 1536; *supra* notes 23, 164, 186, 189-93 and accompanying text.

217. 6 Op. Att’y Gen. at 342-43. If Wirt’s view were correct, “it would have been the singular condition of a great government, in which the executive power was vested by Constitution in the President, and he had authority over the primary executive officers, but neither he nor they had any authority over the secondary executive officers.” *Id.* at 342.

218. *See id.* at 342.

219. 7 Op. Att’y Gen. 453, 460 (1855); *see also id.* at 460 (“[T]he great constitutional fact remains, that the ‘executive power’ is vested in the President, subject only, in the respect of appointments and treaties, to the advice and consent of the Senate.”).

220. *See id.* at 464 (citing 1 Op. Att’y Gen. 636 (1824) (Wirt); 2 Op. Att’y Gen. 302 (1829) (Berrien); 2 Op. Att’y Gen. 507 (1832) (Taney); 5 Op. Att’y Gen. 630 (1852) (Crittenden); 6 Op. Att’y Gen. 326 (1854) (Cushing)).

221. *Id.* at 469-70.

222. *Id.* at 470. Certain language in these opinions arguably suggested that the attorney general operated independently of presidential control when rendering legal opinions. *See id.* at 464; 6 Op. Att’y Gen. at 333-34 (1854). However, as Nelson Lund has explained, in offering these statements Cushing simply meant to acknowledge that the attorney general

administration to the extent that someone of his limited ability could, issuing an executive order centralizing his control over the federal government's legal affairs.<sup>223</sup> The Pierce administration thus firmly advanced the president's power to direct as well as the president's power to remove.

Finally, the Pierce administration rebuffed one of the earliest attempts by Congress to impose what amounted to a legislative veto, when both the House and the Senate passed separate resolutions urging that the Secretary of the Interior reverse his denial of a claim. Again, the administration's primary instrument was an opinion by Attorney General Cushing. As Cushing noted, "[T]he Constitution provides for co-ordinate powers acting in different and respective spheres of co-operation. The executive power is vested in the President, whilst all legislative powers are vested in Congress."<sup>224</sup> Thus the Constitution gave Congress the authority to participate in the enactment of general laws. However, "the Constitution has not given to either branch of the legislature the power, by separate resolution of its own, . . . to apply [a general law] to a given case. And its resolutions have obligatory force only as far as regards itself or things dependent on its own constitutional power."<sup>225</sup> That the resolutions were directed at the Secretary of the Interior and not the President was immaterial. Cushing noted that a department head acts "in subordination always to his constitutional and legal relation to the President of the United States."<sup>226</sup> Put simply, "the authority of each Head of Department is a parcel of the executive power of the President. To coerce the Head of Department is to coerce the President."<sup>227</sup>

Thus, despite the fact that Pierce is almost invariably placed

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was entitled to his own opinions when offering legal advice; he did not mean to suggest that the president or any other part of the executive branch would be bound to follow his opinions. See Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 441-46 (1993).

223. See Susan Low Bloch, *The Early Role of the Attorney General In Our Constitutional Scheme: In the Beginning, There Was Pragmatism*, 1989 DUKE L.J. 561, 618 n.184 (citing HOMER C. CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* 145-47 (1937); Griffin Bell, *The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?*, 46 FORDHAM L. REV. 1049, 1052 (1978)); 2 HAYNES, *supra* note 75, at 1578-79.

224. 6 Op. Att'y Gen. 680, 682 (1854).

225. *Id.* at 684-85. "Indeed, it seems little better than a mere truism to say, that a separate resolution of either House of Congress is not a law." *Id.* at 684.

226. *Id.* at 682 (citing *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840)).

227. *Id.* The Attorney General went on to explain that "the act of a Head of Department is, in effect, an act of the President." *Id.*

towards the bottom of any attempt to rate the presidents,<sup>228</sup> the incompetence of his administration did not stop it from vigorously defending the president's sole authority to control the execution of the law. By supporting the president's power to remove and direct and by opposing Congress's attempt to interfere directly with the execution of the law, the Pierce administration supported every major facet of the unitary executive. Moreover, although some of the attorneys general during the Monroe, Jackson, Polk, and Taylor administrations had evinced some willingness to tolerate limitations on the president's authority to oversee the actions of all subordinate executive officers, Pierce's strong opposition to such limitations essentially vitiated previous executives' acquiescence for the purposes of coordinate construction.

#### *H. James Buchanan*

If Pierce was a bad president, then it must be said at the outset that James Buchanan was even worse. A former Federalist who had become a Jacksonian Democrat by 1828,<sup>229</sup> Buchanan was narrowly elected to the presidency in 1856 because the Whig Party had disappeared and the Republicans and Know-Nothings split the anti-Democratic vote.

Buchanan came to the presidency with a well-established reputation as a defender of the president's authority to execute the law, having defended the president's veto power on Jacksonian grounds, and having personally authored the Democratic response to Whig assertions of limited executive power as a Democrat in the Senate during the Tyler administration. Indeed, it was Buchanan's writings during the 1840s that effectively served as the last word on the question of presidential power to veto legislation at will.<sup>230</sup>

But the defining moment of the Buchanan administration from the standpoint of the unitary executive occurred during the months following Abraham Lincoln's election in November 1860 and Lincoln's inauguration in March 1861. During these lame-duck months, Buchanan did nothing while state after state seceded from the Union. Although his refusal to surrender Fort Sumter was not insignificant, it pales beside his larger failings faithfully to execute the Constitution and laws with respect to secession.

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228. GARA, *supra* note 194, at 180.

229. *Id.* at 11, 14.

230. See TUGWELL, *supra* note 7, at 117-118.

Buchanan's administration got off to a horrible start when the President-elect undertook to communicate with several Supreme Court Justices about the pending *Dred Scott* case.<sup>231</sup> This correspondence involved a severe dereliction of duty by both Buchanan and the justices involved, and Buchanan's involvement, in particular, constituted a failure of his responsibility to faithfully execute the Constitution—in violation of his oath of office.

During the Buchanan Administration, cabinet meetings were held regularly and were “supplemented by equally regular dinners and family-type gatherings,” and no “crises were met without long, special cabinet sessions in which the president and his advisers convened as allies against adversaries usually considered enemies as well as opponents on principle.”<sup>232</sup> It would be a mistake, however, to infer from Buchanan's willingness to consult his cabinet any lack of conviction in the president's authority over the administration of the law. The cabinet members “always insisted that despite the attention their views invariably received, the president himself was always in command. The administration was a directory because the president shared fully the basic precepts and emotional attachments of his ministers.”<sup>233</sup>

Buchanan's support for the unitary executive was also made manifest in his widespread use of the removal power.<sup>234</sup> Not only did Buchanan use this power freely, he is cited by modern historians as the executive who took the power of partisan removal to its logical conclusion when he extended its application to Pierce appointees, despite the fact that all of them were fellow Democrats.<sup>235</sup> Buchanan's willingness to use the removal power is dramatically illustrated by his attempts to muster support for an early legislative effort to get Kansas admitted to the Union as a slave state when most of the people in the Kansas territory were clearly anti-slavery.<sup>236</sup> A bill to this effect passed the Senate, with “the cabinet lobbying directly, firing opposing postmasters and other officeholders right and left, and using both threats and promises wholesale,” but failed to be adopted in the House

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231. See ELBERT B. SMITH, *THE PRESIDENCY OF JAMES BUCHANAN* 23-29 (1975); POTTER, *supra* note 152, at 274.

232. SMITH, *supra* note 231, at 22.

233. *Id.*

234. See VAN RIPER, *supra* note 66, at 42; see also 9 Op. Att'y Gen. 516, 518 (1860) (acknowledging the president's power to “remove[] [his subordinates] at pleasure”).

235. See FISH, *supra* note 8, at 166-67; SMITH, *supra* note 231, at 21; VAN RIPER, *supra* note 66, at 42; WHITE, *supra* note 6, at 313.

236. See SMITH, *supra* note 231, at 31-42.

of Representatives.<sup>237</sup>

The widespread removals and threats of removals attest to Buchanan's belief in the Jacksonian theory of an unlimited removal power. Phillip Shaw Paludan, a Lincoln biographer, reports:

When Buchanan sought votes for the Lecompton [Kansas] constitution, passed because of massive vote fraud in Kansas, he bribed legislators with offers of jobs and with contracts to firms owned by congressmen's relatives . . . . To get support for [another Kansas bill] the Buchanan administration walked the lobbies and aisles of the House, alternating bribes of government contracts with threats of loss of patronage. In June 1860 a committee of the House, the Covode committee, reported corruption ranging from Kansas to the navy yards in the East, including instances of promises of offices to congressmen and offers of printing contracts to editors for political support . . . . [T]he overall effect was to brand the Buchanan administration<sup>238</sup> as "the Buchaneers," more interested in spoils than in principle.

Even after his policy and strategy produced horrible losses in the 1858 mid-term elections, Buchanan continued to use the removal power as a political weapon in retaliating against Northern Democrats like Stephen Douglas, who had sensibly opposed Buchanan's efforts to admit Kansas as a slave state. Throughout Douglas's hard-fought 1858 Senate re-election campaign against Lincoln, "the administration did everything possible to destroy Douglas. Democratic newspapers had to oppose him or lose the public printing. Postmasters, other officeholders, and those hoping to be officeholders dared not speak a word in his favor."<sup>239</sup> Ultimately, Douglas squeaked out a victory over Lincoln, "but most Northern Democrats were less fortunate," as "[t]hroughout the North the Republicans were swept into governorships, the Senate, and the House."<sup>240</sup>

Buchanan unflinchingly asserted control over his administration. Indeed, it was one of the few activities that provided any respite from the many political setbacks he was suffering. As Smith reports:

Frustrated at every turn by an opposition Congress, [Buchanan] sought personal relief through immersion in administrative affairs. When Cabinet members became ill or took time off, he assumed their duties. At the Department of State he busied himself with

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237. *Id.* at 44.

238. PHILLIP SHAW PALUDAN, *THE PRESIDENCY OF ABRAHAM LINCOLN* 22-23 (1994).

239. SMITH, *supra* note 231, at 53.

240. *Id.* at 81.

grandiose but impossible dreams of territorial expansion.<sup>241</sup>

As president, Buchanan was among the first to confront a new and serious attempt by Congress to limit the president's control over his administration: the appropriations rider. Specifically, when Congress appropriated \$500,000 to complete the Washington Aqueduct in 1860, it attempted to prevent Secretary of War John B. Floyd from transferring the designer of the aqueduct, Captain Montgomery C. Meigs, to a distant post by attaching a rider requiring that the funds "be expended according to the plans and estimates" and "under [the] superintendence of Captain Meigs."<sup>242</sup> Buchanan signed the bill, but criticized the rider as an unconstitutional impingement on his constitutional authority.<sup>243</sup> According to Buchanan, it was impossible

that Congress could have intended to interfere with the clear right of the President to command the army and to order its officers to any duty he might deem most expedient for the public interest. If [Congress] could withdraw an officer from the command of the President and selected for the performance of an Executive duty, they might, upon the same principle, annex to an appropriation to carry on a war on condition [that] . . . a particular person of its own selection should command the army.<sup>244</sup>

Since Congress could not have "intend[ed] to deprive the President of the power to order [Meigs] to any other army duty for the performance of which he might consider him better adapted," Buchanan announced that he would treat this rider merely as an expression of Congress's "preference" rather than a binding legislative command.<sup>245</sup>

In the end, Meigs's bid to remain in Washington failed. In defiance of the clear mandate of the rider, Buchanan relieved Meigs of his duties and transferred him to the Gulf of Mexico. Meigs sent the aqueduct funds to the Treasury and urged that no project expenses be incurred in his absence, but his recommendations were ignored. By the time Floyd's resignation permitted Meigs to return to the capital

241. *Id.* at 85.

242. Act of June 25, 1860, ch. 211, 12 Stat. 104, 106.

243. See Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 949 (1994).

244. James Buchanan, Special Message to the House (June 25, 1860), in 4 MESSAGES & PAPERS, *supra* note 57, at 3129. Buchanan's hypothetical, although intended to be *reductio ad absurdum*, became reality during the presidency of Andrew Johnson with the passage of the rider to the Army Appropriations Act. See *infra* notes 440-441 and accompanying text.

245. Buchanan, Special Message, *supra* note 244, at 3129; see also May, *supra* note 243, at 949-50.

six months later, the Army had already paid out more than \$150,000 of the \$500,000 allocated in direct contravention of the rider attached by Congress.<sup>246</sup> In the end, Buchanan successfully rebuffed Congress's first major attempt to limit presidential control over the executive branch through an appropriation rider.

The momentous four-way presidential election of 1860 led to the first ever victory for a Republican candidate: Abraham Lincoln of Illinois. There followed the greatest crisis in the "faithful execution" of the laws that was ever known to the Union. After the election and Lincoln's victory, the echoes of secession grew louder, and the slaveholding states began to threaten federal forts. The South viewed the issue of the Union forts located behind Southern lines "as an indicator of Northern intentions. If the Union would give them up or if they could be taken without inciting a war, a peaceful secession would be a reality."<sup>247</sup> Most important was Fort Sumter, in Charleston, South Carolina, defended by Major Robert Anderson who, although of Southern background, was "a Unionist and a military professional determined to do his job."<sup>248</sup>

All eyes were glued to the White House to see what Buchanan's policy might be. "With the growing threat to the federal forts and other national property in the background, the President had to decide upon an overall policy and approach to secession. Was secession constitutional? Did the federal government have the constitutional power to coerce a seceding state back into the Union?"<sup>249</sup> If secession were constitutional, what about the problem of all the federal forts, post offices, and other property in the seceding states? Could the President give up all this federal property consistently with his constitutional obligation to "take care that the laws be faithfully executed?"

Buchanan approached this situation "with his usual strong determination, dogged stubbornness, and confused insight."<sup>250</sup> As usual, he was conscientious and diligent about carrying out his duties. He met with his cabinet faithfully and energetically,<sup>251</sup> but he waffled over sending reinforcements to Fort Sumter. He knew that the army

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246. May, *supra* note 243, at 949-51; Charles Warren, *Presidential Declarations of Independence*, 10 B.U. L. REV. 1, 18 (1930).

247. SMITH, *supra* note 231, at 168.

248. *Id.* at 169.

249. *Id.* at 145.

250. *Id.* at 143.

251. *Id.* at 144.



numbered only sixteen thousand men, and he considered a call for volunteers early on to be “both unconstitutional and unwise.”<sup>252</sup>

Buchanan’s cabinet met with him almost daily and split over the question of secession. Secretary of State Lewis Cass, the 1848 Democratic nominee for president, and Attorney General Jeremiah Black said that the President could not acknowledge any right of secession, while three Southern members of the cabinet came out in favor of secession.<sup>253</sup> Buchanan asked Black for a legal opinion on the situation. Black emphatically denied that the president had any authority to recognize secession<sup>254</sup> and underscored the president’s right to collect customs and his duty to defend public property and to execute the laws.<sup>255</sup> In addition, the military act of 1795 gave the president the power to call out the militia when judicial proceedings were insufficient to check dissenting states.<sup>256</sup>

Buchanan delivered his annual message on December 3, 1860, and the only useful thing he had to say was that the South was in no danger from Lincoln’s mere election and that it should wait for some actual grievance to emerge before resorting to secession.<sup>257</sup> Buchanan took the view that secession was unconstitutional if it was called secession,<sup>258</sup> but suggested that it might be permissible if it were instead called a “revolution.”<sup>259</sup> With respect to the forts, Buchanan added that the president must fulfill his oath of office<sup>260</sup> and that if anyone tried “to expel the United States from [its] property by force . . . the officer in command of the forts has received orders to act strictly on the defensive” and that “responsibility for consequences would rightfully rest upon the heads of the assailants.”<sup>261</sup>

In the months that followed, Buchanan adopted perhaps the narrowest view of presidential power of any president prior to the Civil War, viewing the president as “no more than the chief executive

252. *Id.*

253. *Id.* at 147.

254. 9 Op. Att’y Gen. 516, 523-24 (1860).

255. *Id.* at 518-21, 524.

256. *Id.* at 522.

257. James Buchanan, Fourth Annual Message (Dec. 3, 1860), in 4 MESSAGES & PAPERS, *supra* note 57, at 3157, 3159.

258. *Id.* at 3161-65.

259. *Id.* at 3161, 3165.

260. *Id.* at 3165.

261. *Id.* at 3166; *see also* DAVID HERBERT DONALD, LINCOLN 257 (1995) (“Buchanan was torn between his belief that secession was unconstitutional and his conviction that nothing could be done to prevent it.”).

officer of the government” whose sole province was “not to make but to execute the laws.”<sup>262</sup> He thus misused the bully pulpit of the presidency to encourage rather than discourage secession, in contravention of his oath to take care that the laws be faithfully executed. President-elect Lincoln tried to calm the waters by pledging to enforce the Fugitive Slave Act,<sup>263</sup> but it was too late. Seven states in the deep South passed ordinances of secession.<sup>264</sup>

Buchanan did stand firm in one regard, however: He would not abandon the forts, as “[t]hey were federal property and could not be taken legally under either the right of secession, which he opposed, or the right of revolution, which he defended.”<sup>265</sup> On December 12, 1860, as the issue of the forts percolated, Buchanan received a blow when Secretary of State Lewis Cass resigned in a letter “protesting Buchanan’s refusal to send troops to Charleston.”<sup>266</sup> Cass became an immediate hero, and Buchanan responded by moving Attorney General Black to the State Department and by appointing the soon-to-be-famous Edwin M. Stanton attorney general.<sup>267</sup> Elbert Smith reports:

Some historians have given Black . . . and Stanton all the credit for Buchanan’s refusal to abandon Fort Sumter, but the president himself indicated no great respect and certainly no affection for . . . Stanton . . . . He did usually listen to Black, but the position he followed on Fort Sumter was probably influenced far more by Northern public opinion than by any of his cabinet. Every hint of weakness brought a storm of abuse. Every show<sup>268</sup> of defiance toward South Carolina brought momentary praise.

When South Carolina seceded and its governor asked for the immediate surrender of Fort Sumter, Buchanan wrote that “[o]nly Congress . . . could decide on relations between the federal government and South Carolina, and [that] he had no power to

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262. Buchanan, Fourth Annual Message, *supra* note 257, at 3157; *see also* PETER M. SHANE & HAROLD H. BRUFF, *THE LAW OF PRESIDENTIAL POWER: CASES AND MATERIALS* 16 (1988).

263. SMITH, *supra* note 231, at 157; DONALD, *supra* note 261, at 269 (“Lincoln had always accepted the constitutionality of the Fugitive Slave Law and now, to please the Southerners, he said he was willing to see it more efficiently enforced, provided that it contained the usual safeguards to liberty, securing free men against being surrendered as slave”) (quotation ommitted).

264. *See* PALUDAN, *supra* note 238, at 5.

265. SMITH, *supra* note 231, at 169-70.

266. *Id.* at 172.

267. *Id.* at 173.

268. *Id.* at 175.

recognize the dissolution of the Union or surrender Fort Sumter to anyone.”<sup>269</sup> An attack on the fort absent congressional action would be militarily repelled. Finally, by the end of December 1860, Buchanan ordered federal warships to resupply Fort Sumter.<sup>270</sup>

On January 8, 1861, Buchanan sent a special message to Congress, again insisting that “only Congress had the power and responsibility to find a peaceful solution [to the crisis] or to authorize the use of force to protect federal property.”<sup>271</sup> President-elect Lincoln, meanwhile, circumspectly informed listeners that “he would preserve, protect, defend, and enforce the Constitution equally in all parts of the country.”<sup>272</sup> Buchanan, in contrast, stood idly by in late 1860 and early 1861 as state after state seceded from the Union. In so doing, he abdicated his sworn responsibility to enforce the Constitution and laws of the United States.

Even though Buchanan may have been the worst president in American history as a general matter, on the issues that are central to this survey—issues of the unitariness of the executive—he gets a passing mark. There was no acquiescence during Buchanan’s one term in office in any congressional plan to limit the president’s removal power or his ability to control the executive branch. Buchanan did fail to defend the Constitution and faithfully execute the laws during the winter of 1860 to 1861, but he declined to surrender Fort Sumter, and in any event, Lincoln immediately stepped in to repair the breach. The greatest outbreak of lawlessness and insurrection against federal authority in our history was to be followed by the greatest unilateral use of executive power to defend the Constitution. Buchanan was the last of the Jacksonian presidents, and at the end of this period the concept of the unitary executive bequeathed by the Founding Fathers was alive and well, even though no Jacksonian president was elected to a second term and several were very weak chief executives by modern standards.

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Despite the historically unremarkable administrations of many of the Jacksonian presidents, the record clearly shows that these presidents explicitly or implicitly held the same views of unitary executive power as Andrew Jackson, even though all but Polk were

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269. *Id.* at 177.

270. *Id.* at 183.

271. *Id.* at 161.

272. *Id.* at 163.

far weaker than Old Hickory while in office. As Leonard White observes:

The Democrats maintained the tradition that heads of departments were assistants to the President. Any doubt about the independent position of the Treasury was dispelled when Jackson removed William Duane. No Secretary from 1829 to 1861 challenged the supremacy of the Chief Executive. The Whigs appeared at times to lean toward a type of cabinet government, but such a theory found lodgment nowhere. The President appointed, the President gave directions, and in case of necessity, he had the undoubted power to remove the department heads.<sup>273</sup>

This consistency is all the more remarkable when considered in light of three historical factors specific to this period of American history. First, these presidencies all occurred during a time when congressional assertiveness had reach unprecedented heights, led by such luminaries as Henry Clay, Daniel Webster, and John Calhoun. Second, four of these presidents were nominal Whigs, a party whose central political tenet was an executive branch of limited power relative to Congress. Third, all of these presidencies, and particularly the last four, took place at a time when sectionalism and factionalism over slavery were eroding the power of all of the branches of government, including the executive branch. In spite of these factors, all of the Jacksonian presidents were consistently aggressive and unrestrained in their use of the executive appointment, removal, and law enforcement powers under the Constitution.

### III. THE UNITARY EXECUTIVE DURING THE CIVIL WAR, 1861-1869

Buchanan's refusal to oppose the rebellion of the Southern states set the stage for the climactic event of the first century of our nation's history: the Civil War. The intractability and the morality of the slavery issue tore the country apart, at terrible cost. As is so often the case, the ensuing peace in many ways proved even more divisive than the war itself. The debates surrounding Reconstruction proved just as politically explosive and were in many ways even more vindictive than were the debates leading up to secession.

Although the states and citizens that remained part of the republic were unified in their support for prosecuting the war, it would be a mistake to assume that relations between the various branches of

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273. WHITE, *supra* note 6, at 85 (footnote omitted).

government remained harmonious. Struggles over the balance of power between the president and Congress emerged as an important undercurrent that ran throughout the war. The desperation of the times led Abraham Lincoln to assert and Congress to tolerate an unprecedented degree of concentration of power in the chief executive. The result was that Lincoln led and Andrew Johnson inherited perhaps the strongest presidency in our nation's history.

In fact, the unique nature of the civil war presidencies gave rise to a paradox of sorts. The fact that Lincoln wielded more raw power than any of his predecessors simultaneously appears to have led him to tolerate limitations to the devices needed to superintend the execution of the law that would otherwise be regarded as quite problematic. In addition, Johnson's personal limitations as a politician and his near-total lack of a political power base allowed Congress to emasculate the presidency in ways that were never before possible. In the end, this confrontation between the executive and legislative branches culminated somewhat inconclusively with Johnson's impeachment and the Senate's ultimate refusal to convict him of those charges.

That said, we believe that it would be dangerous to read too much into these developments. The extraordinariness of the times limit their precedential significance, and their implications are muted still further when viewed in the context of Lincoln's extraordinary efforts to ensure the faithful execution of the laws of the land. But most importantly for the purposes of this article, it becomes clear that in many cases these presidents did not suffer these indignations in silence and under no circumstances did they affirmatively acquiesce to them. As a result, whatever deviations from the unitary executive that occurred during this period are too minor and too sporadic to represent the type of established historical pattern needed to settle an issue under the methodology of departmental or coordinate construction.

#### *A. Abraham Lincoln*

If James Buchanan was the nation's worst president, then Abraham Lincoln was one of its best. Lincoln's administration clearly represented the zenith of presidential power during the first century under the Constitution. The exigencies of the Civil War demanded that Lincoln wield a range of powers the like of which the country had never before witnessed, and many of his enemies accused him of taking on dictatorial or tyrannical powers. Lincoln's strong presidency is ironic because he began his political career as a Whig

and, like most Whigs in the 1840s and 1850s, he began his political career opposed to a strong Jacksonian presidency. Lincoln biographer Phillip Shaw Paludan reports: “Lincoln’s roots were in a world where warnings against unrestrained executive authority were party gospel.”<sup>274</sup>

However, Lincoln’s private communications during the 1840’s and 1850’s demonstrate a more thoughtful view of presidential power and a realization of the practical necessity of strength and unitariness in the presidency. Leonard White notes that Lincoln objected to President Zachary Taylor’s policy of delegating responsibility for appointments to the departments and, during the Taylor administration, Lincoln wrote in a private letter, “This . . . must be arrested, or it will damn us all . . . . The appointments need be no better . . . but the public must . . . understand . . . they are the President’s appointments.”<sup>275</sup> Lincoln thus appreciated the fact that the president must pick and remove his own men to control his administration.

During the Lincoln-Douglas debates in 1858, Lincoln addressed the issue of the unitary executive, advocating the position that congressmen and presidents have a co-equal power with the courts to engage in constitutional review. Lincoln believed in the legitimacy of coordinate or departmental review, and he expressed that view as eloquently and forcefully as anyone who has ever occupied the presidential office. In a debate against Stephen Douglas in Springfield, Illinois on July 17, 1858, Lincoln said:

Now, as to the *Dred Scott* decision; for upon that [Douglas] makes his last point at me. He boldly takes ground in favor of that decision.

This is one-half the onslaught, and one-third of the entire plan of the campaign. I am opposed to that decision in a certain sense, but not in the sense which he puts on it. I say that in so far as it decided in favor of Dred Scott’s master and against Dred Scott and his family, I do not propose to disturb or resist the decision.

I never have proposed to do any such thing. I think, that in respect for judicial authority, my humble history would not suffer in a comparison with that of Judge Douglas. He would have the citizen conform his vote to that decision; the member of Congress,

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274. PALUDAN, *supra* note 238, at 27.

275. WHITE, *supra* note 6, at 75 (citing HOLMAN HAMILTON, ZACHARY TAYLOR 217 (1951)).

his; the President, his use of the veto power. He would make it a rule of political action for the people and all the departments of the government. I would not. By resisting it as a political rule,<sup>276</sup> I disturb no right of property, create no disorder, excite no mobs.

Lincoln reiterated his departmentalist opposition to *Dred Scott* in his first inaugural address:

I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having to that extent, practically resigned their government, into the hands of that eminent tribunal. Nor is there, in this view, any assault upon the court or the judges. It is a duty, from which they may not shrink, to decide cases properly brought before them; and it is no fault<sup>277</sup> of theirs if others seek to turn their decisions to political purposes.

Lincoln was clearly a committed departmentalist in the mold of Thomas Jefferson and Andrew Jackson.<sup>278</sup>

In November 1860, Lincoln won the presidency, and the country wondered what to expect from him. After all,

Lincoln lacked administrative experience. He had held no significant military command, no leading position in industry, or business. He had been a legislator, not a governor. Unlike his Southern counterpart, Jefferson Davis, he had not administered any government department. Most notably he had not been trained to command, as Davis had been at West Point. He was an outsider to Washington and its political culture. His last visit to the city had

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276. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 516 (Roy P. Basler ed., 1953), reprinted in WHO SPEAKS FOR THE CONSTITUTION: THE DEBATE OVER INTERPRETIVE AUTHORITY 71 (1992).

277. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 MESSAGES & PAPERS, *supra* note 57, at 3206, 3210-11, reprinted in WHO SPEAKS FOR THE CONSTITUTION, *supra* note 276, at 77-78.

278. See Calabresi & Yoo, *supra* note 1, at 1500-02 (Jefferson), 1529-31 (Jackson).

been twelve years earlier when he had served one two-year term as congressman.<sup>279</sup>

President-elect Lincoln was lucky in one regard. He came into office with large Republican majorities in both houses of Congress, especially after the Southern states seceded and their members gave up their congressional seats.<sup>280</sup>

President-elect Lincoln picked an exceptionally able cabinet with the increasingly cautious William Seward as Secretary of State<sup>281</sup> and the more radical Salmon P. Chase as Secretary of the Treasury.<sup>282</sup> Unlike Buchanan's cabinet, Lincoln's was filled with men of first-rate ability, and it was politically and geographically balanced.<sup>283</sup> Lincoln's willingness to pick men who rivaled him in national stature helped him to fulfill his obligation to "take care that the laws be faithfully executed."

Lincoln's first inaugural address laid out a sophisticated argument as to why secession was unconstitutional,<sup>284</sup> an argument eventually endorsed by the Supreme Court in *Texas v. White*.<sup>285</sup> Lincoln believed that the Union was "perpetual" and "could not lawfully be divided,"<sup>286</sup> and he swore that "I shall take care, as the Constitution itself expressly enjoins upon me that the laws of the Union be faithfully executed in all the States."<sup>287</sup> The natural concomitant of these commitments was to make it "the declared purpose of the Union that it will constitutionally defend and maintain itself."<sup>288</sup> At the same time, Lincoln urged that it would be "much safer of all" if he were to enforce "all those acts which stand unrepealed," even those, such as the Fugitive Slave Act, whose constitutionality had been questioned.<sup>289</sup> With the "momentous issue of civil war" before them, Lincoln closed by maintaining that the government would not "assail" the South if the Union was not assailed, but that both sides needed to note that he had taken the most solemn oath "registered in Heaven" to

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279. PALUDAN, *supra* note 238, at 24.

280. *Id.* at 27.

281. Seward had been a major party rival of Lincoln's and had hoped for the Republican presidential nomination in 1860. *Id.* at 37.

282. *Id.* at 39.

283. *Id.* at 41.

284. *See id.* at 53-55.

285. 74 U.S. (7 Wall.) 700 (1868).

286. Lincoln, First Inaugural Address, *supra* note 277, at 3208.

287. *Id.* at 3208.

288. *Id.*

289. *Id.* at 3207.



preserve, protect, and defend the Union.<sup>290</sup> Lincoln was not going to stand aside, as James Buchanan did, while the Union was coming apart.

After his inauguration on March 4, 1861, Lincoln was able to cast off the cautious, quiet, reassuring pose he had assumed as president-elect. Between March 4, 1861, and July 4, 1861, Lincoln unleashed the most extraordinary period of unilateral executive action that the Republic has ever witnessed. Suffice it to say that had the circumstances that Lincoln faced been any less threatening, he could not be excused for taking some of the steps that he did without congressional approval. Only the extraordinary emergency he faced provides any justification for the sweeping character of his actions.

One of Lincoln's first major decisions was when to call Congress back for an emergency session. "[C]learing a wide space for executive initiative, he set the date for congressmen to return over two-and-a-half months away—4 July 1861. For almost its first three months the Civil War was the president's war."<sup>291</sup> Could Lincoln have safely reconvened Congress earlier? It is plausible that he could not have. The State of Maryland was in total chaos, as Southern sympathizers rioted and sought to get Maryland to join Virginia in seceding.<sup>292</sup> Had they been successful, Washington would have been behind enemy lines and members of Congress meeting there would have been in grave danger. Congress could have convened in a city other than Washington, but that would have humiliated the government and given Southerners great hope that secession was going to succeed, while debilitating Northern public opinion. Arguably, the most prudent thing to do was to secure Maryland before calling Congress back into session in Washington. The delay in calling Congress also gave Lincoln the opportunity to take important unilateral actions to cope with the secession crisis.<sup>293</sup>

First, Lincoln ordered that Union forts and other national outposts

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290. *Id.* at 3212.

291. PALUDAN, *supra* note 238, at 70. For the proclamation calling Congress into special session, see Abraham Lincoln, Proclamation (Apr. 15, 1861), in 4 MESSAGES & PAPERS, *supra* note 57, at 3214.

292. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 289 (1988); DONALD, *supra* note 261, at 298-99.

293. See EDWIN S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1984, at 264 (Randall W. Bland et al. eds., 5th rev. ed. 1984); LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 260 (4th ed. rev., 1997); HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875, at 233 (1982); PALUDAN, *supra* note 238, at 64-71.

and property be defended from any attacks or confiscation by Southern states. This required mobilizing troops and supplies without congressional consent and sometimes without constitutional authority.<sup>294</sup> To protect Fort Sumter specifically, Lincoln dispatched the strongest federal war ship available, the *Powhatan*. “Confusion in orders, and perhaps Seward’s deception, sent the ship toward [another embattled fort] but Lincoln was in charge now” and military force was going to be used to defend Union property.<sup>295</sup>

Second, there were dramatic increases in the size of the army and navy, all accomplished by presidential decree.<sup>296</sup> This was arguably contrary to the clearly expressed congressional power “to raise and support armies.”<sup>297</sup> However, the president has unilateral authority to federalize the state militias when he believes a crisis calls for this. Lincoln thus took a legitimate step when on April 15 he declared the existence of a sufficient state of emergency and called up 75,000 members of state militias into national service.<sup>298</sup>

Third, Lincoln ordered a naval blockade of all Southern ports.<sup>299</sup> This was a highly effective unilateral deployment of ships that helped greatly in the eventual crushing of the South. As commander in chief, Lincoln had the authority to deploy federal warships as he saw fit—as the Supreme Court would eventually recognize in its five-to-four decision in *The Prize Cases*<sup>300</sup>—but surely their use without congressional approval with respect to a domestic insurrection was extraordinary.

Fourth, and most strikingly, Lincoln unilaterally suspended the writ of habeas corpus between Philadelphia and Washington in order to deal with riots and disorder in Maryland.<sup>301</sup> The Constitution is silent

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294. 2 GOLDSMITH, *supra* note 20, at 958.

295. PALUDAN, *supra* note 238, at 64.

296. Abraham Lincoln, Proclamation (May 3, 1861), in 4 MESSAGES & PAPERS, *supra* note 57, at 3216.

297. BINKLEY, *supra* note 70, at 115-16 (quoting U.S. CONST. art. I, § 8, cl. 12).

298. Abraham Lincoln, Proclamation (Apr. 15, 1861), in 4 MESSAGES & PAPERS, *supra* note 57, at 3214; *see also* PALUDAN, *supra* note 238, at 70-71; MCPHERSON, *supra* note 292, at 274.

299. Abraham Lincoln, Proclamation (May 3, 1861), in 4 MESSAGES & PAPERS, *supra* note 57, at 3216; Abraham Lincoln, Proclamation (Apr. 19, 1861), in 4 MESSAGES & PAPERS, *supra* note 57, at 3215; *see also* PALUDAN, *supra* note 238, at 70.

300. 67 U.S. (2 Black) 635 (1862).

301. Abraham Lincoln, Executive Order to the Commanding General of the Army of the United States (Apr. 27, 1861), in 4 MESSAGES & PAPERS, *supra* note 57, at 3219; *see also* HERMAN BELZ, LINCOLN AND THE CONSTITUTION 2 (1984); TUGWELL, *supra* note 7, at 158-59; PALUDAN, *supra* note 238, at 71. Lincoln later expanded the geographic scope of this order. Abraham Lincoln, Proclamation (May 10, 1861), in 4 MESSAGES & PAPERS,

on whether Congress or the president has the authority to suspend the writ of habeas corpus in times of emergency, but the better argument is surely that this is normally a congressional prerogative. In response to Lincoln's suspension of the writ, "[t]he Whig attitude toward the presidency, born of the attack on Jackson as 'King Andrew,' faded so rapidly that within weeks Lincoln was being called a dictator and his government a despotism."<sup>302</sup>

Fifth, Lincoln "closed the mails to 'disloyal' publications; he told generals to begin raising new armies; he paid \$2 million out of the Treasury to private citizens in New York to expedite recruiting; he pledged government credit for \$250,000 million. He had no authority to do these things; Congress clearly did."<sup>303</sup> Lincoln also issued a general order embodying the rules applicable to federal armies in the field. This order was arguably in violation of the Constitution's assignment to Congress of the duty "to make Rules for the Government and Regulation of the land and naval Forces."<sup>304</sup>

Sixth, and finally, Secretary of State Seward was made the "hub of early internal security actions. He set up a special bureau in his department with three clerks assigned to handle the filing and recording of internal security activities."<sup>305</sup> Seward used "federal marshals and attorneys and judges" to gather information; "[o]nce it was known he was interested he attracted grievances and warnings from crackpots as well as from serious citizens."<sup>306</sup> "Policemen and postmasters opened letters with Southern addresses and sent suspect material to Seward. Some letters clearly revealed treason."<sup>307</sup> Even newspapers "were targets for strict surveillance," and one editor "was

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*supra* note 57, at 3217, 3218; Abraham Lincoln, Executive Order to the Commanding General of the Army of the United States (July 2, 1861), in 4 MESSAGES & PAPERS, *supra* note 57, at 3220 (authorizing the suspension of the writ of habeas corpus as far north as New York); Abraham Lincoln, Executive Order to the Lieutenant-General Winfield Scott (Oct. 14, 1861), in 4 MESSAGES & PAPERS, *supra* note 57, at 3240 (extending the suspension of the writ of habeas corpus as far north as Bangor, Maine).

302. PALUDAN, *supra* note 238, at 71. For an analysis of the controversy surrounding Lincoln's decision to suspend the writ, see *infra* notes 318-326 and accompanying text.

303. PALUDAN, *supra* note 238, at 71. Funding military expenses without congressional authorization violates the constitutional provision that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by law." U.S. CONST. art. I, § 9, cl. 7. See BINKLEY, *supra* note 70, at 118-19; BELZ, *supra* note 301, at 2. Lincoln later disclosed many of these actions to Congress in order to defend his former Secretary of War against accusations of malfeasance. Abraham Lincoln, Message to the Senate and House of Representatives (May 26, 1862), in 4 MESSAGES & PAPERS, *supra* note 57, at 3278.

304. U.S. CONST. art I, § 8, cl. 14; BINKLEY, *supra* note 70, at 118.

305. PALUDAN, *supra* note 238, at 73.

306. *Id.*

307. *Id.*

thrown in jail” and his paper “was expelled from the mails.”<sup>308</sup>

In sum, Lincoln unilaterally took a whole variety of measures in the spring of 1861 to repel the Southern attack. Lincoln defended his actions by arguing that the Commander in Chief Clause, when read in conjunction with the Take Care Clause, conveyed upon him the “war power,” which empowered him to take the sweeping actions that he did.<sup>309</sup> Although he expressed the “deepest regret” at having the “war power in defense of the Government forced upon him,” he submitted that he had no choice “but to call out the war power of the Government and so to resist force employed for its destruction by force for its preservation.”<sup>310</sup>

Lincoln did not waste time fleshing out the finer points of his theory of presidential power. Like Jefferson, Lincoln simply took it for granted that his duty to defend the Constitution and to faithfully execute the laws implicitly authorized him to take whatever steps were necessary to preserve the Republic, even if those steps were not specifically authorized by any particular constitutional provision.<sup>311</sup> Lincoln noted:

I understood that my oath to preserve the Constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government, that Nation of which that Constitution was the organic law. Was it possible to lose the Nation and yet to preserve the Constitution? . . . I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the Union.<sup>312</sup> Right or wrong, I assumed this ground, and now avow it.

308. *Id.* at 74.

309. Abraham Lincoln, Special Session Message (July 4, 1861), in 4 MESSAGES & PAPERS, *supra* note 57, at 3221, 3224-25, 3232; *see also* CORWIN, *supra* note 293, at 23, 264; WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 189 (1992); MARTIN S. SHEFFER, PRESIDENTIAL POWER: CASE STUDIES IN THE USE OF THE OPINIONS OF THE ATTORNEY GENERAL I (1991); HYMAN & WIECEK, *supra* note 293, at 233. Lincoln’s arguments were bolstered by antisecessionist legal scholars, including Timothy Farrar, Horace Binney, James Russell Lowell, Theophilus Parsons, and William Whiting. HYMAN & WIECEK, *supra* note 293, at 234.

310. Lincoln, Special Session Message, *supra* note 309, at 3224-25.

311. *See* FISHER, *supra* note 293, at 260-61; NORMAN J. SMALL, SOME PRESIDENTIAL INTERPRETATIONS OF THE PRESIDENCY 33-35 (1932); *cf.* Frank B. Cross, *Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies*, 4 J.L. & POL. 483, 488-89 (1988).

312. SMALL, *supra* note 311, at 35. As Lincoln similarly noted in a letter to Samuel Chase, “I will violate the Constitution, if necessary, to save the Union; and I suspect, Chase, that our Constitution is going to have a rough time of it before we get done with this row.” PETER M. SHANE & HAROLD M. BRUFF, SEPARATION OF POWERS LAW 18 (1996) (citing WARD H. LEMON, RECOLLECTIONS OF ABRAHAM LINCOLN 221 (1911)).

In short, constitutional necessity provided its own justification. Whether his actions were legal or not, Lincoln undertook them, seemingly backed by the populace and the impetus of public exigency. He trusted that Congress would later vindicate his decisions.<sup>313</sup> Further constitutional controversy was averted when, as Lincoln predicted, Congress and a sharply divided Supreme Court ratified all of Lincoln's actions after the fact.<sup>314</sup> The only unilateral action Lincoln undertook that was not immediately authorized by Congress was his suspension of the writ of habeas corpus, and even that was later ratified by Congress.<sup>315</sup>

Upon taking office, Lincoln also put into effect the departmentalist rejection of *Dred Scott* that he had discussed in his debates with Douglas and in his first inaugural address.<sup>316</sup> Lincoln directed his subordinates to conduct governmental affairs in a manner contrary to *Dred Scott* by ordering them to issue patents and visas to African-American citizens.<sup>317</sup> This departmentalist approach assumed new significance for Lincoln when the constitutionality of his suspension of the writ of habeas corpus was challenged in the famous case of *Ex parte Merryman*,<sup>318</sup> which arose when an officer in the Maryland militia was placed in military custody for allegedly using his position to recruit and train Confederate sympathizers. He filed for a writ of habeas corpus before Chief Justice Roger Taney himself, and Taney

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313. Lincoln, Special Session Message, *supra* note 309, at 3225, *quoted in* FISHER, *supra* note 293, at 260-61.

314. For Congress's ratification of Lincoln's actions, see Act of Aug. 6, 1861, ch. 63, 12 Stat. 326 (1863) ("[A]ll the acts, proclamations, and orders of the President of the United States after [March 4, 1861], respecting the army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority and direction of the Congress of the United States."); Act of July 31, 1861, ch. 34, 12 Stat. 284-85 (1863) (authorizing payment of volunteers called up by the President, and authorizing the President to "accept the service of such volunteers without previous proclamation."). For the Supreme Court's ratification of Lincoln's actions, see *The Prize Cases*, 67 U.S. (2 Black) 635 (1862) (5-4 decision). As is discussed further in the text below, Chief Justice Taney expressed some misgivings about Lincoln's suspension of habeas corpus in *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). See *infra* notes 319-320 and accompanying text.

315. Act of Mar. 3, 1863, ch. 81, 12 Stat. 755 (1863); see also PALUDAN, *supra* note 238, at 191; J.G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 130 (rev. ed. 1963).

316. See *supra* note 277 and accompanying text.

317. Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 88 (1993).

318. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). For interesting discussions of *Merryman*, see FISHER, *supra* note 293, at 261-62; HYMAN & WIECEK, *supra* note 293, at 241, 259-60; PALUDAN, *supra* note 238, at 75-77; Paulsen, *supra* note 317.

granted the writ. Taney held that Lincoln's unilateral suspension of the writ was an unconstitutional usurpation of the power of Congress and that Merryman was "[e]ntitled to be set at liberty and discharged immediately from imprisonment."<sup>319</sup> However, complaining that he was "resisted by a force too strong for [him] to overcome," Taney left it for the President, "in fulfillment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced."<sup>320</sup>

Rather than enforce this order from the Chief Justice, Lincoln ignored it and appealed directly to the American people and to the legislature in his message to the special session of Congress on July 4.<sup>321</sup> Lincoln believed that "the president could define the meaning of the Constitution and that the people themselves, in electing the president, also made constitutional law. There was too much at stake to leave the meaning of the Constitution and the polity it helped define to nine justices."<sup>322</sup> Taney had claimed that Lincoln had violated his oath to "[f]aithfully execute" the laws by ignoring Merryman's writ of habeas corpus. Without ever acknowledging that his unilateral suspension of habeas corpus was illegal, Lincoln argued that regardless of legality, the national situation was so dire that it justified his actions:

The whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution, even had it been perfectly clear, that by the use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that, practically, it relieves more of the guilty, than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one should be violated?<sup>323</sup>

Attorney General Edward Bates followed up Lincoln's July 4 address with a legal opinion further justifying Lincoln's position.<sup>324</sup>

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319. *Merryman*, 17 F. Cas. at 147.

320. *Id.* at 153.

321. Lincoln, Special Session Message, *supra* note 309, at 3225-26. See generally PALUDAN, *supra* note 238, at 77; SHEFFER, *supra* note 309, at 13.

322. PALUDAN, *supra* note 238, at 77.

323. Lincoln, Special Session Message, *supra* note 309, at 3226, reprinted in 2 GOLDSMITH, *supra* note 20, at 959.

324. 10 Op. Att'y Gen. 74 (1861); see also Paulsen, *supra* note 317, at 95.

Bates said the three branches of government “are co-ordinate and coequal—that is, neither being sovereign, each is independent in its sphere, and not subordinate to the others, either of them or both of them together . . . . [I]f we allow one of the three to determine the extent of its own powers, and also the extent of the powers of the other two, that one can control the whole government, and has in fact achieved the sovereignty.”<sup>325</sup> Thus, Attorney General Bates applied departmentalism to the question of whether a president is obligated to follow court judgments. This is arguably the most sweeping departmentalist argument ever made by a high government officer.<sup>326</sup>

By September 1861, military commissions had been established to address disloyalty, but the Union government exercised remarkable restraint and arrested few orators and editors for their critiques of Lincoln.<sup>327</sup> Paludan denies that “Lincoln was a ‘dictator,’” but others have debated the question.<sup>328</sup> Notably, in the middle of the greatest war in the nation’s history, Lincoln held the 1862 and 1864 elections right on schedule, something no tyrant or dictator would ever do. In fact, although at several points in his 1864 re-election campaign it appeared that Lincoln could lose and the war end in stalemate, Lincoln nevertheless refused to cancel the presidential election.

Lincoln paid close attention to the details of the Civil War, as the theory of the unitary executive suggests he should. James M. McPherson notes that Lincoln personally picked a series of generals to manage the war, especially in the East, before he settled on Ulysses S. Grant as the man he wanted to command his most important army.<sup>329</sup> McPherson writes:

The task of conducting [the Civil War] would stay in [Lincoln’s] hands in the most compelling and terrible sense—the war would go on as long as he wanted it to go on; it would stop when he said it had stopped. And every day as the casualties mounted and the boys died and the families agonized, he would decide to continue or to

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325. 10 Op. Att’y Gen. at 76.

326. For a critique of the use of departmentalism in this context, which nonetheless defends the extraordinary decision in the *Merryman* case, see Steven G. Calabresi, *Caesarism, Departmentalism, and Professor Paulsen*, 83 MINN. L. REV. 1421 (1999).

327. PALUDAN, *supra* note 238, at 79.

328. BELZ, *supra* note 301; RANDALL, *supra* note 315, at 34-41; CLINTON L. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 224-39 (1948).

329. See James M. McPherson, *Abraham Lincoln*, in *TO THE BEST OF MY ABILITY* 118, 123 (James M. McPherson & David Rubel eds., 2000); see also PALUDAN, *supra* note 238, at 215-16 (noting how Lincoln frequently replaced military leaders, in contrast with Jefferson Davis).

end it. This was his war. He kept close watch<sup>330</sup> on the warmaking that he was asking Union generals to direct.

At times, Lincoln delved into the most minute details of military strategy, and he told his generals very specifically what he wanted them to do.<sup>331</sup> On one occasion he encouraged General Hooker to speak directly with him rather than report to Hooker's superiors, and when he later became exasperated with Hooker, Lincoln personally told Secretary of the Army Stanton to accept Hooker's resignation.<sup>332</sup> On another occasion after the Union victory at Gettysburg, Lincoln became furious with General Meade for failing to pursue the retreating Confederate troops.<sup>333</sup> Lincoln's General in Chief, Henry Halleck, complained "that Lincoln's 'fingers itch to be into everything going on.'"<sup>334</sup> This may have been fortunate because, although "Lincoln's tactical understanding remained flawed, his larger strategic ideas were sound."<sup>335</sup> Lincoln held "the same strategic ideas that Grant held: Union superiority in numbers meant that pressure all along the Confederate front would wear out and break down Southern resistance."<sup>336</sup> By the middle of the war, Lincoln withdrew somewhat and left the day-to-day command of the armies to Halleck, Stanton, and the increasingly able generals he had working for him, among them Grant.<sup>337</sup> Overall, however, Lincoln was a very active and involved commander in chief who took full charge of the faithful execution of the war effort and the fight to defend the Constitution.

Lincoln's management of his cabinet was less direct than his supervision of the armies, in that Lincoln was willing to delegate authority to the very able men he had picked to advise him. Cabinet meetings were held regularly on Tuesdays and Fridays, at Salmon Chase's urging, but "Seward and Stanton often met individually with Lincoln . . . generating resentment within the cabinet that lasted throughout the war."<sup>338</sup> A major cabinet crisis erupted in December 1862 when thirty-one of thirty-two Republican senators voted in caucus that Secretary of State Seward should be removed, in part

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330. PALUDAN, *supra* note 238, at 100.

331. *Id.* at 203.

332. *Id.* at 204-05.

333. *Id.* at 206.

334. *Id.* at 208.

335. *Id.* at 207.

336. *Id.* at 261.

337. *Id.* at 217-18.

338. *Id.* at 123.



because Treasury Secretary Chase had been criticizing Seward on Capitol Hill.<sup>339</sup> Lincoln answered the Seward opponents with finesse, calling upon the senators to meet with him at the White House without telling them that the entire cabinet, minus Seward, would be present. In the presence of the senators, Lincoln pointedly asked his cabinet if there was any lack of unity in the government and all the cabinet members swallowed hard and said no.<sup>340</sup> The senators then backed down and Lincoln refused Seward's resignation, which had been tendered.<sup>341</sup> "The executive branch had established its ultimate autonomy, and Lincoln had clearly shown himself master of it. He, not Congress, would determine who his advisers would be."<sup>342</sup>

Ultimately, Lincoln put Treasury Secretary Chase on notice that he was watching him and "still controlled the patronage and the administration."<sup>343</sup> When Chase tried to appoint yet another former Democrat to a Treasury patronage post, Lincoln enthusiastically accepted Chase's resignation, saying "you and I have reached a point of mutual embarrassment in our official relations which it seems cannot be overcome."<sup>344</sup>

In the wake of the Seward crisis, Lincoln tried to show his devotion to cabinet government by ostentatiously asking every cabinet member for a written opinion on the legality of the various extraordinary events that had made West Virginia a new state.<sup>345</sup> Lincoln thought it important to do this because he was fighting a war to defend the Constitution and laws, and he wanted everyone to see that he took the laws seriously with respect to West Virginia statehood. Paludan writes:

An increasingly independent presidency was emerging, however, and the circumstances of war were validating it. A former Whig and a former Democrat, Bates and Blair, said that the president could ask for as many opinions or as few as he wished; he need not consult with them unless he wanted to. The president himself was accountable for his administration and by implication the only point at which congressmen could challenge a cabinet member was at confirmation hearings. There could be no such thing as a "plural

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339. *Id.* at 171.

340. MCPHERSON, *supra* note 292, at 575.

341. 2 HAYNES, *supra* note 75, at 812-15.

342. PALUDAN, *supra* note 238, at 181.

343. *Id.* at 268.

344. *See id.* at 286-87; DONALD, *supra* note 261, at 508.

345. PALUDAN, *supra* note 238, at 178. For a magnificent discussion of the constitutional issues involved, see Vasani Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291 (2002).

executive,” in Welles’s words.<sup>346</sup>

In the summer of 1862, Lincoln took another momentous step in affirming unilateral presidential power when he announced his Emancipation Proclamation, under which all slaves in areas still in revolt on January 1, 1863, would henceforth and forever after be free.<sup>347</sup> This followed upon congressional action in June 1862 where Congress, in violation of *Dred Scott*,<sup>348</sup> outlawed slavery in the territories of the United States,<sup>349</sup> thus settling an historic and long-debated question. Lincoln believed that he “had authority under his war powers to free slaves in places where war was being made.”<sup>349</sup> He later admitted that the Proclamation, which was criticized by former Supreme Court Justice and Dred Scott dissenter Benjamin Curtis,<sup>350</sup> was without “constitutional or legal justification, except as a military measure.”<sup>351</sup> Lincoln “freed the slaves in the only place that he could legally reach them—in places that he ruled under presidential war powers.”<sup>352</sup> Lincoln’s unilateral action in issuing the Emancipation Proclamation may well be the most important unilateral act any president of the United States has ever taken, and it was truly a sweeping and extraordinary exercise of the executive power conferred by the Constitution.

The Civil War was fought over the issue of the president’s authority to take care that the laws be executed in the South, but there were a number of subsidiary “take care” questions that arose during the War that merit brief mention. First was the question of returning fugitive slaves, an issue which remained alive as slavery survived in some of the loyal border states. “[C]onstitutional commitment stayed firm; the federal government [continued to] return fugitives until June 1864, when Congress killed the fugitive slave law.”<sup>353</sup> Another “take care” issue arose over the unpopular draft law, which Democrats, lumping it with the habeas law, argued “gave the administration

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346. PALUDAN, *supra* note 238, at 175.

347. *See id.* at 187-89.

348. Act of June 19, 1862, ch. 111, 12 Stat. 432.

349. PALUDAN, *supra* note 238, at 179.

350. *See id.* at 158.

351. ARTHUR SCHLESINGER, JR., *WAR AND THE CONSTITUTION: ABRAHAM LINCOLN AND FRANKLIN D. ROOSEVELT* 14 (1988) (quoting letter from Abraham Lincoln to Salmon P. Chase (Sept. 2, 1863)).

352. PALUDAN, *supra* note 238, at 188.

353. *Id.* at 134; *see also* Act of June 28, 1864, ch. 166, 13 Stat. 200 (repealing the Fugitive Slave Act of 1850).

monarchical powers.”<sup>354</sup> Lincoln wrote an “extended argument on the necessity and constitutionality of the draft . . . [and he] asserted that ‘it is my purpose to see the draft law faithfully executed.’”<sup>355</sup> From July 13 to 17, 1863, New York City exploded with riots against the draft law, and Lincoln was faced with a serious crisis of how to execute that law.<sup>356</sup> Lincoln responded discreetly, but he did station troops in New York,<sup>357</sup> thus showing his dedication to enforcing even unpopular laws.

Lincoln maintained military governments in some portions of the South that had been freed, like Louisiana, and thus he experimented unilaterally with military reconstruction there.<sup>358</sup> Lincoln favored a quick, nonpunitive Reconstruction led by the military.<sup>359</sup> Lincoln’s control of Louisiana reconstruction “rested almost entirely on his authority as commander in chief” and on the pardon power.<sup>360</sup> Members of Congress fretted that they should have some say over Louisiana, and they “worried about executive lawmaking.”<sup>361</sup> Lincoln worked to bring Louisiana “quickly back into the Union,”<sup>362</sup> while Congress eventually<sup>363</sup> came to assert its own more radical reconstruction plans. The conflict came to a head when Lincoln refused to sign the second Confiscation Act until Congress had made certain changes to correspond with his view of executive and legislative authority. In response, Congress refused to seat the representatives elected by states that had complied with Lincoln’s Reconstruction plan. Finally, on July 2, 1864, relations between the President and Congress broke down completely with the embodiment of Congress’ Radical Reconstruction policies in the Wade-Davis bill. Objecting to the stiff Reconstruction policies represented in the bill, Lincoln pocket vetoed it. Congress in turn adopted the Wade-Davis Manifesto, reiterating its vision of Reconstruction and denouncing Lincoln’s action as an unconstitutional usurpation of legislative

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354. PALUDAN, *supra* note 238, at 192.

355. *Id.* at 195.

356. *See id.* at 213.

357. *Id.* at 214; DONALD, *supra* note 261, at 448.

358. PALUDAN, *supra* note 238, at 240-41.

359. *See, e.g.*, Abraham Lincoln, Third Annual Message (Dec. 8, 1863), in 5 MESSAGES & PAPERS, *supra* note 57, at 3380, 3390-91; REHNQUIST, *supra* note 309, at 193; HYMAN & WIECEK, *supra* note 293, at 268-69, 271.

360. *See* CORWIN, *supra* note 293, at 370 n.58; HYMAN & WIECEK, *supra* note 293, at 268-69, 271; PALUDAN, *supra* note 238, at 237.

361. PALUDAN, *supra* note 238, at 244.

362. *Id.* at 251.

363. *See id.* at 264-65.

authority.<sup>364</sup> Lincoln's battles with Congress over Reconstruction thus represent another extraordinary exercise of the executive power. It is no wonder that on some occasions Lincoln's Democratic opponents called him "King Lincoln" and charged him with "executive tyranny."<sup>365</sup>

Lincoln's unusually strong commitment to the unilateral exercise of executive power, which led critics to accuse him of being tyrannical and monarchical, may also underlie a few of his more unfortunate positions on the unitary executive. Somewhat paradoxically, though Lincoln wielded more raw power than any of his predecessors or successors, he at times tolerated congressional efforts to limit his exercise of executive authority.

On the one hand, Lincoln dominated his cabinet, on one occasion retracting the decision of his first Secretary of War Simon Cameron to arm fugitive slaves for the Union army and ultimately dismissing Cameron for insubordination.<sup>366</sup> Lincoln also made wider use of the presidential removal power than any president before him, paying great attention to the details of patronage matters even during the crisis over Fort Sumter<sup>367</sup> and removing 1457 out of a total of 1639 presidential officers.<sup>368</sup> In so doing, as Edwin Corwin notes, Lincoln "far surpassed" even Jackson's "record as a spoilsman,"<sup>369</sup> Although Lincoln made many of these removals in order to ensure the loyalty of government officials, he did not hesitate to remove an official on purely partisan grounds.<sup>370</sup> In fact, so partisan were Lincoln's removals that a noted commentator observed, "If Lincoln had made appointments for merit only, the war might have been shortened; on the other hand, he might not have preserved a united North to carry on the war."<sup>371</sup> The importance of patronage only continued to swell, as

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364. CORWIN, *supra* note 293, at 24-25; HYMAN & WIECEK, *supra* note 293, at 270-74; REHNQUIST, *supra* note 309, at 189, 194-95.

365. See PALUDAN, *supra* note 238, at 199.

366. Cross, *supra* note 311, at 489 n.29 (citing Comment, *Presidential Legislation by Executive Order*, 37 U. COLO. L. REV. 105, 108-09 (1964)).

367. See PALUDAN, *supra* note 238, at 35.

368. VAN RIPER, *supra* note 66, at 43 (citing FISH, *supra* note 8, at 170 n.3); see also PALUDAN, *supra* note 238, at 35-36 (reporting that Lincoln removed 1195 out of 1520 presidential appointees); JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 71 (1953); 2 GOLDSMITH, *supra* note 20, at 983.

369. CORWIN, *supra* note 293, at 241.

370. See DAVID M. DEWITT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 182 (State Hist. Soc'y of Wis. 1967) (1903); 2 GOLDSMITH, *supra* note 20, at 983; VAN RIPER, *supra* note 66, at 43.

371. FISH, *supra* note 8, at 172, quoted in VAN RIPER, *supra* note 66, at 43.

the prosecution of the war caused an almost fivefold increase in the number of federal employees.<sup>372</sup> Lincoln came to regret the prevalence of patronage appointments. When facing a throng of office-seekers and congressmen in his outer office, Lincoln observed that the spoils system might in the course of time become far more dangerous to the Republic than the Civil War. Accordingly, Lincoln stubbornly resisted members of his own party who wanted to conduct a thorough “office sweep” in the beginning of his second term.<sup>373</sup> Doing so demonstrated Lincoln’s personal control over removal policy, a conclusion reinforced by an opinion of Attorney General Bates.<sup>374</sup> Lincoln’s vigorous and partisan use of the removal power, in spite of his background as a former Whig, indicates his firm belief in the unitariness of the executive and the importance of presidential control throughout the executive branch.

On the other hand, Lincoln offered no objection when Congress enacted legislation limiting Lincoln’s power to remove the Comptroller of the Currency,<sup>375</sup> military officers,<sup>376</sup> and consular clerks,<sup>377</sup> or when the Joint Committee on the Conduct of the War

372. Paludan notes:

In 1861 there were 40,651 civilian jobs to fill in the federal government. Nearly 22,700 post offices led the list, but there were over 4,000 treasury jobs, nearly 9,400 Navy Department places, and around 1,900 each in the War and Interior Departments. By 1865 the number had increased almost fivefold. Nearly 195,000 civilians worked for the federal government—most of them in the War Department’s Quartermaster Corps.

PALUDAN, *supra* note 238, at 35-36.

373. 4 J.G. RANDALL, LINCOLN THE PRESIDENT 275-79 (1955); *see* FISH, *supra* note 8, at 172; VAN RIPER, *supra* note 66, at 44.

374. 11 Op. Att’y Gen. 14, 16 (1864).

375. *See* Act of Feb. 25, 1863, ch. 58, 12 Stat. 665, 665-66 (1863) (the Comptroller of the Currency was removable only “by the President, *by wand with the advice and consent of the Senate*” (emphasis added)); *see also* HARRIS, *supra* note 368, at 73; GEORGE W. PEPPER, FAMILY QUARRELS: THE PRESIDENT, THE SENATE, THE HOUSE 111 (1931). This provision attracted little discussion when enacted. Louis Fisher, *Congress and the Removal Power*, 10 CONG. & PRESIDENCY 63, 72 (1983). However, this provision was amended the following year to provide for removal “by the President, upon reasons to be communicated by him to the Senate” because the original provision, according to Senator Fessenden, changed the existing rule to all other offices. Act of June 3, 1864, ch. 106, § 1, 13 Stat. 99, 100; *see also* 2 HAYNES, *supra* note 75, at 810 n.1.

376. *See* Act of Mar. 3, 1865, ch. 79, 13 Stat. 487, 489 (1865) (providing that military officers “dismissed by authority of the President” may “make an application in writing for a trial.” Upon such application, “the President shall, as soon as the necessities of the public service may permit, convene a court-martial . . . [a]nd if such court-martial shall not award dismissal or death as the punishment of such officer, the order of such dismissal shall not be void”).

377. *See* Act of June 20, 1864, ch. 136, 13 Stat. 137, 140 (1864) (providing that “no clerk . . . shall be removed from office except for cause stated in writing, which shall be submitted to congress at the session first following such removal”); *see also* HARRIS,

delved far into the conduct of the military, examining past and future battle plans, the conduct of generals, and even demanding dismissals of certain generals on political grounds.<sup>378</sup> This committee, formed largely because of “Old Republican” (i.e., Whig) dismay over Lincoln’s executive assertiveness and Radical Republican fear that Lincoln’s approach to the war was insufficiently abolitionist, conducted wide-ranging investigations into the conduct of the war by the executive branch. Lincoln tolerated the committee and allowed it a success when the committee was able to play a role in forcing the resignation of Lincoln’s first Secretary of War, the corrupt Simon Cameron,<sup>379</sup> and suggest Edwin M. Stanton as Cameron’s successor.

Lincoln never directly responded to these attempted congressional incursions upon presidential power. Publicly, Lincoln preferred to pacify the Committee on the Conduct of the War when possible. In private, Lincoln complained, “Powers of the Government are unquestionably enlarged by a state of war but is Congress the government? I think not . . . . All the powers that Congress possess are those granted in the Constitution.”<sup>380</sup> Lincoln’s official unwillingness to confront the committee was probably more evidence of a desire to maintain wartime political consensus than an abdication of presidential power. As Binkley notes, Lincoln’s strategy in dealing with Congress was “[n]o longer a question of constitutional assignments of power but a matter of maneuvering to preserve the prestige and prerogatives of the executive office which he considers not only constitutionally his but highly essential for the prosecution of the war and the salvation of the Union.”<sup>381</sup> Lincoln thus chose pragmatism over dogmatism in dealing with Congress; he picked his constitutional battles with Congress carefully, with an eye towards gradual expansion of his overall power to administer the war.<sup>382</sup> This desire to maintain wartime unity, especially within Republican Party ranks, was particularly important for Lincoln in the days leading up to the wartime election of 1864.<sup>383</sup>

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*supra* note 368, at 73, 416 n.30 (citing FISH, *supra* note 8, at 187).

378. JAMES HAMILTON, *THE POWER TO PROBE* 5 (1976). Interestingly, Attorney General Bates adopted the intermediate position on presidential review first advanced by Attorney General Crittenden and opined that the president may direct the heads of departments, but should not direct subordinate executive officials. 11 Op. Att’y Gen. 14, 16-19 (1864); 10 Op. Att’y Gen. 527 (1863).

379. RANDALL, *supra* note 315, at 62; see PALUDAN, *supra* note 238, at 105.

380. BINKLEY, *supra* note 70, at 122.

381. *Id.* at 123.

382. *See id.* at 123-29.

383. *See* BELZ, *supra* note 301, at 16.

Thus, it seems reasonably certain that Lincoln's tolerance of some incursions upon the powers of the unitary executive can be explained on purely political grounds. If it was expected to concede to Lincoln the extraordinary powers that he was asserting, Congress surely needed something from which to draw some comfort. Fortunately for Lincoln and the nation, Lincoln possessed the political skills to avoid the worst of Congress's challenges without alienating the legislature, and he was pragmatic enough to respond to situations flexibly without provoking unnecessary fights with Congress. For the purposes of this article, it is sufficient to acknowledge that the Lincoln administration's failure to object to instances of congressional interference with the unitariness of the executive branch occurred when the nation was riven by civil war. Even so, without more explicit presidential concessions, mere silence provides only a weak basis for finding the existence of an established historical pattern of presidential acquiescence, particularly in light of the extraordinary powers Lincoln asserted in an unprecedented effort to see to it that the laws of the land were faithfully executed.

Lincoln ran for re-election in 1864 with a unified party behind him. Safe from challenge on the left, Lincoln then looked to appease the border states by choosing as his running mate Andrew Johnson, the military governor of Tennessee.<sup>384</sup> Although the "Tennessean had spoken of hanging traitors and had favored both emancipation and the use of black troops,"<sup>385</sup> Johnson was to prove a fatefully bad choice. During the campaign, Secretary of War Stanton furloughed loyal troops so they could go home to vote for Lincoln, and he "dismissed quartermaster officials who campaigned for McClellan [Lincoln's Democratic opponent]. [Stanton and Holt] carefully checked to see that anti-Lincoln newspapers and their editors did not get patronage jobs or government contracts."<sup>386</sup> Lincoln himself asked General Sherman to let loyal troops go home to vote in the important October elections in Indiana.<sup>387</sup> Lincoln won easily with fifty-five percent of the popular vote.

Lincoln's party platform in 1864 called for a constitutional amendment abolishing slavery, and in the winter of 1864 to 1865 such an amendment was passed by Congress with Lincoln's help.<sup>388</sup>

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384. PALUDAN, *supra* note 238, at 273.

385. *Id.*

386. *Id.* at 286.

387. *Id.*

388. *See id.* at 302.

Lincoln noted in his annual message to Congress on December 6, 1864 that “[t]he Executive power itself would be greatly diminished by the cessation of actual war.”<sup>389</sup> A few months later, Lincoln became the first president in American history to be assassinated when a Southern traitor fired a fatal shot, shouting “*Sic Semper Tyrannis*”—thus always to tyrants.<sup>390</sup> Lincoln’s successor, Andrew Johnson, abandoned Lincoln’s commitment to equal rights for all citizens, which in turn set the stage for the epic battle between the President and Congress over the Tenure of Office Act.<sup>391</sup>

Lincoln wielded more raw, unilateral power than any president in American history before or since. He wielded that power specifically to uphold his oath to defend the Constitution and to see to it that the laws would be faithfully executed in *all* of the states. He remained silent on a few occasions when Congress transgressed the rights accorded to him as the unitary executive, but he always kept his eye on what was important, which was winning what should justly be called the War of the Rebellion. No president ever did more to take care that the laws be faithfully executed than Lincoln, and that makes him a hero of this history of the unitary executive, his occasional lapses notwithstanding.

#### *B. Andrew Johnson*

Abraham Lincoln was succeeded by one of our worst presidents, Andrew Johnson of Tennessee. Johnson was one of only two presidents to be impeached, and, as we indicate below, his attempts to sabotage congressional Reconstruction might well have represented a sufficient failure to execute the law to justify it. However, Johnson’s actual impeachment was based on his violation of the unconstitutional Tenure of Office Act, which illegally sought to limit the president’s removal power. Johnson’s acquittal (by one vote) on this charge was due to his strong defense of the unitary executive and to several senators who agreed with Johnson’s defense. Importantly, Johnson promised key senators that, if acquitted, he would stop sabotaging Reconstruction during the balance of his term and that he would henceforth faithfully execute all of the laws, even those with which he disagreed.

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389. *Id.* at 306.

390. DONALD, *supra* note 261, at 597. *Sic semper tyrannis* was the motto of the Commonwealth of Virginia.

391. PALUDAN, *supra* note 238, at 318.



Johnson began his political career as a Jacksonian Democrat, and he served as a Democrat in the House of Representatives, as governor of Tennessee, and as a U.S. Senator.<sup>392</sup> As Hans Trefousse writes, “Andrew Johnson held three strong prejudices: a bias favoring yeoman farmers over the planter elite, the certainty that blacks were inferior to whites ‘in point of intellect,’ and a reverence for the Constitution, which he believed should be strictly interpreted.”<sup>393</sup> Johnson regarded Jackson as a prophet of the Constitution,<sup>394</sup> and he adhered to Jackson’s views of the Nullification Crisis when Johnson staunchly opposed secession in 1860, something he equated with treason.<sup>395</sup> A supporter of Southern Democrat John C. Breckinridge in 1860, Johnson was the only senator from a rebel state to remain in Congress.<sup>396</sup> After Grant drove the Confederates out of Tennessee in 1862, Johnson became military governor of Tennessee at Lincoln’s request.<sup>397</sup>

Johnson was added to the Republican ticket in 1864, when the Republican Party temporarily renamed itself the Union Party in order to attract support from Northern Democrats and border state Unionists.<sup>398</sup> After Lincoln was assassinated, Johnson tried to assume Jackson’s presidential swagger, though “‘common sense’ dictated [that he should proceed] with caution and restraint.”<sup>399</sup> As Albert Castel writes, “Andrew Jackson was [Johnson’s] hero and model,” and it did not help that Johnson “inherited from Lincoln what, in some respects, was an almost dictatorial presidency.”<sup>400</sup> Johnson did not understand that as an accidental president, he could not immediately step into Jackson’s and Lincoln’s shoes.

When Johnson rose to the presidency, he faced a nearly impossible task. Lincoln had quarreled with Congress over Reconstruction,<sup>401</sup> and Johnson lacked Lincoln’s finely-honed political skills. Even Johnson’s friends described him as proud and overly serious, and Johnson’s stubbornness and disinclination to compromise served him

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392. ALBERT CASTEL, *THE PRESIDENCY OF ANDREW JOHNSON* 3-4 (1979).

393. Hans L. Trefousse, *Andrew Johnson*, in *TO THE BEST OF MY ABILITY*, *supra* note 329, at 126.

394. CASTEL, *supra* note 392, at 4.

395. *Id.* at 7.

396. *Id.* at 7-8.

397. *Id.* at 9.

398. *Id.*

399. *Id.* at 227.

400. *Id.*

401. *See supra* notes 358-365 and accompanying text.

poorly.<sup>402</sup> Johnson's reliance on constitutional defenses rather than political solutions also distinguished him from Lincoln.

The first signs of trouble appeared in May 1865 when Johnson began to turn his attention to the contentious issue of Reconstruction policy. Congress was in recess until December 1865, leaving Johnson a window of seven months during which he could act unilaterally, if he so chose. Following Lincoln's example, Johnson believed that his war power as commander in chief allowed him to set the terms of Reconstruction, particularly because, in Johnson's view, the Union was indestructible and therefore the Southern states' secession was presumptively invalid.<sup>403</sup> Johnson argued that, because they had not validly seceded, the Southern states were entitled to representation in Congress as soon as order could be restored and elections held.<sup>404</sup> Johnson believed his obligation to ensure faithful execution of the law required that he shepherd the Southern states back into the Union as quickly as possible. Johnson's honeymoon with Congress was extremely short lived,<sup>405</sup> and his presidentially-dictated Reconstruction has been called "the most spectacular exhibition of unilateral national executive authority in American history."<sup>406</sup>

Johnson opened his campaign by issuing a broad pardon to most Southerners on May 29, 1865. He appointed a governor of North Carolina to call a convention in that state to amend the state's constitution in preparation for its restoration to the Union.<sup>407</sup> Similar

402. Fellow Tennessean and Jacksonian James K. Polk described Johnson as "very vindictive and perverse in his temper," while Jefferson Davis noted his "intense, almost morbidly sensitive pride." REHNQUIST, *supra* note 309, at 200 (citing 6 ABRAHAM LINCOLN, COMPLETE WORKS OF ABRAHAM LINCOLN 234 (John G. Nicolay & John Hay eds., Lincoln Memorial University 1894)). Professor Corwin describes Johnson in the following words:

An obstinate, ill-educated man, he took his constitutional beliefs with fearful seriousness, and points that his predecessor would have yielded with little compunction for a workable plan, he defended as though they had been transmitted from Sinai. Few Presidents have surpassed Johnson in the exorbitance of his pretensions for the office, none in his inability to make them good.

CORWIN, *supra* note 293, at 25; *see also* HANS L. TREFOUSSE, IMPEACHMENT OF A PRESIDENT 67 (1975) (describing Johnson as stubborn, dogmatic, and easily angered by the suggestion of compromise).

403. *See* Trefousse, *supra* note 393, at 128.

404. *Id.*

405. At first, Johnson offered conciliatory gestures toward the Radical Republicans, announcing that he would continue Lincoln's policies and that he would retain Lincoln's cabinet members, including the darling of the Radical Republicans, Secretary of War Edwin M. Stanton. REHNQUIST, *supra* note 309, at 200.

406. HYMAN & WIECEK, *supra* note 293, at 304.

407. CASTEL, *supra* note 392, at 26; *see also* RAOUL BERGER, IMPEACHMENT: THE

proclamations for the other seceded states followed.<sup>408</sup> Most Northerners, accustomed to Lincoln's unilateralism, including with respect to Reconstruction, supported Johnson initially, and only a few Radical Republicans called for a special session of Congress.<sup>409</sup> Johnson did all of this in part because he "possessed a Jacksonian concept of the president as the tribune of all the people, whereas each congressman represented merely a fragment of the people."<sup>410</sup>

Johnson's proclamations resulted in the Southern states electing extremely conservative legislative bodies:

[S]ome even refused to repeal their secession ordinances, much less abolish slavery or repudiate the Confederate debt, as Johnson had requested. Instead, [Southern state governments] passed black codes virtually remanding the freed people to a position not far removed from slavery and elected leading former Confederates—including Alexander H. Stephens, Jefferson Davis's vice president—to Congress.<sup>411</sup>

Johnson responded by urging the Southern states to ratify the Thirteenth Amendment,<sup>412</sup> which abolished slavery, and by suggesting suffrage for a handful of the freedmen who owned property and could read. He then granted hundreds of additional pardons to former Confederate leaders on generous terms.<sup>413</sup>

Why did Johnson, who had denounced secession as treason, do all of this? First, he mistakenly thought it his constitutional duty to reunite the South with the Union as quickly as possible. Second, he wanted to transfer power in the South from the planter aristocracy, which he justifiably hated, to a democracy of "plebians and mechanics."<sup>414</sup> He was afraid the freed African-Americans would remain "bound economically to the big planters, who therefore would be able to control them politically."<sup>415</sup> Third, Johnson was, even by the standards of his day, a racist. Johnson once told Governor Fletcher of Missouri that "[t]his country is for white men . . . and by God, as long as I am President, it shall be governed by white men."<sup>416</sup> And

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CONSTITUTIONAL PROBLEMS 254 (1973); HYMAN & WIECEK, *supra* note 293, at 303-04; REHNQUIST, *supra* note 309, at 202-03.

408. CASTEL, *supra* note 392, at 44.

409. *Id.* at 31.

410. *Id.* at 30.

411. Trefousse, *supra* note 393, at 128.

412. CASTEL, *supra* note 392, at 44.

413. *Id.* at 49.

414. *Id.* at 28-29.

415. *Id.*

416. JEAN EDWARD SMITH, GRANT 422 (2001).

fourth, Johnson wanted to be elected president in his own right in 1868, and he wanted Southern support in that effort.<sup>417</sup>

Johnson was sincere in his view of his constitutional obligations, but he was also simply wrong. He overlooked a number of points that Lincoln might eventually have taken into account had he lived. First, Johnson's war power as commander in chief had ended with the cessation of hostilities in April 1865; therefore Johnson never should have attempted to formulate a presidential Reconstruction plan without congressional input. Johnson's first action should have been to call Congress into a special session, but instead, he effectively usurped congressional authority for seven months by planning his own Reconstruction. Second, Johnson overlooked the fact that although secession had been ineffectual, the Southern states lacked Republican forms of government, leaving them unprepared for readmission into the Union, a conclusion eventually confirmed by the Supreme Court in *Texas v. White*.<sup>418</sup> Johnson was thus seriously usurping congressional prerogatives when he attempted to launch presidential Reconstruction between May and December of 1865.

Congress reconvened in December 1865 and refused to seat the delegations from the Southern states. Congress also immediately set up a joint committee on Reconstruction. Both actions were driven by Northern concern over the violent mistreatment of freed African-Americans in the South; revulsion at the Black Codes, which seemed to resurrect slavery under a new name; and anger at the lack of Southern remorse implicit in the election of officials like Alexander Stephens to Congress. Most Northerners and Republicans had been willing to grant Johnson and the South the benefit of the doubt, but the adoption of the Black Codes in particular caused them to conclude that a change in course was necessary. Republicans were also concerned at the diminution in their hefty congressional majorities that immediate Southern restoration would bring.<sup>419</sup>

In February 1866, the first clash between Johnson and Congress occurred over the Freedmen's Bureau Bill, a moderate Republican measure originated by Senator Lyman Trumbell of Illinois.<sup>420</sup> The Bill was designed to benefit the freed African-Americans in the South by extending the life of the Freedmen's Bureau, which had been slated to

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417. *Id.* at 28-29.

418. 74 U.S. (7 Wall.) 700 (1868).

419. CASTEL, *supra* note 392, at 58.

420. *Id.* at 67-70.

expire, increasing the number of its agents, setting aside land for loyal African-Americans and whites, and empowering the Bureau to protect the rights of African-Americans through military tribunals. Johnson vetoed the Bill because he had constitutional objections to its extension of military power in peacetime and its invasion of areas reserved to civilian authorities and the courts.<sup>421</sup> In a speech on February 22, 1866, Johnson celebrated his veto by denouncing Representative Thaddeus Stevens and Senator Charles Sumner as being as traitorous as Jefferson Davis.<sup>422</sup> Northerners were outraged at Johnson's suggestion, and many people concluded "that [Johnson] had been drunk again."<sup>423</sup>

February turned to March, and Congress, still trying to exercise its powers under the Guarantee Clause and to enforce the newly-ratified Thirteenth Amendment, passed the Civil Rights Act of 1866.<sup>424</sup> Again, Johnson vetoed the Bill on constitutional grounds.<sup>425</sup> This severed the final links between the moderate Republicans in Congress and the President, and for the first time in American history, Congress overrode a presidential veto.<sup>426</sup> The vetoes of the moderate-backed Freedmen's Bureau and the Civil Rights Acts had led to a situation such that by the middle of 1866, in the words of historian Hans Trefousse, it was "evident to all" that "the President had finally declared war on Congress."<sup>427</sup> The House of Representatives initiated impeachment proceedings against Johnson, but the proceedings were not successful.<sup>428</sup> While Johnson ought to have recognized that his understanding of Congress's constitutional powers was seriously flawed, he failed to reach that conclusion.

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421. Andrew Johnson, Veto Message (Feb. 19, 1866), in 5 MESSAGES & PAPERS, *supra* note 57, at 3596, 3597, 3598; CASTEL, *supra* note 392, at 67. The fact that Johnson made his final version of his Freedmen's Bureau Veto Message much harsher than Seward's initial draft attests to the extent of Johnson's willingness to defy Congress. See REHNQUIST, *supra* note 309, at 205; TREFOUSSE, *supra* note 402, at 14-15.

422. CASTEL, *supra* note 392, at 69.

423. *Id.* at 70.

424. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

425. Andrew Johnson, Veto Message (Mar. 27, 1866), in 5 MESSAGES & PAPERS, *supra* note 57, at 3603.

426. Civil Rights Act of 1866, ch. 31, 14 Stat. 27; *see also* CASTEL, *supra* note 392, at 71.

427. TREFOUSSE, *supra* note 402, at 27; *see also id.* at 14-15; BERGER, *supra* note 407, at 256; CASTEL, *supra* note 392, at 71; REHNQUIST, *supra* note 309, at 204-05.

428. HYMAN & WIECEK, *supra* note 293, at 448-50; JOHN R. LABOVITZ, PRESIDENTIAL IMPEACHMENT 49 (1978); MARTIN E. MANTELL, JOHNSON, GRANT, AND THE POLITICS OF RECONSTRUCTION 71-87 (1973); REHNQUIST, *supra* note 309, at 208-15; KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION, 1865-1877, at 148-49 (1965); TREFOUSSE, *supra* note 402, at 40, 48, 54-112.

Jean Edward Smith, a biographer of Ulysses S. Grant, reports that by the summer of 1866, Johnson was asking his new attorney general, Henry Stanbery, for an opinion as to the legitimacy of the 39th Congress.<sup>429</sup> Smith writes:

Rumors swirled that the president contemplated recognizing a new Congress made up of Southern representatives and cooperative Northern Democrats. In fact, [Johnson] posed such a possibility to Grant to gauge his reaction. The general in chief did not mince words. "The army will support the Congress as it now is and disperse the other."<sup>430</sup>

By mid-October, Smith claims that Grant was afraid of a presidential coup before the fall elections and resolved not to leave Washington to attend an aide's wedding in Illinois.<sup>431</sup> Nor was Grant the only Lincoln appointee who remained vigilant for fear of what Johnson might attempt. Secretary of War Stanton also stayed in office to control Johnson's cabinet and thereby prevent the President from doing any more mischief. In the summer of 1866, Congress was already so distrustful of Johnson that it reduced the size of the Supreme Court from ten to seven to ensure that Johnson would be unable to make any appointments to that august body.<sup>432</sup>

Johnson spent the balance of 1866 wielding the removal power vigorously to reward his few friends and to punish his foes, backed by additional attorney general opinions supporting his constitutional right to do so.<sup>433</sup> "During the last six months of 1866 Johnson . . . replaced almost seventeen hundred postmasters, three-quarters for political reasons. Postmasterships were the heart of the nation's patronage system and the Republicans responded with alarm."<sup>434</sup> Johnson made such liberal use of his constitutional removal powers in an attempt to organize a new political party around himself and his conservative Reconstruction policies.<sup>435</sup> Patronage loomed as a

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429. SMITH, *supra* note 416, at 427-28.

430. *Id.*

431. *Id.* at 428.

432. *Id.* at 506.

433. See 12 Op. Att'y Gen. 421 (1868); 12 Op. Att'y Gen. 32 (1866). The opinions of Johnson's attorneys general also asserted the president's constitutional right to review the decision of the department heads. In the process, they accepted Attorney General Bates's position that the president cannot directly review the actions of subordinate executive officials. See 12 Op. Att'y Gen. 32, 43 (1866).

434. SMITH, *supra* note 416, at 432; see also CASTEL, *supra* note 392, at 88.

435. MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 47-49 (1973); see also HYMAN & WIECEK, *supra* note 293, at 314. But see ERIC. L. MCKITRICK, *ANDREW JOHNSON AND RECONSTRUCTION* 377-94 (1960) (contending that

particularly powerful weapon in the South, where virtually every federal job lay vacant.<sup>436</sup> Thomas Nast depicted Johnson in one cartoon as “King Andrew, sitting on a throne watching the beheading of a group of well-known Radicals.”<sup>437</sup>

Members of Congress took several steps to control Johnson’s use of his removal powers. In a few cases, they attempted to pressure Johnson into removing certain officers whom they found objectionable.<sup>438</sup> In 1867, at the request of Secretary of War Stanton,<sup>439</sup> Congress attached a rider to the Army Appropriations Act purporting to limit Johnson’s control over the military. In blatant violation of the president’s removal power and his authority as commander in chief, the rider provided that “[t]he General of the Army shall not be removed, suspended, or relieved from command, or assigned to duty elsewhere than at said headquarters without the previous approval of the Senate.”<sup>440</sup> Johnson complained bitterly

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Johnson failed to take full advantage of his patronage powers); HOWARD K. BEALE, *THE CRITICAL YEAR 117-23 (1930)* (same).

436. Johnson’s aggressive use of patronage in the South had a devastating twofold effect. First, it provided Southern whites with the foundation upon which they could rebuild their economic and political power. *See* BENEDICT, *supra* note 435, at 49. Second, it deprived Southern Republicans of the support they needed to drive their organizing efforts. *See* HYMAN & WIECEK, *supra* note 293, at 314. The combination of these two effects revitalized the Democratic party in the South while simultaneously causing the nascent Republican movement to die aborning.

437. CASTEL, *supra* note 392, at 94.

438. For example, the House voted sixty-eight to thirty-seven in favor of Representative Hulburd’s resolution providing “[t]hat it is the sense of this House that Henry A. Smythe should be immediately removed from the office of collector of the port of New York.” *CONG. GLOBE*, 40th Cong., 1st Sess. 395 (1867). The House had initially amended Hulburd’s resolution to provide for an impeachment investigation instead of calling upon the President to remove Smythe. *Id.* at 290. However, because the Committee concluded that “Congress having determined to adjourn, there is not sufficient time prior thereto for the Committee on Public Expenditures to conclude its investigation,” the House passed Hulburd’s resolution in its original form. *Id.* at 395; *see also* 2 HAYNES, *supra* note 75, at 815 n.5.

439. *See* BERGER, *supra* note 407, at 260; DEWITT, *supra* note 370, at 202; REHNQUIST, *supra* note 309, at 210.

440. Army Appropriations Act, ch. 170, § 2, 14 Stat. 485, 487 (1867). The rider further limited Johnson’s authority by requiring that “the head-quarters of the General of the army of the United States shall be at the city of Washington,” and that “all orders and instructions relating to military operations issued by the President or Secretary of War shall be issued through the General of the army, and in case of his inability by the next in rank.” Also, “any orders or instructions relating to military operations issued contrary to the requirements of this section shall be null and void.” Congress backed up the rider’s prohibitions with stiff penalties, deeming “any officer who shall issue orders or instructions contrary to the provisions of this section shall be deemed guilty of a misdemeanor in office,” and subjecting any officers who knowingly “transmit, convey, or obey” such orders to imprisonment for a period of two to twenty years. § 2, 14 Stat. at 486-87; *see also* CASTEL, *supra* note 392, at 113; HYMAN & WIECEK, *supra* note 293, at 451; REHNQUIST, *supra* note 309, at 210; STAMPP, *supra* note 428, at 147; TREFOUSSE, *supra* note 402, at 45. For the congressional debates on the Army Appropriations Rider,

about the Army Appropriations rider, protesting justifiably that its provisions “in certain cases virtually [deprived] the President of his constitutional functions as Commander in Chief of the Army,” and thus “were out of place in an appropriation act.”<sup>441</sup> However, given the necessity of military appropriations during Reconstruction, Johnson felt “constrained to return the bill with [his] signature, but to accompany it with [his] protest against the sections which [he had] indicated.”<sup>442</sup>

Johnson was right that this provision was unconstitutional, but the problem the legislation tried to remedy had been triggered by Johnson’s refusal to recognize Congress’s power with respect to Reconstruction, and its powers under Section 2 of the Thirteenth Amendment to eliminate badges of slavery. Once Johnson and Congress were reduced to fighting over keeping Grant in charge of the army, the situation was beyond repair. At this point, impeachment was likely inevitable.<sup>443</sup>

By the winter of 1867, Congress was concerned that every Southern state had rejected the Fourteenth Amendment. Thinking a fresh start on Reconstruction necessary, Congress passed the First Reconstruction Act,<sup>444</sup> a sweeping measure that employed Congress’s valid Guarantee Clause powers to reconstruct the South. This bill also made adoption of the Fourteenth Amendment by Southern states a requirement for their representation in Congress and for their freedom from continued military occupation.<sup>445</sup> Johnson vetoed the bill, but it was passed over his veto. Believing the Military Reconstruction Act

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see CONG. GLOBE, 39th Cong., 2d Sess. 1351-52 (1867); *id.* at 1404 (rejecting House amendment to delete the rider by a vote of 41 to 88); *id.* at 1855 (rejecting Senate amendment to delete the rider by a vote of 8 to 28); *id.* at 1404 (House voting to pass the bill by a vote of 90 to 32); *id.* at 1855 (Senate voting to pass the bill). A bill to limit the president’s authority to appoint and remove district commanders passed the House on January 21, 1868, but was not acted upon by the Senate. MANTELL, *supra* note 428, at 78.

441. Andrew Johnson, Message to the House of Representatives (Mar. 2, 1867), in 5 MESSAGES & PAPERS, *supra* note 57, at 3670.

442. *Id.* Johnson reiterated these complaints in his fourth annual message, in which he contended that the provisions of the Army Appropriations Act “which interfere with the President’s constitutional functions as Commander in Chief of the Army should be at once annulled.” Andrew Johnson, Fourth Annual Message (Dec. 9, 1868), in 5 MESSAGES & PAPERS, *supra* note 57, at 3872; see also DEWITT, *supra* note 370, at 202; REHNQUIST, *supra* note 309, at 210.

443. During this period, the Fortieth Congress convened immediately following the end of the Thirty-ninth Congress for fear of what Johnson would do to wreck Reconstruction if they left town. CASTEL, *supra* note 392, at 114.

444. Act of March 2, 1867, ch. 153, 14 Stat. 428.

445. § 5, 14 Stat. at 429; *id.* at 107. For discussion of the legal issues surrounding ratification of the Fourteenth Amendment, see BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS/TRANSFORMATIONS (1998).



unconstitutional, Johnson proceeded to try to undermine both the legislation and Reconstruction itself.<sup>446</sup> This only led Congress to pass two more Military Reconstruction Acts to deal with Johnson's efforts at sabotage.<sup>447</sup>

The stage was thus set for one of the great confrontations between the president and Congress in American history. It is arguable that Congress should have impeached and removed Johnson from office for failing to recognize congressional power to proceed with Reconstruction under the Guarantee Clause and failing to ensure that the laws dealing with Reconstruction were faithfully executed. Though the standard for impeachment and removal of a president must be set very high, by November 1866, Johnson was already in a virtual war with Congress and could not be reined in by ordinary means. The problem was that rather than remove Johnson for unconstitutionally impeding Reconstruction and threatening congressional authority, Congress responded by passing unconstitutional legislation that would tie Johnson's hands with respect to the removal power. As we shall see, this error in focus would ultimately prove Congress's undoing.

### C. *The Tenure of Office Act and the Impeachment of Andrew Johnson*

The most sweeping limitation placed on President Johnson's removal power was the Tenure of Office Act.<sup>448</sup> Passed during the winter of 1867 along with the First Military Reconstruction Act, the Tenure of Office Act specifically provided that all civil officers appointed with the advice and consent of the Senate would hold office until their successors were confirmed by the Senate.<sup>449</sup> If the Senate was in recess, the president was permitted to suspend an executive officer so long as he reported the reasons for the suspension to the Senate within twenty days of its return to session. If the Senate failed

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446. Though there were some valid constitutional criticisms of the Military Reconstruction Act, Johnson, as usual, ventured way beyond them, denouncing the whole Act as unconstitutional, which, in our opinion, it was not. Concern over the constitutionality of aspects of the Act led congressional Republicans to take extreme measures to prevent it from being tested in the courts. See, e.g., *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868).

447. Act of March 23, 1867 (Second Reconstruction Act), ch. 6, 15 Stat. 2; Act of July 19, 1867 (Third Reconstruction Act), ch. 30, 15 Stat. 14.

448. See Act of Mar. 2, 1867, ch. 154, 14 Stat. 430 (1867); see also TREFOUSSE, *supra* note 402, at 43-45; REHNQUIST, *supra* note 309, at 210; STAMPP, *supra* note 428, at 147.

449. § 1, 14 Stat. at 430.

to concur in the suspension, the officer would be restored to his position.<sup>450</sup> With an eye towards impeachment, the statute specifically designated violations of the Act as “high misdemeanor[s].”<sup>451</sup>

While the House and the Senate agreed that the Act should apply to inferior executive officers, the two chambers split sharply over the applicability of the Act to the heads of the departments. The Senate believed that the president should have a cabinet of his own choosing, and it specifically included a provision excluding cabinet members from coverage under the Act and twice rejected amendments to delete this exception.<sup>452</sup> Senators in favor of the exception emphasized that the department heads were the president’s confidential advisers and thus should be in harmony with the president’s basic policies.<sup>453</sup> Representative Thomas Williams, the primary sponsor of the Tenure of Office Act in the House, disagreed, arguing that including the heads of departments within the scope of the Act was “essential to the symmetry of the bill,” since the policies which underlay the bill in the first place applied with even greater force to the heads of departments.<sup>454</sup> The majority of the House acceded to Representative Williams’s position and struck the Senate’s exception for cabinet members.<sup>455</sup>

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450. § 2, 14 Stat. at 430. Congress also tried to stem the abuse of recess appointments by providing that if the Senate did not confirm a recess appointment by the end of the following session, that office “shall remain in abeyance, without any salary, fees, or emoluments” until properly filled with the advice and consent of the Senate. § 3, 14 Stat. at 431.

451. § 9, 14 Stat. at 432; *see also* STAMPP, *supra* note 428, at 150.

452. The Senate bill, as originally reported by the Joint Committee on Retrenchment, contained an exception for “the Secretaries of State, of the Treasury, of War, of the Navy, and of the Interior, the Postmaster General, and the Attorney General.” CONG. GLOBE, 39th Cong., 2d Sess. 382 (1867). The Senate rejected an amendment by a vote of thirteen to twenty-seven that would have eliminated the exception for Cabinet members. *Id.* at 548. After the House of Representatives had returned the bill without this provision, the Senate voted seventeen to twenty-eight to reject the House’s amendment and to insist on its original version of the bill. *Id.* at 1047.

453. *Id.* at 382-84 (statements of Senators George F. Edmunds, Charles R. Buckalew, George H. Williams, and William Pitt Fessenden); *id.* at 388 (statement of Sen. Reverdy Johnson); *id.* at 1045-46 (statement of Sen. John Sherman).

454. *Id.* at 937. Williams offered similar arguments during the debate on an early House version of the bill, warning that excluding the heads of departments “would destroy the very essence of the bill.” *Id.* at 71 (debating H.R. 664, 39th Cong. (1866)).

455. The House passed the amendment deleting the Senate’s exception for Cabinet members by a vote of 82 to 63. *Id.* at 969-70. Representative Williams’s victory did not come easily, as he was defeated in his first three attempts to have this amendment approved. Just two months earlier, the House had ignored Williams’s objections and voted fifty-seven to forty-six to include an exception for Cabinet members in the House’s version of this bill. *Id.* at 73. The next day, the House voted seventy-seven to eighty-one to reject Williams’s subsequent amendment to delete this exception. *Id.* at 94. Lastly, just the day before the House finally accepted Representative Williams’s amendment, it rejected it

The conference committee on the Act attempted to resolve this disagreement by drafting compromise language. This language dropped the Senate's exception for cabinet members, substituting a proviso stating that cabinet members "shall hold their offices . . . for and during the term of the President by whom they may have been appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate."<sup>456</sup> Senator John Sherman, head of the Senate conferees and the author of the compromise language, specifically informed the Senate that "its language is so framed as not to apply to the present President" and that "it would not prevent the present President from removing the Secretary of War, the Secretary of the Navy, and the Secretary of State."<sup>457</sup> On the basis of this understanding, the Senate passed the conference report by a wide margin, and after the House did the same, the bill was sent to President Johnson for his consideration.<sup>458</sup>

The cabinet, having been convened by Johnson to advise him on the bill, unanimously believed that the bill was unconstitutional and recommended that the President veto it.<sup>459</sup> Johnson later noted that Secretary of War Stanton's "condemnation of the law was the most elaborate and emphatic"; Stanton cited constitutional provisions, congressional debates, Supreme Court decisions and consistent historical practice for the proposition that the Constitution vests the removal power in the president.<sup>460</sup> The strength of Stanton's opinion and his mastery of the issues led the ever-crafty Johnson to ask him to draft the veto message, but pleading physical infirmity, Stanton demurred, and the message was actually drafted by Secretary of State Seward with Stanton's help.<sup>461</sup>

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by a vote of seventy-six to seventy-eight. *Id.* at 943. Only after a colleague successfully moved to reconsider this initial rejection did Representative Williams finally see his amendment actually pass. *Id.* at 969.

456. *Id.* at 1340 (House); *id.* at 1514 (Senate). The conference report was endorsed by all the conferees except Senator Buckalew. *See id.* at 1514-15.

457. *Id.* at 1516.

458. The House voted 111 to 41 in favor of the conference report. *Id.* at 1340. The Senate adopted the conference report by a vote of 22 to 10. *Id.* at 1518.

459. DEWITT, *supra* note 370, at 202; REHNQUIST, *supra* note 309, at 210. Johnson mentioned the Cabinet's unanimous belief in the Act's unconstitutionality several times. *See* Andrew Johnson, Message to the Senate (Dec. 12, 1867), in 5 MESSAGES & PAPERS, *supra* note 57, at 3781, 3785 [hereinafter Johnson, Stanton Suspension]; Andrew Johnson, Message to the Senate (Feb. 22, 1868), in 5 MESSAGES & PAPERS, *supra* note 57, *supra* note 59, at 3820, 3823, 3825 [hereinafter Johnson, Senate Resolution Protest].

460. Johnson, Stanton Suspension, *supra* note 459, at 3785.

461. DEWITT, *supra* note 370, at 202-03; REHNQUIST, *supra* note 309, at 210. *See* Andrew Johnson, Veto Message to the Senate (Mar. 2, 1867), in 5 MESSAGES & PAPERS, *supra* note 57, at 3690 [hereinafter Tenure of Office Act Veto]. *See also* CASTEL, *supra* note 392, at 113 (stating that "Seward and Stanton's collaboration produced a veto

The Veto Message relied heavily on the fact that since 1789, it had been the unbroken practice of both Congress and the president to construe the Constitution as conferring the removal power on the president, much as this article has suggested. The Message stated: “That the power of removal is constitutionally vested in the President of the United States is a principle which has been not more distinctly declared by judicial authority and judicial commentators than it has been uniformly practiced upon by the legislative and executive departments of the government.”<sup>462</sup> Johnson noted that the Decision of 1789 had settled the constitutional basis of the president’s power to remove and that this resolution had thereafter been accepted by both the Supreme Court and learned legal commentators.<sup>463</sup> Thus “[a] trial of nearly eighty years, through the vicissitudes of foreign conflicts and of civil war” and a renewed challenge during the administration of Andrew Jackson had proven the propriety of the Decision of 1789.<sup>464</sup>

Johnson also defended his veto on structural grounds:

It can not be doubted that the triumphant success of the Constitution is due to the wonderful wisdom with which the functions of government were distributed between the three principal departments—the legislative, the executive, and the judicial—and to the fidelity with which each has confined itself or been confined . . . within its peculiar and proper sphere.<sup>465</sup>

Since the preservation of such a system depended on “maintain[ing] the integrity of each of the three great departments while preserving harmony among them all,” it was “indispensable” that the executive branch be “capable . . . of executing the laws and, within the sphere of executive action, of preserving, protecting, and defending the Constitution of the United States.”<sup>466</sup> Johnson therefore concluded:

Having at an early period accepted the Constitution in regard to the Executive office in the sense in which it was interpreted with the concurrence of its founders, I have found no sufficient grounds in

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message filled with arguments and precedents that convinced most constitutional observers then (and since) that the tenure bill was a rape of presidential powers”). Hans Trefousse, however, has suggested that Stanton’s support for the veto was insincere and that President Johnson, aware of this duplicity, only asked Stanton to write the veto message to embarrass him. TREFOUSSE, *supra* note 402, at 79.

462. Johnson, Tenure of Office Act Veto, *supra* note 461, at 3691.

463. *Id.* at 3693-95.

464. *Id.* at 3693, 3695.

465. *Id.* at 3695.

466. *Id.* at 3695-96.

the arguments now opposed to that construction or in any assumed necessity of the times for changing those opinions.<sup>467</sup>

Notwithstanding these objections, Congress summarily overrode Johnson's veto, and the Tenure of Office Act became law.<sup>468</sup>

The conflict between the legislative and executive branches over the Tenure of Office Act reached full boil when Johnson removed Stanton as Secretary of War. A holdover from the Lincoln administration who had stayed on long after the other Republican cabinet members had resigned in protest of Johnson's policies, Stanton had close ties to many of the Republicans in Congress and often acted as their spy.<sup>469</sup> Given the War Department's central role in Reconstruction, Johnson could not long tolerate Stanton's Republican and congressional sympathies.<sup>470</sup> After a series of events underscored Stanton's estrangement from the administration,<sup>471</sup> Johnson

467. *Id.* at 3696. Johnson also criticized the Tenure of Office Act in his Third Annual Message, in which he declared:

The President may be thoroughly convinced that an officer is incapable, dishonest, or unfaithful to the Constitution, but under [the Tenure of Office Act] the utmost he can do is to complain to the Senate and ask the privilege of supplying his place with a better man . . . . I am entirely persuaded that under such a rule the President cannot perform the great duty assigned to him of seeing the laws faithfully executed.

Andrew Johnson, Third Annual Message (Dec. 3, 1867), in 5 MESSAGES & PAPERS, *supra* note 57, at 3756, 3767-68. The effect of such a system would be "that official malfeasance should become bold in proportion as the delinquents learn to think themselves safe," which would "almost destroy . . . official accountability" and "disable [the President] most especially from enforcing that rigid accountability which is necessary to the due execution of the . . . laws." *Id.* at 3767-68. Moreover, the Senate was institutionally poorly suited to judge removals, since unlike the President, who was "responsible to the whole people," the Senate is "a tribunal whose members are . . . responsible . . . to separate constituent bodies." *Id.* at 3768. Johnson concluded:

Therefore it was that the framers of the Constitution left the power of removal unrestricted, while they gave the Senate a right to reject all appointments which in its opinion were not fit to be made. A little reflection on this subject will probably satisfy all who have the good of the country at heart that our best course is to take the Constitution for our guide, walk in the path marked out by the founders of the Republic, and obey the rules made sacred by the observance of our great predecessors.

*Id.* at 3769.

468. The House voted 133 to 37 to override the president's veto. CONG. GLOBE, 39th Cong., 2d Sess. 1739 (1867). The Senate vote was 35 to 11. *Id.* at 1966. During March of 1867, while this controversy boiled, Secretary of State Seward found time to buy Alaska from the Russians. CASTEL, *supra* note 392, at 120-21.

469. REHNQUIST, *supra* note 309, at 212; TREFOUSSE, *supra* note 402, at 36, 78.

470. BERGER, *supra* note 407, at 270-71; CORWIN, *supra* note 293, at 24.

471. Johnson specifically pointed to Stanton's opposition to Johnson's vetoes of the D.C. suffrage bill and the Reconstruction Acts and his failure to inform Johnson about the August 30, 1866 riots in New Orleans. Johnson, Stanton Suspension, *supra* note 459, at 3787-90; *see also* MANTELL, *supra* note 428, at 81; REHNQUIST, *supra* note 309, at 212; TREFOUSSE, *supra* note 402, at 79. As further evidence of the falling out between Johnson

suspended Stanton on August 12, 1867, and appointed Grant as interim secretary.<sup>472</sup> “It is a tribute to Grant’s diplomatic skill—a trait with which he is seldom credited—that he was able to push Reconstruction and at the same time maintain amicable relations with the president.”<sup>473</sup>

Stanton surrendered the office only grudgingly:

Under a sense of public duty I am compelled to deny your right under the Constitution and laws of the United States, without the advice and consent of the Senate and without any legal cause, to suspend me from office as Secretary of War . . . . But inasmuch as the General Commanding the armies of the United States has been appointed *ad interim*, and has notified me that he has accepted the appointment, I have no alternative but to submit, under protest, to superior force.<sup>474</sup>

Although there was considerable doubt whether the Tenure of Office Act was constitutional and whether the Act even applied to Stanton, the President nonetheless complied with its requirements, submitting the reasons for Stanton’s suspension to the Senate immediately after it resumed session in December, along with an extended message renewing his attack on the Tenure of Office Act as an unconstitutional infringement on the unitary power of the executive.<sup>475</sup> As Johnson maintained:

[T]he President is the responsible head of the Administration, and

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and Stanton, historians have also pointed to Stanton’s differences with the President over statehood for Nebraska and Colorado, TREFOUSSE, *supra* note 402, at 79, as well as his failure to inform Johnson of Mary Suratt’s petition for clemency before she was executed for conspiring in Lincoln’s assassination. *Id.* at 81; NOEL B. GERSON, *THE TRIAL OF ANDREW JOHNSON* 84 (1977).

472. The suspension message was terse:

Sir: By virtue of the power and authority vested in me as President by the Constitution and laws of the United States, you are hereby suspended from office as Secretary of War, and will cease to exercise any and all functions pertaining to the same. You will at once transfer to General Ulysses S. Grant, who has this day been authorized and empowered to act as Secretary of War *ad interim*, all records, books, and other property now in your custody and charge.

Letter from Andrew Johnson to Edwin M. Stanton (Aug. 12, 1867), *reprinted in* Johnson, Stanton Suspension, *supra* note 459, at 3781. *See generally* BENEDICT, *supra* note 435, at 96-98; CASTEL, *supra* note 392, at 132-37; MANTELL, *supra* note 428, at 81; TREFOUSSE, *supra* note 402, at 80-81.

473. SMITH, *supra* note 416, at 435.

474. Letter from Edwin M. Stanton to Andrew Johnson (Aug. 12, 1867), *reprinted in* Johnson, Stanton Suspension, *supra* note 459, at 3782.

475. Johnson justified his suspension of Stanton on non-constitutional grounds as well, noting that it was far from clear that the statute by its own terms even applied to the current members of the cabinet. As Johnson observed, at that time “it seemed to be taken for granted that as to those members of the cabinet who had been appointed by Mr. Lincoln their tenure of office was not fixed by the provisions of the act.” Johnson, Stanton Suspension, *supra* note 459, at 3785.

when the opinions of a head of Department are irreconcilably opposed to those of the President in grave matters of policy and administration there is but one result which can solve the difficulty, and that is a severance of the official relation.<sup>476</sup>

Because “[i]t is the President upon whom the Constitution devolves, as head of the executive department, the duty to see that the laws are faithfully executed,” the president must be “allowed to select his agents” and “ought to be left as free as possible in the matter of selection and of dismissal.”<sup>477</sup> Any other rule would “reverse the just order of administration and . . . place the subordinate over the superior.”<sup>478</sup>

At the same time he suspended Stanton and temporarily replaced him with Grant, Johnson also took a series of removal actions to undercut congressional Reconstruction policies by replacing the most radical of the military governors with more conservative generals.<sup>479</sup> This tactic proved to be very effective. “Stung by the reaction in the South, Senate Republicans recognized that Johnson, by deft use of his appointing authority, was on the verge of overturning Reconstruction.”<sup>480</sup> Despite his decisive actions, Johnson was put on the defensive when Congress assembled in December, with much talk of his being impeached and temporarily suspended from acting as president. Jean Edward Smith reports that Johnson was determined to find out where the army stood on this:

More precisely, where did the general in chief stand? To find out, Johnson called on Grant at the War Department. By now, Grant had come to detest Johnson, but his duty was clear. He told the president he would resist any effort to depose or arrest him prior to the conclusion of an impeachment trial. The constitutional process would be protected. Grant then took it upon himself to inform

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476. *Id.* at 3787.

477. *Id.* at 3790.

478. *Id.*; see also HYMAN & WIECEK, *supra* note 293, at 451, 453.

479. Johnson began on August 17, 1867 by recalling General Philip H. Sheridan, an avowed Radical, from his post as military governor of Texas and Louisiana, replacing him first with General George H. Thomas and later with Winfield S. Hancock, one of the most conservative generals in the army. Two weeks later, he replaced General Daniel Sickles, another well-known Radical, as military governor of the Carolinas. Johnson finally finished his housecleaning in December, when he removed General John Pope as military governor of Alabama, Georgia, and Florida, and General Edward O.C. Ord as military governor of Mississippi and Arkansas. CASTEL, *supra* note 392, at 139-42; TREFOUSSE, *supra* note 402, at 82, 116; HYMAN & WIECEK, *supra* note 293, at 452; MANTELL, *supra* note 428, at 36, 75; STAMPP, *supra* note 428, at 148-49.

480. SMITH, *supra* note 416, at 445.

congressional Republicans of his view.<sup>481</sup>

At that point, the efforts by Thaddeus Stevens to suspend Johnson were thwarted.

The Senate eventually responded sharply to Johnson's actions, declining to approve Stanton's removal by a vote of thirty-five to six on January 13, 1868, although many senators abstained because they did not believe that the Tenure of Office Act applied to Stanton.<sup>482</sup> To Johnson's dismay, Grant vacated the Department of War after the Senate vote; Johnson had wanted him to stay there to precipitate a judicial determination of the Act's constitutionality.<sup>483</sup> Johnson was convinced that if he could just get the Tenure of Office Act dispute into the courts, he would win.<sup>484</sup> Johnson and Grant quarreled publicly, and Grant essentially called the President a liar who had set out to defame Grant's character.<sup>485</sup> Stanton resumed his position in the War Department despite physical and financial problems, because he believed that his influence was needed to combat the President and to protect democracy.<sup>486</sup>

Despite this setback, Johnson remained determined to get rid of Stanton. Ignoring his advisers' warnings, Johnson removed Stanton from office on February 21, 1868,<sup>487</sup> appointing Adjutant General

481. *Id.* at 444.

482. S. EXEC. J., 40th Cong., 2d Sess. 129-30 (1868); *see also* MANTELL, *supra* note 428, at 83; REHNQUIST, *supra* note 309, at 215; TREFOUSSE, *supra* note 402, at 123; BENEDICT, *supra* note 435, at 98-99 (noting the abstentions of Senators Sherman, Grimes, Henderson, Ross, Sprague, and Van Winkle).

483. MANTELL, *supra* note 428, at 82-83; TREFOUSSE, *supra* note 402, at 125-26. Historians have suggested that Grant wavered in his resolve to give Johnson the court challenge he desired because of the potential fines and imprisonment he faced for violating the Tenure of Office Act. Johnson's contention that he suspended Stanton under his constitutional powers rather than under the Tenure of Office Act was undercut by his forwarding of his reasons for the suspension to the Senate in compliance with the Act. *See* BENEDICT, *supra* note 435, at 97-98; HYMAN & WIECEK, *supra* note 293, at 453.

484. CASTEL, *supra* note 392, at 169.

485. SMITH, *supra* note 416, at 451.

486. *Id.* at 223.

487. The removal message was as terse as the previous suspension message:

On the 12th day of August, 1867, by virtue of the power and authority vested in the President by the Constitution and laws of the United States, I suspended Edwin M. Stanton from the office of Secretary War. In further exercise of the power and authority so vested in the President, I have this day removed Mr. Stanton from office and designated the Adjutant-General of the Army to act as Secretary of War *ad interim*.

Andrew Johnson, Message to the Senate (Feb. 21, 1868), in 5 MESSAGES & PAPERS, *supra* note 57, at 3819; *see also* STAMPP, *supra* note 428, at 150; TREFOUSSE, *supra* note 402, at 133 (noting that Attorney General Stanbery, among others, strongly urged against Stanton's removal and that Johnson did not consult with his cabinet before acting).



Lorenzo Thomas as interim secretary.<sup>488</sup> This time the high-spirited Stanton refused to recognize the President's action, swearing out a complaint for Thomas's arrest and barricading himself inside the War Department.<sup>489</sup> The stakes for the Radical Republicans were high, for if Johnson were able to name an anti-Reconstruction Secretary of War, "[i]t would mean the loss of their power in the South and eventually in the nation."<sup>490</sup>

Congressional Republicans used the president's defiance to rally their supporters. Senator Charles Sumner sent a one-word telegram to Stanton, advising him, "Stick," while other senators went to the War Department to encourage Stanton to defy the order.<sup>491</sup> "At Stanton's urgent request Grant stationed extra troops at the War Department; in addition, Senator Chandler and Representative John A. Logan posted over one hundred volunteers in the basement of that building."<sup>492</sup> Meanwhile, the Senate voted twenty-eight to six in favor of a resolution declaring "[t]hat under the Constitution and laws of the United States the President has no power to remove the Secretary of War and designate any other officer to perform the duties of that office *ad interim*."<sup>493</sup> Johnson responded the following day with a

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488. Thomas was hardly Johnson's first choice. Johnson appointed Thomas only after General William T. Sherman rebuffed Johnson's attempt to prepare him for the position by establishing a new Army of the Atlantic, headquartered in Washington, D.C. and under Sherman's command, and by nominating him for a promotion to General of the Army. Sherman's reluctance at becoming embroiled in politics led him to ask his brother, Senator John Sherman, to oppose his nomination. Disappointed, Johnson relented. BENEDICT, *supra* note 435, at 99-100; HYMAN & WIECEK, *supra* note 293, at 455; MANTELL, *supra* note 428, at 85; TREFOUSSE, *supra* note 402, at 128. Johnson also approached John Potts, chief clerk of the War Department, as a possible interim Secretary, but Potts refused. TREFOUSSE, *supra* note 402, at 132.

489. DEWITT, *supra* note 370, at 350-52, 356; STAMPP, *supra* note 428, at 150; TREFOUSSE, *supra* note 402, at 133, 135-36. Thomas ended up being a poor choice as interim Secretary of War. Described as "old, garrulous, and vainglorious" and having "no influence with the army," Thomas celebrated his elevation by attending a masked ball, at which he offered an inebriated boast that he would oust Stanton by force if necessary. A comical situation developed when Thomas, after being arrested and making bail, confronted Stanton at the War Department. The two exchanged requests for the other to leave, after which a hungover Thomas complained that he had had nothing to eat or drink all morning. After drinking shots of whiskey together, Thomas admonished Stanton, "The next time you have me arrested, please do not do it before I get something to eat." Thomas then retreated, leaving Stanton in possession of the War Department. DEWITT, *supra* note 370, at 354-56; TREFOUSSE, *supra* note 402, at 136.

490. CASTEL, *supra* note 392, at 156.

491. BENEDICT, *supra* note 435, at 101-02; DEWITT, *supra* note 370, at 347; TREFOUSSE, *supra* note 402, at 134.

492. CASTEL, *supra* note 392, at 176; *see also* SMITH, *supra* note 416, at 453.

493. The resolution is reprinted in Johnson, Senate Resolution Protest, *supra* note 459, at 3820, and I TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES ON IMPEACHMENT BY THE HOUSE OF

protest against the Senate's resolution, complaining that the Decision of 1789 had determined that Congress had no right to interfere with the president's constitutional power of removal. He said:

The uniform practice from the beginning of the Government, as established by every President who has exercised the office, and the decisions of the Supreme Court of the United States have settled the question in favor of the power of the President to remove all officers excepting a class holding appointments of a judicial character. No practice nor any decision has ever excepted a Secretary of War from this general power of the President to make removals from office.<sup>494</sup>

The Senate was disinclined to listen to such arguments, however, and Johnson's words fell on deaf ears.

In the House, Thaddeus Stevens rallied the president's opposition with the cry, "If you don't kill the beast, it will kill you."<sup>495</sup> The House immediately commenced impeachment proceedings against Johnson, adopting on February 24, in a strict party vote of 126 to 47, a resolution stating "[t]hat Andrew Johnson, President of the United States, be impeached of high crimes and misdemeanors in office."<sup>496</sup> The House subsequently adopted eleven somewhat impenetrable articles of impeachment on March 2 and March 3, 1868, although the fact that Congress chose first to impeach and later to decide the grounds for impeachment boded ill for how well those charges would stand up to legal scrutiny.<sup>497</sup> Although the President was also accused of "bringing Congress into disrepute and failing to carry out the Reconstruction Acts,"<sup>498</sup> the primary charges focused on Johnson's alleged violation of the Tenure of Office Act by removing Stanton.<sup>499</sup> The House appointed Stevens, John A. Bingham, George S. Boutwell, Benjamin F. Butler, John A. Logan, Thomas Williams of

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REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 156-57 (1868); *see also* BENEDICT, *supra* note 435, at 102-03; LABOVITZ, *supra* note 428, at 57; REHNQUIST, *supra* note 309, at 145, 216; TREFOUSSE, *supra* note 402, at 135. Many Republicans abstained from this vote perhaps in an attempt to discourage impeachment proceedings. BENEDICT, *supra* note 435, at 103.

494. Johnson, Senate Resolution Protest, *supra* note 459, at 3820.

495. TREFOUSSE, *supra* note 402, at 135.

496. CONG. GLOBE, 40th Cong., 2d Sess. 1400 (1868); *see also* HYMAN & WIECEK, *supra* note 293, at 456; MANTELL, *supra* note 428, at 87; REHNQUIST, *supra* note 309, at 217; TREFOUSSE, *supra* note 402, at 137.

497. *See* STAMPP, *supra* note 428, at 150.

498. TREFOUSSE, *supra* note 402, at 130.

499. CONG. GLOBE, 40th Cong., 2d Sess. 1612-18, 1642 (1868); *see also* HYMAN & WIECEK, *supra* note 293, at 456; LABOVITZ, *supra* note 428, at 58-62; REHNQUIST, *supra* note 309, at 218; STAMPP, *supra* note 428, at 150; TREFOUSSE, *supra* note 402, at 138-39.

Pennsylvania, and James F. Wilson as managers.<sup>500</sup> The President, for his part, selected a distinguished array of counsel for his defense, including Attorney General Henry Stanbery, who resigned in order to represent the Johnson; former Supreme Court Justice and *Dred Scott* dissenter Benjamin R. Curtis; future Attorney General and Secretary of State William M. Evarts; and war Democrats Thomas A.R. Nelson and William S. Groesbeck.<sup>501</sup> The trial was on. General in Chief Grant, who had done so much to uphold congressional Reconstruction when Johnson was trying to kill it, came out in favor of impeachment and removal.<sup>502</sup>

After a drawn out trial in which grand and petty politics played as important a role as legal principles,<sup>503</sup> Johnson was acquitted by a single vote.<sup>504</sup> The following day, Stanton resigned as Secretary of

500. CONG. GLOBE, 40th Cong., 2d Sess. 1618-19 (1868). Bingham was selected as chairman, but not without intrigue. Initially, Stevens was tapped to chair the committee with Butler replacing him when Stevens's illness prevented him from so acting. Bingham was incensed, shouting "I'll be damned if I serve under Butler." When the committee turned to Boutwell as chair, Bingham again threatened to quit the committee and finally succeeded in being named chairman. BENEDICT, *supra* note 435, at 113-14.

501. See 1 TRIAL OF ANDREW JOHNSON, *supra* note 493, at 18-19 (1868). Groesbeck joined the president's defense team only after former Attorney General Jeremiah S. Black withdrew. See HYMAN & WIECEK, *supra* note 293, at 457; MANTELL, *supra* note 428, at 89; REHNQUIST, *supra* note 309, at 222, 225; TREFOUSSE, *supra* note 402, at 150.

502. Smith notes:

Grant supported conviction because (among other things) he thought Johnson created too much turbulence in his wake. Writing to his old friend Charles Ford, the general allowed as how he thought the president's removal would "give peace to the country." . . . But it was Senator John B. Henderson of Missouri to whom Grant may have confided his deepest reason. Riding alongside Henderson on a streetcar shortly before the vote, Grant said, "I would impeach him because he is such an infernal liar."

SMITH, *supra* note 416, at 454; see also CASTEL, *supra* note 392, at 191 (describing how Grant urged Senators Trumbull, Fessenden, Henderson, and Frederick T. Frelinghuysen of New Jersey—all swing Senators—to vote guilty).

503. The range of conflicts of interest involved in Johnson's impeachment trial was staggering. One of the triers of Johnson's impeachment, Senator Patterson of Tennessee, was in fact Johnson's son-in-law, while Senator Peleg Sprague was the son-in-law of Chief Justice (and presidential hopeful) Chase, who presided over the impeachment trial. Moreover, the fact that Johnson's impeachment would have elevated Senate President *pro tempore* Ben Wade made a number of Senators hesitant to convict Johnson, some objecting to Wade's policies and others objecting out of personal enmity. The rivalry between Wade and Chase also may have had an impact on the trial, as Chase would have gone to great lengths to avoid doing anything which would inure to the benefit of Wade. House Manager Benjamin Butler had long resented Grant's having removed him from his generalship and reportedly attempted to manipulate the trial's timing in order to frustrate Grant's candidacy for president. And finally, Managers Boutwell and Bingham feuded throughout the trial, inhibiting the prosecution from the beginning. See generally BENEDICT, *supra* note 435, at 126-43 (describing the political atmosphere of the impeachment trial); TREFOUSSE, *supra* note 402, at 175-79 (noting the discomfort with Wade and its effects on the trial).

504. In the end, the Senate voted on only three of the articles. In each article, the Senate

War. Johnson nominated in his place General John M. Schofield, a well-known moderate whose name had been mentioned as Stanton's likely successor during the impeachment trial to allay the concerns of certain senators about Johnson's intentions should he be acquitted.<sup>505</sup>

In the aftermath of the impeachment, both houses of Congress launched investigations into its failure, but neither uncovered anything substantial.<sup>506</sup> The Senate exacted a measure of revenge on Stanbery, refusing to reconfirm him as attorney general for his defense of the President, although the Senate did relent in confirming Evarts as attorney general.<sup>507</sup> In the summer of 1868, the Fourteenth Amendment was declared ratified, even though "Johnson had Seward word the July 20 announcement . . . in such a way as to cast doubt on the legality of the ratifying process."<sup>508</sup>

After failing to receive the Democratic presidential nomination in 1868 and registering one final challenge to the Tenure of Office Act,<sup>509</sup> Johnson returned to his home in Tennessee. Strikingly, Johnson and Grant refused to ride together in the same carriage to

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exonerated the President by a vote of thirty-five to nineteen, one vote shy of the necessary two-thirds majority. The Senate subsequently adjourned *sine die* without voting on the other articles. CASTEL, *supra* note 392, at 192-93.

Divining the constitutional significance of Johnson's acquittal is further complicated by the myriad rationales underlying particular Senators' votes. While some Senators based their decision on the Constitution, it is clear that others based their decision on statutory grounds. Moreover, other Senators admittedly ignored the evidence and the legal principles and openly based their votes on purely political considerations. See BENEDICT, *supra* note 435, at 110, 126, 140, 152-57, 178-79; May, *supra* note 243, at 915-18.

Much has been made concerning the closeness of the vote and the courage of the so-called "recusants"—the Republican Senators who voted for acquittal. See, e.g., BENEDICT, *supra* note 435, at 181 (citing JOHN F. KENNEDY, PROFILES IN COURAGE 126-51 (1956)). However, the vote may not have been as close as it seemed; as many as four senators may have stood ready to switch their votes if needed to acquit the president. TREFOUSSE, *supra* note 402, at 169. Furthermore, the Republicans' disapprobation towards the recusants was short lived. See, e.g., BENEDICT, *supra* note 435, at 181-83 (citing Ralph J. Roske, *The Seven Martyrs?*, 64 AM. HIST. REV. 323, 323-30 (1959)); TREFOUSSE, *supra* note 402, at 167 (citing Roske, *supra*).

505. MANTELL, *supra* note 428, at 100.

506. *Id.*; REHNQUIST, *supra* note 309, at 240; TREFOUSSE, *supra* note 402, at 169-70.

507. MANTELL, *supra* note 428, at 100; TREFOUSSE, *supra* note 402, at 172.

508. CASTEL, *supra* note 392, at 205-06.

509. In his Fourth Annual Message, Johnson complained:

Under the influence of party passion and sectional prejudice . . . acts have been passed not warranted by the Constitution . . . . Experience has proved that [the Tenure of Office Act's] repeal is demanded by the best interests of the country, and that while it remains in force the President can not enjoin that rigid accountability of public officers so essential to an honest and efficient execution of the laws. Its revocation would enable the executive department to exercise the power of appointment and removal in accordance with the original design of the Federal Constitution.

Johnson, Fourth Annual Message, *supra* note 542, at 3871. Johnson also called for the repeal of the Army Appropriations Act rider. *Id.* at 3871-72.

Grant's inauguration ceremony, marking only the third time in American history that a president has declined to attend the inauguration of his successor.<sup>510</sup> Although Johnson was unsuccessful in his bids for the Senate in 1871 and the House in 1872, he once again won election to the Senate in 1874. News of his election caused a stir and *The Nation* "stated that Johnson's 'personal integrity was beyond question' and that his 'respect for the law and Constitution [had] made his Administration a remarkable contrast to that which succeeded it.'"<sup>511</sup> After making one last speech criticizing Grant for constitutional violations of federalism, Johnson died on July 31, 1875.<sup>512</sup> He left "having contributed to keeping the South a 'white man's country' for several more generations. For this reason, from his point of view and considering his prejudices, his administration wasn't wholly unsuccessful."<sup>513</sup>

There can be no doubt about Johnson's constitutional position with respect to the unitary executive. Johnson repeatedly and correctly condemned both the Tenure of Office Act and the Army Appropriations rider as improper invasions of the unitary executive, marking an abrupt end to whatever limited acquiescence in a non-unitary vision of the executive branch had begun during the Lincoln administration. Johnson prevailed in his battle with Congress, although by but a single vote. But even had politics prevailed and Johnson been impeached of this unjustifiable charge, it would not alter the significance of Johnson's opposition for the purposes of coordinate construction. Johnson merely becomes a link in the chain of presidents throughout this period who generally opposed almost all congressionally-imposed infringements upon their prerogatives. Admittedly, Lincoln remained silent in the face of a few limited intrusions on his authority. Yet because these presidents generally took vigorous steps to protect the unitary power of the executive branch, minor deviations fail to undercut any inference of acquiescence. Therefore, when the conduct of all the chief executives of this period is taken as a whole, the leaders' commitment to the unitary executive is clear.

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510. CASTEL, *supra* note 392, at 211; SMITH, *supra* note 416, at 466.

511. CASTEL, *supra* note 392, at 216.

512. See BENEDICT, *supra* note 435, at 183; DEWITT, *supra* note 370, at 627-28; GERSON, *supra* note 471, at 144-45.

513. TREFOUSSE, *supra* note 402, at 130.

## IV. THE UNITARY EXECUTIVE DURING THE GILDED AGE, 1869-1889

The impeachment of Andrew Johnson and the passage of the Tenure of Office Act led directly to a weakened presidency during the period between 1869 and 1889. The presidents in office during those years were hampered by a Congress that had gotten quite used to functioning as the government itself during the heady years of the Johnson presidency. Presidents Ulysses S. Grant, Rutherford B. Hayes, James A. Garfield, Chester A. Arthur, and Grover Cleveland fought back, and the Tenure of Office Act was ultimately repealed during the first Cleveland administration. This marks a great victory for the theory of the unitary executive and demarcates the period between 1869 and 1889 as one during which presidents refused to acquiesce in non-unitary constructions of presidential power. The history of this period begins with the presidency of Ulysses S. Grant.

A. *Ulysses S. Grant*

Ulysses S. Grant was the only president to serve eight consecutive years in the White House between the terms of Andrew Jackson and Woodrow Wilson. He became president after having served as General in Chief for the entire Johnson administration, a position which allowed Grant to play a major administrative role in determining the course of Reconstruction. Indeed, it could be said that after Abraham Lincoln was shot in the waning days of the Civil War, it was Grant who held things together, received the surrender of the Confederate forces, demobilized the Union army, and presided over Reconstruction.

Grant's initial presidential election in 1868 against the frail and colorless Horatio Seymour, ex-Governor of New York, was a rout. Americans greeted Grant's replacement of the annoying and controversial Andrew Johnson with great relief.<sup>514</sup> They were thrilled to see that Grant arrived in office owing nothing to the political powers of the day and being deeply familiar with the issues of domestic policy from his years as Andrew Johnson's chief military officer.<sup>515</sup> In a real show of independence, President-elect Grant went about picking his initial cabinet totally on his own and in secret, "in the same methodical way" he had planned his military campaigns.<sup>516</sup>

Grant immediately differentiated himself from Andrew Johnson by

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514. SMITH, *supra* note 416, at 461.

515. *Id.* at 464.

516. *Id.* at 465.

pledging in his inaugural address, “I will always express my views to Congress, and when I think it advisable, will exercise the constitutional privilege of interposing a veto. *But all laws will be faithfully executed whether they meet my approval or not.*”<sup>517</sup> There would be no massive failure to ensure faithful execution of the law under Grant as there had been under Johnson.

Grant’s first cabinet picks were very promising. Grant selected Hamilton Fish as Secretary of State, George Boutwell as Secretary of the Treasury, and Ebenezer Rockwood Hoar as Attorney General, all of whom served with great distinction.<sup>518</sup> His initial picks for Secretary of the Interior and the Postmaster General were also well received, and he surprised people by graciously appointing former Confederate General James Longstreet to be Surveyor of Customs of the port of New Orleans.<sup>519</sup> Grant also stunned the nation by picking a full-blooded Seneca Indian, Ely S. Parker, as his first commissioner of Indian affairs.<sup>520</sup> Succeeding in revolutionizing the government’s Indian policy, Grant emphasized peace with the Indians and appointed Quakers and religious figures to deal with Indian matters.<sup>521</sup> Given Grant’s later problems with Gilded Age corruption, it is worth emphasizing that his initial cabinet picks were all superb; they were his own men with no links or debts to party bosses.<sup>522</sup>

Grant’s first big fight with Congress was to come over repeal of the infamous Tenure of Office Act, the statute that had nearly wrecked Andrew Johnson’s presidency. In some ways, it is surprising and striking that Grant started out his administration with this fight over presidential prerogatives. Grant on occasion expressed limited views of presidential power, asserting that the president was an

517. *Id.* at 467 (emphasis added).

518. *Id.* at 468-72.

519. *See id.* at 472, 522.

520. *Id.* at 472-73.

521. *Id.* at 473, 526-27; GEOFFREY PERRET, ULYSSES S. GRANT: SOLDIER & PRESIDENT 423-25 (1997).

522. PERRET, *supra* note 521, at 381. After his retirement, while traveling around the world with a journalist, a chastened Grant admitted that the president could not always appoint his own men but had to defer sometimes to Congress. Grant said:

An Executive must consider Congress . . . It has become the habit of Congressmen to share with the Executive in the responsibility of appointments . . . It is simply a custom that has grown up, a fact that cannot be ignored. The President very rarely appoints, he merely registers the appointments of members of Congress. In a country as vast as ours the advice of Congressmen as to persons to be appointed is useful, and generally for the best interests of the country.

LEONARD D. WHITE, THE REPUBLICAN ERA: 1869-1901, at 24 (1958) (quoting 2 JOHN RUSSELL YOUNG, AROUND THE WORLD WITH GENERAL GRANT 265-66 (1879)).

“administrative officer” who was, “except on rare occasions[,] disposed to accept without question the work of Congress as the authoritative expression of the will of the American people.”<sup>523</sup> Some in Congress might have hoped that the hero of Appomattox would meekly accept whatever limitations on his power Congress cared to enact. But Grant was no pushover, and he fully and vigorously defended the unitary power of the executive. Ultimately supported by an opinion by his Attorney General affirming his authority to review the decisions of his subordinates,<sup>524</sup> Grant asserted his authority over his department heads, in one case overruling a decision made by the Secretary of the Interior.<sup>525</sup>

Furthermore, Grant wasted no time at all in criticizing the Tenure of Office Act. In his first annual message, Grant challenged the Act’s constitutionality, averring that “[i]t could not have been the intention of the framers of the Constitution, when providing that appointments made by the President should receive the consent of the Senate, that the latter should have the power to retain in office persons placed there by Federal appointment against the will of the President.” Noting further that the Act was “inconsistent with a faithful and efficient administration of the Government,” Grant took the occasion “to earnestly recommend [its] total repeal.”<sup>526</sup>

Grant’s biographer Jean Edward Smith notes:

Eighteen sixty-nine was a time of legislative supremacy in the United States, and America’s solons were reluctant to surrender the power they had wrested from the executive. The Republicans had used the [Tenure of Office Act] to thwart Johnson’s power to remove subordinates and it was now a matter of senatorial prerogative. When Grant indicated that he wanted the statute repealed, the Senate leadership circled the wagons. On March 2, the next-to-the-last day of Johnson’s term, the upper house voted down a bill to repeal the act, 35-15. Two thirds [sic] of the Senate served notice it had no intention of yielding its authority. “I wish to leave the President-elect free to the full and useful exercise of the

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523. See BINKLEY, *supra* note 70, at 159; WHITE, *supra* note 522, at 23.

524. See 15 Op. Att’y Gen. 94, 104 (1876). Earlier opinions authored by Attorney General George H. Williams accepted the position asserted by Wirt that the power of direction did not apply to the decisions of accounting officers. 14 Op. Att’y Gen. 104 (1872); 14 Op. Att’y Gen. 65 (1872).

525. Cross, *supra* note 311, at 489 n.31 (citing MARY BURKE HINSDALE, A HISTORY OF THE PRESIDENT’S CABINET 324 (1911)).

526. Ulysses S. Grant, First Annual Message (Dec. 6, 1869), in 5 MESSAGES & PAPERS, *supra* note 57, at 3981, 3992; see also FISHER, *supra* note 293, at 57; 2 GOLDSMITH, *supra* note 20, at 1100; WHITE, *supra* note 522, at 29; Fisher, *supra* note 375, at 72; Warren, *supra* note 246, at 24.



good judgment and good qualities which we all ascribe to him,” said New York’s Roscoe Conkling. “At the same time, I wish . . . to preserve the position which the Senate has maintained in the last and most dire emergency known in our jurisprudence.”<sup>527</sup>

Most incoming presidents of the United States faced with a two-thirds majority of the Senate opposed to a policy priority might give up, but not Grant. To add some muscle to his request, Grant threatened not to make any additional nominations until Congress had acted on the matter.<sup>528</sup> As Jean Smith writes:

When the new Congress convened following Grant’s inauguration, another effort was made to repeal the statute. Led by Congressman Benjamin Butler of Massachusetts, now one of Grant’s staunchest supporters, the House voted overwhelmingly in early March to overturn the act. Once again the Senate balked. Grant responded by announcing that until the law was repealed he would enforce it vigorously. He would not remove any of Johnson’s appointees and would only fill offices that were vacant. The effect of the president’s announcement was to deny Congress the spoils it was expecting. There would be no new postmasters, pension clerks, or customs collectors until the Senate acted. Grant was scarcely the political babe in the woods sometimes depicted. By halting patronage appointments the president was using the one weapon the senators understood. Even Roscoe Conkling now suggested compromise.<sup>529</sup>

The Senate reluctantly approved compromise legislation permitting the president to suspend any executive officer during the recess of the Senate without providing his reasons to the Senate, so long as the president informed the Senate of any such suspensions. The suspension, however, would not be fully effective until the Senate confirmed the president’s choice of a successor.<sup>530</sup> This meant that the president could remove an official simply by nominating and getting confirmation for a successor. “Grant was satisfied. Rather than fight a protracted struggle for total repeal of the Tenure of Office Act, he signed the new measure on April 6.”<sup>531</sup> Partial repeal of the infamous Tenure of Office Act thus became one of the very first new laws

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527. SMITH, *supra* note 416, at 479. Other prominent opponents included Senator Charles Sumner. *Id.* at 504.

528. 2 GOLDSMITH, *supra* note 20, at 1100.

529. SMITH, *supra* note 416, at 479.

530. Act of Apr. 5, 1869, ch. 10, § 2, 16 Stat. 6, 7. See generally BINKLEY, *supra* note 70, at 192; 2 GOLDSMITH, *supra* note 20, at 1101-05; WHITE, *supra* note 522, at 29-30; TUGWELL, *supra* note 7, at 208; Fisher, *supra* note 375, at 72.

531. SMITH, *supra* note 416, at 480.

enacted under the leadership of the Grant administration. Henry Adams was to note prophetically, however, that “[t]he mere repeal of the Tenure-of-Office Bill cannot at once restore its [presidential] prestige, or wrest from Congress the initiative which Congress is now accustomed to exercise. The Senate has no idea of abandoning its control of power.”<sup>532</sup>

Grant’s strong objections to the Tenure of Office Act represent an incredibly important assertion of the president’s sole authority to execute the laws. But sadly, Grant’s record with regard to the unitary executive was not completely consistent. Somewhat curiously, Grant failed to maintain his commitment to the principles of the unitary executive when Congress enacted statutes modeled on the Tenure of Office Act requiring Senate consent for removals of deputy postmasters.<sup>533</sup> These statutes were to be declared unconstitutional by the Supreme Court in *Myers v. United States*,<sup>534</sup> the landmark case on the unitary executive. Perhaps Grant thought that deputy postmasters were not policymaking officials and so the theory of the unitary executive did not apply.<sup>535</sup> Or maybe he just had other, bigger battles to fight. The fairest interpretation, given Grant’s record, is that his administration took no consistent position, either in favor of or opposed to total presidential control of the removal power.

Grant made a brief effort to effect civil service reform. With Grant’s encouragement, Congress passed a bill in 1871 establishing a Civil Service Commission to which Grant named the illustrious editor of the *Chicago Tribune*, Joseph Medill. Grant tried to put civil service reform in place, but Congress cut off all appropriation for the matter and reform died until 1883, when the Pendleton Act was finally passed.<sup>536</sup>

In other areas of public policy, Grant was vigorous, able, and

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532. WHITE, *supra* note 522, at 24-25.

533. Act of June 8, 1872, ch. 335, § 2, 17 Stat. 283, 284; Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80-81; *see also* FISHER, *supra* note 293, at 57; PEPPER, *supra* note 375, at 121; REHNQUIST, *supra* note 309, at 259; SMALL, *supra* note 311, at 136 n.45; Fisher, *supra* note 375, at 73.

534. 272 U.S. 52 (1926).

535. The theory of the unitary executive requires that the president be able to remove any *policymaking official* in the executive branch. It does not apply to civil service officers who merely carry out policies made by others. This is the key insight underlying the Supreme Court’s decision in *Kendall*. *See supra* notes 28-45 and accompanying text. It is also why the nation’s civil service laws, which date back to the Arthur administration, do not violate the theory of the unitary executive. *See infra* notes 712-714 and accompanying text.

536. *Id.* at 587-89. On the enactment of the Pendleton Act, *see infra* notes 689-691, 699-715 and accompanying text.

thoroughly in charge, just as he been as a general. Grant personally broke Jay Gould's and Jim Fisk's effort to corner the gold market on Black Friday, September 24, 1869, by decisively directing his Treasury Secretary to sell government gold as soon as Grant learned of what Gould and Fisk were doing.<sup>537</sup> "Grant's role was decisive . . . [He personally] had given the crucial order."<sup>538</sup>

In the area of foreign policy, Grant worked with his exceptional Secretary of State, Hamilton Fish, who would remain with him for all eight years of his presidency, to conclude the Treaty of Washington with Great Britain. "Grant's role in American diplomacy was not unlike that of Eisenhower almost a century later. Both . . . delegated day-to-day operations to their secretary of state. Yet both made the final decisions and set the course."<sup>539</sup> Striving to make peace with the Indians, Grant again behaved like Eisenhower, who, as a former general, was able to make peace in Korea.<sup>540</sup> Grant's empathy with African-Americans in the South specifically carried over to the Indians,<sup>541</sup> and Grant persisted with his peace policy until George Custer's defeat at the Battle of Little Big Horn in 1876 made the policy unsustainable.

Grant ultimately delegated matters regarding the Indians to his secretaries of the interior and his commissioners of Indian affairs. Grant's military style of delegation in all matters of governance was hailed by former General Rutherford Hayes, who noted Grant's emphasis on officer accountability, saying "Grant's leadership and rule is beyond question."<sup>542</sup> Senator John Sherman complained that Grant "regarded [the] heads of departments as mere subordinates" and lamented that "the limitation of the power of the President [over cabinet members] is one that an army officer, accustomed to give or receive orders, finds difficult to understand and observe when elected President."<sup>543</sup>

Grant's leadership style also led him to delegate authority over Reconstruction to his attorneys general and secretaries of war, who were a mixed bunch. Three of Grant's Attorneys General—Rockwood Hoar, Amos T. Akerman, and Alphonso Taft—were

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537. SMITH, *supra* note 416, at 481-90.

538. *Id.* at 489.

539. *Id.* at 515.

540. *Id.* at 520.

541. *Id.* at 528.

542. *Id.* at 522.

543. *Id.*

superb, with Akerman being the best. Akerman undertook to protect the freedmen with gusto, and as one historian put it, “no attorney general before or since ‘has been more vigorous in the prosecution of cases designed to protect the lives and rights of black Americans.’”<sup>544</sup> Attorneys General George Williams, who left office in a scandal, and Edward Pierrepont, who refused to protect African-Americans in the South, were much more problematic. Fortunately for Reconstruction, Grant took a special personal interest in the fate of the freedmen, and he began his tenure by working “mightily to secure adoption of the Fifteenth Amendment,”<sup>545</sup> which was proposed by Congress on February 27, 1869 and ratified on March 30, 1870.

Unfortunately, the South responded to the Fifteenth Amendment with a wave of violence—directed by the Ku Klux Klan—targeted at the freed slaves. Grant responded immediately, and in May 1870, Congress passed the first of three Enforcement Acts to counter terrorist violence. In June 1870, Grant brought Akerman to Washington to fight the Klan, and Congress took the momentous step of establishing a Department of Justice on the same level as other cabinet departments.<sup>546</sup> Previously, the attorney general had been a one-man operation and simply served as an advisor to the president. By creating a full scale Justice Department with numerous lawyers and for the first time a Solicitor General—the famous Benjamin Bristow—the Grant administration greatly enhanced the president’s ability to take care that the laws be faithfully executed. The creation of the Department of Justice was a major step in protecting presidential prerogatives and in enhancing the unitariness of the executive,<sup>547</sup> although it would take some time before the Department was able to consolidate its control over the enforcement of the federal law.<sup>548</sup> Henceforth, Justice Department staff lawyers would be able to supervise “the work of the United States attorneys and federal

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544. *Id.* at 542.

545. *Id.* at 543.

546. Act of June 22, 1870, ch. 150, 16 Stat. 162; *see also* SMITH, *supra* note 416, at 544.

547. *See* Bell, *supra* note 223, at 1053 (noting that Congress created the Justice Department “‘for the purpose of having a unity of decision, a unity of jurisprudence . . . in the executive law of the United States’” and because of “‘the need to insure that the federal government spoke with one voice in its view of and adherence to the law’” (quoting CONG. GLOBE, 41st Cong., 2d Sess. 3036 (1870) (statement of Sen. Jenckes))).

548. *See* CUMMINGS & MCFARLAND, *supra* note 223, at 486-520 (describing the gradual evolution of the Justice Department’s role in centralizing execution of the law); Bell, *supra* note 223, at 1054-57 (same).

marshals throughout the country.”<sup>549</sup>

The team of Akerman and Bristow quickly racked up a very impressive record in battling the Ku Klux Klan, securing nearly one thousand indictments in the early 1870s, of which fifty-five percent ended in convictions.<sup>550</sup> Congress passed a second Enforcement Act in 1871, and Grant fought vigorously to prevent the Klan from, in effect, reversing the decision at Appomattox.<sup>551</sup> Grant suspended the writ of habeas corpus in nine lawless counties of South Carolina and sent military reinforcements to that state. Akerman “gave full credit to the president. No one, he told a friend, was ‘better’ or ‘stronger’ than Grant when it came to enforcing anti-terrorist measures.”<sup>552</sup> By the end of his administration, “Grant stood watch over the South almost alone. His cabinet was uninterested, [General in Chief William T.] Sherman was dubious, the Supreme Court had eviscerated the Fourteenth and Fifteenth Amendments, and the public was more interested in reconciliation than Reconstruction.”<sup>553</sup> Grant said, in retrospect, that the South should have been kept under military rule longer.<sup>554</sup> The problem was that “the best chance of forcing fundamental change on the South was in the immediate aftermath of the war. Johnson had wasted that opportunity and, as so often in politics, once the initial impetus has passed from an attempted reform, it is virtually impossible to regenerate it.”<sup>555</sup> When the nation repudiated Reconstruction in 1876, “Grant’s reputation suffered severely.”<sup>556</sup>

In the re-election campaign of 1872, Grant was opposed by liberal Republican Horace Greeley, who was also endorsed by the Democrats. “Grant’s treatment of the South became the central issue of the campaign,”<sup>557</sup> and he was re-elected with fifty-six percent of the popular vote. The highpoint of Grant’s presidency came in 1872, and as “happened with Franklin Roosevelt after his landslide win in 1936 and Ronald Reagan during his second term, hubris led to mistakes, and mistakes to poor administration, corruption, and

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549. SMITH, *supra* note 416, at 544.

550. *Id.* at 545.

551. *Id.* at 546.

552. *Id.* at 547.

553. *Id.* at 571.

554. *Id.*

555. PERRET, *supra* note 521, at 388.

556. SMITH, *supra* note 416, at 568.

557. *Id.* at 549.

scandal.”<sup>558</sup> Unfortunately and inexcusably, “Grant sat back benignly while administration officials shamelessly exploited their positions for personal gain.”<sup>559</sup>

Geoffrey Perret ably summarizes Grant’s scandal problem when he reports that “[f]ew people ever thought [Grant] was personally on the take. On the contrary, Grant is often portrayed as a gullible, naive man far out of his depth, taken advantage of by people a lot smarter and greedier than he was.”<sup>560</sup> The Credit Mobilier Affair erupted, and stained the government’s reputation, although all the scandalous transactions occurred before Grant became president.<sup>561</sup> Congress meanwhile made a sordid effort to raise its pay retroactively, which hurt its standing with the public.<sup>562</sup> Two second-term cabinet secretaries, William Richardson at Treasury and George Williams at Justice, resigned in scandal,<sup>563</sup> and throughout it all “Grant’s loyalty to his appointees went beyond prudence.”<sup>564</sup> By November of 1874, the Democrats recaptured the House of Representatives and gained ten seats in the Senate.<sup>565</sup> Grant responded to his critics in his annual message to Congress, pledging that so long as he remained president, “all the laws of Congress and the provision of the Constitution . . . will be enforced with rigor.”<sup>566</sup>

Another highlight of Grant’s second term was the elevation of the exceptionally able reformer Benjamin Bristow as Secretary of the Treasury. Bristow, who was very ambitious and who sought the presidency in 1876, used his office to bust up the Whiskey Ring—a corrupt conspiracy with tentacles reaching to Orville Babcock, one of Grant’s closest aides. Grant broke with Bristow and unwisely defended Babcock, who was guilty. The episode tarred Grant’s reputation as he left office. More scandals erupted, this time involving Interior Secretary Columbus Delano<sup>567</sup> and Secretary of War William Belknap.<sup>568</sup> Although he greatly liked Belknap, whom he had known

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558. *Id.* at 552.

559. *Id.*

560. PERRET, *supra* note 521, at 433.

561. SMITH, *supra* note 416, at 552-53.

562. *Id.* at 553.

563. *Id.* at 554.

564. *Id.*; *see also id.* at 561.

565. *Id.* at 565.

566. Ulysses S. Grant, Sixth Annual Message, in 6 MESSAGES & PAPERS, *supra* note 57, at 4238, 4253.

567. SMITH, *supra* note 416, at 586-87.

568. *Id.* at 593-95.

since his army days, Grant saw his obligation to ensure that the laws were faithfully enforced, and he ordered the attorney general to launch a criminal investigation of his own cabinet members.<sup>569</sup>

Grant's final test as president came with the disputed presidential election of 1876, during which he remained calm and nonpartisan. "He comes up to the mark so grandly on great occasions" wrote Rockwood Hoar, Grant's first attorney general, "that I wish he were more careful of appearances in smaller matters."<sup>570</sup> In February 1877, as the crisis reached its peak, "Grant's calm visage in the White House reassured the nation. His reputation for firmness, his evenhandedness during the crisis, his personal honesty and respect for the law, plus his known determination to maintain the peace, contributed to a lessening of tension."<sup>571</sup> Michael Les Benedict reports that Grant's "reputation . . . rebounded strongly as he remained calm and resolute [during the crisis of 1876, and as he] made clear that he wouldn't tolerate violence, nor would he use force to install Republican candidate Rutherford B. Hayes."<sup>572</sup> In a series of informal conversations during late February, Hayes's men agreed to end Reconstruction and withdraw the army from the South to smooth the way for Hayes's peaceful inauguration. Grant had nothing to do with any of this. "Having wrestled with the South for sixteen years, he recognized his obligation to leave the matter to his successor."<sup>573</sup>

Several features of the Grant administration were a triumph for the unitary executive. In particular, the partial repeal of the Tenure of Office Act and the creation for the first time in American history of a Department of Justice were big victories. Also, Grant's vigor in taking care to enforce the civil rights laws in the South deserves note and differentiates him from Andrew Johnson, his disgraced predecessor. Finally, Grant's supervision of policy in many fields, including foreign affairs, civil service reform, and Indian policy, bespeak a commitment to mastering the details of his presidential duties. In our judgment, Grant is a wrongly maligned president; though he made some significant mistakes, some of which led to scandals, Grant got the big questions of his day right. His reputation has wrongly suffered because of his failed efforts to make

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569. *Id.* at 595.

570. *Id.* at 600.

571. *Id.* at 603.

572. Michael Les Benedict, *Grant, in TO THE BEST OF MY ABILITY*, *supra* note 329, at 138.

573. SMITH, *supra* note 416, at 604.

Reconstruction work one hundred years ahead of its time.

*B. Rutherford B. Hayes*

Rutherford B. Hayes was a strong-willed man who made a determined effort, under exceptionally difficult circumstances, to bolster presidential power. Hayes became president in 1877, after the Democrats had captured the House of Representatives in the 1874 mid-term elections and maintained control in the elections of 1876. The power of the Republican Party was at low point by 1876 because of the economic depression resulting from the Panic of 1873,<sup>574</sup> because of the scandals in the second Grant administration, and because of public ennui with Republicans after sixteen years of their rule. This ebbing of the tide of Republican power was reflected in the presidential election of 1876, in which Hayes decisively lost the popular vote contest to Democrat Samuel Tilden.<sup>575</sup> Yet Tilden was left one vote short of victory in the Electoral College, receiving 184 electoral votes to Hayes's 166, with nineteen votes from Southern states in dispute.<sup>576</sup> To resolve the contest, a special Electoral Commission of fifteen senators, representatives, and Supreme Court justices was appointed with eight Republican members and seven Democrats.<sup>577</sup> By a straight, party-line vote, the Commission eventually gave all nineteen disputed electoral votes and the presidency to Hayes. The Democratically-controlled House revolted and refused to approve the results. Hayes finally broke the deadlock by offering to withdraw all federal troops from the South and to end Reconstruction in return for Democratic support for his election. The House Democrats acceded to this "Corrupt Bargain," and Hayes assumed office.<sup>578</sup>

After the Electoral Commission awarded him the presidency, Hayes set about picking a cabinet, and astonishingly under the circumstances, resolved to do this completely independent of Congress.<sup>579</sup> Hayes also decided not to offer cabinet positions to those

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574. James A. Rawley, *Rutherford B. Hayes*, in *TO THE BEST OF MY ABILITY*, *supra* note 329, at 141.

575. Tilden won a quarter of a million more popular votes than Hayes. See MICHAEL J. GLENNON, *WHEN NO MAJORITY RULES: THE ELECTORAL COLLEGE AND PRESIDENTIAL SUCCESSION* 16 (1992).

576. *Id.*

577. William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 *J. LEGIS.* 145, 156-57 (1996).

578. See *id.*; GLENNON, *supra* note 575, at 16-17.

579. Rawley, *supra* note 574, at 51-52.



who had competed with him for the Republican presidential “nomination, to their satellites, or to members of Grant’s cabinet.”<sup>580</sup> He asked the able Senator John Sherman to be Secretary of the Treasury and the superb lawyer William Evarts to be Secretary of State. Leading Republican civil service reformer Carl Schurz got the Interior Department, and Southerner David Key was appointed Postmaster General to appease Southern Democrats still seething over the disputed presidential election.<sup>581</sup> As Leonard White reports, “Powerful Senators had expected to be consulted. They were not.”<sup>582</sup> White further notes:

The Senate oligarchy promptly accepted the challenge, declined to confirm as a matter of courtesy, and sent the nominations to committees, not even excepting their fellow Senator, John Sherman. A storm of public indignation swept across the country and shortly thereafter the Senate confirmed all the nominations. “For the first time since the Civil War,” [historian Wilfred] Binkley wrote, “the Senate had been vanquished on a clear-cut issue between it and the President. The upper House had passed its zenith.”<sup>583</sup>

Hayes thus came into office with a striking show of independence and pro-reform sentiment. He was off to a good start.

Hayes’s inaugural address called for the South to have “wise, honest, and peaceful local self-government,”<sup>584</sup> a euphemism for withdrawing federal troops and abandoning the rights of African-Americans. He also called for “thorough, radical, and complete” civil service reform.<sup>585</sup> The address, coupled with his cabinet appointments and the fact he was not Grant, led to “[s]upport from the educated and cultivated elite who thought of itself as ‘the best people.’”<sup>586</sup> Abandoning African-Americans in the South did not bother James Russell Lowell, Henry Wadsworth Longfellow, Charles W. Eliot, Francis James Child, and Charles Eliot Norton, who all wrote the President to express their approval for the course he had set.<sup>587</sup>

Hayes’s practice as president was untrue to his Whig origins, as “he moved away from the Whig ideal of a weak president who would be

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580. *Id.* at 51.

581. *Id.* at 51-52.

582. WHITE, *supra* note 522, at 32.

583. *Id.*

584. ARI HOOGENBOOM, THE PRESIDENCY OF RUTHERFORD B. HAYES 53 (1988).

585. *Id.*

586. *Id.* at 57.

587. *Id.*

subservient to Congress, deferential to his cabinet, and would allow virtual autonomy to heads of departments.”<sup>588</sup> Historian Ari Hoogenboom writes:

Hayes identified with John Quincy Adams in his struggles with Congress, his patronage policies, and his desire to use national power to foster education. Hayes, however, was a much better politician than Adams. By working hard at being president and by fighting a number of battles with Congress, Hayes would reverse the ascendancy of Congress, the independence of cabinet members, and the decline of the presidency.<sup>589</sup>

Hayes relied on and trusted his cabinet, meeting with them twice a week, for two hours each time, and daily during crises. Everything—big and small—was discussed at these cabinet meetings, but “Hayes made the decisions, and on occasion he imposed his will upon reluctant department heads, including Sherman, Evarts, and Schurz, who were the strongest cabinet members.”<sup>590</sup>

From the start of his administration, in March 1877, Hayes confronted the question of what to do about faithfully executing the laws in the South. He thought the federal troops who were then upholding Republican governments in South Carolina and Louisiana were counterproductive.<sup>591</sup> Hoogenboom writes, “Attracted to a policy that would woo conservative Southerners, Hayes became willing, if need be, to abandon white carpetbaggers and scalawags. He rationalized that their corrupt course had forfeited their claims on the Republican party and the federal government for protection . . . .”<sup>592</sup> Hayes urged education for the freed African-Americans, but Congress would never appropriate funds for this purpose. Moreover, Hayes dreamed of governing the South with a new coalition of resurrected white Southern Whigs and freed African-Americans.

The key decision was whether to leave federal troops in place. Hayes’s hands in this regard were tied by the Democratic House of Representatives, which was refusing to appropriate money to keep the army in the South.<sup>593</sup> Rather than fight with the House, as Hayes successfully did on other occasions, he capitulated. At a cabinet meeting on March 22, 1877, Hayes confirmed his intention to pull the

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588. *Id.* at 59.

589. *Id.*

590. *Id.*

591. *Id.* at 60.

592. *Id.* at 61.

593. *See id.* at 57.

federal troops out of South Carolina.<sup>594</sup> By late April, Hayes was also withdrawing federal troops from Louisiana, and as soon as the forces had departed, the Democrats took over the Statehouse.<sup>595</sup> Democrats argued to white Southerners that Hayes deserved no credit for doing something they had made him do, and Hayes failed to receive desired support from white former-Whigs in the South.<sup>596</sup> Former Attorney General Amos T. Akerman “observed that Hayes’s course amounted to combating ‘lawlessness by letting the lawless have their own way.’”<sup>597</sup> William Lloyd Garrison and Benjamin Wade denounced Hayes’s new Southern policy, but Hayes felt constrained by the Democratic House’s refusal to make military appropriations.<sup>598</sup> Beacon Hill patricians had fewer qualms about the shift. In June 1877, Hayes received an honorary Doctor of Laws degree from Harvard, where Oliver Wendell Holmes published a poem hailing him as a “Healer of Strife!”<sup>599</sup>

The Hayes administration also witnessed the enactment of the Posse Comitatus Act of 1878.<sup>600</sup> This law, which remains on the books to the present day, limits the use of federal troops for ordinary law enforcement.<sup>601</sup> The Act has been interpreted to forbid “direct and active participation [of troops] in traditional civilian law enforcement, like making arrests or conducting searches.”<sup>602</sup> More “passive assistance, like providing equipment, training and advice” is allowed.<sup>603</sup> The Posse Comitatus Act reflected Democratic anger over the role federal troops played in the South during the Hayes-Tilden election, and their guarding polling places, arresting members of the Ku Klux Klan, disrupting illegal whiskey production, and putting down labor unrest.<sup>604</sup> One hundred and twenty years after its enactment, the administration of President George W. Bush was to consider asking for modification of the Posse Comitatus Act to facilitate the use of the military in anti-terrorist law enforcement

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594. *Id.* at 63.

595. *Id.* at 67.

596. *See id.* at 68.

597. *Id.* at 68.

598. *Id.* at 68-69.

599. *Id.* at 69.

600. Army Appropriation Act, ch. 263, § 15, 20 Stat. 145, 152 (1878).

601. 18 U.S.C. § 1385 (2000).

602. Adam Liptak, *Posse Comitatus Act Limits Armed Services at Home*, N.Y. TIMES, July 21, 2002, at A16.

603. *Id.*

604. *Id.*

efforts.<sup>605</sup>

Hayes hoped Southerners would honor their pledges to him that they would observe the voting rights of African-Americans, but this was not to be. Hayes's own Christian outlook blinded him to the "pervasiveness and the viciousness of racial prejudice in southern politics and society."<sup>606</sup> A good man himself, Hayes's imagination failed him when it came time to imagine how unconstrained white Southerners would behave. By the time of the mid-term elections of 1878, "Hayes candidly noted that despite solemn pledges to uphold the constitutional rights of all their citizens, South Carolina and Louisiana, by legislation, fraud, intimidation, and 'violence of the most atrocious character,' had prevented blacks from voting."<sup>607</sup> In part as a result, the Democrats took control of the Senate, in addition to retaining their control of the House of Representatives. Not surprisingly, Congress was to ignore Hayes's pleas for money to enforce the federal election laws.<sup>608</sup>

Hayes's failures with respect to sectional politics did not stop him from strongly defending and reasserting the president's sole authority over the execution of the law. In fact, Hayes soon became embroiled in two landmark battles with Congress over the unitary executive. The first of these was the extraordinary battle of wills between Hayes and the House of Representatives over federal election law that amounted to Hayes's finest moment in the White House. Southerners in control of the House tried repeatedly to repeal Reconstruction-era legislation that authorized the president to use federal troops to protect the rights of black voters.<sup>609</sup> The Democrats attempted to accomplish this objective by attaching riders to unrelated appropriations bills.<sup>610</sup> Hayes anticipated the attack, and was fully set and determined to preserve both the civil rights laws and presidential prerogatives. White reports that Hayes wrote in his diary on March 18, 1879:

An important struggle then begins. The Democrats will attempt coercion of the President to secure a repeal of legislation which I deem wise and important. This is to place the Executive "under the coercive dictation" of a bare majority of the two Houses of Congress . . . . It is a "measure of coercion", a revolutionary

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605. See Editorial, *Misusing the Military*, N.Y. TIMES, July 24, 2002, at A18.

606. HOOGENBOOM, *supra* note 584, at 70.

607. *Id.* at 72.

608. *Id.* at 73.

609. See *id.* at 74-75.

610. Rawley, *supra* note 574, at 143.

measure . . . . No precedent shall be established with my consent to a measure which is tantamount to coercion of the Executive.<sup>611</sup>

If riders repealing the test oath and prohibiting the use of federal troops at elections were attached, Hayes wrote “that he would not even consider the merits of the bills so presented.”<sup>612</sup> James Rawley describes what followed:

On April 29, 1879, an outraged Hayes vetoed an army appropriations measure carrying such a rider. A month later, the Democrats passed a bill prohibiting federal troops from serving as peacekeepers at polls unless requested to do so by a state. Hayes hurled back another successful veto. In all, Congress passed seven such bills, five saddled with riders repealing the elections laws and two designed to circumvent them. With his seven vetoes, Hayes fulfilled his oath to enforce the nation’s laws and moreover increased unity within the Republican party as members rallied to his support.<sup>613</sup>

Hayes objected to the use of the riders as an unconstitutional attempt to force his hand on repeal of the so-called Force or Enforcement Acts.<sup>614</sup> The Democrats were in a quandary as it gradually became clear that “Hayes’s vetoes were strengthening him and his party . . . and had helped [the Republicans] prepare for the 1880 presidential campaign.”<sup>615</sup> Hayes was able to savor a victory over Congress, but “he knew that his southern policy had failed.”<sup>616</sup> Leonard White concludes:

[The battle over the riders] was a clean-cut victory for the President and a powerful precedent against congressional encroachment on the executive power by means of appropriations riders. The action was defensive and protective, but it was important. Congress was forced to enact the long-delayed appropriations acts without imposing its will on the President; the integrity of the veto power was sustained; and the popularity of an

611. WHITE, *supra* note 522, at 36 (quoting 3 DIARY AND LETTERS OF RUTHERFORD BIRCHARD HAYES 529 (Charles Richard Williams ed., 1924) (entry of Mar. 18, 1879)).

612. *Id.*

613. Rawley, *supra* note 574, at 143-44. This episode is also recounted in HOOGENBOOM, *supra* note 584, at 74-78, and in WHITE, *supra* note 522, at 35-39.

614. HOOGENBOOM, *supra* note 584, at 75. In one veto message Hayes wrote, “The new doctrine, if maintained, will result in a consolidation of unchecked and despotic power in the House of Representatives. A bare majority of the House will become the government. The Executive will no longer be what the framers of the Constitution intended—an equal and independent branch of the Government.” Rutherford B. Hayes, Veto Message (Apr. 29, 1879), in 6 MESSAGES & PAPERS, *supra* note 57, at 4475, 4483, quoted in WHITE, *supra* note 522, at 36.

615. HOOGENBOOM, *supra* note 584, at 77.

616. *Id.* at 78.

unpopular president was repaired.<sup>617</sup>

White observes that only “the courage and stubbornness of Hayes halted this House aggression on executive power,” and he concludes that “the House lost prestige in the battle of the riders.”<sup>618</sup>

Hayes’s clash with the House of Representatives over the appropriations riders was matched by a scuffle with the Senate over the presidential prerogatives of removal, nomination, and appointment. Hayes came into office with civil service reform and the ending of the spoils system as primary objectives.<sup>619</sup> In addition to wanting to end the congressional practice of dictating nominations to the executive, Hayes also wanted to end the practice of “assessments,” in which federal workers were asked to contribute two to seven percent of their annual salary for campaign funds. As a member of Congress, Hayes had supported legislation that would have required that those who performed best on an open competitive examination be appointed to the civil service. Now that as president, he supervised a bureaucracy of 100,000 employees, Hayes was no less eager to make civil service reform a reality.<sup>620</sup> In April 1877, shortly after taking office, Hayes had Treasury Secretary John Sherman appoint a special commission to investigate the corrupt New York Customhouse, and commissions were also appointed to investigate corruption at the Philadelphia, New Orleans, and San Francisco customhouses.<sup>621</sup> The New York Commission was headed up by John Jay, grandson of the first Chief Justice. Jay recommended sweeping changes, and Hayes ordered the reluctant Sherman to implement Jay’s recommendations.<sup>622</sup> In June 1877, Hayes issued an order prohibiting federal employees from engaging in any political activity aside from voting and public speaking.<sup>623</sup> This sweeping presidential order exacerbated the growing factionalism of the Republican Party by irritating the so-called Stalwart wing of the party, led by powerful New York Senator Roscoe Conkling, a close

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617. WHITE, *supra* note 522, at 38.

618. *Id.*

619. HOOGENBOOM, *supra* note 584, at 101.

620. *Id.* at 102-03.

621. *Id.* at 127.

622. *Id.* at 129.

623. Rutherford B. Hayes, Executive Order (June 22, 1877), in 6 MESSAGES & PAPERS, *supra* note 57, at 4402; see also Rawley, *supra* note 574, at 143. This order represented an extension of a previous order banning political assessments and campaign activity by employees of the New York Customhouse. Rutherford B. Hayes, Executive Order to John Sherman (May 26, 1877), in 6 MESSAGES & PAPERS, *supra* note 57, at 4402.

ally of former President Grant.<sup>624</sup>

Matters came to a head when Hayes sought to replace Chester A. Arthur, the collector of the New York Customhouse, and Alonzo Cornell, the naval officer of the New York Customhouse, both key Conkling allies. When Arthur and Cornell refused to resign, Hayes “sent the names of their successors to the Senate for confirmation, nominations which were greeted with derisive laughter and referred to the Committee on Commerce, of which Senator Conkling was chairman. The committee reported adversely, and the nominations were rejected.”<sup>625</sup> The Senate was fortified in taking these actions by the amended Tenure of Office Act, which of course was still in place. Hayes wrote in his diary, “I am now in a contest on the question of the right of Senators to control nominations . . . . But I am right, and will not give up the contest.”<sup>626</sup> In the summer of 1878, “Hayes summarily dismissed Arthur and Cornell, made recess appointments, and in December again sent in his nominations for these vacant posts. Conkling held up action for two months, but finally defeated himself by his unrestrained attacks on the President. The Senate voted to confirm on February 3, 1879.”<sup>627</sup> Hayes had won as big a victory over the Senate on presidential prerogatives of nomination and appointment as he was to win over the House on appropriations riders.

The key to Hayes’s victory over Conkling was his refusal to back down on the removal of Arthur and Cornell from their posts at the New York Customhouse. Hayes resolved that, no matter what the Senate did with his nominees, “In no event will the old incumbents be allowed to return to their former places, if I have power to prevent it, and as to that I am not in doubt.”<sup>628</sup> Thus armed with the removal power, Hayes reclaimed presidential control over the prerogatives of nomination and appointment. At the end of his term, Hayes described his victory in his diary as follows:

The end I have chiefly aimed at has been to break down congressional patronage, and especially Senatorial patronage. The contest has been a bitter one. It has exposed me to attack,

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624. *Id.*

625. WHITE, *supra* note 522, at 33.

626. Rawley, *supra* note 574, at 143.

627. WHITE, *supra* note 522, at 33. The triumph of Hayes over Conkling is also recounted in BINKLEY, *supra* note 70, at 169-71; 2 GOLDSMITH, *supra* note 20, at 1107-12; HARRIS, *supra* note 368, at 82-84; TUGWELL, *supra* note 7, at 212-13; Fisher, *supra* note 375, at 72-73.

628. HOOGENBOOM, *supra* note 584, at 142.

opposition, misconstruction, and the actual hatred of powerful men. But I have had great success. No member of either house now attempts even to dictate appointments. My sole right to make appointments is tacitly conceded. It has seemed to me that as Executive I could advance the reform of the civil service in no way so effectively as by rescuing the power of appointing to office from the congressional leaders. I began with selecting a Cabinet in opposition to their wishes, and I have gone on in that path steadily until now I am filling the important places of collector of the port and postmaster at Philadelphia almost without a suggestion even from Senators or Representatives!<sup>629</sup>

Hayes's removals of Arthur and Cornell would prove the exception and not the rule. Although Hayes employed his removal power to ensure that certain key positions were occupied by officials loyal to him, as a long-time supporter of civil service reform, Hayes was committed to using the removal power more sparingly than had his immediate predecessors, observing in his first annual message that he had "endeavored to reduce the number of changes in subordinate places usually made upon the change of the general administration."<sup>630</sup> Hayes regarded "congressional demands for patronage [as] not only a great evil, but also [as] a usurpation of executive prerogatives."<sup>631</sup> In general, Hayes's "reluctance to fire able civil servants" to promote political friends "marks him as the least partisan president between John Quincy Adams and Theodore Roosevelt."<sup>632</sup> The opinions of his attorneys general underscored that his reticence to remove was based on matters of policy and did not mark a deviation from the position asserted by previous presidents regarding the removal power's constitutional basis.<sup>633</sup>

In other areas of domestic policy, Hayes took several notable actions to take care that the laws be faithfully executed. In the summer of 1877, when there was great labor unrest following a railroad workers' strike, Hayes ordered federal troops to restore order in West Virginia and in Pittsburgh, "where local militiamen had sided with the strikers. Although Hayes pursued these deployments

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629. WHITE, *supra* note 522, at 34 (quoting DIARY AND LETTERS OF RUTHERFORD BIRCHARD HAYES, *supra* note 611, at 612-13 (entry of July 14, 1880)).

630. Rutherford B. Hayes, First Annual Message (Dec. 3, 1877), in 6 MESSAGES & PAPERS, *supra* note 57, at 4410, 4418; see also HARRIS, *supra* note 368, at 82; VAN RIPER, *supra* note 66, at 75.

631. WHITE, *supra* note 522, at 26.

632. HOOGENBOOM, *supra* note 584, at 144.

633. See 15 Op. Att'y Gen. 421 (1878) (concluding that the president's constitutional power to remove had been long established by the Decision of 1789 and subsequent opinions of the attorneys general).



cautiously, they nevertheless made him the first president since Andrew Jackson to use troops in a labor dispute. The mere presence of the troops quelled the violence.”<sup>634</sup> Grant was critical of Hayes for excessive caution and argued that the strike “should have been put down with a strong hand and so summarily as to prevent a like occurrence for a generation.”<sup>635</sup> Hayes also pardoned one person prosecuted for sending pornography through the mails, but he declined to pardon another victim because he did not think the pardoning power should “be used to nullify or repeal statutes, nor to overrule the judgments of the Courts.”<sup>636</sup>

Hayes asserted the president’s power to control the executive branch even more directly in his third annual message, in which he strongly attacked the notion that inferior federal officials had any executive authority which was separate and apart from that of the president.<sup>637</sup> In Hayes’s opinion, the sole responsibility of subordinate officers was to “their superior in official position.”<sup>638</sup> Hayes elaborated: “It is their duty to obey the legal instructions of those upon whom that authority is devolved, and their best public service consists in the discharge of their functions irrespective of partisan politics. Their duties are the same whatever party is in power and whatever policy prevails.”<sup>639</sup>

In order to depoliticize the process, Hayes recommended that Congress develop clear qualifications to govern the appointment and removal of lower executive officials.<sup>640</sup> But the earlier portions of Hayes’s address, quoted above, made it clear that under any such proposal, failure to follow the directions of higher-ranking executive officials must necessarily constitute proper grounds for removal. Any doubts in this regard were eliminated the following year in Hayes’s fourth annual message, in which he explicitly called for the outright repeal of the nefarious Tenure of Office Act.<sup>641</sup> In Hayes’s opinion, the president would be the sole judge of who should continue to serve

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634. Rawley, *supra* note 574, at 142; *see also* HOOGENBOOM, *supra* note 584, at 79-92; 2 GOLDSMITH, *supra* note 20, at 1136.

635. HOOGENBOOM, *supra* note 584, at 90.

636. *Id.* at 125.

637. Rutherford B. Hayes, Third Annual Message (Dec. 1, 1879) in 6 MESSAGES & PAPERS, *supra* note 57, at 4509, 4514.

638. *Id.*

639. *Id.*

640. *Id.*

641. Rutherford B. Hayes, Fourth Annual Message (Dec. 6, 1880), in 6 MESSAGES & PAPERS, *supra* note 57, at 4557; *see also* HOOGENBOOM, *supra* note 584, at 212.

in the executive branch without any interference from the Senate.

Hayes's most important action in foreign affairs came with his anticipation of the Roosevelt Corollary to the Monroe Doctrine in a special message of March 8, 1880, where he declared it was American policy to build a canal connecting the Atlantic and Pacific Oceans under American control. Like the Monroe Doctrine itself and Washington's Neutrality Proclamation, this was a major assertion of presidential power in setting national policy.<sup>642</sup> Hayes ultimately fired Navy Secretary Thompson for collaborating with a French company seeking to build such a canal.<sup>643</sup>

In his fourth and final annual message to Congress, delivered on December 8, 1880, Hayes urged Congress to investigate violations of the Fifteenth Amendment and to appropriate funds for prosecuting those who were depriving African-Americans of their voting rights.<sup>644</sup> Hayes attacked the spoils system as an unconstitutional encroachment on the president's appointment power, and, as noted above, he called for repeal of the Tenure of Office Act.<sup>645</sup>

When the 1880 election arrived, Hayes, who had declared himself in favor of one six-year, non-renewable term for the president,<sup>646</sup> was not a candidate for reelection. This was a source of relief to Republican politicians, who found Hayes's intra-party fight with Conkling and his pro-Southern policy not to their liking. Hayes had never overcome the taint of his disputed election, and his final two years in office, during which he confronted a Democratic Senate and House, had been stormy indeed. Hayes was a great president from the perspective of unitary executive theorists, but a lousy one from the perspective of Republican politicians.

In sum, Hayes rose above the circumstances of his election to become a strong president, especially when one considers that the Democrats controlled the Senate for two years of his presidency and the House for its entirety. The great disaster of Hayes's presidency was, of course, his withdrawal of federal troops from the South and the ending of Reconstruction. But in terms of restoring the power and prestige of the presidency, Hayes deserves praise. He beat the House on appropriations riders and the Senate on appointments. He also laid

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642. HOOGENBOOM, *supra* note 584, at 189-92.

643. *Id.* at 191.

644. *Id.* at 211.

645. *Id.* at 212.

646. WHITE, *supra* note 522, at 106.

the groundwork for civil service reform.

The price of restoring some presidential power that had been lost by previous administrations was high. The removal of Arthur and Cornell had monopolized the attention of the administration for nearly eighteen months. It became clear that the Senate's continued involvement in executive removals through the amended Tenure of Office Act would remain a significant obstacle to the president's control over the execution of the laws until it was repealed.

### C. James A. Garfield

James A. Garfield was elected to the House of Representatives in 1862, where he served as a Radical Republican member until his election to the presidency.<sup>647</sup> In 1868, he favored the impeachment of President Andrew Johnson.<sup>648</sup> From 1871 to 1875, Garfield was chairman of the powerful House Appropriations Committee, a post that taught him a great deal about the workings of the U.S. government.<sup>649</sup> While in the House, Garfield exhibited an unsurprising pro-Congress bias. He favored a proposal to give department heads seats in Congress in order to rein in the executive branch.<sup>650</sup> And in 1869, when Grant pushed a bill that would have repealed the Tenure of Office Act through the House of Representatives, Garfield opposed it, saying "never by my vote shall Congress give up the constitutional principle and allow to any one man, be he an angel from Heaven, the absolute and sole control of appointments to and removals from office in this country."<sup>651</sup>

At the start of the Hayes administration, the ever-fickle Garfield changed his mind about the Tenure of Office Act, which he had favored in 1869. Writing in 1877, Garfield said:

During the last twenty-five years, it has been understood, by the Congress and the people, that offices are to be obtained by the aid of senators and representatives, who thus become the dispensers, sometimes the brokers of patronage. . . . [The Tenure of Office Act] has virtually resulted in the usurpation, by the senate, of a large share of the appointing power . . . has resulted in seriously crippling the just powers of the executive, and has placed in the

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647. HOOGENBOOM, *supra* note 584, at 150.

648. JUSTUS D. DOENECKE, *THE PRESIDENCIES OF JAMES A. GARFIELD & CHESTER A. ARTHUR* 22 (1981).

649. WHITE, *supra* note 522, at 61.

650. *Id.* at 107.

651. *Id.* at 29 n.31 (quoting 1 *THE LIFE AND LETTERS OF JAMES ABRAM GARFIELD* 444 (Theodore Clark Smith ed., 1925)).

hands of senators and representatives a power most corrupt and dangerous.<sup>652</sup>

Thus by 1877, Garfield was publicly on record as opposing the Tenure of Office Act.

Garfield emerged as a dark horse choice for the 1880 Republican nomination after front-running candidates John Sherman, Ulysses S. Grant, and James G. Blaine faded. Garfield's win was attributable to the votes of followers of Sherman and Half-Breed Blaine, and consequently, the Stalwarts, led by Senator Roscoe Conkling and supporters of Grant, needed to be propitiated. Garfield accomplished this by picking Conkling's protégé, Chester A. Arthur, the corrupt former Collector of the Port of New York, to be the vice presidential candidate.<sup>653</sup> With Garfield and Arthur on a joint ticket, both the pro-reform and anti-reform wings of the Republican Party were represented. This joint representation was made necessary by the stormy battles of the Hayes presidency, which had split the Republican Party into two wings.

President-elect Garfield decided to make Blaine his Secretary of State, to Conkling's irritation, but overall he picked a cabinet that "was remarkably balanced," representing many "disparate wings of the party."<sup>654</sup> Unlike Hayes, Garfield was quite "willing to sacrifice some executive independence in cabinet making in order to secure good relations with Congress."<sup>655</sup>

As president, the ever-malleable Garfield was besieged by office seekers.<sup>656</sup> He wrote in his journal: "My day is frittered away by the personal seeking of people, when it ought to be given to the great problems which concern the whole country. Four years of this kind of intellectual dissipation may cripple me for the remainder of my life."<sup>657</sup> On June 6, 1881, Garfield wrote in his diary that after an absence of three days, "[t]he stream of callers which was damned up

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652. James A. Garfield, *A Century of Progress*, 40 ATL. MONTHLY 61 (1877), reprinted in 2 THE WORKS OF JAMES ABRAM GARFIELD 463, 483 (Burke A. Hinsdale ed., 1883); see also REHNQUIST, *supra* note 309, at 259; WHITE, *supra* note 522, at 32; Richard Harmond, *The Presidency in the Gilded Age: From Rutherford B. Hayes to William McKinley*, in POWER AND THE PRESIDENCY 53, 56 (Philip C. Dolce & George H. Skau eds., 1976).

653. DOENECKE, *supra* note 648, at 21.

654. *Id.* at 35.

655. HOOGENBOOM, *supra* note 584, at 214.

656. See WHITE, *supra* note 522, at 6.

657. *Id.*

by my absence became a torrent and swept away my day.”<sup>658</sup> Two days later he noted, “My day in the office was very like its predecessors. Once or twice I felt like crying out in the agony of my soul against the greed for office and its consumption of my time.”<sup>659</sup>

While in office, Garfield sent somewhat conflicting signals about the president’s power to control the executive branch. As noted earlier, Garfield had condemned the Tenure of Office Act during Hayes’s battle with the Senate in 1877.<sup>660</sup> In his inaugural address, however, the ever-changing Garfield announced his intention to ask Congress to place substantive limits on the removal power by “prescrib[ing] the grounds upon which removals shall be made” in order to “protect[] . . . incumbents against intrigue and wrong.”<sup>661</sup> The import of this proposal was mitigated by the fact that Garfield specifically limited his proposed civil service tenure to “minor offices of the Executive Departments.” The fact that policy-making offices were not covered by Garfield’s proposal makes it consistent with the theory of the unitary executive, which calls only for unlimited presidential removal power over policy-making officials. It also renders Garfield’s inaugural address consistent with his 1877 criticisms of the Tenure of Office Act. Because Garfield’s administration was tragically cut short when he was assassinated by a frustrated office seeker, Garfield never had the chance to expound further on his views of the president’s power to control the executive branch.

Garfield was a weak president, as was his successor Chester A. Arthur. It is no accident that it was during Garfield’s and Arthur’s tenure in office that a young Woodrow Wilson was to claim that the legislative branch “has virtually taken into its hands all the substantial powers of government.”<sup>662</sup> Wilson further declared that “the President is no greater than his prerogative of veto makes him.”<sup>663</sup>

The major issue Garfield faced during his brief six months in office was civil service reform, the desire for which had been growing throughout the 1870s. By the time of his inaugural address, Garfield

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658. *Id.* at 93-94 (citing 2 THEODORE C. SMITH, LIFE AND LETTERS OF JAMES ABRAM GARFIELD 1151-52 (1925)).

659. *Id.*

660. See *supra* note 652 and accompanying text.

661. James A. Garfield, Inaugural Address (March 4, 1881), in 6 MESSAGES & PAPERS, *supra* note 57, 4596, 4601-02.

662. WOODROW WILSON, CONGRESSIONAL GOVERNMENT 49 (Meridian 1973) (1885), quoted in DOENECKE, *supra* note 648, at 12.

663. *Id.* at 173, quoted in DOENECKE, *supra* note 648, at 15.

had irritated reformers by proposing much less change than had outgoing President Hayes. Garfield proposed tenure for minor officeholders, as noted above, while Hayes came out for “uniform methods of appointment, the competitive system, the revival of the Civil Service Commission, and an end to congressional interference with executive officeholders.”<sup>664</sup> When the Star Route Affair, a scandal involving contracts to deliver the U.S. mail, broke two months into his administration and it became clear that major Republican figures were involved, to his credit Garfield told investigators, “Go ahead regardless of where and whom you hit.”<sup>665</sup> This was, however, a minor contribution in light of the overall debate about civil service reform.

The one major contribution of the all too brief Garfield administration suggests that he would have ardently defended the president’s authority over the executive branch. After Garfield was inaugurated, the Stalwart faction, led by the ubiquitous Senator Conkling, attempted to dictate Garfield’s nominations to many minor but important executive branch offices.<sup>666</sup> Garfield refused and openly defied the Stalwarts by nominating William H. Robertson, a not-so-able ally of Conkling’s chief rival as collector of the port of New York.<sup>667</sup> To Garfield, the issue was simple: “Shall the principal port of entry in which more than ninety percent of all our customs duties are collected be under the control of administration or under the local control of a factional senator?”<sup>668</sup> Garfield wrote that the Robertson nomination “brings on the contest at once and will settle the question whether the President is the registering clerk of the Senate or the Executive of the Nation. It is probable that the contest will be sharp and bitter but I prefer to have the fight ended now.”<sup>669</sup>

Conkling threw the entire weight of his political machine against Garfield, but the public sided with Garfield. On May 5, Garfield strengthened his hand by withdrawing all nominations but Robertson’s, indicating that he “considered the power and prestige of the presidency to be at stake.”<sup>670</sup> Thus compromised, Conkling and

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664. DOENECKE, *supra* note 648, at 41.

665. *Id.* at 46-47.

666. See Ari Hoogenboom, *James A. Garfield*, in *TO THE BEST OF MY ABILITY*, *supra* note 329, at 151-52.

667. DOENECKE, *supra* note 648, at 45.

668. 2 *THE LIFE AND LETTERS OF JAMES ABRAM GARFIELD*, *supra* note 651, at 1109.

669. WHITE, *supra* note 522, at 34 (quoting *GARFIELD-HINSDALE LETTERS* 489 (Mary L. Hinsdale, ed. 1949)).

670. DOENECKE, *supra* note 648, at 44.

fellow New York Senator Thomas C. Platt resigned their seats in the U.S. Senate in the hopes that the New York legislature would restore their reputations by re-electing them. Conkling's gambit backfired when the legislature declined to re-elect either of them.<sup>671</sup> Garfield's actions were hailed as a milestone in the revival of the power and prestige of the presidency, and Conkling never held public office again.<sup>672</sup>

Garfield's assassination on July 2, 1881, turned the feckless politician into a martyr for the cause of civil service reform, a cause he had supported tepidly at best while still alive. Henry Adams called the reaction of civil service reformers to Garfield's death "cynical impudence" for this reason.<sup>673</sup> Garfield's assassin Charles Guiteau, a deranged and disappointed office seeker, called out after he shot Garfield that he was a Stalwart and that now Arthur would be president.<sup>674</sup> The general reaction of the public was universal indignation over the spoils system. As Senator Henry L. Dawes was quoted as rightly saying:

" . . . the method of appointment to office in this country has got to be changed. It can be administered but little longer in the methods of the past. It has outgrown those methods adapted for an old system of things never sufficient for them; but it was never dreamt by those who created it that it would be applied to the condition of things now existing in this country. It can no longer be that 200,000 office-holders can be appointed in the methods that were fit and proper for the appointment of 1,000. Two hundred thousand in the very near future are to be appointed . . ." And again, " . . . were it not for the debauchery of this service itself the necessity of a safe administration would be so apparent that the thoughtful and earnest statesman of whatever party . . . would see that this must be changed somehow."<sup>675</sup>

Civil service reform, so long stalled, would be enacted in 1883 under the administration of Garfield's successor.<sup>676</sup>

Garfield's presidency of six months was too brief to permit many conclusions to be drawn about it, but it is noteworthy that Garfield arrived in office as a stated opponent of the Tenure of Office Act. The

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671. *Id.* at 45.

672. See generally BINKLEY, *supra* note 70, at 172-74; DOENECKE, *supra* note 648, at 42-45; TUGWELL, *supra* note 7, at 218; WHITE, *supra* note 522, at 34-35.

673. Hoogenboom, *supra* note 666, at 152.

674. *Id.*; see also DOENECKE, *supra* note 648, at 95.

675. WHITE, *supra* note 522, at 301 (quoting 13 CONG. REC. 467-68 (1882)).

676. *Id.* at 301-02.

one great struggle of his six months in office was with Roscoe Conkling, and it showed that Garfield was determined to wrest back presidential control over the appointment power from the barons of the Senate. Garfield, like Hayes, Grant, and Johnson before him, is thus justifiably regarded as a defender of the unitary executive. There was no acquiescence during Garfield's tenure in any diminution of the rightful powers of the presidency.

*D. Chester A. Arthur*

Vice President Chester A. Arthur had been placed on the Republican ticket to create sectional and ideological balance in 1880. A committed Stalwart, Arthur was to balance the more moderate Garfield, who had gained the support of Blaine's Half-Breeds. Reformer Edward L. Godkin aptly described Arthur's past associations as "a mess of filth," but he optimistically said "there is no place in which [Arthur's] powers of mischief will be as small as in the Vice Presidency."<sup>677</sup> When Arthur became president because of an assassin's bullet, reformers were terrified at the thought of Conkling being "the power behind the throne."<sup>678</sup>

Moreover, there was little in Arthur's "background to prepare him for executive leadership."<sup>679</sup> From 1871 until his dismissal in 1878, Arthur had been the spoilsman collector of the port of New York, a post in which he had been found by the Jay Commission to be notoriously corrupt.<sup>680</sup> Worst of all, Arthur's administration was hamstrung by the fact that he assumed the presidency without having been elected to it. At least two of the three previous vice presidents to succeed to the presidency, John Tyler and Andrew Johnson, endured rocky tenures in no small part because they repudiated the policies of the man whose death brought them to the White House. This was an inherent hazard in the system of picking vice presidential candidates to balance a party ticket. Arthur, to his credit, broke this pattern and behaved more like Millard Fillmore, an accidental president who continued the policies of his deceased predecessor. Stalwarts did not take over the government under Arthur. On the contrary, civil service reform passed and the President signed it into law.

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677. Bernard A. Weisberger, *Chester A. Arthur*, in *TO THE BEST OF MY ABILITY*, *supra* note 329, at 154.

678. *Id.*

679. *Id.*

680. See *supra* notes 625-629 and accompanying text.



The beginning of Arthur's administration showed great promise. Arthur at first appeared to be a good administrator, and "his conduct during the assassination crisis . . . won him public sympathy."<sup>681</sup> He began by keeping Garfield's cabinet and as he gradually replaced its members, he "did so responsibly, almost as if to prove that the Stalwarts were not bereft of talent."<sup>682</sup> The new Secretary of State was former New Jersey Senator Frederick Frelinghuysen, an improvement over Blaine; the new Secretary of the Treasury was Charles Folger, Chief Justice of the New York State Supreme Court; and the new Attorney General was Benjamin Brewster, the former state attorney general for Pennsylvania.<sup>683</sup> While Stalwart cronies were welcome at "sumptuous feasts," Arthur so frustrated their desires for patronage that Conkling was moved to complain that the Hayes administration was "'respectable, if not heroic' in comparison."<sup>684</sup> Although thousands of patronage jobs were available in the Treasury Department alone, "by the summer of 1882, only sixteen removals had been made."<sup>685</sup> Most dramatically, Arthur resisted appeals to fire Robertson from his post as collector of the port of New York.<sup>686</sup> Reacting swiftly to the Star Route scandal, Arthur ordered a series of removals growing out of the affair, and in his first annual message, he pledged to prosecute offenders "with the utmost vigor of the law."<sup>687</sup> Doenecke notes, "As a man Arthur may have been saddened to see his cronies indicted, but as president he wholeheartedly supported the prosecuting attorneys."<sup>688</sup>

In this same message, Arthur also endorsed civil service reforms that would include "ascertained fitness" for positions, stable tenure of office, and prompt investigation of abuses.<sup>689</sup> He pledged to support any civil service reform bill that Congress might pass, and asked for an appropriation of \$25,000 to reactivate President Grant's Civil Service Commission.<sup>690</sup> Ohio Democrat George Hunt Pendleton had a civil service reform bill pending, but Congress was initially quite

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681. DOENECKE, *supra* note 648, at 75.

682. *Id.*

683. *Id.*

684. *Id.* at 76.

685. *Id.*

686. *Id.*

687. Chester A. Arthur, First Annual Message (Dec. 6, 1881), in 6 MESSAGES & PAPERS, *supra* note 57, at 4624, 4640; *see also* DOENECKE, *supra* note 648, at 93.

688. DOENECKE, *supra* note 648, at 93.

689. Arthur, First Annual Message *supra* note 687, at 4647.

690. *Id.* at 4650.

opposed to such reform and appropriated only \$15,000 for the revival of the Civil Service Commission. Harvard president Charles W. Eliot, poet Henry Wadsworth Longfellow, psychologist William James, and author Brooks Adams signed petitions supporting the proposal, but at first, nothing happened.<sup>691</sup>

Over time, however, Arthur began to show his true colors. He was essentially a lazy man whose “apathy toward administrative tasks was in almost inverse ratio to his love of high living. As a White House clerk later commented, ‘President Arthur never did today what could be put off until tomorrow.’”<sup>692</sup> He worked six hours a day, from ten in the morning until four in the afternoon, “after which he pursued the life of a bon vivant.”<sup>693</sup> “Twice a week, at noon, he met with his cabinet.”<sup>694</sup> Arthur’s bad relations with the press were exacerbated by the scathing coverage given to a speech at Delmonico’s Restaurant, where he drunkenly confessed to knowledge of vote purchasing in Indiana.<sup>695</sup> To top all of this off, Arthur suffered from very poor health and was essentially dying during his tenure as president. He suffered from Bright’s disease, a fatal kidney disorder that “leads to spasmodic nausea, mental depression, and inertness.”<sup>696</sup> Arthur learned of his illness in 1882, and he kept it secret from the public. It undoubtedly contributed to his lethargy as president. He eventually succumbed to the disease in 1886, shortly after leaving the White House.

Then, in the 1882 mid-term elections, the Republicans suffered a huge defeat, losing control of the House of Representatives and suffering a greatly reduced margin in the Senate. Newspapers referred to the election as a “Democratic Cyclone.”<sup>697</sup> In the words of Mrs. Henry Adams, Congress may have been behaving like “a pack of whipped boys,” but it was this electoral convulsion, more than anything else, that moved Congress to enact civil service reform.<sup>698</sup> In his second annual message, Arthur explicitly endorsed the Pendleton bill, for the first time endorsing competitive examinations and a ban

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691. DOENECKE, *supra* note 648, at 98.

692. *Id.* at 79 (quoting THOMAS C. REAVES, *GENTLEMAN BOSS: THE LIFE OF CHESTER ALAN ARTHUR* 273 (1975)).

693. Weisberger, *supra* note 677, at 79.

694. DOENECKE, *supra* note 648, at 79.

695. *Id.* at 33, 80.

696. *Id.* at 80.

697. *Id.* at 99.

698. *Id.* at 100 (quoting ARI HOOGENBOOM, *OUTLAWING THE SPOILS SYSTEM: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865-1883*, at 236 (1961)).

on political assessments.<sup>699</sup> Arthur subsequently signed the measure into law, even though he had only supported the measure “most reluctantly.”<sup>700</sup>

The Pendleton Act, as finally adopted, established a bipartisan Civil Service Commission of three members appointed by the president with senatorial consent but subject to removal by the president.<sup>701</sup> It required that open, competitive examinations be held, with appointments going to those who earned the highest grades.<sup>702</sup> It apportioned the civil service among the states equitably.<sup>703</sup> It also provided for protection of the so-called “classified service” (i.e., positions covered by civil service protections) against political assessments by explicitly providing that public servant could not be forced to contribute to political funds or be removed for failure to contribute to do so.<sup>704</sup> The Act also prohibited federal officials from soliciting political contributions from employees<sup>705</sup> and barred anyone from soliciting or receiving such contributions in any public building.<sup>706</sup> The president was given the power to extend the classified service to more employees by executive order,<sup>707</sup> a power used to great effect by President Grover Cleveland.<sup>708</sup> The end product was a model law that ended the spoils system and revolutionized the American civil service. Soon after its enactment, commentators noted a great reduction in the level of incompetence in the civil service, and the proceeds from assessments dropped by as much as half.<sup>709</sup>

During the debates on civil service reform, Arthur never clearly stated his position on the removal power. It is important to note, however, that a close reading of Arthur’s comments regarding an early version of the Pendleton Act suggests that Arthur would have opposed any congressionally imposed limits on the removal power. The bill, as reported by the Senate, was modeled on the British civil

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699. Chester A. Arthur, Second Annual Message (Dec. 4, 1882), in 6 MESSAGES & PAPERS, *supra* note 57, at 4713, 4732-34.

700. DOENECKE, *supra* note 648, at 101-02.

701. Civil Service Act of 1883, ch. 27, § 1, 22 Stat. 403, 403.

702. § 2, 22 Stat. at 403-04 (first and second clauses).

703. § 2, 22 Stat. at 404 (third clause).

704. § 2, 22 Stat. at 404 (fifth clause).

705. § 11, 22 Stat. at 406.

706. § 12, 22 Stat. at 407.

707. § 6, 22 Stat. at 406 (third clause).

708. *See infra* notes 759-760 and accompanying text.

709. DOENECKE, *supra* note 648, at 104; WHITE, *supra* note 522, at 301-02.

service system, providing for competitive examinations for entrance into the public service, security of tenure of most civil officers, and the political neutrality of the civil service.<sup>710</sup> Arthur supported the bill in principle, but complained that “there are certain features of the English system which have not generally been received with favor in this country,” which included limiting entry into the civil service to people who are no older than twenty-five and granting federal employees “[a] tenure of office which is substantially a life tenure.”<sup>711</sup> The final version of the Act incorporated several key changes to the initial legislation to address some of these concerns, making the examinations more practical in character and deleting the provision permitting entrance into the civil service only at the lowest grade. In addition, the bill left to the president the determination of which, if any, officers would be covered by the Act. The result, Arthur noted, is to limit the scope of the bill to “subordinates whose duties are purely administrative and have no legitimate connection with the any political principles.”<sup>712</sup> And most importantly for the purposes of this article, the revised act deleted all restrictions on the president’s power to remove,<sup>713</sup> thus preserving, as Arthur noted, a power essential for ensuring presidential control of all officials in policymaking and political positions.<sup>714</sup> The bill thus cured, Arthur signed it without reservation, although he would subsequently file a limited objection to its appointment provisions.<sup>715</sup> His subsequent approval of the legislation is thus fully consistent with the view that Arthur did not acquiesce in any congressionally imposed limitations on the president’s power to control the executive branch.

Arthur never specifically commented on the Tenure of Office Act during his presidency, but he preserved presidential removal power through the civil service reform battles of the early 1880s. This was no mean feat. It was not until the Lloyd-La Follette Act of 1912 that

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710. S. REP. NO. 47-576, at ix-x (1882).

711. Arthur, First Annual Message, *supra* note 687, at 4647-48.

712. Arthur, Second Annual Message, *supra* note 699, at 4733.

713. VAN RIPER, *supra* note 66, at 99-109.

714. Arthur, Second Annual Message, *supra* note 699, at 4733.

715. A month and a half after signing the Act, Arthur sent a message to the Senate objecting that the provision requiring that the chief examiner be appointed by the Commission, § 3, 22 Stat. at 404, violated Article II, section 2, of the Constitution. Arthur’s message closed by nominating Silas W. Burt as Chief Examiner. Chester A. Arthur, Message to the Senate (Mar. 1, 1883), in 6 MESSAGES & PAPERS, *supra* note 57, at 158. The Senate confirmed Burt and has thereafter acquiesced in the view that the Chief Examiner had to be appointed in accordance with Article II. See May, *supra* note 243, at 952-53 & nn.396, 971.

removal “was required to be made only to promote the efficiency of the [civil] service.”<sup>716</sup> Once appointments had to be awarded to the winner of competitive exams, there was no incentive to make partisan removals anymore. Removals thus decreased substantially of their own accord in the classified civil service.<sup>717</sup> The unitary executive was thus alive and well when Jacksonian Democrat Grover Cleveland became the first Democrat to be elected president since James Buchanan in 1856.

### E. Grover Cleveland

As President, Grover Cleveland was a significant improvement over Arthur. He was “a doughty warrior of undeviating courage”<sup>718</sup> with an admirable commitment to civil service reform. His 1884 presidential campaign is famous for its dirtiness, with the Republicans, led by Blaine, under attack for corruption, and with Cleveland under attack for allegedly having a child out of wedlock.<sup>719</sup> Cleveland called for the president to serve only a single term, a reform intended to eliminate presidential temptations to despoil the civil service.<sup>720</sup>

Cleveland pledged “public allegiance to a Whiggish version of the presidency—the chief executive restricted to administrative duties and abjuring a role in the legislative process,”<sup>721</sup>—but in his heart he was “[n]ostalgic for the Jacksonian past.”<sup>722</sup> Cleveland’s “political heroes” were Jefferson and Jackson,<sup>723</sup> and like Jackson, he believed the president, with his unique national constituency, was “the people’s tribune.”<sup>724</sup> He particularly admired Jackson’s “presidential independence and the authority of the righteous executive in contest with mischievous senators.”<sup>725</sup> Cleveland’s Jacksonian pedigree suggests his belief in the untrammelled importance of the presidential removal power. His “aggressive insistence on presidential independence led him to exercise increasing control of the executive

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716. WHITE, *supra* note 522, at 344; *see generally id.* at 340-45 (describing the evolution of protection against arbitrary removals).

717. *Id.* at 340-41.

718. RICHARD E. WELCH, JR., *THE PRESIDENCIES OF GROVER CLEVELAND* 1 (1988).

719. *Id.* at 32-36.

720. *Id.* at 35-36.

721. *Id.* at 9.

722. *Id.* at 7.

723. *Id.* at 12.

724. *Id.* at 11.

725. *Id.* at 16.

branch and then to seek influence over Congress and national legislation.”<sup>726</sup> In the end, Cleveland was to live up to his idol in protecting the presidential removal power from attempted congressional incursions. Cleveland was able to declare at the end of his first year in office that his most important contribution to the presidency would be to insist upon the independence of the executive and legislative branches.<sup>727</sup> He was accused by his critics of “monarchical arrogance,”<sup>728</sup> a charge often leveled at strong and effective presidents.

Cleveland was sworn in on March 4, 1885, and he delivered his inaugural address “from memory,” the only time this has ever happened in American history.<sup>729</sup> Cleveland was “fascinated by detail,” and he rapidly buried himself in his work putting in long days punctuated by only four to five hours of sleep a night. He generally had cabinet meetings twice a week, and he exhibited “a measure of administrative talent” with his cabinet.<sup>730</sup> He made it “understood that [his cabinet members] were his loyal lieutenants and were to avoid intramural quarrels or dissent. Cabinet officers were expected to observe the policies established by Cleveland for each executive department.”<sup>731</sup> Importantly, “in cabinet meetings everyone was encouraged to speak, *but no votes were taken*. Cleveland would listen carefully to the opinion of each cabinet officer in turn, but he alone would make the final decision on administration policy.”<sup>732</sup> Another noted historian asserts that in Cleveland’s cabinet meetings, “there were no set speeches, and no votes were taken, the President’s theory being that in a cabinet there are many voices, but one vote. Each member was free to express his views; but when the illumination of frank comment and informal discussion was over, it was the president who must make the decision.”<sup>733</sup>

The conflict between the President and Congress over control of the executive branch and the Tenure of Office Act had been brewing since the Grant administration, and it reached its climax during

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726. *Id.*; see also WHITE, *supra* note 522, at 25.

727. WELCH, *supra* note 718, at 10.

728. *Id.*

729. *Id.* at 47.

730. *Id.* at 49-50.

731. *Id.* at 50.

732. *Id.* (emphasis added).

733. WHITE, *supra* note 522, at 100 (quoting I ROBERT MCELROY, GROVER CLEVELAND: THE MAN AND THE STATESMAN 115 (1923)).

Cleveland's first term.<sup>734</sup> In his first annual message, Cleveland laid out a formalist vision of the separation of powers:

Contemplation of the grave and responsible functions assigned to the respective branches of the Government under the Constitution will disclose the partitions of power between our respective departments and their necessary independence, and also the need for the exercise of all the power intrusted [sic] to each in that spirit of comity and cooperation which is essential to the proper fulfillment of the patriotic obligations which rest upon us as faithful servants of the people.<sup>735</sup>

Consistent with this vision, Cleveland quickly asserted the authority to direct all executive officials, in one instance overruling a decision of the Secretary of the Interior.<sup>736</sup> The first Democrat elected to the White House in a quarter-century, Cleveland also suspended 643 officials during his first ten months in office. The Republican-controlled Senate attempted to force the new administration into admitting that it made these removals for partisan purposes by refusing to confirm the new appointees until Cleveland had informed it of the reasons for the removals. After three months, only 15 of the 643 nominations had been approved.<sup>737</sup> As Cleveland's biographer, Richard Welch, notes, "Senate Republicans were in a contentious mood and were determined to demonstrate the hypocrisy of Cleveland's stance as a civil service reformer. They would force him to admit that partisan animus alone dictated his appointments policy, and in the revised Tenure of Office Act they believed they had the necessary tool."<sup>738</sup>

Under the Tenure of Office Act as revised in 1869, "[n]o longer did a president have to charge officeholders with criminal misconduct before he could suspend them, and no longer would a president have to provide the Senate with 'the evidence and reasons' for his action."<sup>739</sup> The president could suspend officeholders and appoint

734. The Duskin controversy described below is recounted in Louis Fisher, *Grover Cleveland Against the Senate*, 7 CONG. STUD. 11 (1979); see also BINKLEY, *supra* note 70, at 198-99; 2 GOLDSMITH, *supra* note 20, at 1113-14; HARRIS, *supra* note 368, at 88; VAN RIPER, *supra* note 66, at 120-21; WHITE, *supra* note 522, at 30-31.

735. Grover Cleveland, First Annual Message (Dec. 8, 1885), in 6 MESSAGES & PAPERS, *supra* note 57, at 4910.

736. Cross, *supra* note 311, at 489 n.31 (citing HINSDALE, *supra* note 525, at 324).

737. BINKLEY, *supra* note 70, at 198-99; 2 GOLDSMITH, *supra* note 20, at 1113-14; HARRIS, *supra* note 368, at 88; VAN RIPER, *supra* note 66, at 120-21; Fisher, *supra* note 375, at 73; Fisher, *supra* note 735, at 13-14.

738. WELCH, *supra* note 718, at 53.

739. *Id.* at 53-54.

temporary replacements, but he would have to submit “the names of all replacements within thirty days after the Senate had reconvened.”<sup>740</sup> The revised Act lessened the obstructionist authority of the Senate, “but presidential control over the dismissal of civil officers in the executive branch was still restricted. It was the intention of the Republican senators to expand that restriction.”<sup>741</sup>

Senate Republicans “caucused and decided to refuse to confirm Cleveland’s appointments unless he produced all documents bearing on the suspension of the former officeholder, as well as the nomination of his successor.”<sup>742</sup> Cleveland saw this as an invasion of presidential prerogatives and he instructed his subordinates “not to submit any papers concerning suspensions but to continue to provide ‘official papers’ in support of nominations submitted for senatorial confirmation.”<sup>743</sup> Cleveland was determined to prevent the Senate from engaging in a fishing expedition “to publicize confidential or irrelevant communications.”<sup>744</sup>

The dispute between Cleveland and the Republican-controlled Senate came to a head over the case of Republican George M. Duskin, whom Cleveland had suspended as U.S. Attorney for the Southern District of Alabama. Cleveland nominated Democrat John D. Burnett to replace Duskin. George F. Edmunds, the crusty chairman of the Senate Judiciary Committee, believed Duskin’s suspension was the ideal test case.<sup>745</sup> On January 25, 1886, the Senate passed a resolution directing the attorney general to submit all documents relating to this suspension.

The battle was joined, and it was understood by both sides that it was a battle over more than the installation of Duskin’s successor. At stake was the President’s ability to assure the cooperation of officials who would have responsibility for executing administration policy, the proper breadth of the investigatory powers of the Senate, and the issue of presidential control over papers deposited in executive departments.<sup>746</sup>

The attorney general refused the Senate’s demand for all documents relating to the Duskin suspension, stating that the

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740. *Id.* at 54; *see supra* note 523 and accompanying text.

741. WELCH, *supra* note 718, at 54.

742. *Id.*

743. *Id.*

744. *Id.*

745. *Id.* at 54.

746. *Id.* at 54-55.



President had directed him not to comply with the resolution. When the Senate persisted with its call for the information, Cleveland responded on March 1, 1886, with a scathing message challenging the constitutionality of both the original and the revised versions of the Tenure of Office Act and denying the Senate's right to request such information. This message was targeted to the American public as well as the Republican Senate and placed its primary reliance on the text of the Constitution, declaring that "the power to remove or suspend such officials is vested in the president alone by the Constitution, which in express terms provides that 'the executive power shall be vested in a President of the United States of America,' and that 'he shall take care that the laws be faithfully executed.'"<sup>747</sup> The Senate, in contrast, "belongs to the legislative branch of the Government." Although Cleveland conceded, "the Constitution by express provision [had] superadded to its legislative duties the right to advise and consent to appointments to office and to sit as a court of impeachment," these provisions represented an "express and special grant of such extraordinary powers" which were "a departure from the general plan of our Government, [and thus] should be held, under a familiar maxim of construction, to exclude every other right of interference with Executive functions." Any doubts as to the propriety of this view, Cleveland submitted, had been resolved by "the first Congress which assembled after the adoption of the Constitution,"

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747. Grover Cleveland, Message to the Senate (Mar. 1, 1886), in 6 MESSAGES & PAPERS, *supra* note 57, at 4960, 4964 [hereinafter Cleveland, Duskin Message]. Cleveland later offered similar sentiments in his book, *Presidential Problems*:

The Constitution declares: "The executive power shall be vested in a President of the United States of America," and this is followed by a recital of the specific and distinctly declared duties with which he is charged, and the powers with which he is invested. The members of the convention were not willing, however, that the executive power which they had vested in the President should be cramped and embarrassed by any implication that a specific statement of certain granted powers and duties excluded all other executive functions; nor were they apparently willing that the claim of such exclusion should have countenance in the strict meaning which might be given to the words "executive power." Therefore we find that the Constitution supplements a recital of the specific powers and duties of the President with this impressive and conclusive additional requirement: "He shall take care that the laws be faithfully executed." This I conceive to be equivalent to a grant of all the power necessary to the performance of his duty in the faithful execution of the laws.

...  
It is therefore apparent that as the Constitution, in addition to its specification of especial duties and powers devolving upon the President, provides that "he shall take care that the laws be faithfully executed," and as this was evidently intended as a general devolution of power and imposition of obligation in respect to any condition that might arise relating to the execution of the laws . . .

GROVER CLEVELAND, *PRESIDENTIAL PROBLEMS* 14-16 (1904).

which had similarly sustained “the independence of the Executive in the matter of removals from office.”<sup>748</sup>

The Senate retaliated by considering a series of four resolutions condemning the actions of the attorney general and declaring the Senate’s refusal to act on any of Cleveland’s nominations until the requested information was provided. After a prolonged debate, the Senate proceeded to pass all four of the resolutions, although the key resolution refusing to consider any further nominations until the requested information was provided passed by only a single vote.<sup>749</sup> However, after this vote was taken, it was discovered that the entire debate concerning Duskin’s suspension was for naught, as his appointment had already expired according to its own terms. Cleveland’s message of March 1 had “inspired considerable support from the public and the press”<sup>750</sup> even though a few Mugwumps like Carl Schurz sided with the Republican Senate.<sup>751</sup> Having exhausted their political resources and facing a wave of adverse public opinion, Senate Republicans finally conceded defeat and promptly confirmed Cleveland’s nominee to succeed Duskin. Shortly thereafter, an exhausted Congress finally repealed the Tenure of Office Act in its entirety,<sup>752</sup> after Senator George Frisbie Hoar, “a devout Republican whose allegiance to the Constitution exceeded his love for the Grand Old Party, proposed repeal. Cleveland had the pleasure of signing the repeal bill on March 3, 1887. With its passage, Congress formally abrogated its claim ‘to control presidential discretion in suspending or removing officials in the executive branch.’”<sup>753</sup>

Years later, Cleveland wrote, “thus was an unpleasant controversy happily followed by an expurgation of the last pretense of statutory sanction to an encroachment upon constitutional Executive prerogatives, and thus was a time-honored interpretation of the Constitution restored to us.”<sup>754</sup> Cleveland eventually settled into a general policy of immediately replacing “corrupt and inefficient spoilsmen,” but to allow current Republican officeholders “who had not made themselves obnoxious” to finish their four year terms.<sup>755</sup>

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748. Cleveland, Duskin Message, *supra* note 747, at 4964.

749. 17 CONG. REC. 2810-14 (1886).

750. WELCH, *supra* note 718, at 55.

751. *Id.* at 56.

752. Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.

753. WELCH, *supra* note 718, at 56.

754. CLEVELAND, *supra* note 747, at 76, *quoted in* WHITE, THE REPUBLICAN ERA, *supra* note 522, at 31.

755. WELCH, *supra* note 718, at 57.

“The implication was clear that ‘offensive partisans’ would be removed before their four years were up and that other Republicans, upon the conclusion of their term of office, most likely would be replaced by meritorious members of the Democratic party.”<sup>756</sup> Cleveland wanted to improve the efficiency of the civil service and right the partisan imbalance in the service after twenty-four years of unbroken Republican rule. To Cleveland’s irritation, the Mugwumps criticized him for being too partisan in his personnel policies. By the spring of 1886, Cleveland became worried about Democratic criticism, and he accelerated the removal of Republicans.<sup>757</sup> By the end of Cleveland’s first term in March 1889, “some 75 percent of the one hundred thousand nonclassified workers had been replaced, with fourth-class postmasters furnishing a large share of the total.”<sup>758</sup>

Although Cleveland was not afraid to clean house with respect to partisan jobs through vigorous exercise of his removal power, he did make major efforts to extend the merit system of classified appointees created by the Pendleton Act. When it was enacted under President Arthur, the Act initially protected eleven percent of the government’s 131,000 employees,<sup>759</sup> but the Act allowed the president to extend the merit system to additional employees by adding them to the classified civil service. After Cleveland was defeated for re-election in 1888, he extended the merit system significantly in order to limit the patronage authority of his Republican successor and to protect Democratic officeholders. “When Cleveland left the White House in March 1889, the classified list had expanded from sixteen thousand to twenty-seven thousand officeholders.”<sup>760</sup> “The extension of the merit system had a slow but incremental effect in making the federal civil service less political and more professional.”<sup>761</sup>

It would be a mistake to conclude that in supporting the expansion of civil service protections, Cleveland sanctioned any interference with the president’s power to execute the law. As president, Cleveland opposed the creation of a Civil Service Commission rule that required “a statement of cause of removal to be filed,” and he never supported a requirement that removals of classified officials be

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756. *Id.*

757. *Id.* at 57-58.

758. *Id.* at 57.

759. DOENECKE, *supra* note 648, at 102.

760. WELCH, *supra* note 718, at 61.

761. *Id.* at 61-62.

made only with just cause.<sup>762</sup> Such a requirement would not appear until the McKinley administration added such a rule in 1897 and the Lloyd-La Follette Act wrote these and other requirements into the federal statute books in 1912.<sup>763</sup>

Cleveland also vigorously exercised the presidential veto power, sending 304 veto messages to Congress in his first term—more than all his predecessors combined.<sup>764</sup> Many of these vetoed bills were minor private pension bills that, after painstakingly reviewing each of them, Cleveland found lacking in merit. There was certainly no hesitation about vetoing bills for policy reasons in the Cleveland administration. The manner in which he wielded the veto put him at odds with one powerful interest group, the veteran members of the Grand Army of the Republic.

The Cleveland administration also bore witness without comment to a development often mistakenly regarded as establishing presidential acquiescence to a non-unitary executive: the birth of the independent regulatory commissions. It is indisputable that under the Interstate Commerce Act of 1887, members of the Interstate Commerce Commission (ICC) were removable by the president for inefficiency, neglect of duty, or malfeasance. However, a close historical analysis indicates that Congress did not intend this clause to represent a departure from the unitariness of the executive branch. It is far from clear that these removal provisions in any way precluded the president from removing a member of the ICC simply for disagreements over policy.<sup>765</sup> In fact, independence from the president was never discussed during the debates leading up to the enactment, and the discussions that did take place suggest that Congress was primarily concerned with bipartisanship, not independence from executive control.<sup>766</sup> As an early scholar of independent regulatory commissions has noted, Congress viewed the removal provisions “more as a protection to the public by providing a way to get rid of objectionable commissioners than as a limitation on Presidential authority.”<sup>767</sup>

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762. WHITE, *supra* note 522, at 343-44.

763. *Id.* at 344.

764. WELCH, *supra* note 718, at 56.

765. Lessig & Sunstein, *supra* note 3, at 110-12.

766. ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 60-61 (1941); Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 272 n.69.

767. CUSHMAN, *supra* note 766, at 62.

Other portions of the legislative history support the same conclusion. Throughout the decade-long debate leading up to the Interstate Commerce Act's passage, members of Congress consistently referred to the ICC as part of the executive branch.<sup>768</sup> Consistent with this view, the ICC was initially placed within the Department of Interior and thus was not independent at all.<sup>769</sup> It was not until 1889 that the ICC was removed from the Department of the Interior,<sup>770</sup> and even that shift was made for purely practical reasons.<sup>771</sup> When one fully appreciates that Congress never indicated

768. The early committee reports proposing the establishment of the ICC recommended that it be set up within the executive department. *Id.* at 41, 55 (noting that the Windom Report, S. REP. NO. 43-307 (1874), proposed that the ICC be set up "in one of the Executive Departments of the Government"); *id.* at 42, 55 (noting that the 1882 report of the House Committee on Interstate and Foreign Commerce, H.R. REP. NO. 47-1399 (1882), recommended establishing the ICC within the Department of the Interior). Individual legislators similarly indicated that they regarded the ICC as an executive agency during the ensuing discussion. 17 CONG. REC. 4422 (1886) (statement of Sen. Edmunds) (referring to the ICC as exercising "executive, discretionary power"); 18 CONG. REC. app. at 187 (1887) (statement of Sen. La Follette) (referring to the ICC's "supervisory and executory" powers). In fact, the Senate appeared to go out of its way to avoid taking a position on the proper characterization of the ICC. When Senator Morgan proposed an amendment providing that "the commissioners appointed under this act shall be considered and regarded as being executive officers, and shall not exercise either legislative or judicial powers," 17 CONG. REC. 4422 (1886), Senator Maxey responded by stating:

[I]t is not a matter of the slightest consequence to me whether the powers are called executive, judicial, legislative, or ministerial. We have defined on the face of the bill the powers which are to be exercised by the commissioners, and if those powers are not constitutional, that fact ought to be pointed out. Therefore I see no necessity whatever for the amendment proposed by the Senator from Alabama.

*Id.* See generally CUSHMAN, *supra* note 766, at 55-58.

769. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887). In fact, Representative Oates even referred to "the veto power which the bill gives to the Secretary of the Interior." 18 CONG. REC. 849 (1887), *quoted in* CUSHMAN, *supra* note 766, at 62.

770. Act of Mar. 2, 1889, ch. 382, 25 Stat. 855; see also LOUIS FISHER, THE POLITICS OF SHARED POWER 124 (1981); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS 416-21 (1951), *excerpted in* THE INDEPENDENT FEDERAL REGULATORY AGENCIES 109, 111 (Leon I. Salomon ed., 1959); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 75; Angel M. Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 Admin. L.J. Am. U. 461, 514 n.2 (1994); Verkuil, *supra* note 766, at 272-73; Paul R. Verkuil, *The Status of Independent Agencies after Bowsher v. Synar*, 1986 DUKE L.J. 779, 780 n.7.

771. One noted commentator has indicated that the ICC was removed from the Department of the Interior at the Secretary of the Interior's request. CUSHMAN, *supra* note 766, at 67, 687. Other commentators have speculated that Congress removed the ICC from the Department of the Interior because of concerns about the background of incoming President Benjamin Harrison as a railroad lawyer. 5 Senate Comm. on Governmental Affairs, Study on Federal Regulation, S. DOC. NO. 95-91, at 27-28 (1977); Miller, *supra* note 770, at 75 (citing 5 STAFF OF SEN. COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION PREPARED PURSUANT TO S. REV. 71, at 28 (1977)); Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the*

an intent for the ICC to be a structural innovation to limit presidential control over the execution of the laws,<sup>772</sup> it becomes less surprising that its creation failed to evoke a presidential response.

While Cleveland did sign the Interstate Commerce Act into law, it did not have Cleveland's unmixed blessing; Cleveland "had doubts about the constitutional soundness of 'government by commission.'"<sup>773</sup> He "did not publicize those doubts, however, and appointed to the new Interstate Commerce Commission respected individuals such as Thomas M. Cooley, former dean of the University of Michigan Law School, [who were] untainted by ties to the management and financing of the nation's railroads."<sup>774</sup>

The doubts about whether the Act placed any limits on the president's power to remove and the strength of Cleveland's other actions and pronouncements regarding the unitary executive, such as advocating the repeal of the Tenure of Office Act, counsel against reading too much into Cleveland's failure to object to the removal provisions of the Interstate Commerce Act. Properly understood, it does not constitute so substantial and sustained a deviation from the position adopted by his predecessors as to constitute executive acquiescence, and the positions adopted by Cleveland fit comfortably into the pattern of presidential insistence on the unitariness of the executive established since the ratification of the Constitution.

One final development of note occurred during the Cleveland years: the U.S. Supreme Court's decision in *United States v. Perkins*.<sup>775</sup> *Perkins* was a case involving a naval cadet engineer who had been discharged from his position by the Secretary of the Navy even though he appeared to be entitled by statute to the job. The issue was whether when Congress by law vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal of those heads of departments as it deems best for the public interest. It is of critical importance that in *Perkins* it was the Secretary of the Navy and not the President who was trying to exercise the removal power. After noting that the case did not involve

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*Unitary Executive*, 57 GEO. WASH. L. REV. 627, 657 n.169 (1989); Verkuil, *supra* note 766, at 272 n.69. In either case, it is clear that Congress enacted this change because of political expediency and not because of any grand constitutional conception of the proper structure of government.

772. Miller, *supra* note 770, at 74; Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1207-08, 1223-24 (1986).

773. WELCH, *supra* note 718, at 79.

774. *Id.*

775. 116 U.S. 483 (1886).

a presidential removal of a Senate confirmed principal officer, the Court said “We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest.”<sup>776</sup>

This conclusion makes eminent good sense as applied to the removal power of heads of departments. Since the Secretary of the Navy is a creature of statute to begin with, and since he gets his authority to appoint inferior officers from Congress, it makes sense that Congress could restrict the Secretary of the Navy’s statutory removal power. Importantly, the *Perkins* case did not involve an effort by the President to remove such an inferior officer or to delegate his executive power of removal to the Secretary of the Navy. The *Perkins* Court thus elided over that far more interesting and provocative question in a cursory three-page opinion that was largely devoid of analysis. Moreover, even if *Perkins* were read to limit the President’s power to remove at will inferior officers appointed by Heads of Departments, nothing in *Perkins* precludes principal officers from supervising and directing all exercises of executive power by inferior officers. Failure to follow such supervision or direction would, in our judgment, constitute “just cause” grounds for removal.

From the perspective of the unitary executive, Cleveland’s record is unequivocal. His first term in office was nothing less than a great triumph. Cleveland’s biographer Richard Welch sums up his achievements as follows:

[T]he presidency was reestablished as a branch of the government coordinate in authority with the Congress, and this was in large part attributable to the labors and personality of Grover Cleveland. The administrative reforms that he encouraged in the various departments, his extensive use of the veto power, his fight for executive independence during his battle with the Senate over the Tenure of Office Act, and his leadership efforts in such areas as Indian policy, western land policy, and tariff reform gave the executive branch a vigor and a morale that it had not known for twenty years.<sup>777</sup>

All of this was in part due to his “naturally assertive disposition” and in part due to his desire to improve “the level of integrity in American politics.”<sup>778</sup> The end of the first Cleveland administration

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776. *Id.* at 485.

777. WELCH, *supra* note 718, at 89.

778. *Id.* at 89-90.

thus marked the close of a century of presidential administration in which the president remained firmly in control of the executive branch of the government.

#### V. CONCLUSION

Presidents throughout the period from 1837 to 1889 persisted in opposing almost all congressional attempts to infringe upon their sole power to execute the laws. With the exception of one loose statement by John Tyler that was never acted upon and a few wartime laws limiting the removal power that President Lincoln did not have the energy to block, every president during this fifty-two-year period vigorously defended the unitary executive. Admittedly, Presidents Grant and Cleveland failed to enter their objections when Congress enacted statutes purporting to limit the president's power of removal. In Grant's case, a statute passed limiting his ability to remove minor postal officials, and, in Cleveland's case, the Interstate Commerce Commission was created. However, in light of Grant's vigorous opposition to the Tenure of Office Act and Cleveland's resolute defense of his removal of U.S. Attorney Duskin, it is difficult to construe these limited departures from the presidents' uniform espousal of the unitariness of the executive branch as sufficient to constitute acquiescence for the purposes of coordinate construction. On the contrary, by the end of the century, the presidency had managed to reclaim most of the prestige and authority lost during Andrew Johnson's administration.

Throughout this period, presidential opposition to invasions of the unitariness of the executive branch was so consistent and sustained that one of the harshest critics of the unitary executive was forced to admit that "[b]y the combined action of the three branches of government the principle of superior control became firmly rooted in the second half of the nineteenth century."<sup>779</sup> As Leonard White notes, "the executive power was the constitutional possession of the President, and it carried with it the practical authority to see that the laws were enforced. The President, in short, was the constitutional head of the administrative system."<sup>780</sup>

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779. Itzhak Zamir, *Administrative Control of Administrative Action*, 57 CAL. L. REV. 866, 873 (1969).

780. WHITE, *supra* note 522, at 106.