

Resolved, The Unitary Executive Is a Myth

PRO: Richard J. Ellis

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In 1988 in *Morrison v. Olson* the U.S. Supreme Court heard a challenge to the constitutionality of the Office of the Independent Counsel, which was created by Congress in 1978.¹ Born out of a belief forged in the experience of the Watergate scandal that the executive branch could not be trusted to investigate its own wrongdoing, the Office of the Independent Counsel was designed to be independent of the president and the attorney general so that the investigation and prosecution of high administration officials could be carried out without fear or favor. Congress stipulated that an independent counsel would be selected by a panel of three federal judges and could only be removed from office by the president for “good cause.” The Reagan administration challenged the independent counsel law in court, arguing that prosecution was a purely executive function and therefore the president should be free to dismiss an independent counsel for any reason.

Eight justices brushed aside the administration’s argument, reasoning that allowing the executive branch to remove an independent counsel for good cause preserved the executive’s ability to “perform his constitutionally assigned duties” of seeing that the laws are faithfully executed. The Court’s newest justice disagreed, however. Antonin Scalia excoriated the Court for declaring “open season upon the President’s removal power for all executive officers.” Scalia argued that the independent counsel statute was not merely unwise—a position that both parties ultimately accepted when they let the statute expire in 1999—but also unconstitutional. According to Scalia, the text of the Constitution is unambiguous: all executive powers are vested in the president. Faithful adherence to the text of the Constitution, Scalia maintained, required the Court to strike down any legislative restriction on the president’s power to remove officials exercising executive powers. At stake, Scalia argued, was the integrity of the “unitary executive” established by the framers of the Constitution.

At the time, few if any Americans would have even recognized the term “unitary executive,” but it had deep meaning for the Reagan Department of Justice. Under the leadership of Attorney General Edwin Meese III, a cadre of conservative lawyers was devising a constitutional theory and legal strategy that could enable the Reagan administration to gain control of the

independent regulatory agencies that were seen as impeding the administration's agenda of deregulating business. Speaking before the Federal Bar Association in 1985, Meese signaled the administration's intent: "Federal agencies performing executive functions are themselves properly agents of the executive. They are not 'quasi' this or 'independent' that." Meese argued that any statutory restrictions on a president's removal power are unconstitutional, and that "the entire system of independent agencies may be unconstitutional."² Meese did not use the term, but this was precisely what Scalia meant by unitary executive.

The administration's challenge to the independent counsel statute was the opening gambit in a calculated effort to get the courts to accept the unitary executive thesis and to roll back the regulatory state. At the D.C. Circuit Court of Appeals the administration was spectacularly successful. Reagan appointee Laurence Silberman not only struck down the independent counsel statute but also affirmed that "the doctrine of the unitary executive" is "central to the government instituted by the Constitution."³ After the Supreme Court's emphatic 8–1 reversal of Silberman, however, Solicitor General Charles Fried, who argued the case before the Court, pronounced the unitary executive thesis "dead."⁴

Fried turned out to be dead wrong. If anything, conservatives' attachment to the unitary executive grew stronger in subsequent years. Although Reagan rarely used the term "unitary executive," his successor, George Bush, invoked it more often. But it was during the administration of George W. Bush that the term "unitary executive" became part of the public conversation. Bush and his top aides relentlessly invoked the unitary executive to justify presidential power, and Donald Trump's administration has very much followed in Bush's footsteps. Trump's Supreme Court appointee Brett Kavanaugh, who was White House staff secretary under George W. Bush, is among the most ardent advocates of the unitary executive doctrine.

Far from being dead, then, the important—if often partisan—debate over the unitary executive continues to invoke strong convictions on both sides. One side, exemplified by Richard J. Ellis, insists that the unitary executive is a myth that distorts the framers' understanding of the Constitution. The other side, articulated by Saikrishna Prakash, maintains that the unitary executive is, as Silberman put it, "central to the government instituted by the Constitution." Whether myth or not, the unitary executive doctrine will likely be debated by politicians, courts, and citizens for decades to come.

PRO: Richard J. Ellis

Partisanship and political ideology have never lain far from debates about presidential power. From the 1930s through the 1960s progressive Democrats championed a robust presidency, while conservative Republicans

sounded cries of alarm. Progressives looked to the president to transcend the power of parochial interests and to combat powerful special interests. Only a strong president, they believed, could overcome the tremendous centrifugal force exerted by a constitutional system that endlessly divided and checked power.⁵ By the 1980s, with Republican Ronald Reagan ensconced in the White House and Democrats seemingly in permanent control of the House of Representatives, the roles were reversed. Progressives now warned of the imperial presidency, while conservatives sang the virtues of a powerful presidency.⁶

Both progressive and conservative advocates of a presidency-centric political system have invented history and propagated myths to suit their political aspirations. The liberal narrative relied heavily on the myths that presidential elections bestow policy mandates and that a president's words express an authentic voice of the people.⁷ Conservatives exploited these fictions as well—most notably after Reagan's election in 1980—but they also created new myths that departed dramatically from the progressive storyline of presidential development as “the work of the people breaking through the constitutional form.”⁸ Whereas progressives had located the sources of presidential power outside the Constitution, conservatives—specifically, conservative lawyers—insisted that broad, unilateral presidential powers could be located in “the text, structure, and ratification history of the Constitution.”⁹

Writing in 1960, political scientist and liberal Democrat Richard Neustadt famously advised presidents not to rely on the formal powers of the Constitution.¹⁰ Instead, presidents needed to master the art of persuasion, as Franklin Delano Roosevelt allegedly had done.¹¹ Beginning with Reagan and culminating with President George W. Bush, conservative lawyers offered very different advice, premised on a very different myth. They counseled conservative presidents to trust less in personal persuasion than in the inherent executive power that Article II of the Constitution vests in the president. Personal persuasion was too dependent on bargaining and compromise and the willingness of other actors to acquiesce to the president's wishes. In contrast, the Constitution, properly interpreted, gives the president power that no political opponents can take away or diminish. This is the myth at the heart of the conservative theory of presidential power that flourished during the presidency of George W. Bush and has often informed Donald Trump's exercise of presidential power.

Conservative constitutional mythmaking took two forms. The first myth was that in wartime the Constitution, particularly the commander-in-chief clause, endows the president with virtually unlimited powers to keep the nation safe. So long as there is a “war on terror,” according to this legal fiction, the president is not required to abide by laws that compromise the president's power to conduct electronic surveillance or carry out interrogations of enemy combatants, including bans on torture. The second

myth—the myth of the unitary executive—was that the Constitution gives the president absolute control over the executive branch. Under this theory, Congress has no constitutional right to prevent the president from firing executive branch officials or from ordering subordinates to follow the president's dictates. Statutes that restricted the president's power to remove or control agents of the executive branch were not textbook instances of checks and balances, but instead were unconstitutional encroachments on presidential power.

To describe the doctrine of the unitary executive as a myth is not to deny the indisputable fact that there is only one president—what Alexander Hamilton, in *Federalist* No. 70, famously called “unity in the executive.” On that question there is no debate, though many of the delegates at the Constitutional Convention—at least a quarter of them—did prefer a plural executive.¹² Unity in the executive, however, is far different from a unitary executive. In fact, as a logical matter the two ideas are completely independent. From the perspective of the unitary executive doctrine, it should not matter whether there is one president or three presidents. Either way, Congress is proscribed by the Constitution from interfering with the functioning of the executive branch.¹³

It is worth highlighting at the outset that labeling the unitary executive doctrine as a myth does not commit one to the proposition that Congress should, as a practical matter, micromanage the executive branch. There are good, pragmatic reasons in many, maybe even most, instances why Congress should give the president wide latitude in administering and executing the laws. But the Constitution does not forbid Congress from meddling in the executive branch any more than it commands Congress to keep the president on a short leash.

Advocates of the unitary executive doctrine reject the pragmatic argument for executive discretion because it requires them to accept Neustadt's classic formulation of the American political system as “a government of separated institutions sharing powers.”¹⁴ To grant this premise is to allow that presidential power is ultimately the power to persuade, and that Congress can legitimately constrain the president's exercise of executive power.

This is not merely an abstract or theoretical debate. The unitary executive doctrine, at its heart and in its origins, is an assault on the regulatory state that has existed for more than a century. At stake are the legitimacy and independence of all the myriad independent agencies that regulate economic activity, such as the Board of Governors of the Federal Reserve System (1913), the Securities and Exchange Commission (1934), the National Labor Relations Board (1935), and the Commodity Futures Trading Commission (1975). Congress has generally made these agencies independent of presidential control by providing agency heads with fixed terms and specifying that they cannot be fired without cause. According to the unitary executive doctrine, such limits on a president's ability to direct

the bureaucracy are unconstitutional. By vesting executive power in the president, this theory holds, the Constitution forbids Congress from insulating administrative agencies from presidential control.¹⁵

What is the evidence that the Constitution establishes a unitary executive? The answer is, precious little—so little that the unitary executive can only be regarded as a myth. It is admittedly a simple and seductive construct with “a beautiful symmetry” and a seemingly “perfect logic.”¹⁶ If (1) the president is the chief executive, and (2) the president alone is vested with the executive power, then surely it follows that (3) the legislature has no say in how the executive branch is run, except where the Constitution explicitly grants the legislature that power. The only problem with this syllogism is that there is no evidence that the framers understood the Constitution in this way.

The unitary executive thesis rests principally on two clauses in Article II: the vesting clause (“The executive power shall be vested in a President of the United States of America”) and the faithful execution clause (the president “shall take care that the laws be faithfully executed”). It strains credulity that, in commanding the president to take care that the laws be faithfully executed, the framers intended to empower the president to defy Congress. The clause, as Peter Shane points out, is “derived from the ban on the executive suspension of statutes that appears in the English bill of rights and clearly implies the faithful execution of Congress’s will, not the President’s.”¹⁷

What about the vesting clause? The opening sentence of Article II announces that there will be a single president (“unity in the executive,” in Hamilton’s language), but the further claim that it posits a unitary executive is without foundation. Neither those who wrote nor those who ratified the Constitution understood discretionary executive power as the power to set public policy. That was Congress’s job, subject of course to the president’s veto. Administration could be “good or ill” (again, to quote Hamilton), but the metric of good administration was efficiency, honesty, and neutral competence, not compliance with the president’s policy preferences.¹⁸

There is also the inconvenient matter of another vesting clause in Article II that states, “Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” In this clause the Constitution leaves it entirely up to Congress to decide (“as they think proper”) whether “inferior officers” (that is, those government officers that the Constitution does not require to be approved with the advice and consent of the Senate) should be appointed by the president or department heads or the courts.¹⁹ If the framers had intended to create a unitary executive, they would not have included this clause.

Indeed, if the framers were intent on creating a unitary executive, they were guilty of constitutional malfeasance since nowhere did they even mention the president’s removal power. Even more striking, the subject never

came up at the Constitutional Convention in Philadelphia. If the framers—or even just some of them—had in mind a unitary executive, one would think they would at least have discussed removal at some point during the nearly four months they argued over the making of a new constitution.

Perhaps this silence was because everybody assumed that the president had the removal power, since it was self-evidently part of the executive power that was vested in the president in the opening sentence of Article II. But this interpretation runs into the embarrassing problem of *Federalist* No. 77, also written by Hamilton. No framer of the Constitution was a more enthusiastic advocate of presidential prerogative. Yet in *Federalist* No. 77, published May 28, 1788, Hamilton explicitly rejected the idea that the Constitution endowed the president with the sole power to remove executive officers. Instead, he listed as one of the virtues of the Constitution that the “the consent of [the Senate] would be necessary to displace as well as to appoint . . . officers of the government.”²⁰ Some have interpreted Hamilton’s statement as either a disingenuous attempt to sell the new Constitution or as a poorly thought-out remark that he subsequently repudiated. However, as political scientist Jeremy Bailey has shown, Hamilton’s vision of a restrained removal power was perfectly consistent with his understanding of robust executive power.²¹

Hamilton valued unity in the executive—one president rather than several—because he believed it was an essential part of energy in the executive. Unity was necessary for the executive to act decisively, swiftly, and sometimes secretly. Unity also ensured that presidents would be held accountable for their actions. But Hamilton also valued stability in the executive branch. Frequent turnover in the executive, he feared, would lead to a neglect of longer-term projects.²²

In *Federalist* No. 72 Hamilton favored allowing the president to be eligible for reelection precisely because it would minimize administrative disruption. In that essay he stressed that there is an “intimate connection between the duration of the executive magistrate in office and the stability of the system of administration.” If presidents changed constantly, and with them the “men who fill the subordinate stations,” then there would be a “ruinous mutability in the administration of the government.”

Similarly, in *Federalist* No. 77, Hamilton defended the Senate’s involvement in appointments and removals because that would ensure that “a change of the Chief Magistrate . . . would not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices.” Requiring the Senate—which “from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government”—to consent to removals, in short, would make it more likely that these removals would be based on competence and integrity rather than political ideology or personal whim. An unrestrained use of the removal power, in

Hamilton's view, thus would undermine administrative stability and expertise, which are as central to an energetic executive as is executive unity. Unlimited presidential control over the executive branch (the unitary executive) thus could sap energy from the executive by politicizing the neutral competence that is so essential to good public administration.

Prevented from enlisting Hamilton in the unitary executive cause, advocates of the unitary executive often invoke instead "the great debate of 1789" to support the notion that the framers intended the Constitution to bestow on the president the unilateral power to remove any executive officer for any reason. It is true that the first Congress (1) included many who had been delegates at the Constitutional Convention (eight in the House and ten in the Senate) and (2) decided to vest the removal of department heads in the president. But it is not true that the congressional debate demonstrates that the framers intended the Constitution to grant the president an unlimited power to remove executive officers. In fact, the debate shows nearly the opposite.²³

First, it is important to recall the context for this so-called great debate: It began in the House of Representatives on May 19, 1789, when Virginia congressman James Madison introduced a motion to establish the Department of Foreign Affairs (soon to be renamed the Department of State), headed by a secretary who would "be removable by the president." (The Constitution did not establish any executive departments, leaving that task to Congress.) The debate that ensued was not over the president's power to control or remove "inferior" executive officers. Instead, it centered on the question of the proper relationship between the president and the department head (what the Constitution refers to as "the principal officer"). Madison rightly worried that requiring the Senate to consent to the removal of a department head would fatally weaken the executive's independence and thereby undermine the Constitution's checks and balances.

Second, Madison's motion was incredibly contentious. The fierce debate belies the suggestion that the Constitution's silence on executive branch removals is evidence that it was widely understood that the removal power is an inherent part of executive power. Instead, the great debate of 1789 suggests that it is far more likely that the framers avoided taking up the question of removal because they believed it would be divisive and difficult to obtain agreement.

Third, careful examination of the congressional debate and voting that ensued after Madison introduced his resolution shows that only a minority in the House maintained that the Constitution vests the president with the inherent power to remove a department head. As Charles Thach showed nearly a hundred years ago, the House was divided essentially into three blocs. One bloc, the largest of the three (about 40 percent), opposed Madison's resolution because they insisted that a department head should only be removable with the advice and consent of the Senate, since the Senate's advice and consent

were necessary to the appointment. Otherwise, a unilateral power to remove would undo the constraints that the Constitution had carefully placed on the president's appointment power. A second bloc (about 30 percent) agreed that the Constitution does not give the president the power to unilaterally remove officers, but they supported Madison's resolution because they thought it prudent for Congress to allow the president to remove a department head. A third bloc (about 30 percent) believed that the Constitution implicitly vests the president with the power to remove a department head. Only two of the eight House members who were delegates at the Constitutional Convention voted with this third bloc.²⁴

The final language approved by the House specified that a chief clerk should assume the duties of department head "whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy." When the legislation was taken up in the Senate, gadfly William Maclay proposed to strike out "by the President of the United States." Maclay was a bit of a hysteric about executive power, but his amendment attracted surprisingly strong support from even reliable Federalists who supported the Washington administration. Four of those who backed Maclay's amendment had signed the Constitution, including Connecticut's much-respected William Samuel Johnson, who chaired the five-person Committee of Style that polished the Constitution into its final form. Only through a furious last-ditch lobbying campaign did the Washington administration manage to engineer a deadlocked vote and avoid an embarrassing defeat on the amendment.²⁵

The unitary executive thesis looks even more implausible if we look at the statute creating the Treasury Department, the only domestic executive department set up by the nation's first Congress (the other two departments created in 1789 were the Department of Foreign Affairs and the Department of War). The legislation establishing the Treasury Department required the department head to submit to Congress "plans for the improvement and management of the revenue, and the support of the public credit." This language did alarm some in Congress, but their objection was not that requiring the Treasury secretary to "digest and prepare plans" for Congress violated a unitary executive. Instead, the objection was that it encroached on legislative autonomy. In any event, the wording was endorsed by a "great majority" of those in Congress.²⁶

One person who certainly had no objection to the wording—and may even have had a hand in drafting it—was Alexander Hamilton, who virtually everyone believed (correctly, as it turned out) would be named the first secretary of the Treasury. Hamilton was an ardent admirer of the British political system—"the best in the world," he called it in his June 18, 1787, speech at the constitutional convention. What made the British system effective, in Hamilton's view, was not only that the nation was symbolically united in its attachment to a monarch but also that the executive

and legislative powers were knitted together through the great ministers of state, particularly the prime minister, who served both as a leader in parliament and as the chancellor of the exchequer. Hamilton envisioned himself, as historian Forrest McDonald puts it, as “Sir Robert Walpole to Washington’s George II.” That is, Washington would be the symbolic unifying force that commanded the nation’s love and respect, while Hamilton would be the government’s prime minister, directing the new nation’s economic policies. This is hardly a vision to warm the hearts of proponents of the unitary executive.²⁷

In sum, as a reading of the original intent of the Constitution’s framers, the unitary executive doctrine is a myth. However, even if we are right to reject the effort to make the framers into apostles of the unitary executive, there remains the question of whether as a political or pragmatic matter—as opposed to a constitutional one—something very like a unitary executive is preferable to a messier pluralist vision. That is, regardless of what the Constitution dictates, are we better off with the president as (in George W. Bush’s oft-quoted phrase) “the decider”? After all, presidents are elected and their subordinates are not. Doesn’t democratic accountability, not to mention administrative efficiency, require that the president be able to direct the actions of subordinates and remove them when they do not comply with the president’s wishes?

The idea is appealing, but it rests on an unproven assumption that insulating agencies or officials from presidential desires will lead to decisions that adhere less closely to the law, the preferences of the majority of the people, the public interest, or all three. Two examples from George W. Bush’s administration should give us reason to doubt that the assumption is warranted: so-called Firegate and Hurricane Katrina.

In 2006 Bush fired nine federal district attorneys. A central premise of the unitary executive thesis is that presidential control is necessary to ensure the “uniform execution of the laws” across the nation. But the firings had nothing to do with a concern for ensuring that the law was enforced the same way in different jurisdictions. Instead, the firings were motivated purely by politics: the desire to dispense patronage to supporters and to punish attorneys who had resisted political pressure to pursue legally weak voter fraud cases. Far from trying to achieve uniform execution of the laws, the White House used its removal power to try to enforce federal law more aggressively in some parts of the country (electorally competitive, battleground states) than others. The White House’s aim was to advance Republican political interests; the federal attorneys, adhering to the norms and rules of the legal profession, were trying to ensure that the laws were faithfully executed.²⁸

Hurricane Katrina struck the Gulf Coast in 2005, killing nearly two thousand people and causing more than \$100 billion in damages. The Bush administration and the Federal Emergency Management Agency (FEMA)

were widely criticized for their slow and inept response to the disaster. Yet from the unitary executive perspective, FEMA is a model agency since it possesses an extraordinarily high number of political appointees—a number that increased by 50 percent under Bush. More political appointees, according to the logic of the unitary executive, should mean more accountability and responsiveness to the president's agenda. Yet, as political scientist David Lewis has shown, not only was politicization of the agency responsible for the agency's incompetent response to Hurricane Katrina, but the increase in political appointees under Bush was driven not by a desire to make bureaucracy more responsive but instead by the old-fashioned desire to reward supporters and campaign workers with patronage.²⁹

Let us not be beguiled by the myth of a unitary executive or trust in the beneficence of the president. Instead, we should recognize that, in a pluralist system, administrative accountability and effectiveness are achieved in multiple ways, including through professional norms and policy expertise, congressional committees and oversight, the courts, and the media.³⁰ The pluralist vision is admittedly messy, but then reality generally is messier than myth. The pluralist recognizes that Article II vests executive power in a president but doubts that the powers were intended to be hermetically sealed within the different branches of government. As Madison emphasized in *Federalist* No. 47, “The three great departments of power should be separate and distinct,” but that does “not mean that these departments ought to have no partial agency in, or no control over, the acts of each other.” On this reading, the Constitution's aim is not an elegant or simple governmental structure but instead is a complex system of checks and balances that are designed to curb the abuse or accumulation of power. The purpose of the Constitution, as Supreme Court Justice Louis Brandeis wrote nearly a century ago, “was not to avoid friction but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”³¹

CON: Saikrishna Prakash

“Unitary executive” has become a frightful bogey, something of an accomplishment for a phrase coined by scholars. If a member of the commentariat believes that a president is grasping, lawless, or imperial, the pundit often will finger the administration's supposed embrace of the theory of the unitary executive. The concept is said to be relevant to, among other things, disputes about executive privilege, signing statements, and adherence to laws the president believes are unconstitutional. In each area the theory supposedly insists that the Constitution grants presidents tremendous, perhaps limitless, authority. In other words, executive unity supposedly sanctions executive license.

In fact, the unitary executive theory has more humble roots and a more modest reach. Properly understood, the theory has nothing to do with executive privilege or signing statements. Rather, it asserts that the Constitution's vesting of the "executive power" in one person has significant consequences for control of the civilian executive branch.

The theory has descriptive and normative elements. The descriptive features can be summed up in five simple principles, all grounded in readings of the original Constitution. First, the Constitution grants the president the "executive power," subject to considerable constraints (e.g., the president cannot create offices, unilaterally appoint to high offices, or fund executive agencies). Second, this grant makes the president, in the words of Alexander Hamilton, the "constitutional executor" of the law, meaning that the president has *constitutional* authority to execute any federal law personally. Third, the president may direct others charged with executing federal law, issuing general orders, or intervening in specific cases. The president has such power because, when others execute federal law, they help exercise *his or her* constitutional power over execution. As James Madison said in Congress in 1789, "If any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." Fourth, the president may remove federal executives at will. Because such officers help implement the president's executive power, the chief executive may determine that some are unfit to serve as his assistants. Finally, Congress has no constitutional authority to subdivide, divest, or parcel out the president's executive power. Hence it cannot create independent agencies charged with law execution or establish autonomous executive officers.

The benefits of a unitary executive are many. To begin, "Decision, activity, secrecy, and dispatch" result from unity in the executive, said Alexander Hamilton, writing as Publius in *Federalist* No. 70. When one person decides what should be done, decisions can be made rapidly and implemented vigorously. In contrast, when the executive's apex is plural—for example, an executive council—deliberations may be protracted or inconclusive, and the losing coalition may try to obstruct the implementation of the collective decision.

Unity also conduces to accountability. As compared to a plural executive, where assigning responsibility is often difficult, a unitary executive naturally draws the public's attention. Because the president decides (or may decide) all executive matters and may direct officers, the president is properly responsible for the executive branch and its decisions.

Finally, the president's superintending authority ensures that someone can coordinate policies across the executive departments. When disputes arise about what ought to be done, the president can resolve them and do so in ways that ensure that the administrative departments do not act at cross-purposes, with one agency barreling toward one goal and another erecting obstacles to its attainment.

Some may recoil at this portrayal of the president, wondering whether the theory of the unitary executive regards the president as something of a monarch. All agree that the Constitution's presidency bears little resemblance to an absolute monarchy. Yet given the president's extensive powers, including authorities typically wielded by monarchs (such as the pardon and veto powers), no one should be surprised that the presidency resembles a limited monarchy in many respects. The similarities were not lost on people in the eighteenth century. After beholding the Constitution for the first time, people with vastly different sensibilities, including Thomas Jefferson and John Adams, regarded it as ushering in a regal presidency. To some extent they were right. The founders created a republican monarch.

Many moderns fail to see the semblance to monarchy because they mistakenly suppose that what the founders wished to avoid at all costs was anything approaching a monarch. This reads the Constitution as if it had been written in 1776. Yet between 1776 and 1787 there was a revolution in opinion. Many leading Americans came to believe that what the nation needed was a powerful executive. Several founders supposed that America's post-independence dalliance with weak executives had handicapped the states and the nation.

In 1776 and 1777 framers of the state constitutions had been extraordinarily suspicious of executive authority, creating executives that were, in the estimation of James Madison, generally no more than "cyphers." The state governors typically had limited appointment powers, were elected by the legislatures, served but a single year, and had no veto. Fear of executive unity led some states to resort to a plural executive in the form of an executive council, with executive authority exercised via majority vote of the councilors.

At the national level, the Continental Congress served as a plural chief executive, appointing, directing, and removing executive department heads. Experience quickly revealed the folly of a plural executive. Whereas the proper exercise of executive power was said to require energy and decision, a plural, deliberate, and part-time executive could only function at a glacial, halting pace. Congress experimented with various administrative structures, including the creation of departments headed by secretaries. But these reforms proved inadequate. The root problem—a ponderous, distracted, and unstable chief executive in the form of Congress—could not be addressed with mere tinkering.

Surveying the scene in 1787, several delegates to the Philadelphia Convention openly pushed for a single, powerful chief executive on the theory that the executive branch needed vigor. Others protested, preferring a triumvirate on the ground that unity in the executive was a "foetus" of monarchy. After the idea of a triumvirate quickly faded, some sought an executive council to check the unitary executive's actions. If the British king had his councilors, why shouldn't the American president have a few as well? Although the

Senate serves as a council of sorts on appointments and treaties, the framers never established a generic executive council. Delegates feared that such a council would enervate the executive and shield the president from responsibility. Decisions would be contested and much belated. If difficulties surfaced after decisions had been made, the president might blame the council and the council might fault the president. The public would have no way of umpiring such disputes, and accountability would suffer. The Constitution, as adopted, made clear that the president could seek advice from executive officers (via the “Opinions Clause”), but that the president, vested with the executive power, would be responsible for the measures taken.

During the ratification debates, people commonly read Article II as empowering the president to superintend the executive branch. Alexander Hamilton spoke of executive officers as the president’s assistants and deputies, and as being subject to the president’s superintendence. Future Supreme Court justice James Wilson said that when the executive power rests with “one person, who is to direct all the subordinate officers of that department; is there not reason to expect, in his plans and conduct, promptitude, activity, firmness, consistency, and energy?” Other Federalists said that if the president gave wrong instructions to subordinates, people could seek legal redress, a claim premised on the president’s power to direct officers. Even anti-Federalists acknowledged the president’s power to command executive officers, with some praising the arrangement. As the Federal Farmer put it, “A single man seems to be peculiarly well circumstanced to superintend the execution of laws with discernment and decision, with promptitude and uniformity.”

After the new government commenced, Congress had to recreate the executive departments and consider the implications of the unitary executive. Many in the House of Representatives, including James Madison, thought the president had a constitutional power to direct and remove executive officers in what would become the three great departments—Foreign Affairs (later State), War, and Treasury. Such members of Congress derived the power to direct and remove officers from the grant of executive power and believed the vesting clause of Article II was a crucial means by which the president could fulfill the duty to ensure faithful execution of the laws. Others denied these claims, arguing that the grant of executive power ceded nothing more than the powers specifically listed elsewhere in Article II and insisting that the Senate had a role in removal. After months of back and forth, the Madisonians prevailed. No statute conveyed the president a power to remove. Rather, the acts creating all three departments discussed what would happen when the president removed a departmental secretary, thereby implying that the Constitution itself granted the president the authority to remove. This language was purposely designed to make clear that Congress had concluded that the president had a *constitutional* power to remove, and by implication a power to direct, executive officers.

This was precisely how others at the time understood the three acts. When Congress created other officers, its legislators recognized that the president could remove them as well. As Thomas Jefferson said in 1793, the department and officers were “instituted to relieve the President from the details of execution.” Even before Congress acted in 1789, the new president had come to these conclusions on his own. Upon assuming office, George Washington began directing the entities formerly under the exclusive control of the Continental Congress, including the secretary of foreign affairs, the postmaster general, and the board of Treasury. His direction lacked any statutory warrant. These commands were appropriate because Washington correctly saw himself as the constitutional font of law execution authority, and therefore empowered to direct executive officers as they implemented the law. As he explained on one occasion, “The impossibility that one man should be able to perform all the great business of the State, I take to have been the reason for instituting the great Departments, and appointing officers therein, to assist the Supreme Magistrate in discharging the duties of his trust.” The first president evidently believed that the departments and their officers existed to help him exercise his powers and satisfy his duties. They were not free agents.

Washington continued in this view after the creation of officers and departments under the new Constitution. He directed ambassadors, tax collectors, the attorney general, district attorneys, and numerous other federal executives. There was no statutory warrant for issuing any of these commands. He even directed state governors in their execution of federal laws because they were helping to implement his constitutional power to execute those laws. Undergirding his commands to federal officers was the threat of removal. Indeed, the commissions he issued to executive officers invariably mentioned that they held their offices at his pleasure, language that reflected his view that these officers were his instruments and tools. He periodically acted on this belief, unilaterally removing various federal executives.

Years later, Thomas Jefferson described the benefits of a singular executive, as borne out by the Washington administration. Washington had the wisdom and information of his secretaries at his disposal and ensured a “unity of action and direction” in the executive departments, recounted Jefferson. Despite severe disagreements within the administration, the president heard from all and “decided the course to be pursued and kept the government steadily in it.” A plural executive, said Jefferson, would have yielded less accountability and more discord, indecision, and inaction.

Over time, the consensus about the unitary executive disintegrated because of partisanship, legitimate concerns about a spoils system, and anxieties about a domineering executive. When Andrew Jackson’s Treasury secretary refused his order to withdraw federal deposits from the Bank of the United States, Jackson fired him and found a more compliant

instrument in Roger Taney. The Senate, dominated by Whigs, censured Jackson's actions as contrary to the law and the Constitution. Later still, Andrew Johnson unilaterally ousted his Secretary of War, a removal that on some accounts violated a recent federal statute requiring the Senate's consent. The House impeached, and the Senate came within one vote of removing Johnson from office.

Eventually, the Supreme Court waded into the fray, issuing opinions difficult to reconcile. In *Myers v. United States* (1926), the Court said the president had an illimitable constitutional power to remove all those appointed with the Senate's consent. Later, in *Humphrey's Executor v. United States* (1935), the Court said that Congress could constrain the president's power to remove quasi-judicial and quasi-legislative officers, two categories never mentioned in the Constitution. In the late 1980s *Morrison v. Olson* (1988) declared that removal restrictions were permissible with respect to all officers so long as the president enjoyed enough authority to exercise constitutional powers and satisfy constitutional duties. Because the Court never identified what would satisfy this rather unclear standard, we have only a hazy sense of how far Congress may go in insulating departments and officers from presidential direction.

Based in part on such Court decisions, in practice we have had both a unitary executive *and* plural executive councils for a century or so. As to the executive departments—Defense, State, Treasury, Justice, and all those whose heads form the president's cabinet—we have a unitary executive of the sort that dates to the Washington administration. The measures of these departments are seen as the president's policies, and the chief executive directs their execution of federal law and their exercises of discretion. The cost-benefit rules established by executive order and overseen by the Office of Management and Budget are perhaps the most conspicuous example of presidential control. The significant officers in these traditional departments typically resign when the president asks them to do so and almost invariably resign when a new president comes into office. How far presidents intrude into particular executive departments turns on their policy agendas and their desire to allow their deputies to wield expertise. But few doubt the president's legal authority to direct these departments.

Alongside these remnants of the original constitutional structure are dozens of specialized executive councils. The so-called independent agencies—including the Securities and Exchange Commission (SEC), the Federal Election Commission (FEC), the Federal Reserve, and the Federal Communications Commission (FCC)—are headed by panels of commissioners who direct their agencies via majority votes. In their functions, the independent agencies mirror the executive departments—they make rules, enforce federal laws, and adjudicate violations. What makes the independent agencies different is that many regard them as unconnected to the executive.

Sometimes a federal statute will declare that an agency is “independent.” Other times, observers infer independence from the multimember nature of these councils and the fact that the statutes restrict presidential removal. Finally, sometimes the assertion of independence reflects nothing more than conventional wisdom that the agency is supposed to be free of presidential control, a convention that incoming presidents typically accept. For instance, the statute creating the SEC never declares that the commission is to be independent. Nor does any other federal law limit the president’s ability to remove SEC commissioners. Yet many suppose that the SEC is an independent agency and that the president may remove its commissioners only “for cause.”

The independent agencies are unconstitutional, or so the theory of the unitary executive instructs. These agencies—the SEC, the FEC, the FCC, and so forth—execute federal laws as they create interstitial rules, judge violations of them, and bring civil prosecutions. As such, they implement the president’s executive power. The president, as “constitutional executor,” has a constitutional power to superintend the execution of these laws, just as the president may direct the execution of laws committed to the Treasury or the Commerce Departments. Neither the Necessary and Proper Clause nor anything else in the Constitution grants Congress the power to parcel out the president’s executive power among various officers and agencies. Congress can no more subdivide and redirect the executive power than it may split and strip away the president’s powers to make treaties or pardon offenders. Congress only has such power when the Constitution explicitly grants it. With respect to inferior officers, for instance, the appointments clause specifically allows Congress to vest appointment authority in others. No analogous clause authorizes Congress to deprive the president of the “executive power” and vest it elsewhere.

The arguments for the constitutionality of independent agencies have no stopping point. If Congress can insulate civil prosecutions from presidential supervisions (as is the case now) and if the independent prosecutor statute was constitutional (as *Morrison v. Olson* held), the consequences are startling. Every prosecutor in the Department of Justice, including all U.S. attorneys, could enjoy for-cause protections, thereby granting them independence from the president. Indeed, the Congress could make the Department of Justice wholly independent of the president. More generally, current Supreme Court case law makes it possible for Congress to wrest loose all executive departments (other than perhaps Defense and State) from the president’s orbit and refashion them into independent agencies.

Apart from their constitutional infirmities, independent agencies are less than ideal as a matter of governmental structure, for the very reasons the founders supposed. With such agencies, there is far less coordination, far more opacity, and rather little responsibility. Because each plural executive council executes separate areas of federal law, these councils typically

do not coordinate with either the president or each other. At least when the Continental Congress served as a plural chief executive there was a chance that it could coordinate across all executive agencies. That sort of harmonization is rather unlikely in a world in which Congress has carved up the unitary executive into different subject-matter fiefdoms.

Moreover, when these plural executives take measures, the public finds it difficult to assign responsibility, since almost all commissioners are relatively anonymous. While a commission may be at fault for some rule or prosecution, exactly which commissioners are to blame is difficult to determine. And the proliferation of personnel and agencies with responsibility for different areas of federal law makes it impossible to hold individuals accountable. In a world where many Americans have difficulty identifying who serves as vice president, precious few can identify the members of even powerful independent agencies, like the FCC or the SEC. While the electorate is naturally drawn to a single person, they cannot be bothered with keeping track of a hundred commissioners, much less discerning which are to blame for particular blunders or oversights.

The independent agency concept has such a tight grip on modern thought and practice that it has successfully staved off any meaningful presidential supervision of independent agencies. While the president could theoretically monitor these plural councils and remove commissioners for cause (because the underlying statutes typically provide as much), the executive branch often knows relatively little of what transpires in the independent agencies. The independent agencies generally do not report to the president, and the president rarely requests opinions or facts from them. Instead, presidents and their minions seem to have accepted the idea of independent agencies to such an extent that they rarely consider if a commissioner has given cause for removal. Put another way, the independent agencies are more autonomous than their statutes demand because the executive has turned a blind eye toward them. By failing to superintend the execution of these laws, modern presidents have not only ceded their power to execute federal law, but they also have violated their obligation to take care that the laws are being faithfully executed. A duty that requires watchfulness cannot be satisfied by a persistent presidential indifference.

The independent agencies should be integrated into the executive branch, with presidents superintending them just as they do the various executive departments. We ought to return to the presidency's early days, when responsible chief executives routinely directed executive branch officers regarding prosecutions, investigations, and law execution more generally, and when no set of federal laws were walled off from the constitutional executor of federal laws.

Reform would be easy. With respect to the independent agencies, the Supreme Court could eliminate the for-cause restrictions on presidential removal on the ground that they are unconstitutional and make clear in

its opinions that presidential direction of the FEC, SEC, FCC, and so forth is entirely appropriate. The reformed agencies could continue to be structured as commissions, because the theory of the unitary executive does not require that the apexes of executive departments or agencies also be unitary. Executive commissions are fine so long as the president may superintend and remove the commissioners that compose them.

Presidents have a part to play. At a minimum, they ought to monitor the independent agencies and remove commissioners who have been remiss in their duties or have misread their statutes—that is, to remove commissioners for “cause.” Going further, presidents ought to attempt to direct the independent agencies—say, by requiring them to engage in cost-benefit analysis when they come up with rules and by reviewing their civil prosecutions. Should commissioners fail to heed directions, presidents ought to remove them. Before the courts, presidents ought to consistently repudiate the idea of independent agencies and urge the courts to do so as well.

The unitary executive is no panacea, since scandals would not disappear. As history proves, presidents are quite capable of abusing power. But this is both a feature and a bug. The powers assigned by Article II properly rest with the president, as does the responsibility. Fortunately, the public can readily perceive who is to blame for the misuse of those powers. Contrast this with a system no less prone to abuses, where it is impossible to say who should be held accountable.

In sum, we ought to end the failed experiment with a fourth branch of government and revert to the original design, where power to execute the laws and responsibility for their execution rest with the president. Only a single accountable person, like the president, may direct the execution of federal laws “with discernment and decision, with promptitude and uniformity.” When it comes to law execution, the buck stops with the president.

NOTES ●

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1. The reader interested in the case should read Kevin M. Stack, “The Story of *Morrison v. Olson*: The Independent Counsel and Independent Agencies in Watergate’s Wake,” in *Presidential Power Stories*, ed. Christopher H. Schroeder and Curtis A. Bradley (New York: Foundation Press, 2009), 401–46.
2. Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (New Haven, CT: Yale University Press, 2008), 381.

3. *In re Sealed Case* 838 F.2d 476.
4. Charles Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* (New York: Simon and Schuster, 1991), 167.
5. See, for instance, Harold J. Laski, *The American Presidency: An Interpretation* (New York: Harper and Brothers, 1940); and Grant McConnell, *The Modern Presidency* (New York: St. Martin's Press, 1967). I discuss the progressive vision in more depth in Richard J. Ellis, *The Development of the American Presidency*, 2nd ed. (New York: Routledge, 2015), 13–16. Also see Stephen Skowronek, “The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive,” *Harvard Law Review* (2009): 2070–103, esp. 2083–92.
6. Compare Arthur M. Schlesinger Jr., *The Imperial Presidency* (Boston: Houghton Mifflin, 1973), with L. Gordon Crovitz and Jeremy Rabkin, eds., *The Fettered Presidency* (Washington, DC: American Enterprise Institute, 1989).
7. On the myth of the presidential mandate, see Robert A. Dahl, “Myth of the Presidential Mandate,” *Political Science Quarterly* 105 (Autumn 1990): 355–72; and Richard J. Ellis and Stephen Kirk, “Presidential Mandates in the Nineteenth Century: Conceptual Change and Institutional Development,” *Studies in American Political Development* 9 (Spring 1995): 117–86. Also see B. Dan Wood, *The Myth of Presidential Representation* (New York: Cambridge University Press, 2009).
8. Henry Jones Ford, *The Rise and Growth of American Politics* (New York: Macmillan, 1898), 292–93.
9. John Yoo, quoted in Skowronek, “The Conservative Insurgency,” 2093.
10. *Ibid.*, 2092; Richard E. Neustadt, *Presidential Power: The Politics of Leadership* (New York: Wiley, 1960).
11. On the mythical persuasive powers attributed to FDR as well as Ronald Reagan, the “Great Communicator,” see George C. Edwards III, *The Strategic President: Persuasion and Opportunity in Presidential Leadership* (Princeton, NJ: Princeton University Press, 2009). Also see Ellis, *Development of the American Presidency*, 123–28, 187–93.
12. Ellis, *Development of the American Presidency*, 3, 47.
13. The same point is made somewhat differently in Peter M. Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy* (Chicago: University of Chicago Press, 2009), 32.
14. Neustadt, *Presidential Power*, 33.
15. Ellis, *Development of the American Presidency*, 447–54.

16. Fried, *Order and Law*, 171. Fried concedes that the unitary executive vision, however appealing, “is not literally required by the words of the Constitution. Nor did the framers’ intent compel this view” (170). On Fried’s distrust of the young revolutionaries in the Reagan Justice Department who pushed the unitary executive doctrine, see Ellis, *Development of the American Presidency*, 448.
17. Shane, *Madison’s Nightmare*, 37.
18. The “good or ill” quote is from *Federalist* No. 68. Also see Shane, *Madison’s Nightmare*, 38.
19. According to Madison’s notes, Madison was the only person at the convention to speak against this clause, and his objection was that it did not go far enough: “Superior officers below heads of Departments ought in some cases to have the appointment of the lesser offices.” Richard J. Ellis, ed., *Founding the American Presidency* (Lanham, MD: Rowman and Littlefield, 1999), 197.
20. Hamilton was not the only prominent Federalist to make this argument. Six months before Hamilton penned *Federalist* No. 77, Tench Coxe made the same claim at the Pennsylvania ratifying convention. Upon Congress’s creation of the Treasury Department in 1789, Coxe became assistant secretary of the Treasury; Hamilton, of course, was secretary of the Treasury.
21. See Jeremy Bailey, “The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton,” *American Political Science Review* 102 (November 2008): 453–65.
22. *Ibid.*, 459–61.
23. A detailed summary and analysis of the debate can be found in Ellis, *Development of the American Presidency*, 414–18.
24. Ellis, *Development of the American Presidency*, 417, 460–61 (n14), 18; Charles C. Thach, *The Creation of the Presidency, 1775–1789* (Baltimore: Johns Hopkins University Press, 1969; originally published 1923), 154.
25. Ellis, *Development of the American Presidency*, 417–18. Amazingly, this “great debate” was adduced in 1926 by Chief Justice William Howard Taft to justify striking down as unconstitutional an 1876 statute—signed into law by President Ulysses S. Grant—that required Senate consent for the removal of postmasters. Champions of the unitary executive hail Taft’s opinion as “masterful and scholarly” (Calabresi and Yoo, *Unitary Executive*, 248), but in truth the opinion is the sort of potted history that only legal advocates could love. That Taft’s opinion is considered “one of the cornerstones of unitary executive scholarship” (*ibid.*, 248) should

be warning enough of the weakness of the foundations on which conservative lawyers have built the unitary executive doctrine. For a critical analysis of Taft's opinion in *Myers v. United States*, 272 U.S. 52 (1926), and a capsule summary of the devastating dissenting opinions, especially those by Louis Brandeis and Felix Frankfurter, see Ellis, *Development of the American Presidency*, 440–42.

26. Ellis, *Development of the American Presidency*, 151; Shane, *Madison's Nightmare*, 38–39.
27. Ellis, *Development of the American Presidency*, 152. Forrest McDonald, *The American Presidency: An Intellectual History* (Lawrence: University Press of Kansas, 1994), 228. Also see Forrest McDonald, *Alexander Hamilton: A Biography* (New York: Norton, 1982), 125–26.
28. For a fuller discussion of Firegate and its connection to the unitary executive, see Ellis, *Development of the American Presidency*, 454–58. The quote is from Chief Justice Taft's opinion in *Myers v. United States*.
29. David E. Lewis, *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance* (Princeton, NJ: Princeton University Press, 2008).
30. See Shane, *Madison's Nightmare*.
31. Brandeis's dissent in *Myers v. United States*.