

THE SOMETIMES UNITARY EXECUTIVE: PRESIDENTIAL PRACTICE THROUGHOUT HISTORY

**THE UNITARY EXECUTIVE: PRESIDENTIAL
POWER FROM WASHINGTON TO BUSH.** Steven G.
Calabresi¹ and Christopher S. Yoo.² New Haven: Yale
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*Harold J. Krent*³

Steven Calabresi and Christopher Yoo's book *The Unitary Executive* presents an excellent inquiry into the concept of a centralized executive throughout our history. The authors' goal is to persuade the reader that all presidents have viewed the power to supervise and remove subordinates as central to the very meaning of "executive power" in Article II of the Constitution. Without such an ability, presidents would be unable to execute the law effectively and place their stamp on the administration. The authors succeed in attaining that goal, for the record they portray reveals a long tradition of forceful assertion of presidential rights to control policy through close supervision of officers within the executive branch.

In assessing the history, the authors focus on "the president's constitutional power to remove and direct subordinates, including those in entities like the Treasury Department, the Post Office, federal prosecutors, and the independent agencies that some have said are beyond presidential powers of control" (p. 418). All forty-three presidents (prior to the current Administration) have embraced a conception of the unitary executive that at least encompasses the powers to remove and supervise their subordinates' exercise of delegated authority so as to create one centralized executive branch. Moreover, an unbroken his-

1. Professor of Law, Northwestern University.

2. Professor of Law and Communication, University of Pennsylvania Law School.

3. Dean and Professor, IIT Chicago-Kent College of Law. I thank Tom Merrill and Mark Rosen for commenting on an earlier draft.

torical practice, in their view, lends considerable force to the contemporary question of whether the unitary executive ideal is grounded in the Constitution.⁴ Their normative view embraces the unitary executive concept, and they accordingly critique current doctrine, in particular, the Supreme Court's decision in *Morrison v. Olson*,⁵ for permitting Congress to limit the executive's removal authority over agency officials (pp. 377–78). To them, the existence of independent agencies cannot be squared with the historical recognition of the importance of the president's removal authority.⁶

Had the authors only addressed the removal authority,⁷ their argument would have been convincing. But the authors claim to be addressing the entire panoply of authorities that can be traced to the unitary executive. The authors never delineate which powers—other than the appointment and removal authorities—are critical to the unitary executive ideal.⁸ Thus, it is difficult, at times, to ascertain whether the authors present a historical incident to further their thesis that presidents have consistently asserted a particular power, like the removal authority, or rather merely to applaud a president's actions.

For example, the authors write of President Lincoln's unilateral efforts to prepare the Union for war (pp. 165–69), but it is not clear why. A presidential power to act outside of congressional will, which they at times criticize (pp. 174–78), seems far from falling within a unitary ideal. Moreover, they describe at length the Supreme Court decision in *In re Neagle*,⁹ which af-

4. P. 4 (“[A] foundational principle of law is that to some degree what the law is on the books is determined by what it actually is in practice.”). Similarly, to the extent that Congress or the courts consistently claim a particular view, that evidence should be relevant as well to the ultimate meaning of a constitutional provision, whether in Article I, II, or III. The authors suggest that the views of the coordinate branches have not been as consistent as those of the executive branch. (pp. 16, 28).

5. 487 U.S. 654 (1988).

6. In making their case, the authors only touch tangentially on a wide panoply of other presidential powers, whether the pardon power or the power to serve as Commander-in-Chief. Their book, therefore, does not explore some of the most controversial exercises of presidential power during President George W. Bush's Administration—the sanction of torture, the spying on U.S. citizens, and the incarceration of enemy combatants at Guantanamo Bay.

7. The authors largely rely only on the removal authority. Longstanding criticism by presidents as to congressional efforts to limit the appointment authority would have bolstered their thesis. See HAROLD J. KRENT, *PRESIDENTIAL POWERS* 24–36 (2005).

8. In the conclusion, the authors summarize their findings by category such as “independent counsels,” “the civil service,” “independent agencies,” and so forth (pp. 417–28). They do not specify, however, which attributes of the unitary executive have been consistently adhered to by presidents throughout history.

9. 135 U.S. 1 (1890).

firmed a realm of inherent presidential power in sustaining an executive branch decision—in the absence of congressional authorization—to detail a marshal to protect the life of a threatened Supreme Court Justice (pp. 221–24).¹⁰ There is a conceivable but by no means ineluctable connection between that decision and the unilateral executive.¹¹ Similarly, the authors commend presidents who have asserted the power to construe the constitution for themselves, but do not explain why that authority fits within their conception of the unitary executive (pp. 69–71, 80, 98).¹² The exercise of the veto power, which the authors discuss at several points, seems even more tangential (pp. 95, 99, 135–36, 153, 385). The book suffers from lack of a taxonomy of powers linked to the unitary executive conception: a strong executive is not necessarily a unitary one.

The unitary executive ideal as traditionally understood focuses not on the relationship between the president and the coordinate branches but more narrowly on the relationship between the president and subordinates within the executive branch. That is why the appointment and removal authorities are so key under this “superintendence” theory. In the absence of such authorities, Congress could delegate key functions to independent presidential subordinates so as to preclude effective centralized control of executive authority by a president. The power of a president to disagree with the Supreme Court’s constitutional interpretations or to act in the absence of congressional authorization is beside the point. The historical evidence

10. They add that “[i]t is inconceivable that an administration that endorsed [Attorney General] Miller’s Lincolnian interpretation of Article II would not also believe that the president had the authority to control subordinate executive officials in their execution of federal law” (p. 223). The authors simply do not make the case that all who believe that the president has inherent authority to act to protect the nation, in the absence of a statute to the contrary, must believe in the power to dismiss subordinates at will, much less to nullify any actions taken pursuant to congressional direction.

11. Presumably, if presidents can act in the absence of legislation to pursue measures protecting the public welfare, they can ignore congressional limits on the presidential removal authority or congressional specification that particular executive branch officials (as opposed to the president) are to make certain decisions. But, the connection is indirect. In any event, the authors dismiss Supreme Court decisions with which they disagree, such as *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), so the relevance of celebrating *In re Neagle* is unclear.

12. In addition, the authors laud President Wilson for vetoing legislation that sought to vest in congressional committees a continuing say over executive policymaking (p. 256). They do not connect how opposition to congressional meddling can be equated to preservation of the unitary executive ideal. See also p. 155 (addressing Pierce’s opposition to a type of congressional veto); p. 282 (addressing FDR’s vetoes of similar congressional efforts).

presented in the book is thus overinclusive, confusing the reader as to the scope of the authors' claims.

Moreover, the evidence addressed is underinclusive as well. For while the material presented to demonstrate longstanding executive views with respect to the removal authority is impressive, no comparable evidence is presented with respect to other potential attributes of the unitary executive ideal. For instance, the unitary executive principle should prompt presidents to centralize authority through executive orders (pp. 12–13) and through efforts to reorganize the executive branch irrespective of Congress's initial assignment of authority. The authors include mention of these attributes,¹³ but do not treat them in the same depth or with the same consistency as the removal authority.

The authors stress another possible attribute of the unitary executive principle, namely that the president must have the power not merely to supervise subordinates, but to supplant their authority directly. They state that “[a]ll subordinate nonlegislative and nonjudicial officials exercise executive power . . . only by implicit or explicit delegation from the president” (p. 4). With that statement, they suggest that Congress plays only an attenuated role in designating the officer to exercise particular executive functions given that the president retains authority to exercise all delegated authority directly. No matter what powers Congress assigns to particular officeholders, the president can make the final decision. Later, the authors repeat that there has been a consistent view that the president exercises the “power to nullify or veto subordinate executive officials’ exercise of discretionary executive authority” (p. 14). Indeed, President George W. Bush’s administration recently advanced a similar view that only presidents exercise the “executive” power, and that therefore presidents may nullify anything performed by a subordinate.¹⁴

13. The authors address President Taft’s reorganization efforts in some depth (p. 250), as well as those of President Wilson (p. 257), but do not analyze presidential views towards reorganization across administrations. Interestingly, President Reagan’s own Office of Legal Counsel disclaimed that there had been any consistent presidential practice with respect to reorganizing the executive branch in the absence of authorization from Congress: “This understanding has also generally been reflected in the Executive Branch’s acquiescence in the need for reorganization legislation in order to restructure or consolidate agencies within the Executive Branch.” *Limitations on Presidential Power to Create a New Executive Branch Entity to Receive and Administer Funds Under Foreign Aid Legislation*, 9 OP. OFF. LEGAL COUNSEL 76, 78 (1985).

14. See *infra* text accompanying notes 27–51.

As a matter of history, there is no longstanding agreement among presidents as to a “nullification” power. The book itself provides scant evidence of any presidential power to nullify acts of subordinates.¹⁵ The authors elide concepts of control and nullification, persuasively arguing only as to the former. Thus, although the depth and breadth of the evidence they marshal to support a robust presidential removal power are impressive, their further argument as to historical grounding for a nullification power is wholly unpersuasive.

Moreover, the authors overlook a corollary to their unitary executive conception: given that subordinates speak in the president’s name, presidents should stand accountable for subordinates’ actions. The closer the control claimed by a president over subordinates—as reflected most clearly in the authors’ nullification thesis—the more a president should stand accountable for all actions within the executive branch. In litigation against the federal government, however, presidents have argued that the executive branch is comprised of independent governmental entities, and that each must be sued before relief can be accorded. Presidents thereby have reinforced the notion that executive branch agencies possess distinct legal personalities, undermining the authors’ thesis of a consistent presidential assertion of a power to supplant the decisionmaking of subordinates. The authors—and to my knowledge, nearly all other commentators—have overlooked that questions concerning the unitary executive have surfaced in routine litigation initiated by private parties against the federal government. In short, although Professors Calabresi and Yoo’s book is wonderfully informative about presidential views concerning the unitary executive as a control mechanism, it slights the salience of the same theory in litigation against the federal government. At the end, examining these related contexts should not render the authors’ historical examination superfluous, but it does suggest that the presidential practice outside of the removal authority context has not been as uniform as the authors suggest.

In Part I, I review the book, and highlight the authors’ stress on the importance of the removal power to understand the unitary executive ideal. The authors present a cornucopia of exam-

15. For normative defenses of a nullification power, indeed from one of the authors, see Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

ples to demonstrate how presidents have viewed the removal power as sacrosanct. The very accumulation of the historical materials discussed strongly supports their view of the centrality of the appointment and removal powers in providing presidents with unitary control over the executive branch.

In Part II, however, I suggest that the authors' more limited focus on a presidential power to nullify acts of subordinates is misguided. Some administrations, most notably that of George W. Bush, have asserted that the Constitution vests presidents with plenary control over all authority delegated to the executive branch. To President Bush and others, a unitary presidency demands not only the power to hire and fire, but also the prerogative to exercise personally all authority delegated by Congress. Irrespective of one's normative reaction to such an assertion—and I have critiqued it in the past¹⁶—the authors' excellent history on the removal power is not repeated here. They simply have not made the historical case for any such nullification power.

Finally, in Part III, I sketch in a more tentative fashion the previously unexplored implications of the unitary executive in the litigation context—when the executive branch is defending itself in litigation against suit filed by private entities and individuals. Presidents in a wide variety of cases have not hesitated to rely on a fragmented executive branch to dismiss claims. They have argued that cases should be dismissed because the wrong federal governmental entity was named and due to the fact that insufficient governmental entities were before the court to permit effective redress. They have recognized that federal agencies have distinct legal personalities. The litigation stances do not comport with the authors' insistence on a consistent executive belief in the ability to supplant agency determinations. The historical evidence, in other words, provides a more cabined understanding of the unitary executive than the authors and President Bush's administration would have us believe.

16. Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523 (2008).

I. THE IMPORTANCE OF THE REMOVAL AND APPOINTMENT AUTHORITY

A. THE UNITARY EXECUTIVE IDEAL

The idea of a unitary executive is neither new nor radical. The Framers rejected several proposals to split the executive, and there have been adherents of a strong centralized executive ever since.¹⁷ The language of Article II seemingly embraces some form of unitary executive by vesting “the executive power” in a president; assigning the president the responsibility to “take care that the laws be faithfully executed;” directing the president to appoint all principal officers of the United States, and empowering the president to “require the Opinion, in writing, of the principal Officer in each of the executive Departments upon any Subject relating to the Duties of their respective Offices.”¹⁸

To most commentators, arguments for greater centralized control based on the unitary executive ideal have coalesced around two virtues: accountability and effective leadership. The constitutional structure stresses accountability in order to secure individual liberty. Articles I, II, and III delineate powers that the branches are to exercise so as to clarify the lines of constitutional authority. The president stands responsible for all discharge of policy, and is judged by his or her performance on election day. To be sure, voters cannot always call the president to account for one particular issue given that they vote for a candidate based upon that candidate’s entire record. Nor may the president be able to stand for reelection. Nonetheless, the political process remains open to air misgivings about presidential leadership and, as those concerns mount in importance, they may become determinative at election time if not for the president, then for his party. As the authors put it, the question of control “is not a liberal or a conservative issue, but rather one of good government” (p. 7). Indeed, Alexander Hamilton noted in the *Federalist Papers* that:

it often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure . . . ought really to fall The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that where there are a number of actors who may have had

17. See KRENT, *supra* note 7, at 12–16.

18. U.S. CONST. Art. II, § 2.

different degrees and kind of agency . . . it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.¹⁹

Liberty is gained to the extent that one electorally accountable official stands responsible for such law implementation efforts. With a plural executive, responsibility may be shrouded, and the costs of determining who was responsible for what increase.

B. EXECUTIVE PRACTICE

To demonstrate the historical importance of this governing principle, the authors trace each president's views and actions reflecting on the unitary executive theory. They focus on a number of administrations in particular during which controversy over the president's removal authority arose. Throughout our history, presidents zealously have safeguarded the power to appoint and remove federal officials, despite pressure from Congress. The following is a sampling drawn from the book.

President Washington's administration was critical, for the first debates over the removal authority arose shortly after he assumed office. The authors argue that Congress's ultimate decision to vest in the president the removal authority over newly minted federal governmental positions demonstrates the importance placed on such centralized control. The so-called Decision of 1789 has been widely studied in the past, under which Congress provided that the president be able to remove the Secretary of Foreign Affairs and the Secretary of Treasury from office at will (pp. 35–36). The authors assert that the congressional decision to vest a plenary removal authority in the president reflected a constitutional view as opposed to a policy preference. The fact that the debate was closely contested with respect to the Secretary of the Treasury has suggested to others that Congress was far from convinced that the Constitution mandated that the president be empowered to remove executive officials at will. The authors, however, focus rather on the fact that President Washington exercised the same control over the Treasury Secretary as he did over the Secretary of Foreign Affairs, and that he did not hesitate to remove a number of executive branch officials with whom he was not pleased (pp. 44–45). The authors subsequently endeavor to show that the president exercised supervi-

19. THE FEDERALIST NO. 70, at 428 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

sory control over criminal law enforcement of federal laws (pp. 47–52). The fact that private relators, grand juries, and state prosecutors played a far greater role than today does not undermine their thesis,²⁰ but does raise questions as to how close the control over law enforcement in fact was.

The authors also argue that the Washington administration exercised close control, or at least could have, over the executive commissions created during his tenure in office. The authors point out that the apparent independence of the Patent Office and a federal commission to inspect the mint did not cut to the contrary and that the president for all intents and purposes retained significant control (pp. 52–53). Only the structure of the Bank of the United States gives the authors pause, and that structure, they argue, may have stemmed from a view, since repudiated, that monetary policy was separate from governmental policy (pp. 53–54).

The authors also focus on President Jackson's administration, both for his assertive leadership and for his claims of expansive executive power. In terms of the removal authority, Jackson was not shy in dismissing officeholders upon assuming the reins of power (p. 100). Moreover, President Jackson demonstrated a personal interest in law enforcement, ordering termination of condemnation proceedings against the jewels owned by the Princess of Orange (p. 103).

In the battle over the Second Bank of the United States, President Jackson's views of the scope of the unitary executive became more manifest. He ordered Secretary of State Duane to remove deposits held in the Bank but Duane, who had been an ally, refused (p. 108). Jackson dismissed Duane, the deposits were removed, and the Senate counteracted with a censure. Jackson then responded that, because Article II made him "responsible for the entire action of the executive department, it was but reasonable that the power of appointing, overseeing, and controlling those who execute the laws—a power in its nature executive—should remain in his hands" (p. 111). He continued that "it is a necessary consequence that he should have a right to employ agents of his own choice to aid him in the per-

20. The authors argue that the president, as a theoretical matter, could have ordered private relators or state law enforcement officials to drop or alter a prosecution. Even if true, which is by no means clear, it remains incontrovertible that the president lacked control over the *initiation* of law enforcement. See Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989).

formance of his duties, and to discharge them when he is no longer willing to be responsible for their acts” (pp. 111–12). The House, too, debated the issue, but President Jackson stood his ground (p. 117), and ultimately prevailed. Jackson relied on the removal authority to unify execution of the law.

Challenges of the Civil War and Reconstruction bring to light Presidents Lincoln and Johnson’s convictions that strong centralized control was indispensable to effective presidential governance. President Lincoln’s decisive acts during the Civil War manifested a strong unitarian conception of the presidency. Indeed, any other view during that tumultuous period may have stymied his efforts to combat the crisis.

As noted before, however, the authors relate a number of measures that cannot be ascribed to any unitarian conception of the executive branch. For instance, they relate that, at the outset of the war, President Lincoln mobilized troops and supplies without congressional authorization (p. 166), ordered a naval blockade of southern ports, and unilaterally suspended the writ of habeas corpus (pp. 166–67). Many of his actions left Congress scrambling to keep up.

With respect to supervision of the executive branch, Lincoln removed his first Secretary of War, Simon Cameron, for insubordination in arming fugitive slaves for the Union Army (p. 171). He also removed from office almost the entire group of presidential appointees who held office under his predecessor. Although President Lincoln justly is remembered for his unilateralism and energy in responding to secession, the authors stress that he also understood the critical importance of the removal power in coordinating the executive branch.

President Andrew Johnson pursued his own views of Reconstruction unilaterally, but without Lincoln’s skill. President Johnson refused to implement the congressional design to punish leaders of the secession, protect the newly freed slaves, and integrate the South back into the Union on Congress’s terms. Although impeachment efforts might have resulted from his continued efforts to thwart Reconstruction (pp. 176–78), the first impeachment of a president in our nation’s history stemmed instead from a deep conflict between Congress and the President over the removal authority.

Congress passed the Tenure of Office Act²¹ to provide that all civil officers appointed with the advice and consent of the Senate would hold office until their successors were confirmed by the Senate. Cabinet members were treated slightly differently and made subject to the president's removal authority but only if the Senate consented. President Johnson vetoed the bill, arguing in his message "[t]hat 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" (p. 180). He defended the removal authority not only upon historical grounds but also on the separation of powers structure in the Constitution: the executive branch must be "capable . . . of executing the laws and, within the sphere of executive action, of preserving, protecting, and defending the Constitution of the United States" (p. 181). Congress overrode the veto.

President Johnson subsequently attempted to remove from office War Secretary Edwin Stanton, a holdover from the Lincoln administration who remained on good terms with the radicals in Congress. Initially, Johnson complied with the Act and submitted the reasons for the removal to the Senate, although he accompanied the message with a call for repeal of the Act on the grounds of its unconstitutionality: "The President is the responsible head of the Administration, and 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" (p. 182). The Senate refused to approve Stanton's ouster.

President Johnson a month later ordered that Stanton leave office. Stanton refused, precipitating the constitutional challenge. The Senate passed a resolution condemning the ouster as a violation of the Act, and Johnson responded that "[t]he 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" (p. 185).

21. Act of Mar. 2, 1867, ch. 154, 14 Stat. 430. Congress repealed the Act in 1887, Act of March 3, 1887, ch. 353, 24 Stat. 500.

The House thereupon commenced impeachment proceedings, the primary charge consisting of the violation of the Tenure of Office offense. The House overwhelmingly voted to impeach the President. The Senate ultimately failed by a single vote to convict on impeachment articles related to the removal of Stanton. Thus, although the impeachment reflects a congressional determination that Congress enjoyed the power to limit the president's removal authority, President Johnson's steadfast refusal to cave in followed a long line of presidents who viewed the removal authority as a key determinant of presidential power.

President Franklin Roosevelt assumed great centralized power, both to combat the threat within caused by the Depression, and the threat of German domination from without. Upon entering office he issued an executive order transferring all legal authority to the Justice Department, and he shifted the Bureau of the Budget from the Treasury to the Executive Office of the President (p. 280). FDR, as would his successors, utilized the executive order as a means of asserting tighter control over subordinates on a wide variety of issues.

FDR also jealously guarded his removal power, objecting when Congress attempted to force him to remove subordinates because of their allegedly radical views (p. 283). Moreover, FDR dismissed the Chairman of the FTC, William Humphrey, because of his right wing views (pp. 283–84). That dismissal prompted a lawsuit, and the FDR Justice Department argued to the Supreme Court that the restrictions in the FTC Act constitute "a substantial interference with the constitutional duty of the President to 'take care that the laws be faithfully executed.'" The brief further argued that the type of duties exercised by the FTC in no way undermined the need for executive branch control through the removal authority (pp. 283–84). In its decision in *Humphrey's Executor v. United States*,²² the Supreme Court embraced a limitation on dismissals for all executive officials exercising quasi-judicial and quasi-legislative functions, thus protecting the independence of certain agencies from direct presidential control. Congress reacted by inserting for the first time limitations on removal in a number of statutes (p. 287).

Moreover, FDR sought to reorganize the executive branch substantially, convening what was to be called later the Brownlow Commission to enhance the effectiveness of presidential leadership. The Commission recommended that the independent

22. 295 U.S. 602 (1935).

agencies be integrated into executive departments so as to prevent their centripetal pull. Indeed, if the agencies proliferated, the Commission warned that the president's "stature is bound to diminish. He will no longer in reality be *the Executive*, but only one of many executives, threading his way around obstacles which he has no power to overcome" (p. 293). The Commission also recommended centralizing budget authority further, and vesting in the president continuing authority to reorganize the executive branch as conditions changed. FDR embraced the Commission's recommendations, but Congress resisted, and ultimately handed FDR a stinging setback.

Upon reviewing the first fifty years after the launch of the modern independent administrative agencies, the authors conclude that presidents consistently asserted the constitutional prerogative to rein in that independence. Both through efforts to reorganize the executive branch and through deployment of the removal authority, presidents acted congruent with the unitary executive ideal.

With respect to our most recent president, the authors note President George W. Bush's assertion of the right to fire any official with whom he disagreed in the newly formed Department of Homeland Security (p. 408). In the face of serious allegations about wrongdoing within his administration, Bush appointed not an independent special prosecutor but a United States Attorney (Patrick Fitzgerald) to investigate whether executive branch officials had illegally disclosed the identity of a CIA operative, Valerie Plame (p. 410). President Bush expanded the regulatory review program and, in so doing, directed that regulatory review officers within each agency report not to the agency head but to the president himself (p. 413).²³

The focus on the administrations above, however, should not obscure that the authors evaluate each presidency with reference to the executive's power to remove subordinates. All viewed the removal authority as critical to the effective exercise of executive power. Even the creation of administrative agencies and the civil service system did not erode presidential assertions of a robust removal authority, both before and after the *Humphrey's Executor* decision.

23. See Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007). President Obama has since reversed that Order. See Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009).

Indeed, the authors take pains to track presidential reactions to the independent agencies. They write that Presidents McKinley, Roosevelt, Wilson, Harding, and Coolidge all believed that they controlled the independent agencies and in fact at times directed their actions, as might be expected before the *Humphrey's Executor* precedent (e.g., pp. 234–35, 242, 257–59, 265–66). Presidents Roosevelt and Harding proposed consolidating independent agencies into new executive departments (pp. 241, 262), and it was President Wilson's discharge of postmaster first class Frank Myers that ultimately led to the Supreme Court's broad defense of the president's removal authority in *Myers v. United States*,²⁴ a case which was briefed under the supervision of President Coolidge.

Frustration with the expansion of independent agencies continued after *Humphrey's Executor* during the administrations of every successive president. Presidents from Truman to Johnson railed against the notion that the independent agencies were outside the executive's orbit, and the first President Bush threatened at the end of his administration to remove all nine members of the independent Postal Service Board of Governors for failing to comply with a directive to abandon a position maintained in a postal rate fight (p. 389).²⁵ (The courts came to the rescue of the Service and protected the Governors' tenure in office.²⁶) And, it was President Clinton who first imposed formal regulatory oversight over the independent agencies, requiring them to share proposed rules with the Office of Management and Budget prior to final issuance (pp. 393–95). In many respects, therefore, presidents even after *Humphrey's Executor* and *Morrison v. Olson* have attempted to limit the ambit of independent agencies so as to preserve greater authority for the unitary executive.

Based on this wealth of information, the authors conclude that presidents historically have believed that they could remove from office all executive branch officials, whether "independent" or not, for reasons of policy. They do not clarify further whether such removals can be reviewed by judges to ensure that the removals stem from policy differences, as opposed to reasons of spite or bias, and there are few relevant presidential announcements on that score. Nonetheless, the authors make a strong case

24. 272 U.S. 52 (1926).

25. The courts rebuffed President Bush's effort, enjoining removal of the Governors. See *Mail Order Ass'n of Am. v. U. S. Postal Serv.*, 986 F.2d 509 (D.C. Cir. 1993).

26. KRENT, *supra* note 7, at 67–68.

that, without the removal authority, presidents cannot attain centralized control of executive branch implementation of the law.

II. ADDITIONAL CLAIMS OF THE UNITARY EXECUTIVE

Although the book is styled as a history of the unitary executive, the authors rigorously analyze only the removal authority. The unitary executive ideal should also include, at a minimum, efforts to reorganize the executive branch and to funnel delegated authority through the White House, such as through executive orders. The authors note the development of executive orders and efforts to reorganize the executive branch, but do not trace each president's actions with respect to these attributes.

The authors assert an additional presidential prerogative that they claim has been consistently adhered to by presidents. They argue that presidents should be able to nullify any act by a subordinate with which they disagree. In other words, presidents cannot only remove officers with whom they disagree, they can directly supplant their authority and change their decisions. Although they do not flesh out their theory, they apparently are of the view that congressional delegations of authority to particular officeholders are only provisional—the president can personally exercise that power if he so chooses, and perhaps even reassign that power to someone else. Without the power to nullify acts of executive officials, presidents could not be fully accountable for executive branch administration of the law.

The authors relate some incidents in which presidents countermanded the orders of subordinates. For instance, they report that Presidents Grant and Cleveland overruled decisions by their secretaries of the interior, but do not amplify (pp. 192–93, 210).²⁷ They also recount an incident in which President Jefferson's efforts to direct a customs collector to take a particular action were rebuffed by a reviewing court, much to President Jefferson's displeasure (pp. 73–74). Attorney General Caleb Cushing during the Pierce administration voiced support for a nullification power (p. 155). The first President Bush issued a number of signing statements protesting Congress's decision to impose ob-

27. *See also* p. 147 (recounting that President Taylor's administration asserted the power to direct accounting officials).

ligations on agents of the executive branch without permitting his supervision (p. 386).

Yet, those few instances are contradicted by others that the authors cover. For instance, they relate that the comptroller exercised final decisionmaking authority over certain disbursements in President Washington's administration (p. 57). They recount that Attorneys General William Wirt, Roger Taney, and John Young Mason all argued that the president lacked the power to correct "the errors of judgment of incompetent or unfaithful subordinates" (pp. 142-43). The authors state, as well, that the Fillmore administration asserted that the president lacked authority to direct accounting officers in their settlement of accounts (p. 151). They also note that presidents such as Truman specifically disclaimed the power to direct their subordinates' actions (p. 310).

More tellingly, they omit any discussion of presidential views as to whether presidents enjoy the power to direct agency heads to reach particular positions in rulemakings or adjudications. The authors are clear that presidents should be able to discharge agency heads for policy differences, presumably whether in fashioning rules or adjudicating cases. That position is controversial in itself.²⁸ But the authors fail to document historically or justify normatively the further position that presidents should be able to nullify or supplant agency head determinations when issuing rules or adjudicating disputes.

Indeed, with relatively minor exceptions, the nullification theory only flowered with the administration of George W. Bush. President George W. Bush's signing statements and other initiatives portray a unitary executive that would permit the president to countermand a subordinate's decision. In President Bush's view, Congress evidently cannot delegate authority to a subordinate executive branch official without formally allowing the president to substitute his own views for those of the officer. In a sense, the identity of the delegate chosen by Congress would become largely irrelevant. Congress might as well choose to delegate to the Secretary of Labor as opposed to the Secretary of Defense: they are just stand-ins for the president himself.

28. See, e.g., A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994); Robert V. Percival, *Presidential Management of the Administrative State: The Not-so-Unitary Executive*, 51 DUKE L.J. 963 (2001); Peter Shane, *Conventionalism in Constitutional Interpretation and the Place of Administrative Agencies*, 36 AM. U. L. REV. 573 (1987); Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59 (1983).

In the signing statements, President Bush objected to a number of congressional directives that delegate “final” authority to a subordinate official. Although President Bush did not expound on his views, he seemingly determined that Congress, consistent with the theory of a unitary executive, can delegate such final authority only to the president.

For instance, Congress in a 2002 DOJ Appropriations Authorization Act delegated “final authority” to a subordinate of the Attorney General over certain prosecutorial training grants abroad.²⁹ President Bush responded that such delegation had to be construed “in a manner consistent with the President’s constitutional authorities to supervise the unitary executive and to conduct the Nation’s foreign affairs.”³⁰ President Bush believed that vesting final authority in a subordinate officer risked undermining his own ability to administer the law. In the same Act, Congress vested in United States Attorneys, in the context of particular civil settlements, “the exclusive authority to select an annuity broker from the list of such brokers established by the Attorney General.”³¹ President Bush wrote that “the executive branch shall construe the section in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch.”³² In this most routine or even trivial of administrative settings, the statement asserts that Congress cannot vest “exclusive” authority in any executive branch official other than the president—officials subordinate to the president do not enjoy independent legal status.

President Bush’s objections to legislation directing that he act through a specific officer reinforces that view of a highly centralized unitary executive. For instance, in crafting an emergency preparedness plan, Congress provided that:

If the President, acting through the Secretary of Health and Human Services, determines that 1 or more substances of concern are being, or have been released in an area declared to be a disaster area . . . the President, acting through the Secretary of Health and Human Services, may carry out a program for the coordination, assessment, monitoring, and study

29. 21st Century Department of Justice Appropriations Act, Pub. L. No. 107-273, §§ 2002, 2004, 116 Stat. 1758, 1789-1790.

30. Statement on Signing the 21st Century Department of Justice Appropriations Act, 2 PUB. PAPERS 2010, 2011 (Nov. 2, 2002).

31. § 11015(b), 116 Stat. at 1824.

32. Statement of Nov. 2, 2002, *supra* note 30.

of the health and safety of individuals with high exposure levels”³³

To President Bush, the congressional direction that the president was to act through a specified individual, even though a cabinet-level official subject to his plenary removal authority, violated the unitary executive. He stated that: “The executive branch shall construe Section 709 of the Act, which purports to direct the President to perform the President’s duties ‘acting through’ a particular officer, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch.”³⁴ Moreover, in the Foreign Relations Authorization Act of 2003, President Bush asserted the unconstitutionality of the provision that “[t]he President, acting through the Director General of the United States and Foreign Commercial Service of the Department of Commerce, is authorized to establish Technology American Centers.”³⁵ Even though President Bush exerted supervisory authority over the Director General, the congressional specification, in President Bush’s view, sapped presidential authority. As with the earlier set of statements, Congress may not purport to permit an agency official to bind the president: presidents must be permitted the opportunity to change subordinates’ determinations.

The scope of President Bush’s theory of the unitary executive also is illustrated in his many signing statements asserting the unconstitutionality of requiring agency heads to recommend to Congress proposals for legislative revisions. In objecting to over one hundred provisions requiring agency officials to recommend legislation to Congress,³⁶ President Bush seemingly has embraced the view that Congress cannot compel presidential subordinates to make recommendations to Congress.

For instance, in signing the Maritime Transportation Security Act of 2002³⁷ President Bush objected to a numbers of provisions which

33. Security and Accountability for Every Port Act of 2006, Pub. L. No. 109-347, § 709(b)(1), 120 Stat. 1884, 1948.

34. Statement on Signing the SAFE Port Act, 42 WEEKLY COMP. PRES. DOC. 1817 (Oct. 13, 2006).

35. Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 645, 116 Stat. 1350, 1403 (2002).

36. Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307 (2006) (arguing, however, that President Bush’s signing statements did not stake out new ground).

37. Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064.

purport to require an executive branch official to submit recommendations to the Congress. The executive branch should construe such provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch. Moreover, to the extent such provisions of the Act would require submission of legislative recommendations, they would impermissibly impinge upon the President's constitutional authority to submit only those legislative recommendations that he judges to be necessary and expedient. Accordingly, the executive branch shall construe such provisions as requiring the submission of legislative recommendations only where the President judges them necessary and expedient.³⁸

Section 110(c)(4) requires the head of the Coast Guard to "make[] a recommendation with respect to whether the program, or any procedure, system or technology should be incorporated in a nationwide system for preclearance of imports of waterborne goods."³⁹ Section 112(4) similarly requires a recommendation "for legislative or other actions needed to improve security of United States ports against potential threats posed by flag vessels of [certain] nations."⁴⁰ Congress did not bar presidential review of the proposed safety measures. Yet, to President Bush, these legislative provisions undermined the unitary executive, apparently by intruding into the president's constitutional prerogative to be the sole executive branch official to make all recommendations to Congress.

For another example, in the Department of Justice Appropriations Act discussed previously,⁴¹ Congress directed the Attorney General to "submit a report and a recommendation . . . whether there should be established, within the Department of Justice, a separate office of the Inspector General for the Federal Bureau of Investigation."⁴² Again, Congress did not bar the Attorney General from conferring with the President before the recommendations were made, yet President Bush objected.⁴³ Even officers of the United States had no role under the Bush conception to make proposals for legislative change. In the same Act, Congress required the Office of Personnel Management to "submit a report to Congress assessing the effectiveness of ex-

38. Statement on Signing the Maritime Transportation Security Act of 2002, 2 PUB. PAPERS 2132 (Nov. 25, 2002).

39. § 110(c)(4), 116 Stat. at 2092.

40. § 112(4), 116 Stat. at 2093.

41. See *supra* note 29.

42. § 309(c), 116 Stat. at 1784.

43. Statement of Nov. 2, 2002, *supra* note 30.

tended assignment incentive authority as a human resources management tool and making recommendations for any changes necessary to improve the effectiveness of the incentive authority.”⁴⁴ To President Bush, that directive crossed constitutional lines because it “purport[ed] to require executive branch officials to submit to the Congress plans for internal executive branch activities or recommendations relating to legislation.”⁴⁵ The mandatory nature of the provision clashed with his understanding of the unitary executive ideal. Therefore, he continued, “[t]he executive branch should construe such provisions in a manner consistent with the President’s constitutional authority to supervise the unitary executive and recommend for the consideration of the Congress such measures as the President judges necessary and expedient.”⁴⁶ All recommendations to Congress apparently must be funneled through the Office of the President.

As relayed by the authors,⁴⁷ President Bush also changed the reporting relationship within each agency so that regulatory policy officers would report not to the agency head but to the president directly. President Bush evidently believed that he could brush aside the reporting relationship established by Congress. Indeed, a Congressional Research Service Report asserted that:

[W]ith the submission of the President’s FY2003 budget, the Bush Administration appears to be attempting to transfer programs from agencies through funding consolidations. For example, the programs and \$234.5 million budget of the Office of Domestic Preparedness, Department of Justice, would be transferred to the Federal Emergency Management Agency. . . . [T]he propriety of moving program responsibilities and related funds without statutory authority appears to be highly questionable.⁴⁸

President Bush apparently claimed the authority to rearrange both funding and responsibilities among executive branch agencies.

44. § 207(d), 116 Stat. at 1780.

45. Statement of Nov. 2, 2002, *supra* note 30.

46. *Id.*

47. See *supra* text accompanying note 23.

48. HAROLD C. RELYEA, EXECUTIVE BRANCH REORGANIZATION AND MANAGEMENT INITIATIVES 8 (CRS June 12, 2002). In addition, President Bush announced in early 2008 that he intended to transfer the functions of the Office of Government Information Services from the National Archives to the Department of Justice. See *White House Plan to Put New FOIA Office in Justice Department Draws Lawmakers’ Ire*, 76 U.S.L.W. 2441 (Jan. 29, 2008).

President Bush's Administration, however, did not consistently assert a presidential power to supplant the decisions of subordinates. Consider an Opinion of the Office of Legal Counsel, not discussed in the book, which explored whether the president could centralize border control policy to a greater extent than Congress had authorized:

Congress may prescribe that a particular executive function may be performed only by a designated official within the Executive Branch, and not by the President. The executive power confers upon the President the authority to supervise and control that official in the performance of those duties, but the President is not constitutionally entitled to perform those tasks himself.⁴⁹

The Opinion flatly contradicts the nullification thesis forwarded by the authors.

Furthermore, President Bush never claimed the power to substitute his views for those of an agency head in formal rule-making or adjudication under the Administrative Procedure Act.⁵⁰ Congressional directives that particular officers exercise administrative power are routine. The Secretary of Health and Human Services, for instance, issues rules and adjudicates cases that bind the executive branch. In common parlance, these rules, decisions, and orders are "final." The president can remove the Secretary from office if he disagrees with the rules promulgated or the cases adjudicated. If presidents could exercise final authority over rulemaking or adjudication, the very premise of on-the-record administration action would be compromised. To my knowledge, not one president has opposed the Administrative Procedure Act as a derogation of his authority.

My point here is not to engage the authors as to whether, as a normative matter, presidents should be able to supplant the decisions of subordinates,⁵¹ but rather to highlight how little historical support exists for such a conception. The book's careful assessment of longstanding presidential support for a robust removal authority does not extend to other potential attributes of a unitary executive theory, including the power to nullify acts of subordinates. The authors fail to present evidence of continuous

49. *Centralizing Border Control Policy Under the Supervision of the Attorney General*, 26 OP. OFF. LEGAL COUNSEL, slip op. 2 (2002).

50. 5 U.S.C. §§ 500-596 (1966).

51. For criticism of their theory, see Peter L. Strauss, *Overseer, or "the Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007); Percival, *supra* note 28.

presidential opposition to congressional determinations to vest particular responsibilities in particular agency officials. Congress long has viewed agency heads as distinct legal personalities.

III. THE UNITARY EXECUTIVE AS A SHIELD

In this last section, I investigate, as a preliminary matter, the possible salience of litigation against the federal government to the unitary executive theory. Litigation provides an illustrative context with which to assess the depth of presidents' commitment to the unitary executive ideal in general and, in particular, to the nullification version espoused by the authors. One can discern presidential views towards executive power as much through stances in litigation as through removals, signing statements, and executive orders. Although litigation patterns among presidents are not uniform, presidential administrations, in a wide variety of contexts, have asserted defenses in litigation that compromise the unity of the executive branch. They have acknowledged the separate legal personalities of executive branch entities, arguing that the wrong government agency was named or that additional agencies needed to be named before relief could be granted. Presidents have not assumed responsibility for acts of subordinates. My goal is not to examine the probity of such defenses but rather to point out how problematic these litigation stances are when examining the authors' sweeping claims for consistent presidential assertions of the nullification version of the unitary executive. No president, to my knowledge, has ever significantly eased the path of adverse litigants for the sake of burnishing the image of a unitary executive in the public's eye.

A. INTRABRANCH LAWSUITS

In many litigations, the executive branch itself has not treated the federal government as one indivisible entity. One such instance has been remarked upon before—presidential administrations have permitted, if not encouraged, one agency to sue another in seeking judicial resolution of a dispute.⁵² Such lawsuits undercut the conception of a unitary executive under which each official's decision represents that of the president. A brief inquiry into intrabranh lawsuits serves as an introduction

52. See generally Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991).

to presidential positions in relatively routine litigation that reflect upon the unitary executive ideal.

Consider the Federal Labor Relations Authority, which Congress created in 1978 to resolve disputes between agencies and their unionized employees.⁵³ The FLRA can rule against agencies, and it subsequently can petition the appellate court to enforce an order. So far, six presidents have served since passage of the FLRA, and none, to my knowledge, has protested that only he can resolve such intrabran­ch disputes. Indeed, the Supreme Court has resolved a number of disputes between the FLRA and another executive branch agency.⁵⁴ If the president can supplant the decisionmaking of all executive branch subordinates, how can lawsuits be permitted to proceed without making a mockery of the nullification version of the unitary executive that the authors advance?

The FLRA cases, as well as those involving the Merit Systems Protection Board,⁵⁵ perhaps can be rationalized on the ground that one federal agency stands in the shoes of government employees and thus its position with respect to the employing agencies is sufficiently adverse to permit suit. The reasoning may be persuasive as a matter of standing doctrine, but does not explain why presidents permit agencies to sue one another if they can nullify the decisions of subordinates. At a minimum, presidents have acquiesced in congressional schemes that pit one agency against the other.

The history of intrabran­ch disputes extends more broadly. Most famously, President Nixon engaged the courts to contest a subpoena issued by the special prosecutor.⁵⁶ In cases of lesser notoriety, executive branch agencies have initiated suit against each other. For instance, prior to *United States v. Nixon*, the United States sued the ICC when it disagreed with its railroad rate determinations,⁵⁷ and it later sued the FCC in a dispute over telephone rates.⁵⁸ Moreover, the executive branch has sued to

53. Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

54. See, e.g., *NASA v. FLRA*, 527 U.S. 229 (1999); *Dep't of Defense v. FLRA*, 510 U.S. 487 (1994); *Dep't of Treasury v. FLRA*, 494 U.S. 922 (1990).

55. *U.S. Postal Serv. v. Gregory*, 534 U.S. 1 (2001); *Lachance v. Erickson*, 522 U.S. 262 (1998).

56. *United States v. Nixon*, 418 U.S. 683 (1974).

57. *United States v. ICC*, 337 U.S. 426 (1949); see also *Ford Motor Co. v. ICC*, 714 F.2d 1157 (D.C. Cir. 1983) (Department of Defense challenged the ICC's refusal to award reparations for overcharges).

58. *United States v. FCC*, 707 F.2d 610 (D.C. Cir. 1983).

contest mergers and rate agreements that one of its agencies approved.⁵⁹ More recently, two federal agencies overseeing personnel matters lined up on opposing sides in litigation over qualifications critical for the corps of administrative law judges.⁶⁰

Perhaps some of the litigation can be understood as a nod to the reality that, under prevailing doctrine, presidents cannot in fact control independent agencies but must use whatever means, including litigation, to ensure control.⁶¹ Yet, by permitting its own agencies to sue others within the executive branch, presidents have perpetuated the idea of a divided executive branch.

In any event, some litigation has been launched between executive branch agencies that are not considered "independent." The Secretary of Agriculture, for instance, sued the EPA for suspending the registration of pesticides.⁶²

Presidents have, at times, endeavored to keep intrabran­ch lawsuits out of the courts, instructing agencies to bring any disputes to the Attorney General for resolution.⁶³ Moreover, they have *defended* against suit by independent agencies on the ground that intrabran­ch disputes are not consistent with the unitary executive.⁶⁴ But, the fact that presidents have permitted and even launched litigation against agencies presupposes separate legal personalities of agencies and undermines the authors' thesis that presidents have acted consistently with the nullification power.⁶⁵

The authors might retort that, until the president chooses to nullify a subordinate's acts, the subordinate maintains legal independence. They could continue that, although agencies can sue each other, the president has the means to halt such litiga-

59. *United States v. Marine Bancorp.*, 418 U.S. 602 (1974) (challenge to merger that had been approved by Comptroller of the Currency); *United States v. Fed. Mar. Comm'n.*, 694 F.2d 793 (D.C. Cir. 1982) (challenge to agency approval of rate-fixing agreement). For a more complete discussion, see Herz, *supra* note 52.

60. *Meeker v. MSPB*, 319 F.3d 1368 (Fed. Cir. 2003) (pitting OPM against MSPB).

61. Even then, the Solicitor General represents most independent agencies in court, at least at the Supreme Court level. Neal Devins, *Unitariness and Independence: Solicitor General Control Over Independent Agency Litigation*, 82 CAL. L. REV. 255 (1994).

62. *Env'tl. Def. Fund. Inc. v. EPA*, 548 F.2d 998 (D.C. Cir. 1977).

63. Herz, *supra* note 52. *Executive Order No. 12,146*, 3 C.F.R. 409 (1979). Even then, the Order does not prohibit resort to courts, but rather only imposes a preliminary hurdle.

64. For relatively recent examples, see *Tenn. Valley Auth. v. EPA*, 278 F.3d 1184 (11th Cir. 2002); *Dean v. Herrington*, 668 F. Supp. 646 (E.D. Tenn. 1987) (exercising jurisdiction over the TVA's contract claims against the DOE).

65. Intrabran­ch litigation is an affront to the theory that presidents can supplant the determinations of subordinates. Such cases conflict as well with the superintendence theory, but not as sharply.

tion. Yet, in the public eye, intrabranh litigation undercuts the notion of any nullification power and, in any event, the book is bereft of examples in which presidents attempted to halt intrabranh litigation in its tracks.⁶⁶

B. STANDING AND REDRESSABILITY

In addition to presidential acquiescence in the intrabranh litigation, presidents proactively have asserted the independent legal personalities of agencies as a shield to protect the executive branch from lawsuits filed by private entities. They have argued that, if plaintiffs cannot show that their injury is redressable by the *particular* governmental entity sued, then their case should be dismissed. They have refused to be accountable for injuries suffered due to the combined actions of subordinate governmental agencies.

The Supreme Court first elaborated on the redressability component of standing in *Lujan v. Defenders of Wildlife*.⁶⁷ The case arose out of a challenge to governmental aid for hydroelectric projects in Egypt that allegedly harmed the environment. Plaintiffs challenged the Department of Interior's decision under the Endangered Species Act,⁶⁸ which limited the duty of federal agencies to consult with the Secretary over federally funded projects affecting endangered species. Under the regulation, federal agencies must consult with the Secretary over projects in the United States or on the high seas, but not over projects overseas supported by the agencies, such as one for the Aswan Dam in Egypt.

For the Court, Justice Scalia held that plaintiffs had failed to demonstrate redressability: "instead of attacking the separate decisions to fund particular projects allegedly causing them harm, [plaintiffs] chose to challenge a more generalized level of Government action (rules regarding consultation)."⁶⁹ By that, he meant that "[s]ince the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary."⁷⁰ The executive branch itself had argued against standing, reasoning that courts should not view the executive branch as one "generalized" entity, but rather composed

66. The prominent exception is President George H.W. Bush's efforts in the postal service dispute. See *supra* text accompanying note 25.

67. 504 U.S. 555 (1992).

68. 16 U.S.C. § 1536 (1988).

69. *Lujan*, 504 U.S. at 568.

70. *Id.*

of component parts. In its reply brief, the government stressed that “only the Secretary [of the Interior] is a party,” and “an injunctive order must specify the federal officers who are responsible for compliance.”⁷¹ The case was not redressable because the absent agencies would not necessarily change their conduct.⁷² Plaintiffs’ claims were unsuccessful in part due to the executive branch’s refusal to take responsibility for actions within its control.⁷³

The executive branch argued to similar effect in *Bennett v. Spear*.⁷⁴ There, ranchers and water irrigation districts challenged a biological opinion issued by the U.S. Fish and Wildlife Service analyzing the effects of a planned Bureau of Reclamation project on two species of endangered fish. Under the regulatory scheme, agencies such as the Bureau must determine whether to abide by the biological opinions of the Service, a separate agency, before proceeding with planned projects. Accordingly, the executive branch argued that the suit should be dismissed because any injury suffered by plaintiffs could not be redressable by the U.S. Fish and Wildlife Service, but rather only by the agency that in fact proceeded on the project, the Bureau of Reclamation, which was not before the Court.⁷⁵ As the executive branch argued in opposing certiorari, “Because petitioners’ alleged injury results from the ‘independent action of some third party not before the court,’ they have failed to satisfy the constitutional requirements for standing.”⁷⁶

To the executive branch, it was immaterial that both agency heads were subject to close presidential control and presumably reflected the president’s views. Rather, the government argued that no standing existed in the case because all agencies had to be subject to the jurisdiction of the court before relief could be accorded the plaintiff. The agencies had separate legal personalities. Although the government was not successful in urging this

71. Reply Brief for the Petitioner at 16 n.6, *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (No. 90-1424), 1990 U.S. Briefs 1424.

72. See also *Wilderness Soc’y v. Norton*, 434 F.3d 584 (D.C. Cir. 2006) (holding non-redressable Wilderness Society’s action to compel the National Park Service to seek the President to recommend creation of additional wilderness areas).

73. Ironically, Justice Scalia’s redressability holding in *Lujan* undercuts the very unitary executive ideal that he previously embraced in cases such as *Morrison v. Olson*, 487 U.S. 654, 698 (1988) (Scalia, J., dissenting).

74. 520 U.S. 154 (1997).

75. Brief for the Respondents at 15-20, *Bennett v. Spear*, 520 U.S. 154 (1997) (No. 95-813), 1996 WL 396714.

76. Brief for the Respondent in Opposition at 6, *Bennett*, 520 U.S. 154 (No. 95-813), 1996 WL 33413297 (citations omitted).

particular argument,⁷⁷ its reasoning is telling: in litigation, the executive branch has disclaimed at least one version of the unitary executive theory for, if all agencies are subject to the immediate control of the president—and, indeed, are mere stand-ins for the president himself—then plaintiffs could have received redress.

C. FAILURE TO NAME PROPER EXECUTIVE BRANCH PARTY

Indeed, in settings far more mundane than the standing cases, the executive branch has supported distinctions drawn by Congress as to which agency is a proper defendant by urging that suits be dismissed or resubmitted when the wrong agency is on the caption, or when the wrong governmental official has been named. For example, in *Williams v. Army and Air Force Exchange Service*⁷⁸ plaintiff had filed an employment discrimination claim arising out of her job as department supervisor for the Army and Air Force Exchange Service. As the court of appeals described, “instead of suing the Secretary of Defense or the head of AAFES, [she] named AAFES as the sole defendant.”⁷⁹ Counsel followed that up by mailing a summons and copy of the complaint to the AAFES, the U.S. Attorney General, and the U.S. Attorney for the relevant district. Despite the notice, the executive branch moved to dismiss the case on the ground that plaintiff had named the wrong governmental entity, and the court agreed.⁸⁰ The executive branch did not avail itself of the opportunity to demonstrate its unitariness by accepting responsibility for actions of subordinates and defending suit on the merits. Many comparable cases exist.⁸¹

Similarly, the government has often moved to dismiss cases for lack of venue, arguing that the congressional differentiation with respect to which official is the proper respondent be strictly followed. To illustrate with but one example, consider the controversial case involving Jose Padilla, who was apprehended on

77. The Court rejected the executive branch's argument in this respect, finding a close enough connection between the biological opinion and the ultimate relief sought by plaintiffs.

78. 830 F.2d 27 (3d Cir. 1987).

79. *Id.* at 28.

80. *Id.* at 29.

81. See, e.g., *State Bank of Coloma v. Nat'l Flood Ins. Program*, 851 F.2d 817 (6th Cir. 1988) (dismissing suit because plaintiffs had sued subordinate part of Federal Emergency Management Agency instead of the Director of the agency itself); *Calderon v. U.S. Dep't of Agric., Food & Nutrition Serv.*, 756 F. Supp. 181 (D.N.J. 1990) (dismissing case for failure to name United States as defendant as opposed to FNS); *Rhys v. U.S. Postal Serv.*, 702 F. Supp. 945 (D. Mass. 1989) (dismissing case for failure to name Postmaster General as defendant).

suspicion of Al Qaeda links and then designated by President Bush and Defense Secretary Rumsfeld as an enemy combatant.⁸² The Defense Department held Padilla in a brig off of South Carolina, and denied him the right to counsel. Through an attorney acting as next friend, Padilla filed a petition for habeas corpus, contesting the continued incarceration and violation of his right to counsel.

The government responded in part by arguing that the case should be dismissed for failure to bring the action in the proper jurisdiction. Although Padilla had named as respondents the President, the Secretary of Defense, and the commander of the brig in which he was housed in South Carolina, the government argued that only the commander as the immediate custodian could be named as a respondent in a habeas corpus case. Because the case was not filed in South Carolina, the government argued that the case should have been dismissed. There have been numerous cases dismissing habeas corpus actions when the wrong party, such as the Attorney General, has been named instead of the warder or jailer,⁸³ and individuals contesting loss of parole must sue the prison warden, not the Board of Parole.⁸⁴ Petitioner, however, argued that the Secretary of Defense exercised *de facto* control over him because of the enemy combatant designation so that venue would have been appropriate in New York where, arguably, the Secretary of Defense could have been sued. The lower courts agreed.⁸⁵

On certiorari to the Supreme Court, the government's brief explicitly relied on Congress' differentiation of functions: "The habeas statutes dictate, in the context of core habeas challenges to present, physical confinement, that the proceedings take place in the federal district of confinement . . . against his immediate, on-site custodian rather than a supervisory official located in another, potentially far-removed district."⁸⁶ The supervisor could not serve in the stead of a subordinate, despite the fact that the subordinate followed the supervisor's dictates. The Supreme Court agreed with the executive branch and ordered the habeas

82. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

83. *See, e.g., Sanders v. Bennett*, 148 F.2d 19, 20 (D.C. Cir. 1945) (holding that the warden and not the Attorney General is the appropriate respondent in a habeas case); *Monk v. Sec'y of the Navy*, 793 F.2d 364, 369 (D.C. Cir. 1986) (same).

84. *Billiteri v. U.S. Bd. of Parole*, 541 F.2d 938 (2d Cir. 1976).

85. *Padilla ex. rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002); *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003).

86. Brief for the Petitioner at 16, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), 2003 U.S. Briefs 1027.

petition to be dismissed,⁸⁷ holding that Rumsfeld was not an appropriate respondent even though he had ordered that Padilla be treated as an enemy combatant and exercised continuing “legal control” over petitioner. Presidents have rarely, to my knowledge, rejected the refuge of congressional venue provisions to permit suit against a federal official, even though suit would have been appropriate against another official over whom the court had jurisdiction.

Congress’s specification of the role to be played by specific executive branch actors has weight, and presidents have urged courts to dismiss suits when the congressional specifications have not been adhered to, even though a different federal actor—whether subordinate or supervisor—may have caused the injury. Presidents have missed an opportunity to assert the unitariness of the executive branch.

D. DISTINGUISHING BETWEEN AGENCY OFFICIALS AND THE PRESIDENTS THEY SERVE

Moreover, the executive branch has defended against suit on the ground that agency determinations do not reflect presidential input. Congress in a variety of contexts has set presidents to review agency decisions, thus suggesting a difference between agency and presidential determinations. Presidents have acquiesced in the distinction.

Consider the Supreme Court’s decision in *Dalton v. Specter*.⁸⁸ There, a number of plaintiffs sued in part to overturn the Secretary of Defense’s recommendation to the president to close a particular military base. Under the Defense Base Closure and Realignment Act,⁸⁹ the Secretary was to propose closure of bases based on congressionally set criteria to an independent commission appointed by the president. The commission then held public hearings and was to submit its report to the president.

The Court held, accepting the executive branch’s arguments, that the commission’s report was not “final agency action” under the Administrative Procedure Act,⁹⁰ in that the president need not comply with any recommendation by the commission. In other words, agency determinations were not viewed as actions of the president, but as the determinations of a

87. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

88. 511 U.S. 462 (1994).

89. 10 U.S.C. § 2687 (1988).

90. 5 U.S.C. § 704 (1966).

distinct legal personality. Accordingly, because the president could not be sued directly under the APA, the Court rejected the suit. Similarly, in *Franklin v. Massachusetts*⁹¹ the executive branch successfully urged no review on the ground that census decisions of the Secretary of Commerce could not be imputed to the president.⁹² The executive branch did not consider the Secretary's decision to reflect the views of the president.

To be sure, one could argue that the congressional scheme itself is consistent with the unitary executive because it vests ultimate decisionmaking in the president. But, in so doing, Congress has legislated a distinction between agency and president, and the executive branch has stood behind Congress's differentiation in defending against the suit. A nullification theory presupposes the potential for presidential intervention *ex ante*, not *ex post*. If subordinates in the executive branch can "exercise executive power . . . only by implicit or explicit delegation from the president," as the authors suggest (p. 4), then congressional efforts to distinguish between the decisions of the president and a subordinate would be invalid. Every "final" decision of a subordinate would in effect be that of the president. Yet, in litigation, presidents seemingly have furthered the notion that presidents and agencies have distinct legal personalities. By acquiescing to congressional structures that set presidents apart from the agency officials they control, the executive branch arguably has undermined the authors' claim that presidents consistently have asserted a conception of the unitary executive that permits no salient distinction between presidents and the agencies they supervise.⁹³

91. 505 U.S. 788 (1992).

92. To similar effect, see also *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (denying review because Civil Aeronautics Board certification of airline routes had yet to be approved by the president).

93. Consider, as well, the sovereign act doctrine, which the executive branch has embraced to excuse contract performance by executive entities. In one of the first cases to articulate the doctrine, *Horowitz v. United States*, 267 U.S. 458 (1925), the Supreme Court examined the question of whether an agency's decision to embargo the shipment of silk was a sovereign act that precluded a different agency's prior contractual pledge to ship silk that the government had sold to a private entity. The Court held that "[w]hatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons." *Id.* at 461. The two characters of government—"contractor" and "sovereign"—could not be "fused." *Id.* Accordingly, one agency's policy decision could excuse another entity's breach without necessitating payment of damages.

Similarly, in *Derektor v. United States*, 128 F. Supp. 136 (Ct. Cl. 1954), plaintiff had contracted with the Maritime Commission, a federal agency, to purchase a ship with the understanding that it could be transferred to a foreign registry. The State Department

Finally, there are a number of cases in which the executive branch has argued, and the courts have agreed, including in *Dalton* and *Franklin*, that there is no judicial review of presidential as opposed to agency officials' acts. However, if an agency official acts only at the explicit delegation of the president, why should there be a difference as to reviewability? Presidents should stand accountable for the acts of their agency heads and permit review to the same extent as presidential determinations since all executive branch decisions stem from the same fount of power. Yet presidents have never complained that Congress has subjected agencies, but not themselves, to APA requirements and the potential for judicial review. Indeed, they have asserted in litigation that agency officials as opposed to the chief executive should be subject to suit.⁹⁴ In so doing, presidents have further separated their own office from those of the agencies they control.

A cursory examination of litigation involving the executive branch reveals, therefore, that presidents in defending against litigation have taken positions that suggest a stratified executive branch. Agencies have sued other agencies in court; the absence of all agencies before a court needed to provide relief makes a case nonjusticiable; naming the wrong executive branch agency

later intervened to prevent the transfer on the ground that it might be used to smuggle Jewish refugees to Palestine. Plaintiff sued for damages caused by the breach of contractual terms, but the court rejected the claim, reasoning that the State Department's embargo constituted a "sovereign act," excusing the Maritime Commission from contractual liability. As Judge Whitaker retorted in dissent: "This is a case in which this court gives sanction to bureaucratic action in violation of a right, this time a right acquired in consideration of the payment of a large sum of money to the defendant itself, who asserts the power to keep the money and to deny the right for which the money was paid." *Id.* at 142. He continued further that "[n]o sovereign has the power to induce the payment of money to it in consideration of a promise and then not keep the promise, or pay for the damages suffered for its failure to do so." *Id.* at 144. *See also* *Conner Bros. Constr. Co. v. Geren*, 550 F.3d 1368 (Fed. Cir. 2008) (holding that military commander's order shutting down base was a sovereign act excusing delay by Corps of Engineers before allowing construction project to proceed).

In a sense, the sovereign act doctrine can be understood more as a gloss on sovereign immunity than the unitary executive. The key issue, after all, is the nature of the governmental action, and it is immaterial whether the sovereign act stemmed from Congress or a different governmental agency. Nonetheless, the doctrine reveals an instance in which the executive has gone out its way to disclaim full unitariness: one agency's promise can be breached by another's policy priority. To the litigant, the executive branch has refused to stand as one undivided entity.

94. In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), for instance, the executive branch argued successfully that, although whistleblowers could bring claims directly against agencies for retaliation, they could not sue the president. Moreover, in cases such as *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), they have argued that federal courts can enjoin agency officials but not the presidents who order them to take particular positions.

is grounds for dismissal, and agency head decisions are not deemed to be those of the president. Taken together, these positions strongly indicate that presidents have staked out claims inconsistent with the nullification version of the unitary executive advocated by the authors, and thus undermine the authors' thesis that there has been a consistent executive practice in this respect.

CONCLUSION

Steven Calabresi and Christopher Yoo have performed a great service by exploring every president's exercise of the removal power. They relay the circumstances leading up to the removals, relate relevant presidential pronouncements, and depict the controversies that from time to time arose.

As a historical work gauging the extent to which each president's practice conformed with the unitary ideal, however, the book warrants only an incomplete. The book is both over and underinclusive in presenting examples during the respective presidential administrations. Moreover, the book's assertion of a nullification power is not even borne out by the examples that the authors themselves provide, and finds only limited support elsewhere. Had the authors examined the positions staked out in litigation by the executive branch, they would have been even more hard pressed to point to a nullification power in particular, for presidents widely have accepted and indeed furthered a conviction that executive agencies have distinct legal personalities. Thus, although the book's focus on the pivotal role of the removal authority throughout our history is exemplary, a more complete historical analysis of the unitary executive remains to be written.