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### The Bi-Partisan Enabling of Presidential Power: A Review of David Driesen's 'Specter of Dictatorship: Judicial Enabling of Presidential Power

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#### Recommended Citation

Jed H. Shugerman, *The Bi-Partisan Enabling of Presidential Power: A Review of David Driesen's 'Specter of Dictatorship: Judicial Enabling of Presidential Power*, 72 *Syracuse L. Rev.* 1521 (2022)

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**THE BI-PARTISAN ENABLING OF PRESIDENTIAL  
POWER:  
A REVIEW OF DAVID DRIESEN’S *THE SPECTER  
OF DICTATORSHIP: JUDICIAL ENABLING OF  
PRESIDENTIAL POWER* (2021)**

**Jed Handelsman Shugerman<sup>†</sup>**

“That same cloud-capt, fire-breathing Spectre of Democracy; incalculable, which is enveloping the world!”<sup>1</sup>

Thus Thomas Carlyle, in his famous three volumes on *The French Revolution* in 1837, described the death of King Louis XV, a “hollow phantasmagory,” a foreshadowing of a world turned upside down. Carlyle was ambivalent about the revolution, but many of his nineteenth-century readers feared populist chaos.<sup>2</sup> In America, Andrew Jackson had just finished his second term. Many Americans celebrated his populism; many loathed his demagoguery. In the same year, Queen Victoria began her reign, notable for its stability, by contrast to the revolutions that soon would sweep Europe in the 1840s.

Just as in 1789 and in 1837, today we are haunted by similar polarizing fears. The left fears the specter of dictatorship, as David Driesen titled his book. The right fears the specter of *sans-culottes* democracy and its Reign of Terror. Ironically, conservative scholars and judges have turned from democratic “specter” to royal “scepter”: they have embraced a monarchist unitary model for the presidency, ostensibly as originalism, but it is really just cherry-picking from Blackstone and the English crown (even from Mad King George III).<sup>3</sup> This review will summarize some recent unitary originalism scholarship that turn out to be royalism, not originalism.

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<sup>†</sup> Professor, Fordham Law School. With appreciation to Doron Dorfman, Julian Davis Mortenson, Alan Rozenshtein, Noah Rosenblum, Robert Tsai, and especially David Driesen for inspiring this review. Thanks to Abigail Gorzlaneyk, Cameron Rustay, Meghan Mueller for helpful edits. To Danya Handelsman, thanks for your judicious enabling of this review of presidential power.

1. THOMAS CARLYLE, *THE FRENCH REVOLUTION* 17 (1837).

2. Joshua Bennett, *Thomas Carlyle’s Place in German Intellectual History, 1830-1939: Kulture Protestantismus and the Creation of a Prophet*, OXFORD CARLYLE STUDIES J. (2021).

3. Brief for Seilia Law LLC v. Consumer Fin. Prot. Bureau as Amici Curiae in Support of Petitioner, Separation of Power Scholars, 140 S. Ct. 2198 (No. 19-7); MICHAEL MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING* 162 (2021).

The main point of this review is that it is not just conservatives driving the imperial executive and unitary theory. “Specter” is a reference to a fearsome apparition, but the etymology of “specter” is, surprisingly, from the Latin “spectrum,” which is appropriately a metaphor for how both ends of the American political spectrum have embraced the growth of the imperial presidency over the past century.

A specter is also defined as a “phantom,” and another important books on the unitary executive theory published in 2021 invoked the same themes in its title: *Phantoms of a Beleaguered Republic* by Stephen Skowronek, John A. Dearborn, and Desmond King;<sup>4</sup> and David Driesen’s *The Specter of Dictatorship: Judicial Enabling of Presidential Power*.<sup>5</sup> Skowronek, Dearborn, and King focus on fears on both sides of the political spectrum: the left’s fear of the imperial presidency and the right’s fear of the deep state. Driesen is not as balanced. Like Driesen, conservative Justices also fear tyranny and the abuse of executive power, even if the Justices fears turn into confirmation bias and motivated reasoning in misreading the historical record to construct a unitary executive myth.

Driesen starts his book correctly contesting this myth, arguing that the Founders feared of tyranny, and that the Supreme Court has ignored this original underlying constitutional purpose.<sup>6</sup> Driesen then shifts to another important history: the rise of European tyranny from Nazi Germany to the modern examples of Hungary, Turkey, and Poland and the specter of authoritarians fomenting fear.<sup>7</sup> He builds on these two historical perspectives to suggest a range of doctrinal reversals and recommendations. Driesen proposes wise reforms: more active judicial scrutiny of presidential “bad faith,” broadening standing, limiting the political question doctrine, abandoning the super-strong clear statement rule on limits to presidential power, and robust defense of the ballot.<sup>8</sup>

In the first part of this review titled “Article I”, I focus on Driesen’s approach to Congress and how he identifies the broad congressional delegation of powers to the president as a source of

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4. STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE (2021).

5. DAVID DRIESEN, THE SPECTER OF DICTATORSHIP: JUDICIAL ENABLING OF PRESIDENTIAL POWER (2021) [hereinafter, DRIESEN, THE SPECTER OF DICTATORSHIP].

6. *Id.* at 11–12.

7. *Id.* at 95–97.

8. *Id.* at 156.

expansive executive power, but then he does not identify the non-delegation doctrine as one of the solutions. Perhaps Driesen's anti-tyranny principle should lead to both a critique of the unitary executive and the excessive delegation of power. A second part, "Article II," is about a cause of the expansive interpretation of Article II: a bi-partisan pipeline from the Executive to the Judiciary. Both parties use executive branch lawyers in the Office of the Legal Counsel (OLC) to expand presidential power, and then appoint those lawyers with a pro-executive-power track record to the bench. The third part, "Article III," is on the formalist Justices from Scalia to Roberts and their theory of separation of powers as a defense of liberty. Driesen focuses on European dictatorships as an example of the problem of consolidated executive power, but some of those examples are evidence for the opposing side and the separation of powers as a check against ambitious party leaders. Poland seems to be a counter-example of factionalism that demonstrates the Framers' wisdom in their formal separation of powers. This review questions the assumption that the anti-unitary position is the pro-liberty position, because the unitary advocates have their own good-faith theory of liberty. However, the conclusion notes that the unitary theorists' assumptions about liberty reflect Republican ideology of the 1980s, not the original public meaning of executive power from the 1780s.

#### ARTICLE I: CRYING WOLF AND ELEPHANT

Frequently an issue of this sort [the concentration of powers] will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

-Justice Scalia's lone dissent in *Morrison v. Olson*<sup>9</sup>

The modern turn to the unitary executive theory more or less started with Justice Antonin Scalia. He cried wolf about the independent counsel in a lone dissent in *Morrison v. Olson* (a lone "wolf"?) in 1988. His dissent was full of historical assumptions about prosecution and executive power.

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9. 487 U.S. 654, 699 (Scalia, J. dissenting).

Two decades later, the Roberts Court turned Scalia's lone dissent into a 5-4 majority. Roberts revived the unitary theory as doctrine in *Free Enterprise Fund v. Public Company Accounting Oversight Board*<sup>10</sup> in 2010, then extended the theory in *Seila Law, LLC v. Consumer Finance Protection Bureau*<sup>11</sup> in 2020 and again in *Collins v. Yellen*<sup>12</sup> in 2021. Following these precedents, lower courts have raised doubts about traditional independent agencies like the FTC and the Federal Reserve.<sup>13</sup> The unitary executive theory plays a significant role in other originalist-textualist-formalist doctrines.<sup>14</sup>

Given how Scalia cried wolf in *Morrison*, and how the Roberts Court followed his fears and fictions in *Free Enterprise* and *Seila Law*, it is understandable that Driesen focuses on the conservative ideology of unchecked presidential power. However, it is not just a conservative ideology: It is a convenient ideology for whichever party holds the White House in an era when Congress is dysfunctional. If a party wants to accomplish its agenda, it exploits a mix of ambiguous statutes plus "presidential administration" (the title of Justice Kagan's most famous article,<sup>15</sup> one critiqued by fellow symposium contributor Noah Rosenblum<sup>16</sup>). This review's conclusion will offer more on this point and its relationship to conservative unitary theory, but for now, the salient point is the bipartisan convergence on presidential power.

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10. 561 U.S. 477 (2010).

11. 140 S. Ct. 2183 (2020).

12. 141 S. Ct. 1761 (2021).

13. *Axon Enter., Inc. v. Fed. Trade Comm'n*, 986 F.3d 1173, 1187 (9th Cir. 2021).

14. Examples beyond the removal power include: invalidating other independence provisions, such as potential DOJ reforms, independent prosecutors, and inspectors general. *Morrison v. Olson*, 487 U.S. 654, 659 (1988); *Edmond v. United States*, 520 U.S. 651, 666 (1997); *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018); invalidating congressional oversight. *Immigr. and Naturalization Serv. v. Chadha*, 462 U.S. 919, 956–59 (1983); *Bowsher v. Synar*, 478 U.S. 714, 736 (1986); expanding executive privilege claims. See the dissenting opinions *Trump v. Mazars*, 140 S. Ct. 2019, 2037, 2048 (2020) (Thomas, J. dissenting) (Alito, J. dissenting); *Trump v. Vance*, 140 S. Ct. 2412, 2434, 2441 (2020) (Thomas, J. dissenting) (Alito, J. dissenting); see also *Trump v. Mazars U.S., LLP*, 940 F.3d 710, 748 (D.C. Cir. 2019) (Roa, J. dissenting); curtailing standing and private rights of action: *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1115 (2021) (Newsom, J., concurring).

15. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

16. Ashraf Ahmad, Lev Menand & Noah Rosenblum, *The Tragedy of Presidential Administration*, 3 (Antonin Scalia L. Sch., Ctr. For the Study of the Admin. State, Working Paper No. 21-39, 2021) <https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2021/09/Ahmed-Menand-Rosenblum-The-Tragedy-of-Presidential-Administration.pdf> [hereinafter Ahmad, Menand, & Rosenblum, *The Tragedy of Presidential Administration*].

Since the Civil War, both parties have expanded “the Imperial Presidency,”<sup>17</sup> from some of the greatest presidents of both parties (Lincoln and Roosevelt), to some of the worst, and many mediocre ones in between. Congress has enabled much of this expansion—and often Democratic Congresses—by delegating powers with broadly open-ended language, including expansive emergency powers. The Trump era made these dangers all the more concrete, from the Muslim Ban to the family separation policy to the diverting defense spending to the Border Wall, all in the name of emergency powers.<sup>18</sup>

In Chapter 2, “The Rise of Presidential Power,” Driesen identified the “broad delegation” of power,<sup>19</sup> as well as the abuse of emergency powers,<sup>20</sup> as sources of presidential abuse of power. However, Driesen focuses on the emergency powers problem, and he underemphasizes the excessive ambiguous delegation problem and the potential solutions to this problem. It is true that Congress has delegated many emergency powers to the president, and the potential for abuse of those powers is great. But over the past century, the growth of the imperial presidency has been the result of more regular and institutional delegations that do not require a president to invoke an emergency. Driesen’s solution of limiting or sunseting emergency declarations would not address the general problem of the inexorable imperial presidency.

In his solutions section in Chapter 7, Driesen suggests that the constitutional (and statutory) rule against “non-arbitrary” executive action is a solution, with courts requiring “a factual basis” and “good faith.”<sup>21</sup> He is right that courts should take these requirements more seriously as a stronger limit on presidential abuses, and he suggests that Congress has granted too many and too ambiguous a range of emergency powers in 123 different provisions.<sup>22</sup> Driesen observes, “[s]ome statutory provisions provide authority that could be very useful to an autocrat,”<sup>23</sup> and he goes on to note how Trump abused emergency powers to fund the border wall with Mexico and to justify

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17. ARTHUR SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

18. Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Feb. 1, 2017) (titled “Protecting the Nation from Foreign Terrorists Entry Into the United States”); Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 20, 2019) (titled “Declaring a National Emergency Concerning the Southern Border of the United States”).

19. DRIESEN, *THE SPECTER OF DICTATORSHIP*, *supra* note 5, at 39.

20. *Id.* at 46.

21. *Id.* at 139–40.

22. *Id.* at 165

23. *Id.*

the Muslim Ban in *Trump v. Hawaii*.<sup>24</sup> Driesen understands that the “good faith,” “fact-based,” and “non-arbitrary” rules are hard to enforce, and judges wind up being deferential on these standards. Perhaps that permissive approach is not simply because the judges are permissive, but because these doctrines are worded permissively and are constructed from a deferential perspective. The Roberts Court has been developing doctrines to limit executive discretion: the limiting of *Chevron* deference to agency interpretation, “super-hard-look doctrine,”<sup>25</sup> the rise of the major questions doctrine and the non-delegation doctrine. However, Driesen does not engage with these developments as potential means of addressing the problem he has identified.

Scholars have recently published ground-breaking work on the Founding and non-delegation, especially fellow conference participant Julian Mortenson and his co-author Nicholas Bagley.<sup>26</sup> A mix of other scholars have focused first on structural arguments for non-delegation,<sup>27</sup> and more recently, more originalist historical arguments.<sup>28</sup>

The burden should be on the non-delegation proponents to establish clear original public meaning in order to justify judicial intervention in striking down federal statutes as violations of the separation of powers. The Framers may not have fully developed a “non-delegation doctrine,” but they established a structure of separation of powers and checks and balances that lead to some limits on who can exercise legislative power. Article I’s Vesting Clause states, “All legislative power shall be vested in a Congress.”<sup>29</sup> Article II’s Vesting Clause lacks the “all”: “[t]he executive power shall be vested in a president.”<sup>30</sup> As I have observed in a recent article focused on eighteenth-century dictionaries and the digital archives of the Framers’ letters and speeches, the word “vest” by itself did not have the meaning that many formalist originalists have assumed: it did not

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24. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 5, at 167–68.

25. See *DHS v. Regents of Univ. Cal. Berkeley*, 591 U.S. \_\_\_, 140 S.Ct. 1891 (2020).

26. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021).

27. See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 334–35 (2002); see also DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993).

28. See MCCONNELL, *supra* note 3; Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L. J. 1490 (2021).

29. U.S. CONST. art. I § 1.

30. U.S. CONST. art II § 1.

convey indefeasibility or exclusivity.<sup>31</sup> But I also found that the Framers sometimes added words to emphasize the scope and degree of vesting, with modifiers like “fully vested,” “exclusively vested,” “completely vested,” “absolutely vested,” etc.<sup>32</sup> The databases also show that the Framers also used the phrase “vesting all power,” signifying more complete vesting. These modifiers suggest that the word “fully” by itself conveyed less legal status, especially when referring to core legislative powers like taxation or in cases of military command. Article I’s Vesting Clause vests all power, while Article II does not. Is this simply a reflection of how the Framers took traditional executive powers and gave some to Congress, such as the power over war and peace (Treaty in the Senate) and over appointments (advice and consent)? The Constitution did not give “all” executive power to the President, and perhaps the Vesting Clause simply acknowledged this distribution by not claiming “all.” On the other hand, the Constitution gives the president the power to sign or veto legislation, a major legislative power—and yet the Constitution still vests “all legislative power” in Congress. In other words, if “all legislative power” was vested in Congress, and if “all” meant permanent vesting, Congress may not delegate its legislative power elsewhere.

This interpretation makes sense in terms of the Founders’ republican theories about legislative primacy in democratic law-making. Mortenson and Bagley show that the non-delegation doctrine was not fully formed,<sup>33</sup> but the separation of powers was a principle and a structural purpose, and just as Driesen draws from the Founding to find a principle of anti-tyranny as an argument against the unitary executive, one might also fill in the scope of separation-of-powers doctrine with the same anti-tyranny principle in favor of non-delegation, so that a president does not arrogate excessive legislative-like powers. Americans draw from the original purposes and apply them to new circumstances, as “fidelity in translation,” in Larry Lessig’s terms,<sup>34</sup> or “living originalism” in Jack Balkin’s terms.<sup>35</sup>

This interpretation of “all power vested” as completeness and non-delegation would not mean the end of administration and regulation: Congress would still enact broad legislation with sufficient

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31. Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479 (2022) [hereinafter Shugerman, *Vesting*].

32. *Id.* at 1.

33. Mortenson & Bagley, *supra* note 24, at 280–82.

34. Lawrence Lessig, *Fidelity in Translation*, 71 TEXAS L. REV. 1165 (1993).

35. JACK BALKIN, *LIVING ORIGINALISM*.



guidance by “intelligible principles,” and agencies could still engage in rule-making. However, the intelligible principles would need to be somewhat more clear. *A.L.A. Schechter Poultry Corp. v. United States*<sup>36</sup> would be right to find an impermissibly open-ended delegation. Justice Gorsuch would be right in *Gundy v. United States*<sup>37</sup> that Congress improperly delegated to the Attorney General, but he would be wrong in *West Virginia v. Environmental Protection Agency*,<sup>38</sup> because Congress was sufficiently clear. The “major question doctrine” might be a valid and more incrementalist interpretation of the separation-of-powers: Instead of striking down the entire statute for delegating legislative power, courts would instead strike down an executive action or agency rule for being impermissibly exercising legislative power beyond what Congress had enacted. If Driesen is committed to the anti-tyranny principle as a limit on executive power, it would have been worthwhile to follow up on the questions about *Chevron* deference, major questions, and non-delegation, even if he ultimately disagrees with them or would not apply the doctrines as restrictively as Justice Gorsuch or Justice Thomas.

#### ARTICLE II: THE PRO-PRESIDENTIAL PIPELINE TO ARTICLE III

In addition to the bi-partisan action of Congresses and Presidents inflating presidential power, both parties have built a pipeline from Article II lawyers to Article III judges. Presidents have increasingly turned to their own administration’s lawyers for judicial appointments, and more and more Supreme Court Justices had a professional foundation in the executive branch and/or as prosecutors.

A reason for the separation of powers is to frustrate the power of a party or faction to dominate all the levers of government. It turns out that even in the American system of separated powers, presidents from both parties use their appointment power to shape the judiciary in favor of presidential power.

Republican presidents have been most likely to nominate Justices who have significant experience in the executive branch:

Justice Scalia: Chair, ACUS, 1972-74; Assistant Attorney General and head of OLC, 1974-77.<sup>39</sup>

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36. 295 U.S. 495 (1935).

37. 139 S. Ct. 2116 (2019).

38. 2022 U.S. LEXIS 3268 (2022).

39. *Antonin Scalia*, OYEZ, [https://www.oyez.org/justices/antonin\\_scalia](https://www.oyez.org/justices/antonin_scalia) (last visited June 25, 2022).

Justice Thomas: Education Department, 1981-82; Chair of EEOC, 1982-90.

Chief Justice Roberts was Special Assistant to Reagan's Attorney General William French Smith (1982-86), associate with the White House Counsel; Bush's Principal Deputy Solicitor General (1989-92).<sup>40</sup>

Justice Alito: Assistant U.S. Attorney for New Jersey, 1977-81; Assistant to U.S. Solicitor General Rex E. Lee (1981-85).<sup>41</sup>

Justice Gorsuch: Principal Deputy Associate Attorney General at the DOJ from 2005-06; at the DOJ Civil Division, supervised the "terror litigation," including opposing disclosure of Abu Ghraib prisoner abuse;<sup>42</sup> also the son of Reagan's EPA Administrator Ann Gorsuch.

Justice Kavanaugh: Associate Counsel in Office of the Independent Counsel under Kenneth Starr, 1995-1997; Associate to White House Counsel Alberto Gonzales, 2001-03; Associate to the President and White House Staff Secretary, 2003-06.<sup>43</sup>

The only recent exceptions without executive experience are Anthony Kennedy and Amy Coney Barrett (and she assisted George W. Bush's litigation in *Bush v. Gore* while at the firm Baker Botts<sup>44</sup>). David Souter had significant state executive experience as a state prosecutor and New Hampshire attorney general.<sup>45</sup>

Democratic presidents have followed suit:

Justice Breyer: DOJ's Antitrust Division special assistant to its Assistant Attorney General, 1965-67; assistant

40. *Current Members*, SUP. CT., <https://www.supremecourt.gov/about/biographies.aspx> (last visited June 25, 2022).

41. *Id.*

42. Charlie Savage, *Neil Gorsuch Helped Defend Disputed Bush-Era Terror Policies*, NEW YORK TIMES (Mar. 15, 2017), <https://www.nytimes.com/2017/03/15/us/politics/neil-gorsuch-torture-guantanamo-bay.html>.

43. *Current Members*, *supra* note 38.

44. Beth Reinhard & Tom Hamburger, *How Amy Coney Barrett Played a Role in Bush v. Gore—and helped the Republican Party Defend Mail Ballots*, WASH. POST (Oct. 10, 2020), [https://www.washingtonpost.com/politics/amy-coney-barrett-bush-gore/2020/10/10/594641b8-09e3-11eb-991c-be6ead8c4018\\_story.html?tid=pm\\_politics\\_pop](https://www.washingtonpost.com/politics/amy-coney-barrett-bush-gore/2020/10/10/594641b8-09e3-11eb-991c-be6ead8c4018_story.html?tid=pm_politics_pop).

45. *Current Members*, *supra* note 38.

special prosecutor on the Watergate Special Prosecution Force in 1973.<sup>46</sup>

Justice Kagan, Associate White House Counsel, 1995-96; Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council, 1997-99; Solicitor General, 2009-10.<sup>47</sup>

Justice Sotomayor did not hold a federal executive office, but she did have state executive experience: state prosecutorial experience as an Assistant District Attorney in Manhattan, 1979-84; and she also served on the New York City Campaign Finance Board, 1988-92.<sup>48</sup> Former Justice Ruth Bader Ginsburg and Justice Ketanji Brown Jackson did not have significant executive experience on either level, given that the U.S. Sentencing Commission is an independent agency under the Judiciary.<sup>49</sup>

Republican appointees and Democratic appointees both expanded presidential power. Breyer was a major advocate for federal preemption law.<sup>50</sup> Breyer and Kagan are administrative law scholars who favor an expansive interpretation of administrative power and broad delegation. Their rulings and academic writings, like Kagan's "Presidential Administration,"<sup>51</sup> have given tacit acceptance and even cover for the Roberts Court's expansion of presidential power.

With assists from Congress and executive branch lawyers, Democratic presidents arguably have expanded executive power (or tried to) as much as Republicans have, from Woodrow Wilson's New Freedom to Franklin Roosevelt's New Deal and Japanese Internment to Harry Truman's Fair Deal and Steel Seizure to John Kennedy's New Frontier to Lyndon Johnson's Great Society and Vietnam and (...skip Jimmy Carter...) to Bill Clinton's "Presidential Administration." Clinton's OLC wrote an opinion conveniently concluding that a sitting president cannot be indicted, with a false claim that delay and statutes of limitations are not a problem because of "equitable tolling" for a prosecution—something that does not

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46. *Id.*

47. *Id.*

48. *Id.*

49. *Senate Confirms Ketanji Brown Jackson*, WHITE HOUSE, <https://www.whitehouse.gov/kbj/> (last visited June 26, 2022).

50. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 899–901 (2000).

51. Kagan, *supra* note 15.

exist.<sup>52</sup> The OLC author Randolph Moss was thanked with a judicial nomination by President Obama.

In terms of flexing the unitary executive powers of removal, Barack Obama allegedly removed AmeriCorps Inspector General Gerald Walpin because he had investigated Obama ally and then-Sacramento Mayor Kevin Johnson, despite norms of independence for all inspectors general.<sup>53</sup> In the Libya military intervention, the Obama administration acted to evade a formal opinion on the War Powers Resolution requirement that, if a president does not get congressional approval, the president must end military action within 90 days.<sup>54</sup>

The Obama administration implausibly asserted that its military campaign did not qualify as “hostilities” under the War Powers Resolution, and they failed to persuade Pentagon general counsel Jeh Johnson and acting OLC director Caroline Krass. Obama turned to State Department’s legal adviser Harold Koh to get the answer he wanted. President Obama also postponed (called “Big Waiver”) the Affordable Care Act’s requirements, allegedly for electoral advantage in the months before the 2012 election.<sup>55</sup> Now the Biden administration’s Office of Legal Counsel has embraced the ahistorical Roberts Court decisions in *Seila Law* and *Collins* to justify its removal of the Commissioner of Social Security, a holdover from the Trump administration whose office was protected from removal with a good-cause requirement.<sup>56</sup> The Biden administration could have attempted to give good cause, but instead, it legitimized the Roberts Court’s erroneous unitary executive theory, perhaps because it is convenient

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52. Jed Shugerman, *The Single Fatal Flaw in the Legal Argument Against Indicting a Sitting President*, SLATE (Dec. 11, 2018), <https://slate.com/news-and-politics/2018/12/trump-indict-sitting-president-statute-of-limitations.html>.

53. Josh Gerstein, *Ousted IG Cleared in Kevin Johnson Flap*, POLITICO (Nov. 10, 2009), <https://www.politico.com/blogs/under-the-radar/2009/11/ousted-ig-cleared-in-kevin-johnson-flap-022711>.

54. Eugene Robinson, *Obama’s Novel Definition of “Hostilities”*, WASH. POST (June 20, 2011), [https://www.washingtonpost.com/opinions/obamas-novel-definition-of-hostilities/2011/06/20/AGrFhVdH\\_story.html](https://www.washingtonpost.com/opinions/obamas-novel-definition-of-hostilities/2011/06/20/AGrFhVdH_story.html).

55. David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013); Peter Shane, “*Big Waiver*” as a Constructive New Tool of the Administrative State, ADMIN. L. J. OF THINGS WE LIKE (LOTS), (May 10, 2013), <https://adlaw.jotwell.com/big-waiver-as-a-constructive-new-tool-of-the-administrative-state/>.

56. U.S. Dep’t of Just. Off. Legal Couns., Memorandum Opinion for the Deputy Counsel to the President, *Constitutionality of the Commissioner of Social Security’s Tenure Protection* (July 8, 2021 1, 3, 5–6).

to have unitary power when you are in power, just like it is usually good to be king.

Presidents have too much power to shape the judiciary to their institutional advantage, and they seem to have learned that appointing their own executive officers leads to more favorable rulings for presidential power. The recent trend of nominating judges from outside of Article II, such as Justices Sotomayor, Barrett and Brown Jackson, is a positive development, but we have yet to see if they will actually scale back the executive expansionism of their colleagues.

### ARTICLE III: THE ROBERTS COURT'S THEORY OF SEPARATION AND LIBERTY

The metaphor of being haunted by “specters” – the ghosts of authoritarianisms past, present, and future – is appropriate, especially given that the unitary executive theory is an ahistorical figment of right-wing originalists’ imaginations, a manufactured myth. The unitary executive theory is the core constitutional argument for one of the most significant problems of our time: the growth of unchecked presidential power.

Driesen wisely focuses on how fear framed the Constitution in positive ways, but he also is attuned to how dictators exploit fear, especially of national security threats, minorities, outsiders, and emergencies, to consolidate power. However, Driesen’s account of fear in favor of checks and balances is, ironically, not balanced. He treats the Founders’ fears and the modern liberals’ fear as valid, but he overlooks modern conservatives’ valid fears of populist or bureaucratic power as the basis for their separation-of-powers interpretations. On the other hand, his book sometimes gives them too much latitude for their erroneous historical and constitutional interpretations.

The unitary executive theory claims that Article II gives the President unconditional and “indefeasible” executive power, meaning that they are above the checks and balances of Congress or the courts. Driesen’s most important contributions on this are in Chapters 5, “The Specter of Dictatorship: Poland, Hungary, and Turkey,” and 6, “Parallels to America’s Democratic Erosion.” He synthesizes the recent work of Kim Scheppele,<sup>57</sup> Tom Ginsburg and Aziz Huq,<sup>58</sup>

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57. Miklos Bankuti, Gabor Halami, & Kim Lane Scheppele, *Disabling the Constitution*, 23 J. DEMOCRACY 138 (2012).

58. TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2019).

Steven Levitsky and Daniel Ziblatt,<sup>59</sup> and others, on Viktor Orban's Hungary, Jaroslaw Kaczynski's Poland and Recep Tayyip Erdogan's Turkey.<sup>60</sup> Driesen does not discuss Vladimir Putin, but his observations are alarmingly applicable and devastatingly poignant as this review goes to print, and Vladimir Putin has jolted from a specter of dictatorship to brutal invader and alleged war criminal. Together with Trump, these European authoritarians reveal a dictator's playbook: play "constitutional hardball" (though "constitutional beanball" may be more apt<sup>61</sup>), undermine democracy, the ballot, the media, judicial independence, and the rule of law. Then assert emergency powers, abuse prosecutorial powers, lock up opponents.

In a life-follows-fiction twist, SPECTRE is also in the James Bond universe as an acronym for "Special Executive for Counter-intelligence, Terrorism, Revenge and Extortion," a villainous and shadowy organization of Nazis, Russians and other eastern Europeans, and Turks among others.<sup>62</sup> The Special Unitary Executive, in Driesen's telling, builds on the national security state, a fear of terrorism, and a certain degree of revenge.

However, if the Bond screenwriters lumped together too many disparate groups, Driesen may have been casting too wide a net. In fact, one of his examples may be a counterexample. Poland's leader Kaczynski is the head of the Law and Justice Party and, not the chief executive.<sup>63</sup> As Driesen concedes, Kaczynski is "the *de facto* head of state," and the prime minister and president are his "puppets": "Kaczynski controls [the party], which controls Parliament. While Kaczynski and his supporters vilify Russian communism, Kaczynski's government follows the communist model of autocracy based on having a head of a political party control the government."<sup>64</sup>

Poland may be an example that confirms the unitary theorists' fears about the head of a party or faction taking advantage of

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59. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2019).

60. DRIESEN, *THE SPECTER OF DICTATORSHIP*, *supra* note 5, at 95.

61. Jed Handelsman Shugerman, *Hardball v. Beanball: Identifying Fundamentally Antidemocratic Tactics*, 119 COLUM. L. REV. ONLINE 85, [https://columbialawreview.org/wp-content/uploads/2019/04/Shugerman-HARDBALL\\_VS\\_BEANBALL\\_IDENTIFYING\\_FUNDAMENTALLY\\_ANTIDEMOCRATIC\\_TACTICS.pdf](https://columbialawreview.org/wp-content/uploads/2019/04/Shugerman-HARDBALL_VS_BEANBALL_IDENTIFYING_FUNDAMENTALLY_ANTIDEMOCRATIC_TACTICS.pdf).

62. Chris Klimek, *The Messy, Improbable History of SPECTRE*, ATL. (Nov. 6, 2015), <https://www.theatlantic.com/entertainment/archive/2015/11/the-dubious-messy-history-of-spectre/414397/>.

63. DRIESEN, *THE SPECTER OF DICTATORSHIP*, *supra* note 5, at 101.

64. *Id.*

consolidated powers. Vladimir Putin also demonstrated a similar problem of consolidating power in the head of a party. After Putin served as President for two terms from 2000 to 2008, the Russian Constitution did not allow for a third consecutive term. His party ally First Deputy Prime Minister Dmitry Medvedev won the presidency in 2008, but they had already colluded, and Putin immediately engineered his appointment as Prime Minister, and he took over the reins of power, regardless of titles, executive roles, and “parchment barriers.” Without formal separation of powers, Putin could take over an office and turn that office into the dictatorship.

The Framers turned to the separation of powers as a hedge against faction.<sup>65</sup> They understood the threat of “faction,” manifested over time as a party-boss and a demagogue, whether Soviet, fascist, Putin, or Kaczynski. Their idea of the model of strict separation is that it prevents a faction or demagogue from taking over a unified parliamentary government. Consolidating power over three separate branches takes time, extra resources and coordination, and a series of elections.

Driesen claims the mantle of liberty and democracy for his critique of presidential power and the unitary executive theory. However, critics of the unitarians have not cornered the market on claims of democracy and liberty, and they have no monopoly on the Founding. In explaining the separation of powers, Madison wrote in *Federalist* No. 51, “[a]mbition must be made to counteract ambition.”<sup>66</sup> Chief Justice (and former President) William Howard Taft quoted Madison again in *Myers*: “[v]est this power in the Senate jointly with the President, and you abolish at once that great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good.”<sup>67</sup> Chief Justice John Roberts continued from *Federalist* No. 51 in *Free Enterprise*: “the Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.”<sup>68</sup> Chief Justice Roberts referred to the Framers in *Seila Law* as “scrupulously avoid[ing] concentrating power in the hands of any

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65. THE FEDERALIST NO. 51 (James Madison).

66. *Id.*

67. *Myers v. United States*, 272 U.S. 52, 131 (1926).

68. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 501 (2010) (citing *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)).

single individual.”<sup>69</sup> Roberts concluded that the Constitution includes a broad formal framework of separation of powers, because “the Framers did not rest our liberties on such bureaucratic minutiae” of agency design.<sup>70</sup> Justices Anthony Kennedy,<sup>71</sup> Clarence Thomas,<sup>72</sup> Neil Gorsuch,<sup>73</sup> and Brett Kavanaugh<sup>74</sup> also have suggested that the formal separation of powers promotes liberty.

The unitary theorists also emphasize presidentialism as democracy. Chief Justice Roberts also claims the president is the one representative for the entire nation. In *Seila Law*, he was exaggerating or wrong about whether the president is a direct representative as the Electoral College exists (notably, the “Faithless Electors” case was on the docket during that same term when Chief Justice Roberts neglected to acknowledge this purposeful design of indirectness).<sup>75</sup> Notwithstanding the Electoral College, the presidential election is the closest thing that the United States has to a national election. This valid concept has a long pedigree, as Jeremy Bailey demonstrated in his 2019 book *The Idea of Presidential Representation: An Intellectual and Political History*.<sup>76</sup>

This “presidential representation” argument is balanced by the separation-of-powers hedge against too much democracy. The risk of tyranny is not just presidential or national. Other kinds of officials sometimes have too much power without judicial constraints, particularly prosecutors. Additionally, many ambitious attorney generals and FBI leaders have overzealously advanced their own agendas.<sup>77</sup> Elected non-unitary executive officials, such as the ambitious California Attorney General Earl Warren, were the true

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69. *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2202 (2020).

70. *Free Enter. Fund*, 561 U.S. at 499.

71. *Clinton v. City of New York*, 524 U.S. 417 (1998)

72. *Seila Law*, 140 S. Ct. at 2211 (2020) (Thomas, J., concurring in part, dissenting in part).

73. *U.S. v. Arthrex, Inc.*, 141 S. Ct. 1970, 1988 (2021) (Gorsuch, J. concurring in part, dissenting in part).

74. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 217 (2018) (Kavanaugh J., dissenting).

75. *Seila Law*, 140 S. Ct. at 2203.

76. JEREMY D. BAILEY, *THE IDEA OF PRESIDENTIAL REPRESENTATION* (2019)

77. Jed Handelsman Shugerman, *Professionals, Politicos, and Crony Attorneys General: A Historical Sketch of the U.S. Attorney General as a Case for Structural Independence*, 87 *FORDHAM L. REV.* 1965, 1966 (2019).



architects of the Japanese internment.<sup>78</sup> Accordingly, ambitious prosecutors-politicians may be one of the driving forces in mass incarceration.<sup>79</sup>

Driesen sometimes validates the unitary theorists' fears about the legal and bureaucratic establishment's cultural assumptions. He compares the 9/11 attacks to the dangers of greenhouse gasses. Driesen, who teaches environmental law contends that climate change "will surely cause much greater destruction," and that the public overreacts to "national security" and misperceives environmental risks.<sup>80</sup> He has a point, but he takes it too far: "[b]ut why do attacks killing three thousand people harm national security instead of just constitute a horrific crime? It cannot be said that the possibility of losing three thousand lives in and of itself constitutes a threat to national security."<sup>81</sup> He posits that terrorism's threat to "national security in the true sense" is its "triggering overreaction by the government."<sup>82</sup>

Driesen is too dismissive of the violence of terrorism. Our legal system differentiates between murder and unintentional risks to life. Surely, we can acknowledge that terrorism has a "true risk" of mass murder, potentially many more than those who died on 9/11, considering the risk of biological, chemical, or nuclear terrorism. When Driesen suggests that the "true" threat of terrorism is national overreaction, he is taking the core of a valid point way too far. The true threat of terrorism is terror and mass murder. It has a huge secondary risk of triggering over-reactions, and it is important to note that some terrorists may want to trigger those over-reactions, such as drawing American troops into Iraq and Afghanistan. But it is understandable that many Americans worry that academic and bureaucratic elites underestimate the more direct risk of terrorism as mass murder—also a "true risk"—and many unitary theorists worry

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78. Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 19 B.C. THIRD WORLD L. J. 73, 75 (1998).

79. Jed Shugerman, "The Rise of the Prosecutor Politicians": *Databases of Prosecutorial Experience for Justices, Circuit Judges, Governors, AGs, and Senators, 1880-2017*, SHUGERBLOG (July 7, 2017), <https://shugerblogger.wordpress.com/2017/07/07/the-rise-of-the-prosecutor-politicians-database-of-prosecutorial-experience-for-justices-circuit-judges-governors-ags-and-senators-1880-2017/>.

80. DRIESEN, THE SPECTER OF DICTATORSHIP, *supra* note 5, at 152.

81. *Id.*

82. *Id.* at 155.

that too many administration insiders may share Driesen's dismissiveness about terrorism. This section of the book confirms conservatives' fears.

Ironically, just as Driesen is correct that the fear of dictatorship should lead to reducing presidential power, the unitary theorists may be right to fear that the bureaucratic elite are out of touch with public opinion and are dismissive of national security. Their fears are a valid reason to protect fast presidential decision-making as commander-in-chief. In an astute critique of the unitary theory in his book *Madison's Nightmare*.<sup>83</sup> Peter Shane describes this kind of fear as an explanation for a one-way ratchet increasing presidential power. In Driesen's version of "specter", fear should be an anti-unitary one-way-ratchet. Rosenblum and other historians of the administrative state have shown elsewhere that fear of fascism has led to checks on executive power.<sup>84</sup> I think a fair synthesis is that fear is equal opportunity: both parties have their fears, and both parties turn to presidential powers to combat what they fear.

As Driesen shows, the last century has shown that we must update our institutional designs to prevent more modern models of tyranny. However, while he was sometimes too dismissive of the unitarians and their theory of liberty, he was too concessionary to their originalist arguments. His critique is too mild: "that not all of the evidence is on one side of the debate."<sup>85</sup> To be fair, Driesen has been tougher on the unitary theorists' historical accuracy in articles,<sup>86</sup> but it is surprising that he softened his language in his book even after more research bolstered his earlier and stronger criticisms. In fact, Driesen's text and especially his careful footnotes reflect others' devastating work taking down the executive theory (citing work by Julian Mortensen,<sup>87</sup> Curtis

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83. PETER M. SHANE, *MADISON'S NIGHTMARE, HOW EXECUTIVE POWER THREATENS DEMOCRACY* (2009).

84. Noah A. Rosenblum, *The Anti-fascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 3–4 (2022), [https://columbialawreview.org/wp-content/uploads/2022/01/Rosenblum-The\\_Antifascist\\_Roots\\_Of\\_Presidential\\_Administration.pdf](https://columbialawreview.org/wp-content/uploads/2022/01/Rosenblum-The_Antifascist_Roots_Of_Presidential_Administration.pdf); Jed Shugerman, *The Legitimacy of Administrative Law*, 50 TULSA L. REV. 301, 301–02 (2015) (reviewing Dan Ernst and Joanna Grisinger's books, among others).

85. DRIESEN, *THE SPECTER OF DICTATORSHIP*, *supra* note 5, at 11.

86. *See generally* David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71 (2009).

87. Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019).

Bradley and Martin Flaherty,<sup>88</sup> Peter Shane,<sup>89</sup> Ethan Leib, and Andrew Kent,<sup>90</sup> and myself<sup>91</sup>). Emerging scholars Jane Manners and Lev Menand,<sup>92</sup> Daniel Birk,<sup>93</sup> and Christine Kexel Chabot<sup>94</sup> have offered a new challenge to the unitary account of English and American law of offices. He should have stated unequivocally: the unitary theory is not originalism. It is not supported by the historical record, but by modern ideological assumptions.

Ironically, the unitary theory relies on the notion of “democratic accountability,” but the originalists avoid accountability for repeated historical errors.

### CONCLUSION

If the historical support for the unitary executive theory is strong, why so many errors and misinterpretations? It is important to remember that these separation-of-powers formalists have a good-faith theory of liberty, but they let their presentist liberty concerns overtake the historical evidence. With “liberty” leading to motivated reasoning and confirmation bias, the unitary-theory Justices and scholars “find their unitary friends at the party,” to paraphrase Justice Scalia’s critique of legislative history.<sup>95</sup>

I have noted a puzzle: American conservatives had spent decades arguing for federalism and against the dangers of centralized national

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88. Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004).

89. Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 J. CONST. L. 2 (2016).

90. Andrew Kent, Ethan J. Leib, & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019).

91. Shugerman, *Vesting*, *supra* note 31; Shugerman, *The Marbury Problem and the Madison Solutions*; Shugerman, *Removal of Context*; Shugerman, *The Indecisions of 1789: Strategic Ambiguity and Inconstant Originalism*, PENN. L. REV. (forthcoming 2023), Shugerman, “Venality: Why ‘Executive Power’ Does Not Imply Removal” (forthcoming 2023).

92. Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021).

93. Daniel D. Birk, *Interrogating the Historical Basis for Unitary Executive*, 73 STAN. L. REV. 175 (2021).

94. Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1 (2020).

95. ANTONIN SCALIA, A MATTER OF INTERPRETATION 36 (1997); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

control. Then in the 1980s, they embraced the unitary executive theory and more centralized control.<sup>96</sup> At least federalism has more reliable conservative results at the local level, but Democrats would win the White House often enough for conservatives to regret so much presidential power. Even after Clinton's, Obama's, and Biden's five victories, the unitary theory on the Court and among conservative scholars remains strong. Is it a matter of principle?

In recent articles, legal scholars have identified the Reagan administration as the rise of unitary executive theory,<sup>97</sup> and some suggest that conservatives turned to the unitary theory to promote their policy of economic deregulation.<sup>98</sup> This observation is important but only partial and maybe only secondary. Conservatives do seem to perceive presidentialism as a path to deregulation, but what is good for the goose is good for the gander: conversely, Democrats Clinton, Obama, and Biden have used presidentialism to regulate. In fact, Kagan was making this very point in "Presidential Administration."<sup>99</sup> When Congress is broken, both parties rely on presidentialism to advance their agenda (and try to get re-elected).

I also see evidence that the unitary executive textual legal argument emerged earlier – in the 1970s during the Watergate litigation. If the turn to unitary presidentialism started with the Nixonites, the motivation was primarily de-regulatory. The Nixon

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96. Jed Shugerman, *A Unitary Puzzle: Why Do Conservative Decentralizers Want to Centralize?*, SHUGERBLOG (June 23, 2021), <https://shugerblogger.com.wordpress.com/2021/06/23/a-unitary-puzzle-why-do-conservative-decentralizers-want-to-centralize/>

97. Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Economic Investment in the Unitary Executive Theory, 1981-2000*, at 89 DENV. U. L. REV. 197, 201-10, 243-44 (2011); Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 355-56, 377 (2020) ("In the 1970s, the unitary theory per se hardly existed, with only a few scattered references in the legal literature. After the election of President Reagan and particularly after the selection of Ed Meese as Attorney General, the theory began to grow in prominence."). Skowronek identifies the 1970s and 1980s as the rise of unitary executive theory, with an emphasis on the Reagan to the George W Bush administrations and 9/11. Stephen Skowronek, Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 Harv. L. Rev. 2070, 2073 (2009).

98. Ganesh Sitaraman, "The Political Economy of the Removal Power," *supra*; Ahmad, Menand, & Rosenblum *The Tragedy of Presidential Administration*, *supra* note 16 at 3-4.

99. Kagan, *supra* note 15.

administration was pro-regulation in ways that surprise many modern readers. For example, Nixon supported the creation of the Environmental Protection Agency, the Clean Air Act, and the National Environmental Policy Act, even though he vetoed the Clean Water Act.<sup>100</sup> He also signed the Endangered Species Act and major regulation like the Occupational Safety and Health Act.<sup>101</sup>

Presidential power increased for many reasons since the Civil War and especially in the twentieth century, related to military command plus regulation, but balanced out by independent regulatory commissions and by other checks and balances (as Rosenblum shows in “Anti-fascist Roots of Presidential Administration”<sup>102</sup>). However, the Nixonite and Reaganite turn to unitary theory was likely more about the Cold War and the Culture Wars. They observed the sweeping Nixon and Reagan elections, the “silent majority,” and believed that the presidency was the best hope for more populist conservative values as a check on a secularist Beltway elite, today referred to as “the swamp” and the “Deep State”).<sup>103</sup> Reagan, Bush, and Trump used presidentialism to de-regulate (and fight the culture war). Clinton (with Kagan), Obama, and Biden use presidentialism to regulate (and return fire in the culture war).

Given the lay of political and structural landscape in the 1970s/80s (the Democrats’ seemingly permanent hold of the House plus a long-term liberal-moderate judiciary), the conservatives’ best bet was on presidentialism. Even if Democrats may now have advantages in national popular vote, the electoral college still skews conservative and rural. Presidential elections (the primaries, populism, and the electoral college’s swing states) force both parties’ nominees to play to the rural Midwest, to the South, and to religious conservatives, whereas the Fourth Branch (the “Deep State”) is more elite, secular, pluralist, and metropolitan/cosmopolitan. Conservatives put their bet on presidentialism, because presidential politics are more culturally conservative than Deep State bureaucratic norms.

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100. *Richard Nixon’s Top Domestic and Foreign Policy Achievements*, RICHARD NIXON FOUND., <https://www.nixonfoundation.org/richard-nixons-top-domestic-and-foreign-policy-achievements/> (last visited June 26, 2022).

101. *Id.*

102. Rosenblum, *supra* note 82 at 3–4.

103. I offer the same conclusion in Jed Hanelnman Shugerman, *Specters of Fear and Executive Power*, *LAWFARE* (Feb. 1, 2022), [https://www.lawfareblog.com/specters-fear-and-executive-power\\_](https://www.lawfareblog.com/specters-fear-and-executive-power_)

Perhaps it is the combination of all these forces—religious and cultural conservatism, nationalism/national security, the military-industrial complex, and imperial presidency—that combine as specters of dictatorship. Driesen rightly reads the Constitution in the light of liberty and the darkness of royal tyranny, he looks around the world at the gathering storms of authoritarianism, and we would be wise to heed his insightful warnings.

