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## **Saving the Unitary Executive Theory from Those Who Would Distort and Abuse it: A Review of the Unitary Executive, by Steven G. Calabresi and Christopher Yoo**

Richard J. Pierce Jr  
*George Washington University Law School, [rpierce@law.gwu.edu](mailto:rpierce@law.gwu.edu)*

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**SAVING THE UNITARY EXECUTIVE THEORY  
FROM THOSE WHO WOULD DISTORT AND ABUSE IT:  
A REVIEW OF *THE UNITARY EXECUTIVE*,  
BY STEVEN G. CALABRESI AND CHRISTOPHER YOO**

Forthcoming in *University of Pennsylvania Journal of Constitutional Law*

Richard J. Pierce, Jr.\*

**ABSTRACT**

Calabresi and Yoo make three important contributions to the literature on separation of powers in their new book. First, they seek to rescue the unitary executive theory from the Bush Administration lawyers who have discredited the theory in the eyes of many by relying on it to support outlandish claims of presidential power that are unrelated to the unitary executive theory. Second, they make a persuasive case for the unitary executive theory by explaining why a president must have the power to remove executive branch officers and to control policy making in the executive branch. Third, they document the ways in which all forty-three of our presidents have demonstrated their beliefs in the theory by consistently acting in accordance with the theory.

In this review, I agree with most of the arguments that Calabresi and Yoo make, but I disagree with them on two points. First, I do not believe that the president has the power to “veto” the decision of an executive branch officer. I believe that his only recourse is to remove an officer with whom he disagrees. Second, I do not believe that the for cause limits on the president’s removal powers that the Supreme Court has upheld interfere with the president’s ability to control policy making in the executive branch.

I also make two other points. First, political limits on the removal power are often formidable and are socially beneficial as a means of rendering the president accountable to the electorate. Second, to the extent that the president’s ability to control policy making by “independent agencies” is unduly impaired, the root of that problem lies in unconstitutional statutory limits on the president’s appointment power rather than in the innocuous statutory limits on his removal power.

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\* Lyle T. Alverson Professor of Law, George Washington University.

Steven Calabresi and Christopher Yoo have made important contributions to our understanding of allocation of powers among the branches of government in their book, “The Unitary Executive.”<sup>1</sup> One of those contributions lies in their effort to rescue the unitary executive theory from those whose recent attempts to distort and abuse it have produced an environment of extreme hostility toward anything that is tied to the theory. During the Administration of President George W. Bush, many scholars, politicians, and members of the general public came to think of the unitary executive theory as illustrated by the far-fetched claims of people like John Yoo, Jay Bybee, David Addington, and Alberto Gonzales that the President is omnipotent in his capacity as Commander-in-Chief. As Jack Goldsmith has chronicled,<sup>2</sup> President Bush’s lawyers claimed that the President could do anything he wanted to do in the context of the war against terror, including authorizing the torture of prisoners, and that his discretion was not limited by statutes and was not reviewable by courts.

The lawyers for the Bush Administration often referred to their claims as supported by the unitary executive theory, but their claims are totally unrelated to the real unitary executive theory. This misleading use of the term has caused many scholars, politicians, and members of the public to develop understandable hostility toward any idea that is based on anything that is associated with something called the unitary executive theory. The Calabresi and Yoo book has the potential to restore respect for the unitary executive theory by disassociating it completely from the claims of Presidential omnipotence that have been made by the Bush Administration.

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<sup>1</sup> Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (544 pages Yale University Press 2008).

<sup>2</sup> Jack L. Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (2007).

As Calabresi and Yoo explain, the unitary executive theory has a rich history that spans several centuries. It has been embraced by many scholars with widely varying political philosophies. It is not nearly as ambitious in its scope and effects as the spurious version of the theory that a few government lawyers have attempted to sell in recent years. The real unitary executive theory does not imply that the President has powers greater than the powers of Congress or the Judiciary. It refers to the belief of many scholars that the Vesting Clause of Article II confers on the President plenary power over policy making by all Executive Branch agencies and officials.

Calabresi and Yoo seek to fill a void in the scholarly literature on the unitary executive theory. Many scholars have discussed the theory with reference to the text and history of the Constitution and to the famous cases in which the Court has resolved disputes that are relevant to the theory, but no one has attempted the daunting task of documenting the ways in which each President has actually implemented the theory. Calabresi and Yoo describe their response to that gap in the literature:

This book fills the void in the literature on executive branch practice by undertaking a comprehensive historical chronicle of the struggles between the President and Congress over control of the execution of federal law, beginning with the Presidency of George Washington in 1789 and concluding with the Presidency of George W. Bush through mid-2007. Our historical survey seeks to trace the development over time of all three mechanisms essential to the classic theory of the unitary executive. These include the President's power of removal, the President's power to direct subordinate executive officials, and the President's

power to nullify or veto subordinate executive officials' exercise of discretionary executive power.<sup>3</sup>

Calabresi and Yoo claim that their research shows that all forty-three presidents believed in the theory of the unitary executive as they describe it; that each acted in accordance with the theory; and that each prevailed on every occasion on which he was forced to defend the theory against assaults from the legislative branch.<sup>4</sup> They also contend that their research shows that “the executive branch’s consistent opposition to congressional incursions of the unitary executive has been sufficiently consistent and sustained to refute any suggestion of presidential acquiescence in derogations from the unitary executive.”<sup>5</sup>

With a few important qualifications that I will discuss later, Calabresi and Yoo support well all of the claims they make for their book. Before I discuss the evidence Calabresi and Yoo amass to support their claims, however, it is important to note the scope of their undertaking and the important issues they choose not to address. They explicitly exclude from the scope of their project claims that the President has inherent powers to act in the absence of statutory authorization or contrary to a statutory prohibition. They state their belief that the President has some extremely limited inherent powers, but they express great skepticism about the claims of some other scholars that the President has broad inherent powers. Their skepticism borders on outright hostility when it comes to many of the claims of inherent power made by lawyers for the Bush Administration:

[T]he cost of the bad legal advice that [President Bush] received is that Bush has discredited the theory of the unitary executive by associating it not with

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<sup>3</sup> Calabresi and Yoo, *supra*. note 1, at 14.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.* at 16, 28.

presidential authority to remove and direct subordinate executive officials but with implied foreign policy powers, some of which, at least, the president does not possess.

Calabresi and Yoo also choose not to discuss other controversial interpretations of Article II, including the many disputes with respect to the Appointments Clause<sup>6</sup> and the apparent belief of four Justices that the Take Care Clause precludes Congress from conferring on anyone except a member of the Executive Branch standing to obtain judicial review of any decision that implements a public law.<sup>7</sup>

As I have explained in detail elsewhere,<sup>8</sup> I agree with most of the views that Calabresi and Yoo express with respect to the unitary executive theory, including the view that the President has the power to remove any executive branch officer and the power to direct any executive branch officer to act in accordance with the policies preferred by the President as long as those policies are within constitutional and statutory boundaries. I am delighted that their painstaking research has revealed that every President has shared those views and acted in accordance with those views.

### **The President Cannot Veto a Decision Made by an Executive Branch Officer**

There are a few points on which I disagree with Calabresi and Yoo, however. In their version of the unitary executive theory, the President has the power to “nullify or veto subordinate executive officials’ exercise of executive power.”<sup>9</sup> I do not believe that

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<sup>6</sup> See, e.g. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 537 F. 3d 667 (D.C. Cir. 2008) ( D.C. circuit panel divides on whether provisions of Sarbanes Oxley Act that create PCAOB violate the Appointments Clause).

<sup>7</sup> Justice Scalia described this theory in detail in Antonin Scalia, *Standing as an Essential Element of Separation of Powers*, 17 *Suffolk Law Review* 881 (1983). Four Justices appeared to adopt the theory in the plurality opinion in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>8</sup> Richard Pierce, *I Administrative Law Treatise* §§2.4 & 2.5 (4<sup>th</sup> ed. 2002); Richard Pierce, *Morrison v. Olson, Separation of Powers, and the Structure of Government*, 1988 *Supreme Court Review* 1.

<sup>9</sup> Calabresi & Yoo, *supra*. note 1, at 14.

the President has such a power. I believe instead that, when Congress has lawfully vested decision making power in an executive branch officer, e.g., the Secretary of Health and Human Services or the EPA Administrator, that executive branch officer is the only person who can make the decision. In that situation, the only recourse the President has is to remove the executive branch officer and replace him or her with someone who will act in accordance with the President's views of wise policy.

Peter Strauss has argued persuasively that the President has the power to remove subordinates but not the power to veto the decisions of subordinates.<sup>10</sup> Calabresi and Yoo say nothing that persuades me that they are right and Strauss is wrong on this point. In fact, they say little about the issue beyond their conclusory statement that the President has the power to veto or nullify decisions made by executive branch officers. They also provide little evidence that any President has asserted such a power or attempted to exercise such a power.

I personally observed a recent occasion on which a representative of the President acknowledged the accuracy of Strauss's position. The occasion was a panel discussion of Executive Order 13,422<sup>11</sup> during the spring 2008 meeting of the ABA section of Administrative Law and Regulatory Practice. During the discussion a critic of the Order argued that the President was overreaching. The head of the Office of Information and Regulatory Analysis in the Office of Management and Budget responded by saying that he could not understand what all the fuss was about since it was clear that the only

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<sup>10</sup> Peter Strauss, *Overseer of the Decider? The President in Administrative Law*, 75 *George Washington Law Review* 696 (2007).

<sup>11</sup> 72 *Fed. Reg.* 2763 (Jan. 18, 2007).

mechanism the President can use to obtain compliance from any agency is the power of removal.<sup>12</sup>

The difference between the power to veto and the power to remove is not subtle. If a President could veto a decision of an executive branch officer, he undoubtedly would do so with some frequency and often at little political cost. By contrast, removing an officer is always costly. Frequently, the cost of removal is so high that a President reluctantly acquiesces in a decision with which he strongly disagrees in order to avoid incurring the high cost of removing the executive branch officer who made the decision. I will discuss the political cost of removing an executive branch officer systematically in a subsequent section of this essay, but one example provides a good illustration of the potentially high cost of removal. I believe that President Nixon's unquestionably lawful decisions to remove Attorney General Elliot Richardson, Acting Attorney General William French Smith, and indirectly, Special Counsel Archibald Cox cost him the Presidency. By contrast President Clinton was able to survive a similar scandal because he was smart enough to know that removing Attorney General Reno and replacing her with someone who would remove Ken Starr would cost him far more than allowing Starr to continue the Whitewater investigation.

### **The President Has Not Always Prevailed**

Calabresi and Yoo claim that the President has always prevailed in his many battles with Congress with respect to the removal power:

Big fights about whether the Constitution grants the President the removal power have erupted frequently, but each time the president in power has claimed that the

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<sup>12</sup> This a paraphrase. I did not write down the exact words, but I am confident that I heard correctly and remember accurately the substance of the statement.



Constitution gives the President power to remove and direct subordinates in the executive branch. And each time the president has prevailed.

That is a questionable characterization of a complicated body of case law. As Calabresi and Yoo implicitly recognize in other parts of their book, the President has lost three major battles with respect to the removal power.<sup>13</sup> Three times the Court has upheld statutory limits on the President's removal power;<sup>14</sup> none of those cases has been overruled; and the President continues to be subject to statutory limits on his power to remove many executive branch officers. Moreover, over the last half century no president has challenged those judicially-approved limits on his removal power by attempting to remove any of the many executive branch officers that are subject to such limits.

In each of the three cases in which the President did not prevail, the Court held that the President could remove the executive branch officer only for cause. For reasons that I will discuss in detail in a subsequent section of this essay, I do not consider the for cause limit on the President's power to remove some executive branch officers important. Unlike Calabresi and Yoo, I do not believe that limit has any real effect on the President's ability to control policymaking in the executive branch.

If we set aside the three cases in which the Supreme Court held that Congress can impose a for cause limit on the president's power to remove some executive branch officers, Calabresi and Yoo's claim is accurate. The Court has never upheld a statute that precludes the president, or an agent of the president, from removing an executive branch officer for cause, and the Court has repeatedly held unconstitutional statutes that give

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<sup>13</sup> Calabresi & Yoo, *supra*. note 1, at 9.

<sup>14</sup> *Morrison v. Olson*, 487 U.S. 654 (1988); *Wiener v. U.S.*, 357 U.S. 349 (1958); *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935).

Congress any role in the process of removing an executive branch officer.<sup>15</sup> Calabresi and Yoo argue that any for cause limit on the president's removal power is unconstitutional and is inconsistent with the unitary executive theory.<sup>16</sup> I do not consider for cause limits unconstitutional or inconsistent with the unitary executive theory. Thus, ironically, while Calabresi and Yoo's claim that presidents have prevailed in each case in which they have fought with Congress about the removal power is not accurate, given their version of the unitary executive theory, it is accurate in the context of my somewhat different version of the theory.

**The Unitary Executive Theory Does Not Ensure that Agencies Act in a Consistent Manner and in Accordance with the President's Policy Preferences**

The most important difference between my version of the unitary executive theory and the version Calabresi and Yoo adopt lies in my belief that for cause limits on the president's power to remove some executive branch officers are constitutional and are consistent with the unitary executive theory. Before I explain the bases for that belief, however, I will mention another more subtle difference between their views and mine. Calabresi and Yoo make a powerful and sweeping normative instrumental claim about the effects of the unitary executive theory:

The Constitution's creation of a unitary executive eliminates conflicts in law enforcement and regulatory policy by ensuring that all of the cabinet departments and agencies that make up the federal government will execute the law in a consistent manner and in accordance with the president's wishes.

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<sup>15</sup> *Bowsher v. Synar*, 478 U.S. 714 (1986); *Myers v. United States*, 272 U.S. 52 (1926).

<sup>16</sup> Calabresi & Yoo, *supra*. note 1, at 4.

That statement is theoretically true, but we now know that this is one of the areas in which there is a large gap between theory and reality.

Like most legal academics, Calabresi and Yoo assume that the President exercises control over the bureaucracy primarily through the systematic, relatively transparent processes described in Executive Orders 12,291, 12,866, and 13,422. Those Executive Orders authorize the Office of Information and Regulatory Analysis (OIRA) within the Office of Management and Budget (OMB) to take a variety of actions to implement the policies preferred by the President. If that process was the primary means through which the president exercised control over the bureaucracy, Calabresi and Yoo's description of the effects of presidential control might be a reasonably good first approximation of reality. If the president exercised control primarily through OIRA, it would be safe to assume that policy directives from the White House to agencies would be consistent and would reflect the policy preferences of the President. However, the transparent systematic control mechanisms used by OIRA to control the bureaucracy are not now, and never have been, the most important means through which presidents, and presidential subordinates who purport to be acting on behalf of the president, exercise control over the bureaucracy. Largely invisible ad hoc white house jawboning is now, and always has been, far more important in its impact on agency policy decisions.

If there was any doubt about the relative importance of ad hoc jawboning by the white house, two studies published in the last year should put an end to any debate about the subject. Lisa Bressman and Michael Vandenberg conducted an empirical study of all contacts between the white house and EPA during the administrations of President Bush

(41) and President Clinton.<sup>17</sup> They found that eighteen white house offices in addition to OIRA attempted to control policy making at EPA during that period. They also found that the various white house offices often tried to persuade EPA to adopt different policies. Moreover, while OIRA was the most frequent source of white house influence and had the greatest effect on relatively routine policy decisions, other white house offices had more influence over the most important policy decisions made by EPA.

The second study that provides a window on white house control of agency policy decisions was conducted by Jo Becker and Barton Gellman, two investigative reporters for the Washington Post.<sup>18</sup> They found that Vice President Cheney exercised extraordinary power over agency policy making through use of a clever, extremely low visibility process. Vice President Cheney first persuaded President Bush to appoint over two dozen people who were personally loyal to Vice President Cheney to policy-making positions in many agencies. Vice President Cheney then exercised control over many agency policy decisions by calling one of his people at an agency and persuading him or her to make a decision that reflected Vice President Cheney's policy preferences. Thus, for instance, DOI reversed a prior decision concerning the balance between farming and fisheries interests in the operation of dams as a result of Vice President Cheney's communications with the nineteenth ranking person in the Department of Interior. Most of Cheney's highly successful efforts to control agency policy decisions were unknown to the head of the agency involved, much less to President Bush. We will never know the extent to which Cheney's highly effective means of exercising control over many agency policy decisions produced policies preferred by President Bush.

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<sup>17</sup> Lisa Bressman & Michael Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 Michigan Law Review 47 (2008).

<sup>18</sup> Jo Becker & Barton Gellman, *Leaving No Tracks*, Washington Post, June 27, 2007, p.1.

The findings of these two studies should not come as any great surprise to anyone who is familiar with the white house, the bureaucracy, and the relationship between the two. The dramatic increase in the size and scope of the sprawling bureaucracy that took place over the past century was followed by an analogous increase in the size and scope of the now-sprawling white house bureaucracy. Over the same period, the number of political employees within the bureaucracy has also increased dramatically -- ten-fold over the last forty years and four-fold over the last decade.<sup>19</sup> The net result is a massive white house bureaucracy that influences agency policy making through communications among thousands of political appointees.

It is simply impossible for the president to control the white house, much less the bureaucracy. There are not enough hours in the day for the president to be aware of more than a tiny fraction of the policy decisions that are made by agencies every day, and the chain of agency relationships between the president and the people who actually make policy decisions in the bureaucracy is far too long to indulge the assumption that everyone in the white house who purports to speak for the president is acting in a manner consistent with the president's policy preferences.

Despite the yawning gap between Calabresi and Yoo's normative instrumental claims for the unitary executive theory and reality, I share their belief that presidential control over agency policymaking is highly desirable. It increases to some uncertain extent the degree of coordination and consistency in the bureaucracy and it increases to some uncertain extent the degree of convergence between the policies adopted by agencies and the policies preferred by the president. As in all other contexts, it is important not to allow the perfect to be the enemy of the good.

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<sup>19</sup> Paul R. Verkuil, *Outsourcing Sovereignty* 164 (2007).

## **For Cause Limits on the President's Power to Remove Officers Are Not Important**

Calabresi and Yoo emphasize repeatedly their strong belief that the President has, and must have, an unqualified power to remove an executive branch subordinate.<sup>20</sup> I agree that the President must have the power to remove any executive branch officer and that Congress cannot be allowed to give itself any role in the removal process. I am pleased that the Supreme Court has acted in a manner consistent with that view. I disagree with Calabresi and Yoo, however, to the extent that they argue that Congress cannot impose a for cause limit on the President's power to remove some executive branch officers and to the extent that they argue that the President can remove without cause executive branch employees who have no policy making responsibility. I believe that the President can control policy making within the executive branch even though he does not have plenary power to remove every executive branch subordinate.

In three cases, the Court has held that Congress can limit the president's power to remove an executive branch officer by requiring the president to state a cause for removal if Congress identifies an adequate functional rationale to support such a limitation, e.g., the agency adjudicates disputes involving private rights,<sup>21</sup> the agency provides advice to Congress,<sup>22</sup> or the agency has responsibility to investigate and/or prosecute alleged criminal wrongdoing at a high level in the executive branch.<sup>23</sup> I do not believe that the for cause limits the Court upheld in those cases are inconsistent with the unitary executive

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<sup>20</sup> Calabresi & Yoo, *supra*. note 1, at 4-7.

<sup>21</sup> *Wiener v. U.S.*, 357 U.S. 349 (1958).

<sup>22</sup> *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935). At the time the Court decided *Humphrey's Executor*, Congress had no independent means of conducting an investigation to determine whether there was a need to enact a new regulatory statute, so it was entirely dependent on the Federal Trade Commission to perform that function.

<sup>23</sup> *Morrison v. Olson*, 487 U.S. 654 (1988).

theory or preclude the president from controlling policy making within the executive branch. In fact, I think they have little, if any, effect on the president's ability to control executive branch policy making.

The vast majority of executive branch officers have three reasons to act in accordance with the president's policy preferences that are independent of the president's removal power. All were either appointed or nominated by the president because of some combination of three characteristics – agreement with the president on policy issues related to their areas of responsibility, long-time loyalty to the president's political party, and/or personal loyalty to the president. As a result, presidents rarely need to resort to explicit or implicit threats to remove an officer to persuade the officer to act in accordance with the president's policy preferences. On the unusual occasion when an officer feels so strongly about a policy issue that the president is unable to persuade the officer to act in accordance with the president's policy preferences, I do not believe that the legal requirement that the president must state a cause for removing the officer has any effect at all on the president's ability to use the threat of removal as an added inducement to the officer to act in accordance with the president's policy preferences.

We know just about nothing about the contours of the for cause limit on the president's removal power. Thus, for instance, we do not know whether a court would be willing to review a president's decision to remove an officer if the president were to state that he is removing an officer for cause, and we do not know whether an officer's refusal to act in accordance with the president's policy preferences qualifies as a sufficient cause for removal. I doubt that a court would be willing to review a president's decision to remove an officer for cause, and I am confident that a court would conclude that refusal

to comply with a president's stated policies qualifies as sufficient cause for removal if a court were willing to review a president's decision to remove an officer. I can not prove that my beliefs are correct, but no one can prove that they are incorrect. Without knowing the answers to those critical questions, it is impossible to conclude that a for cause limit on the removal power has any effect at all on the president's ability to use an express or implied threat of removal as an added inducement in an effort to persuade an officer to act in accordance with the president's policy preferences.

We know so little about the for cause limit on the removal power because there has never been any case in the 220 year history of the country in which a president has removed an officer for cause and the officer has refused to leave his position. That gives rise to an important question. Why have there been no cases of this type? One possibility is that no president has ever encountered a situation in which he so disagreed with an officer who was subject to a for cause limit that he wanted to remove the officer. That seems highly unlikely, given the thousands of people who have served in such positions. Another possibility is that every president has reluctantly concluded that he could not remove any officer who holds such a position no matter how strongly the president disagreed with the officer. That seems equally unlikely, given the number and variety of occasions on which presidents and officers who are subject to for cause limitations on their removal must have disagreed on important issues of policy.

There is a third potential explanation that I find far more plausible – some uncertain percentage of the thousands of “voluntary resignations” of such officers were not as voluntary as they appeared to outside observers. Imagine that you are an executive branch officer who reaches impasse with your president with respect to some important



policy issue. The president asks you to resign. You know that the president has the power to remove you. You may or may not know whether you are subject to a for cause limit on your removal. I doubt that many executive branch officers even know whether they are subject to such a limit. Would you hire a lawyer to determine your rights and to fight to retain your job? That would put you at odds with the person who appointed you, who is almost always someone you respect and admire, as well as the head of your political party. It would also expose you to the risk of extreme embarrassment if the president then specifies a cause to remove you, as well as the risk of incurring the wrath of many of your old friends and fellow party members for taking an action that many would consider an act of extreme disloyalty. You would pay an extremely high cost for doing that which no one in your position has ever chosen to do – launch a legal fight to retain your job.

Now consider the alternative. You can agree to resign and to be honored by the president in a rose garden ceremony at which the president lavishes praise on you and regrets your decision to resign to spend more time with your family. You can then accept one of the many job offers that pay five to ten times your present salary, and leave the administration with an impeccable reputation both with the public and in your political party.

It is hard to imagine any officer who would give more than a moment's thought to the high cost option of litigating to try to retain his job when the alternative is so much more attractive. I am quite confident that is why there has never been a case in which a president has specified a cause to remove an officer and the officer has relied on a for cause limit on the president's removal power as the basis to challenge the legality of the president's decision. The absence of any case of that type in over two centuries persuades

me that the presence or absence of a for cause limit on the president's power to remove an executive officer is of little, if any, consequence to the president's ability to maintain control over policy making in the executive branch.

**For Cause Limits on the President's Power to Remove Employees Are Not  
Important**

Calabresi and Yoo also argue that the unitary executive theory requires the president to have an unlimited power to remove executive branch employees, as well as officers.<sup>24</sup> They argue that the statutory limits on removal of civil servants do not actually limit the president's power to remove employees because they have been, and should be, interpreted only to prohibit the president from removing an employee because he refuses to contribute to political campaigns.<sup>25</sup> They do not support this claim with the abundant high quality evidence they rely on to support most of their other claims, and this claim is contradicted by both precedents and long-standing practice.

The law is particularly clear with respect to the statutory limits on the president's power to remove an Administrative Law Judge (ALJ). As I have described at length elsewhere, the statutory for cause limit on the president's power to remove an ALJ has existed since 1946; it has been consistently interpreted to have a meaning far broader than Calabresi and Yoo claim and so broad that it is at least as difficult to remove an ALJ as it is to impeach an Article III judge; and, no president has ever tested that broad limit on his removal power by attempting to remove an ALJ without specifying a cause.<sup>26</sup>

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<sup>24</sup> Calabresi & Yoo, *supra*. note 1, at 422-23.

<sup>25</sup> *Id.* at 423.

<sup>26</sup> See Paul Verkuil, Daniel Gifford, Charles Koch, Jeffrey Lubbers & Richard Pierce, *The Federal Administrative Judiciary* 124-165 (1992); Richard Pierce, *Political Control Versus Impermissible Bias in Agency Decisionmaking*, 57 *University of Chicago Law Review* 481, 504-515 (1990).

Unlike statutory limits on the president's power to remove officers, statutory limits on the president's power to remove employees have real effects on the conduct of presidents and employees. Employees are in dramatically different circumstances from officers, and each of the many differences between the two groups increases significantly the likelihood that an employee will obtain counsel and litigate in response to an attempt to remove the employee. Unlike most officers, most employees were not appointed by the president, have no personal loyalty to the president, have no loyalty to the president's party, are unlikely to suffer social or professional harm as a result of challenging a removal decision, and are unlikely to have financially attractive alternatives to their government jobs. Thus, while only a handful of officers have ever challenged a presidential removal decision, employees often challenge decisions to remove them.

I believe that the broad statutory limits on the president's power to remove employees are consistent with the unitary executive theory and do not interfere with the president's ability to control policymaking in the executive branch for one simple reason. Employees do not have the power to make policy decisions. That is the primary distinction between employees and officers.<sup>27</sup>

### **Political Obstacles to Use of the President's Removal Power Are Formidable**

While legal obstacles to use of the president's removal power are insignificant in their effects, political obstacles are often formidable. Calabresi and Yoo appear to agree with me on this point. They refer to many situations in which presidents have faced major

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<sup>27</sup> Pierce, *supra*. note 8, at 20-40. In *Landry v. FDIC*, 204 F. 3d 1125 (D.C. Cir. 2000), the court held that ALJs are employees rather than officers. I sometimes include a question on my final exam in administrative law in which I note ask students to evaluate the legality of one of the many legislative proposals to give ALJs greater power to make final policy decisions that bind agencies. The good students apply the case law under the appointments clause and conclude that all such proposals would be unconstitutional because they would convert ALJs into officers by conferring on them power to make policy decisions.

political obstacles to removal and to others in which presidents erred by exercising the removal power in circumstances in which the cost of exercising the power was far too high. The famous incidents to which they refer include President Nixon's fatal decision to remove Attorney General Elliot Richardson, Acting Attorney General William French Smith, and special counsel Archibald Cox when Cox seemed to be on the verge of uncovering President Nixon's role in the Watergate scandal, and President George W. Bush's decision to remove seven U.S. Attorneys – a decision that Calabresi and Yoo characterize as one through which the Bush administration “badly wounded itself” and from which “it will never fully recover.”<sup>28</sup> In each case, there was no legal obstacle to the exercise of the removal power; yet, the political costs of exercising the removal power were so high that they posed a threat to the viability and/or continued efficacy of the presidential administration.

Calabresi and Yoo also identify one of the variables that can cause the political cost of removing an executive branch officer to be particularly high<sup>29</sup> -- whether the opposition party controls the Senate. They argue that President Clinton would have removed Janet Reno as Attorney General if Democrats had controlled the Senate at the time. Even though President Clinton disliked Reno and wanted to remove her, Calabresi and Yoo express their belief that he declined to do so out of concern that the ensuing hearings on potential confirmation of her successor would have been too embarrassing and politically costly. That explanation is plausible as at least one factor that influenced President Clinton's decision, and the identity of the party that controls the Senate

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<sup>28</sup> Calabresi & Yoo, *supra*. note 1, at 414.

<sup>29</sup> *Id.* at 8.

undoubtedly is one of the variables that determines the magnitude of the political cost of removing an officer.

We have seen a more recent example of the importance of this variable in the obvious reluctance of President Bush (43) to remove Attorney General Gonzales. President Bush eventually removed Gonzales but long after his incompetence and tendency toward prevarication had made him a major liability to the administration. The delay in removing Gonzales undoubtedly was motivated in part by the difficulty the administration encountered in finding a potential replacement who would testify at his confirmation hearing in a way that would allow him to be confirmed but that would not implicate President Bush in felonious conduct. If the nominated replacement for Attorney General Gonzales testified that water boarding is not torture, he would not be confirmed. If he testified that water boarding is torture, he would be implicitly accusing President Bush of violating several statutes, including statutes that make it a crime to engage in torture. It is no surprise that the administration had difficulty finding someone who would profess to have views on the meaning of torture that were so contingent and non-committal that he could be confirmed without implicating the president in criminal wrongdoing.

There are other variables that also have effects on the magnitude of the political costs of removing an officer. Thus, for instance, President Bush's delay in removing Attorney General Gonzales undoubtedly was also caused in part by his awareness that the resulting confirmation hearings would shine an unwanted spotlight on Bush Administration practices that were extremely unpopular with most members of the public, including several prominent Republican members of the Senate. Even if

Republicans had controlled the Senate at the time, President Bush had reason for concern that a hearing on the confirmation of a new Attorney General would cause the administration to become unpopular by focusing attention on practices like torture and widespread violations of individual rights that were unpopular with the public.

Similarly, President Clinton's decision not to remove Attorney General Reno undoubtedly was influenced by factors in addition to Republican control of the Senate. One of the many reasons President Clinton wanted to remove Janet Reno was his belief that she had cooperated far too much with Kenneth Starr in his investigation of alleged presidential wrongdoing. President Clinton would have much preferred that the Starr investigation come to an end. It is thus ironic that the ongoing and constantly expanding nature of the Starr investigation undoubtedly was among the reasons President Clinton concluded that the cost of removing Reno would be too high.

The independent counsel provisions of the Ethics in Government Act required an independent counsel to "comply with the policies of the Department of Justice." The statute also authorized the Attorney General to remove an independent counsel for cause. It would have been child's play for any Attorney General to identify some respect in which Independent Counsel Starr's wide-ranging investigation violated one of the thousands of policies of the Department of Justice. President Clinton would have had no difficulty identifying some one he could name Acting Attorney General who would have removed Starr for allegedly violating a Department of Justice policy. Thus, he could have followed President Nixon's lead and removed Attorney General Reno and each of her replacements in the line of succession at DOJ until he found someone who was willing to remove Independent Counsel Starr for cause. I doubt that any court would find any legal

flaw in that sequence of actions, and President Clinton would have been delighted at two of the results – removal of Attorney General Reno and removal of Independent Counsel Starr.

President Clinton understood well, however, that the cost of removing anyone who had a major role in investigating his conduct would have been intolerably high. He did not want to meet the same fate as President Nixon. He undoubtedly concluded that he would be better off leaving Reno and Starr in office and fighting a public relations war against Starr. History has demonstrated that President Nixon underestimated the cost of removing officers who had roles in investigating the President, while President Clinton evidenced a good understanding of the intolerably high cost of such a removal decision.

There are many other incidents that illustrate the often high political cost of removing an officer. On at least three occasions, President Reagan and Secretary of State Shultz had highly visible disagreements about major issues. Secretary Shultz prevailed on each occasion.<sup>30</sup> Thus, for instance, when President Reagan ordered polygraph tests to be administered to 4500 personnel at the State Department in an effort to discover the source of an embarrassing leak, Secretary Shultz called a press conference at which he angrily announced that no one at the State Department would submit to a polygraph.<sup>31</sup> President Reagan had every legal right to remove Secretary Shultz without specifying any cause, but he did not do so. Instead, he backed down.

President Reagan's decision not to remove Secretary Shultz when the Secretary publicly defied the President necessarily was attributable to the President's belief that he would pay an intolerably high cost if he were to remove Secretary Shultz. The total

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<sup>30</sup> Terry Atlas, Shultz Offered Three Times to Resign, Chicago Tribune (July 24, 1987).

<sup>31</sup> Shultz Took Vigorous Stand Against Lie Tests, Boston Globe ( July 24, 1987).

political cost of removing Schultz would be the sum of three components – cost in the form of loss of the services of an officer whose services the President valued highly; cost in the form of reduced respect for the president in the foreign relations community because of the high regard the members of that community had for the secretary; and, cost in the form of reduced public popularity of the president because many members of the public were likely to side with the secretary on the issue of whether mass polygraphing of thousands of people was an appropriate response to a leak.

Each of those costs is generalizable to the other cases in which presidents have to consider the many ways in which a decision to remove an officer might impose high costs on the president. In all such cases, a president must consider carefully the value of the services of the officer, the popularity of the officer in some important community, the risk that the public might side with the officer with respect to the issue on which the two differ, the potential problems the president might encounter in attempting to persuade the Senate to confirm a replacement for the officer, the risk that the ensuing confirmation hearings will be embarrassing to the president, and the risk that the public might draw the inference that the removal decision is part of an effort to cover up, or block investigation of, wrongdoing by the president or senior members of his administration.

Of course, each case is unique. When President Bush (43) removed FEMA Director Brown after FEMA's utterly incompetent response to the Katrina disaster, he incurred only modest political costs; Director Brown has publicly criticized President Bush on many occasions since he was removed from office. The political costs of not removing Director Brown far outweighed the costs of removing him, however.



It is highly unlikely that any president ever gives serious thought to the presence or absence of a for cause limit on his removal power in making a decision whether to remove an officer. That legal technicality is inconsequential in the high stakes world of presidential politics. The strength of the political limits on the president's removal power depends on many variables, but those costs are completely independent of any legal limits on the president's removal power. The political limits on the president's removal power are indispensable to the proper functioning of a democracy. They provide a means through which the public can hold the president politically accountable for his actions.

### **For Cause Limits Are Unrelated to the “Independent Agency” Problem**

Calabresi and Yoo refer to the so-called “independent agencies” as an illustration of the problems that can be created by for cause limits on the president's removal power.<sup>32</sup> Like most legal academics, they equate the concept of an “independent agency” with statutory for cause limits on the president's power to remove an agency head. Calabresi and Yoo characterize as unconstitutional and inconsistent with the unitary executive theory the Supreme Court's famous decision in *Humphrey's Executor*,<sup>33</sup> in which the Court upheld the statutory for cause limit on the president's power to remove an FTC Commissioner.

To their credit, Calabresi and Yoo acknowledge that there is no evidence that “independent agencies” are less responsive to the policy preferences of the president than are agencies headed by officers who can be removed without any stated cause. In discussing the administrations of President Reagan and President Clinton, they note that: “At times it even seemed that presidential appointees in independent agencies were more

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<sup>32</sup> Calabresi & Yoo, *supra*. note 1, at 6.

<sup>33</sup> 295 U.S. 602 (1935).

committed to the administration's policy program than were the president's own cabinet secretaries." Calabresi and Yoo seem surprised by the absence of evidence that "independent agencies" are any more "independent" of the president in the policy making context. That dearth of evidence fits well with my belief that the presence or absence of a for cause limit on the president's removal power has no significant effect on the president's ability to persuade executive branch officers, including commissioners of "independent agencies," to act in accordance with the president's policy preferences.

Even if we indulge the plausible assumption that "independent agencies" are more difficult for presidents to control than are other agencies, the for cause limit on the president's removal power is unlikely to be a significant factor in explaining that difference between "independent agencies" and agencies that are headed by officers who are subject to an unlimited removal power. "Independent agencies" differ from other agencies in other respects that are far better candidates to explain any difference in the president's ability to persuade them to act in accordance with the president's policy preferences. "Independent agencies" are headed by multi-member collegial bodies. Each member, usually called a Commissioner, is appointed for a term of years, with the terms staggered so that only one Commissioner's term expires every year. The statutes that establish "independent agencies" limit the president's appointment power by providing that no more than a bare majority of the Commissioners can be members of the same political party.

As a practical matter, the statutory limit on the president's appointment power requires the president to appoint two Commissioners who are members of the opposing party. Moreover, if the Senate is controlled by the opposing party, the president often has

no practical choice but to appoint a commissioner who has been chosen by the leaders of the opposing party as the price of persuading the Senate to confirm a Commissioner who has been chosen by the president. It is certainly plausible that “independent agencies” headed by five-member collegial bodies, two of whom are likely to be political opponents of the president, are less likely to act in accordance with the president’s policy preferences than are agencies headed by individuals who have been chosen by the president. Thus, to the extent that “independent agencies” interfere with the unitary executive theory by impairing the president’s ability to direct executive branch officers and agencies to act in accordance with the president’s policy preferences, the source of that problem lies not in the innocuous for cause restriction on the president’s removal power but in the highly restrictive statutory limits on the president’s appointment power.

I am confident that the statutory limits on the appointment power contained in all of the statutes that create “independent agencies” are unconstitutional. So far, however, no one has been able to persuade a court to address that important question. The D.C. Circuit has held that such limits are not justiciable except in the unlikely event that a president nominates and the Senate confirms more than a majority of members of such an agency who are members of the same party.<sup>34</sup>

### **Conclusion**

In sum, I share Calabresi and Yoo’s belief in the importance of the unitary executive theory, the president’s power to remove executive branch officers, and the president’s ability to direct executive branch officers and agencies to act in accordance with the president’s policy preferences. I congratulate them on writing an excellent book

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<sup>34</sup> *FEC v. NRA Political Victory fund*, 6 F.3d 821 (D.C. Cir. 1993), cert. dismissed 513 U.S. 88 (1994).

that makes two important contributions to the literature on the unitary executive theory. First, they engage in a successful attempt to save the unitary executive theory from the bad odor that surrounds it today as a result of the Bush Administration's outlandish claims of presidential power that have no relation to the unitary executive theory. Second, they demonstrate through careful historical research that every president in history has acted in a manner that is consistent with his belief in the unitary executive theory.

I disagree with Calabresi and Yoo on only three major points. First, I do not believe that the president has the power to veto a decision made by an executive officer to whom Congress has delegated the decision. If the President disagrees with such a decision his only recourse is to remove the officer.

Second, I do not believe that the statutory for cause limits on the president's power to remove employees and some officers unconstitutionally impair the president's power to control policymaking in the executive branch. The for cause limits on the president's power to remove some officers do not have any adverse effect on the president's ability to use the implicit or explicit threat of removal as one of the many means through which he can persuade an executive officer to act in accordance with his policy preferences. The only legal limits on the president's power to remove officers that the Court has upheld are innocuous in their effects on the president's ability to control policy making in the executive branch. The political obstacles to removal of an officer are often formidable, but they are both unrelated to any legal limits on the president's removal power and socially beneficial through their effects on presidential accountability to the electorate.

The legal limits on the president's power to remove executive branch employees that the courts have consistently upheld have no adverse effects on the president's power to control policy making in the executive branch for a different reason – by definition, employees have no power to make policy decisions.

Finally, I believe that any unconstitutional impairment of the president's power to control policy making by “independent agencies” is attributable to statutory limits on the president's appointment powers rather than to statutory limits on his removal power.