THE IMPERIAL PRESIDENCY
STRIKES BACK:
EXECUTIVE ORDER 13,233, THE
NATIONAL ARCHIVES, AND THE
CAPTURE OF PRESIDENTIAL HISTORY

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In November 2001, after delaying the release of President Reagan's presidential papers, President Bush issued Executive Order 13,233, which limits the ability of the public to access presidential documents by giving the sitting president and former presidents an effective veto over the release of their records. In this Note, Stephen H. Yuhan argues that Executive Order 13,233 is an impermissible aggrandizement of presidential power at the expense of Congress, the National Archives, and the public. In an effort to find the outer limits of the President's power to issue executive orders, Yuhan looks first to the watershed case of Youngstown Sheet & Tube Co. v. Sawyer. Finding that Youngstown fails to yield any definitive answers, Yuhan then draws on case law and legal scholarship on the President's appointment and removal powers. Yuhan contends that preventing arbitrary decisionmaking must be the paramount consideration in evaluating executive orders. Because Executive Order 13,233 creates an intolerably high risk that Presidents will exercise their "veto" power over the release of their records for arbitrary or self-interested considerations rather than the public good, Yuhan concludes, the executive order violates separation of powers.

INTRODUCTION: PRESIDENTIAL HISTORY BY INVITATION ONLY

In its first three years, President George W. Bush's administration has been notable for its unwavering focus on setting the political agenda and controlling the news cycle and the flow of government information generally. This has led the Bush administration, among other things, to assert and rely on an expansive notion of executive

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1 See, e.g., Ken Auletta, Fortress Bush, NEW YORKER, Jan. 19, 2004, at 53. Arguably, the Bush administration's skill at agenda-setting has greatly contributed to its political successes. See generally E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE 60–75 (1975) ("The outcome of the game of politics depends on which of a multitude of possible conflicts gains the dominant position.").

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prerogative not often invoked in the post-Watergate era. This Note examines one such abuse of executive power, President Bush’s Executive Order 13,233 (13,233 or Bush Order), which makes it considerably more difficult for members of the public to obtain access to the papers and records of former presidents.

The Bush Order purports “to establish policies and procedures implementing” the Presidential Records Act of 1978 (PRA), which reposits ownership and control of presidential papers in the public. Under the PRA, presidential records generally are available to members of the public under the Freedom of Information Act (FOIA). However, the President can designate certain categories of records for restricted access. The determination of whether to restrict access to the designated documents is to be made “by the Archivist [of the United States], in his discretion, after consultation with the former President.”

The PRA reflects Congress’s attempt to balance two competing concerns: executive privilege and the public’s right to know. On the one hand, “[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.” On the other hand, as James Madison noted, the public must be kept informed about what its government does: “A popular Government, without popular information, or the means of

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2 See, e.g., Mark J. Rozell, Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency, 52 DUKE L.J. 403, 407 (2002) (“It became clear early in President Bush’s term that the president was committed to . . . revitaliz[ing] executive privilege and expand[ing] the scope of that power substantially.”); see also Adam Clymer, Government Openness at Issue as Bush Holds on to Records, N.Y. TIMES, Jan. 3, 2003, at A1.


7 5 U.S.C. § 552 (2000). The Freedom of Information Act requires government agencies to release “promptly” any written records in their possession upon request, § 552(a)(3)(A), unless the requested records fall into one of nine statutory exemptions, § 552(b).

8 44 U.S.C. § 2204(a).

9 § 2204(b)(3).

10 Executive privilege is “the right of the president and high-level executive branch officers to withhold information” from, among others, the public. Rozell, supra note 2, at 404.

acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.”

The Bush Order upsets this balance by greatly expanding the prerogatives of presidents to control access to their records. Under 13,233, once a former President designates a record for restricted access, “the Archivist shall not permit access to the records by a requester unless and until . . . the former President and the incumbent President agree to authorize access to the records or until so ordered by a final and nonappealable court order.”

The Bush Order has been roundly criticized in legal scholarship, in the press, and in Congress, and it has been (unsuccessfully) challenged in court. By and large, critics have attacked the Bush Order

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13 Bush Order, supra note 3, § 3(d)(1)(ii).


17 See Am. Historical Ass’n v. Nat’l Archives & Records Admin., 310 F. Supp. 2d 216 (D.D.C. 2004) (dismissing for lack of standing and ripeness). Plaintiffs had sued to gain access to President Reagan’s documents, but the court dismissed the complaint without reaching the merits. The court held that plaintiffs “lack[ed] standing under the redres-
for its reliance on an unconscionably expansive view of executive privilege. While it is understandable that most critics of 13,233 have chosen to focus on this aspect of the Bush Order, the Order is equally (if not more) alarming as a structural matter, particularly in terms of its consequences on the balance of power in our government.

This Note argues that 13,233 is an impermissible attempt to aggrandize presidential power at the expense of Congress, the National Archives and Records Administration, and the public at large. Surveying the protracted struggle over the independence of the National Archives, Part I demonstrates that 13,233 is simply the latest effort by presidents to make the Archives subordinate to the White House. Part II attempts to examine the separation-of-powers issue by looking at the landmark case of *Youngstown Sheet & Tube Co. v. Sawyer* but finds that *Youngstown* does not provide a useful framework for analyzing the Bush Order. Part III surveys the normative implications of formalist and functionalist approaches to executive authority by looking at the case law discussing the President’s power to appoint and remove agency officials. Part IV first argues that a functional approach is more apposite to evaluating the problems raised by executive orders and then applies this model to the Bush Order.

I

13,233 AND THE STRUGGLE FOR CONTROL OF PRESIDENTIAL RECORDS

The controversy surrounding Executive Order 13,233 is the most recent battle in a long-standing war over the independence of the National Archives. This Part tells the story of 13,233 within this broader narrative. Section A recounts the creation of the National Archives and tracks the agency’s reorganization as part of the Hoover Commission reforms. Section B then describes the events leading up to and including the passage of the PRA, in which Congress established the statutory framework governing presidential records. Sec-
tion C examines the various ways in which 13,233 undermines the PRA regime.

A. The Autonomy of the National Archives

In 1934, Congress created an agency in the executive branch known as the National Archives to carry out two functions, namely overseeing the management of federal records and preserving history. Though these functions are broadly similar, the need for an efficient, effective system of records management often has been in tension with the desire to preserve a complete, unvarnished historical record. Vesting both functions in the Archives has led, over the years, to considerable schizophrenia regarding the agency's role in the federal bureaucracy, particularly with respect to the agency's

20 Act of June 19, 1934, ch. 668, Pub. L. No. 73-432, 48 Stat. 1122. Congress gave the new agency power "to inspect . . . the records of any agency of the United States Government whatsoever and wheresoever located, . . . and to requisition the transfer to the National Archives Establishment such archives, or records." Id. § 3, 48 Stat. at 1122. The agency was to be headed by an Archivist appointed by the President (subject to Senate confirmation), id. § 1, who was authorized "to make regulations for the arrangement, custody, use, and withdrawal of material deposited in the National Archives Building," id. § 3. The powers of the Archivist were subject to the proviso "[t]hat any head of an executive department, independent office, or other agency of the Government may, for limited periods, not exceeding in duration his tenure of that office, exempt from examination and consultation . . . such confidential matter transferred from his department or office, as he may deem wise." Id. Predictably, this proviso "turned out to be a serious problem," as agencies, "particularly after the coming of World War II, relied heavily on this right." DONALD R. MCCOY, THE NATIONAL ARCHIVES: AMERICA'S MINISTRY OF DOCUMENTS 1934-1968, at 10 (1978).

21 See James D. Lewis, Note, White House Electronic Mail and Federal Recordkeeping Law: Press "D" to Delete History, 93 MICH. L. REV. 794, 798 (1995) ("[C]urrent law attempts to serve two purposes, administrative efficiency and preservation of a historical record, that may suggest conflicting recordkeeping priorities and practices."). These two functions can be linked analytically, broadly speaking, to what political scientist Paul Light has described as the "scientific management" and "watchful eye" approaches to the administrative state. See generally PAUL C. LIGHT, THE TIDES OF REFORM: MAKING GOVERNMENT WORK, 1945-1995 (1997). The scientific management approach seeks to order the bureaucracy according to "a set of discernible management principles" and prizes efficiency and order. Id. at 22. The watchful eye approach, on the other hand, seeks to "prevent the arbitrary exercise of power" by promoting transparency, relying on "whistleblowers, interest groups, the media, and the public to enforce its goal." Id. at 31-32.

22 The literature can be confusing with respect to the status of the Archives. Scholars often describe the Archives as an "independent agency." See, e.g., Lewis, supra note 21, at 804 ("In the National Archives and Records Administration Act of 1984, Congress transformed the National Archives and Records Service (NARS) from a branch of the General Services Administration (GSA) into an independent agency . . . ."). However, the use of this phrase does not appear to bear on the distinction between executive agencies and independent agencies as these terms are used in the administrative law context. See infra Part III.A.1. This Note always uses the phrase "independent agency" in contemplation of
autonomy.\textsuperscript{23} In 1950, over the opposition of Archivist Wayne C. Grover, who defended the autonomy of the Archives,\textsuperscript{24} Congress reconstituted the Archives as a division of the newly established General Services Administration (GSA),\textsuperscript{25} which was created to manage the supply and property needs of the government.\textsuperscript{26} The newly organized National Archives and Records Service would be headed by an Archivist appointed by the Administrator of General Services.\textsuperscript{27}

The absorption of the Archives into the GSA reflected a subordination of professional archival functions to recordkeeping efficiency. In 1966, Grover predicted that the Archives one day would regain its autonomy, writing that "[s]ooner or later the leadership of GSA will make a mistake that the historical profession will not be able to stomach."\textsuperscript{28}

\textbf{B. The Watergate Reforms}

Grover's statement was prescient. In 1974, soon after resigning in the shadow of the Watergate scandal, President Nixon reached an agreement with General Services Administrator Arthur Sampson regarding the disposition of Nixon's presidential records. The Nixon-Sampson Agreement permitted Nixon to retain control over access to his presidential materials.\textsuperscript{29} Although the Agreement was consistent

\textsuperscript{23} Some argued at the time that the Archives should be placed under the control of an existing agency, such as the Library of Congress or the National Park Service. \textit{See} McCoy, \textit{supra} note 20, at 7–8.
\textsuperscript{24} \textit{Id.} at 225–29.
\textsuperscript{25} Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, §§ 101, 104, 63 Stat. 377, 381. Congress's decision to create the General Services Administration (GSA) was based in large part on the recommendations of the so-called Hoover Commission, which was created in 1947 to study and rationalize the burgeoning federal bureaucracy. \textit{Act of July 7, 1947, ch. 207, Pub. L. No. 80-162, 61 Stat. 246}; \textit{Light}, \textit{supra} note 21, at 55 (describing five organizational principles guiding Hoover Commission's recommendations). The Hoover Commission played a central role in initiating a wave of government reform measures in the early 1950s, accounting for almost five percent of all public laws enacted in the Eighty-First Congress (1949-1950) and in the first session of the Eighty-Second Congress (1951), \textit{see id.} at 49, and its influence continues to this day, \textit{see id.} at 55 (arguing that Hoover Commission's model organizational chart "continues to this day to thicken the federal hierarchy with management layers"): For an extended treatment of the Hoover Commission and its role in administrative reform, see generally Ronald C. Moe, \textit{The Hoover Commissions Revisited} 23–80 (1982).
\textsuperscript{26} Federal Property and Administrative Services Act of 1949 § 104, 63 Stat. at 381.
\textsuperscript{27} \textit{Id.}
\textsuperscript{29} \textit{Nat'l Study Comm'n on Records and Documents of Fed. Officials, Final Report of the National Study Commission on Records and Documents of Federal Officials} 9 (1977) [hereinafter \textit{National Study Commission Report}].
(if only in form) with the generally accepted custom that presidential papers were the property of the President, it clearly illustrated the dangers of locating archival responsibilities in a politicized entity: First, the agreement put the records under the control of an ad hoc GSA staffer instead of "qualified archivists." Furthermore, Sampson made the agreement without even seeking the input of the archival staff. Finally, the Agreement not only gave Nixon the right to restrict access to the materials, but it also authorized the former President to destroy the now-infamous White House tape recordings.

In response, Congress passed the Presidential Recordings and Materials Preservation Act (PRMPA), which nullified the Nixon-Sampson Agreement, transferred custody of Nixon’s papers to the National Archives, and forbade the destruction of the Nixon materials. The PRMPA also established a blue-ribbon commission to

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30 See Carl Bretscher, The President and Judicial Review under the Records Acts, 60 GEO. WASH. L. REV. 1477, 1482 (1992) (“Consistent with the tradition of private ownership, the Nixon-GSA agreement stated that President Nixon retained legal title to his records . . . .”); Carl McGowan, Presidents and Their Papers, 68 MINN. L. REV. 409, 416 (1983) (recounting opinion of William B. Saxbe, Attorney General under President Ford, that “practice of former Presidents, and the absence of any statute to the contrary, generally supported ownership by the President”); Turley, supra note 14, at 663–64 (describing congressional acquiescence to practice of private ownership).

31 S. REP. NO. 98-373, at 11 (1984), reprinted in 1984 U.S.C.C.A.N. 3865, 3875 (“NARS’ subordination to GSA has opened the door for archival decisionmaking which is politicized, rather than professional.”).

32 See, e.g., McCoy, supra note 20, at 372 (“Administrator Sampson placed a special representative instead of qualified archivists in charge of Nixon’s presidential materials.”).

33 Id.

34 See, e.g., Turley, supra note 14, at 664 (noting that agreement permitted President Nixon to begin destroying tapes on September 1, 1979).

35 Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695 (1974) (codified at 44 U.S.C. § 2111 note (2000)). President Nixon challenged the Presidential Recordings and Materials Preservation Act (PRMPA) on constitutional grounds, arguing, inter alia, that the Act violated separation of powers and infringed on presidential privilege. The Court rejected each of Nixon’s challenges. See Nixon v. Adm’r of Gen. Servs., 433 U.S. 425, 439 (1977) (“We further hold, however, that neither his separation-of-powers claim nor his claim of breach of constitutional privilege has merit.”). Chief Justice Burger and Justice Rehnquist dissented, arguing that the PRMPA was an unconstitutional encroachment on “the President’s freedom from control or coercion by Congress.” Id. at 510 (Burger, C.J., dissenting); see also id. at 558 (Rehnquist, J., dissenting) (“[T]his Act is a significant intrusion into the operations of the Presidency.”). The Burger and Rehnquist dissents apparently serve as the analytical basis for the Bush Order. See, e.g., Bruce P. Montgomery, Nixon’s Ghost Haunts the Presidential Records Act: The Reagan and George W. Bush Administrations, 32 PRESIDENTIAL STUD. Q. 789, 794 (2002) (“The rationale for the selective reading of Nixon v. Administrator of General Services may be found in the vigorous dissenting opinions of Chief Justice Warren E. Burger and Justice William H. Rehnquist . . . .”).
study the policies governing the records and documents of high-ranking officials and to suggest possible reforms.\(^\text{36}\)

On the recommendation of the PRMPA commission,\(^\text{37}\) Congress then passed the PRA, which provides that "[t]he United States shall reserve and retain complete ownership, possession, and control of Presidential records."\(^\text{38}\) The PRA also established procedures governing the administration of presidential documents. The Act provides six statutory exceptions under which the President may designate certain documents as sensitive records meriting restricted access. If the Archivist grants the President’s request, access to the designated records is restricted for up to twelve years after the President leaves office,\(^\text{39}\) after which time the records become subject to public access under FOIA.\(^\text{40}\)

Congress also implemented the PRMPA commission’s recommendation that “NARS should be independent of the General Services Administration (GSA) and insulated from partisan political influences”\(^\text{41}\) by passing the National Archives and Records Administration Act.\(^\text{42}\) The Senate Governmental Affairs Committee’s report on the Act stressed that “[p]rofessionalism is absolutely essential to proper performance of archival and records management functions; it is the sina [sic] qua non of the Archivist’s work,” and warned that “[i]f these [archival] decisions are made arbitrarily, or motivated by political rather than professional considerations, the historical record could be impoverished, even distorted.”\(^\text{43}\) The 1984 Act reestablished the

\(^{36}\) Presidential Recordings and Materials Preservation Act §§ 3316–3317.


\(^{39}\) 44 U.S.C. § 2204.

\(^{40}\) 5 U.S.C. § 552 (2000); see also supra note 7 and accompanying text.

\(^{41}\) National Study Commission Report, supra note 29, at 43 (emphasis omitted). While the commission acknowledged that “[t]he placement of NARS within the Government has been a matter of concern to the scholarly community for over twenty years,” id. at 44, the commission stressed the importance of the Watergate scandal on its findings: “[T]he memory of the so-called Nixon-Sampson Agreement ... [h]as demonstrated how vulnerable the National Archives is to political pressure” as a subsidiary of the GSA, id. Protecting the Archives from political pressure was “a necessary component,” the commission said, to allowing the National Archives “to operate in a professional, wholly non-partisan manner.” Id. at 43.


\(^{43}\) S. Rep. No. 98-373, at 10 (1984), reprinted in 1984 U.S.C.C.A.N. 3865, 3874 (emphasis omitted). The committee concluded that “establishing independence for NARS and the Archivist would provide the best insurance that archival and records management decisions would be made on a professional basis unaffected by political considerations or
National Archives as a separate entity and set up the organizational structure that controls the agency to this day.44

C. The Attempt to Restore Presidential Control

In 2001, after delaying the release of President Reagan's papers for ten months,45 President Bush issued Executive Order 13,233.46 The Bush Order "chang[es] virtually every substantive provision of the PRA,"47 permitting current and former presidents to delay indefinitely the release of presidential materials.48 First, 13,233 substantially


44 44 U.S.C. § 2103(a) (2000). The President may remove the Archivist at will but must communicate his reasons for removal to Congress. Id. The version of the Act initially passed by the Senate provided for the Archivist to serve a fixed term of ten years, removable only for good cause, see S. REP. NO. 98-373, at 23, reprinted in 1984 U.S.C.C.A.N. at 3887, but this section was changed by the Conference Committee to its present form, in which the term of the Archivist is not specified, and in which there is no "good cause" requirement for removal, see H.R. CONF. REP. NO. 98-1124, at 19–20 (1984), reprinted in 1984 U.S.C.C.A.N. 3894, 3894–95. However, the President must communicate his reasons for removing the Archivist to the Senate. Id. Because the Archivist can be dismissed absent "good cause," the National Archives is not considered to fall into the category of independent agencies as they are typically defined. But see infra Part IV.B (presenting arguments militating in favor of recognizing limited independence of National Archives).

45 President Reagan is the first president whose papers are governed by the PRA. In January 2001, when his papers were scheduled to be released under the statute, the Bush administration delayed the release of the papers three times, asserting that it needed time to review the PRA. In November, Bush issued Executive Order 13,233. See Montgomery, supra note 35, at 802. In the face of public outcry, the administration later relented, releasing the vast majority of the Reagan papers. See id. at 804.

46 The Bush Order apparently was issued with the assent of the Archivist. See Bush Order Hearings, supra note 16, at 97 ("[W]e have had unprecedented access and opportunity to share our experiences and share our professional concerns that we may have.") (statement of John W. Carlin, Archivist of the United States). But when asked to comment on the substance of 13,233, Carlin demurred: "Well, obviously, as you are well aware, policy is developed by you and/or the administration, and it is our role to implement. We did share some—what we could call professional concerns, and, as I indicated earlier, appreciate the fact that we were given the opportunity to do so." Id.

47 Turley, supra note 14, at 671; see also Karin, supra note 14, at 553 ("[W]hen President Bush issued Executive Order 13,233 he ... substantially changed the substance of six areas of the PRA.").

48 In addition to the three features of 13,233 discussed above, two other features of the order are noteworthy. First, a citizen challenging the assertion of privilege "must establish at least a 'demonstrated, specific need' for particular records." Bush Order, supra note 3, § 2(c) (quoting United States v. Nixon, 418 U.S. 683, 713 (1974)); see also Turley, supra note 14, at 673–74; Karin, supra note 14, at 558–59. Second, all of the prerogatives 13,233 confers on former presidents are extended to former vice-presidents. Bush Order, supra note 3, § 11; see also Karin, supra note 14, at 553–55.
revives the core of a directive issued by President Reagan,\(^{49}\) which had been struck down by the D.C. Circuit,\(^{50}\) providing that the Archivist may release records only if authorized by both the current President and the former presidents.\(^{51}\) Second, the Bush Order allows a former President to delay indefinitely the release of records simply by making repeated "request[s] . . . to extend the time for review[ing]" the records in question; the Archivist is barred from permitting access to the records during review.\(^{52}\) Third, the prerogatives the Bush Order bestows on a former President survive his death; 13,233 permits a former President to designate a representative (or a series of repre-

\(^{49}\) Pursuant to Executive Order 12,291, in 1985, the National Archives submitted a set of proposed regulations for review by the Office of Information and Regulatory Affairs (OIRA), a division of the Office of Management and Budget (OMB). See Exec. Order No. 12,291, 46 Fed. Reg. 13,193, 13,194 (Feb. 19, 1981) (directing executive agencies to submit proposed rules to OMB, for clearance prior to implementing rules); Public Citizen v. Burke, 843 F.2d 1473, 1476 (D.C. Cir. 1988); see also Montgomery, supra note 35, at 797. OIRA then referred the matter to the Justice Department's Office of Legal Counsel (OLC). After ex parte meetings between "top officials at the Justice Department" and Nixon's lawyers, see Montgomery, supra note 35, at 796-97, OLC issued a memorandum, apparently based on its interpretation of presidential privilege. Public Citizen, 843 F.2d at 1478, which directed the Archivist to honor any assertion of executive privilege by Nixon or the sitting President, see Montgomery, supra note 35, at 797; see also Public Citizen, 843 F.2d at 1476-77. Strictly speaking, the opinions stated in the OLC memorandum were not binding on the Archives. However, the Archivist treated the OLC directive as binding "‘because approval . . . was conditioned upon the Department of Justice opinion and because the Department of Justice represents the National Archives in all litigation.'" Public Citizen, 843 F.2d at 1477 (quoting Review of Nixon Presidential Materials Access Regulations: Hearings Before the Subcomm. on Gov't Info., Justice, and Agric. of the House Comm. on Gov't Operations, 99th Cong. 29, 43 (1986) (statement of Frank G. Burke, Archivist of the United States)).

\(^{50}\) In Public Citizen v. Burke, the D.C. Circuit rejected the OLC's interpretation of privilege and held that the directive was therefore incompatible with the PRA. 843 F.2d at 1479-80.

\(^{51}\) Bush Order, supra note 3, § 3(d); see also Turley, supra note 14, at 672 ("[T]he executive order would give the former president an effective veto, even in cases when the incumbent president thinks the assertion is unfounded."); Karin, supra note 14, at 557 ("In effect, both presidents have the equivalent of a veto over a decision by the Archivist to release the papers."). In practice, disagreements between the current and former presidents may be rare, as the Bush Order provides that "absent compelling circumstances, the incumbent President will concur in the privilege decision of the former President .... " Bush Order, supra note 3, § 4 (emphasis added). "[T]he order does not indicate what 'compelling circumstances' entail . . . ." Turley, supra note 14, at 674.

\(^{52}\) Bush Order, supra note 3, § 3(b). While 13,233 specifies a ninety-day period for review by the former President, a President can "effectively bar release" by requesting extensions ad infinitum. Turley, supra note 14, at 672. In addition, 13,233 provides for the incumbent to review the records, either concurrently with or after the former President. Because there is no time limit on the incumbent's review, see Bush Order, supra note 3, § 3(d), the incumbent independently can delay the release of records, even if the former President would want them released, see Karin, supra note 14, at 557-58 ("[T]he Order affords the current president an unlimited amount of time to review any record that is subjected to a request for access under the PRA . . . .").
sentatives) who, "[u]pon the death or disability of a former President, . . . shall act on his behalf." 53

II
EXECUTIVE ORDERS AND THE LIMITS ON PRESIDENTIAL POWER

Executive Order 13,233 can be seen as the latest in a series of Bush-administration moves to consolidate control of the administrative state (and of policymaking generally) in the White House. 54 While some measure of presidential control is appropriate—even necessary—the extent of this control has been the subject of considerable debate. In particular, it is not clear whether and to what extent presidents may use executive orders to exercise policymaking authority normally delegated to administrative agencies. Part A provides a

53 Bush Order, supra note 3, § 10; see also Karin, supra note 14, at 555 ("Bush’s Order also grants the right to appoint a designated ‘representative’ in the event that the involved office holder dies or becomes incapacitated."). The Bush Order also permits the former President’s family to designate the agent if the former President has not done so already. Bush Order, supra note 3, § 10.

54 See, e.g., Alexis Simendinger, Power of One, NAT’L J., Jan. 26, 2002, at 231 ("Even before September 11, Bush was interested in exerting control from the West Wing."). To be fair, President Bush is hardly the first occupant of the Oval Office to attempt to bring agency action under presidential control. See, e.g., Richard H. Pildes & Cass R. Sunstein, Reinventing the Regulatory State, 62 U. CHI. L. REV. 1, 11 (1995) ("Almost since the birth of the modern administrative agency, American presidents have struggled to assert more centralized control over the regulatory state."). Indeed, this trend towards increased presidential consolidation (or, at least, towards increased attempts at presidential consolidation) arguably can be seen as merely the mirror image of the public-choice argument that agencies, once created, seek to expand power and/or autonomy. See Kenneth R. Mayer, With the Stroke of a Pen: Executive Orders and Presidential Power 24 (2002); Terry M. Moe, The Politicized Presidency, in The New Direction in American Politics 235, 236–46, 239 (John E. Chubb & Paul E. Peterson eds., 1985) (arguing that visibility and accountability of presidency drives "the modern president . . . to seek control over the structures and processes of government"). See generally William A. Niskanen, Jr., Bureaucracy and Representative Government (1971).

However, President Bush has gone far beyond his predecessors in attempting to dictate policy from the Oval Office. Policymaking in the Bush administration has been dominated by White House political staff. See Union of Concerned Scientists, Scientific Integrity in Policymaking 2 (2004), available at http://www.ucsusa.org/documents/RSIfinal_fullreport.pdf ("There is significant evidence that the scope and scale of the manipulation, suppression, and misrepresentation of science by the Bush administration are unprecedented."") (emphasis omitted); see also Spencer Ackerman & John B. Judis, The First Casualty, THE NEW REPUBLIC, June 30, 2003, at 14 (reporting on administration efforts to pressure intelligence agencies into supporting Bush’s claims regarding existence of weapons of mass destruction in Iraq); Andrew C. Revkin & Katharine Q. Seelye, Report by E.P.A. Leaves Out Data on Climate Change, N.Y. TIMES, June 19, 2003, at A1 (reporting that White House edited report by Environmental Protection Agency to remove references to causes and effects of global warming); Noam Scheiber, Buried Treasury, THE NEW REPUBLIC, Aug. 11, 2003, at 17 (describing marginalization of Treasury Department economists in formulating fiscal policy under Bush).
short primer on the role of executive orders in the modern presidency, arguing that the use of executive orders for policymaking (as in the Bush Order) raises significant separation-of-powers concerns. Part B begins to analyze the separation-of-powers question, looking at the landmark case of *Youngstown Sheet & Tube Co. v. Sawyer*, in which the Court declared that presidential actions are subject to judicial review. Part C attempts to apply *Youngstown*’s analytical framework to 13,233 but concludes that the *Youngstown* model fails to answer the determinative question regarding the scope of the President’s constitutional authority to direct administrative agencies.

A. "Stroke of the Pen . . . Law of the Land"  

Perhaps the single most important legal instrument available to the President, the executive order is a “directive[ ] issued by the president to officers of the executive branch, requiring them to take an action, stop a certain type of activity, alter policy, change management practices, or accept a delegation of authority under which they will henceforth be responsible for the implementation of law."  

Executive orders have the force of law, and ever since the founding of the republic, presidents have used executive orders to carry out "the day-to-day conduct of government." However, as the institutional character of the presidency has evolved, the use of executive orders has changed as well. Political scientist Kenneth Mayer observes that "executive orders became more common . . . precisely at the time when enduring government institutions began to form along with an expansion of state administrative capacity." More important, the substantive nature of the orders has

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55 343 U.S. 579 (1952).  
57 PHILLIP J. COOPER, *By Order of the President: The Use and Abuse of Executive Direct Action* 16 (2002); see also STAFF OF COMM. ON GOV’T. OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF THE USE OF PRESIDENTIAL POWERS 1 (Comm. Print 1957) (explaining that executive orders and proclamations have force and effect of law).  
58 See, e.g., Mayer, supra note 54, at 35 (“For over a century the Supreme Court has held that executive orders, when based upon legitimate constitutional or statutory grants of power to the president, are equivalent to laws.”).  
59 STAFF OF SENATE SPECIAL COMM. ON NAT’L EMERGENCIES AND DELEGATED EMERGENCY POWERS, 93D CONG., EXECUTIVE ORDERS IN TIMES OF WAR AND NATIONAL EMERGENCY 2 (Comm. Print 1974) (“From the time of the birth of the Nation, the day-to-day conduct of Government business has, of necessity, required the issuance of Presidential orders and policy decisions to carry out the provisions of the Constitution that specify that the President ‘shall take care that the laws be faithfully executed.’”)).  
60 Mayer, supra note 54, at 51; see also Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 9 (2002) (“The first
Early executive orders generally pertained to minutiae of day-to-day governing; few executive orders had broad policy implications. Today, the executive order is "an indispensable policy and political tool," and presidents regularly have used executive orders to initiate far-reaching policy changes, such as desegregating the armed forces, establishing controls over wages and prices, banning the assassination of foreign leaders, and imposing a "global gag rule" that forbids foreign nongovernmental organizations receiving federal funding from promoting abortion.

From the perspective of presidents and their advisors, the chief advantage of executive orders is that they enable the President to take decisive action without having to endure protracted negotiations with Congress over proposed legislation or to jump through procedural hoops such as notice and comment. Yet it is precisely the unilateral character of executive orders—and the attendant specter of policymaking by presidential fiat—that creates grave separation-of-powers concerns.

From this point forward, when this Note discusses "executive orders," it is nearly always concerned specifically with the subset of orders described above, that is, the subset of orders where the President has bypassed normal legislative and agency processes to initiate policy changes unilaterally.

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62 See Branum, supra note 60, at 9 ("Originally, presidents used directives merely as administrative tools.").

63 Mayer, supra note 54, at 7.


68 See Cooper, supra note 57, at 17 ("For many administrations, this simple process of promulgating authoritative policies is far more attractive than the arduous effort needed to move a bill through Congress . . . [or] to promulgate a regulation.").

69 See, e.g., id. at 15 ("Some might indignantly claim that this is a constitutional travesty on a magnitude that would cause the founders to roll over in their graves."); Branum, supra note 60, at 2 ("The Constitution does not give one individual an 'executive pen' enabling that individual to single-handedly write his preferred policy into law.").
B. The Steel Seizure Case

Any examination of the limits on the President’s power to issue executive orders necessarily begins with Youngstown Sheet & Tube Co. v. Sawyer, which expressly established the principle that executive action was subject to judicial review and set forth a general framework for assessing the limits on presidential authority. Youngstown arose out of President Truman’s attempt to seize the nation’s steel mills during the Korean War. Fearing an imminent nationwide strike that would have crippled the production of war matériel and potentially jeopardized the war effort, President Truman issued Executive Order 10,340 directing the Secretary of Commerce to seize the mills and take steps necessary to ensure their continued operation.

Truman’s order exemplified an “overarching theory of presidential emergency authority that cut across every area, domestic and foreign.” Assistant Attorney General Homer Baldrige, defending the action in court, made the bold assertion that the only limits on presidential emergency powers were “the ballot box and . . . impeachment.”

The Youngstown Court rejected this expansive conception of presidential authority. Writing for the Court, Justice Black declared that “[t]he President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.”

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71 343 U.S. 579 (1952). Youngstown has been compared (favorably) with Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), in terms of its significance: Youngstown is to executive power what Marbury v. Madison is to legislative power, only more so. Marbury was, at most, a weak assertion of judicial power over the legislature, and not at all an assertion of judicial supremacy over the other branches of the federal government. . . . Youngstown, in contrast, is a bold assertion of judicial power over the conduct of the President in matters concerning the scope of the President’s constitutional authority.

Michael Stokes Paulsen, Youngstown Goes to War, 19 CONST. COMMENT. 215, 217–18 (2002); see also David Gray Adler, The Steel Seizure Case and Inherent Presidential Power, 19 CONST. COMMENT. 155, 156 (2002) (“Justly celebrated in the pages of this volume . . . for its landmark status and deserving rank in the pantheon of great cases—alongside Marbury, McCulloch, and Brown—Youngstown has been assured of immortality in the annals of constitutional jurisprudence.”).


73 Neal Devins & Louis Fisher, The Steel Seizure Case: One of a Kind?, 19 CONST. COMMENT. 63, 67 (2002). At a press conference following the seizure, Truman was asked, “Mr. President, if you can seize the steel mills under your inherent powers, can you, in your opinion, also seize the newspapers and/or the radio stations?” Truman responded, “Under similar circumstances the President has to act for whatever is for the best of the country.” Id.

74 Id. at 68–69.

75 Youngstown, 343 U.S. at 585.
Black found no statutory basis for the order.\textsuperscript{76} Turning to the constitutional question, Black focused on the distinction between executive power (which the Constitution vests in the President\textsuperscript{77}) and legislative power (which the Constitution vests in Congress\textsuperscript{78}). Because the order was legislative in nature,\textsuperscript{79} Black concluded, the order exceeded the President's constitutional authority.\textsuperscript{80}

In a concurring opinion that has since become celebrated in legal scholarship\textsuperscript{81} and subsequent case law,\textsuperscript{82} Justice Jackson presented an alternative basis for holding Truman's order unconstitutional. Jackson stressed that the Constitution established separate though interdependent branches of government.\textsuperscript{83} Accordingly, "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."\textsuperscript{84} Jackson then set forth a three-tiered framework for assessing whether a given action is within the President's power. Jackson's first category consists of executive orders issued "pursuant to an express or implied authorization of Congress," which, he argued, are entitled to "the strongest of pre-


\textsuperscript{77} See U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

\textsuperscript{78} See id. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States.").

\textsuperscript{79} Youngstown, 343 U.S. at 588.

\textsuperscript{80} Id. at 587 ("Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. . . . The Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.").

\textsuperscript{81} See, e.g., KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 342 (14th ed. 2001) ("Of all the opinions in the Steel Seizure Case, Justice Jackson's has been the most widely relied on in later decisions."); Harold H. Bruff, Judicial Review and the President's Statutory Powers, 68 VA. L. REV. 1, 11-12 (1982) ("It is Justice Jackson's famous concurring opinion in Youngstown that has most influenced subsequent analysis."); see also MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 10 (1990) ("Youngstown is remembered mostly for the concurring opinion of Justice Robert Jackson."); Branum, supra note 60, at 62 ("Despite the numerous opinions issued in Youngstown upholding the importance of a system of checks and balances, Justice Jackson's concurrence may have been the most important.").


\textsuperscript{83} Youngstown, 343 U.S. at 635 (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

\textsuperscript{84} Id.

\textsuperscript{85} Id.
assumptions and widest latitude of judicial interpretation." It86 On the other end of Jackson’s spectrum are those executive orders which are “incompatible with the express or implied will of Congress."87 The power to issue such orders, wrote Jackson, finds presidential power “at its lowest ebb, for then [the President] can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”88 In between these extreme cases are orders issued “in absence of either a congressional grant or denial of authority,” in which “any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”89 Noting that Congress enacted “three statutory policies inconsistent with this seizure,”90 Jackson placed Truman’s order in the category entitled to the least deference and then rejected the government’s virtually limitless view of emergency power.91

C. Inherent Presidential Authority and the Administrative State

By using the presence or absence of statutory authorization to determine how skeptically an executive order should be viewed, Jackson’s approach promises to account for the nuanced, complex interrelationship between Congress and the President. Turning to 13,233, as a threshold matter of statutory interpretation, the express language of the PRA seems incompatible with 13,233.92 The next logical question is whether Congress impliedly delegated supervisory authority to the President.93

The answer to this question unavoidably is informed by the underlying constitutional issue regarding the scope of the President’s constitutional powers over the Archives (and over the bureaucracy generally):94 Does the President’s constitutional authority to super-

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86 Id. at 637.
87 Id.
88 Id.
89 Id.
90 Id. at 639.
91 Id. at 653 (“Such power either has no beginning or it has no end. If it exists, it need submit to no legal restraint. I am not alarmed that it would plunge us straightway into dictatorship, but it is at least a step in that wrong direction.”).
92 See supra Part I.C.
93 See Harold H. Bruff, Presidential Power and Administrative Rulemaking, 88 YALE L.J. 451, 488 & n.184 (1979) (“Because most rulemaking responsibilities are not directly delegated to the President, analysis must focus on his implied authority.”).
94 Compare, e.g., Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 COLUM. L. REV. 573, 637 (1984) (“Congressional delegations of regulatory authority are most often made . . . to some executive branch or independent agency. It is . . . not at all clear that the President is entitled to participate in the proceedings of these bodies to the extent suggested by calling him the delegate.”), with, e.g., Elena Kagan, Presidential Administration, 114 HARV. L. REV. 2245, 2326–27 (2001)
vise the conduct of subordinates include the power to override, obviate, or otherwise nullify the decisions of agency officials? If the President indeed has such inherent authority, any attempted delegation from Congress to the Archives necessarily must be accompanied by a delegation from Congress to the President to supervise the Archives. The statutory question thus is subsumed by the constitutional question. Unfortunately, Jackson's opinion provides no guidance as to how to determine the limits on the President's constitutionally granted powers. Though Jackson's framework in Youngstown provides a conceptually appealing way to look at executive power, it is of limited use in the agency context because it offers no guidance on what ought to be the relationship between the President and agencies.

III

THE REMOVAL POWER AND AGENCY INDEPENDENCE

In another context, however, the Court has offered some clues regarding the bounds on the President's inherent supervisory authority over the executive branch. In the line of cases beginning with Myers v. United States and Humphrey's Executor v. United States ("[I]f Congress, as it usually does, simply has assigned discretionary authority to an agency official, . . . then an interpretive question arises . . . [A] second way to read such a statute is to assume that the delegation runs to the agency official specified, . . . but still subject to the ultimate control of the President.").

Indeed, under this view, to the extent that the statute rejects the supervisory delegation, the statute would be unconstitutional. Cf infra Part III.A.1 (discussing cases holding as unconstitutional statutes that restrict presidential authority to remove agency officials).

65 See Erwin Chemerinsky, Controlling Inherent Presidential Power: Providing a Framework for Judicial Review, 56 S. CAL. L. REV. 863, 870 (1983) ("Justice Jackson's analysis is of no help in deciding cases involving inherent powers such as executive privilege, impoundment, rescission of treaties, executive agreements, removals of executive officials from office, and the like."); see also Patricia L. Bellia, Executive Power in Youngstown's Shadows, 19 CONST. COMMENT. 87, 124 (2002) ("[T]he questions about the scope of presidential foreign affairs powers are not easily resolved, and Youngstown contributes little to the analysis. Youngstown offers no general theory of the scope of the President's constitutional powers.").

When faced with a case that raised the issue (albeit in the foreign policy context), the Supreme Court sidestepped it. In Dames & Moore v. Regan, 453 U.S. 654 (1981), the Supreme Court upheld an executive agreement negotiated with Iran, which, among other things, suspended all pending claims against Iran. Although the Court conceded that Congress had not delegated explicitly to the President the authority to suspend claims in the specific statute at issue, the Court looked to other laws bearing on the President's power to suspend claims and concluded that the "general tenor" of legislation did not evince clearly a congressional intent to deny the President this power. Id. at 678; see also Kim Rennard Tulsky, Judicial Review of Presidential Initiatives, 46 U. PITZ. L. REV. 421, 439–42 (1985) (discussing Court's treatment of Jackson's Youngstown framework in Dames & Moore).

97 272 U.S. 52 (1926).
States.\textsuperscript{98} the Court has analyzed congressional attempts to restrict the President's power to remove agency officials, holding that Congress cannot restrict the President's ability to remove officials of executive agencies at will, whereas it may restrict the President's power to remove officials of independent agencies.\textsuperscript{99} In locating the line between executive and independent agencies, the Court has focused on how much authority the Constitution gives to the President. As such, these cases offer hints as to how one ought to approach separation-of-powers controversies involving the President's inherent powers.

Part III analyzes these removal cases in an effort to answer the constitutional question that Jackson's Youngstown framework raises but fails to resolve: Does the President's supervisory authority extend so far as to permit him to make decisions that Congress has delegated to agency officials? While these cases offer some assistance, the Court, in deciding them, has not consistently employed a coherent view of separation of powers. Parts A and B discuss the removal cases in the context of the formalist-functionalist debate, using this framework in order to identify the normative underpinnings of each approach.

A. The Formalist/Accountability-Centered Approach

Formalists argue that the totality of federal power is divided among the executive, legislative, and judicial branches.\textsuperscript{100} A court, in deciding whether an action is consistent with separation of powers, must distill the essential characteristics of the action and determine whether the action is most appropriately categorized as executive, legislative, or judicial in nature:\textsuperscript{101} The "[s]eparation of powers principle is violated whenever the categorizations of the exercised power and

\textsuperscript{98} 295 U.S. 602 (1935).
\textsuperscript{99} See id. at 631-32. In Humphrey's Executor, the Court stated:

\[\text{[T]he Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.} \]

Id.; see also infra notes 105-07 and accompanying text.

\textsuperscript{100} See, e.g., Gary Lawson, Territorial Governments and the Limits of Formalism, 78 CAL. L. REV. 853, 857-58 (1990) ("Formalists treat the Constitution's three 'vesting' clauses as effecting a complete division of otherwise unallocated federal governmental authority among the constitutionally specified legislative, executive, and judicial institutions.").

\textsuperscript{101} Id. at 858 ("Any exercise of governmental power, and any governmental institution exercising that power, must either fit within one of the three formal categories thus established or find explicit constitutional authorization for such deviation.").
the exercising institution do not match and the Constitution does not specifically permit such blending." 102

The formalist approach reflects a concern for ensuring that the government remains accountable for its actions. By requiring that only the executive branch take executive actions, and that only the legislative branch take legislative actions, the formalist approach, in principle, makes it relatively easy to allocate praise or blame for any given government action.

1. The Myers-Humphrey's Executor Framework

The Supreme Court's early removal cases distinguished between executive and independent agencies by adopting a formalist approach. In Myers, the Court struck down a congressional statute requiring that the president obtain the "advice and consent" of the Senate before removing postmasters. 103 In an opinion written by Chief Justice (and former President) Taft, the Court held that Article II "vested general executive power in the President alone," including the power to remove subordinates. 104 Myers thus constitutionalized the President's removal power. In Humphrey's Executor, however, the Court upheld a provision of the Trade Commission Act that set forth an exclusive list of reasons for which the President could dismiss members of the Federal Trade Commission (FTC). 105 In so doing, the Court limited Myers to "purely executive officers," 106 holding that Congress could restrict the President's ability to remove an officer with "quasi-legislative" or "quasi-judicial" functions. 107 In Weiner v. United States, 108 the Court cast the Myers-Humphrey's Executor framework in formal terms: "[T]he most reliable factor for drawing an inference regarding the President's power of removal in our case is the nature of the function that Congress vested in the War Claims Commission." 109 Finding that the FTC's function was of an "intrinsic judicial char-

102 Id.
104 Id. at 135.
106 Id. at 631–32. In reaching this conclusion, the Court seized upon dicta in Myers which left open the possibility that the decision might be limited to executive officers. See Myers, 272 U.S. at 135 ("[T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control.").
107 Humphrey's Ex'r, 295 U.S. at 629. The Federal Trade Commission has the power to enforce antitrust laws and to prevent the use of "unfair methods of competition in commerce." Id. at 620.
109 Id. at 353.
acter,” the Court upheld the statutory restriction on the removal power.\textsuperscript{110}

In two later cases, the Court reaffirmed its earlier formalist holdings by striking down congressional attempts to intrude upon the executive’s removal power. In \textit{Buckley v. Valeo},\textsuperscript{111} the Court struck down a provision of the 1974 amendments to the Federal Election Campaign Act giving Congress the power to appoint members of the Federal Election Commission (FEC); finding that the FEC commissioners exercised executive powers,\textsuperscript{112} the Court held that Congress could not appropriate for itself the power to appoint executive officials.\textsuperscript{113} In \textit{Bowsher v. Synar},\textsuperscript{114} the Court invalidated what it perceived to be another attempt by Congress to circumvent \textit{Myers} by vesting a congressional officer, removable only by a joint resolution of Congress, with executive functions.\textsuperscript{115}

2. Accountability and the Need for “a [V]igorous [E]xecutive”\textsuperscript{116}

The textualist-originalist case for plenary presidential control over agency action begins with the observation that the Constitution itself vests “[t]he executive Power . . . in a President of the United States of America,” with no mention of any executive powers vested in any other official or body.\textsuperscript{117} As a consequence, any other official

\begin{footnotesize}
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\item [110] Id. at 355. The War Claims Commission was charged with adjudicating personal injury and property damage claims for damages incurred “at the hands of the enemy in connection with World War II.” Id. at 350.
\item [111] 424 U.S. 1 (1976) (per curiam).
\item [112] Id. at 138. The Federal Election Commission is the principal agency charged with implementing campaign finance laws; its authority includes “recordkeeping, disclosure, and investigative functions, . . . extensive rulemaking and adjudicative powers,” id. at 110, and enforcement powers that are “direct and wide ranging,” id. at 111.
\item [113] Id. at 140-41.
\item [114] 478 U.S. 714 (1986).
\item [115] Id. at 734. Under the Gramm-Rudman-Hollings Act, the Comptroller General was charged with presenting recommendations to the President regarding the spending reductions required to comply with the statutory requirement to balance the federal budget. Id. at 717-19.
\item [116] THE FEDERALIST No. 70, at 341 (Alexander Hamilton) (Terrence Ball ed., 2003).
\item [117] U.S. CONST. art. II, § 1; see also Steven G. Calabresi & Saikrishna B. Prakash, \textit{The President’s Power to Execute the Laws}, 104 YALE L.J. 541, 568-69 (1994) (“Does Article II’s vesting of the President with all of the ‘executive Power’ give him control over all federal governmental powers that are neither legislative nor judicial? The answer is unambiguously yes.”). A full treatment of this “unitary executive” thesis is beyond the scope of this Note. For examples of scholarship articulating the historical case for a unitary executive, see, in addition to the article cited above, Steven G. Calabresi & Kevin H. Rhodes, \textit{The Structural Constitution: Unitary Executive, Plural Judiciary}, 105 HARV. L. REV. 1153 (1992); David P. Currie, \textit{The Distribution of Powers After Bowsher}, 1986 SUP. CT. REV. 19; Gary Lawson, \textit{The Rise and Rise of the Administrative State}, 107 HARV. L. REV. 1231 (1994); Lee S. Liberman, \textit{Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong}, 38 AM. U. L. REV. 313 (1989).
\end{enumerate}
\end{footnotesize}
wielding executive power must be constitutionally subordinate to the President. Creating a “unitary executive,” the argument goes, is consistent with the Framers’ desire to establish a strong executive to counterbalance the threat of a dominant legislature.\footnote{118 See, e.g., Calabresi & Prakash, supra note 117, at 603 (“[T]he Constitution’s clauses relating to the President were drafted and ratified to energize the federal government’s administration and to establish one individual accountable for the administration of federal law.”).}

The historical argument for a unitary executive is predicated on a narrative that casts the Constitution largely as a response to the dominance of the legislature at the state and federal levels. The ineffectiveness of these pre-Constitution governments, proponents argue, demonstrated to the Founders the need for “a vigorous executive.”\footnote{119 The Federalist No. 70, supra note 116, at 341 (Alexander Hamilton) (“Energy in the executive is a leading character in the definition of good government. . . . It is essential . . . to the steady administration of the laws, to the protection of property . . . and to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy.”).}

Alexander Hamilton, in particular, argued that having a strong executive required a unitary executive. In Hamilton’s view, only unity ensured that the executive would be accountable for its actions: “[A]
plurality in the executive . . . tends to conceal faults, and destroy responsibility. . . . It often becomes impossible, amidst mutual accusations, to determine on whom the blame . . . ought really to fall."\(^{120}\)

Contemporary formalists have adapted the unitary-executive thesis to the modern administrative state.\(^{121}\) Elena Kagan, for one, has argued for a presumption of plenary presidential control based on accountability considerations.\(^{122}\) Accountability thus serves as the linchpin for the legitimacy of the administrative state: presidential control is essential because it subjects all administrative action to a democratic, electoral check.\(^{123}\)

Presidential control also helps raise the public profile of regulatory decisions that otherwise might go unnoticed.\(^{124}\) While individual decisions of obscure government agencies might escape the public eye, "almost no presidential exercise of authority, however masked or oblique, long can escape public notice."\(^{125}\) Placing agency action squarely under the control of the President promotes accountability by heightening awareness of administrative decisions.

Second, bringing administrative agencies under presidential control "establishes an electoral link between the public and the bureaucracy."\(^{126}\) Without this link, agencies would be directly accountable to no one and indirectly accountable to the courts (who themselves cannot be held accountable) or to members of Congress (who answer to necessarily more parochial constituencies).\(^{127}\) Presidential control

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\(^{120}\) The Federalist No. 70, supra note 116, at 345 (Alexander Hamilton). Hamilton argued that a nonunitary executive would thwart accountability by endlessly passing responsibility and blame back and forth "with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author." Id.

\(^{121}\) Lisa Bressman, a critic of the model, describes this argument as a preference that decisions be made by a "focused governmental official . . . rather than a bunch of bureaucrats." Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. Rev. 461, 489 (2003). Bressman also criticizes the presidential-control model as inadequate to justify the administrative state because it fails to take seriously the concern for preventing arbitrary governmental action. See id. at 463-64; see also infra Part III.B.2 (discussing Bressman’s view).

\(^{122}\) See Kagan, supra note 94, at 2328.

\(^{123}\) See id. at 2331-39; see also Steven G. Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23, 42-45 (1995).

\(^{124}\) See Kagan, supra note 94, at 2331-32.

\(^{125}\) Id. at 2337. Kagan attributes the high visibility of presidential actions to, among other things, the singularly intense media coverage of the White House, see id. at 2332, and the fact that modern presidents generally attempt to use "the direct connection between the President and public" to consolidate political power, id.

\(^{126}\) Id. at 2332.

\(^{127}\) Id. at 2336-37. Peter Shane has argued that presidential control may not lead to a net increase in accountability overall, because increasing presidential accountability for agency action decreases accountability for congresspeople. Peter M. Shane, Political Accountability in a System of Checks and Balances, 48 Ark. L. Rev. 161, 209 (1994) [here-
of agency action solves the legitimacy problem because presidents are uniquely responsive to democratic pressure: "[T]hey are the only governmental officials elected by a national constituency in votes focused on general, rather than local, policy issues," and remain responsive to a national constituency.129

B. The Functionalist/Arbitrariness-Centered Approach

Functionalists reject the formalists' assumption of "a radical division of government into three parts, with particular functions neatly parcelled out among them." As a result, functionalists see no reason

inafter Shane, Political Accountability] ("[I]f the President were to enjoy more and more complete control over the content of domestic policy, then the weaker the identifiable link would become between legislator effectiveness and government performance.").

Under Shane's framework, determining whether increased presidential control leads to gains in accountability depends on whether the President or the Congress is better suited to be a representative institution. Notably, as reflected by the decision to create the Electoral College, the Founders themselves did not envision the presidency as being a representative institution. See Peter M. Shane, Independent Policymaking and Presidential Power: A Constitutional Analysis, 57 Geo. Wash. L. Rev. 596, 614 (1989) [hereinafter Shane, Independent Policymaking]. Instead, it was intended to be "a relatively apolitical award for men who had demonstrated extraordinary virtue and character through selfless public service." Martin S. Flaherty, The Most Dangerous Branch, 105 Yale L.J. 1725, 1822 (1996). By contrast, the Founders did envision Congress—at least, the House of Representatives—as being an acutely representative body. See id. at 1822–23; cf. U.S. Const. art. I, § 7 (requiring all revenue bills to originate in House of Representatives); Alan L. Feld, Separation of Political Powers: Boundaries or Balance?, 21 Ga. L. Rev. 171, 190 (1986) ("The Constitution's origination clause provides that all bills for raising revenue shall originate in the House of Representatives; the Senate may then propose amendments or concur. Presumably, the Framers sought to invest the more popularly elected House with the power to initiate and thereby control tax matters.") (footnote omitted).


Peter Shane, among others, has questioned whether "the President is more accountable... than other public officials." Shane, Political Accountability, supra note 127, at 196. Empirical research regarding presidential elections shows that "[t]wo considerations seem to outweigh all others in recent choices of Presidents—public satisfaction (or the lack of it) with economic performance under the most recent incumbent, and a general sense of an incumbent President's personal performance." Id. at 199. Shane concludes that "detailed stances on matters of policy are not likely to make decisive differences in [the President's] political fortunes." Id. Experience with presidential elections thus raises doubts about whether the specter of being thrown out of office is a credible deterrent to individual regulatory decisions.

130 Strauss, supra note 94, at 578.
to "identify and place" specific powers in specific actors.\textsuperscript{131} Under a functionalist model, the key concern is "to protect the citizens from the emergence of tyrannical government."\textsuperscript{132} Functionalists see the administrative state as a means of maintaining balance and competition among the executive, legislative, and judicial branches.\textsuperscript{133} As a result, the functionalist model focuses on the relationship between the agency and the three branches of government and seeks to maintain the balance of power necessary to safeguard against tyranny.\textsuperscript{134}

1. The Functionalist Alternative

Dissenting in \textit{Bowsher}, Justice White decried the Court's "distressingly formalistic view."\textsuperscript{135} White distinguished between "executive functions that . . . must be performed by officers subject to removal at will by the President . . . [and] the far larger class that may be relegated to independent officers."\textsuperscript{136} Arguing that the Comptroller General did not possess any powers falling into the former category,\textsuperscript{137} White concluded that the statutory delegation of power "deprives the President of no authority that is rightfully his."\textsuperscript{138}

A majority of the Court adopted a functionalist reading in \textit{Morrison v. Olson},\textsuperscript{139} upholding the Ethics in Government Act, which provided for the appointment of independent counsels who had the power to investigate high-level officials and who could be removed only for "good cause."\textsuperscript{140} \textit{Morrison} appeared to be an easy formalist case,\textsuperscript{141} and the Court itself noted that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive.'"\textsuperscript{142}

However, Chief Justice Rehnquist, writing for the \textit{Morrison} Court, rejected the notion that the executive nature of the office was

\begin{footnotes}
\item[132] Strauss, supra note 94, at 578.
\item[133] Id.
\item[134] Id.
\item[135] \textit{Id.}
\item[137] \textit{Id.} at 762.
\item[138] \textit{Id.} at 763–64.
\item[139] \textit{Id.} at 764. White's analysis consciously paralleled the Court's reasoning in \textit{Nixon v. Adm'r of Gen. Servs.}, 433 U.S. 425 (1977), in which the Court rejected former President Nixon's argument that the PRMPA violated separation of powers, \textit{id.} at 441; see also supra note 35.
\item[139] \textit{Id.} at 654 (1988).
\item[140] \textit{Id.} at 686.
\item[141] \textit{See, e.g., Liberman, supra note 117, at 314–18. But see Shane, Independent Policymaking, supra note 127, at 599 (defending \textit{Morrison} on formalist grounds).}
\item[142] \textit{Morrison}, 487 U.S. at 689.
\end{footnotes}
determinative: "[T]he determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'"  

Instead, Rehnquist wrote, the key consideration is "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light." 

Undertaking this functional analysis, Rehnquist concluded that "[a]lthough the counsel exercises no small amount of discretion and judgment . . . , we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of

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143 Id. at 691. In Morrison, Rehnquist argued that the key distinction in the previous removal cases was between cases where Congress merely encroached upon the executive's removal power (as in Humphrey's Executor, Weiner, and Morrison), and cases where Congress, in addition to limiting the President's power, attempted to aggrandize its own power by inserting itself into the removal process (as in Myers and Bowsher). Rehnquist argued that Myers's formalistic analysis was appropriate only in aggrandizement cases but not in cases of mere encroachment. See Morrison, 487 U.S. at 685–86; see also Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 COLUM. L. REV. 1, 114–15 (1994) ("The cleanest line between Bowsher and Chadha on the one hand and Mistretta and Morrison on the other is that in the first two cases Congress attempted to give itself a degree of ongoing authority over the administration of the laws. The Court has firmly set itself against such aggrandizement."); see also Strauss, supra note 94, at 614–15 ("Humphrey's Executor, in turn, could be understood as having turned on precisely this distinction between those limitations on removal where Congress has retained some role and those in which it has not.").

While the distinction between encroachment and aggrandizement seems plausible enough on its face, the choice to apply functionalism to encroachment and formalism to aggrandizement makes little sense in light of the normative concerns that each approach seeks to address. Intuitively, the encroachment of one branch upon another would seem to pose accountability problems but few problems regarding arbitrary action. Self-aggrandizing behavior, on the other hand, would seem to pose little to no accountability concerns, but would carry a heightened risk that faction and self-interest might infect decisionmaking processes. See, e.g., infra Part IV.A.

Rehnquist, then, seems to have gotten things exactly backwards: A formalist reading, which addresses accountability concerns, would be more appropriate in cases of mere encroachment. There, a court solves a turf war between branches of government by characterizing the activity as executive, legislative, or judicial. A functionalist reading, which addresses the arbitrariness issue, would be apposite for the aggrandizement cases. Preventing arbitrary governmental action is a crucial factor in assessing whether the court should be concerned about an expansion of governmental power.

144 Morrison, 487 U.S. at 691. The Court adopted a similarly functional analysis in upholding the U.S. Sentencing Commission against a challenge brought on nondelegation grounds. See Mistretta v. United States, 488 U.S. 361 (1988). Justice Scalia, dissenting, adopted a formal approach and derisively referred to the Sentencing Commission as a "juniorvarsity Congress," stressing that the Commission "exercises no governmental powers except the making of rules that have the effect of laws." Id. at 427 (Scalia, J., dissenting).
the Executive Branch as to require . . . that the counsel be terminable at will."\textsuperscript{145}

2. Faction and Governmental Self-Interest

The argument for a functional approach to separation of powers stresses that the Founders, more than anything else, worried about preserving individual liberty against arbitrary or tyrannical governmental action by the Crown. In particular, the Founders saw the need to combat "the twin problems of faction and governmental self-interest—the principal components of governmental tyranny."\textsuperscript{146} Under a functional view, separation of powers aims, above all else, to secure individual liberty by ensuring that government decisions are nonarbitrary—that is, that decisions are motivated by public rather than private interests.\textsuperscript{147}

In \textit{Federalist No. 10}, James Madison recognized the tendency of mobilized interest groups, "united and actuated by some common impulse or passion,"\textsuperscript{148} to use democratic processes to pursue their narrow self-interest at the expense of "the rights of other citizens" and of "the permanent and aggregate interests of the community."\textsuperscript{149} This danger posed by faction is compounded by governmental self-interest. Specifically, public choice theory recognizes that public officials, seduced by the "encroaching spirit of power,"\textsuperscript{150} seek to "consolidate and entrench [their] own influence while shielding [themselves] from criticism or reform."\textsuperscript{151}

In addition, public officials, concerned with

\textsuperscript{145} \textit{Morrison}, 487 U.S. at 691–92.

\textsuperscript{146} Bressman, \textit{supra} note 121, at 497 (citation omitted).

\textsuperscript{147} \textit{Id.} at 499 ("[S]eparation of powers does not require separation among the branches to ensure that only the branches responsive to the people make or execute the law. Rather, [it] prevents the concentration of power in any one branch so as to prevent the tyranny of any one branch."); see also Rebecca L. Brown, \textit{Separated Powers and Ordered Liberty}, 139 U. PA. L. REV. 1513, 1515–16 (1991) ("I argue that the Madisonian goal of avoiding tyranny through the preservation of separated powers should inform the Supreme Court's analysis in cases raising constitutional issues involving the structure of government. Moreover, that goal should be understood as a concern for protecting individual rights against encroachment by a tyrannical majority.").

\textsuperscript{148} \textit{The Federalist} No. 10, at 41 (James Madison) (Terrence Ball ed., 2003).

\textsuperscript{149} \textit{Id.} The problem of faction is well articulated in areas of constitutional law directly concerned with individual liberties. For example, First and Fourteenth Amendment scholars, drawing on the problem of faction, have questioned the place of majoritarianism in the constitutional system and have invoked the threat of faction to justify the aggressive use of countermajoritarian institutions such as judicial review. \textit{See}, e.g., Ronald Dworkin, \textit{Freedom's Law} 1–5 (1996); see also Bressman, \textit{supra} note 121, at 493 & n.149 ("Some have challenged the assumption on which majoritarianism rests: that the purpose of our complex system of mediated powers is to aggregate popular preferences.").

\textsuperscript{150} \textit{The Federalist} No. 48, \textit{supra} note 119, at 241 (James Madison).

reelection, face pressure to subordinate the public good to the private interests of major campaign donors and other special interests.¹⁵²

The Founders understood that making government accountable to popular opinion could have salutary effects on government decisionmaking. Forcing government officials to stand for regular elections makes “elected officials . . . subject to the check of the people if they do not discharge their duties in a sufficiently public-regarding and otherwise rational, predictable, and fair manner.”¹⁵³ Yet, at the same time, Madison understood that accountability alone “was . . . insufficient to prevent private interest and government self-interest from diverting their policy decisions from public purposes, and may even facilitate this result.”¹⁵⁴

Separation of powers reduces the risk that faction and government self-interest will lead to arbitrary decisions in two ways. First, by distributing governmental functions among different branches, separation of powers makes it harder for any one faction to control all sources of governmental power.¹⁵⁵ This separation of functions reduces the likelihood of sweeping political changes and leads to stability.¹⁵⁶ Second, separation of powers creates and maintains a balance of powers among the branches on the belief that, to paraphrase Madison, ambition will counteract ambition.¹⁵⁷ The interest of each branch “in jealously protecting the prerogatives of their home department” will cause it to “vigorously resist[ ] efforts by those in other departments to expand their influence.”¹⁵⁸ Ultimately, this tension

¹⁵² See, e.g., Mark Green, Selling Out 188-91 (2002); see also Bressman, supra note 121, at 496; Carpenter, supra note 151, at 309.
¹⁵³ Bressman, supra note 121, at 499.
¹⁵⁴ Id. at 498.
¹⁵⁵ See The Federalist No. 47, at 234 (James Madison) (Terrence Ball ed., 2003) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced to be the very definition of tyranny.”); see also, e.g., Magill, supra note 131, at 1156-57.
¹⁵⁶ See Shane, Independent Policymaking, supra note 127, at 621-22. Shane argues that the diffuse nature of policymaking power has two consequences:

Even a strong majority is likely to produce no more than incremental policy changes in short periods of time, and minority opinion, defeated in one forum, is likely to have other political forums in which to compete more effectively. This means that a political minority, when it loses an election, does not lose everything.

Id.
¹⁵⁷ See The Federalist No. 51, at 252 (James Madison) (Terrence Ball ed., 2003) (“Ambition must be made to counteract ambition.”).
¹⁵⁸ See, e.g., Magill, supra note 131, at 1158.
The imperial presidency and competition among the branches prevents any single branch from accumulating too much authority.159

Plenary presidential control over agencies is troubling because it undermines both of these features of separation of powers. Indeed, since before the advent of the modern administrative state, critics have argued that the fusion of executive, legislative, and judicial functions in a single governmental entity violates separation of powers.160 Yet even these critics could take solace in the fact that the power of any powerful agency was circumscribed by an organic statute defining that agency’s mandate.161 By contrast, the subject-matter authority of the presidency encompasses the entirety of domestic and foreign policy. As a consequence, vesting all administrative authority in the President dramatically increases the risk that minority interests will be ignored across the full spectrum of policy issues.

In the early days of the republic, it might have been possible to dismiss this fear as unfounded. Indeed, there is evidence to suggest that the Founders initially conceived of the presidency as being separate from and above partisan politics.162 However, this vision of an apolitical presidency representing a national constituency simply is no longer realistic. Today, presidents are intensely political figures, elected on the basis of “a patchwork of potential interest coalitions, whose utility to him depends upon a combination of their geographical location and concentration, and their marginal value in assembling a plurality within the state.”163 Moreover, modern presidents have used the bully pulpit of the presidency to exploit their deep, direct connection with voters for political gain.164 Michael Fitts concludes that because voters see the President as a central political figure, they demand that the President take decisive positions, even


160 See, e.g., THE FEDERALIST NO. 47, supra note 155, at 234 (James Madison).

161 Cf. Carpenter, supra note 151, at 318–22 (arguing that California Coastal Commission raises particularly strong separation-of-powers concerns due to Commission’s central role in California’s bureaucracy).

162 See Flaherty, supra note 127, at 1822–23.


164 See Kagan, supra note 94, at 2332 (describing new strategies of presidential leadership as “focused . . . on intensifying the direct connection between the President and public”).
on controversial issues. As a consequence, "the president's visibility ... is a disadvantage with respect to his ability to avoid issues or achieve agreement on distributive issues or value judgments—that is, his ability to mediate conflict." Placing the administrative state under presidential control also upsets the balance of power among the branches of government. Madison, reflecting on the dominance of the early state legislatures, may have worried about a legislative vortex, but as Martin Flaherty notes, "even the most glancing survey indicates that the executive branch long ago supplanted its legislative counterpart as the most powerful—and therefore most dangerous—in the sense that the Founders meant." Faced with the modern presidency, "invoking separation of powers to invalidate congressional attempts to keep pace with the presidency is . . . fundamentally unfaithful to our founding values." It is, ironically, the unity and vigor of the executive—the very qualities that Hamilton prized in Federalist No. 70—that have led Peter Shane to caution that "it may be quite dangerous to raise the policy stakes in presidential elections."

IV
TOWARD A MORE COHERENT UNDERSTANDING OF PRESIDENTIAL POWER AND AGENCY INDEPENDENCE

Some commentators have argued that the President's power to remove agency officials should be determinative of the President's control over that agency generally. Under this view, if Congress cannot place restrictions on the President's power to remove an agency official, that agency is an executive agency, entirely subordinate to the President. Inversely, if Congress can restrict the President's removal power, that agency is an independent agency, not necessarily subject to plenary executive control.

Yet others have argued that it would be an oversimplification to reduce the broad question of agency independence to the narrow issue of tenure. Peter Shane has argued that "[f]ederal agencies do not come in two discrete models, one 'executive' and one 'independent,'

166 Id.
167 See supra note 119 and accompanying text.
168 Flaherty, supra note 127, at 1821.
169 Id.
170 See supra notes 119–20 and accompanying text.
171 Shane, Independent Policymaking, supra note 127, at 622.
that are recognizable by clearly distinguishable characteristics."\textsuperscript{173} Agency independence simply means that the agency is "insulated from presidential control in one or more ways."\textsuperscript{174}

This view recognizes that the power to appoint and remove agency officials is but one of a myriad of ways—and arguably not even the most important one\textsuperscript{175}—in which the President might assert authority over an agency, each of which implicates different concerns. The complexity of the relationship between agencies and the President demands a more robust, more coherent idea of agency independence.

This Part returns to the constitutional question left unanswered in Part II, informed by the normative considerations gleaned from the case law and scholarship concerning the removal power. Section A argues that the functional approach provides a better model for determining the limits on the President's constitutional power to assume authority over agencies. Section B reappraises the Bush Order from a functional perspective and argues that 13,233 presents an especially strong risk of arbitrary government decisionmaking.

A. Selecting a Framework for Analyzing Presidential Control

Although both the formal and the functional approaches serve important values, a functional approach—and the resulting focus on arbitrariness—provides a more useful framework for answering the constitutional issue raised under the Youngstown analysis: Does the constitution mandate plenary presidential control over administrative decisionmaking? In other words, to what extent is control over administrative decisionmaking a "core function" of the executive?

The formalist framework cannot provide a meaningful mode of analysis when applied to efforts to increase presidential authority, because such efforts rarely pose serious questions of accountability.\textsuperscript{176} As agencies increasingly fall under the complete dominion of the White House, it is all the more apparent that the President can and should be held responsible for agency decisions. By contrast, when agencies are autonomous or are subject to both executive and legislative oversight, it is unclear which governmental entity ought to be ultimately responsible for agency action. As a result, under an approach

\textsuperscript{173} Shane, Independent Policymaking, supra note 127, at 608. 
\textsuperscript{174} 1 \textsc{Kenneth Culp Davis} \& \textsc{Richard J. Pierce, Jr.}, \textsc{Administrative Law Treatise} § 2.5, at 46 (3d ed. 1994). 
\textsuperscript{175} See \textsc{Sidney A. Shapiro}, Political Oversight and the Deterioration of Regulatory Policy, 46 \textsc{Admin. L. Rev.} 1, 6 (1994) (describing limitations of appointment power as means of exerting presidential control over agencies). 
\textsuperscript{176} See supra notes 121–29 and accompanying text.
singly focused on accountability, efforts to increase presidential control would almost never be struck down on separation-of-powers grounds.

This result, however, would run directly counter to our intuition regarding separation of powers. As the exercise of presidential power is more unilateral—that is, the more dubious it is that Congress has authorized the President to issue the order—the question of accountability becomes more and more unambiguous. For example, in *Youngstown*, the responsibility for seizing the steel mills rested squarely with Truman himself. Yet it is precisely because the only asserted basis for the order was Truman's own limitless view of the President's emergency power that the order is so profoundly troubling from a separation-of-powers standpoint.

In contrast to the accountability model, an approach concerned with arbitrariness permits a serious consideration of the separation-of-powers issues raised by particular assertions of presidential authority. Indeed, a focus on arbitrariness suggests that certain features of executive actions will be more troublesome than others.

One such feature relates to whether the assertion of executive control is in Mark Seidenfeld's terms "micromanagement" or "big picture management."177 Presidential attempts to dictate the outcome of "particular agency policies" pose a far greater risk of arbitrariness than do attempts to "inculcat[e] an overarching policy vision in administrative decision-makers."178 Permitting individual regulatory outcomes to be dictated by the President as opposed to agencies increases the risk that the decision will be motivated by private interests rather than the public good. Because White House decisionmaking processes are "not governed by standards that encourage equal access," there is a substantial danger that "the President's circle of political friends and supporters" will be able to influence policy outcomes through ex parte contacts.179 Yet many individual regulatory decisions—even when made by the President himself—are unlikely to rise to the level of political salience necessary to make electoral defeat a credible deterrent.180

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178 Seidenfeld, *supra* note 177, at 3-4.


In striking down the Line Item Veto Act, which gave the President the power to approve congressional appropriations bills while rejecting specific items of spending, the Supreme Court indicated that presidential micromanagement raises serious separation-of-powers concerns.\textsuperscript{181} The Court in \textit{Clinton v. City of New York} struck down the Act on formal grounds, arguing that the line-item veto enabled the President to bypass the legislative process altogether.\textsuperscript{182}

Though the Court’s decision in \textit{Clinton} was cast in formalist rhetoric, it “is better explained from an arbitrariness perspective.”\textsuperscript{183} First, “it permitted the President to act without a process designed to produce deliberative policymaking and prevent arbitrary policymaking, or at least to ensure the consent of the two accountable branches or a supermajority of one.”\textsuperscript{184} In so doing, “it allowed the President to influence spending decisions in ways that tended to please private interests at public expense,”\textsuperscript{185} for example, by “cut[ting] funding for programs supported by politically powerless groups or disfavored by politically powerful ones.”\textsuperscript{186}

Like the line-item veto, executive orders that attempt to insert the President into individual regulatory decisions create intolerable opportunities for arbitrary decisionmaking. Indeed, executive orders arguably present an even more egregious case than the line-item veto. Congress, in passing the Line Item Veto Act, manifestly consented to the relocation of decisionmaking power to the White House. By contrast, executive orders providing for presidential micromanagement are likely to be impermissibly self-aggrandizing. As a result, this type of executive order simply cannot be considered to be within the “core functions” of the presidency.

\textbf{B. A Functional Separation-of-Powers Analysis of 13,233}

Indeed, when the scope of the President’s constitutional powers is analyzed under a functional model, Executive Order 13,233 raises particularly strong arbitrariness concerns.

The Bush Order is extremely troubling when reappraised through a functional lens because it effectively gives current and former presidents (and their designees) a line-item veto over the archival process.

\textsuperscript{182} \textit{Id.} at 438–41 (discussing requirements of bicameralism and presentment).
\textsuperscript{183} Bressman, \textit{supra} note 121, at 526. As Bressman observes, \textit{Clinton} is difficult to defend on formalist grounds, because the line-item veto, “by affording the President a mechanism to control federal spending, enhanced presidential control of an \textit{executive function}.” \textit{Id.} (emphasis added).
\textsuperscript{184} \textit{Id.} at 527.
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.}
Like all executive orders providing for presidential micromanagement, 13,233 substitutes the judgment of the President for that of the agency. The order does not create an inherently more unilateral process.\(^\text{187}\) It is true that the PRA itself never specifies the procedures by which privilege determinations must be made;\(^\text{188}\) the statute says only that such determinations are made by the Archivist.\(^\text{189}\) Yet 13,233 nonetheless increases the risk of arbitrary decisionmaking by allowing the judgment of an inescapably self-interested actor to preempt the decisions of professional archivists.

The Bush Order concerns an area of policy where the President himself cannot help but be an interested party.\(^\text{190}\) Even rejecting the most cynical gloss on the Bush Order—that President Bush was motivated by a desire to limit access to his own records, and more generally to prevent the exposure of politically embarrassing information\(^\text{191}\)—there is reason to believe that 13,233 is nonetheless motivated by self-interest in a broader sense of loyalty to presidents and the presidency generally. That is, given the desire of presidents to strengthen the institution of the presidency,\(^\text{192}\) it should not be surprising that any president would adopt an expansive view of presidential prerogative.\(^\text{193}\) Thus, the particular subject-matter authority of the National Archives—to set policies governing, inter alia, the release of

\(^{187}\) One could argue that there is nothing about the decisionmaking procedure itself under 13,233 (where decisions are made unilaterally by current and former presidents) that is inherently more unilateral and nondeliberative (and thus, potentially arbitrary) than the status quo ante (where decisions were made unilaterally by the Archivist). By contrast, the Line Item Veto Act substituted a unilateral judgment by the President for the inherently deliberative process of bicameralism and presentment. See supra notes 181–86 and accompanying text.

\(^{188}\) Indeed, those who defend 13,233 point to the lack of specificity in the PRA, arguing that the Order was necessary to clarify the procedures governing the release of records. See, e.g., Khoobyarian, supra note 14, at 959.


\(^{190}\) See Lessig & Sunstein, supra note 143, at 108–10, 117–18. See generally Bruff, supra note 93, at 499 ("The Court should seek to determine whether a particular rulemaking program has been placed in an independent agency because its nature renders presidential intervention inappropriate . . . ."). In other words, when it makes decisions regarding the release of presidential records, the White House is inherently "captured" by its own self-interest.

\(^{191}\) See, e.g., Steven L. Hensen, The President's Papers Are the People's Business, Wash. Post, Dec. 16, 2001, at B1 ("This has led to speculation that the administration is trying to shield members of Bush's own administration, as well as his father, from a variety of uncomfortable revelations, including possible connections to the Iran-contra scandal.").

\(^{192}\) See supra note 54.

\(^{193}\) See Mayer, supra note 54, at 50 ("Presidents, not surprisingly, tend to view broad executive power more sympathetically once they are in office.").
presidential documents—creates a strong incentive for presidents to act arbitrarily.

There is reason to be particularly vigilant in guarding against self-interested decisionmaking when such decisions have the potential to skew the democratic process or otherwise entrench the government.\textsuperscript{194} This concern explains, for example, the Court's decision in \textit{Morrison} to preserve the independence of prosecutors investigating high-ranking executive officials.\textsuperscript{195}

There is a similarly strong case for preserving impartial decision-making regarding access to presidential records. Presidential historians investigate the highest-ranking executive officials, and while their findings may not be used in a prosecutorial setting, their work informs the public about its past and, in so doing, shapes the public's assessment of the present and its hopes for the future.\textsuperscript{196} In a world in which American-history textbooks tend to elide controversial or unpleasant details,\textsuperscript{197} it is all the more essential that presidential historians be permitted to write "unauthorized" accounts. Because this is fundamentally incompatible with placing control over presidential records in the hands of the very subjects of those accounts, it would be a betrayal of the Founders' concern regarding arbitrariness to hold that the Constitution grants such authority to the President.

\textbf{Conclusion}

In issuing Executive Order 13,233, President Bush has overstepped the bounds of presidential authority. Under \textit{Youngstown}, all assertions of presidential power must be based on an act of Congress or the President's inherent constitutional authority. Unfortunately,

\textsuperscript{194} See John Hart Ely, \textit{Democracy and Distrust} 103 (1980) (defending judicial review of controversies involving "malfunctions" of political process because "our elected representatives are the last persons we should trust" in such situations). The wave of partisan gerrymanders after the 2000 census demonstrates that permitting self-interested policymakers to set the parameters of the democratic process can have disastrous consequences. See, e.g., Adam Cox, \textit{Partisan Fairness and Redistricting Politics}, 79 N.Y.U. L. Rev. 751 (2004).

\textsuperscript{195} See supra notes 139–45 and accompanying text; cf. Marshall J. Breger & Gary J. Edles, \textit{Established by Practice: The Theory and Operation of Independent Federal Agencies}, 52 Admin. L. Rev. 1111, 1159 (2000) ("But one must be careful not to overread \textit{Morrison’s} independence principle. \textit{Morrison} concerns a highly unusual fact pattern—a case in which the executive is being asked to investigate itself.").

\textsuperscript{196} See, e.g., Harlan Grant Cohen, Note, \textit{The (Un)favorable Judgment of History: Deportation Hearings, the Palmer Raids, and the Meaning of History}, 78 N.Y.U. L. Rev. 1431, 1469 (2003) ("History is a process of learning, not a database to be mined. Understanding the lessons of the past requires care, humility, and engagement. It is a method for applying the experience of our forebears, no less delicate than that of the law itself.").

the dichotomy between statutory and constitutional powers begins to collapse when dealing with questions regarding presidential control over agencies, and *Youngstown* itself fails to provide adequate guidance as to defining the limits of this authority.

Looking to the removal cases, however, yields some important insights regarding the relevant doctrinal and normative considerations that must guide any inquiry into presidential control. In particular, a concern for arbitrariness emerges as a paramount consideration in determining whether an assertion of presidential authority violates separation of powers. Looking at executive orders generally and 13,233 specifically, it becomes clear that the Bush Order creates too strong a risk of arbitrary decisionmaking to fall within the President's constitutional authority.