

The Foundations of the Modern Presidency: Presidential Representation, the Unitary Executive Theory, and the Reorganization Act of 1939

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*Two claims of presidential authority – presidential representation and the unitary executive theory – were contested during the legislative battle over the reorganization of the executive branch in the late 1930s. A unitary executive theory envisioned top-down control of the executive branch, while a theory of presidential representation tied the president’s purported national viewpoint to a larger role in policymaking. I argue that, in passing the Reorganization Act of 1939, Congress rejected the unitary executive theory, but cautiously endorsed the idea of presidential representation. As later shown in *INS v. Chadha* (1983), however, Congress’s accommodation of presidential representation did not provide a very firm foundation for presidential reorganization authority.*

The President has the advantage that if delegated the necessary authority by the Congress he may, if he so elects, ignore sectional interests and pressure groups...

- Lewis Meriam (1939, 117)

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Presidents and their defenders make many claims to bolster their authority. Among the most prominent are the unitary executive theory and the idea of presidential representation. The unitary executive theory, popularized in recent decades in conservative legal and political circles (Skowronek 2009), asserts that the president possesses the entire executive power through the vesting clause of Article II of the Constitution. Those who embrace it agree that the president can control the entire executive branch through the removal power, and they argue that presidential claims in this regard have been constant and unchanging (Calabresi and Yoo 2008). Unitary theory, though contested, is an originalist claim about the Constitution. By contrast, the idea of presidential representation is largely a developmental claim. Arguments on behalf of the president as a representative figure have grown more expansive over time. The idea that the president uniquely represents the entire citizenry, because of being elected by a national constituency (Smith 1981; Bailey 2014), has been associated with various institutional reforms, and today it competes for supremacy with congressional representation. At its boldest, it envisions structural changes to government that stretch far from what the Constitution anticipated (Howell and Moe 2016).

While claims of the unitary executive theory or presidential representation are not mutually exclusive – both figure as rationales for the removal power (Alvis, Bailey, and Taylor 2013) – they are usually distinguishable as justifications for different types of institutional changes. The unitary executive theory envisions top-down presidential control of the executive branch. By contrast, the idea of presidential representation argues for allowing the president's purported national viewpoint to have a larger role in policymaking.

Both of these theories were contested in Congress during the debate over the reorganization proposal of Franklin Roosevelt and the President's Committee on Administrative

Management [PCAM] (1937). The defeat of the PCAM proposal and passage of a compromise law is a well-known tale of debated significance (Skowronek 1992; Milkis 1993, ch. 5-6; Dickinson 1997, ch. 2-3; Ellis 2012, 277-281). In this article, I advance the novel claim that the failure of PCAM's proposal and the first reorganization bill in 1938 signified a congressional rejection of institutional innovations based upon claims of the unitary executive theory. Specifically, Congress rejected presidential control over the independent regulatory commissions and the audit. Conversely, in passing a different reorganization bill in 1939, Congress accepted and accommodated institutional adjustments based on the idea of presidential representation. Congress created a special process for reorganization plans in which presidents would submit proposals that would be enacted unless both chambers of Congress voted to disapprove those plans through a legislative veto by concurrent resolution. This procedure, departing from constitutional expectations, was both implicitly and explicitly justified based upon an assumption of presidential representation: Congress was too bound to parochial interests to effectively reorganize the executive branch, so only a nationally-oriented president could do the job.

My argument is not that the idea of presidential representation caused the passage of executive reorganization. Rather, I contend that the idea influenced the *design* of the 1939 law. I show that the unitary executive theory and idea of presidential representation each were associated with different aspects of reorganization, and I chronicle how Congress, having cause to be dubious of both claims, ultimately responded differently to them. While it might seem that reorganization of the executive branch naturally would be a presidential responsibility, that assumption is symptomatic of how far we have come in presidency-centered thinking about government. In fact, against the unitary claim, Congress possessed a strong case for control and oversight of the executive branch from its enumerated and implied Article I powers – creating

agencies, funding them at will, setting terms of appointments for officers, and vesting certain powers in those officers.¹ Against the idea of presidential representation, Congress expressed wariness of a presidential agenda setting power that went beyond the Article II provision for the presidential to recommend measures. Given ample reason for congressional skepticism, it is important to understand the theoretical rationale behind the design of the 1939 law and the change that it enacted.

Other accounts have explained the Reorganization Act with reference to Congress's collective action problem (Sundquist 1981, 50-54) or provisions for presidential control over informational resources if associated with powers the president already possesses (Gailmard and Patty 2013, 197-204). But to understand the law's design and implications – what was accepted versus what was rejected – analyses must contend with issues that were central to the debates in Congress: presidential versus congressional representation, governmental structure, and constitutionality. The reorganizing authority granted in 1939 *did* amount to a new presidential power, and a specific intellectual rationale was invoked to justify the reform chosen. Moreover, Congress's accommodation of presidential representation, and accompanying rejection of the unitary executive theory, had long-term implications, placing presidential reorganizing authority on a vulnerable constitutional foundation.

The Logic of Presidential Reorganizing Authority

Who should reorganize the executive branch? The answer to this question changed in the 1930s. Though reorganizing was mostly perceived as a congressional responsibility in the late-nineteenth century, acquiring reorganization authority became a goal of presidents in the twentieth century (Polenberg 1966, 3). The potential scope of such a reorganizing authority was vast, including the possibilities of simply shuffling bureaus to different departments,

undermining the independence of the regulatory commissions, or even creating or abolishing entire departments. The idea of presidential representation became the rationale advanced for presidential reorganization authority.

Congress briefly legitimized an association between presidential representation and reorganization at the height of the Great Depression, passing the Economy Acts of 1932 (under Herbert Hoover) and 1933 (under FDR). Under the 1932 law, the president could issue reorganization orders subject to a one-chamber legislative veto by concurrent resolution – a new invention to allow Congress to vote down presidential plans (Korn 1996, 5). Republican President Herbert Hoover found his efforts thwarted by the Democratic House. With the 1933 law, Congress had to pass a bill disapproving of presidential plans, subject to presidential veto. FDR possessed this authority until 1935 (Arnold 1998, 81-84). While efficiency was the proclaimed goal, the assumption behind the laws was presidential representation. In floor debate, Representative John Miller (D-AR) told his colleagues that, unlike Congress, “the President represents all and will not be moved by any partisan consideration nor sectional desire” (*CR* 1933, 3903). Senator Arthur Vandenberg (R-MI) argued that Congress “must place authority and responsibility [in the president], and then demand results.” (*CR* 1933, 2588). Though the reform was temporary, Congress had made a notable departure, endorsing reorganization based upon the assumption of presidential representation.

Having focused on responding to the Great Depression more than on reorganization, FDR decided to address his confessed weakness in administration in 1936 (Brownlow 1958, 392), enlisting Louis Brownlow, Charles Merriam, and Luther Gulick to study the issue. Each member of the President’s Committee on Administrative Management viewed reorganization through the lens of the president’s purported unique national perspective. Writing a decade later, Brownlow

(1949, 19) explained that “the President has become the supreme servant” of the people, expected to realize “their purpose, their plans, and their aspirations.” In his political science writings, Merriam (1903, 178-181) chronicled the development of the idea of presidential representation under Andrew Jackson. Stronger executives had subsequently emerged at all levels of government in the twentieth century, Merriam (1920, 127) posited, because of “the demand of the people for vigorous and effective leadership against strong special groups.” Under a “new theory of the division of powers,” Gulick (1933, 66) argued, “the executive will be called upon to draft the master plan.”

Far from shuffling some bureaus, FDR saw reorganization as one facet of achieving constitutional change (Skowronek 1992). Indeed, he and PCAM embraced the notion of the “living” Constitution, seeking to change the way government worked without formal amendment. In Merriam’s (1920, 220) words, “the doctrine of the flexibility of the Constitution developed as part of the general democratic movement.” Privately, FDR admitted to Gulick that he was seeking reforms through reorganization rather than formal constitutional amendment: “...there is more than one way of killing a cat, just as in the job I assigned you” (Milkis 1993, 109). But this was perceived publicly too. As journalist Arthur Krock (1937) reported when FDR unveiled his reorganization proposal, “The President, in December, 1936, decided that the amendment process requires too much time for the country’s needs and security.”

Yet despite advocating for a new vision of the separation of powers and flexible constitutional interpretation, FDR and PCAM embraced an originalist interpretation of Article II with the unitary executive theory (Rosenblum n.d.) alongside the claim of presidential representation. In effect, Congress would decide to what extent it was willing to endorse either theory.

Proposals: Constitutional Divergence, Representational Convergence

Two prominent studies of reorganization in the mid-1930s, undertaken by PCAM and the Brookings Institution respectively, reflected different institutional perspectives. While PCAM considered the question of reorganization broadly and reflected the president's point of view, Brookings, with its mission set by Senator Harry Byrd's (D-VA) congressional committee, focused more narrowly on individual agencies and the congressional priority of economy (Brownlow 1958, 346; Polenberg 1966, 31-36). The reports diverged on one fundamental assumption, while converging on another. Brookings disagreed with one of the central claims of PCAM – that the president was vested with *all* executive power under Article II – and instead asserted that Congress had substantial constitutional authority over the organization of the executive branch. However, though differing on the degree of reforms it should entail, both reports revealingly accepted the claim of presidential representation.

PCAM: The Presidentialist Manifesto

The PCAM proposal, unveiled in January 1937, mixed the originalist claim of the unitary executive theory, emphasizing presidential control of the executive branch, with the developmental claim of presidential representation, focusing on the president's connection to the public and unique national perspective.² The overall rationale for reorganization was based on the purported logic of presidential representation: the president would overcome localistic and special interests in Congress to achieve a rational reorganization. As PCAM (1937, 1) stated, “The President is indeed the one and only national officer representative of the entire Nation.” In his accompanying message, FDR argued that presidential reorganizing authority would help to “carry out the will of the Nation” (iii). But FDR also made a unitary claim about the Constitution's purported intent for executive power: “The plain fact is that the present

organization and equipment of the executive branch of the Government defeats the constitutional intent that there be a single responsible Chief Executive” (iv).

The specific proposals to place all agencies, including the independent regulatory commissions, within the regular departmental structure of the executive branch and to gain executive control of the audit relied explicitly upon a unitary reading of Article II (Calabresi and Yoo 2008, 295). Articulating the unitary executive theory, PCAM (1937) argued that the Constitution placed “in the President, and in the President alone, the whole executive power of the Government of the United States” (31). Placing the independent regulatory commissions – “a headless ‘fourth branch’ of the Government” (40) – in departments would purportedly fulfill original intent: “It will reestablish a single Executive Branch, with the President as its responsible head, as provided by the Constitution.” (53). In essence, taking away the independence of the commissions would fundamentally alter one of the major achievements of the Progressive Era (Alvis et al. 2010, ch. 5).³ PCAM’s (1937) attempt to gain control of the audit was also controversial because the General Accounting Office [GAO] was viewed as an agent of Congress. The report asserted that this setup “dissipate[d] executive responsibility” and violated the Article II provision that the president must “take Care that the Laws be faithfully executed.” Rather than having a Comptroller General in the GAO perform a pre-audit, allowing him to potentially reject requests for expenditures of funds by executive officials, PCAM wanted an Auditor General to conduct a post-audit for Congress, while placing pre-audit authority in the Treasury Department (22-25).

By contrast, the proposal for the president to have authority to reorganize the executive branch relied heavily upon the justification of presidential representation. While PCAM (1937) asserted that the president possessed “the whole executive power,” the report nonetheless

admitted that because the Constitution “sets up no administrative organization for the government,” reorganization involved legislative power: “the administrative organization of the Government to carry out ‘the executive Power’ thus rests upon statute law” (31). Thus, PCAM focused on portraying presidential representation as superior to congressional representation. The report criticized the existing executive branch organization, mirroring the congressional committee organization, as serving parochial interests: “The departments themselves and groups of citizens interested in particular activities often seek to settle such disputes by direct appeals to the Congress, there again only to find the same or almost the same differences represented in the jurisdictional jealousies of congressional committees” (32). Instead, PCAM advocated presidential responsibility for “the continuous administrative reorganization of the Government” (36), requiring a sweeping agenda setting power to overcome parochial resistance in Congress to determine “the effective division of duties among the departments” (33). The reorganizing authority envisioned, subject to no expiration, would have provided for both the establishment and abolition of agencies, including entire departments (Hogue 2012, 10-11).

Moreover, PCAM (1937) envisioned enhancing presidential agenda setting through an overhead management apparatus. PCAM sought to strengthen the Bureau of the Budget [BOB] to help the president take an overall view of budgeting and policymaking for the nation’s benefit. Because the BOB director was “one of the few Government in a position to advise the President from an over-all, as opposed to a bureau or departmental, point of view” (17), BOB could serve for central clearance of all legislative proposals and executive orders, ensuring that the president’s views prevailed over the preferences of others in the executive branch (20). Additionally, a new National Resources Board would further assist the president to present detailed legislative recommendations to Congress (28-29).

The report held out the promise of the presidency as a way to achieve policies benefiting the entire country. Its goal was an institutionalization of presidential representation: “Our national will must be expressed not merely in a brief, exultant moment of electoral decision, but in persistent, determined, competent day-by-day administration of what the Nation has decided to do” (53). The point, PCAM stressed, was to use the presidency as an “efficient and effective instrument for carrying out the will of the Nation” (4) and provide the “means for holding the Executive to account for his program” (3). Unsurprisingly, PCAM’s audacious manifesto aroused resistance, but revealingly, that resistance was not equal across its various proposals.

Brookings: Accommodate, but Check, Presidential Representation

Presented to Congress in August 1937, the Brookings plan rejected PCAM’s unitary executive claim, but partially embraced its emphasis on the logic of presidential representation. Though commissioned by Congress, the Brookings report was far from entirely hostile to presidential power. Foreshadowing Congress’s choice in the 1939 legislation, Brookings settled on a proposal for presidential reorganizing authority subject to legislative veto as a device to accommodate, but check, the president in his role as the nation’s representative.

Brookings rejected entirely the unitary executive theory and its associated entailments. “The Federal Constitution,” Brookings emphasized, “does not permit complete executive centralization nor the establishment of a perfect hierarchical organization” (*Investigation of Executive Agencies of Government [IEAG] 1937*, 18). A lack of unitary control was an innate feature of the separation of powers: “In a system of separated powers a tendency naturally exists for the legislative body to make certain agencies independent or semi-independent of the Chief Executive” (*IEAG 1937*, 8). Thus, Brookings resisted executive control of the independent regulatory commissions and audit. Because the commissions had legislative functions – “They

do what Congress would if it had the time” – and judicial functions – “resembl[ing] the courts” in adjudicating disputes” – they could not be “viewed from the viewpoint of the Executive alone” (*IEAG* 1937, 9). Thus, the commissions were to be left alone. Brookings likewise opposed changes to the audit, viewing it as a tool of Congress and not the executive. The audit system reflected Congress’s desire to have a robust system to prevent expenditures not authorized under law (Polenberg 1966, 39).

However, Brookings cautiously offered support for the idea of presidential representation and reforms associated with it. Despite Congress commissioning the report, Brookings made striking criticisms of congressional representation, comparing Congress to a family whose members care only about their “divergent interests” rather than “matters affecting the family as a whole” (*IEAG* 1937, 2). The report recognized the president’s major stake in reorganization because he was “held by the people responsible for administrative results” (*IEAG* 1937, 18), and it also supported augmenting the role of BOB (*IEAG* 1937, 22). Elaborating in a subsequent Brookings Institution book, Lewis Meriam (1939, 118) stated the logic of presidential representation as keenly as the most fervent presidentialist:

[The President] is not the representative of a state or a congressional district. His constituency is the entire country and his position is such as to give him a sense of responsibility to the whole people. He may therefore take a national as distinct from a sectional point of view.

In exchange for giving “sufficient powers” to the president, argued Meriam, Congress must have “compensating... devices for holding him responsible” (16). Meriam’s chosen solution essentially granted the president an enhanced agenda setting power to improve chances of enactment: the president would issue executive orders on reorganization subject to a legislative

veto by concurrent resolution (either in one or both chambers). The president could “with safety” to be given such power because “the system of checks and balances would be preserved” (177). Preserved perhaps, but with a presidential tilt. Moreover, Meriam candidly admitted that he was unsure of the legislative veto’s constitutionality, as “the constitutionality of such a delegation has been debated but it has not been decided by the courts” (175). Thus, it was evident that devices to institutionalize presidential representation in reorganizing potentially pushed against constitutional boundaries.

The Brookings proposal rejected the unitary executive theory while embracing a reform based on an assumption of presidential representation. After a protracted battle, this would essentially be the outcome in Congress.

Legislation: The Unitary Executive Theory’s Defeat, Presidential Representation’s Revival

When PCAM’s reorganization proposal went before Congress, it faced significant pushback. This is a familiar story. What is underappreciated, however, is that this pushback was not uniform against all the reforms proposed. The portions of the proposal facing the fiercest resistance – placing the independent commissions in the departments and making the audit an executive function – had been mostly justified with an originalist unitary executive claim. By contrast, those in Congress who wanted to give the president reorganization authority – even a limited one subject to a legislative veto – understood that this reform was based upon an assertion of presidential representation. While the entirety of PCAM’s proposals were defeated in 1938, the reorganizing authority associated with presidential representation was successfully revived in 1939.

Pushback and Alteration: The 1937 Hearings

In the first attempt at a reorganization bill, reforms associated with the unitary executive theory faced the most opposition. The Senate bill immediately exempted the independent regulatory commissions, while the audit would be a subject of major disagreement in hearings on the legislation (Polenberg 1966, 47-50). However, while some in Congress expressed skepticism of presidential reorganizing authority, others implicitly and explicitly acknowledged the logic of presidential representation and sought to devise a reform they could accept.

PCAM continued to mix the originalist claim of the unitary executive theory with the developmental justification of presidential representation for the overall proposal. Explaining why presidents “should be given more authority over the management of the executive branch,” Louis Brownlow cited both the Constitution and public opinion, arguing this responsibility was both “clearly set out in the Constitution” and “even more clearly in... popular estimation” (*Reorganization of the Executive Departments [RED]* 1937, 12). Reorganization, argued Charles Merriam, would be the next “step” to bring the presidency “up to date” (*RED* 1937, 131). The presidency, declared Luther Gulick, was key to “get[ing] things done; the things the people want” (*Reorganization of the Government Agencies [RGA]* 1937, 66).

Members of Congress resisted changes to both the independent regulatory commissions and the audit, signifying a rejection of the unitary executive theory. Revealingly, Brownlow could not assure Congress that the independence of the commissions could be guaranteed if they were placed in departments (*RED* 1937, 8-11). PCAM also argued that the pre-audit should be performed in the Treasury Department, but Representative John Cochran (D-MO) responded that the GAO “was set up as an agency of the Congress, not as an agency of the executive branch” (*RED* 1937, 14). Testifying for Brookings, Lewis Meriam described the audit as “the major issue” of dispute “between our group and the President’s committee”; the audit needed to “be

independent of the executive branch” (*RED* 1937, 283-284). Representative Frederick Vinson (D-KY) likewise felt the audit proposal’s “weakness” was “relying upon the executive side to make investigations for the purpose of the use of those investigations by the legislative branch” (*RED* 1937, 253-254).

While proposals involving the independent regulatory commissions and the audit relied heavily upon the unitary executive claim, the proposed reorganization authority relied upon a claim of presidential representation. Members of Congress recognized that they were debating granting the president a greater portion of legislative power. But while some congressmen, such as Senator Byrd, resisted new presidential authority, the more notable division was over the extent of the proposed power, not whether delegating power was necessary. Senators Byron ‘Pat’ Harrison (D-MS) and Joseph Robinson (D-AR) agreed that Congress could not overcome particularistic interests, requiring presidential involvement (*RED* 1937, 89-91). Senator James Byrnes (D-SC) directly admitted congressional incompetence: “Congress has been trying to merge bureaus for 150 years, but it has not succeeded up to this time” (*RGA* 1937, 40). Instead, Byrnes wanted “the President of the United States, who was chosen by the people,” to undertake reorganization. When asked rhetorically by Byrd whether Congress was “chosen by the American people,” Byrnes replied, “No, each Congressman is chosen by the people of his district” (*RGA* 1937, 87-88).

Congressmen in the hearings were inclined to favor the Brookings view of how to devise a reform based on presidential representation, as opposed to the more expansive vision of PCAM. They wanted to add limitations – exemptions, a legislative veto, and a limitation on how long such authority would last before requiring congressional reauthorization. The legislative veto, initially opposed by PCAM, was an accommodation to the idea of presidential

representation, allowing the president a strong agenda setting power but preserving a potential congressional check on it. Senator Robinson preferred this to PCAM's alternative of Congress relying solely on the budget process to check the president (*RED* 1937, 92). Strikingly, this solution was embraced despite questions over its constitutionality. While Representative Charles Gifford (R-MA) opined that the legislative veto procedure could likely withstand judicial scrutiny better than just giving the president reorganization authority *carte blanche*, C. M. Hester, testifying alongside members of PCAM, admitted that he had "been unable to find any authority establishing the proposition that Congress, by silence, can legislate" (*RED* 1937, 171, 173). Persuaded that the legislative veto was necessary to win congressional approval, Luther Gulick later defended the device against criticism from Senator Byrd, who worried that presidents could nullify Congress's ability to exercise the veto by continually issuing reorganization orders and overwhelming Congress with changes (*RGA* 1937, 56).

Though the reorganization authority was the principal focus, it was also evident that PCAM sought other changes influencing presidential agenda setting power. Both PCAM and Brookings agreed that the president's role in budgeting should be enhanced, especially by moving BOB out of the Treasury. Placing "directly under the president," Lewis Meriam argued, would allow BOB to be "entirely independent of any Cabinet officer" (*RED* 1937, 278, 283). Additionally, the president would be, in essence, granted a share of legislative power through an enhanced capacity to plan. Charles Merriam explained that overhead management would help presidents in "promoting the appropriate congressional policy" (*RED* 1937, 136). Senator Joseph O'Mahoney (D-WY) pointed out that planning for long-term policymaking was "the basis of all legislative activity." While acknowledging the president's Article II power to recommend measures, he asked Merriam, "Does it not occur to you that a planning function of the

Government might be normally more of a legislative function than an executive function?”

Merriam admitted this, but argued that the president, assisted by a planning board, could take “a longer look ahead than a particular Congress... would or could take” (*RGA* 1937, 21-22).

Implicitly, Merriam again endorsed the view that presidents could be relied upon to behave differently than members of Congress, acting in the long-term national interest.

Though many elements of PCAM’s proposals faced opposition in the hearings, the sharpest criticism was aimed at reforms associated with the unitary executive theory. Though hesitant to accept the full extent of PCAM’s vision, congressmen were more open to devising institutional solutions that, in effect, accepted the legitimacy of the idea of presidential representation.

Defeat in 1938

Though the initial prospects for reorganization appeared promising, the first reorganization bill would be defeated in April 1938, seemingly dealing both the unitary executive theory and the idea of presidential representation a significant blow. The independent regulatory commissions had been exempted, but the change to the audit faced significant criticism. Contestation of the idea of presidential representation in congressional floor debate also revealed concerns over allowing the president a share of what many congressmen perceived to be legislative power over structuring the executive branch. With the concurrent controversy over FDR’s judicial reorganization plan, reorganization faced a daunting gauntlet.

Though disagreeing on whether the president should have reorganizing power, members of Congress viewed reorganization as a legislative function. Leading opposition in the Senate, Senator Josiah Bailey (D-NC) argued that reorganizing was “legislative power” – “our power.” He attacked the bill for taking reorganizing power “from ourselves, to whom it belongs” and

giving it “to one single, sole man, who, until we do transfer it, never had or enjoyed one particle of it” (*CR* 1938, 2738-2739). Revealingly, even the critic Bailey admitted that Congress’s parochialism was preventing effective executive branch reorganization, as members of Congress feared paying a “price on election day” if they went against agencies that were able to reach “into our States and districts.” Nonetheless, emphatically declaring that reorganizing was a “constitutional power of ours” (*CR* 1938, 2740), Bailey hoped that the power would remain “in the hands of the duly elected constitutional representatives of the American people” (*CR* 1938, 2746). By contrast, Senator Byrnes emphasized that “the purpose of the Reorganization Bill is to make the Government a more efficient instrument for accomplishing the will of the people.”⁴

Questions also arose over both the constitutionality of the legislative veto and whether the legislative veto by joint resolution was the right form. Senator Marvel Logan (D-KY) argued that avoiding a legislative veto was a form of attaining congressional consent: “does not Congress determine whether his Executive order shall go into effect?” Bailey attacked this as a constitutional inversion. However, he did say that he would vote for reorganization if the legislative veto were changed to require positive congressional *assent* to a presidential proposal, as opposed to avoiding congressional *dissent* (*CR* 1938, 2741). Seeking to diminish the president’s agenda setting advantage by requiring a majority of the House and Senate to approve reorganization plans within ten days of submission, Senator Burton Wheeler (D-MT) offered an amendment to the bill to that end, but it was defeated 39 to 43. Managing the bill, Senator Byrnes sought to ensure that reorganization orders would take effect unless both chambers voted them down via joint resolution. Because a joint resolution required presidential assent, blocking a president’s reorganization plans would essentially require two-thirds of both chambers, the threshold for overcoming a presidential veto. Senators supportive of the Byrnes bill believed

only the president could overcome the inability of congressmen to collectively agree on reorganization (Polenberg 1966, 130-131). As Byrnes himself stated, “I am confident that if the executive departments are not reorganized until Congress does it, they will never be reorganized.” Moreover, he again emphasized the president’s constituency: “the same people who elected the Senators and Congressmen elected the President and the people have just as much confidence in the ability of the President to reorganize the departments.”⁵

The Byrnes bill passed the Senate 49 to 42 in March 1938 and was sent directly to the House, rather than going to conference committee. While it had eliminated one unitary provision by exempting independent regulatory commissions from reorganization, the bill still contained unitary elements, including creating an Auditor General, eliminating the Comptroller General, and having BOB perform the audit. An amendment from Senator Byrd to protect the Comptroller had lost 36 to 47. Drawing on the purported logic of presidential representation, the bill allowed for presidential reorganization orders subject to veto by joint resolution. The bill also created a Department of Welfare (Polenberg 1966, 138-143).

Despite Senate passage, House approval of the bill was in jeopardy. An economic recession and ominous events in Europe soured the political context (Polenberg 1966, 147-149). Trying to rebut accusations from opponents that he sought dictatorial power, FDR issued an extraordinary letter, denying he had the “qualifications” or “inclination to be a dictator” (Roosevelt 1938). The letter backfired. Representative Hamilton Fish (R-NY), for example, turned FDR’s words against him: “The President says he does not want to become a dictator... If the bill is voted down, it will not even give President Roosevelt a chance to become a dictator.” By contrast, if the bill passed, “we shall have a government of the people, by the President, and for the President” (*CR* 1938, 5114-5115).

In an effort to mollify the opposition, a compromise was devised in the House between the Byrnes and Wheeler positions on the extent of the advantage given to presidential reorganizing proposals. Despite arguments over the constitutionality of the provision, the House passed Representative Frank Kniffin's (D-OH) amendment 151 to 113 to allow both chambers of Congress to override a reorganization plan by a simple majority concurrent resolution, rather than a joint resolution. FDR approved the compromise (Polenberg 1966, 168-169), even after declaring only days earlier that such a use of a concurrent resolution – “only an expression of Congressional sentiment” (Roosevelt 1938) – would be unconstitutional.

Nonetheless, the bill suffered a stunning defeat in the House in April 1938. Leading the opposition, Rules Committee Chairman John Joseph O'Connor (D-NY) asserted that the bill – “an attempt to compel Congress to surrender its rights” – gave the president congressional power. Speaker William Bankhead (D-AL) defended the legislative veto as an adequate control on presidential power, saying Congress would “for 60 days” be able to decide “whether the recommendations of the President shall stand or not.” But despite earlier successes preventing opposition amendments, the bill lost narrowly 196 to 204 on a motion to recommit (CR 1938, 5121-5123).

The defeat appeared to indicate a decisive break on the extent to which presidential representation would be institutionalized in American government. However, while the presidential reorganization power *was* resisted, many factors sank the bill. Congressmen continued to chafe at placing the pre-audit in the executive branch – a key reform associated with the unitary executive claim. Some opposed the creation of a Department of Welfare. The specter of executive authority spreading in Europe worried Americans. Indeed, considering the furor

over the bill, its near-passage was notable. A second attempt, shorn of the unitary provisions, would focus on the idea of presidential representation itself.

Passage in 1939

Congress's decision on reorganization in 1939 would be based on the purported merits of presidential representation. The new bill – exempting the independent regulatory commissions and some other bureaus from reorganization, while also avoiding changes to the audit – signified a retreat from any assertion of the unitary executive theory. The proposed bill also did not create new departments, and it left the Civil Service Commission in place (Polenberg 1966, 185). What was left in the bill relied on the assumed logic of presidential representation: the president could submit reorganization plans to Congress, subject to legislative veto by majority vote through concurrent resolution. The president could abolish agencies or transfer functions, but could not abolish government functions or create new departments (Hogue 2012, 12-13). The fundamental principle of the bill, journalist Arthur Krock (1938) wrote, was this new procedure seeking to tap the advantages of a nationally-oriented presidential perspective: “If the Federal Government is ever to be practically and soundly set up and administered, the President and not Congress will have to do the reshuffling. That is in the nature of the case.”

Though there were concessions, the 1939 bill still contained an agenda setting power for the president in reorganization that was substantially stronger than anything the Constitution anticipated. The legislative veto through concurrent resolution was essentially devised to make presidential representation more palatable: Congress accepted the assumption that the president would best consider the needs of the whole nation in proposing reorganization plans, but preserved the ability to veto plans deemed too bold. House sponsor Representative Lindsay Warren (D-NC) admitted that Congress was deferring to the executive's perspective: the

president would undertake “reorganization of the government under a review by Congress” (“New Bill” 1939). Considering many congressmen thought that, under Article I, Congress was responsible for reorganizing the executive branch, promising a “review” of presidential actions with the chance to vote against them was far from a ringing endorsement of legislative supremacy. Moreover, another procedural alteration to mollify congressional concerns essentially recognized the president as a legislative figure. As Louis Brownlow (1958, 413-414) recounted later, the bill made “the President an agent of the legislature.” Rather using executive orders, reorganization plans would be “published as statutes” if they avoided congressional disapproval. Presumably tongue-in-cheek, Brownlow explained that the duty of proposing reorganization plans had been placed “upon a legislative agent who merely happened to be the President of the United States.”

In Congress, opponents continued to argue the bill surrendered congressional responsibilities to the president, perverting the Constitution. Representative George Dondero (R-MI) complained that “the representative branch of the Government has surrendered its functions to the Executive of the Nation” (*CR* 1939, 2396). The new bill, argued Representative John Ditter (R-PA), remained a creature of PCAM, leaving “little doubt” as to its true purpose: “the findings [of PCAM] were that economy and efficiency could only come by increasing Executive power, even though such increases were contrary to the limitations and separations prescribed by the Constitution.” Saying the bill delegated “a purely legislative function” to the president, Ditter also scorned the legislative veto as “only a pretense of protection against the exercise of arbitrary authority” (*CR* 1939, 2400).

Supporters countered that only the president could overcome the resistance of congressmen and the bureaucracy to effective reorganization. Senator Joseph Hill (D-AL)

directed his colleagues' attention to a speech by Solicitor General Robert Jackson that emphasized the president's national perspective:

Only the Executive is elected by the Nation as a whole, or has a national constituency or a responsibility to all citizens and sections of the Nation. The President has every citizen of the United States as a constituent, but every Senator or Representative is primarily a representative of a section, however much he may desire to take a national view. (*Appendix to the Congressional Record* 1939, 708)

Representative Jed Johnson (D-OK) likewise asserted that the president needed reorganizing authority because it was "obvious" that congressional parochialism prevented reorganization; the "departments and agencies are too powerful," having "too many friends in and out of Congress" (*CR* 1939, 2395).

More importantly, bill supporters defeated attempts to weaken the presidential agenda setting power for reorganization. Amendments that would have required a congressional majority to vote in favor of reorganization, rather than avoiding a negative judgment, were defeated. Offering such an amendment in the House, Representative Richard Kleberg, Sr. (D-TX) criticized the bill's "devious methods" and asserted it was wrong for Congress "to accept a position where by negative action only can they express the wish of the people or the voice of those whom they represent." Representative Warren countered that "anyone who wants to see reorganization in the Government cannot support this amendment." The amendment failed 139 to 176 (*CR* 1939, 2500-2501). In the Senate, Senator Wheeler nearly succeeded with the same amendment, attempting to require an affirmative vote from Congress. Joseph Harris, PCAM's Director of Research, privately warned Byrnes: "Some of the senators are in favor of reorganization if a measure can be passed which grants no authority whatever to the President,

and under which there is little or no chance of actual reorganization.”⁶ After initially passing 45 to 44, the amendment was reconsidered the following day and defeated 44 to 46. Another amendment from Representative Hatton Sumners (D-TX), allowing just one chamber to veto a presidential plan, also failed 193 to 209 (Polenberg 1966, 186-187). Majority Leader Sam Rayburn (D-TX) argued that those “who really want reorganization” should require a two-chamber veto, making a presidential plan harder to reject (*CR* 1939, 2500). The final bill passed the House 246 to 153 and the Senate 63 to 23; FDR signed it into law on April 3 (*CR* 1939, 2504; Polenberg 1966, 187). In a letter to his cousin, Representative Warren said the measure ensured presidential accountability: “it will put the President on the spot to either do a good job in effecting economies and promoting efficiency or admit failure.”⁷

Pared back from the ambition of PCAM, the final law provided for an executive reorganization authority, subject to legislative veto, for two years before requiring congressional reauthorization, and it gave the president the ability to hire new administrative assistants.⁸ Congress had rejected the unitary executive theory, but cautiously accepted presidential representation in statute.

Implementation: Presidentialism in the Service of Democracy

The transformation wrought by passage of the Reorganization Act of 1939 would become evident in its implementation (Milkis 1993, ch. 6; Ellis 2012, 280-281). FDR used the authority to establish a new Executive Office of the President [EOP] and to transfer other functions into a new Federal Security Agency, the forerunner to the Department of Health and Human Services (Hogue 2012, 14). The establishment of EOP in September 1939 indicated a new status for the presidency. EOP would provide the president with “adequate machinery” to manage the executive branch as a whole. The constituent parts of EOP would be physically located next to

the White House in the old State, War and Navy Building. Importantly, EOP would assist with presidential agenda setting, allowing the president to inform Congress “with respect to the state of the Union” and recommend “appropriate and expedient measures” (Roosevelt 1939). Both Brownlow and Gulick emphasized the idea of presidential representation in explaining the establishment of EOP. Implicitly invoking the idea of presidential representation, Brownlow (1941, 103-104) asserted that an enhanced presidential role was necessary because “the legislature [had] lost its ability to take a coherent view... of the nation.” Gulick (1941, 139) asserted that the establishment of EOP was “one part of America’s answer to the taunt of the dictators that democracies cannot meet the demands of the modern world and still remain democratic.” Significantly, this was seen as a substitute for formal alteration of the constitutional structure. Establishing EOP, asserted Clinton Rossiter (1956, 104), had saved the Constitution “from radical amendment.”

The signature move of the law’s implementation was the transfer of BOB from the Treasury Department to EOP. From the perspective of presidency proponents, this corrected a perceived flaw of the Budget and Accounting Act of 1921. Though BOB was envisioned as a presidential agency, its physical location in the Treasury meant that it was still associated with a department that historically maintained a close relationship with Congress. BOB had been created to realize the promise of presidential representation in budgeting, helping the president formulate a budget with a uniquely national perspective (Dearborn n.d.). Now additional responsibilities would be emphasized, including developing plans for future reorganizations and clearing both proposed legislation and executive orders (Roosevelt 1939; Neustadt 1954). Director Harold Smith (1941, 115) explained that BOB would “help the President develop a suggested program of action for the consideration of Congress.” Brownlow (1949, 107) later

noted that the move to EOP allowed BOB to better serve “as an engine to aid [presidents] in coordinating general legislative programs.”⁹

The Reorganization Act, as implemented, helped to expand and routinize the involvement of the president in the legislative process and augmented his organizational capacity.¹⁰ Acknowledging the president’s “newfound leverage as orchestrator of the nation’s policy commitments” (Orren and Skowronek 2017, 108), the law and EOP marked Congress’s increased acceptance of the presidency as a representative institution.

Conclusion: The Vulnerability of Presidential Representation

The full implications of Congress’s choice to accommodate presidential representation through the invention of the legislative veto would emerge in the 1980s. The reorganization process adopted in 1939 and reauthorized by subsequent Congresses between 1945 and 1984 (Hogue 2012, 4) rejected the unitary executive theory to ensure passage. To make presidential representation safe for Congress, a constitutional gimmick – the legislative veto – had to be invented. By contrast, the theory rejected – unitary executive theory – only required acquiescence in a particular reading of the original constitutional framing. It is not surprising that the Supreme Court rejected the legislative veto as unconstitutional nor that conservative insurgents at that very moment began to express new interest in the unitary executive theory (Skowronek 2009). In *INS v. Chadha* (1983), the Court nullified both the one- and two-chamber legislative veto by concurrent resolution, citing the principle of bicameralism and the Presentment Clause (Korn 1996, ch. 3). Bemoaning the outcome in dissent, Justice Byron White described the legislative veto as an “important if not indispensable political invention,” implicitly acknowledging that it had been a feature that had stretched from the constitutional structure (*INS v. Chadha* 1983, 972). Suddenly confronted with the reality that decades of reorganization plans

had been implemented through an unconstitutional device, Congress hurriedly passed a law to ratify all those past actions (Hogue 2012, 31).

Indeed, by the 1980s, the assumed logic of presidential representation itself was viewed more skeptically (Alvis et al. 2013, 187). Indicating such skepticism, Congress had begun to chip away at the extent of the reorganization authority even when renewing it – switching from a two-chamber to a one-chamber legislative veto (1949), forbidding the president from creating new departments (an authority granted by the 1949 act) (1964), and allowing presidents to submit subsequent amendments to reorganization plans to respond to congressional or interest group pressure (1977) (Fisher and Moe 1981, 311-312). By the time the Court found the legislative veto invalid, Congress was less prepared to stomach presidential pretensions for reorganizing.¹¹

All this points to the vulnerability of institutional reforms based upon the idea of presidential representation. Reforms that the idea portends often push against constitutional boundaries. Institutional innovations based on the assumed logic of presidential representation are subject to the give-and-take of delegations between Congress and the president (Mayhew 2017, 114-116), and they face greater risk of pushback by formalist reasoning. When the idea of presidential representation begins to lose political purchase, the structural vulnerabilities of the innovations stemming from it loom all the larger. Presidency-oriented political actors, searching for other authority, are likely to seize upon claims that can be more firmly grounded constitutionally, such as the unitary executive theory.

Presidents continue to promise and seek authority for major reorganization efforts (Schafer 2017). It might seem that they would try to utilize, as justification, the constitutional claim of the unitary executive theory. Indeed, conservatives have increasingly used this argument to appeal to the courts. But instead, presidents have continued to reach for claims of presidential

representation. Reprising the argument that broad presidential reorganization authority was necessary to achieve “efficiency,” Barack Obama (2012) criticized “congressional committees” and “lobbyists” fighting “to protect their turf.” His successor, Donald Trump (2017), promised a “very special” reorganization to make the executive branch “efficient, effective, and accountable to the people.” This suggests that presidential reorganization authority – devised because of the perception that Congress is itself incapable of overcoming special interests to efficiently reorganize the executive branch – fundamentally relies on the idea of presidential representation as a rationale. Given Congress’s reticence to create an alternative reorganization process (Hogue 2012, 31-35), presidents who continue to promise reorganization efforts are likely now only grasping at straws.

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¹ Congress – "the constitutionally designated source of national policy" – "can assert its will in administration" through "program design" (Orren and Skowronek 2017, 114).

² Overall, the report made five general recommendations: (1) expanding the White House staff, (2) strengthening "managerial agencies," including "those dealing with budget, efficiency research, personnel, and planning," as "arms of the Chief Executive," (3) extending the merit system to all non-policy-determining positions and reorganizing the civil service system, (4) placing all executive branch agencies within the regular department structure, and (5) changing the audit system (PCAM 1937, 4, 52).

³ For example, the Interstate Commerce Commission, Federal Communications Commission, Federal Power Commission, Federal Trade Commission, Securities and Exchange Commission, and Federal Reserve Board of Governors all would have suddenly been brought under the influence and direction of the president.

⁴ "Government Reorganization Speech, Station W. O. L.," February 13, 1938, 1, Folder 20, Box 3, Series 9, *James F. Byrnes Papers*, Special Collections and Archives, Clemson University, Clemson, SC.

⁵ *Reorganization of Executive Departments*, Address by Hon. James F. Byrnes, March 27, 1938 (Washington, D.C.: Government Printing Office, 1938), 5, Folder 21, Box 3, Series 9, *Byrnes Papers*.

⁶ “Suggested Outline of Points in Support Bill with Particular Reference to the Wheeler Amendment,” Memorandum from Joseph P. Harris to James F. Byrnes, March 17, 1939, 1, Folder 8, Box 50, Series 2, *Byrnes Papers*.

⁷ Letter from Lindsay C. Warren to William Bragaw, March 11, 1939, Folder 318-A, Box 9, *Lindsay C. Warren Papers*, Southern Historical Collection, Special Collections, Wilson Library, University of North Carolina, Chapel Hill, NC.

⁸ The legislative veto was deemed to have found “a nice balance between legislature and executive” (Millett and Rogers 1939, 176).

⁹ The other initial EOP agency, the National Resources Planning Board, was short-lived due to its abolition by conservatives in Congress in 1943, but its emphasis on long-term planning remained in EOP, especially in the Council of Economic Advisers.

¹⁰ The “chief effect” of the law, wrote James MacGregor Burns (1949, 171), “may be to enlarge the President’s legislative power.”

¹¹ For example, Louis Fisher testified that faith in the presidency and criticism of Congress as an outdated and simplistic view: “Another attitude back in the 1930’s was one of distrust of Congress, that you had to take Congress out of the picture because Congress would not support any reasonable proposal” (*Legislative Veto after Chadha* 1984, 647).