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

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We cannot call ourselves either wise or patriotic if we seek to escape the responsibility of remolding government to make it more serviceable to all the people and more responsive to modern needs.

- Franklin Delano Roosevelt

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ABSTRACT

This paper considers how 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 1930s, culminating in the passage of the Reorganization Act of 1939. The unitary executive theory envisions top-down control of the executive branch, while the idea of presidential representation anticipates allowing the president’s purported national viewpoint to have a larger role in policymaking. The 1937 report of the President’s Committee on Administrative Management embraced both claims as rationales for different parts of its proposal for reorganization. I argue that, in passing compromise legislation in 1939, Congress rejected the unitary executive theory, but cautiously embraced the idea of presidential representation in reorganization. By rejecting the proposed changes to the independent regulatory commissions and General Accounting Office, Congress largely pushed back against the unitary executive theory. Conversely, in granting the president a qualified reorganization authority subject to a legislative veto, Congress cautiously embraced the purported logic of presidential representation. The president, elected by a national constituency, was perceived as more likely to reorganize the executive branch for effective governance than members of Congress, who were perceived as parochial and attached to the interests of various agencies. However, Congress’s accommodation of presidential representation, and accompanying rejection of the unitary executive theory, placed presidential reorganizing authority on a vulnerable constitutional foundation, as would later be shown in INS v. Chadha (1983).
INTRODUCTION

Presidents 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 particularly in recent decades in conservative legal circles and politics, focuses on the vesting clause, asserting that the president possesses the entire executive power under Article II of the Constitution. While there are varying interpretations of this theory’s full implications, the central point of agreement among those who embrace it is that the president can control the entire executive branch through the removal power. This theory, though contested, is an originalist claim about the Constitution. The idea of presidential representation, by contrast, is more of a political development. It asserts that the president uniquely represents the entire citizenry as a result of being the only elected official (besides the Vice President) chosen by a national constituency. This idea emerged over time, and it took decades in the nineteenth century for the idea that the president was a representative figure to become legitimized. Moreover, the idea of presidential representation has become associated with different institutional reforms over time as well. At its boldest, the idea arguably envisions structural changes to government that stretch from what the Constitution anticipated.

Both the unitary executive theory and the idea of presidential representation, then, are claims that presidents and their defenders have reached for. While these claims have sometimes been intertwined, particularly as rationales for the presidential removal power, they nonetheless are mostly distinguishable as justifications for different types of institutional changes. The unitary executive theory envisions top-down presidential control of the executive branch, plain and simple. The idea of presidential representation, however, is more concerned with allowing the president’s purported national viewpoint to have a larger role in policymaking. As such, it
anticipates enhancing the president’s ability to get Congress to consider executive proposals, both through a formal license for agenda setting and an enhanced executive organizational capacity to privilege the presidential perspective. The first significant institutionalization of the presidency, the passage of the Budget and Accounting Act of 1921, had been based largely on the idea of presidential representation.

In the 1930s, however, both the unitary executive theory and the idea of presidential representation came to the fore in the politics of executive branch reorganization. The debate over the reorganization proposal of Franklin Roosevelt and the President’s Committee on Administrative Management [PCAM] saw both of these theories contested, especially in Congress. The failure of the PCAM proposal and the first reorganization bill of 1937, and the subsequent passage of the Reorganization Act of 1939, is a well-known tale. In this paper, I advance the novel interpretation that the failure of PCAM’s proposal and the defeat of the first reorganization bill in 1938 signified a congressional rejection of those institutional innovations based upon a bold originalist claim of the constitutional unitary executive. Specifically, Congress strongly rejected presidential control over the independent regulatory commissions and the audit, two key features of PCAM’s reorganization proposal that were strongly justified according to the unitary executive theory. Conversely, in passing the 1939 act, Congress accepted and accommodated institutional adjustments based mainly on the idea of presidential representation. In particular, Congress created a special process for reorganization plans in which the president would submit proposals through a strong agenda setting power which would be enacted unless both chambers of Congress voted to disapprove those plans through the legislative veto device. 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. In the politics of reorganization in the 1930, Congress grappled with how to reconcile the institutionalization of presidential representation within the existing constitutional framework. The institutionalization of the presidency in reorganization thus proceeded upon the developmental claim of presidential representation, not the originalist claim of the unitary executive.⁹

In this paper, I examine the claims and institutional innovations that were contested and that culminated in the political compromise of the Reorganization Act of 1939. I demonstrate how the unitary executive theory and the idea of presidential representation each were associated with different aspects of executive reorganization, and I chronicle how Congress responded to each claim. Having ample reason to contest the unitary claim, Congress possessed a strong case for control and oversight of the executive branch from both its enumerated and implied powers under Article I. Congress can, for example, create agencies, fund them at will, set terms of appointments for officers, and vest certain powers in those officers. Congress also had cause to resist the idea of presidential representation. At the least, the scope of the agenda setting authority sought went beyond the Article II provision for the president to recommend measures to the legislature, and it potentially intruded on the Article I legislative power. Given ample reason for potential congressional resistance, it is important to understand the theoretical rationale that motivated enough congressmen to pass the 1939 law. My argument is not that the idea of presidential representation caused the passage of executive reorganization. Rather, I contend that the design of the 1939 law owes its origins to the idea of presidential representation, while the timing of that law was in response to the proliferation of New Deal programs and agencies during the Great Depression.¹⁰
My analysis of the political battle over reorganization moves beyond some other prominent accounts of this episode. While some have focused on Congress seeking to solve a collective action problem in reorganizing, recognition of this problem alone is insufficient to explain the specific reform chosen. The solution did not, in theory, have to involve granting new authority to the presidency, so a specific intellectual rationale existed for that particular choice. Another account holds that Congress refuses to create new institutional capacities for presidents if it amounts to granting new power, but will give presidents direct control over such informational resources if they are associated with powers the president already possesses. However, the reorganizing power granted to the president in 1939 did amount to a new power, and this was the precise mechanism that was soon after used to create and place the new Executive Office of the President under direct presidential control. Moreover, any analysis of the reorganization battle must contend with the issues of presidential versus congressional representation, governmental structure, and constitutionality that were central to the debates in Congress.

Disagreement about the ultimate significance of the Reorganization Act of 1939 is also reflected in scholarship. While Sidney Milkis argues that FDR achieved his most important objectives in gaining limited reorganization authority and creating EOP, Stephen Skowronek focuses on how what was achieved paled in significance to the broader ambition of FDR’s three-pronged executive reorganization, Supreme Court packing, and party purge efforts. My contribution here is to show how, and with what ultimate consequence, prominent presidential claims were contested in the politics over reorganization. Congress’s accommodation of presidential representation, and accompanying rejection of the unitary executive theory, placed presidential reorganizing authority on a vulnerable constitutional foundation.
PRESIDENTIAL REPRESENTATION RECOGNIZED: THE ECONOMY ACTS

The intense political battle over reorganization from 1936 to 1939 was the culmination of earlier efforts that had incrementally changed the perception about to whom the responsibility for reorganizing the executive branch should belong. Though many in the late-nineteenth century had perceived the reorganization of the executive branch as a congressional matter, acquiring reorganization authority became a goal of presidents in the twentieth century, even as Congress generally resisted taking that step.¹⁴

In the midst of a new economic emergency, Congress hinted at a new relationship with the president over management of the executive branch. The Economy Acts of 1932 (under Hoover) and 1933 (under FDR), significant congressional departures passed during the height of the Great Depression, forged the connection between the idea of presidential representation and reorganization. While efficiency was proclaimed as the principal object of reform, the technique devised for this end – the legislative veto – was an invention inspired by the idea of presidential representation and a tool that clearly pushed against the boundaries of constitutional structure.¹⁵

Explaining the need for a presidential reorganizing authority, while noting that he was willing to accept a legislative veto device, Republican President Herbert Hoover declared that Congress was incapable of adequately addressing the issue:

> I can see no hope for the development of a sound reorganization of the Government unless Congress be willing to delegate its authority over the problem (subject to defined principles) to the Executive, who should act upon approval of a joint committee of Congress or with the reservation of power of revision by Congress within some limited period adequate for its consideration.¹⁶

As the economic downturn deepened, Congress (including a Democratic House) responded by granting a new reorganization authority. The president would be authorized to regroup agencies
in the executive branch by executive order, subject to a veto through concurrent resolution by 

*either* chamber of Congress within sixty days. No new departments could be created.\(^{17}\)

Despite the bill’s emphasis on economy, Members of Congress acknowledged the direct connection between the idea of presidential representation and the invention of the legislative veto in floor debate. They candidly discussed the difficulties of achieving any reorganization through the normal congressional process, attributed these issues to localistic electoral motivations, and looked to the president to provide a national perspective in making proposals. Citing the president as “the servant of all the people,” Representative John Miller (D-AR) called for the president to be given the “sole responsibility” to initiate reorganization. While congressmen were too particularistic, the president would only be motivated by efficiency on behalf of the whole country:

> It can not be successfully argued that Congress can do it, for the reasons above stated; not that the individual Members are not just as able as anyone and just as desirous of reducing expenses, but because the particular interests of our districts lead us to fight for the retention of the various bureaus. We are afraid to surrender one because we do not know that the other fellow will have to surrender, and so the fight goes on. The President represents all and will not be moved by any partisan consideration nor by any sectional desire. He will be dominated and controlled by the imperative duty to reduce governmental expenses without a corresponding destruction of governmental efficiency in the fundamental activities.\(^{18}\)

Senator Arthur Vandenberg (R-MI) also argued that it would be “too much to expect of human nature that over 500 minds in the two branches of Congress can meet upon so perplexing, technical, and intricate a proposition as is governmental reorganization.” Instead, Congress “must place authority and responsibility coextensively in one place, and then demand results.”

Likewise, Senator William King (D-UT) expressed doubts over Congress’s capacity for action: “…knowing the power of active minorities, the power of the organizations that infest the Capitol
and project themselves into every part of the country, I am rather dubious about reforms being effectuated in the machinery of the Government if the task is left to Congress.”

While the first Economy Act passed in June 1932 provided presidential agenda setting authority in reorganization, Hoover found his efforts thwarted by the legislative veto device. The Democratic House rejected Hoover’s executive order for reorganization of December 1932, believing that incoming president Franklin Roosevelt should have the opportunity to act instead. FDR would possess this authority until 1935 under the Economy Act of 1933. Congress did not make the reorganization power of 1933 subject to legislative veto through concurrent resolution; instead, to “veto” the plan, Congress had to pass a bill disapproving of a reorganization plan, subject to presidential veto. However, given the scale of the economic crisis, FDR’s focus was mainly on responding to the Great Depression.

Though the reform was temporary, Congress had made a notable departure. While the impulse for such a measure was the economic emergency, Congress had endorsed a reform based upon the assumption of presidential representation. The 1932 act called for an inversion of the governmental process: the president was given substantial agenda setting authority subject to legislative veto by either chamber. Thus, when reorganization was considered in the late 1930s, the connection between reform and presidential representation was clear.

BEYOND EFFICIENCY: THE POLITICAL THOUGHT OF PCAM

The major proponents of executive reorganization consciously sought to move beyond the efficiency discourse of previous decades. In 1936, having passed on the chance for a substantial reorganization a few years earlier, FDR decided to address his confessed weakness in administration, creating a committee composed of Louis Brownlow, Charles Merriam, and
Luther Gulick to study the issue. The president and members of PCAM emphasized the objective of administrative management, but, more importantly, their ideas for reform had significant implications for the structure of the American government. While they would later give much attention to the president’s purported power according to the originalist unitary executive theory, in their backgrounds, FDR and PCAM had described changes to the presidency in evolutionary terms. Importantly, they endorsed the idea of presidential representation and had also emphasized the doctrine of constitutional flexibility, seemingly clearing the way for significant structural alterations without amendment. Indeed, FDR privately admitted that executive reorganization, devised with presidential representation in mind, was essentially a substitute for more ambitious constitutional change. Telling Luther Gulick that he was seeking reforms through reorganization rather than formal constitutional amendment, he said, “…there is more than one way of killing a cat, just as in the job I assigned you.”

Both Louis Brownlow and Charles Merriam described the idea of presidential representation in developmental terms. Having observed Theodore Roosevelt and Woodrow Wilson in his journalistic career, Louis Brownlow believed that presidents should direct any reorganization and administrative reform efforts because they best knew what was needed and had the trust of the public. A decade after the reorganization effort, Brownlow described the president’s relationship to the public as a political development: “In a word, the Presidency has become the symbol in which the American people see made one their purpose, their plans, and their aspirations; the President has become the supreme servant who is expected to take the lead in realizing that purpose, those plans and aspirations.” Moreover, Brownlow and Merriam shared a conviction that a strengthened American presidency was needed to combat the onslaught of authoritarianism abroad in the 1930s.
In his early political science writings, Charles Merriam likewise connected the idea of presidential representation to American political development. The concept, he argued, had emerged in stages in the nineteenth century, most notably under Andrew Jackson. It had taken new forms in the twentieth century with “the development of the idea of executive leadership and initiative,” whereby, “The president came to possess the double attributes of a Prime Minister, who is the leader of the legislative body and also of an independent executive who is not responsible to the legislative body.” Dismissing concerns about the president being too strong, Merriam described the democratization of executive leadership as the crucial development that had overcome suspicions of “monarchy” and “kingship” in American political culture. Believing in the “continuous scrutiny of the organization of consent,” Merriam felt that the public would be better served if the president had a greater ability to plan, enhancing his ability to serve as an effective agenda setter. Similarly, FDR connected the executive electoral connection with his view of planning, arguing, “True leadership calls for the setting forth of the objectives and the rallying of public opinion in support of these objectives.”

Luther Gulick’s explanation of the need to rethink the organization of government more explicitly revealed how reforms based upon an assumption of presidential representation could anticipate alternative governing arrangements. As he wrote:

In the world into which government is moving, the executive will be called upon to draft this master plan. Deliberative and advisory representative groups will be asked to consider and adopt the broad outlines of various parts of this plan. The executive will then be given full power to work out the remainder and the interrelations of the program and to carry it into effect…

Correspondingly, the role of the legislature would fundamentally be altered, focusing on “two primary powers: first, the veto over major policy, and second, the right to audit and investigate.” The “controlling hand” would be “the mass of the citizens.” Gulick admitted the departure from
the existing separation of powers that he envisioned: “These are the bricks and straws from which the new theory of the division of powers must be constructed.”

Accompanying this call for an updated theory of the separation of powers was a more general emphasis on the notion of a “living” Constitution. Outlining his view in his first inaugural, FDR asserted, “Our Constitution is so simple and practical that it is possible always to meet extraordinary needs by changes in emphasis and arrangement without loss of essential form.” “The doctrine of the flexibility of the Constitution,” explained Charles Merriam, “developed as part of the general democratic movement.” In a blunt summation, Merriam wrote, “The Constitution is not an idol but a spirit; not a form of words but a set of political attitudes and habits of behavior.” Trying to persuade Americans of the virtues of constitutional flexibility in 1937, FDR echoed, “The Constitution of the United States was a layman’s document, not a lawyer’s contract. That cannot be stressed too often.”

Executive reorganization was conceived of as a way to forge some level of constitutional change and institutionalize presidential representation. As Stephen Skowronek notes, FDR’s combined plans for both executive and judicial reorganization “reveal a single-mindedness of purpose in redesigning basic constitutional relationships unrivaled by any president.” Yet despite their calls for a new vision of the separation of powers and a flexible constitutional interpretation, FDR and PCAM would simultaneously embrace an originalist interpretation of Article II with the unitary executive theory. The general rationale behind executive reorganization would remain presidential representation, but the concurrent emphasis on the unitary claim meant that Congress would, in considering the issue of reorganization, essentially decide to what extent it was willing to endorse either theory.
PROPOSALS: CONSTITUTIONAL DIVERGENCE, REPRESENTATIONAL CONVERGENCE

Two prominent studies of reorganization undertaken, one by PCAM and the other by the Brookings Institution, reflected two different institutional perspectives. With its charge from the president, the PCAM report considered management of the executive branch and the role of the presidency broadly.\(^{39}\) Indeed, Charles Merriam would describe the report as an exercise in “philosophy.”\(^{40}\) By contrast, with its mission set by Senator Harry Flood Byrd (D-VA) and his Select Committee to Investigate the Executive Agencies of the Government, the Brookings report of 1937 reserved more of Congress’s role, made economy more of a priority, and focused more on individual agencies.\(^{41}\) Moreover, 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 adopted instead the perspective of its first chair William Willoughby 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 some measure of the claim of presidential representation (see Table 1).

The Presidentialist Manifesto: The PCAM Plan

The PCAM proposal muddled the originalist claim of the president’s responsibilities under the constitutional unitary executive theory with repeated references to the developmental claim of the president’s greater connection to the broader public and resulting unique national perspective.\(^{42}\) While the Brownlow, Merriam, and Gulick’s report couched its language in constitutional terms, a leading constitutional scholar of the presidency, Edward Corwin, later
noted its emphasis on executive representation, referring to the PCAM report as “Jacksonian.”\textsuperscript{43} The report’s overall rationale for reorganization was based upon the idea of presidential representation: the president would overcome localistic and special interests in Congress to achieve a rational reorganization for the good of the country. As PCAM stated, “The President is indeed the one and only national officer representative of the entire Nation.”\textsuperscript{44} But some of PCAM’s specific proposals as part of such reorganization, especially moving the independent commissions to departments and making the audit an executive function, relied upon the constitutional claim of the unitary executive theory.\textsuperscript{45}

The tension between the originalist and developmental claims was immediately apparent in FDR’s accompanying message. Unveiling the proposal after much secrecy in January 1937, FDR explained how the report – “a great document of permanent importance” – was a continuation of a tradition of presidential reorganization efforts, including those of Theodore Roosevelt, William Howard Taft, Woodrow Wilson, and Herbert Hoover. He argued that a lack of presidential reorganizing authority prevented the government from being “effective in working, under popular control, for the common good.” He also embraced PCAM’s view that the presidency was key to proving American democracy could survive the rise of totalitarianism: “We can prove to the world that American Government is both democratic and effective.” However, at the same time, FDR focused on an originalist claim, arguing that enacting PCAM’s reforms would return to 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.”\textsuperscript{46} FDR had spent much effort advocating for a doctrine of constitutional flexibility, so his heavy reliance on an originalist claim of the unitary executive revealed how controversial some of his reforms were.\textsuperscript{47}
Though the report did mix justifications based on the unitary executive theory and the idea of presidential representation, the proposals corresponded to these respective rationales differently. The proposed reforms to gain control of the audit and to place all agencies of the executive branch within the regular departmental structure relied most explicitly upon a unitary reading of Article II.\textsuperscript{48} Directly stating an originalist unitary claim, PCAM argued that the Constitution placed “in the President, and in the President alone, the whole executive power of the Government of the United States.”\textsuperscript{49} Reacting against the Supreme Court’s 1935 decision in \textit{Humphrey’s Executor} that the president’s removal power did not apply to the commissions, PCAM criticized the commissions as “a headless ‘fourth branch’ of the Government.”\textsuperscript{50} Placing the independent commissions in departments would fulfill original intent: “It will reestablish a single Executive Branch, with the President as its responsible head, as provided by the Constitution.” Yet, PCAM still felt the need to accompany this originalist claim with an emphasis on presidential representation: the change would also “render the whole Government more easily understood and controllable by the people,” making it “a more faithful servant of the people.”\textsuperscript{51}

PCAM also relied upon the unitary executive claim to justify the proposal for executive control over the audit. This reform was controversial because the General Accounting Office was viewed as an agent of Congress. It had been structured that way under the Budget and Accounting Act of 1921 precisely to balance placing the BOB under presidential control. The report asserted that the GAO setup violated the Article II provision that the president must “take Care that the Laws be faithfully executed.” In serving as an agent of Congress, GAO “dissipate[d] executive responsibility” and made it so that “Congress is unable to secure a truly independent audit.”\textsuperscript{52} The pre-audit was the main issue. Republican John R. McCarl, who
opposed New Deal spending, had been the Comptroller General since 1921. His pre-audit powers had allowed him to reject requests in some cases from executive officials for the expenditures of funds.\textsuperscript{53} Instead, PCAM wanted an Auditor General to conduct a review for Congress in a post-audit, but would have the pre-audit performed in the Treasury Department.\textsuperscript{54}

In contrast, the more general proposal for the president to have authority to reorganize the executive branch, subject only to positive action by Congress to overturn, relied heavily upon the justification of presidential representation. The report did explain that the president’s interest in the organization of the executive branch stemmed from the vesting clause in Article II, asserting that the president possessed “the whole executive power.” However, the report also admitted that the Constitution “sets up no administrative organization for the government.” As a result, PCAM admitted that they were stepping on a congressional function: “the administrative organization of the Government to carry out ‘the executive Power’ thus rests upon statute law.”\textsuperscript{55}

Because Congress viewed reorganization as a legislative power, PCAM focused on asserting the purported superiority of presidential representation to congressional representation. The report criticized the existing executive branch organization as serving localistic 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.”\textsuperscript{56} Instead, a nationally-oriented president should “be required to accept the responsibility for the continuous administrative reorganization of the Government” and to determine “the effective division of duties among the departments.”\textsuperscript{57} In essence, the report envisioned the president having significant agenda setting power over reorganization to overcome parochial resistance in Congress.
Other aspects of the report also envisioned a strengthened agenda setting power and overhead management capacity for the president based upon the idea of presidential representation. PCAM envisioned a strengthened BOB to help the president take an overall view of the government budget for the benefit of the nation.\textsuperscript{58} The BOB director was “one of the few Government officers in a position to advise the President from an over-all, as opposed to a bureau or departmental, point of view.”\textsuperscript{59} The report envisioned BOB assisting with more than just the president’s budget. BOB would be enhanced so that “fiscal planning may assume its proper relationship to the economic and social planning for which the Nation holds the President responsible.”\textsuperscript{60} To ensure that the president’s views prevailed in agenda setting over the preferences of others in the executive branch, PCAM envisioned BOB serving for central clearance of legislative proposals and executive orders beyond just the budget. Instead, central review should be “applied to all legislation proposed by the executive departments and agencies and should not be limited to fiscal considerations.”\textsuperscript{61} Additionally, a new National Resources Board would further assist the president to present detailed recommendations to Congress for legislation.\textsuperscript{62} While control over the executive branch might plausibly claim support for Article II, PCAM’s vision of greater agenda setting authority and capacity for the president clearly impacted Congress’s Article I powers. As a result, PCAM portrayed the president as a nationally-representative figure.

Though PCAM embraced an originalist theory of the unitary executive, its ultimate goal was an institutionalization of presidential representation. The will of the people would be expressed through the president in everyday governing: “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.”\textsuperscript{63} The point of its proposals,
PCAM asserted, was to “make our Government an up-to-date, efficient and effective instrument for carrying out the will of the Nation” and provide the “means for holding the Executive to account for his program.”64 The report held out the promise of presidential representation as a way to achieve policies benefiting the entire country.

The audacious proposals of PCAM’s manifesto to presidential power aroused resistance. The subsequent politics surrounding its proposals would reveal that the originalist claims of the unitary executive were largely rejected, while the logic of presidential representation in reorganization was cautiously embraced.

**Accommodate, but Check, Presidential Representation: The Brookings Plan**

The Brookings plan for reorganization, presented to Congress a few months later in August 1937, rejected PCAM’s constitutional claim for the unitary executive, but partially embraced its emphasis on the logic of presidential representation. In doing so, the report demarcated the limits of what institutional reforms were likely to be accepted and which justifications would be found compelling for reorganization. Commissioned by Congress and set up by Senator Byrd, the Brookings report was to focus mainly on economy and analyze the problem of reorganization from parts of the executive branch, as opposed to the top-down approach of PCAM.65 Yet even as its charge came from Congress, the Brookings report was not entirely hostile to presidential power. Indeed, in its final recommendation for reorganization, Brookings acknowledged the benefits of presidential representation, and its proposal for a presidential reorganization power subject to legislative veto was a device to accommodate, but check, the president in his role as the nation’s representative. This foreshadowed the solution that Congress would embrace in 1939.
Without hesitation, Brookings rejected entirely the constitutional unitary executive claim read off of Article II by PCAM. As it stated, “the Federal Constitution, as we have seen, does not permit complete executive centralization nor the establishment of a perfect hierarchical organization.” A lack of unitary control, Brookings argued, 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. Such a situation may or may not be desirable, but it cannot well be ignored.” While admitting that “the theoretical case for executive centralization is an attractive one,” the report admonished it as a simplistic and naïve solution: “Federal reorganization cannot be solved in an offhand way by the use of this or any other all-inclusive theory.”

Beyond just shooting down claims of the unitary executive, Brookings resisted its associated entailments – presidential control of the independent regulatory commissions and placing the pre-audit in the Treasury Department. Describing the independent commissions, Brookings noted that their functions were far from just executive. In formulating policies, they had legislative functions: “They do what Congress would if it had the time.” And “resembl[ing] the courts” in adjudicating disputes, they possessed judicial functions. Thus, rejecting the unitary claim, Brookings argued that the commissions could not be “viewed from the viewpoint of the Executive alone.” The special status of the commissions could not “wisely be discarded without full understanding of their broader and deeper implications.” While acknowledging concerns about “insuring popular control,” the independent commissions were to be left alone.

Brookings was likewise against any change to the audit, viewing it as a tool of the legislature and not the executive. Whatever faults might exist in the system, the audit system reflected Congress’s desire to have a robust system to prevent expenditures not authorized under law.
However, the Brookings report was more cautiously supportive of the idea of presidential representation and reforms associated with it – especially budgeting and a reorganizing power. Considering that Congress had commissioned the report, Brookings’s criticisms of congressional representation in reorganization were striking. The report illustrated the problem of divergent interests in Congress detracting from the interests of the whole nation by comparing it to the problems of a family: “In a family all members may have like interests in matters affecting the family as a whole, whereas they may have very divergent interests in matters affecting individual members of the family.”

Brookings acknowledged the president’s major stake in reorganization because he was “held by the people responsible for administrative results.” And in budgeting, Brookings built on its earlier role in championing the virtues of the executive budget after World War I. Thus, Brookings’s support for further centralizing budgeting “in an agency directly responsible to the Chief Executive” continued to be based in large part upon an assumption that the president would propose a budget considering the needs of the whole nation.

In a subsequent book published by Brookings in 1939, the discussion of presidential representation was more directly addressed at a theoretical level and its applicability to reorganization was elaborated upon. Lewis Meriam, writing for Brookings, sought to articulate under what conditions Congress might accept reorganization based upon an assumption of presidential representation. While many agreed that reorganization could “only be attained through providing for greater executive control by the President,” wrote Meriam, there was “wide and fundamental disagreement as to the devices.” He described three distinct positions and justifications, the first and third of which overlapped in the PCAM report. First, the president could be given more control over reorganization without any corresponding grant to Congress to
check that power (presumably such as a legislative veto). The assumption behind this position was presidential representation, which Meriam noted pushed against constitutional boundaries:

The argument advanced in support of this change is briefly that the President alone represents all the people; the people hold the President responsible for the success of the government; and consequently the President should have power commensurate with his responsibility. Some advocates of this proposal contend that the American people should be far more concerned about the power to govern than about preserving the constitutional system of the division of powers.

Second, inspired by parliamentary government, Congress could be given new means to hold the president accountable for how any new presidential powers in reorganization were used.

Exercising greater caution, this position envisioned mechanisms to make presidential representation safe for Congress:

They agree [with the first position] that the President should have sufficient powers so that he may fairly be held responsible for results, but they would not give him increased powers until compensating increases have been made in the devices for holding him responsible to the people through their chosen representatives in the Congress. 77

Third, the constitutional unitary executive view held that the president already was granted all the executive power necessary under the Constitution, but that “improved mechanisms for the exercise of the power” were necessary. 78

PCAM had essentially combined the first and third rationales in its proposal: the presidential represented the entire people, but he also possessed the entire executive power. By contrast, Meriam advocated for the second position: reorganization was a continuous process that should embrace the assumed advantages of presidential representation, but with a new check from Congress. Meriam admitted that “the President, being just one man, can and often does have a much more consistent, logical program than may be evolved out of the group action of the Congress.” Stating the case for presidential representation as well as the most fervent presidentialist, Meriam wrote:
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, select his own group of experts and advisers, and having arrived at decisions press them through with vigor and dispatch. He 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.\(^79\)

Having considered both presidential and congressional representation, Meriam advocated for balance: “each has both merits and defects,” so Congress should “not delegate unrestricted power to the President” and both branches should “participate in the control of the administrative agencies of the government.”\(^80\) In essence, Meriam proposed granting the president a strong agenda setting power: the president’s coherent plans for reorganization could be presented to Congress with a greater chance of enactment, but Congress would still have a defense against presidential pretensions through the legislative veto device.

Revealingly, Meriam chose a solution inspired by presidential representation even as he admitted being unsure of its constitutionality. Of the three possibilities he listed as possible for a continuous process of reorganization – (1) using the normal legislative route, (2) proposing executive orders subject to legislative veto, or (3) proposing executive orders with only a two-thirds congressional override possible to pass a law against the order – Meriam advocated for the second. Having the president issue executive orders subject to a legislative veto through concurrent resolution, either in one or both chambers, would allow the president “with safety” to “be given a large measure of discretion in legislative matters affecting the administrative departments” because “the system of checks and balances would be preserved.” Preserved perhaps, but with a presidential tilt. Moreover, Meriam candidly admitted that “the constitutionality of such a delegation has been debated but it has not been decided by the
Thus, it was immediately evident that devices to institutionalize presidential representation in reorganizing potentially pushed against constitutional boundaries.

The significance of the Brookings proposal was that it rejected originalist constitutional claims of the unitary executive theory while partially embracing new reforms based upon an assumption of presidential representation. Despite admitting the device’s potentially dubious constitutionality, Brookings settled on the legislative veto as a mechanism to make the institutionalization of presidential representation in reorganization acceptable and workable. In large part, Congress would come to agree.

**LEGISLATION: THE UNITARY EXECUTIVE’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. For the most part, the portions of the proposal that faced the fiercest resistance – placing the independent commissions in the departments and making the audit an executive function – had been justified with an originalist claim of the constitutional unitary executive. By contrast, those in Congress who wanted to give the president reorganization authority – even a limited one subject to a legislative veto – clearly understood that this reform was based upon a claim of presidential representation. In general then, the initial concessions extracted by Congress in the 1938 bill, as well as its defeat, marked a congressional rejection of the constitutional unitary executive theory. The 1939 bill’s passage – pared down to a reorganization power subject to legislative veto and authorizing new White House staff –
marked a cautious acceptance of presidential representation (see Table 2). This in itself was an achievement, as there were sharp opponents of that idea in Congress.

“The Amendment Process Requires Too Much Time”: Unveiling the Proposal

The vast ambition behind the PCAM proposal was clear to Congress, but more striking was the discrepancy between FDR’s originalist justification for many of PCAM’s proposals versus his broader philosophy of living constitutionalism. Beginning his three-pronged strategy of court packing, executive reorganization, and the party purge, FDR’s plans amounted to much more than a simple reclaiming of presidential control over rightful executive power. Indeed, discussing his political philosophy with the press, FDR himself explained that constitutional flexibility was necessary to preserve democracy. As one reporter described it:

The President, in December, 1936, decided that the amendment process requires too much time for the country’s needs and security. He feels that, by the general permissions of 1934 and 1936, he was given ample mandate to attempt what upon mature consideration, and even altered method, he thinks is best. 83

Notwithstanding his originalist pretensions, FDR clearly viewed executive reorganization, in concert with judicial reorganization, as substituting for changes to the constitutional text itself. 84 Here again was an indicator that executive reorganization, based substantially on the idea of presidential representation even as some of its associated reforms were justified with the unitary executive theory, strained against the constitutional structure.

The initial unveiling of the proposal to congressional leaders in January 1937 foreshadowed the later pattern in Congress: shock at the unitary claims, mixed with cautious agreement with the representational claims. Auguring congressional concern over the unitary executive claim, Majority Leader Sam Rayburn (D-TX) asked FDR whether the Interstate Commerce Commission would be exempt from reorganization, and FDR said no. However, FDR
“found heads nodding in agreement” when he emphasized the logic of presidential versus congressional representation. As Brownlow described it, FDR realized that though each congressman was “jealous of his own prerogative,” they were “also doubtful of the exercise of a similar prerogative by any other member of either the House or the Senate.”

Interestingly, Brownlow’s depiction of the event seemingly contradicted PCAM’s assertions about purported constitutional intent. Describing the “radical changes” being proposed, Brownlow admitted that the creation and structure of the executive branch “from the first had been controlled directly by congressional action.” Despite having referred in the report to constitutional intent for a unitary executive, Brownlow now said that FDR was the first president to directly assert the need to be in charge of the executive branch: “for the first time in the history of the great American Republic,” a president was “deeming himself in fact as well as in name the head of the executive branch of the government.”

The divergence between proponents of economy versus management is well known. But the initial public reaction also immediately hit upon broader themes of constitutional structure and representation. House Minority Leader Bertrand H. Snell (R-NY) said that Congress would have to choose “whether we are going to follow the framers of the constitution or change the whole original conception of the nation.” Echoing this criticism, some stories referred to the proposal as seeking “a radically new governmental structure” and asserted that it would “rank in its consequences with the declaration of American independence and the American Civil War as a major event” in U.S. history. By contrast, other accounts focused on placing the proposal into the context of previous reform efforts. Importantly, the contrast between presidential and congressional representation was directly associated with the
Beyond the economy versus management disagreement, these themes of constitutional structure and representation would be directly contested in Congress.

Pushback and Alteration: The 1937 Hearings

The first reorganization bill and the hearings in 1937 yielded significant congressional pushback, amplified by outside opposition groups. Reforms that had been justified most strongly in terms of the unitary executive theory faced the most significant opposition. The Senate bill immediately exempted the independent regulatory commissions, while the audit would be a subject of major disagreement in the hearings. However, though some congressmen expressed skepticism of giving any reorganization authority to the president, others implicitly and explicitly acknowledged the logic of presidential representation and sought to incorporate it into a reform that they could accept.

Just as in their report, members of PCAM continued to muddle the originalist and developmental rationales for the bill. Making an originalist claim, Charles Merriam argued that the Founders had established a “strong Executive,” meaning a powerful presidency was consistent with Founding intent. On the other hand, Merriam also described the presidency’s development as evolutionary, noting the adoption of the merit system in 1883 and the budget system in 1921 as key events. Reorganization would be the next “step” to bring the presidency “up to date.” Louis Brownlow also fudged the distinction between originalist intent and the developing rationale of presidential representation. When asked by Representative Charles L. Gifford (R-MA) why the report leaned toward “giving more power to the administration,” Brownlow responded:

We believe that the Chief Executive should be given more authority over the management of the executive branch, in order to make that authority more nearly
commensurate with his responsibility, a responsibility clearly set out in the Constitution, clearly set out in the laws, and even more clearly in the tradition and popular estimation.\textsuperscript{95}

In effect, Brownlow admitted that public expectations of the president were clearer than constitutional intent. Luther Gulick elaborated upon the logic of presidential representation, explaining that the presidency was necessary for citizens to truly exercise democratic control:

You have to get things done; the things the people want. If you do not get them done, you do not have democracy. We require a means of democratic control adequate so that the average man in the street throughout the length and breadth of this land can succeed in bringing his Government under control, so it will do the things that he wants to have done.\textsuperscript{96}

Put simply, the presidency was the key to getting things done. However, when asked by Gifford if PCAM “would have written a different kind of report” if it had received the assignment from Congress instead of the president, Merriam did admit the influence of the presidency perspective: “I suppose that would be quite a different kind of report, Congressman.”\textsuperscript{97}

While PCAM continued to emphasize both originalist and developmental claims, congressmen pushed back most strongly against the unitary executive theory. The resistance to placing the independent regulatory commissions in the departmental structure, out of fear of subjecting them to presidential control, amounted to a direct rejection of the unitary claim. Members of PCAM revealingly could not assure Congress that the independence of the commissions could be guaranteed if they were placed in departments. When pressed on whether it would be possible that the president could abolish the Federal Trade Commission, Brownlow had to respond, “Well, he might.” Brownlow tried to defend the proposal by arguing that the commission would have “semi-autonomous status in the department” and “would report to the President through the department head.”\textsuperscript{98} But this was a nonstarter. Moreover, in addition to
congressional resistance, the commissions themselves, most notably the ICC, also protested to Congress.  

Resistance to changing the audit also signified pushback against the unitary claim. At its core, this dispute centered over whether the audit was an executive or a legislative function. Gulick adopted the position that the Budget and Accounting Act had not actually answered this question directly. Referring to debates over the 1921 law, Gulick argued that “all the attention” had been “centered on the Budget section,” while “the amount of attention that was devoted to fiscal control was very small indeed.” Thus, he surmised, “No one seemed to understand exactly where we were headed and what we were doing.” But this position prompted an unequivocal response from the House chairman, Representative John J. Cochran (D-MO), as to Congress’s intent for the audit: “Congress set up the Accounting Office under the Comptroller General. It was set up as an agency of the Congress, not as an agency of the executive branch.”

More specifically, the pre-audit was at issue, a practice in which the Comptroller General could disallow expenditures in the executive branch. Gulick claimed that a “mix” of auditing and control was lodged in the Comptroller, preventing him from being fully “impartial.” Instead, Gulick sought to have the pre-audit done in the Treasury Department and the post-audit carried out by an Auditor General, both responsible to the president. Emphasizing the unitary claim, Gulick explained that placing the pre-audit in the Treasury would keep it in the regular departmental structure and give the president appropriate control over it. The Senate chairman, Joseph T. Robinson (D-AR), suggested that Gulick might be right on constitutional grounds, speculating that the president would be granted an undisputed removal power over the Comptroller if a case ever went before the Supreme Court.
The purported merits of moving the pre-audit to the Treasury Department were met with skepticism. Representative Cochran asserted that the Comptroller only exercised delegated legislative power: “he simply says, ‘Yes’, or ‘No.’ If the law is not worded so it will permit the expenditure the Comptroller General will say so.”\textsuperscript{106} Senator Byrd praised the Comptroller’s role in the “large sums of money saved to the Congress and the people of this country.”\textsuperscript{107} Representative Frederick M. Vinson (D-KY) worried about making both the budget and audit “executive,” arguing that the plan’s “weakness” was “relying upon the executive side to make investigations for the purpose of the use of those investigations by the legislative branch.”\textsuperscript{108} Testifying on the Brookings proposal, Lewis Meriam rejected the unitary claim, describing the audit as “the major issue” of dispute “between our group and the President’s committee.” Criticizing the idea of allowing “the executive branch… to audit its own accounts,” Meriam said, “Auditing control should, in our judgment, be independent of the executive branch of the Government.”\textsuperscript{109} Meriam further pointed out that William F. Willoughby, the Institute for Government Research’s director and a lead protagonist for the 1921 budget law, had favored a legislatively-controlled audit to balance the executive budget.\textsuperscript{110} Clearly then, Congress rejected the unitary assertion that the audit was an executive function that should be controlled by the president.

While proposals involving the independent commissions and the audit relied heavily upon the unitary executive claim, the idea of granting the president a reorganization power relied upon a claim of presidential representation. Moreover, Members of Congress recognized that they were discussing granting the president a greater portion of legislative power.\textsuperscript{111} For example, Senator Byrd, skeptical of the proposal, wanted a more specific idea of what agencies would be “annihilated” versus those that would be “preserved.”\textsuperscript{112} But while some congressmen
resisted new presidential authority, the most notable division was over the extent of a potential presidential reorganizing power, not whether the power was necessary. There was often substantial agreement on the principle of presidential representation: the president, to overcome localistic interests in Congress, should make proposals. Senator Byron ‘Pat’ Harrison (D-MS) cited resistance from congressmen and cabinet officers as evidence that Congress could not overcome particularistic interests, arguing, “you have got to give this power to the Executive if anything is to be accomplished.” Senator Robinson agreed that giving the president “the authority to make the reorganization” was “probably the only way a reorganization ever can be made.” After Robinson’s death, his successor as Senate chair of the August 1937 hearings, Senator James F. Byrnes (D-SC), directly admitted congressional incompetence at achieving executive reorganization: “Congress has been trying to merge bureaus for 150 years, but it has not succeeded up to this time.” If it were “left to the Congress,” no changes would be made. Byrnes also explicitly defended presidential representation in an exchange with Byrd:

Byrnes: The President of the United States, who was chosen by the people to be President, and chosen by the American people alone and not by any other people, is going to do it.

Byrd: Is Congress chosen by the American people?

Byrnes: No, each Congressman is chosen by the people of his district. Taking them all collectively – yes.

These exchanges made it clear that any acceptance of a presidential reorganization power by Congress would be based upon an assumption of presidential representation.

Still, 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 exemptions of
agencies, especially the independent commissions, were more a strike against the unitary executive theory than the idea of presidential representation. Congress reserved its prerogatives over executive agencies it had created, prioritizing its preference for the continued independence of those commissions. By contrast, the legislative veto was a congressional accommodation to the idea of presidential representation, envisioning a strong presidential agenda setting power in reorganization and echoing earlier Progressive proposals to invert the direction of the governmental process.  

Strikingly, congressmen revealed a willingness to knowingly embrace a solution of potentially questionable constitutionality rather than read a unitary claim out of Article II. Senator Robinson opined that the legislative veto procedure for reorganization would probably withstand judicial scrutiny because it avoided delegating too much legislative authority to the president. Representative Gifford also argued that a legislative veto would better withstand a constitutional challenge than just giving the president reorganization authority carte blanche. Gifford believed that the legislative veto could be an alternative mechanism for providing congressional assent, even if the president had a greater agenda setting capacity:

If the 60-day clause was there and if Congress did not act it would be affirmatively interpreted as Congress agreeing to the change, and therefore, would get by the constitutional challenge. It seems to me in the very broad powers it gives the President here, you will need to avoid constitutional questions.

However, testifying alongside the principal PCAM members, C. M. Hester admitted that this was constitutionally uncertain. Having given the question “very considerable consideration,” he had “been unable to find any authority establishing the proposition that Congress, by silence, can legislate.” The exchange showed that institutionalizing presidential representation posed challenges to the constitutional structure.
PCAM initially resisted Congress’s proposal for a legislative veto, seeking an even stronger reorganization authority for the president with the only congressional check coming from the budget process, but its members became more persuaded that accepting the device would be necessary.\(^{121}\) Though he supported a presidential reorganization authority, Senator Robinson argued against relying on only the budget process as a check against the president because it would raise “the immediate possibility, not to say probability, of an impasse.”\(^{122}\)

Having earlier criticized the legislative veto, Gulick now defended the device against criticism from Senator Byrd, who worried that the president could effectively nullify Congress’s ability to exercise its legislative veto by continually issuing reorganization orders and overwhelming Congress with changes.\(^{123}\) Gulick disputed this, noting that the reorganization proposal “must lie before Congress, while Congress is in session, for 60 calendar days.” Senator Alben W. Barkley (D-KY) suggested that if any president continually issued such orders “then he ought to be changed.” Sensing the opportunity to make a point, Byrd sarcastically asked, “Is there any provision in this bill to change the President?” But Senator Byrnes responded by expressing faith in the people: “No, but the people will change him.”\(^{124}\) In these exchanges, Congress made it clear that it was willing to apply the idea of presidential representation to reorganization, but only with the legislative veto safeguard.

Though the proposed presidential reorganizing authority was the principal agenda setting power discussed, it was also evident that the changes PCAM sought would enhance presidential agenda setting in policy areas beyond reorganization. For example, both PCAM and Brookings agreed the president’s role in budgeting should be enhanced, including moving BOB out of the Treasury and placing it more firmly under presidential control.\(^{125}\) More generally, the president would be, in effect, further made the nation’s representative by being granted a share of
legislative power with an enhanced ability to plan. Enhancing the president’s organizational capacity would improve policy planning and allow for longer time horizons to be considered in making decisions. Though Charles Merriam assuaged congressional angst by asserting “that the principle of legislative predominance in a democratic government has no stronger defenders than the President’s committee,” he also explained that executive overhead management would help presidents in “promoting the appropriate congressional policy.”¹²⁶ When Senator Joseph C. O’Mahoney (D-WY) pointed out that planning for long-term policy was “the basis of all legislative activity,” Merriam responded affirmatively. O’Mahoney, while acknowledging the president’s Article II power to recommend measures, proceeded to highlight that this could be interpreted as granting the president a greater share of legislative power. He asked, “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 explained that the president, assisted by a planning board, could take “a longer look ahead than a particular Congress, which is burdened with many immediate responsibilities, would or could take.”¹²⁷ Implicitly, Merriam was once again endorsing a view that the president could be relied upon to behave differently than Members of Congress, acting more in the national interest.

The hearings demonstrated that any decision on reorganization would require Congress to respond to two claims put forth by PCAM: the constitutional unitary executive theory and the idea of presidential representation. Though many elements of the proposal faced opposition, the sharpest criticism in the hearings was trained on reforms of the independent commissions and the audit, which relied substantially on the unitary claim. Though congressmen were also hesitant to accept the full extent of PCAM’s vision for presidential representation, they were more open to devising institutional solutions that would, in effect, accept the legitimacy of the concept.
Defeat in 1938

Though the initial prospects for the ambitious reform looked promising (a bill passed the House 283 to 75 on August 12, 1937), the first reorganization attempt would ultimately be defeated in April 1938, seemingly dealing both the unitary executive theory and the idea of presidential representation a significant blow. Reforms justified based upon the unitary executive theory continued to come under attack; the independent regulatory commissions were exempted from reorganization entirely, and the change to the audit attracted controversy. Congress also contested the idea of presidential representation in reorganization, and the debates revealed concerns over allowing the president a share of what many perceived to be legislative power over the structure of the executive branch. With the concurrent controversy over FDR’s judicial reorganization plan, the political winds shifted against the president.128

A *New York Times* editorial from March 1938 provides an example of how the unitary aspects of the bill attracted the most controversy, while the idea of presidential representation in reorganization had a greater potential to be accepted. The editorial was cool to the two main unitary proposals – placing the independent regulatory commissions in departments and placing the audit under executive control. It expressed relief that the commissions were to be exempt from presidential reorganization orders. Additionally, even as it supported the reorganization bill, it declined to endorse the proposal to move the pre-audit to BOB. However, the *Times* was persuaded that the “safeguards” of a legislative veto were sufficient to allow the president a strong reorganization agenda setting power. Criticizing congressional representation, the *Times* implicitly argued for the superiority of presidential representation in reorganization: “practical experience has shown the difficulty of attempting to work out a detailed plan of departmental
reorganization on the initiative of Congress. In these matters, as in the matter of detailed tariff changes, log-rolling invariably appears." Simply put, the *Times* was more willing to accept the idea of presidential representation than the unitary executive theory.

Despite the broader legitimation of the idea of presidential representation in reorganization, many in Congress pushed back on what they viewed as granting the president a share of congressional power. The dispute over whether the president should have the power to lead reorganization efforts thus revealed how the idea of presidential representation anticipated the president increasingly having a share of powers perceived to belong to Congress. Leading the opposition in the Senate, Senator Josiah William Bailey (D-NC) argued that reorganizing was a "legislative power" – “our power.” He criticized the bill for taking that power “from ourselves, to whom it belongs, to one single, sole man, who, until we do transfer it, never had or enjoyed one particle of it.” Bailey disputed the notion that congressional incompetence was an excuse for giving the president a share of reorganizing – “this constitutional power of ours.” As Bailey surmised, Congress was responsible for creating the executive agencies: “If there is a Frankenstein in America, we are the creators of that Frankenstein.” Yet, Bailey found himself criticizing congressional representation on the Senate floor, even if he was unwilling to fully embrace the alternative of presidential representation:

We not only create these agencies but we vest in them a tremendous spending power; and we begin to fear, once we see that they have the money, that reaching out over our country and into our States and districts, after all, there is a power mightier than ourselves, and if we undertake to abolish the bureau or the agency or the corporation or the activity and fail, we fear that they will make us pay the price on election day.

It was revealing that one of the bill’s chief critics nevertheless admitted that the parochialism of Congress prevented broader executive branch reorganization. Nonetheless, Bailey viewed only congressmen, not the president, as able to truly represent the American people on the question of
reorganizing, warning: “God grant that when the vote is taken it may be said that they are still in the hands of the duly elected constitutional representatives of the American people.”

The device to make presidential reorganizing power safe for Congress – the legislative veto – faced further questions over its constitutionality in the debates, showing again how the idea of presidential representation pushed against the constitutional structure. Bailey argued that the bill gave the president not only the power to “rearrange,” but also “the power to destroy the creatures of the Congress.” Senator Marvel Mills Logan (D-KY) defended the reorganizing power by arguing that the bill required the president to obtain a measure of congressional consent by avoiding a legislative veto: “Is not the President’s action in the nature of a recommendation to the Congress? Does not he say, ‘This bureau ought to be abolished,’ and then submit his recommendation to Congress, and then does not Congress determine whether his Executive order shall go into effect?” Bailey attacked this as a constitutional inversion. However, Bailey allowed that he would vote for reorganization if the legislative veto were changed to require congressional *assent* to a presidential reorganization proposal, as opposed to avoiding congressional *dissent*. In other words, rather than creating a special process for reorganization that privileged the president’s views, he wanted presidents to simply propose reorganization plans in a normal legislative process.

Despite the questions over the constitutionality of the legislative veto, senators supportive of the bill fended off many attempts to weaken the provision. Senator Burton K. Wheeler (D-MT) attempted to diminish the strength of the presidential agenda setting power by preventing reorganization orders from becoming effective until a majority of the House and Senate approved, giving the chambers ten days to act. This amendment was defeated 39 to 43 on March 18. Managing the bill, Senator Byrnes sought to ensure that reorganization orders would take
effect unless both chambers voted them down with a joint resolution. Because a joint resolution required the president’s signature, this effectively raised the voting threshold for blocking a president’s reorganization plans to two-thirds of both chambers. Senators supportive of the Byrnes bill looked to the president to overcome the inability of congressmen to collectively agree on reorganization. Significantly, several of the unitary provisions were also kept in the bill. Though the independent commissions were exempt from reorganization plans, the audit change was still included. Attempting to amend the bill to protect the Comptroller General, Senator Byrd lost 36 to 47. Another amendment to keep the Civil Service Commission, rather than have a single Civil Service Administrator, was defeated 38 to 50. The final bill passed the Senate 49 to 42 in late March and was sent directly to the House rather than going to conference committee. While it no longer contained one key unitary provision in exempting the independent commissions, the bill still contained reforms based both upon the unitary executive theory and the idea of presidential representation. Supported by a unitary claim, the bill created an Auditor General, eliminated the Comptroller General, and moved the audit function to BOB. The bill also created a Department of Welfare. Associated with claim of presidential representation, the bill allowed for presidential reorganization plans subject to veto by joint resolution.¹³⁴

Though the bill had passed the Senate, House approval was in jeopardy, as the political context was increasingly unfavorable thanks to an economic recession and ominous events in Europe.¹³⁵ Trying to rebut accusations that he sought to be a dictator, FDR issued an extraordinary letter:

A: I have no inclination to be a dictator.
B: I have none of the qualifications which would make me a successful dictator.
C: I have too much historical background and too much knowledge of existing dictatorships to make me desire any form of dictatorship for a democracy like the United States of America.¹³⁶
The letter arguably backfired. Representative Hamilton Fish (R-NY), for example, turned FDR’s words against him to argue against the bill: “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.” Defending the president, the *New Republic* expressed bewilderment that the “fuss and fury” of the opposition could be “invested with constitutional sanctity,” reminding its readers of the logic of presidential representation for reorganization: “students of the subject [of reorganization] have come to the conclusion that nothing would ever be done unless the President were given authority to do it.”

Seeking to mollify the opposition, FDR now declared that he would accept the legislative veto as the price for a presidential reorganizing power. The House devised a compromise between the Byrnes and Wheeler positions on the proposed reorganizing power, seeking to privilege the president’s plans but assuaging congressional anxieties. Despite the arguments over the constitutionality of the provision, the House on April 7 passed Representative Frank C. Kniffin’s (D-OH) amendment 151 to 113 to allow both chambers of Congress to override a presidential reorganization plan by a simple majority concurrent resolution, rather than a joint resolution. FDR approved the compromise.

Nonetheless, the bill suffered a stunning defeat in the House. Leading the opposition, Rules Committee Chairman John Joseph O’Connor (D-NY) asserted that the president was being given a portion of Congress’s power, declaring that the bill was “an attempt to compel Congress to surrender its rights.” Trying to salvage victory, Speaker William Brockman Bankhead (D-AL) defended the legislative veto as an adequate control, saying that Congress would have “the power to say… for 60 days, whether the recommendations of the President shall stand or not.”
Despite Bankhead’s efforts and previous successes at preventing opposition amendments, the bill lost narrowly 196 to 204 (with 29 not voting) on a motion to recommit.143

The bill’s defeat in 1938 appeared to indicate a sharp break on the extent to which presidential representation would be institutionalized in American government.144 Congressional opponents of the bill were accused of selfishly protecting their own prerogatives against the good of the whole nation.145 However, while the presidential reorganization power was resisted, that alone did not sink 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 new cabinet positions or departments.146 FDR had personally drawn the ire of many in Congress. Finally, “the spread of executive authority” abroad “alarmed” American opinion.147 Indeed, considering the furor over the bill, it was notable that it nearly passed. A second attempt at passage, of a bill shorn of its unitary provisions, would clarify whether Congress would reject the idea of presidential representation itself.

Passage in 1939

The second attempt at passage essentially removed the issue of the constitutional unitary executive theory from Congress’s consideration, focusing instead more directly on the claim of presidential representation. After Democrats lost many seats in the 1938 midterm elections, FDR made several adjustments to the bill with PCAM and Senator Byrnes.148 Already having conceded on the status of the independent regulatory commissions, he now permitted more bureau exemptions, left the Civil Service Commission in place, and avoided changing the audit setup. Altogether, this signified a total retreat from any assertion of the constitutional unitary executive theory. The proposed bill also omitted new departments. What was left in the bill was
a plan based on the idea of presidential representation: the president could submit reorganization plans to Congress, subject to legislative veto by majority vote through concurrent resolution.\footnote{149} Not coincidentally, FDR’s rhetoric on the bill shifted as well. Having previously described the reorganization bill as fulfilling original constitutional intent, FDR now defended it based on the idea of constitutional flexibility, implicitly recognizing how the proposed reorganization procedure departed from envisioned constitutional relationships.\footnote{150} As one journalist wrote, the fundamental principle of the bill 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.”\footnote{151} Congress’s decision in 1939 would be based on the purported merits of presidential representation itself.

Though much attention was directed at the concessions in the 1939 bill, it still contained what amounted to a stronger agenda setting power for the president in reorganization than the Constitution had contemplated.\footnote{152} The legislative veto through concurrent resolution was a device invented 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 allowed Congress to veto plans that were too bold. Unveiling the new bill in February 1939, Representative Lindsay C. Warren (D-NC) admitted that Congress was deferring to the executive’s perspective, saying that it would permit the president to undertake a “reorganization of the government under a review by Congress.”\footnote{153} Considering that many congressmen felt that, under Article I, Congress was responsible for reorganizing the executive branch, promising a “review” of presidential proposals with the chance to vote against them was not exactly a ringing endorsement of legislative supremacy.
Another procedural alteration to mollify congressional concerns essentially recognized the president as a representative figure by conceiving the executive as a legislative figure. As Brownlow later recounted, instead of using executive orders for reorganization plans, the new bill would instead make “the President an agent of the legislature.” 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.”

Additionally, while not embracing unitary claims, the bill did enhance the president’s organizational capacity by providing six new administrative assistants. Taken together, the two elements of the 1939 bill – a formal mechanism to propose executive reorganization and new White House staff – corresponded to the two key institutional entailments that had been connected to the idea of presidential representation with the passage of the Budget and Accounting Act of 1921 – a formal agenda setting responsibility and greater executive organizational capacity.

The claim of presidential representation was central to the congressional debate. Opponents continued to portray the bill as surrendering congressional responsibilities to the president, perverting the Constitution in the process. Representative George Anthony Dondero (R-MI) complained that “the representative branch of the Government has surrendered its functions to the Executive of the Nation.” Accusing the bill’s proponents of delegating “a purely legislative function” to the president, Representative John William Ditter (R-PA) complained that the legislative veto was “only a pretense of protection against the exercise of arbitrary authority.” Ditter also sought to remind his colleagues that FDR could not be trusted. Citing the “brazenness” of FDR’s “Court-packing proposal,” “discredited reorganization bill,”
and “pitiless purge,” he asked, “Have not our suspicions been aroused?” The new bill, he
concluded, remained a creature of PCAM, leaving “little doubt” as to its true purpose: “In a
nutshell the findings 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.”

Supporters of the bill countered that only the president could overcome the resistance of
individual congressmen and the bureaucracy to reorganization. Emphasizing the value of the
president’s national constituency and perspective, Senator Joseph Lister Hill (D-AL) placed a
speech by Solicitor General (and future Supreme Court Justice) Robert H. Jackson into the
Record:

Any party in power under our constitutional plan has one leader, chosen by and
responsible to the whole people. That is the President. 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… Unless the Democratic Party is
willing to accept a national leadership from the President, it can at best have only the
leadership of a coalition of local leaders.

Echoing this argument, Representative Jed Joseph Johnson (D-OK) asserted that the president
needed to be given reorganizing power because it was “obvious” that congressional
representation prevented reorganization; the “departments and agencies are too powerful,”
having “too many friends in and out of Congress.”

More importantly, supporters of a presidential reorganization authority defeated
challenges that would have weakened this agenda setting power. In the House, Representative
Richard Mifflin Kleberg, Sr. (D-TX) tried to revive the Wheeler amendment from the Senate,
seeking to require a congressional majority in favor of a proposed reorganization rather than the
avoidance of a negative judgment. Criticizing the “devious methods” being invented for the
reorganization process, he asserted that it was wrong to “ask the 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.” In response, Representative Warren defended privileging the president’s reorganizing power, saying that “anyone who wants to see reorganization in the Government cannot support this amendment.” Kleberg’s amendment requiring congressional assent was rejected 139 to 176. An amendment from Representative Hatton William Sumners (D-TX) proposed that a majority vote against the president’s plan from either chamber of Congress, rather than from both chambers, should be sufficient for the veto of presidential reorganization plans. This too was defeated 193 to 209. Majority Leader Rayburn argued those “who really want reorganization” should require that both chambers of Congress should have to veto a proposal, making it harder to reject. The final bill passed the House 246 to 153 (with 34 not voting).

The Senate also narrowly held off an amendment aimed at weakening the presidential reorganizing power. Once again, Senator Wheeler proposed an amendment requiring an affirmative vote from both chambers of Congress before presidential reorganization plans could take effect. The amendment initially passed 45 to 44, but was reconsidered the following day and defeated 44 to 46. As a whole, the bill passed the Senate 63 to 23. FDR signed the bill into law on April 3. 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 more staff.

Scholars have long debated what is most significant about the passed law – what had failed versus what was achieved. My analysis of the reorganization saga contributes a new understanding of the claims that were being contested. Simply put, the originalist claim of the
unitary executive theory was roundly rejected, while the developmental claim of presidential representation was cautiously accepted.

IMPLEMENTATION: PRESIDENTIALISM IN THE SERVICE OF DEMOCRACY

The passage of the Reorganization Act of 1939 marked another partial move toward institutionalizing presidential representation. Despite curtailing PCAM’s original vision, including rejecting its originalist unitary pretensions, Congress had again recognized in statute the idea that the president represented the nation. The transformation the law allowed for would become evident in its implementation.

FDR ensured that PCAM’s ideas would influence the law’s implementation, summoning Brownlow, Merriam, and Gulick to Washington. Congress upheld the resulting Reorganization Plans I and II. In September 1939, FDR issued Executive Order 8248 to establish the Executive Office of the President [EOP], “the touchstone of modern presidential leadership.” 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 State, War and Navy Building. Moreover, as the executive order itself noted, 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.” Both Brownlow and Gulick emphasized the idea of presidential representation in explaining the need for EOP. Brownlow asserted that the new presidential role was justified because of a purported political development: “the legislature lost its ability to take a coherent view of the state and of the nation.” And Gulick emphasized EOP as a way for America to be an effective democracy:
“you will find in that action 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.”

The signature move of the 1939 law’s implementation was the transfer of BOB to EOP, correcting one of the perceived flaws – from the perspective of presidency proponents – of the Budget and Accounting Act of 1921, which had placed BOB in the Treasury. BOB was envisioned as a presidential agency, but its physical location placement the Treasury had meant that it was still associated with a department that had historically maintained a close relationship with Congress. BOB had been created in 1921 to realize the promise of presidential representation, helping the president formulate a budget with a uniquely national perspective. Now FDR emphasized additional responsibilities beyond budgeting, including developing plans for further reorganizations and clearing both proposed legislation and executive orders. BOB Director Harold D. Smith explained how BOB’s new position would enhance the president’s agenda setting capabilities, allowing the president to more easily “get from the various departments information.” Its “job” would be “to help the President develop a suggested program of action for the consideration of Congress.” Brownlow also later explained that moving BOB to EOP would allow it to better serve “as an engine to aid [the president] in coordinating general legislative programs.” The other agency of the law’s implementation, the National Resources Planning Board, proved to be short-lived because of its abolition by conservatives in Congress in 1943, but its emphasis on long-term planning and presidential recommendations to Congress lived on in later parts of EOP, such as the Council of Economic Advisers.

The authority granted to the president in the Reorganization Act of 1939 was used to great effect. Not only did the law grant the president a greater agenda setting authority in reorganization, it allowed FDR to enhance the office’s executive organizational capacity. The
new tools of presidential management would be used to recommend measures beyond just the budget, further routinizing the president’s involvement in the legislative process and marking the office’s institutional emergence as a representative actor. As James MacGregor Burns noted of the law, its “chief effect” arguably was “to enlarge the President’s legislative power.” Once again, the idea of presidential representation had pushed against the written constitutional frame.

**CONCLUSION: THE VULNERABILITY OF PRESIDENTIAL REPRESENTATION**

The Reorganization Act of 1939 marked another step in the incremental institutionalization of presidential representation. The immediate impact of Congress’s acceptance the concept was evident in FDR’s ambitious implementation of the law. Moreover, though the 1939 law contained a two-year time limit, Congress would reauthorize presidential reorganization authority repeatedly between 1945 and 1984. PCAM’s vision continued to influence subsequent reorganizations as well, though the demands of presidential representation also remained insatiable. Significantly, the Reorganization Act of 1939 and its implementation were viewed as having institutionalized presidential representation without altering the formal constitutional structure. The legislative veto, the key procedural invention of the law, was said to have found “a nice balance between legislature and executive.” Establishing EOP, asserted Clinton Rossiter, had helped to preserve the Constitution, saving it “from radical amendment.”

The full implications of Congress’s choice to pass a law based upon the developmental claim of presidential representation, while rejecting the originalist claim of the unitary executive theory, would emerge in the 1980s. The reorganization process adopted in 1939 and reauthorized by subsequent Congresses had needed to reject the unitary executive theory to ensure its passage. Instead, Congress had devised a reorganization process that accommodated the claim of
presidential representation. So it was no small irony that the crucial device invented to make presidential representation safe for Congress – the legislative veto – was rejected by the Supreme Court as unconstitutional in 1983 at the very moment the unitary executive theory was on the rise in conservative legal circles.188 Though the subject of INS v. Chadha was specifically the one-house legislative veto in the Immigration and Naturalization Act of 1952, by citing the principle of bicameralism and the Presentment Clause in its decision, the Court nullified the two-house legislative veto by concurrent resolution as well.189 Bemoaning the invalidation of the legislative veto in dissent, Justice Byron White described that instrument as an “important if not indispensable political invention,” implicitly acknowledging that it had been a feature that had stretched from constitutional structure.190 Suddenly confronted with the reality decades of reorganization plans had been implemented through an unconstitutional device, Congress hurriedly passed a law to assent to all of those past actions.191

This points to the vulnerability of institutional reforms based upon the idea of presidential representation. The reforms the idea portends often push against constitutional boundaries, leading to the risk of pushback. The legislative veto had been invented to accommodate presidential representation in reorganization, but, with the rise of originalism in legal circles, its constitutional vulnerability was exposed. Yet the idea of presidential representation itself is durable, even if its associated reforms do not always prove to be so. One only has to look at the beginning of any new presidential administration. Though an alternative process for major reorganization efforts has eluded the president and Congress, the allure of promising such a plan to the public remains.192 Donald Trump is only the latest in a string of presidents to reach for the representative claim by asserting that he, and not Congress, is best situated to accomplish executive branch reorganization.193 He certainly will not be the last.
# APPENDIX

**Table 1. Summary of Reorganization Proposals**

<table>
<thead>
<tr>
<th>Innovations Proposed</th>
<th>Resistance Encountered</th>
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<tbody>
<tr>
<td><strong>PCAM</strong></td>
<td></td>
</tr>
<tr>
<td>Emphasis on management over economy</td>
<td>Departments wary of PCAM’s study</td>
</tr>
<tr>
<td>Presidential reorganization authority</td>
<td>Comptroller-General rejected use of originally-allocated funds for the study</td>
</tr>
<tr>
<td>New executive assistants</td>
<td>Congress sets up its own study on reorganization to focus on economy</td>
</tr>
<tr>
<td>An executive office including BOB and planning functions with a National Planning Board</td>
<td>Many congressmen viewed bureau transfers as a legislative prerogative</td>
</tr>
<tr>
<td>All agencies, including independent commissions, organized into 12 departments</td>
<td></td>
</tr>
<tr>
<td>Pre-audit function moved to Treasury Department</td>
<td></td>
</tr>
<tr>
<td>Extension of merit system, increased salaries, and replacement of Civil Service Commission with single administrator</td>
<td></td>
</tr>
<tr>
<td><strong>Brookings Institution</strong></td>
<td></td>
</tr>
<tr>
<td>Presidential reorganization authority, emphasizing likely need for continuous adjustments</td>
<td>Legislative Veto</td>
</tr>
<tr>
<td>Greater presidential control over BOB</td>
<td>No change to independent commissions</td>
</tr>
<tr>
<td></td>
<td>No change to the audit</td>
</tr>
<tr>
<td></td>
<td>Criticizes broad theories of reorganization and argues for studying more specific units</td>
</tr>
<tr>
<td></td>
<td>Emphasizes continuous adjustments rather than one wholesale change at once</td>
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</tbody>
</table>
Table 2. Summary of Reorganization Legislation

<table>
<thead>
<tr>
<th>Year</th>
<th>Innovations Adopted</th>
<th>Limitations Imposed</th>
</tr>
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<tbody>
<tr>
<td>1938</td>
<td>Presidential reorganization authority</td>
<td>Legislative veto (Senate proposed a joint resolution; House proposed concurrent resolution)</td>
</tr>
<tr>
<td></td>
<td>New executive assistants</td>
<td></td>
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<tr>
<td></td>
<td>Creation of new Department of Public Welfare</td>
<td>Some exceptions to reorganization authority, including independent commissions??</td>
</tr>
<tr>
<td></td>
<td>Single civil service administrator</td>
<td>2-year time limit on reorganization authority</td>
</tr>
<tr>
<td></td>
<td>Created Auditor-General in BOB and abolished Comptroller-General</td>
<td>No salary increases</td>
</tr>
<tr>
<td>1939 law</td>
<td>Presidential reorganization authority</td>
<td>Legislative veto by concurrent resolution of both chambers (no presidential assent required)</td>
</tr>
<tr>
<td></td>
<td>New executive assistants</td>
<td>Some exceptions to reorganization authority, including independent commissions</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2-year time limit on reorganization authority</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No change to Civil Service Commission</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No new departments</td>
</tr>
<tr>
<td></td>
<td></td>
<td>No change to audit</td>
</tr>
</tbody>
</table>
recommendations of the Joint Committee on Reorganization. Yet, for the time being, Congress resisted giving greater reorganization authority to the presidency, despite the establishment of the presidency as the center of governmental activity. Sidney M. Milkis, The Transformation of the American Party System (New Haven, CT: Yale University Press, 2015). Efficiency. Mordecai Lee, Institutionalizing Congress and the Presidency: The U.S. Bureau of Efficiency, 1916-1933 (College Station, TX: Texas A&M University Press, 2006). The creation of the Bureau of the Budget in 1921 was a first step toward giving the president new managerial tools toward managing the executive branch effectively. Yet, for the time being, Congress resisted giving greater reorganization authority to the presidency, despite the recommendations of the Joint Committee on Reorganization. Gailmard and Patty, Learning While Governing, 193-194.


18 *Congressional Record*, 72nd Congress, 2nd Session (February 11, 1933), 3903.

19 *Congressional Record*, 72nd Congress, 2nd Session (January 26, 1933), 2588. In citing examples of strong presidents to show what sort of leadership reorganization might require, King hinted at the sort of struggle that might be to arise from a serious reform effort: “We may need a Jackson; we may need a man with the courage, not to say the impetuosity, of a Theodore Roosevelt, to effectuate these reforms…” Senator David Walsh (D-MA) also expressed confidence in the idea of presidential representation, but believed Congress was choosing the wrong institutional reform to institutionalize it. Rather than give the president a formal agenda setting power for reorganizing for economy, he wanted a constitutional amendment for a line-item veto “with the power lodged in one man, responsible to the whole country, to no particular State or group…” *Congressional Record*, 72nd Congress, 2nd Session (January 26, 1933), 2585.


21 Though in the 1932 campaign FDR had pledged a reorganization that would reduce government expenditures “by no less than twenty-five percent,” he had also made clear his belief that presidential leadership required the capacity for planning: “When the nation becomes substantially united in favor of planning the broad objectives of civilization, then true leadership must unite thought behind definite methods.” Roosevelt, *Looking Forward*, 51.


24 Quoted in Milkis, *President and the Parties*, 109. As Milkis points out, a draft of Louis Brownlow’s autobiography contained this anecdote, but the published version did not. See also, Karl, *Executive Reorganization*, 221.


27 Viewing international events as “a new challenge to the whole democratic system,” they believed, as Brownlow put it, that “the presidency of the United States was the institution around and behind which democrats might rally to repel the enemy.” Thus, the president needed to be “better equipped for his tremendous task.” At a European conference in Warsaw in 1936, they responded to the anti-democratic views of some academics by praising the presidency for “combining as it does the elements of popular control and the means for vigorous action and leadership.” Brownlow, *Passion for Anonymity*, 336, 369-370.

28 Though Merriam saw seeds of the representative claim in John Adams and Thomas Jefferson, he attributed a greater departure to Andrew Jackson, who aroused Whig resistance because he “regarded himself as the representative of the people” and “asserted the rights of the executive against the legislature and the judiciary as they had never been asserted before.” Charles Edward Merriam, *A History of American Political Theories* (New York: Macmillan, 1903), 139, 164, 178-179, 181.


31 Merriam dismissed concerns over presidential tyranny: “In our own national experience sincere but misguided persons denounced Andrew Jackson as ‘King Andrew,’ Abraham Lincoln as a ‘tyrant,’ Theodore Roosevelt as a ‘usurper,’ and Franklin Delano Roosevelt as a ‘dictator’ — according to the verbal fashion of the hour.” In fact, Merriam had been with Theodore Roosevelt when he was shot in an assassination attempt: “I was with Colonel Roosevelt when he was shot in Milwaukee in 1912, and was present at the preliminary examination of Schrank, who fired the bullet. ‘I shot him’ said Schrank, ‘because he was about to become a tyrant and overthrow our Constitution and our liberty. I read this is a newspaper.’” Merriam, *Prologue to Politics*, 31.


34 Luther Gulick, “Politics, Administration, and the ‘New Deal,’” *Annals of the American Academy of Political and Social Science* 169: The Crisis of Democracy (September 1933): 66. Merriam likewise noted the attacks on “the separation of governmental powers” were often part of the “general sentiment” of the times. Merriam, *American Political Ideas*, 140.


40 PCAM operated mostly outside of FDR’s influence in 1936, but it was clear that his concerns would be addressed in any final report. Merriam had recommended that an outside committee should do the study so that it would be less likely to be interpreted as a purely presidential grab for power. Brownlow, *Passion for Anonymity*, 334.


42 Brownlow, *Passion for Anonymity*, 346. In fact, Byrd, who had previously undertaken reorganization from an executive perspective while governor of Virginia, had tried to convince Brownlow to partake in his inquiry.
Brownlow, Passion for Anonymity, 337; Polenberg, Reorganizing Roosevelt’s Government, 31, 33, 35-36. Luther Gulick would later be surprised by Byrd’s opposition to reorganization on PCAM’s terms because he had worked with him on the Virginia reorganization. Arnold, Making the Managerial Presidency, 113.

While the committee was primarily made up of Brownlow, Merriam, and Gulick, more specific studies were undertaken by others including Arthur Eugene Buck, William Y. Elliott, and Herbert Emmerich.


For an explanation of how PCAM departed from the teachings of their mentors on the separation of powers, see Noah A. Rosenblum, “Making Presidential Democracy: The Public Law Theory of the Executive Reorganization Act,” Columbia University manuscript, 2017. 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, Report, 4, 52; Polenberg, Reorganizing Roosevelt’s Government, 21; Milkis, President and the Parties, 114-115.

Franklin D. Roosevelt, “Message of the President of the United States,” in PCAM, Report, iii-v.


Calabresi and Yoo, Unitary Executive, 295. Two proposed departments – Social Welfare and Public Works – were to be added to the existing ten in order to facilitate placing all agencies of the executive branch into the departmental structure. Additionally, the replacement of the Civil Service Commission with a single Civil Service Administrator (along with a seven-member advisory board) was argued to make it easier for the president to control the executive branch. PCAM, Report, 8-11. Furthermore, the president would be given six executive assistants to help obtain information from the departments and inform departments of presidential decisions. PCAM, Report, 5.

PCAM, Report, 31.

Humphrey’s Executor v. United States, 295 U.S. 602 (1935). The court ruled that Franklin Roosevelt did not have removal power over the independent regulatory commissions without congressional consent.


PCAM, Reorganizing Roosevelt’s Government, 23; Arnold, Making the Managerial Presidency, 110. In fact, PCAM itself had suffered from the pre-audit. In April 1936, the Comptroller General did not release the allocated funds for the committee that had been part of the National Emergency Council budget. To solve the problem, the council was eliminated and FDR was authorized to give PCAM $100,000, but Congress made finding some economies (through pointing out agency overlap and duplication) a stipulation in exchange for funding. Brownlow, Passion for Anonymity, 351, 354.

PCAM, Report, 22, 24-25; Calabresi and Yoo, Unitary Executive, 294-295.

PCAM, Report, 31.

PCAM, Report, 32.

PCAM, Report, 36, 33.

PCAM, Report, 16. FDR and PCAM believed that BOB had not lived up to its potential for focusing on organization, stemming in part from Charles Dawes’s decision to make BOB itself a model for efficient spending by keeping a small staff. Brownlow, Passion for Anonymity, 338.
William Willoughby, as the first chair of the then-Institute for Government Research, had advocated for Congress to place the president more firmly at the head of the administration as part of budget reform. However, he did not base this off a unitary claim from Article II. Rather, he had argued that it was Congress’s decision to make and would mark a new political development. William Franklin Willoughby, *The Problem of a National Budget* (New York: D. Appleton, 1918); Institute for Government Research, *A National Budget System: The Most Important of All Governmental Reconstruction Measures* (Washington, D.C.: Institute for Government Research, 1919).

Meriam also noted that opinion was “sharply divided” on whether executive representation was the savior of democratic government against the potential for autocracy or whether it itself was the seed of tyranny.” Meriam, “Part I: An Analysis of the Problem,” 19.


Meriam, “Part I: An Analysis of the Problem,” 117-118. However, he did note that the president could not quite literally claim to represent the whole country because of serving as a party leader.

Meriam, “Part I: An Analysis of the Problem,” 120.


Skowronek, “Franklin Roosevelt and the Modern Presidency.” In announcing his attempt at judicial reorganization, FDR displayed “evident relish and delight.” “Roosevelt Puts on Broad Smile for Court News,” *Chicago Daily Tribune*, February 6, 1937, 8. Opponents, including Herbert Hoover, denounced the proposal as a scheme “for packing the Supreme Court to get through New Deal measures.” “Aim to Pack Court, Declares Hoover,” *New York Times*, February 6, 1937, 1, 9. More interestingly, the issue of presidential representation was debated in Congress in terms of the judicial reorganization proposal. Supporting the president, Representative Byron Berry Harlan (D-OH) argued, “The President represents the people… He was given a mandate by the Congress to carry out the purpose of the New Deal.” *Congressional Record*, 75th Congress, 1st Session (February 11, 1937), 1150.

Defending congressional representation and judicial independence, Representative Charles Aubrey Eaton (R-NJ) urged his fellow congressmen to remember their responsibilities: “They say the President represents the whole country. Well, so do you.” *Congressional Record*, 75th Congress, 1st Session (April 9, 1937), 3338. The Record states that Eaton’s speech to the House was followed by “long, continued applause.”


Turner Catledge, “Roosevelt Faces an Economy Bloc,” *New York Times*, January 2, 1937, 4; Louis M. Lyons, “Streamlining the Government: VI – Efficiency vs Economy. Senator Byrd’s Criticism of the President’s Plan of Reorganization,” *Daily Boston Globe*, February 6, 1937, 14. FDR was acutely aware of the issue of management versus economy. In a November 1937 meeting with Luther Gulick, FDR reportedly said, “We have to get over the notion that the purpose of reorganization is economy. I had that out with Al Smith in New York. I pleaded with him not to go before the people with the pledge of economy. But he did, and his first budget after reorganization was...
way up over the previous budget, though there was some saving in administrative salaries. The reason for reorganization is good management.” Quoted in Brownlow, Passion for Anonymity, 382.


92 One reporter noted the challenge in Congress, “where, especially among the older members, each bureau and each interest has its circle of friends.” Turner Catledge, “Roosevelt Meets Congress Leaders on Reorganization,” New York Times, January 11, 1937, 1, 9. Another journalist noted that the proposal was “for the one purpose of giving the President a better chance to govern” since “the Presidency has not kept up the pace of modern life.” Louis M. Lyons, “Streamlining the Government: I – To Give the President a Chance to Work,” Daily Boston Globe, February 1, 1937, 14. A political scientist echoed the point. Congress was “dependent upon the presidency for leadership” and “concrete proposals” because “its members are representatives of sections with differing interests and points of view.” Thus, institutionalizing presidential representation was necessary: “The point is that we have leadership by presidents at times, but the presidency is not yet an institution… If the presidency is to be adequate today, it must be institutionalized.” George A. Graham, “Reorganization – A Question of Executive Institutions,” American Political Science Review 32, no. 4 (August 1938): 709-710.

93 Polenberg, Reorganizing Roosevelt’s Government, 47-50, 55, 62, 78.

94 Reorganization of the Executive Departments, Hearings before the Joint Committee, 131.

95 Reorganization of the Executive Departments, Hearings before the Joint Committee, 12.


97 Gifford replied that Merriam’s answer “seems to show that if you had the assignment from the Congress that perhaps you would have been more careful that we did not lose our powers.” Reorganization of the Executive Departments, Hearings before the Joint Committee, 135.

98 Reorganization of the Executive Branch, Hearings before the Joint Committee, 8, 11.


100 In fact, the audit was clearly viewed as a check on the presidency when it was created in the 1921 law.

101 Reorganization of the Executive Branch, Hearings before the Joint Committee, 374.

102 Reorganization of the Executive Branch, Hearings before the Joint Committee, 14.

103 Reorganization of the Executive Branch, Hearings before the Joint Committee, 52, 54.

104 Reorganization of the Executive Branch, Hearings before the Joint Committee, 85. Arthur Eugene Buck, who had worked with Frederick Cleveland in advocacy of an executive budget previously, echoed Gulick’s recommendation for giving the president more authority in auditing. Reorganization of the Executive Branch, Hearings before the Joint Committee, Charts on proposed versus present controls of expenditures between 196-197, 219-220.

105 Reorganization of the Executive Branch, Hearings before the Joint Committee, 295.

106 Reorganization of the Executive Branch, Hearings before the Joint Committee, 14.

107 Reorganization of the Executive Branch, Hearings before the Joint Committee, 211.

108 Reorganization of the Executive Branch, Hearings before the Joint Committee, 253-254.

109 Reorganization of the Executive Branch, Hearings before the Joint Committee, 283, 277, 284.

110 Reorganization of the Executive Branch, Hearings before the Joint Committee, 347-348. It is worth noting again that Willoughby did think the president should be made the real head of administration, but he viewed this as Congress’s choice, not a constitutional inevitability.

111 Congressmen were often devoted to particular bureaus that they had respective interests in, and chiefs and staff in bureaus viewed themselves as having greater tenure and investment in their agencies than presidents and cabinet members. Polenberg, Reorganizing Roosevelt’s Government, 44-46, 91-96. For a detailed explanation of one such battle over the Forest Service, see ch. 5.

112 Reorganization of the Executive Branch, Hearings before the Joint Committee, 140.

113 Reorganization of the Executive Branch, Hearings before the Joint Committee, 89.

114 Reorganization of the Executive Branch, Hearings before the Joint Committee, 91.
Brownlow argued against a “time limit” because reorganization would be a “continuing process.” Criticizing any time limit on the reorganization authority, Brownlow said, “If the Archangel Michael could come down and arrange it perfectly by the 1st day of March 1937 by the 1st day of March 1938 you would need another Archangel to come down and adjudge it.” Additionally, he posited that Congress, through the budget and auditing processes, would have enough power to “check the Executive on those occasions” without needing a legislative veto. The president would need a majority vote each year in the budget procedure, giving Congress “adequate control” unless the president was willing “to veto an entire appropriation bill.” Reorganization of the Executive Branch, Hearings before the Joint Committee, 173.

Lewis Meriam wanted to see “the ambiguity” of BOB’s location “removed and have it definitely recognized that it is directly under the President and that it is his agency for managerial control.” When Senator Byrd pointed out that Meriam and PCAM were “in substantial agreement on that proposition,” Meriam replied affirmatively, saying, “We would prefer to see the Budget Bureau entirely independent of any Cabinet officer who is responsible for large expenditures within his own establishment.” Reorganization of the Executive Branch, Hearings before the Joint Committee, 278, 283.

Byrd: “Let us get this clear. The President can make an order today and it will not become operative until September or October; he can write another order tomorrow on the same agency and it would become operative on October 5, another one on October 6, another one on October 7, and another one on October 8, indefinitely.” Reorganization of the Government Agencies, Hearings before the Select Committee, 56. Byrd’s concern was that the president could use an agenda setting power continually to overwhelm Congress.

Reorganization of the Government Agencies, Hearings before the Select Committee, 56-57.

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Reorganization of the Executive Departments, Hearings before the Joint Committee, 133-136.

Reorganization of the Government Agencies, Hearings before the Select Committee, 21-22.

In Louis Brownlow’s words, “This one was a tornado.” Brownlow, Passion for Anonymity, 400.

Brownlow, Passion for Anonymity, 403; Polenberg, Reorganizing Roosevelt’s Government, 129-133, 138-143.

The bill suffered a notable defection from Senator Robert Wagner (D-NY), who went against it because he wanted to keep the bipartisan Civil Service Commission and believed the effective two-thirds vote threshold to overturn presidential reorganization plans was too high.

Adolf Hitler took over Austria in March 1938. In the same month, a Gallup poll showed public opposition to the bill: 20% in favor, 35% opposed, and 45% undecided. In July 1938, Fortune found 22.3% for, 38.3% opposed, and 39.4% undecided. Polenberg, Reorganizing Roosevelt’s Government, 147-149. Representative Bruce Barton (R-NY) claimed to have received 3000 letters opposing the bill and only 3 in support of it. Congressional Record, 75th Congress, 3rd Session (April 4, 1938), 4657.

FDR had quickly made it clear he planned to try again. Turner Catledge, “President Insists on Reorganization,” Arthur Krock, “Executive’s Prestige is Shaken by Revolt within His Own Party,” New York Times, April 13, 1938, 290-291.

For example, Representative Clifton Alexander Woodrum (D-VA) did not oppose the presidential reorganization power, which he had supported in 1932. Rather, he was against new cabinet positions. Congressional Record, 75th Congress, 3rd Session (April 8, 1938), 5121; Polenberg, Reorganizing Roosevelt’s Government, 181. As Brownlow later wrote, “The death of the proposed reorganizations… turned out to be not so final as a great many persons thought.” Brownlow, Passion for Anonymity, 413. In November 1938, Democrats lost 72 House seats and 7 Senate seats, but maintained control of the House and Senate.

Polenberg, Reorganizing Roosevelt’s Government, 185. One report summed up the qualifications: “The term ‘all executive agencies’ is considerably qualified in the present bill, for the President is not permitted to establish any new executive department or abolish any existing one, or to transfer, consolidate or abolish such well-known agencies as the FTC, ICC, NLRB, SEC, Civil Service Commission, Coast Guard, Army Engineer Corps, the General Accounting Office and several others.” “Executive Reorganization,” New York Times, March 26, 1939, 62.

On September 17, 1938, FDR addressed the nation via radio for Constitution Day, attempting to reframe how Americans viewed reorganization from a constitutional perspective. He explained that the Constitution had only “presented the outline of a form of government.” To “become a workable instrument,” it required great men who sought “to make the Constitution workable in the face of the new problems and conditions that have faced the American Nation from year to year.” FDR also spoke about his great-great-grandfather Isaac Roosevelt, whose vote in favor of constitutional ratification was “a family tradition of which I am proud.” Franklin D. Roosevelt, “Radio Address on Constitution Day, Washington, D.C.,” September 17, 1938, The American Presidency Project, http://www.presidency.ucsb.edu/ws/index.php?id=15538.


Brownlow, Passion for Anonymity, 413-414.

Dearborn, “The ‘Proper Organs’ for Presidential Representation.”

Congressional Record, 76th Congress, 1st Session (March 7, 1939), 2396.

Congressional Record, 76th Congress, 1st Session (March 7, 1939), 2403. Representative James Wheaton Mott (R-OR) also reminded his colleagues that FDR’s previous attempt to place the independent commissions into regular departments was a reason for distrust: the “real object” of the previous reorganization attempt had been “to enable
the President to gain control” of the commissions, concentrating “more governmental authority in the hands of the Chief Executive.” Congressional Record, 76th Congress, 1st Session (March 7, 1939), 2400.

Appendix to the Congressional Record, 76th Congress, 1st Session (February 27, 1939), 708. This belief would also make an appearance in one of Jackson’s most famous legal opinions: “Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations.” Youngstown Sheet & Tube Co. v. Sawyer 343 U.S. 579 (1952), 654.

Congressional Record, 76th Congress, 1st Session (March 7, 1939), 2395.

One exception was the success of Senator Byrd’s amendment to declare economy as a purpose of the bill, but nothing was functionally changed by that declaration. Polenberg, Reorganizing Roosevelt’s Government, 186-187. A more substantial attempt at forcing economy on the president came from Representative Taber, who submitted an amendment requiring the president to “tell the Congress what savings he figures will be made as the result of the proposed reorganization.” That amendment was rejected. Congressional Record, 76th Congress, 1st Session (March 8, 1939), 2497-2498.

Congressional Record, 76th Congress, 1st Session (March 8, 1939), 2500.

Congressional Record, 76th Congress, 1st Session (March 8, 1939), 2501.

Polenberg, Reorganizing Roosevelt’s Government, 186.

Congressional Record, 76th Congress, 1st Session (March 8, 1939), 2500.

Congressional Record, 76th Congress, 1st Session (March 8, 1939), 2504.

In Sidney Milkis’s view, this amendment demonstrated that the bill was “not any empty shell” of the original PCAM plan. Milkis, President and the Parties, 126.


On the one hand, as Stephen Skowronek argues, the weakening of the reorganization proposal, combined with the court packing and party purge efforts, had marked the failure of FDR’s attempt to holistically overhaul every aspect of the federal government. While the bill “recognized the president as first among equals in tackling the problems of administrative management,” it also preserved the independence of other political actors to prevent the president from entirely controlling the executive apparatus. Skowronek, “Franklin Roosevelt and the Modern Presidency,” 351, 346-356. However, the achievement of any reorganization authority for the president at all was in itself significant, marking a further turn to a presidency-centered government. As Sidney Milkis surmises, FDR had been “confirmed” in his belief “that the concept of an energetic and independent presidency as the fulcrum of progressive change was more easily cast in the American political tradition” than other institutional alternatives. Milkis, President and the Parties, 127. Peri Arnold also notes that it had been “a success of some measure” because it allowed for “reforms which were aimed at supporting the president and extending his authority over administration.” Arnold, Making the Managerial Presidency, 115.

Congress had also recognized this in effect with the passage of the Budget and Accounting Act of 1921. Dearborn, “The ‘Proper Organs’ for Presidential Representation.”

Reorganization Plan I was created in April and was upheld on a vote in the House on May 3 by more than a 2 to 1 margin. In addition to creating an Executive Office of the President, this plan would establish a Federal Security Agency, a Federal Works Agency, and a Federal Loan Agency, with relevant bureaus placed under their supervision. Passing Congress on May 9, Reorganization Plan II would then set up a Federal Security Agency, a Federal Loan Agency, and a Public Works Agency. Reorganization Plan No. 1 and No. 2, Public Resolution No. 20, 76th Congress, 1288-1298; Brownlow, Passion for Anonymity, 414; Polenberg, Reorganizing Roosevelt’s Government, 187-188.


Franklin D. Roosevelt, “Executive Order 8248 Reorganizing the Executive Office of the President,” The American Presidency Project, September 8, 1939, http://www.presidency.ucsb.edu/ws/index.php?pid=15808. The White House Office was meant to “serve the President in an intimate capacity in the performance of the many detailed activities” he personally was in charge of. The administrative assistants would not have “authority over anyone in any department or agency,” but rather would help the president “get information and to condense and summarize it for his use.” The order also created a Liaison Office for Personnel Management and an Office of Government Reports. Furthermore, though FDR had been unable to replace the three-person Civil Service Commission with a single administrator, he established a liaison from the White House to the commission.
Brownlow, *Passion for Anonymity*, 421. Later, President Dwight Eisenhower brought the Civil Service Commission chairman himself into the White House as liaison.


175 Luther Gulick, “Conclusion,” *Public Administration Review* 1, no. 2 (Winter 1941): 139. Brownlow also noted the significance of the fact that Congress had thus essentially agreed to the creation of EOP: “this new institution was created, not by the President alone, but with the concurrence, and presumably the blessing, of the Congress.” Brownlow, “General View,” 101.

176 In the summer of 1939, BOB was physically moved from the Treasury Department to EOP in the State, War and Navy Building. As Brownlow reported later, the Treasury Secretary “was never quite able to forgive me or [BOB Director] Harold Smith” for moving BOB. Brownlow, *Passion for Anonymity*, 417, 419. As one scholar would point out, PCAM had specifically rejected the British solution of making the Treasury Department the key tool for improving administrative management. “With the tradition of an especially strong Congressional interest in the Treasury, the committee would naturally hesitate to propose that the Treasury be the instrument through which to strengthen the President’s managerial leadership.” George A. Graham, “The Presidency and the Executive Office of the President,” *Journal of Politics* 12, no. 4 (November 1950): 600.

177 Dearborn, “The ‘Proper Organs’ for Presidential Representation.”


181 The NRB was to focus on “problems pertaining to national resources” and engage in long-term planning that could be made into recommendations to the president and then to Congress. In a preview of the function of the later Council of Economic Advisers, the NRPB was also to keep the president apprised of economic trends and make recommendations in response. Roosevelt, “Executive Order 8248.” Charles Merriam wrote that the NRPB would give the president the “ways and means of taking such an over-all view of the best and highest use of the national assets.” Charles E. Merriam, “The National Resources Planning Board,” *Public Administration Review* 1, no. 2 (Winter 1941): 116. As one scholar later noted, “Significant parts of the Board’s functions have been continued, however, within the Executive Office.” Philip W. Warken, “A History of the National Resources Planning Board,” Ph.D. dissertation, The Ohio State University, 1969, 246.


185 Brownlow – the defender of originalism when discussing Article II – ridiculed the idea of strictly sticking to the formal separation of powers: “Our government works… because none of its component parts ever carry to a conclusion – or rather, reduce to an absurdity – their constitutional powers in any of the ways that constitutional lawyers so often discuss hypothetically.” Brownlow, “General View,” 104.

Clinton Rossiter, *The American Presidency* (New York: Harcourt, Brace, 1956), 104. Rossiter also wrote that EOP had “decisively helped to save the Presidency from paralysis and the Constitution from oblivion.” Clinton L. Rossiter, “The Constitutional Significance of the Executive Office of the President,” *American Political Science Review* 43, no. 6 (December 1949): 1217. Similarly, Gulick attributed the importance of the creation of EOP not just to representation, fashioning the presidency to “what public expectation demands,” but also as a means to “restore” and “preserve” the Constitution. Gulick, “Conclusion,” 140.

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An Act to prevent disruption of the structure and functioning of the Government by ratifying all reorganization plans as a matter of law (P.L. 98-532, 98 Stat. 2705, October 19, 1984); Hogue, “Presidential Reorganization Authority,” 31. As Justice White fretfully observed, the Supreme Court had struck down “in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history.” *INS v. Chadha*, 462 U.S. 919 (1983), 1002.
