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Contesting the Reach of the Rights Revolution: The Reagan Administration and the Unitary Executive

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Research Article

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Abstract

Today, two touchstones of the conservative legal movement are support for the unitary executive theory and skepticism of affirmative action policies. This article reveals a connection between these two positions, demonstrating how policy disputes over civil rights contributed to conservative efforts to increase and legitimize presidential control over the bureaucracy through the controversial claim that the president possesses the whole executive power under Article II. Specifically, I examine two intertwined controversies from 1983, which pit the Reagan White House and Department of Justice (DOJ) against the Equal Employment Opportunity Commission (EEOC) and U.S. Commission on Civil Rights (USCCR), two agencies that Reagan officials viewed as obstacles to pursuing its preferred civil rights agenda. Conflicts between the DOJ and EEOC led the administration to deploy the unitary executive theory to help centralize control over its civil rights litigation strategy, while clashes with the USCCR spurred the administration to assert the theory's tenets amid battles over that agency's reauthorization. While these episodes yielded mixed political and legal outcomes, the early articulations of the unitary executive theory that emerged helped to elaborate and advance a controversial constitutional doctrine about presidential power that has become increasingly consequential over time.

> "The most tangible manifestation of the Government's commitment to the realization of constitutional and statutory promises of equal opportunity is the way the executive branch carries out the Federal civil rights enforcement effort."
>
> –U.S. Commission on Civil Rights (1981)[1]

> "[A]n executive commission ought to reflect predominantly the views of the executive, right?"
>
> –William F. Buckley, Jr. (1983)[2]

1. Introduction

Among the vast transformations that the Rights Revolution effected in American politics, law, and society, one that deserves more attention is its impact on the trajectory of the relationship between presidents and the bureaucracy. The landmark laws, court decisions, and executive actions of the "Second Reconstruction" put federal power to work in the cause of forbidding discrimination based on race, color, religion, sex, or national origin.[3] They led to the creation of a "civil rights state," with commitments to civil rights embedded in agencies whose structural relationship to the president varied.[4]

This article reconsiders how the Rights Revolution and its aftermath affected presidential power over the administrative state. I argue that the development of civil rights institutions ultimately incentivized presidents to try to exercise more direct control over the executive branch. The establishment of this "civil rights bureaucracy"—compromising agencies such as the U.S.

[1] *Civil Rights: A National Interest, Not a Special Interest*, A Statement of the United States Commission on Civil Rights, June 25, 1981, 46.

[2] Southern Educational Communications Association, "Do Civil Rights Equal Affirmative Action?," *Firing Line* Transcript, July 20, 1983, 4, Folder 10, Box 8, John H. Bunzel Papers, Herbert Hoover Institution Library and Archives, Stanford, CA.

[3] Richard M. Valelly, *The Two Reconstructions: The Struggle for Black Enfranchisement* (Chicago: University of Chicago Press, 2004), 1.

[4] Desmond King and Robert C. Lieberman, "The Civil Rights State: How the American State Develops Itself," in *The Many Hands of the State: Theorizing Political Authority and Social Control*, eds. Kimberly J. Morgan and Anna Shola Orloff (New York: Cambridge University Press, 2017), 178–202; R. Shep Melnik, *The Crucible of Desegregation: The Uncertain Search for Educational Equality* (Chicago: University of Chicago Press, 2023), ix.

Commission on Civil Rights (USCCR), Civil Rights Division in the Department of Justice (DOJ), Equal Employment Opportunity Commission (EEOC), Office for Civil Rights (OCR) in the Department of Health, Education, and Welfare (HEW, now the Department of Education and the Department of Health and Human Services), Office of Federal Contract Compliance Programs (OFCCP) in the Department of Labor, and Office of Fair Housing and Equal Opportunity in the Department of Housing and Urban Development—meant that the battle over determining the scope of rights of millions of Americans increasingly shifted from trying to enact new statutes to trying to control the interpretation and implementation of those statutes.[5] Presidents would seek to determine the reach of the Rights Revolution through their attempts to exercise control over the civil rights bureaucracy, while officials from those agencies and their allies in Congress and in the civil rights community kept careful watch to spotlight what they viewed as deviations from the missions of those agencies. Policy conflicts between civil rights agency bureaucrats and presidents also raised structural questions about the relationship between presidents and those agencies, and in the politics of sorting out those relationships, stronger claims to and ideas about presidential power over the executive branch emerged.[6] As this article shows, one consequential idea that was deployed in these conflicts was the unitary executive theory.

To demonstrate this, I examine two critical, intertwined civil rights controversies from the Reagan administration, which came to power looking to achieve a "reconstruction" of the federal government's policy commitments.[7] In 1983, the administration struggled to gain control over two civil rights agencies, the EEOC—created by the Civil Rights Act of 1964 and strengthened by the Equal Employment Opportunity Act of 1972 to enforce federal laws against employment discrimination—and the USCCR—established by the Civil Rights Act of 1957 (and subsequently reauthorized several times) to investigate and report on the status of civil rights policy and enforcement. Top Reagan officials at the White House and the DOJ came into open conflict with these agencies over the scope of affirmative action and, in the case of the USCCR, over busing as well. The Reagan administration wanted "colorblind" policies, but they argued that those agencies supported "quotas." For their part, officials at the agencies, supported by allies in the civil rights community, viewed themselves as carrying out longstanding responsibilities, particularly as determined by the legislative branch through statutes and the judiciary through relevant court cases.[8] As a result of these divergent perspectives, disputes over the implementation of rights-related policies became clashes over institutional structure.

Indeed, the precise nature of the president's relationship with each agency was questioned in each struggle. The EEOC was composed of five commissioners, with no more than three from one political party, who were appointed for terms of 5 years with Senate consent. The statute did not include language about explicit for-cause removal protections; its provision for continuation of service stated that "all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted." The president also appointed the EEOC general counsel to a 4-year term, subject to Senate consent.[9] The question over what kind of commission the USCCR was raised as well. Prior to its reauthorization in 1983, the USCCR was composed of six commissioners, with no more than three from one political party, who were appointed with Senate consent. The president also appointed the USCCR staff director in consultation with the commissioners and subject to Senate consent. The issues of both the length of term and potential removal of the commissioners by the president were not explicitly addressed in statute.[10]

In the 1983 conflicts, defenders of these agencies portrayed them as independent of the president, while the White House and DOJ sought to exercise more direct control over these agencies' policies and personnel. The administration sought to gain the upper hand in these conflicts by articulating principles of the unitary executive theory. First, in the case of the EEOC, the DOJ's Office of Legal Counsel (OLC) issued an opinion that questioned the extent of the EEOC's independent litigating authority, specifically over whether it could file amicus briefs in civil rights-related state or local government employment cases at odds with the position of the White House and DOJ. The OLC argued that allowing divergent legal opinions in the executive branch to be presented in court would infringe on the president's control of the executive power.[11] Thus, this case shows that the Reagan administration understood how it needed to be able to speak with "one voice" in court to even begin effectively advocating for its preferred vision of civil rights policies in the judiciary. As the former Reagan DOJ official Terry Eastland later wrote about the episode, "A presidency willing to litigate an agenda must be united in its purposes."[12]

[5]Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960-1972* (New York: Oxford University Press, 1990), 363; Christopher W. Schmidt, *Civil Rights in America: A History* (New York: Cambridge University Press, 2020), 103–105.

[6]For another perspective on the connections between ideas about presidential power and American political development, see John A. Dearborn, *Power Shifts: Congress and Presidential Representation* (Chicago: University of Chicago Press, 2021).

[7]Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Cambridge, MA: Belknap Press of Harvard University Press, 1997), ch. 8; Stephen Skowronek, *Presidential Leadership in Political Time: Reprise and Reappraisal*, 3rd ed. (Lawrence, KS: University Press of Kansas, 2020), ch. 3. See also Desmond S. King and Rogers M. Smith, *Still a House Divided: Race and Politics in Obama's America* (Princeton, NJ: Princeton University Press, 2011), ch. 4.

[8]Jocelyn C. Frye, Robert S. Gerber, Robert H. Pees, and Arthur W. Richardson, "The Rise and Fall of the United States Commission on Civil Rights," *Harvard Civil Rights-Civil Liberties Law Review* 22, no. 2 (Spring 1987): 449–506; Raymond Wolters, *Right Turn: William Bradford Reynolds, the Reagan Administration, and Black Civil Rights* (New York: Routledge, 1996), ch. 10; Terry H. Anderson, *The Pursuit of Fairness: A History of Affirmative Action* (New York: Oxford University Press, 2004), 176–179; Emily Zuckerman, "EEOC Politics and Limits on Reagan's Civil Rights Legacy," in *Freedom Rights: New Perspectives on the Civil Rights Movement*, eds. Danielle L. McGuire and John Dittmer (Lexington, KY: University Press of Kentucky, 2011), 247–266; Schmidt, *Civil Rights in America*, 106–109.

[9]Civil Rights Act of 1964 (PL 88-352, 78 Stat. 241, July 2, 1964); Equal Employment Opportunity Act of 1972 (PL 92-261, 86 Stat. 103, 109, March 24, 1972). See also Jennifer L. Selin and David E. Lewis, *Sourcebook of United States Executive Agencies*, 2nd ed., Report to the Administrative Conference of the United States (Washington, DC: Government Printing Office, 2018), 42, 46, 48, 97. The current EEOC statute does not explicitly require staggered terms, though its previous version had.

[10]Civil Rights Act of 1957 (PL 85-315, 71 Stat. 634, September 9, 1957).

[11]On the significance of the OLC, see Daphna Renan, "The Law Presidents Make," *Virginia Law Review* 103, no. 5 (September 2017): 805–904; Amanda Hollis-Brusky and Isaac Cui, "Beyond the Torture Memos: How the Office of Legal Counsel Matters for Executive Branch Scholarship," *Presidential Studies Quarterly* 51, no. 4 (December 2021): 904–928; Reilly Steel, "Political Threads in Legal Tapestry: A Computational Analysis of Executive Branch Legal Interpretation, 1934-2022," *University of Pennsylvania Journal of Constitutional Law*, forthcoming.

[12]Terry Eastland, *Energy in the Executive: The Case for the Strong Presidency* (New York: Free Press, 1992), 173.

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Second, in the case of the USCCR, the administration sought to fire commissioners it viewed as hostile to its agenda. When this produced controversy in Congress amidst debates over the commission's reauthorization, the administration agreed to a compromise. Congressional leaders would select half of the commissioners, and the new appointees would have for-cause removal protections. But the result was that the USCCR was reconstituted with a majority of Reagan-preferred appointees. Still, Reagan issued a signing statement asserting that the law's provisions infringed on the president's constitutional control of the executive branch.[13] As this case demonstrates, Reagan officials again objected to an agency undermining the administration's ability to articulate its civil rights agenda with one voice, and so they sought to take more direct control of the commission.

The political and legal outcomes in these two cases were mixed, but these struggles led the Reagan administration to articulate key tenets of the emerging unitary executive theory. These episodes suggest that the nascent unitary executive theory developed, in part, through its deployment in the Reagan administration's efforts to undermine the independence of rights-focused agencies. They left a deep influence on key political actors who became more influential in American politics in subsequent decades. And they helped to advance a controversial constitutional doctrine that has become increasingly consequential over time, one that has been used for subsequent assertions of presidential power over both rights-related and other agencies.[14]

1.1. Executive power and the civil rights bureaucracy

This article offers contributions to two recent lines of inquiry in presidency and American political development scholarship. First, it sheds light on key formative moments in the development of the unitary executive theory, showing how civil rights was a key policy area motivating more expansive and formalistic claims to presidential power. Promulgated by the conservative legal movement, the unitary executive theory asserts that the president possesses the entirety of "the executive power" under Article II of the Constitution. The key to its operationalization is the removal power. A substantial body of work debates the historical accuracy and legitimacy of theory itself.[15]

But scholars have also considered the circumstances influencing the development and timing of unitary claims. The expansion of the federal bureaucracy in the 1960s and 70s, Stephen Skowronek, Desmond King, and I have noted, incentivized presidents to act "independently, through administrative direction."[16] Correspondingly, as William Howell and Terry Moe emphasize, the skepticism of Republican presidents toward particular administrative agencies led them to turn to the theory in pursuit of retrenchment and deregulation.[17] The Reagan administration elaborated tenets of the theory on multiple fronts. In 1981, Executive Order 12291 asserted presidential control over agency rulemaking through regulatory review by the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs. As Ashraf Ahmed, Lev Menand, and Noah Rosenblum show, the administration justified that action by referring to the president's authority under Article II of the Constitution.[18] Quoting from the removal power case *Myers v. United States* (1926), the OLC argued that regulatory review would help the president ensure "unitary and uniform execution of the laws."[19] Another front was the administration's efforts to invalidate Congress's use of the legislative veto. The OLC viewed legislative vetoes as violating the "constitutional principle of the separation of powers," and the Reagan DOJ achieved a significant victory with the Supreme Court finding such provisions unconstitutional in *INS v. Chadha* (1983).[20]

This article addresses a further crucial front in the emergence of the unitary executive theory—battles over civil rights policy. Given the conservative movements "particular hostility" to "the commitments and responsibilities assumed by the federal government during the 'social revolution,'" the exercise of presidential power over the bureaucracy was more attractive.[21] Here, I show the extent to which the emergence of the unitary executive theory was connected to the aftermath of the Rights Revolution. In their efforts to clamp down on what they viewed as hostile bureaucrats at civil rights agencies, the Reagan White House and the DOJ asserted and elaborated on the tenets of the theory.

Some of the connections between the cases considered here and the unitary executive theory have been highlighted before. For

[13]On the significance of Reagan's use of signing statements, see Steven G. Calabresi and Daniel Lev, "The Legal Significance of Presidential Signing Statements," *The Forum* 4, no. 2 (2006), article 8.

[14]For a description of how disputes over civil rights and Reconstruction were also connected to disputes over the president's removal power in an earlier era, see Nikolas Bowie and Daphna Renan, "The Separation-of-Powers Counterrevolution," *Yale Law Journal* 131, no. 7 (May 2022): 2020–2386.

[15]For arguments supporting the theory, see, for example, Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (New Haven, CT: Yale University Press, 2008); Saikrishna Bangalore Prakash, *Imperial from the Beginning: The Constitution of the Original Executive* (New Haven, CT: Yale University Press, 2015). For criticism of the theory, see, for example, Jeffrey Crouch, Mark J. Rozell, and Mitchel A. Sollenberger, *The Unitary Executive Theory: A Danger to Constitutional Government* (Lawrence, KS: University Press of Kansas, 2020); Blake Emerson, "The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller," *Yale Journal on Regulation* 38, no. 1 (2021): 90–174. Christine Kexel Chabot, "Interring the Unitary Executive," *Notre Dame Law Review* 98, no. 1 (2022): 129–209; Jed H. Shugerman, "The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity," *University of Pennsylvania Law Review* 171, no. 3 (March 2023): 753–868; Andrea Scoseria Katz and Noah A. Rosenblum, "Becoming the Administrator-in-Chief: *Myers* and the Progressive Presidency," *Columbia Law Review* 123, no. 8 (December 2023): 2153–2248.

[16]Stephen Skowronek, John A. Dearborn, and Desmond King, *Phantoms of a Beleaguered Republic: The Deep State and the Unitary Executive*, exp. ed. (New York: Oxford University Press, 2022), 47. See also Stephen Skowronek, "The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive," *Harvard Law Review* 122, no. 8 (June 2009): 2070–2103.

[17]William G. Howell and Terry M. Moe, "The Strongman Presidency and the Two Logics of Presidential Power," *Presidential Studies Quarterly* 53, no. 2 (June 2023): 145–168; William G. Howell and Terry M. Moe, *Trajectory of Power: The Rise of the Strongman Presidency* (Princeton, NJ: Princeton University Press, forthcoming). See also Morton Rosenberg, "Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive," *George Washington Law Review* 57, no. 3 (January 1989): 627–703.

[18]Ashraf Ahmed, Lev Menand, and Noah A. Rosenblum, "The Making of Presidential Administration," *Harvard Law Review* 137, no. 8 (June 2024): 2131–2221, at 2153–2159. See also Peter M. Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy* (Chicago: University of Chicago Press, 2009), ch. 6.

[19]"Proposed Executive Order Entitled 'Federal Regulation,'" Opinion of the Office of Legal Counsel, U.S. Department of Justice, February 13, 1981, 62. On the significance of *Myers* to presidential power, see Bowie and Renan, "Separation-of-Powers Counterrevolution," 2072–2082; Katz and Rosenblum, "Becoming the Administrator-in-Chief."

[20]"The Legislative Veto and Congressional Review of Agency Rules," Opinion of the Office of Legal Counsel, U.S. Department of Justice, October 7, 1981, 297. See also Barbara Hinkson Craig, *Chadha: The Story of an Epic Constitutional Struggle* (Berkeley and Los Angeles, CA: University of California Press, 1988), ch. 6–7.

[21]Skowronek, Dearborn, and King, *Phantoms*, 34, 47–48.

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example, in her analysis of OLC opinions on the unitary executive theory from 1981 to 2000, Amanda Hollis-Brusky points to the 1983 opinion addressing the EEOC: "if one of the tenets of the Reagan Revolution in the law was to get courts and government agencies to stop 'twisting' the law to achieve racial and social justice, then one way to assure this was carried out was to curtail the litigating authority of agencies like the EEOC, whose primary mission it is to investigate and enforce antidiscrimination laws."[22] In work examining the extent to which an agency's structure matters to its practical independence, Neal Devins also analyzes the conflict between the EEOC and the DOJ over the *Williams v. City of New Orleans* affirmative action case. In his view, the conflict led to the EEOC being more widely recognized as part of the executive branch.[23] Finally, Steven Calabresi and Christopher Yoo describe Reagan asserting his removal power to replace members of the USCCR as an example of his determination to assert his control over the executive branch.[24]

This article adds to these accounts in several ways. It draws on extensive archival sources to track the sequence of events in each controversy, revealing how the Reagan White House and DOJ responded to bureaucratic resistance to the administration's policy goals with an articulation of a constitutional rationale for greater presidential control over the executive branch.[25] It also identifies how and why unitary claims were especially attractive to the Reagan administration in these conflicts. The EEOC conflict highlighted the importance of what Lauren Mattioli has termed the president's "judicial agenda."[26] Because litigation through the courts was a primary strategy for the Reagan administration to try to change civil rights policies in its preferred direction, the unitary theory was meant to ensure the administration presented a unified front in court. The USCCR struggle arose from the Reagan administration's weariness of consistent criticism from an agency it perceived to be within the executive branch. Ultimately, both cases showcased the administration's concern over its ability to speak with one voice on civil rights—both to the rest of the government and to the broader public.[27]

A second line of literature this article contributes to is the focus in American political development on connections between changes in rights and government structure. As Stephen Skowronek and Karen Orren explain, developments in rights—who is granted the rights of full citizenship in the political community—affect disputes over the government's structure—including the development of the administrative state.[28] Of course, the civil rights movement itself—and the transformations it achieved—were a response to the use of state and federal government power to impose segregation and uphold systems of discrimination.[29] Those efforts to dismantle discrimination, R. Shep Melnik stresses, disrupted all sorts of institutional relationships, affecting "our understanding of federalism, the proper role of the courts, the powers of Congress, and the authority of administrative agencies."[30] Indeed, as Charles Epp argues, "governmental rights-enforcement agencies" were a vital part of "the support structure for legal mobilization" through the courts.[31] This growth of the civil rights bureaucracy also raised the stakes of controlling it. "The legislative creation of civil rights and the expansion of national administrative power in the mid-twentieth century," Nicholas Jacobs, Desmond King, and Sidney Milkis point out, "created a new arena for contesting and deploying State power."[32]

Important connections between key civil rights policies and issues of administrative power and structure have also been made by scholars focusing on specific agencies like the EEOC. For example, as Sean Farhang and Paul Frymer each discuss, skepticism of bureaucratic power influenced the design of the Civil Rights Act of 1964, weakening the initial potential authority of the new EEOC and leading to a focus on private litigation instead of bureaucratic regulation for the implementation of Title VII. The subsequent Equal Employment Opportunity Act of 1972, which strengthened the agency, built on that emphasis of enforcement through the courts.[33] As Robert Lieberman explains, the EEOC figured out many strategies to wield influence, including working with groups like the National Association for the Advancement of Colored

[22]Amanda Hollis-Brusky, "Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981-2000," *Denver Law Review* 89, no. 1 (2011): 197–244, at 205. On the Reagan administration and conservative legal movement more generally, see also Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton, NJ: Princeton University Press, 2008); Amanda Hollis-Brusky, *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution* (New York: Oxford University Press, 2015); Jefferson Decker, *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government* (New York: Oxford University Press, 2016).

[23]Neal Devins, "Political Will and the Unitary Executive: What Makes an Independent Agency Independent?" *Cardozo Law Review* 15, no. 1–2 (October 1993): 273–312. The DOJ-EEOC conflict was one example of how "the Reagan administration took steps to bring independent agencies under the wing of the White House." Neal Devins and David E. Lewis, "The Independent Agency Myth," *Cornell Law Review* 108, no. 6 (September 2023): 1305–1374, at 1350–1351.

[24]Calabresi and Yoo, *Unitary Executive*, 375–376.

[25]On bureaucratic constraints on presidential power, see, for example, Andrew Rudalevige, *By Executive Order: Bureaucratic Management and the Limits of Presidential Power* (Princeton, NJ: Princeton University Press, 2021); Skowronek, Dearborn, and King, *Phantoms*, ch. 3; Carlo Prato and Ian R. Turner, "Institutional Foundations of the Power to Persuade," *American Journal of Political Science*, forthcoming.

[26]Lauren Mattioli, *U.S. Attorneys and the President's Judicial Agenda*, Dissertation, Princeton University (January 2020), ch. 3. See also Christina M. Kinane and Lauren Mattioli, "Serving the Law or Playing Politics? The Strategic Use of U.S. Attorney Appointments," *Presidential Studies Quarterly* 52, no. 1 (March 2022): 107–139, at 109.

[27]On the connection between the unitary executive theory and the question of who speaks for the presidency, see Daphna Renan, "The President's Two Bodies," *Columbia Law Review* 120, no. 5 (June 2020): 1119–1214, at 1194–1195.

[28]Stephen Skowronek and Karen Orren, "The Adaptability Paradox: Constitutional Resilience and Principles of Good Government in Twenty-First-Century America," *Perspectives on Politics* 18, no. 2 (June 2020): 354–369, at 355. See also Stephen Skowronek, *The Adaptability Paradox: Political Inclusion and Constitutional Resilience* (Chicago: University of Chicago Press, forthcoming).

[29]Desmond King, *Separate and Unequal: African Americans and the US Federal Government*, rev. ed. (New York: Oxford University Press, 2007).

[30] R. Shep Melnik, "Courts and Agencies in the American Civil Rights State," in *The Politics of Major Policy Reform in Postwar America*, eds. Jeffrey A. Jenkins and Sidney M. Milkis (New York: Cambridge University Press, 2014), 77–102., at 77. On the transformations of the civil rights movement, see also, for example, Graham, *Civil Rights Era*; Bruce Ackerman, *We the People*, Vol. 3: *The Civil Rights Revolution* (Cambridge, MA: Belknap Press of Harvard University Press, 2014); Megan Ming Francis, *Civil Rights and the Making of the Modern American State* (New York: Cambridge University Press, 2014); Robert Mickey, *Paths Out of Dixie: The Democratization of Authoritarian Enclaves in America's Deep South, 1944-1972* (Princeton, NJ: Princeton University Press, 2015).

[31]Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998), 19.

[32]Nicholas F. Jacobs, Desmond King, and Sidney M., Milkis, "Building a Conservative State: Partisan Polarization and the Redeployment of Administrative Power," *Perspectives on Politics* 17, no. 2 (June 2019): 453–469, at 456.

[33]Sean Farhang, "The Political Development of Discrimination Litigation, 1963-1976," *Studies in American Political Development* 23, no. 1 (April 2009): 23–60; Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* (Princeton, NJ: Princeton University Press, 2010), ch. 4–5; Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* (Princeton, NJ: Princeton University Press, 2008), 39–42, 83–86.

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People (NAACP) and the Legal Defense Fund in developing affirmative action policies.[34]

What this article adds to these accounts is an in-depth look at one of the formative moments in which disputes over rights led to disputes over issues of government structure. Just as Calvin TerBeek demonstrates how constitutional "originalism" arose among political actors opposed to the *Brown v. Board of Education* (1954) decision, this article demonstrates that issues of race and rights were intertwined, in part, with the development of one of the core elements of originalism today—the unitary executive theory.[35]

1.2. Case selection and timing

This article focuses on the Reagan administration's conflicts with the EEOC and USCCR in 1983, but tensions between Republican presidents and the civil rights bureaucracy were not new by that time. In 1973, the assistant attorney general (AG) for the DOJ Civil Rights Division, J. Stanley Pottinger, had described the growing significance of how the laws were implemented: "Today, with the laws now on the books, the civil rights action is in the Executive Branch."[36] But this raised the stakes for presidents to influence the "action" of how the laws were to be implemented. For example, courting the South as part of the Republican coalition, the Nixon White House had significant disputes with the OCR in HEW over its aggressiveness in drawing up desegregation plans to implement court orders, as the administration came to staunchly oppose busing. These conflicts resulted in the forced resignation of that office's director, Leon Panetta.[37]

Yet despite these conflicts, conservatives viewed the Nixon and Gerald Ford administrations as not doing enough about quotas and busing. Crucially, they faulted them for not exercising effective control over the civil rights bureaucracy. In 1974, *National Review* senior editor Jeffrey Hart wrote that while "the federal bureaucracy" was "nominally part of the 'executive branch,'" it "actually operates with considerable autonomy." He complained that this meant "that no matter who the people actually *vote* for, they end up being governed by the same semi-permanent bureaucrats and quasi-autonomous agencies," including the "officials at HEW who write the guidelines on racial quotas." In response, Hart advised conservatives to embrace presidential power: "At the present juncture, as a matter of fact, the only way these agencies can be diverted, cut back, or eliminated is through the action of a powerful President who is willing virtually to go to war within his own executive branch in order to carry out his mandate."[38] Similar sentiments permeated articles in *Human Events*. Patrick Buchanan posited that "reverse discrimination can be halted by the President himself" through an executive order "replacing or amending" Democratic President Lyndon Johnson's Executive Order 11246 on affirmative action in federal contracting.[39] Arguing that there was "a New Majority in this country which seeks a reassertion of the pre-Great Society America" and which would "not celebrate forced busing" or "racial quotas for schools and businesses," Howard Phillips contended that "the New Majority must look to the President … for firm leadership."[40]

The Reagan administration would seek the sharper break on civil rights policy that conservatives had been looking for. Reagan's USCCR Transition Team reported that the commission's then-chairman, Arthur Flemming, believed "that the nation is operating under 'reasonably good' civil rights laws and 'reasonably good' court decisions," meaning the country was "in a period of 'implementation' in which the Commission's main function should be oversight of existing laws."[41] But the Reagan administration did not view the implementation of these laws as "reasonably good"; it instead claimed an electoral mandate to change course. The 1980 Republican Party Platform had assailed the bureaucracy on the issue of affirmative action—"equal opportunity should not be jeopardized by bureaucratic regulations and decisions which rely on quotas, ratios, and numerical requirements to exclude some individuals in favor of others"—and criticized busing—"we condemn the forced busing of school children to achieve arbitrary racial quotas."[42] Similarly, the Heritage Foundation's *Mandate for Leadership* report described a need to take on what it viewed as a hostile civil rights bureaucracy. The DOJ Civil Rights Division was said to be "one of the two most radicalized elements of the Justice Department," necessitating an assistant AG "who is willing to 'take the heat' for policies intended to reverse the use of discrimination to end discrimination."

[34]Robert C. Lieberman, *Shaping Race Policy: The United States in Comparative Perspective* (Princeton, NJ: Princeton University Press, 2005), 187–190. See also John David Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (Chicago: University of Chicago Press, 1996), ch. 5. On the broader and earlier origins of the movement seeking "fair employment practices," see, for example, Ruth P. Morgan, *The President and Civil Rights: Policy-Making by Executive Order* (New York: St. Martin's Press, 1970), ch. 3; Kenneth J. Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton, NJ: Princeton University Press, 2001), ch. 6; Anthony S. Chen, *The Fifth Freedom: Jobs, Politics, and Civil Rights in the United States, 1941-1972* (Princeton, NJ: Princeton University Press, 2009), 5; Sidney Milkis and Katherine Rader, "The March on Washington Movement, the Fair Employment Practices Committee, and the Long Quest for Racial Justice," *Studies in American Political Development* 38, no. 1 (April 2024): 16–35.

[35]Calvin TerBeek, "'Clocks Must Always Be Turned Back': *Brown v. Board of Education* and the Racial Origins of Constitutional Originalism," *American Political Science Review* 115, no. 3 (August 2021): 821–834. See also Ruth Bloch Rubin and Gregory Elinson, "Anatomy of Judicial Backlash: Southern Leaders, Massive Resistance, and the Supreme Court, 1954-1958," *Law & Social Inquiry* 43, no. 3 (Summer 2018): 944–980; Logan Sawyer III, "Originalism from the Soft Southern Strategy to the New Right: The Constitutional Politics of Sam Ervin Jr," *Journal of Policy History* 33, no. 1 (January 2021): 32–59. On the significance of the Constitution to conservative thought more generally, see Ken I. Kersch, *Conservatives and the Constitution: Imagining Constitutional Restoration in the Heyday of American Liberalism* (New York: Cambridge University Press, 2019).

[36]"Civil Rights: What's Happened Since the Sixties," Remarks by J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, before Commonwealth Club of California, San Francisco, CA, October 12, 1973, 14, Folder "6/74—'How the Civil Rights Movement got buried by Progress,' Barrister, June 1974," Box 117, J. Stanley Pottinger Papers, Gerald R. Ford Presidential Library, Ann Arbor, MI.

[37]For background on this conflict, see Roy Reed, "Liberal Is Given Civil Rights Post," *New York Times*, March 30, 1969; Robert B. Semple, Jr., "Nixon Staff Denies its Views are Polarized," *New York Times*, July 12, 1969; John Herbers, "Panetta's Ouster Linked to Policy," *New York Times*, February 19, 1970, 1, 36; Leon E. Panetta and Peter Gall, *Bring Us Together: The Nixon Team and the Civil Rights Retreat* (Philadelphia and New York: J. B. Lippincott, 1971); Dean J. Kotlowski, *Nixon's Civil Rights: Politics, Principle, and Policy* (Cambridge, MA: Harvard University Press, 2001), 151–152.

[38]Jeffrey Hart, "The Presidency: Shifting Conservative Perspectives?" *National Review*, November 22, 1974, 1351–1355, at 1353. Emphasis in original.

[39]Patrick J. Buchanan, "Reverse Discrimination Advocates Must Go," *Human Events*, November 15, 1975, 9. On the enduring impact of Buchanan's style of politics on the Republican Party, see Nicole Hemmer, *Partisans: The Conservative Revolutionaries Who Remade American Politics in the 1990s* (New York: Basic Books, 2022).

[40]Howard Phillips, "Ford Should Learn from Nixon Mistakes," *Human Events*, August, 24, 1974, 16–17, at 16.

[41]Alternative Report by Reagan USCCR Transition Team Members Robert J. Cynkar, Joel Mandleman, Thomas Parry, and Charles Wood, undated, 4, Folder "[Transition Reports]: Civil Rights Commission," Box 18, OA 11,258, Edwin L. Harper Files, Ronald Reagan Presidential Library and Museum, Simi Valley, CA.

[42]"Republican Party Platform of 1980," July 15, 1980, *The American Presidency Project*, https://www.presidency.ucsb.edu/documents/republican-party-platform-1980.

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The EEOC was depicted as "even more liberal than the Labor Department."[43]

Some of the most immediate changes in approach came from Reagan's top appointments at the DOJ. AG William French Smith had been determined that a "rejection of quotas and busing as remedies for discrimination" would "alter the way things had been done around DOJ's Civil Rights Division," and he had emphasized the choice of an assistant AG for that division—William Bradford Reynolds—whose "views on such matters as busing and quotas as remedies for civil-rights violations" were "compatible with administration philosophy."[44] While it produced significant friction with career employees in the Civil Rights Division, the result was "an about-face" on "hiring and promotion goals" and an effort "to replace an inherited law enforcement practice" of busing "with one reflecting the new President's views."[45] More generally, the administration sought to change the focus of the civil rights bureaucracy broadly—including the EEOC and OFCCP—to addressing the claims of individual victims of discrimination, rather than class-action claims based on statistical evidence.[46] While the "minority rights revolution" may have been, as John Skrentny argues, "a bipartisan project" for a time, the conflicts of the Reagan administration made it clear that such a period was over.[47]

Still, conservatives felt a sense of disappointment with an initial lack of progress on their goals a few years in. The *National Review* suggested that "it could be argued that the Reagan Administration has not moved vigorously enough on such issues as racial busing, reverse-discrimination, and quotas—which it has a clear mandate to curtail."[48] Inside the administration, the mood was also unsettled. "What we still have is a massive career bureaucracy which, to justify itself, must continue to push for even more elaborate schemes of affirmative action and quotas," charged Morton Blackwell, an official in the White House Office of Public Liaison. Believing that "most of the American people believe the extremists have gone too far," Blackwell wanted a more forceful response: "We are, to too great an extent, allowing this Administration to be stampeded by threats of criticism and political reprisal from people and organizations who are already devoting most of their efforts to criticizing and defeating the President's entire public policy agenda."[49]

Thus, the stakes were set for high-profile conflicts over civil rights and affirmative action in 1983. As Reagan officials like the White House Office of Policy Development's Michael Uhlmann saw it, "Quotas have been bureaucratically created without legislative sanction."[50] Such disputes over the implementation of civil rights law would not only lead to assertions of presidential power over the bureaucracy, but to formalistic assertions about the president's constitutional authority over the executive branch by the Reagan DOJ.[51]

Drawing largely on archival evidence gathered from the papers of Reagan administration officials, allies, and critics, this article proceeds as follows. It first covers the Reagan administration dispute over affirmative action cases with the EEOC, before turning to the administration's disputes with the USCCR. In each case, I focus on (1) the initial tensions between the administration and the established civil rights agencies, (2) the confrontations that occurred in 1983, (3) the assertions by the administration of formal claims about the president's constitutional authority, and (4) the mixed political and structural outcomes for the administration, the agencies, and civil rights defenders. The conclusion addresses the legacies of these episodes, including connections to recent developments involving the second Trump administration.

2. Disputing EEOC independence

2.1. Tension

The likelihood of conflict between the Reagan administration and the EEOC over policies such as affirmative action was clear even before Reagan took office. In considering how the new administration would approach that agency, Reagan's EEOC Transition Team charged that "the EEOC has, rather than implementing the 1964 Civil Rights Act against racial and other forms of discrimination, created a new racism in America, in which every individual is judged by race and every employer must keep records on the basis of race, sex and other such criteria."[52] The EEOC Transition Team's chairman, Jay Parker, an African American conservative and president of the Lincoln Institute for Research in Education, stated that "we don't want discrimination causing more discrimination." A *Wall Street Journal* story on the transition report noted that "critics in the business community" viewed the EEOC "as an 'imperial bureaucracy' that imposes excessive requirements on companies through court actions and sweeping guidelines."[53] Indeed, the report accused the EEOC of undermining betraying the Rights Revolution through bureaucratic regulation: "Just as the American society finally came to accept the idea of moral equality for which men and women of good will had fought for so many years, government has, through regulation, implemented a contrary view, that of 'numerical equality.'"[54]

Supporters of the EEOC in the broader civil rights community signaled that the fight over affirmative action would also be a conflict about presidential control over administration. Defenders of the agency warned the new administration not to try to inhibit it from vigorously enforcing equal opportunity policies. "No Administration can claim to promote equal opportunity while tying the hands of those federal agencies charged with enforcing it,"

[43]Michael E. Hammond, "The Department of Justice," in *Mandate for Leadership: Policy Management in a Conservative Administration*, ed. Charles L. Heatherly (Washington, DC: Heritage Foundation, 1981), 447, 449.

[44]William French Smith, *Law and Justice in the Reagan Administration: The Memoirs of an Attorney General* (Stanford, CA: Hoover Institution Press, 1991), 91, 25.

[45]Eastland, *Energy in the Executive*, 155–156.

[46]Schmidt, *Civil Rights in America*, 105.

[47]John D. Skrentny, *The Minority Rights Revolution* (Cambridge, MA: Belknap Press of Harvard University Press, 2002), 2.

[48]"Reagan and the Blacks," *National Review*, November 26, 1982, 1460–1461, at 1461.

[49]Memorandum for Elizabeth H. Dole thru Diana Lozano from Morton Blackwell re: "Special Analysis J, Civil Rights Activities," January 29, 1982, Folder "Affirmative Action 1982 (1 of 6)," Box 1, Elizabeth H. Dole Files, Ronald Reagan Presidential Library and Museum, Simi Valley, CA.

[50]Memorandum for Edwin L. Harper from Michael M. Uhlmann re: "Summary of Comments on 'Federal Equal Employment Opportunity Programs," May 9, 1983, 1, Folder "[EEO (Equal Employment Opportunity)] Federal Equal Employment Opportunity Program," with attached draft on "Federal Equal Employment Opportunity Programs," OA 9441, Box 3, Michael Uhlmann Files, Ronald Reagan Presidential Library and Museum, Simi Valley, CA.

[51]On the significance of the Reagan DOJ, see Steven M. Teles, "Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment," *Studies in American Political Development* 23, no. 1 (April 2009): 61–83; Crouch, Rozell, and Sollenberger, *Unitary Executive Theory*, 20–21.

[52]Excerpt of Reagan EEOC Transition Team Report, undated, 7, Folder 3, Box 36, Series II, Leadership Conference on Civil Rights (LCCR) Records, Manuscript Division, Library of Congress, Washington, D.C.

[53]Joann S. Lublin, "Reagan's Advisers Accuse the EEOC Of 'Racism,' Suggest Big Cutback," *Wall Street Journal*, January 30, 1981.

[54]Excerpt of Reagan EEOC Transition Team Report, 5.

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wrote the National Association of Office Workers program director of Working Women, Ellen Cassedy, to President Reagan: "We urge you to reject your advisers' recommendation that the EEOC be restricted in its activities to ensure equal opportunity at the workplace."[55] Clarence Mitchell, the chairman of the Leadership Conference on Civil Rights (LCCR), likewise noted the LCCR's disagreements with the Transition Team on matters of policy: "We oppose attacks on the concept of affirmative action as a preventive and remedial tool to end discrimination on the basis of race, color, national origin, or sex." While he "recognize[d] that the recommendations contained in that Report are not more than that—recommendations—and may well be disregarded by the officials charged with implementing civil rights laws," he also stressed a limited view of how much the president could alter the agency's activities. The EEOC, he pointed out, needed to be responsive to the laws of Congress and the decisions of the courts. Mitchell warned against actions that could amount to "such a complete abdication of the EEOC's mandate" that it "would violate the very law that created the agency." He argued that decisions about "methods of proof of unlawful discrimination and the remedies to be ordered when discrimination is proved under Title VII" were matters "decided on by the courts interpreting the statute." "In its guidelines and policy," Mitchell concluded, "the EEOC must reflect the courts' interpretations."[56]

The EEOC itself raised the issues about presidential control in a "combative rebuttal" to the Reagan EEOC Transition Team report. As the *Washington Post* reported, the EEOC argued that what the Transition Team wanted went against the agency's need to be responsive to congressional laws and court decisions, suggesting "that few of the changes could be made by the president without congressional and court consent, since most EEOC procedures are based on congressional and court action." The *Post* described the EEOC's view that "the Parker report showed ignorance of the law—in particular, disregard for Supreme Court decisions that remedial action can be ordered even where intentional discrimination hasn't been shown." Moreover, the EEOC was described as accusing the Transition Team of advocating presidential interference. The "proposed changes would cripple EEOC," reflecting "a desire to make EEOC a political arm of the White House" and "stripping away its independent power to protect minorities."[57] While prior EEOC chair Eleanor Holmes Norton (who had been appointed by Democratic President Jimmy Carter) expressed faith that "equal employment remedies have been so firmly embedded in American law, it would take a counter-revolution in the courts to dislodge them," the "future" of the agency was said to be "somewhat clouded."[58]

The Reagan administration's efforts to influence the EEOC through its appointment of commissioners faced initial setbacks. Reagan's first nominee for EEOC chair, William Bell, an African American conservative, faced criticism about his qualifications, and the administration ultimately withdrew his nomination in the face of likely Senate defeat.[59] Reagan nominated another African American conservative to be chair, Clarence Thomas, who had been serving as assistant secretary of education for the OCR in the Department of Education. Parker, the lead author of the Reagan EEOC Transition Team report, supported Thomas's nomination. Indeed, the administration was deeply concerned with ensuring that all of its nominees to the EEOC were philosophically committed to the administration's views of civil rights, as evidenced by one internal memorandum in 1983 that took stock "of the political background of our appointees" as commissioners and general counsel.[60]

Still, despite Thomas's appointment, it was not a foregone conclusion that the EEOC would pursue the president's preferred policies. Evidently, Thomas himself suggested he would have independence from the assistant AG for the Civil Rights Division at DOJ, William Bradford Reynolds. As one LCCR memorandum explained, when Thomas was asked "whether … Reynolds would exercise much involvement in the dealings of the EEOC as he has recently attempted to," he responded, "'the authority of the EEOC is with the EEOC,' 'EEOC matters should be run by the EEOC,' 'EEOC is the EEOC' and 'I'm nobody's puppet.'"[61]

2.2. Confrontation

It was no accident the LCCR was interested in how Thomas would interact with Reynolds. Gaining influence over the EEOC was recognized as a logical step for the DOJ and the Civil Rights Division to pursue court cases addressing affirmative action. Indeed, in June 1982, John Roberts, a special assistant to the AG in the DOJ, had raised concerns about how the EEOC's stances related to the administration's and DOJ's positions on employment discrimination. Complaining to AG Smith that "the Solicitor General's office, in consultation with EEOC," had been "present[ing] arguments to the Supreme Court which were totally inconsistent not only with general Administration policies but with specific and announced priorities of your own," Roberts argued that "the policy input of the Civil Rights Division is needed" and suggested that the "Solicitor General's office" should "keep the Civil Rights Division fully advised of all EEOC filings."[62] As the administration pursued its legal agenda, the connection between disagreements over affirmative action and issues of the president's relationship to the EEOC would come into sharper relief.

One skirmish arose in late 1982 over the case *Boston Firefighters v. NAACP* (1983). The case involved the question of whether, in the face of budget issues, longer-tenured white employees could be laid off, while minority employees who had been more recently hired would be protected. A dispute arose over whether to intervene in the case and, if so, on whose side. The DOJ, as well as the

[55]Letter from Ellen Cassedy to Ronald Reagan, February 12, 1981, Folder 3, Box 36, Series II, LCCR Records.

[56]Letter from Clarence Mitchell to Ronald Reagan, February 12, 1981, 2–3, Folder 3, Box 36, Series II, LCCR Records. On the significance of the LCCR, see Shamira Gelbman, *The Civil Rights Lobby: The Leadership Conference on Civil Rights and the Second Reconstruction* (Philadelphia: Temple University Press, 2021).

[57]Spencer Rich, "Reagan Panel, Citing 'New Racism,' Urges Easing of EEOC Rules," *Washington Post*, January 30, 1981.

[58]"Leadership Conference Responds to EEOC Report," *Women Today* II, no. 5, March 6, 1981, 33, Folder 3, Box 36, Series II, LCCR Records.

[59]Henry H. Denton, "The Bell Nomination: Sensitivity Session," *Washington Post*, November 22, 1981.

[60]Memorandum for Kenneth Cribb from Tad Tharp re: "EEOC Reagan Appointments," March 15, 1983, Folder 19, Box 699, Edwin Meese Papers, Herbert Hoover Institution Library and Archives, Stanford, CA; On the importance of Reagan's appointees as chairman and general counsel, see B. Dan Wood, "Does Politics Make a Difference at the EEOC?," *American Journal of Political Science* 34, no. 2 (May 1990): 503–530.

[61]Memorandum to Interested Parties from A. Torres, February 1982, 2, Folder 12, Box 35, Series II, LCCR Records.

[62]Memorandum to the Attorney General from John Roberts re: "Solicitor General Briefs in EEOC cases," June 16, 1982, 1–2, Folder "Solicitor General's Office," Box 7, Files of Carolyn B. Kuhl, Accession #60-88-0494, Record Group 60, Department of Justice, National Archives and Records Administration, College Park, MD.

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White House, supported intervening with an amicus brief favoring the unions supporting the white employees. Taking a position described by the *Washington Post* as "departing significantly from the policies of past administrations," the DOJ "asked the Supreme Court to strike down a controversial 'reverse discrimination' order that aided black and Hispanic Boston city employe[e]s and resulted in temporary layoffs for hundreds of whites." Solicitor General Rex Lee's brief acknowledged the shift in policies from past administrations: "The brief represents the first time that an administration has intervened on the side of whites in a major reverse discrimination case at the Supreme Court."[63] The decision also reflected the influence of Assistant AG Reynolds; as one internal administration memo explained, "There is informed speculation that this afternoon Brad Reynolds intends to encourage the Solicitor General to file a friend of the court brief supporting the unions' position, upon the premise that the Court should protect only identified injured parties (presumably the handful or named plaintiffs in the original action), and reject any protection for the rest of the class."[64] The White House agreed on the potential promise of the case for their cause. As Michael Uhlmann wrote, "This case is the first one to reach the Supreme Court in which people have actually been laid off from their jobs solely on account of their race." "The Justice Department's action in this case in this case is consistent with this Administration's often stated opposition to reverse discrimination and racial quotas," Uhlmann emphasized: "The President's opposition to racial quotas has been longstanding and it reflects a concern that, in an effort to redress past grievances, you should not commit new injustices on innocent people solely on account of their race."[65]

The Reagan administration recognized how that position would be viewed by the civil rights community, the civil rights bureaucracy, and the conservative movement. "This action will be viewed by Civil Rights groups as an attack on affirmative action," one memorandum explained. This was especially true given that both the EEOC and the USCCR wanted the administration to file a brief taking the opposite side in the case, in favor of the minority employees. As the memo noted, "This is the position recommended to the Solicitor General by the Equal Employment Opportunity Commission by a 4-1 vote, with only the Chairman dissenting." It was notable that DOJ chose to take a contrary position, as the federal government did not have to intervene in the case: "Since the federal government is not a party to this case, there is no necessity to take a public position on the issue, nor to file a brief on behalf of either party."[66] The *National Review* recognized the significance of the intervention: "William Bradford Reynolds, the head of the Civil Rights Division, and his deputy Charles Cooper … deserve credit for finally swinging the weight of the Executive Branch behind the simple, color-blind precept of fairness and justice held by most Americans."[67]

The link between policy disagreements over affirmative action and the issue of presidential control over administration became even clearer amid the administration's intervention in early 1983 in *Williams v. City of New Orleans* (5th Cir. 1984). That case involved a challenge to a race-conscious promotion plan for the New Orleans Police Department. Reagan officials were aware that a DOJ intervention in the case would not only raise issues about Title VII of the Civil Rights Act of 1964, but would also impact the policy stances of several agencies, relating "to the question of how the Administration's EEO policy is developed, and whether there is any coordination to the effort, particularly when the outcome is likely to have serious implications for the positions established by one or more of the several cognizant agencies."[68]

The USCCR publicly opposed to the administration's stances in both the *Boston* and *New Orleans* cases. It argued that the Reagan DOJ was "charting the Administration's course for ending judicial approval of affirmative action" and that, in "opposing race conscious relief in the New Orleans police case," the DOJ "has set sail on this course." "This course is contrary to that pursued by the preceding Democratic and Republican administrations," the commissioners proclaimed: "It seeks to reverse decisions in virtually every Federal circuit upholding affirmative action, including quotas, as an essential remedy for race, sex and national origin discrimination." By contrast, the USCCR expressed an alternative understanding of affirmative action policies: "such discrimination occurs against individuals because of their membership in disfavored groups rather than their individual attributes … To be effective, remedies must take into account group characteristics (such as race) and the reality of discrimination."[69] Only Reagan-appointed Chairman Clarence Pendleton supported the administration's positions in the two cases.[70]

The EEOC took matters a step further, not only opposing the White House and DOJ stance, but seeking to contradict it in court through an amicus brief. Even Reagan-appointed Chairman Clarence Thomas objected to how the DOJ had decided to take a position in the *Williams* case. Writing to AG Smith, Thomas and the other four commissioners held that the administration's stance was a major policy change: "We find the action unacceptable because the Equal Employment Opportunity Commission was neither notified nor consulted before the Department of Justice took a position in a brief which represents a radical departure from prior Department of Justice and current Equal Employment Opportunity policy." The commissioners contended that the administration's stance amounted to a procedural change in DOJ-EEOC coordination: "we feel that the Department's attempt to initiate a major and, as it turned out, newsworthy change in the government's Civil Rights policy, without even consulting the Equal Employment Opportunity Commission, constitutes not only a sharp departure from acceptable standards of inter-agency protocol but was an action taken in derogation of this agency's

[63]Fred Barbash, "Justice Dept. Asks Reversal Of Order on Reverse Bias," *Washington Post*, December 18, 1982, A3.

[64]Memorandum to Elizabeth Dole, Red Cavaney, Diana Lozano, Thelma Duggin, Bob Bonitati, and Henry Zuniga from Bill Triplett re: "Boston NAACP v. Beecher," December 16, 1982, Folder "Affirmative Action 1982 (5 of 6)," Box 1, Dole Files.

[65]Memorandum for Larry Speakes from Michael M. Uhlmann, December 17, 1982 with attached "Briefings Points on Boston Layoffs Case," Folder "Chron File, 12/14/1982-0/20/1983," Box 16, Series II, William P. Barr Files, Ronald Reagan Presidential Library and Museum, Simi Valley, CA.

[66]Memorandum to Elizabeth Dole, Red Cavaney, Diana Lozano, Thelma Duggin, Bob Bonitati, and Henry Zuniga from Bill Triplett re: "Boston NAACP v. Beecher," December 16, 1982, with attached "For Your Information" Memorandum to Henry Zuniga re: "Boston NAACP v. Beecher," December 14, 1982, 2–3, Folder "Affirmative Action 1982 (5 of 6)," Box 1, Dole Files.

[67]"Reverse Reverse Discrimination," *National Review*, February 4, 1983, 95–96, at 96.

[68]Memorandum for Ed Harper from Mel Bradley re: "Justice Department's Intervention in the New Orleans Case (*Williams v. City of New Orleans*)," January 28, 1983, Folder "Civil Rights Policy / Affirmative Action," Box 35, OA 9448, Edwin Meese III Files, Ronald Reagan Presidential Library and Museum, Simi Valley, CA.

[69]United States Commission on Civil Rights, "Statement on the Department of Justice's Position in New Orleans Police Case," January 11, 1983, 1–3, Folder "Civil Rights Statement (Fried) [5 of 6]," Box 3, OA 9440, Uhlmann Files.

[70]Robert Pear, "Rights Panel Criticizes President On Two Affirmative Action Stands," *New York Times*, January 12, 1983, A19.

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statutory designation as the chief interpreter of Title VII of the Civil Rights Act of 1964, as amended." Indeed, they cited the prior Carter administration's 1978 reorganization plan involving the agency and asserted that the EEOC was primarily responsible for resolving conflicts within the executive branch for stances relating to equal employment opportunity: "The Equal Employment Opportunity Commission is the 'principal Federal agency in fair employment enforcement.' … In enforcing Federal fair employment laws, the Commission is charged with the responsibility for 'eliminat[ing] conflict … and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal government responsible for the implementation … of equal employment legislation, orders and policies.'"[71]

2.3. Assertion

The EEOC's opposition drew out a stark assertion of presidential authority from the Reagan administration. Assistant AG Reynolds responded sharply to the EEOC's actions, arguing that the EEOC could not act independently. Explaining that AG Smith had "asked" him to reply to the commissioners, Reynolds made several arguments. One was an assertion that, under the existing statute, the EEOC had authority to act on its own in cases involving only private employers, not public employers: "Title VII assigns to the Commission responsibility for enforcing its equal opportunity provisions against private employers … On the other hand, the Department has been given exclusive Title VII 'coordination and enforcement' responsibility at the state and local levels with regard to *public* employers." He further stated that the statute "authorizes only the Attorney General, not the Commission, to intervene in Title VII cases 'involving a government, governmental agency, or political subdivision … upon certification that the case is of general public importance.'" For Reynolds, this had become an issue of executive control. He argued that the EEOC needed to receive approval from the DOJ to file such an amicus brief in a case involving a public employer: "While *amicus* participation in such an action is available to the Commission, it must, as an Executive agency, first obtain the approval of the Solicitor General of the United States."[72]

But Reynolds did not only look to statute in making his argument. He stressed that the DOJ's stance in *Williams* was consistent with the 1980 Republican Party platform, the president's policy positions, and the DOJ's litigation positions: "This Administration's opposition to hiring and promotion quotas based on race or sex was explicitly set forth in the Republican Party platform. It was repeated on numerous occasions, both during the campaign and after election, by the President. On no fewer than ten separate occasions, dating back to May, 1981, the Attorney General, the Deputy Attorney General and I have formally spoken out against race- and sex-conscious quota relief in employment cases. And, this policy has governed the Department's remedial position in all Title VII litigation since early in 1981." Moreover, Reynolds connected the intervention in *Williams* with the intervention in the *Boston Firefighters* case: "The Department's filing in *Williams* is but another manifestation of the Government's Title VII enforcement policy, not an indication of any 'major change.' Indeed, in an *amicus* brief filed in the Supreme Court by the United States in the *Boston Firefighters* case some three weeks earlier, a quota lay-off procedure upheld by the First Circuit was attacked by the Government as being 'contrary to both the language and spirit of [Section 706(g)].'"[73]

The administration did not stop there in pushing back against the EEOC. "As a precautionary measure," Reynolds reported to AG Smith, "I obtained an opinion from the Office of Legal Counsel on the question of EEOC's litigation authority." "That opinion," Reynolds wrote, "fully confirms my own legal analysis of the question. I have shared this information with [Solicitor General] Rex Lee."[74] Assistant AG for the OLC Theodore Olson responded to Reynolds's request, providing an opinion in which the OLC found that the EEOC could take not submit an amicus brief at odds with the DOJ's position in the case. Part of the opinion made an argument based on the EEOC's authorizing statute as amended, contending that "the EEOC's litigating authority under Title VII of the Civil Rights Act is limited to the enforcement of claims against private sector employees." By contrast, the OLC opinion held that the EEOC "lacks authority to prosecute, intervene in, or otherwise appear in, public sector Title VII litigation on its own behalf."[75] Moreover, the opinion posited that there was no distinction between the agency intervening as a party to the case or submitting an amicus brief: "It is unclear whether the Commission seeks to present its views as *amicus curiae* or as an intervening party-appellant. Because we conclude that the Commission lacks the authority to appear on its own behalf in any public sector Title VII litigation, the distinction between intervention and *amicus* appearances is without significance to the consideration and resolution of this issue."[76]

But significantly, the OLC opinion went beyond a focus on Title VII and argued that the president's constitutional authority was at stake, articulating several elements of the unitary executive theory. First, citing *Myers v. United States* (1926), the OLC pointed to the vesting clause, stating that it was a "fundamental premise that the whole of the Executive power, created by Article II of the Constitution, is vested exclusively in the President." Second, the OLC cited *Myers* to emphasize the take care clause: "Included within the Executive power is the obligation to 'take care that the laws be faithfully executed,' Art. 2, § 3, which necessarily encompasses the authority to exert 'general administrative control of those executing the law,' i.e., the Executive officers." Citing the position of the Carter administration's OLC, which had characterized the EEOC as an executive branch agency in support of President Carter's 1978 equal employment opportunity enforcement reorganization plan, the opinion also stated, "There is no doubt that the EEOC, which performs functions that are 'predominantly' …

[71]Letter from Clarence Thomas, Cathie A. Shattuck, Armando M. Rodriguez, Tony E. Gallegos, and William A. Webb to William French Smith re: "*Williams, et al v. The City of New Orleans* (5th Cir. No. 82-3435)," January 26, 1983, 1, Folder "Civil Rights Statement (Fried) [5 of 6]," Box 3, OA 9440, Uhlmann Files. On the Carter reorganization plan, see Jimmy Carter, "Equal Employment Opportunity Enforcement Message to the Congress Transmitting Reorganization Plan No. 1 of 1978," February 23, 1978, *The American Presidency Project*, https://www.presidency.ucsb.edu/documents/equal-employment-opportunity-enforcement-message-the-congress-transmitting-reorganization.

[72]Letter from William Bradford Reynolds to Clarence Thomas, Cathie A. Shattuck, Armando M. Rodriguez, Tony E. Gallegos, and William A. Webb, February 28, 1983, 1–2, Folder "Civil Rights Statement (Fried) [5 of 6]," Box 3, OA 9440, Uhlmann Files.

[73]Ibid., 5.

[74]Memorandum to the Attorney General from William Bradford Reynolds re: "*Williams v. City of New Orleans*, No. 82-3435, CA 5," March 16, 1983, Folder "Civil Rights Statement (Fried) [6 of 6]," Box 3, OA 9440, Uhlmann Files.

[75]Memorandum for William Bradford Reynolds from Theodore B. Olson re: "Litigation Authority of the Equal Employment Opportunity Commission in Title VII Suits Against State and Local Governmental Entities," March 3, 1983, 3, 14, Folder "Civil Rights Statement (Fried) [4 of 6]," Box 3, OA 9440, Uhlmann Files.

[76]Ibid., 2, fn 4.

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executive in nature—conciliation and the prosecution of civil law suits—is an Executive Branch agency whose members serve at the pleasure of the President and are removable without cause."[77]

The OLC opinion went on to stress the importance of the administration being able to speak with one voice in pursuit of its litigative agenda in civil rights. It described the possibility of having the EEOC take the opposite side of the DOJ in a federal court case—even in an amicus brief—as interfering with the president's ability to execute the law: "Such a circumstance would, literally, put the Executive in the untenable position of speaking with two conflicting voices, abdicating his constitutional responsibility to 'take care that the laws [are] faithfully executed.'"[78] Summing up its reasoning, the memo explicitly invoked the notion of unity:

> Apparently the EEOC seeks to present its views to the court in the *Williams* case because it disagrees with the position taken by the Attorney General on behalf of the United States in the litigation; it is equally evident that as an executive agency subject to the supervision and control of the President, the Commission may not represent on its own behalf a position in court that is contrary to that taken by the Executive, through his delegee, the Attorney General. To permit otherwise would raise serious constitutional issues relative to the unity and integrity of the Executive.[79]

Nor did the DOJ rest with that opinion. In his letter to AG Smith about the *Williams* issue, Reynolds had warned that "apparently, EEOC remains adamant about filing a brief 'on the other side' in this case" and that "immediate action is needed to respond to this situation."[80] The OLC elaborated on its initial memo with an "addendum" memo, explicitly written "for the purpose of responding directly to those issues raised by Chairman Thomas regarding the EEOC's litigating authority, and should be read in conjunction with that memorandum."[81] First, the OLC again restated its statutory reasoning: "the general rule with respect to litigation on behalf of Executive Branch agencies and departments is that the Attorney General exercises plenary authority over the supervision and conduct of litigation to which the United States, its agencies and departments, or offices, thereof, is party … Exceptions to this general principle must be stated clearly and specifically in the statutory provision that purports to invest an agency with independent litigating authority." In the OLC's view, the "absence of any affirmative statement" providing the EEOC "authority to participate as an *amicus* in public sector Title VII litigation clearly disputes the Commission's claim to such authority." The OLC also explained that it was irrelevant that the EEOC wanted only to submit an amicus brief, rather than being direct party to the case: "We do not believe that, for purposes of analyzing an agency's litigating authority, *amicus* participation is analytically distinct from participation with full party status. Although parties have a more immediate stake in the outcome of the litigation, *amicus* participants, like full parties, nevertheless seek to present their views to the court in an effort to persuade the court to adopt their views in the resolution of the litigation before it."[82]

Having dispensed with the statutory point, the OLC restated its view of the president's constitutional authority. It held that since the DOJ had already taken a position in court, allowing the EEOC to submit a contradictory amicus brief would undermine executive branch unity:

> This conclusion is especially mandated in the *Williams* litigation because the Attorney General has already appeared in the case and presented the views of the Executive Branch on behalf of the United States. [T]his authority to represent the United States, in litigation, with the full weight of the Executive Branch, is vested in the President by Article II of the Constitution … and has been delegated to the Attorney General … Thus, to permit the EEOC, an Executive agency subject to the control of the President and the supervision of the Attorney General in litigation matters, to present to the court views contrary to those already presented by the Attorney General for the United States, as Chairman Thomas has indicated is the desire of the Commission, whether as an *amicus* or as a full party, would seriously frustrate and undermine the constitutional unity and integrity of the Executive.[83]

Moreover, the OLC restated its reliance on both the vesting clause and the take care clause of Article II: "Art. II, §1 vests the whole of the executive power in the President … and §3 obligates the President to 'take care that the laws be faithfully executed,' which necessarily includes the powers of enforcement and litigation." Furthermore, the OLC again described the president as possessing the entirety of the executive power: "Moreover, as discussed above and in our memorandum of March 3, 1983, we believe that such a result is consistent with the President's constitutionally exclusive exercise of his Executive power, *and* with his having delegated that part of his power which deals with the arbitration of legal disputes within the Executive Branch to the Attorney General by [the Carter administration's] executive order [12146]."[84]

2.4. Outcome

The administration continued to work to reconcile the DOJ-EEOC disagreement. As Special Assistant to the Chief of Staff James Cicconi wrote to Chief of Staff James Baker, both White House Counsel Fred Fielding and Counselor to the President Edwin Meese were attempting to settle the issue: "You'll recall that this

[77]Ibid., 14–15. The Carter OLC had taken the position "that commissioners of the EEOC serve at the pleasure of the President and that the Agency is an executive—as opposed to an independent regulatory—agency." "Reorganization Plan No. 1 of 1978—Equal Employment Opportunity Commission—Transfer of Function," Opinion of the Office of Legal Counsel, U.S. Department of Justice, March 16, 1978, 69. See also "President's Authority to Promulgate a Reorganization Plan Involving the Equal Employment Opportunity Commission," Opinion of the Office of Legal Counsel, U.S. Department of Justice, October 20, 1977, 248–250. Another OLC opinion on the subject from the Nixon administration had similarly argued the president had authority to remove EEOC commissioners. Memorandum for Peter M. Flanigan from William H. Rehnquist re: "Tenure of Members of the Equal Employment Opportunity Commission," October 22, 1969, Folder "EEOC—Reorganization Proposals [2]," Box 242, Doug Huron's Subject Files, Records of the White House Office of Counsel to the President, Jimmy Carter Presidential Library and Museum, Atlanta, GA.

[78]Memorandum for Reynolds from Olson, March 3, 1983, 14–15.

[79]Ibid., 16. When the OLC opinion was published, the headnotes described that line of reasoning with the phrase "the unitary executive": "To permit the EEOC, an executive agency subject to the authority of the President, to represent on its own behalf a position in court independent of or contrary to the position of the United States, would be inconsistent with the constitutional principle of the unitary executive." "Litigation Authority of the Equal Employment Opportunity Commission in Title VII Suits Against State and Local Governmental Entities," March 13, 1983, in *Opinions of the Office of Legal Counsel*, Vol. 7, U.S. Department of Justice (Washington, DC: Government Printing Office, 1993 [1983]), 57.

[80]Memorandum to the Attorney General from Reynolds, March 16, 1983.

[81]Memorandum for the Attorney General re: "Authority of the Equal Employment Opportunity Commission to Participate as *Amicus Curiae* in *Williams v. City of New Orleans*," March 24, 1983, 1, footnote 1, Folder "Civil Rights Statement (Fried) [4 of 6]," Box 3, OA 9440, Uhlmann Files.

[82]Ibid., 3–4.

[83]Ibid., 4–5.

[84]Ibid., 5, footnote 6, 6. Emphasis in original. On the Carter administration's executive order, see Jimmy Carter, "Executive Order 12,146—Management of Federal Legal Resources," July 18, 1979, *The American Presidency Project*, https://www.presidency.ucsb.edu/documents/executive-order-12146-management-federal-legal-resources.

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is the case where EEOC was threatening to file in opposition to Justice's views. Meese is still trying to work it out; also, Fielding is now involved in the discussions, and he and I have already talked about the preferred method of handling this problem."[85] Soon, in the wake of a meeting with AG Smith and Meese, the EEOC changed course. The commission voted four-to-one not to submit the brief. While the Carter-era EEOC chair, Eleanor Holmes Norton, blasted the DOJ for trying to "intimidate" the commission, the EEOC's public affairs office stated it would "be within the public interest not to file conflicting views on a legal issue involving a city government where the Justice Department has sole enforcement litigation responsibility."[86]

The issue simultaneously increased the conflict between the White House and the USCCR. Noting that the "case upholds a consent decree requiring the New Orleans Police Department to promote one black officer for every white officer until blacks hold half the supervisory positions," several commissioners wrote to President Reagan, "EEOC's brief would have argued that the Department of Justice's position in the case was legally and constitutionally incorrect." Moreover, the commissioners described the OLC opinion about EEOC's litigation authority as an unusual political development: "Prior to adopting that policy position in this case, the Department of Justice had never challenged EEOC's authority to file such briefs, and EEOC had done so frequently. The unprecedented nature and timing of the Department's disputable action leave the distinct impression that its legal rationale was developed in order to deprive the courts and the public of EEOC's knowledgeable perspective on affirmative action." The commissioners further argued that the EEOC should be able to publicly air disagreements with the DOJ: "EEOC's expert opinions on critical issues, especially affirmative action, should be publicly aired even when they conflict with the Department of Justice."[87]

The USCCR's response did not reflect the views of its Reagan-appointed chairman. Writing to Reagan, Clarence Pendleton explained that he viewed the DOJ's position about the EEOC's authority as correct: "My review of the relevant documents indicates that the Department of Justice's opinion is correct with respect to the Equal Employment Opportunity Commission's jurisdiction to file in cases of this type." He also agreed with the DOJ's position on affirmative action in the case: "It is apparent to me that some members of this Commission are attempting to politicize this issue because they disagree with this Administration's opposition to quotas as expressed in the *Williams* case. Like you, I support affirmative action, but oppose quotas." More significantly, he objected to the idea that the USCCR should inform the president of how to deal with the EEOC: "I think that it is presumptuous of the Commission to advise the President on how he directs the Executive Branch."[88]

The civil rights community was also angered by the administration's actions, viewing the EEOC and USCCR as key sites of bureaucratic resistance to the president's preferred policies. For example, the managing attorney for the Center for National Policy Review, Garland Pinkston, wrote to Clarence Thomas to praise the EEOC: "the current dispute between the Commission and the Department of Justice must be distressing to you and the other Commissioners. Keep up the good fight; even if the Commission loses on this one, the administration and affected interest groups will know you are in there trying to keep alive some hope for blacks and other disadvantaged groups." He also urged the EEOC to keep pushing back on the administration, describing the EEOC and USCCR as critical bulwarks and connecting the protection of rights to the resistance of presidential power and DOJ pressure: "The EEOC and the Commission on Civil Rights are the only agencies currently trying to foster the interests of minorities and women. It is critical that the EEOC not hesitate to resist interference with the performance of its mission."[89] The Center for National Policy Review also facilitated defiance of the administration's internal agreement, as it included EEOC's draft brief in an amicus brief it submitted in the case.[90]

The negative reaction of civil rights advocates to the administration's actions were also made clear in congressional hearings in 1983. For example, Barry Goldstein, the assistant counsel for the NAACP Legal Defense Fund, testified that he viewed the White House as trying to silence the EEOC: "The Equal Employment Opportunity Commission voted to file a brief *amicus curiae* with the Fifth Circuit disputing the positions taken by the Justice Department. However … the EEOC 'bow[ed] to intense pressure from the White House' and voted not to file the brief." Noting that the "entire brief" had come out, Goldstein described it as "thoroughly support[ing] and document[ing] the EEOC's statements attacking the Justice Department's brief."[91] Muriel Morisey, the legislative counsel of the American Civil Liberties Union (ACLU), also connected the administration's policy dispute over affirmative action with questions of the structure of the executive branch: "the Reagan administration is assaulting the very structure of the Federal civil rights machinery. There are numerous illustrations." Citing the DOJ-EEOC disputes, she noted that, "the administration decided to intervene on behalf of whites in the *Boston Firefighters* case … despite recommendations by the Equal Employment Opportunity Commission and the U.S. Commission on Civil Rights that the Justice Department intervene on behalf of minorities." Furthermore, she cited the *Williams* controversy: "In the New Orleans Police Department discrimination case, the EEOC was forced to withdraw its planned amicus brief that would have run counter to the administration's position attacking affirmative action."[92]

Nor was this the end of EEOC-DOJ disagreements on case positions related to affirmative action. As Deputy Assistant Director for Legal Policy in the Office of Policy Development William Barr noted in a memo to Assistant to the President for Policy Development Edwin Harper, "the Attorney General decided that it was necessary to file a brief in the Detroit quota case, and he signed the necessary intervention papers. The panel in the Detroit case had reached a decision that was directly contrary to the position DOJ had taken in the New Orleans case. It appears that the

[85]Memorandum from JC [James Cicconi] to JAB III [James A. Baker III], March 30, 1983, Folder "Cicconi Memos—January 1983-June 1983 (7)," Box 2, Subseries A, Series I, James W. Cicconi Files, Ronald Reagan Presidential Library and Museum, Simi Valley, CA.

[86]United Press International, "Pressure Seen in Vote to Withdraw Brief on Quotas," April 8, 1983, *New York Times*, D15.

[87]Letter from Mary Louise Smith, Mary Frances Berry, Blandina Cardenas Ramirez, Jill S. Ruckelshaus, and Murray Saltzman to the President, April 13, 1983, 1–2, Folder "Civil Rights / Equal Opportunity Policy and Organization (1)," Box 62, OA 11,839, Meese Files.

[88]Letter from Clarence M. Pendleton to the President, April 13, 1983, Folder "Civil Rights / Equal Opportunity Policy and Organization (1)," Box 62, OA 11,839, Meese Files.

[89]Letter from Garland Pinkston, Jr. to Clarence Thomas, April 7, 1983, Folder "Chron April 1983," Box 13, Center for National Policy Review (CNPR) Records, Manuscript Division, Library of Congress, Washington, D.C.

[90]Zuckerman, "EEOC Politics and Limits on Reagan's Civil Rights Legacy," 262.

[91]*Oversight Hearings on the OFCCP's Proposed Affirmative Action Regulations*, Hearings before the Subcommittee on Employment Opportunities of the Committee on Education and Labor, House of Representatives, 98th Congress, 1st Session (Washington, D.C.: Government Printing Office, 1983), 109–110.

[92]Ibid., 80.

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Detroit case is on a faster track to the Supreme Court than the New Orleans case, and therefore to preserve the government's position, it was necessary for a brief to be filed in the Detroit case." Given the decision to take that position, DOJ officials also met with the EEOC. As Barr explained, "Friday, the day after the AG made the decision, Brad Reynolds and his deputy met with Clarence Thomas and his general counsel. They explained the DOJ position and gave them a copy of the draft brief. The EEOC people raised the same objections that they had in the New Orleans case."[93] The ACLU likewise criticized the administration for this action, arguing that the DOJ's position in both the New Orleans and Detroit cases "is part of a deliberate disregard of interpretations of Title VII. Race-conscious affirmative action (including so-called quota relief) has been approved for correcting the effects of discrimination in more than twenty federal courts of appeals decisions."[94]

In the immediate term, the overall outcome for the administration was mixed. The EEOC had backed down from formally filing its amicus brief, but the brief had nonetheless been leaked and submitted with another amicus brief in the case. The outcome in the *Williams* case itself was also complicated. On the immediate issue, the DOJ won a victory. In its seven-six ruling in 1984, the Fifth Circuit Court "gave the administration a victory by ruling against the proposed one-to-one black-white promotion quota."[95] In Reynolds's view, this was "the first judicial recognition that there was something wrong with consent decrees that assigned racial preferences."[96] On the other hand, as Raymond Wolters notes, the court "rejected the administration's claims that affirmative relief should be limited to actual victims of past discrimination."[97] The *Boston* police and firefighters case also became moot once it was considered by the Supreme Court: "By the time the case got to the Supreme Court in 1983, however the financial situation in Boston had improved, and the laid-off workers had been reinstated. In light of this, the Supreme Court vacated the judgment of the lower court and declared the case moot. The workers had their jobs back, but the Reagan administration's hopes for a strong ruling against reverse discrimination were dashed."[98] Furthermore, the Court declined to take the *Detroit* case.[99]

Nevertheless, the EEOC and DOJ battle had been significant for the Reagan administration's policies and the administration's ability to control its litigation strategy in civil rights going forward. "The importance of the *New Orleans* case is not to be found in the final settlement," sums up Wolters: "The case was important because it provided the occasion for the Reagan administration to develop its approach to affirmative action."[100] Terry Eastland, who had worked as a speechwriter for the AG and later became spokesperson for the DOJ, described the *Williams* case as a significant moment for the department going forward. The case had provided the DOJ with the opportunity to present "for the first time in a federal court" its "substantive arguments" that "the remedial authority of judges under Title VII extends only to making whole the actual victims of discrimination … and that the quota violated the Equal Protection Clause," and while the court had not accepted DOJ's arguments, the ruling "against the promotions quota" gave DOJ "its first litigated triumph" on the subject. Moreover, he reflected on the importance of the case to the Reagan administration centralizing more control over its civil rights litigation strategy: "Had the EEOC made its argument in court, the government would have been officially speaking with two voices; executive energy in the form of legal argument would have been weakened, precisely because 'unity' in the litigating executive would have been fractured."[101] Indeed, the administration would soon gain some incremental wins for its preferred policies in similar cases on affirmative action.[102] In the Memphis case *Firefighters Local Union No. 1784 v. Stotts* (1984), the Supreme Court ruled six-to-three "that the terms of a bona fide seniority system takes precedence over an affirmative action plan when layoffs are involved."[103] In a "complicated" decision in the Jackson, Michigan case *Wygant v. Jackson Board of Education* (1986), the Court also struck down a race-conscious layoff plan that had led to white teachers losing their jobs, even as it "approved affirmative action in some limited circumstances, disapproved it in others and left many questions unresolved."[104] The DOJ's colorblind arguments did not prevail in a variety of other subsequent cases, but the Reagan administration ultimately achieved another "considerable victory" for its preferred position in *City of Richmond v. J.A. Croson Co.* (1989). The Court held that a Richmond, Virginia law "that channeled 30 percent of public works funds to minority-owned construction companies" had "violated the constitutional rights of white contracts to equal protection of the law," and it established a standard of "strict scrutiny" for affirmative action programs.[105]

The battle with the EEOC also resulted in clearer recognition about the limits of that agency's independence.[106] In congressional hearings in October 1983, Clarence Thomas asserted that the administration did not prevent the EEOC from filing the brief in *Williams* per se, but that the EEOC had come to have doubts about its authority to file such a brief: "I still maintain that we were not precluded from filing a brief, contrary to the way it is reported. The reason we did not file a brief in that case was, as I stated before Congressman Don Edwards' [(D-CA)] subcommittee based upon decisions made in the previous administration as to the status of our agency, we concluded there was a serious question as to whether we had the authority to file such a brief. And we stand by that decision." In an exchange with Representatives Major Owens (D-NY) and Augustus Hawkins (D-CA), Thomas referred

[93]Memorandum for Edwin L. Harper from William P. Barr re: "Detroit Quota Case," May 6, 1983, Folder "Chron File, 05/06/1983-05/15/1983," Box 16, Series II, Barr Files.

[94]Muriel Morisey Spence, "In Contempt of Congress and the Courts: The Reagan Civil Rights Record," American Civil Liberties Union, February 27, 1984, 18, Folder 5, Box 87, Series III, LCCR Records.

[95]Wolters, *Right Turn*, 223.

[96]Quoted in Wolters, *Right Turn*, 223.

[97]Wolters, *Right Turn*, 223.

[98]Ibid., 208.

[99]Eastland, *Energy in the Executive*, 168.

[100]Wolters, *Right Turn*, 224.

[101]Eastland, *Energy in the Executive*, 167–168, 173.

[102]Charles Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* (New York: Simon and Schuster, 1991), ch. 4.

[103]Douglas F. Seaver, "Memphis Did Not Kill Affirmative Action," *New York Times*, July 1, 1984, 119.

[104]Stuart Taylor, Jr., "High Court Bars a Layoff Method Favoring Blacks," *New York Times*, May 20, 1986, A1.

[105]Linda Greenhouse, "Court Bars a Plan Set Up to Provide Jobs to Minorities," *New York Times*, January 24, 1989, A1.

[106]"The EEOC not only lost the battle over *Williams*; it lost a much larger battle with the Justice Department as a consequence of *Williams*," argues Neal Devins: "The Justice Department … relegated the EEOC to the executive branch." Indeed, in several subsequent cases, the Reagan DOJ discounted the EEOC's views of what the position of the administration should be. "Following the *Williams* dispute," Devins notes, "the Solicitor General freely disregarded competing EEOC perspectives—even in cases where the EEOC was a party." By contrast, "Throughout the Carter administration, the EEOC was allowed to file briefs in direct opposition to Solicitor General positions. During Reagan's first term, Solicitor General Rex Lee noted disagreements between his office and the EEOC." Devins, "Political Will and the Unitary Executive," 289–291.

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to the prior Carter DOJ "finding EEOC to be a part of the executive branch," which he described as "a problem." Despite this, Thomas still asserted that the agency operated independently in practice: "I felt that when I took this job that EEOC was independent, without, again, doing that research. I think that EEOC has to be independent. We have operated in this administration independently." This struck some lawmakers as an odd claim given the *Williams* controversy, and Thomas admitted a few caveats. One was that the Reagan administration had issued its own legal opinions about the EEOC's executive branch status: "During the controversy over the *Williams* case, we had reiterations of the previous opinions." Thomas further muddied the waters in answering Representative Hawkins's questions. After Thomas said "We operate independently as a matter of fact," Hawkins observed, "What you are saying, in effect, is that in some instances you operate as an independent agency, in other instances you do not operate as an independent agency. I assume that, in the *Williams* case, you operated as an executive agency." While Thomas claimed, "We operated cautiously in the *Williams* case," Hawkins observed, "That is a new classification."[107]

Notably, a critic of the EEOC's retreat suggested that the episode reflected problems with Congress's structuring of the agency. Barbara Hutchinson, the director of the Women's Department of the American Federation of Government Employees and the vice president of the AFL-CIO, testified that "the demand by the Justice Department that the Commission not file an appellate brief, in the case of *Williams* v. *the City of New Orleans*" was unprecedented: "No administration has ever before interfered with or attempted to direct the litigation policy of the EEOC." To her, independence was necessary for the agency to accomplish its statutory mandate: "In enacting the 1964 Civil Rights Act, one of the major concerns of the Congress was to keep the agency free from the manipulation and the shifting political winds of the country." Thus, she argued that lawmakers should "clarify and reaffirm the principle that the EEOC is an independent agency whose policy is not subject to change without the approval of Congress."[108]

But the Reagan administration OLC would again apply unitary reasoning to issues involving the EEOC. In 1984, it issued an opinion arguing that the EEOC "lacks the authority to defend itself, independently of the Attorney General, in suits brought under Title VII of the Civil Rights Act in connection with its federal sector administrative enforcement and adjudicative responsibilities, as well as in suits brought by its own employees challenging Commission personnel decisions." Echoing the earlier 1983 opinion, the OLC contended that "to permit the Commission to represent itself in such circumstances, independently of the Attorney General, would create the risk of conflict in the courts as to the position of the United States in such litigation, *i.e.*, the Executive speaking with two conflicting voices."[109] In another opinion that responded to a request from Reynolds in 1986, the OLC raised concerns about legislation Congress was considering that sought to allow the EEOC "to subpoena employees of federal agencies not in compliance with EEOC annual reporting requirements and to seek enforcement of such subpoenas in federal court." That opinion stressed key tenets of the earlier 1983 opinion. Arguing that "permit[ting] the EEOC to seek enforcement of its subpoena in court is unconstitutional" and "would violate the doctrine of separation of powers," the OLC stated its reasoning in explicitly unitary terms:

> The Constitution provides for a tripartite system of government, with the President as the head of the Executive Branch. The President alone may speak for the unitary interests of that branch. As a result, one part of the Executive Branch may not sue another part; there can be no case or controversy between agencies that are subject to the direction and control of the same person.

Moreover, just as in 1983, the OLC again underscored the importance of the "Executive Branch" being able "to speak with a single voice to the courts."[110] Thus, the administration had again turned to unitary theory in an effort to limit the potential actions and authority of the EEOC.

3. Disputing USCCR independence

3.1. Tension

As the Reagan administration prepared to take office, another agency it was expected to come into conflict with was the USCCR. In fact, the transition team responsible for evaluating the commission was internally divided on what approach the incoming administration should take with the agency. The main transition report on the commission took a relatively conciliatory stance that reflected the views of the USCCR transition team leader Jewel Lafontant, who had served as deputy solicitor general during the Nixon and Ford administrations. That report suggested that it was not customary for the president to replace all of the commissioners: "it is noted that the present Staff Director has informed the Team that it has never been the custom of prior administrations, when they come into office, to replace the Commission."[111]

However, a dispute within the USCCR Transition Team led to an alternative report prepared by transition team members Robert Cynkar, Joel Mandleman, Thomas Parry, and Charles Wood. Together, they asserted that "their views have been completely misrepresented or ignored in the 'Final Report'" and that they had to issue an alternative, since they had "consistently advocated diametrically opposed positions" to those adopted in the main report. Unsurprisingly, the alternative report focused on the perceived policy differences between the USCCR and the views of the incoming Reagan administration. It posited that the "Commission's understanding of 'discrimination' dilutes the potential benefits of the Commission's work and tends to undermine, rather than enhance the cohesion of society." It suggested that the USCCR's vision of discrimination was too broad: "The Commission's view is ambiguous because it has indiscriminately applied the label of 'discrimination[']' to a range of very different social and economic phenomena." It held that the USCCR was too focused on government intervention and regulation: "The Commission's recommended resolutions to problems of discrimination invariably call for the expansion of government regulation." It accused the USCCR as representing only a liberal viewpoint of problems of discrimination: "The Commission's work shows little evidence that the

[107] *Oversight Hearings on the Federal Enforcement of Equal Employment Opportunity Laws*, Hearings before the Subcommittee on Employment Opportunities of the Committee on Education and Labor, House of Representatives, 98th Congress, 1st Session (Washington, D.C.: Government Printing Office, 1984 [1983]), 159, 201–202, 204.

[108] Ibid., 62.

[109] "Authority of the Equal Employment Opportunity Commission to Conduct Defensive Litigation," Opinion of the Office of Legal Counsel, U.S. Department of Justice, June 21, 1984, 156, 154.

[110] "Federal Equal Employment Opportunity Reporting Act of 1986," Opinion of the Office of Legal Counsel, U.S. Department of Justice, August 12, 1986, 112–113.

[111] Transition Team, Final Report on the United States Commission on Civil Rights, December 22, 1980, 47, Folder "[Transition Reports]: Civil Rights Commission," Box 18, OA 11,258, Harper Files.

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Commission has addressed opposing points of view in the essentially subjective endeavor of recommending policy." And it focused on what would become central to the battle between the Reagan administration and the commission—policy disputes over affirmative action and busing—claiming that the USCCR had "exceeded its jurisdiction" and had "become an advocate for reverse discrimination, forced busing, and hiring quotas."[112]

Having outlined substantial differences over civil rights policy, the alternative report also criticized the USCCR as an unaccountable bureaucracy. It assailed the notion that the USCCR was as independent of political pressure. While acknowledging the USCCR "is often characterized as America's 'conscience,' an objective, independent entity telling the nation where it should be headed," the alternative report pushed back on that depiction: "This view of the Commission is a delusion and this image of the Commission is a cruel charade. The products of the Commission's labors provide little evidence that the Commission is objective, independent, or not self-interested." Indeed, the report charged that the USCCR was too influenced by civil rights advocates and special interests: "The Commission and its staff are closely linked to the 'civil rights community.' When citing examples of outside input into the commission's work, the staff repeatedly referred to comments and advice from the professional civil rights organizations. Such organizations are hardly disinterested parties, who are advocating what is decidedly only one approach to securing equal rights, an approach not shared by a consensus of Americans." The commission, the report suggested, had become "a captive of narrow interest groups."[113]

What, then, did the alternative report envision as an institutional solution to this perceived issue of agency capture? Its first preference was the disbanding of the commission. "A Civil Rights Unit should be established in the Office of the Director of the Office of Management and Budget to monitor and coordinate the efforts of the executive branch to enforce the civil rights statutes," the authors wrote, and the USCCR, "having fulfilled its mission, should be disbanded." But because the authors acknowledged "there is some small political risk in so doing," they made an "alternative proposal" for a "restructured and restaffed" commission. Specifically, the report pointed to the potential of the president's appointment and removal powers to change the policies advocated by the commission: "The present sitting Commissioners, the staff director and the deputy staff director ought to be dismissed. They should be replaced with persons whose philosophical views on issues such as reverse discrimination, quotas, and forced busing are compatible with those of the Reagan Administration." The authors also advocated changing the senior executives at the commission: "For the same reason, the newly appointed staff director should be instructed by the President to immediately replace all senior executive service personnel who may legally be removed from office after the initial 120 day waiting period has elapsed. Those staff personnel who cannot legally be dismissed should be transferred to positions in which they will be unable to obstruct implementation of vital Administration policies and programs."[114]

For its part, the USCCR looked skeptically at the Reagan administration's plans for civil rights enforcement. For example, in one report, it undermined Reagan's budget proposal to Congress by criticizing the administration's proposed cuts to civil rights agencies.[115] After analyzing the administration's requests for the DOJ Civil Rights Division, the EEOC, the OFCCP in the Department of Labor, the OCR in the Department of Education, and the OCR in the Department of Health and Human Services, the report summed up: "Our review of five major civil rights enforcement programs indicates that the administration's proposed revisions to their budgets will jeopardize recent efforts to improve Federal civil rights enforcement activity." Warning that the U.S. might be entering a "period of civil rights retrenchment," the commissioners suggested that "the administration's budget threatens the progress made during the last several decades."[116] Another report issued to defend affirmative action policies cited speeches of AG Smith and Assistant AG Reynolds to suggest that "Key leaders in the administration" had "enunciate[d] positions inconsistent with the principles of established civil rights law and policy explained in this statement."[117] Reacting to the report, AG Smith's special assistant, John Roberts, described it as relying on "perfectly circular" reasoning about the merits of affirmative action and observed, "I do not recommend reading it.[118]

The Reagan administration looked to make changes to the USCCR in November 1981 with the removal and replacement of two commissioners, including the chairman. While one of Reagan's new appointees as commissioner (and as vice chairwoman), Mary Louise Smith, was a feminist and Equal Rights Amendment advocate, the new chairman, an African American conservative, Clarence Pendleton, was a friend of Reagan's influential aide Edwin Meese.[119] "Edwin Meese—one of President Reagan's closest counselors in the White House—is viewed by many San Diegans as Pendleton's political godfather," one news report later stated.[120] Civil rights advocates lambasted these moves. "The removal of [Chairman] Arthur Flemming and Stephen Horn," the LCCR stated, "is a threat to the integrity and independence of the Commission itself." It was also, the LCCR contended, an attempt "to stifle such criticism by changing the composition of the Commission" and "a clear indication that this Administration is unwilling to tolerate independence or dissent."[121]

Civil rights groups also focused on the issue of what authority the president actually had over the commission. LCCR Vice Chairman William Taylor, a former general counsel and staff director at the USCCR, noted that it appeared that commissioners served at the pleasure of the president. His concern was that this could mean further removals could be forthcoming: "While the commissioners serve at the pleasure of the President, Bill Taylor expressed concern about the possibility of the President replacing all the commissioners and thus bringing into question the independence of the Commission." Nonetheless, in a preview of battles

[112]Alternative Report by Transition Team Members Robert J. Cynkar, Joel Mandleman, Thomas Parry, and Charles Wood, undated, 4–6, 12, Folder "[Transition Reports]: Civil Rights Commission," Box 18, OA 11,258, Harper Files.

[113]Ibid., 14–15.

[114]Ibid., 17.

[115]Schmidt, *Civil Rights in America*, 108.

[116]*Civil Rights*, Statement, 47, 117–118.

[117]*Affirmative Action in the 1980s: Dismantling the Process of Discrimination*, A Statement of the United States Commission on Civil Rights, November 1981, 4.

[118] R. Jeffrey Smith, Jo Becker, and Amy Goldstein, "Documents Show Roberts Influence in Reagan Era," *Washington Post*, July 26, 2005, https://www.washingtonpost.com/archive/politics/2005/07/27/documents-show-roberts-influence-in-reagan-era/f7f2cbb4-f3fe-45a0-8902-0f11b1ce6004/.

[119]Mary Frances Berry, *And Justice for All: The United States Commission on Civil Rights and the Continuing Struggle for Freedom in America* (New York: Alfred A. Knopf, 2009), 188–189.

[120]Jay Harris and John Hanchette, "Pendleton Duped Them, Agency Directors Feel," Gannett News Service, 1983, Folder 1, Box 61, Series III, LCCR Records.

[121]Press Release from Leadership Conference on Civil Rights, November 17, 1981, Folder 10, Box 29, Series II, LCCR Records.

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to come, the LCCR considered the possibility of offering assistance to Flemming: "The Executive Committee indicated that if Dr. Flemming is disposed to resist his removal, the LCCR would be supportive."[122]

At the same time that civil rights advocates worried the administration would push further, key Reagan officials and supporters believed the change to the USCCR's leadership did not go far enough. While Pendleton and Smith were confirmed in March 1982, other nominations by Reagan failed. In the face of likely Senate defeat, the administration withdrew the nomination of B. Sam Hart nomination to replace Jill Ruckelshaus. And while Reagan initially attempted a bold move by offering three more nominations in 1982—Robert Destro, Constantine Nicholas Dombalis, and Guadalupe Quintanilla—to replace the sitting commissioners Murray Saltzman, Blandina Cardenas Ramirez, and Mary Frances Berry, the Senate declined to approve them over concerns about the commission's independence.[123]

Thus, Reagan still did not have ideological control over the commission, a fact that was not lost on the USCCR's critics. For example, the president of the National Association for Neighborhood Schools, William D'Onofrio, wrote to Edwin Meese to criticize the commission's continued support of "forced busing" and to recommend a more aggressive White House stance: "Short of de-funding the Civil Rights Commission (which is what should be done), the Administration must see to it that the commissioners and staff are of the strongest possible conservative conviction."[124] Indeed, the USCCR voted in October 1982 "to reaffirm its support for mandatory busing as a means of ending school segregation," a stance "directly at odds" with the administration's position and Assistant AG Reynolds's emphasis that DOJ was "opposed to relying on mandatory busing as a remedial technique to desegregate public schools."[125]

One example of a notable external intervention was a *Commentary* article, "'Affirmative Action' Under Reagan," published by Chester Finn, a Vanderbilt education professor. Finn argued that Reagan's civil rights policies were "not as clear as they should be" and that the "implementation" of those policies "has been uneven on good days, indefensible on bad ones."[126] Finn's article made an impression. "Your article on affirmative action in this month's *Commentary* has been widely circulated here at Heritage," wrote Robert Huberty to Finn: "I hope it has a beneficial effect on their policy."[127] More significantly, the article attracted attention from key Reagan officials who were skeptical of affirmative action, the EEOC, and the USCCR. For example, Assistant AG Reynolds wrote to Elizabeth Dole, the assistant to the president in the Office of Public Liaison, that Finn was "absolutely correct in its ultimate conclusion that what is demanded if the President's philosophy (as articulated in the 1980 GOP Platform, at pp. 4-5) is to prevail are 'firm ideas, constancy and high principle.'"[128] Edwin Harper thanked Finn for sending him the article, saying, "I hope that a year from now you will find more to praise in the Administration's handling of this important policy area." Furthermore, Harper invited Finn to share his suggestions for the administration: "Also if you have any informal suggestions you'd like to make in these areas, I would be delighted to hear from you."[129]

The interaction between Finn and Reagan officials continued. In addition to emphasizing the importance of "a clear and comprehensive statement" of civil rights policy "tied firmly to the ideas of colorblindness and non-discrimination," Finn focused on the USCCR: "put some more first rate people onto the Civil Rights Commission (and change its staff—the root of much evil—while you're at it) … It's not necessary to look to the civil rights 'establishment' to find respected and respectable people of sound character and principle."[130] After what Harper described as "a stimulating discussion" between White House staffers and Finn over lunch, Finn continued to press for changes to the USCCR.[131] Indeed, Finn's post-lunch reply to Harper noted that they had discussed the notion of changing the USCCR from an irritant of the administration into an advocate for its preferred civil rights policies: "please don't forget my idea of 'turning around' the Civil Rights Commission into the right kind of watchdog group. With a few more good people on it, and a different staff, it could be of some benefit to the cause."[132]

Finn continued to press the point over the coming months. While praising the appointment of Pendleton as chair, Finn stressed that the commission was still at odds with the Reagan administration's views: "Pendleton is obviously a good and sensible man, and was a good choice. But the Civil Rights Commission that he chairs, I suppose I need not tell you, continues to be a disaster … Most days, it's impossible to see any difference from the previous regime … The majority demands busing, quotas, etc."[133] In a follow-up letter, Finn wrote that "Pendleton's instincts seem fine, but you really must give him some competent colleagues—and enough of them to effect a change in that dreadful staff."[134] Indeed, the notion of Finn himself potentially serving as a commissioner was discussed. In a letter to Dennis Patrick, the associate director of the Office of Presidential Personnel, Finn described himself as "an independent thinker who is a Reaganite at heart," suggested that part of his focus "as a Commissioner" would include "rooting out 'reverse discrimination,'" and stressed he was in agreement with administration officials who were skeptical of affirmative action: "I believe my views are entirely consistent with those of people such as [Michael] Horowitz, Uhlman[n] and Brad Reynolds."[135]

[122]"Minutes of the LCCR Executive Committee," November 18, 1981, 2, Folder 10, Box 29, Series II, LCCR Records.

[123]Mary Frances Berry, "Ronald Reagan and the Leadership Conference on Civil Rights," in *Winning While Losing? Civil Rights, the Conservative Movement, and the Presidency from Nixon to Obama*, eds. Kenneth Osgood and Derrick E. White (Gainesville, FL: University Press of Florida, 2014), 82–120, at 102–103.

[124]Letter from William D. D'Onofrio to Edwin Meese III, February 12, 1982, Folder "Civil Rights," Box 4, Series I, Morton C. Blackwell Files, Ronald Reagan Presidential Library and Museum, Simi Valley, CA.

[125]Robert Pear, "Rights Unit Affirms Support for Court-Mandated Busing," *New York Times*, October 13, 1982, A18.

[126]Chester E. Finn, "'Affirmative Action' Under Reagan," *Commentary*, April 1982, https://www.commentary.org/articles/chester-finn/affirmative-action-under-reagan/.

[127]Letter from Robert Huberty to Chester E. Finn, Jr., April 21, 1982, Folder 3, Box 27, Chester E. Finn, Jr. Papers, Herbert Hoover Institution Library and Archives, Stanford, CA.

[128]Note from William Bradford Reynolds to Elizabeth Dole, April 20, 1982, Folder "Affirmative Action 1982 (3 of 6)," Box 1, Dole Files.

[129]Letter from Edwin L. Harper to Chester E. Finn, Jr., April 12, 1982, Folder 3, Box 27, Finn Papers.

[130]Letter from Chester E. Finn, Jr. to Edwin L. Harper, April 19, 1982, 2, 1, Folder 3, Box 27, Finn Papers.

[131]Letter from Edwin L. Harper to Chester E. Finn, Jr., May 24, 1982, Folder 3, Box 27, Finn Papers.

[132]Letter from Chester E. Finn, Jr. to Edwin L. Harper, May 19, 1982, Folder 3, Box 27, Finn Papers.

[133]Letter from Chester E. Finn, Jr., to Edwin L. Harper, November 4, 1982, Folder 3, Box 27, Finn Papers.

[134]Letter from Chester E. Finn, Jr. to Edwin Harper, December 29, 1982, Folder 3, Box 27, Finn Papers.

[135]Letter from Chester E. Finn, Jr. to Dennis Patrick, January 25, 1983, Folder "Corr. while at Vanderbilt," Box 26, Finn Papers.

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3.2. Confrontation

An added dynamic in the Reagan administration's tensions with the USCCR was that the commission's authorization was set to expire in late 1983. The administration was sensitive to charges that the president was skeptical of civil rights, especially in the wake of controversies over the extension of the Voting Rights Act in 1982.[136] Because "the extension of the Commission is a priority issue for all civil rights organizations," Reagan aide Rod Cavaney advocated for the president to call for legislation in the 1983 State of the Union Address: "If the President announces his support for the re-authorization of the Civil Rights Commission in the State of the Union message, it will be received very positively in the civil rights community." It would also help the president wanted credibly claim credit for reauthorization: "This action would also put us on the offense rather than the defense. If you will remember during the whole debate on the Voting Rights Act, even though the President signed it, he never received the proper credit because he was perceived as getting on board after the 'train left the station.'"[137] Reagan's address to Congress would include this request: "The Commission is an important part of the ongoing struggle for justice in America, and we strongly support its reauthorization."[138]

But the agreement on all sides to seek reauthorization did not dispel the ongoing tensions between the administration and the USCCR over policies like affirmative action and structural issues like the president's authority over the commission. The administration was concerned that supporters of the USCCR wanted to change the president's authority regarding commissioner appointments. One internal memo from late 1982 noted the significance of Reagan's earlier efforts being rebuffed: "The Reagan Administration has forwarded six new nominations to Congress for confirmation. For a variety of reasons, only two have been confirmed." As the memo explained, Congress had refused to act because viewed replacing all commissioners "as an unprecedented revamping of the Commission" and was worried subsequent administrations would take "similar actions," "detracting from the continuity in the Commission's work." As the memo further explained, the USCCR had responded by advocating a reauthorizing statute providing more structural independence from the president: "In response to the Congressional reaction, the Commission proposes staggered fixed terms of 6 years (initially pairs of members would be appointed for 2, 4 and 6 year terms respectively). The Commission believes such changes would result in continuity in policy-making, promote the independence of the Commission, and limit the President's power to remove commissioners from office at will."[139]

The memo went on to explain the administration's objections to those proposed changes. Significantly, it stated that the DOJ objected to any kind of provisions for structural independence as a deviation from the appropriate constitutional structure of the executive branch: "LRD has been informally advised by Justice that in order to limit the President's power to remove commissioners from office at will, the Commission's draft bill would have to be modified to specifically limit the President's authority so that he could remove a commissioner only for cause. The Department of Justice objects, however, to limiting the President's present complete control over commissioner appointments and removals." "On constitutional grounds," the memo explained, "Justice has always opposed attempts to create independent officials or units in the Executive branch." The memo noted that DOJ did not inherently object "to the proposed staggered fixed terms" for the commissioners, but it observed that such a provision would imply removals should be unusual: "This option—staggered fixed terms but still serving at the pleasure of the President—would, however, make the Commission more independent than it is now in that it would be more difficult politically to remove a commissioner prior to the expiration of his term."[140] Ultimately, the memo argued for presidential control over the USCCR:

> Although we appreciate the Commission's reasons for proposing this amendment, we perceive no advantage, from the Administration's perspective, in limiting the President's appointment authority. While there must be certain assurances of the Commission's autonomy, the political and sometimes controversial nature of this particular body dictates that, as a practical matter, the ultimate prerogative in the appointment of commissioners should remain with the President. Specific actions each Administration chooses to take pursuant to its broad appointment power will affect the stability and independence of the Commission, and lend continuity to the degree deemed appropriate by each President. We, therefore, recommend that commissioners continue to serve for indefinite periods at the pleasure of the President.[141]

The disagreement between the USCCR and the administration, especially the DOJ, over whether and how independent the commission escalated in 1983. For its part, the USCCR commissioners themselves advocated reauthorization legislation that would grant commissioners for-cause removal protections against presidential firings. In February 1983, USCCR Acting Staff Director John Hope III wrote to OMB Assistant Director for Legislative Reference James Frey about the uniqueness of the commission's responsibilities and what he thought the corresponding implications should be for the issue of the removal power: "The Commission on Civil Rights is unique in the Executive branch in that while not a regulatory agency, it does *not* perform its functions under the direct control and supervision of the President. Therefore, consistent with the objective of ensuring the ability of the U.S. Commission on Civil Rights to continue to exercise its independence the proposed legislation would specify the authority of the President to remove members, but only for neglect of duty or malfeasance in office."[142]

The DOJ, of course, disagreed. First, it "strenuously object[ed]" to the USCCR's characterization of itself as "'unique' in that it is not under the direct control and supervision of the President." "In fact," the DOJ contended, "the Commission's authorizing legislation does not, by terms or implication, constrain the President's power to remove members of the Commission. Accordingly, since the President can remove them in his discretion, the Commission's

[136]Richard Johnson, "The 1982 Voting Rights Act Extension as a 'Critical Juncture': Ronald Reagan, Bob Dole, and Republican Party-Building," *Studies in American Political Development* 35, no. 2 (October 2021): 223–238. Another significant civil rights controversy was the administration's stance in the *Bob Jones University v. United States* (1983) case. Milkis and Tichenor, *Rivalry and Reform*, 245–254.

[137]Memorandum for Jim Cicconi from Red Cavaney re: "Re-authorization of the Civil Rights Commission," January 13, 1983, Folder "Cicconi Memos—January 1983-June 1983 (2)," Box 2, Subseries A, Series I, Cicconi Files.

[138]Ronald Reagan, "Address Before a Joint Session of the Congress on the State of the Union," January 25, 1983, *The American Presidency Project*, https://www.presidency.ucsb.edu/documents/address-before-joint-session-the-congress-the-state-the-union-3.

[139]Memorandum for Ken Clarkson from Connie Bowers, VA Branch/Maurice White, LRD re: "Legislation extending the authorization of the Commission on Civil Rights," December 14, 1982, 2, Folder "Cicconi Memos—January 1983-June 1983 (2)," Box 2, Subseries A, Series I, Cicconi Files.

[140]Ibid., 2.

[141]Ibid., 3.

[142]Letter from John Hope III to James M. Frey, February 11, 1983, 2, Folder "Civil Rights Statement (Fried) [4 of 6]," Box 3, OA 9440, Uhlmann Files. Emphasis in original.

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members are clearly subject to the President's supervision." Second, the DOJ objected to changes to the removal power on unitary grounds: "Historically, this Department has opposed limitations on the President's plenary removal authority on the ground that the President, as head of the Executive Branch, must have effective supervisory authority over his subordinates. Such authority entails the power to remove at will officials in the Executive Branch appointed by the President … We are aware of no basis for making any exception to this policy for the Commission on Civil Rights, which is presently established in the Executive Branch." It further noted that were legislation to be passed with staggered terms for commissioners, it would have no bearing on the removal power question: "We understand that the Commission originally proposed staggered terms for Commission members with the idea that this alone would insulate the members from removal at will. We do not believe that the establishment of staggered fixed-year terms for Commission members by itself would prevent the President from removing members in his discretion."[143] The USCCR itself recognized the significance of DOJ's reaction to the commission's reauthorization proposal: "Justice came down pretty hard on this."[144]

Reagan officials prioritized presidential power as their primary concern in the legislative battle over reauthorization. In a memo to Chief of Staff Baker, James Cicconi explained in one that there were three differences between the administration's proposal and the House Democrats' alternative: (1) the length of the commission's reauthorization, (2) the terms of the appointees, and (3) the extent of the commission's subpoena power. "We seem to have settled on ten years as a compromise between previous, shorter extensions and the fifteen years proposed by [Representative Don] Edwards and the Commission," Cicconi observed, but he suggested that agreeing to a longer extension might be prudent: "It can be argued, though, that the fifteen to twenty-year extension we are now considering would allow us to remove the distinction between our bill and Edwards' version on the point most susceptible to liberal demagoguery." Regarding a broadening of the USCCR's subpoena power, Cicconi noted "it may make little difference if we concede this point." By contrast, the administration was deeply concerned with the issue of appointments. While conceding a point by advocating for staggered terms, it adopted a unitary perspective on the removal power issue: "We advocate staggered six-year terms with the President retaining his power to replace members at will. The Commission has suggested the same thing except removal would be 'for cause' only. Edwards is preparing to add a provision on this issue that will no doubt attempt to tie the President's hands on removal."[145] Subsequently, Cicconi again noted that "the only really critical issue in this legislative battle will be the terms of office."[146]

The initial congressional hearings over the USCCR's reauthorization showed that political actors on all sides recognized the significance of the commission's structure. For defenders of the president, the USCCR had been engaged in sabotage of the administration. Representative Jim Sensenbrenner (R-WI), for example, introduced Chester Finn's *Wall Street Journal* article on the commission into the record, which had described "the ongoing guerrilla war that the commission is conducting against the Reagan administration."[147] Chairman Clarence Pendleton testified that he viewed it as appropriate for the president to be able to replace commissioners: "I think if I work for someone and I am not doing a good job and he or she wants someone else to do that job, then I should just get out of the way." As Pendleton put it, "I think in any other job, if you are appointed by someone, that person has the right to remove you."[148]

By contrast, those who defended the existing USCCR viewed the president as inappropriately clamping down on a commission that was just doing its job in vigorously advocating for robust civil rights policies. Arthur Flemming, the former chairman who Reagan had fired, depicted the country as being "at a crossroad": "the Nation needs an independent, bipartisan U.S. Commission on Civil Rights that will help it combat a regressive movement in civil rights that is more interested in preserving the status quo than in paying the price that must be paid, if we are to deal effectively with the root causes of institutional discrimination." Ralph Neas, the LCCR executive director, described the USCCR as an "unusual body" that "is located in the executive branch, but its structure and functions are similar to those of independent regulatory agencies." In Neas's view, for the USCCR to "properly" carry out "its duty to 'appraise the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the laws * * * or in the administration of justice,'" the commissioners "must be prepared to exercise independent judgment, to point out failings in the enforcement of civil rights caused by departments in the executive branch, and indeed, where necessary, to be critical of the President's performance of his constitutional duty to take care that the laws are faithfully executed." Still, Neas acknowledged that Congress had not provided commissioners with formal protections: "The one major gap in assuring the independence of the agency is in the failure of Congress to provide fixed terms of office, as it does with regulatory agencies. Because the Agency was viewed as temporary, no terms were specified, and the Commissioners have served at the pleasure of the President." Joseph Rauh, the founder of Americans for Democratic Actions, civil rights lawyer, and a lobbyist for civil rights laws, argued that the USCCR should be able to criticize the president: "I don't think, for example, that they have gone too far in their criticism of the President and what you might call his counterrevolution on civil rights." He advocated providing removal protections for commissioners in the legislation: "I think it ought to include something about independence of Commission members … I think in some bills Congress puts in 'for cause' or something." USCCR commissioner Mary Frances Berry even directly contradicted Chairman Pendleton's testimony in the same congressional hearing. After Pendleton had emphasized the commission's relationship with the president, Berry disagreed: "The Chairman's statement is precisely inaccurate in terms of how it characterizes what Commissioners

[143] Letter from Robert A. McConnell to David Stockman, March 15, 1983, 1–2, Folder "Civil Rights Statement (Fried) [4 of 6]," Box 3, OA 9440, Uhlmann Files.

[144] Letter from William A. Lewis, Jr. thru Carol A. Bonosaro to John Hope III re: "Response from OMB re: the appeal letter of February 11, 1983," March 15, 1983, 1, Folder "Civil Rights Statement (Fried) [4 of 6]," Box 3, OA 9440, Uhlmann Files.

[145] Memorandum for James A. Baker III from Jim Cicconi re: "Reauthorization of the Civil Rights Commission," April 5, 1983, 1–2, Folder "Cicconi Memos—January 1983-June 1983 (7)," Box 2, Subseries A, Series I, Cicconi Files.

[146] Memorandum for James A. Baker III from Jim Cicconi re: "Issues Briefing Lunch," April 11, 1983, Folder "Cicconi Memos—January 1983–June 1983 (7)," Box 2, Subseries A, Series I, Cicconi Files.

[147] Chester E. Finn Jr., "From Civil Rights to Special Interests," *Wall Street Journal*, March 22, 1983. Reprinted in *Extension and Authorization Request for Appropriations for the U.S. Commission on Civil Rights*, Hearings before the Subcommittee on Civil and Constitutional Right of the Committee on the Judiciary, House of Representatives, 98th Congress, 1st Session (Washington, D.C.: Government Printing Office, 1985 [1983]), 4.

[148] *Extension and Authorization Request for Appropriations for the U.S. Commission on Civil Rights*, Hearings, 114, 116.

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do. We do not work for the President. We do not work for any President. We are an independent, bipartisan Commission."[149]

3.3. Assertion

While seeking reauthorization, the Reagan administration also wanted to change the composition of the commission in the interim. In May 1983, Reagan announced his intent to nominate three new appointees—John Bunzel, Morris Abram, and Robert Destro (in a second attempt)—as commissioners to replace three of the commissioners most critical of the administration—Berry, Ramirez, and Saltzman. He also announced the nomination of a new staff director, Linda Chavez. All were "Reagan Democrats" who shared the president's views of affirmative action.[150]

This attempt to use the president's appointment and removal authority stemmed from the administration and the USCCR having different understandings of civil rights. In a memorandum to Uhlmann, Office of Policy Development staffer Stephen Galebach argued that "the more recent view espoused by the Commission goes well beyond investigation concerning denial of equal protection of the laws on grounds of race, and looks to the different question whether particular racial groups are being given governmental benefits that the Commission deems desirable." As a result, Galebach argued that the president had to use his power to influence the direction of the commission to reflect the administration's policies: "the Commission would benefit from fresh blood if it is to return to the concept of civil rights for which it was set up and to which the vast majority of American citizens are committed."[151]

One internal administration exchange about the language in a White House Correspondence House form letter addressing the nominations included suggested edits that revealed a concern with emphasizing the president's purported right to control the commission. Whereas the original sentence in a draft of the form letter stated, "The President is strongly committed to the fundamental goals of the Civil Rights Commission and to its independence and bipartisan nature," a handwritten change dropped the emphasis on independence, crossing out "and to its independence and bipartisan nature" and replacing that phrase only with "and bipartisan character." Similarly, a sentence stating that "members of the Commission serve for indefinite terms at the request of the President" was changed to specify they served "at the pleasure of the President."[152] The White House Counsel's Office and Office of Policy Development were both involved in reviewing the letter. As Deputy Counsel to the President Robert Hauser wrote to Associate Counsel John Roberts, "called Uhlmann [in the Office of Policy Development], left message that letter was okay."[153]

A more consequential way that the administration sought to emphasize presidential power was by looking to the OLC for support. Just as in the dispute with the EEOC, the OLC again intervened to try to bolster presidential power over a civil rights agency. In March 1983, Theodore Olson had written to Uhlmann to explain that an earlier 1972 OLC opinion had indicated the president had removal authority over USCCR commissioners: "I am enclosing a November 20, 1972, Office of Legal Counsel Memorandum on Presidential removal of members of the Civil Rights Commission. This ought to be quite helpful. There is little doubt about the President's authority in this area. We have some other materials, but this seems to be the most directly relevant."[154]

The OLC also elaborated with a new legal opinion in June 1983. It noted the precedent from the Nixon OLC opinion: "In light of the language and the plan of the statute, as well as its legislative history, it is our conclusion that the President has power to remove the members of the Commission on Civil Rights at his discretion. This Office analyzed the issue eleven years ago and reached the same conclusion." The new opinion went on to consider the significance of the legislative history behind the creation of the USCCR. Describing Congress's intent for the agency, the OLC explained "that the statute which established the Commission is silent on removal and provides no set term for members. Therefore, we would normally conclude that the authority which appointed these Executive Branch officials, the President, has the power to remove them at his discretion." Having "scrutinized the Act and all of its contemporaneous as well as prior and subsequent legislative history and all of the relevant indicia of legislative intent," the OLC stated it had "found no reliable evidence of such an intent [to limit removal], and we therefore conclude that the President's authority to remove Presidential appointees from the Commission has not been restricted by the Legislature." Notably, the opinion said this could settle the matter prior to any determination of the constitutionality of any removal power restrictions: "We, accordingly, need not consider whether any such restriction would be constitutional."[155]

Still, the OLC opinion went on to note several considerations for how it would evaluate the constitutionality of removal power restrictions. First, the opinion stated that the president's appointment powers generally implied a power to remove: "A basic presumption, albeit rebuttable, underlying the general law on the President's removal authority is that the power to appoint implies the power to remove." Second, it cited Article II's take care clause as a justification for such presidential control: "In the case of the President, a constitutionally based premise for this principle is that the President, having been given the constitutional duty to 'take care that the laws be faithfully executed', Art. II, § 3, must be able to exercise control over those whom he has appointed to assist him in discharging this responsibility."[156]

[149]Ibid., 9, 57, 144, 114.

[150]Robert Pear, "Reagan's Wounds on Rights Frequently Seem Self-Inflicted," *New York Times*, May 29, 1983, E4; Berry, "Ronald Reagan and the Leadership Conference on Civil Rights," 104.

[151]Memorandum for Michael M. Uhlmann from Stephen H. Galebach re: "Civil Rights Commission," June 15, 1983, 1, Folder "EEOC [Equal Employment Opportunity Commission] Memo on Constitutional Status from OLC," Box 3, OA 9440, Uhlmann Files.

[152]Memo to Judy Johnston from Anne V. Higgins re: "Form Letter on Civil Rights Commission," June 3, 1983, with attached "Draft (Appointments to Civil Rights Commission)," Folder "JGR/Civil Rights Commission," Box 11, Series I, John G. Roberts Files, Ronald Reagan Presidential Library and Museum, Simi Valley, CA.

[153]Memo to J.G.R. from Richard A. Hauser, June 9, 1983, Folder "JGR/Civil Rights Commission," Folder "JGR/Civil Rights Commission," Box 11, Series I, Roberts Files.

[154]Memorandum to Michael M. Uhlmann from Theodore B. Olson, March 25, 1983, Folder "Civil Rights Commission: Internal Memos," Box 4, OA 9441, Uhlmann Files. The Nixon administration OLC had argued "that Civil Rights Commission members do serve at the pleasure of the president." Memorandum for Leonard Garment from Roger C. Cramton re: "Authority of the President to Require the Resignations of Members of the Civil Rights Commission," November 20, 1972, 1, Folder "Civil Rights Commission [I] [1 of 5]," Box 19, Bradley H. Patterson, Jr. Files, Richard Nixon Presidential Library and Museum, Yorba Linda, CA.

[155]Memorandum to Richard A. Hauser from Theodore B. Olson re: "Legal Opinion Regarding Removal by the President of Members of the Commission On Civil Rights," June 21, 1983, with attached Memorandum for Fred F. Fielding re: "The President's Power to Remove the Members of the Commission on Civil Rights," June 21, 1983, 1, 7, Folder "Civil Rights Office of Legal Policy Memo re Removal Powers," Box 4, OA 9441, Uhlmann Files.

[156]Ibid., 4.

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Beyond those Article II considerations, the OLC opinion described other features of the USCCR's structure as implying the president had removal power. It characterized the USCCR as an executive branch agency and suggested it performed executive functions: "The very fact that the Civil Rights Commission was expressly and unequivocally placed in the Executive Branch thus negates any inference of a Congressional intent to limit the President's removal power. However, even if Congress had not expressly placed the Commission in the Executive Branch, the result would have been the same since the functions of the Commission are neither to adjudicate, nor to perform quasi-legislative functions." The opinion rejected the notion that some proponents of USCCR independence raised in support of an implied removal restriction, suggesting that the requirement that the commission be bipartisan implied no such constraint: "The provision that the Commission is to be bipartisan … also does not indicate a Congressional intent to limit the President's removal power." And it identified the lack of fixed terms as an indication that the president was meant to have such removal authority: "it is significant that the Act does not provide for specific, fixed-year terms of service for Commission members … Although the mere presence of a statutory provision for a specific term of service has not been deemed a sufficient basis on which to infer a legislative purpose of restricting Presidential removal authority … the absence of any fixed-year term of service buttresses the argument that the President has removal authority in this case."[157]

However, even as the administration bolstered its legal arguments for presidential control over the USCCR, it had serious concerns about the political situation. OMB official Michael Horowitz worried that the administration risked defeat on two fronts—a rejection of the nominations and the imposition of restrictions on presidential power over the commission in the reauthorization legislation. Horowitz explained that "our nominations can be expected to encounter loud and well orchestrated criticism" and "the result could be rejection of our nominees 'on principle', (i.e. because no Administration has or should be able to replace the entire Commission)." In terms of the reauthorization legislation, Horowitz noted that "the Democratic majority on [Representative] Don Edwards' Civil and Constitutional Rights Subcommittee made clear that they intend to include provisions in the reauthorization bill that would substantially increase the Commission's authority and effectively grant life tenure to its current members. Edwards and the civil rights establishment can be expected to characterize these provisions as necessary to safeguard the Commission's 'historic independence' against the Administration's alleged onslaughts." Horowitz fretted that the controversy could result in "the enactment of onerous reauthorization legislation which the President might find politically difficult to veto."[158]

Similarly, Michael Uhlmann also ruminated over whether the president would prevail in the conflict with the USSCR. "I am increasingly concerned," Uhlmann wrote to Meese, "that our plans for a major presidential coup with the CRC nominees could turn into a political disaster." Uhlmann worried that Congress would delay considering the president's nominees and delay voting on them: "It is clear that the Democrats' strategy is to avoid a vote on the merits for as long as possible, both in committee and on the floor. They have already succeeded in delaying the hearings. They will now seek to drag them out. Once the hearings are over, they will delay a committee vote for as long as they can. When the nominees do reach the floor, they will probably filibuster." Moreover, he noted that the possibility of court lawsuits could provide an additional excuse for such delays: "In the meantime, we can expect a lawsuit which, although it has little chance of prevailing on the merits, they will use as an excuse for not voting." Nonetheless, Uhlmann felt that the issue was one on which the White House had to prevail: "This is a major battle for the President and the Party. I do not think I am exaggerating when I say that this fight falls into that small category of Must Wins for the President."[159]

Uhlmann's concerns were borne out by the response of the civil rights community. The "attempted wholesale replacement" of the commissioners, Ralph Neas asserted, "seriously jeopardizes the independence, the integrity, and the effectiveness of the Commission." He described the move as a sharp break from how past presidents had dealt with the USCCR: "For twenty-five years, all Presidents, Republicans and Democrats alike, have sought to preserve the unique bipartisan independence of the Civil Rights Commission. They carefully insulated the Commissioners from Presidential election results. Indeed, prior to the Reagan Administration, only one Commissioner had been removed in the Commission's entire history." By contrast, "it appears that President Reagan is about to shatter that proud tradition in an unprecedented effort to have the Commission reflect only his philosophies, programs, and policies."[160] Supporters of the USCCR thus suggested that the upcoming battle should not focus on the qualifications of his nominees. "The critical issue is not the qualifications of the nominees or their positions on particular issues," stated the LCCR: "Rather, our deep concern is to prevent the President from subverting the Commission's historic independence and integrity." To the LCCR, fulfilling the USCCR's statutory mandate to "*Appraise federal laws and policies* with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice" required the agency to be insulated from politics: "It is self evident that the Commission can fulfill this charge only if it is completely insulated from Presidential election results." Reagan's efforts, they suggested, sought "to transform the Commission from an independent agency to an instrument of Presidential policy."[161] The ACLU Bill of Rights Lobby similarly held that presidential pressure would fatally undermine the USCCR's reputation: "The Commission has been able to play a key role in federal civil rights policy for over two decades largely because of its credibility as an independent and objective fact-finding agency. Its effectiveness and usefulness will be irreparably impa[i]red if it becomes or is perceived as an instrument of Presidential policy."[162]

This dispute over whether Reagan's desired appointments would constitute too sharp a break in the ideological orientation of the commission featured prominently in congressional hearings on the nominations in July 1983. Defenders of the president focused on what they viewed as Reagan's legitimate use of his

[157] Ibid., 11–13.

[158] Memorandum for Ken Cribb from Mike Horowitz re: "Our Civil Rights Commission Nominees," March 31, 1983, 1–2, Folder "Civil Rights Commission: Internal Memos," Box 4, OA 9441, Uhlmann Files.

[159] Memorandum for Edwin Meese III from Michael M. Uhlmann re: "Civil Rights Commission Nominees," June 23, 1983, 1–2, Folder "Civil Rights Commission [1 of 7]," Box 62, OA 11,839, Meese Files.

[160] Ralph G. Neas, "Statement of the Leadership Conference on Civil Rights Regarding the Firing of Civil Rights Commission Members," May 25, 1983, Folder 12, Box 60, Series III, LCCR Records.

[161] Leadership Conference on Civil Rights Statement, June 15, 1983, 1–2, Folder 12, Box 60, Series III, LCCR Records. Emphasis in original.

[162] "Issue Brief," ACLU Bill of Rights Lobby, July 18, 1983, 1, Folder 1, Box 61, Series III, LCCR Records.

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power. "The issue is, in my view, wholly beyond dispute," stated Senator Strom Thurmond (R-SC), "and the President is therefore entirely within his rights in making these nominations." For Senator Orrin Hatch (R-UT), the notion that "Presidents may not remove Commissioners" was "a bogus issue." One of Reagan's nominees, John Bunzel, suggested that critics just wanted to entrench continued opposition by the USSCR to Reagan: "Maybe there is a hidden agenda here. Maybe what the people who are talking about preserving the independence of the Commission really want is some assurance from anyone who would be appointed to it that he would continue to attack President Reagan."[163] The USCCR chairman, Clarence Pendleton, also advocated for the president's nominees. "I am doing everything within my power to ensure that our colleagues get confirmed," Pendleton wrote to Chester Finn, and he claimed that "the civil rights advocacy groups certainly made fools of themselves" in the nomination hearings.[164]

Each Reagan nominee for commissioner—all Democrats—stressed their skepticism of quotas and busing. "I refuse to believe," stated Morris Abram, "that proportionate representation in educational opportunity and the work force and the education force and the medical and legal forces is a proper way for this country to proceed." "The difficulty with quotas," Bunzel echoed, "is that it sets up artificial barriers; it does not allow individuals to be treated fairly, so that all of their talents, and abilities can be honestly weighed and judged." For Robert Destro, "it cannot be who you are, it cannot be where you came from. It has to be your qualifications. If it is not, that is not fair." "I think it is important," noted the nominee for staff director, Linda Chavez, "that I, too, state that I have a position and a record of opposition to quotas."[165]

Critics of Reagan's actions, however, argued that the commission's independence was an important norm that was now at stake. "The Commission has been the backbone, the structure, the salespersons for civil rights in America," suggested Rauh: "We plead: Do not wreck its independence." "Throughout its history the U.S. Commission on Civil Rights has been treated—not as a part of the executive branch—but as an independent agency charged with the responsibility of serving both the Congress and the President," claimed Flemming.[166] Notably, Flemming organized a statement of former commissioners accusing Reagan of taking an unprecedented step: "As former Commissioners, we are alarmed by the Present Administration's attempt to destroy the independence and impartiality of the Commission on Civil Rights … This long tradition of independence has enabled Commissioners to speak without fear or favor when criticizing shortcomings or praising progress in the field of civil rights."[167]

Democratic lawmakers agreed. One notable statement to that effect came from Senator Joe Biden (D-DE). Though he "support[ed] affirmative action proposals," Biden was "not at all enamored with busing, nor with quotas." Still, he declined to support a major shift in the makeup of the commission: "I do not have any argument with you, but I am going to vote against all of you." He argued that whether the president had the power was less important than the context in which Reagan wanted to make the appointments: "I think that the legalistic interpretation of whether the President has the right to dismiss you—that misses the point." Even though the "President has the authority to do it," Reagan's action, Biden suggested, "has tainted the Commission, and it will taint the question of your independence." "What is at issue is the independence of the Commission," Senator Patrick Leahy (D-VT) likewise stressed: "that tradition is not an accident of history. It has reflected the acceptance by both Republican and Democratic Presidents alike that the Commission cannot be independent or effective if members serve at the pleasure of each new administration." Senator Howard Metzenbaum (D-OH) accused Reagan of uniquely trying to silence his critics: "Yet no President—I emphasize that—no President has ever seen fit to try to silence the Commission." "The President's purge," suggested Senator Ted Kennedy (D-MA), "is nothing more than a flagrant attempt to politicize the Commission and to make it a political arm of the White House."[168]

Key pushback against Reagan's efforts also came from some of Reagan's fellow Republicans in the Senate. For example, Senator Arlen Specter (R-PA) explained that while "it was my initial conclusion that the nominees should be confirmed," the context made this a "unique situation." Specter conceded that he believed critics of Reagan who charged that the number of nominations would undermine the independence of the commission had a point: "In a context where you would be replacing five of six Commission members in an unprecedented manner during the 26 year life of the Commission, there is substance to the objection raised by so many witnesses that the character of the commission is being inappropriately reshaped by one Administration which is contrary to the intent of Congress and the continuity of independence of the Civil Rights Commission." As Specter saw it, "The substance, as well as the perception, is that the institutional independence of the Commission would be altered."[169]

The Reagan administration and its allies had their own pointed response to the constant attention to the history of the USCCR's relationship with past presidential administrations. Reagan officials argued that the history of how the commission operated revealed consistent presidential influence. Deputy Assistant Director for Legal Policy William Barr asserted in a memorandum that no such independence had existed for the USCCR during the Kennedy and Johnson administrations. To begin with, he noted that commissioners had offered both Kennedy and Johnson their resignations at the start of their respective terms: "When President Kennedy took office, all the members of the Commission submitted their resignations"; "When President Johnson assumed the Presidency in 1963, again all the Commissioners submitted their resignations"; and "When Johnson was elected President in"64, he requested all the Commissioners to submit their resignations. Five of the six did so, with Father Hesburgh holding out because he thought compliance with the President's request would acknowledge that the Commission was not independent." Barr then noted that Richard Nixon, a Republican president, was not offered resignations by all the sitting commissioners on taking office: "The election of Nixon was the first change in Administration in which all or most of the members of the Commission did not tender

[163] *Presidential Nominations to the Civil Rights Commission*, Hearings before the Committee on the Judiciary, United States Senate, 98th Congress, 1st Session (Washington, D.C.: Government Printing Office, 1984 [1983]), 3, 29, 124.

[164] Letter from Clarence M. Pendleton, Jr. to Chester E. Finn, Jr., August 1, 1983, Folder "Corr. while at Vanderbilt," Box 26, Finn Papers.

[165] *Presidential Nominations to the Civil Rights Commission*, Hearings, 42, 108, 111, 103.

[166] Ibid., 203, 439.

[167] "Statement by Former Commissioners of the U.S. Commission on Civil Rights," reprinted in *Presidential Nominations to the Civil Rights Commission*, Hearings, 448.

[168] *Presidential Nominations to the Civil Rights Commission*, Hearings, 31, 37, 33, 220.

[169] Letter from Arlen Specter to the President, July 29, 1983, Folder "Civil Rights Enforcement; Commission on Civil Rights, 1983-85," Box 35, CNPR Records.

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their resignations." At the same time, Barr argued that Nixon had demonstrated that a president could compel removal of a commissioner. In a "first test of the President's authority to involuntarily remove a sitting member," Nixon "demanded Hesburgh's resignation, and Hesburgh complied." Barr further asserted that a president seeking to change the overall philosophical outlook of the commission was not unprecedented, claiming that Kennedy had used his appointments to make the commission more liberal: "Nor is President Reagan the first President to use his appointment power to change the character of the Commission. Kennedy's nominations in 1961 radically transformed the body from bipartisan 'neutrality' to the liberal civil rights position."[170]

Other internal memoranda echoed these points. One memorandum from Uhlmann, discussing a review of "all CRC meetings since 1958," asserted "that the Commission worked hand-in-glove with the Kennedy and Johnson Administrations."[171] In another, OMB official Michael Horowitz pointed to the importance of the tradition of commissioners offering to resign at the start of a president's term ending with the Republican Richard Nixon: "Until the onset of the Nixon Administration, members of the Commission gave each incoming President the opportunity to change the Commission's membership by submitting their resignations. It is highly significant that this tradition ended with Nixon."[172]

Reagan himself also publicly spoke out against the idea that the commission had been independent of past presidents. In an address to the American Bar Association, Reagan said the claim that his nominations "compromise[d] the independence of the Commission" was "hogwash," and he offered his own understanding of how past Democratic administrations had engaged with the commission:

> Historian Carl Brauer wrote that John Kennedy sought, through appointments, to liberalize the Commission. And officials of his administration, and even a representative of the Democratic National Committee, met regularly with the Staff Director of the Civil Rights Commission to plan strategy. Presidents Johnson and Carter also sought to appoint individuals who reflected their ideas on how to achieve our common goal of civil rights for all Americans. So, isn't it strange that we never heard in the past this charge about compromising the independence of the Commission?

Reagan then stressed the notion of "independence" in a different way, suggesting that his nominees were independent of what the president viewed as the standard policy stances of the civil rights community: "our nominees are independent, independent from every voice but their own conscience. They don't worship at the altar of forced busing and mandatory quotas."[173]

As the dispute over reauthorization and the nominations continued, civil rights advocates strategized about how to reauthorize the commission in a way that could lessen the president's claims to formal control over it. For William Taylor, the solution was to have legislation that would stagger the commissioners' terms and permit their firing only for cause. Taylor believed that trying to challenge the president's removal authority over the existing commissioners in the courts risked defeat. Writing to NAACP Legal Defense and Education Fund Director-Counsel Jack Greenberg, Taylor explained, "I have talked with [LCCR Executive Director] Ralph Neas and given more thought to the questions we discussed yesterday." The first question was whether "*there a real chance that the Senate would hold up the nominations and extend the Commission for 18 months to give the courts an opportunity to act?*" Taylor believed the answer was "No," because that choice "would be seen by all but perhaps one or two Republicans as equivalent to a rejection of the nominations." The second question was whether there would be "*a better chance that the Senate would approve any other measure that would accomplish the same objective?*" Here, Taylor thought the answer was "Yes," as the Senate "might agree to extension legislation that would set fixed, staggered terms for the Commissioners and permit firing only for cause, and might be prepared to do so before acting on the pending nominations." To Taylor, this was an option that could allow Republicans to grant Reagan some appointments, but not fully take control of the commission: "Some Republicans would find this more attractive since it would allow them to vote for an affirmative measure without directly rebuffing the President .. under this alternative or variations of it a resolution could be reached that, while addressing Republican concerns, would prevent the Administration from gaining control of the Commission." By contrast, Taylor was concerned about a third question about allowing approval of the nominations, "*since the issue would still be thrown to the courts?*" As Taylor saw it, Senate approval of the nominations would be "devastating" for the NAACP Legal Defense Fund's argument that the president could not have remove the commissioners: "Since the whole question revolves around legislative intent, would not Senate approval of the nominations at a time when the issue was squarely posed be seen by any court as fairly conclusive evidence of Congressional ratification of the removal power of the President?" Taylor concluded by reemphasizing his preference for the legislative strategy: "I think that the legislative route proposed in #2 is more promising than the other legislative or litigative options … I do hope that if a suit is filed, careful attention will be given to framing any request for relief in a way which will not diminish the legislative prospects."[174]

Soon the president escalated the issue. In August 1983, Reagan made Chavez staff director through a recess appointment.[175] Though the USCCR had argued in 1977 that "layoffs by seniority 'lock in' the effects of past discrimination," Chavez quickly pressed the commission to reverse its position on seniority-based layoff plans. The commission had undermined the Reagan DOJ's affirmative action litigation stances by criticizing its efforts in the *Williams v. City of New Orleans* and *Boston Firefighters v. NAACP* cases, but Chavez sought to change that. She unsuccessfully urged the commissioners to side with the Reagan DOJ in its position in the Memphis firefighters case, *Firefighters Local Union No. 1784 v. Stotts*, persuading only Pendleton to adopt that position.[176]

[170]Memorandum for T. Kenneth Cribb, Jr. from William P. Barr re: "Appointment History to Civil Rights Commission," August 15, 1983, 1, Folder "Civil Rights Commission [6 of 7]," OA 11,839, Box 62, Barr Files.

[171]Memorandum for Edwin Meese III and Roger Porter from Michael M. Uhlmann re: "'Independence' of Civil Rights Commission," August 8, 1983, Folder "Civil Rights: Historical background on CRC (Civil Rights Commission)," Box 3, Series I, Barr Files.

[172]Memorandum for Ken Cribb from Mike Horowitz re: "Historical background on Civil Rights Commission," September 14, 1983, Folder "Civil Rights Commission [7 of 7]," Box 62, OA 11,839, Meese Files.

[173]Ronald Reagan, "Remarks at the Annual Meeting of the American Bar Association in Atlanta, Georgia," August 1, 1983, *The American Presidency Project*, https://www.presidency.ucsb.edu/documents/remarks-the-annual-meeting-the-american-bar-association-atlanta-georgia.

[174]Letter from William L. Taylor to Jack Greenberg, July 28, 1983, 1-2, Folder "Civil Rights Enforcement: Commission on Civil Rights Senate Hearings, 1983," Box 35, CNPR Records. Emphasis in original.

[175]"Shanker Aide Named To a Civil Rights Post," *New York Times*, August 17, 1983, B22.

[176]Robert Pear, "New U.S. Rights Aide Backs Whites for Jobs in Memphis," *New York Times*, September 11, 1983, 24; Berry, *And Justice for All*, 211.

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The president pressed further in October 1983, announcing the immediate firings of the three holdover Democratic commissioners Berry, Ramirez, and Saltzman. In its press release, the administration emphasized what it viewed as the president's constitutional right to exercise his removal power: "Under the Constitution and the relevant statute (42 U.S.C. § 1975), members of the Commission serve at the pleasure of the President." The White House further asserted "that the issue at stake in this matter is not the removal of certain individuals or the Civil Rights Commission itself. The issue is the responsibility of the President to exercise the power given to him by law. It is that Constitutional power of appointment … that is at stake here."[177] Notably, that announcement occurred soon after the filming of a *Firing Line* debate over affirmative action, which had vividly put the dispute on display by pitting Assistant AG Reynolds, USCCR Chairman Pendleton, and *National Review* editor William Buckley against USCCR Commissioner Berry, Legal Defense Fund Director-Counsel Jack Greenberg, and Women's Legal Defense Fund Executive Director Judith Lichtman.[178]

For some civil rights advocates, Reagan's escalation gave them hope. For one thing, when Commissioners Ramirez and Berry challenged their dismissal in federal court, they succeeded in obtaining a preliminary injunction from district court Judge Norma Johnson. Suggesting that the subsequent lack of a quorum of commissioners was impeding the "vital" work of the commission, Johnson posited that there was evidence that Congress had "intended the duties of the commission to be discharged free from any control or coercive influence by the president or the Congress." While the DOJ filed an appeal, the issue was poised to be moot given the upcoming expiration of the commission and debates over reauthorization.[179]

Civil rights advocates also hoped that lawmakers would respond in designing the reauthorization law. Writing to Representative Peter Rodino (D-NJ), Rauh suggested that a strategy of (1) pursuing reauthorizing legislation that would restrict the president's removal authority, while (2) simultaneously delaying Senate action on the president's nominations, had forced the president into taking a rash action:

> [T]he strategy of the civil rights forces has been to *preserve the independence of the Commission* by preventing President Reagan from replacing a majority of Commissioners with his own appointees. The effort was to amend the Commission's authorizing statute to accomplish this before Senate action on the nominations. The strategy worked well—with House passage of a bill permitting firing only for cause and with a delay of several months of confirmation in the Senate. In fact it worked so well that the President was forced into his rash action of October 25 of removing the three sitting Commissioners, thereby repudiating Republican supporters in the Senate who were trying to negotiate a compromise and incurring a great deal of political fallout.

As a result of Reagan's action, Rauh argued that the "only way to forestall the Commission becoming a complete instrumentality of the Administration is to convert the Commission into a legislative arm of the Congress, vesting complete or primary appointment power in the Speaker of the House and President *pro tem* of the Senate." He noted that civil rights groups had worked with lawmakers to introduce concurrent resolutions taking this action in both chambers.[180]

3.4. Outcome

Faced with the possibility of the USCCR being placed in the legislative branch, the Reagan administration agreed to a compromise. Lawmakers adopted a 6-year authorization for what the *New York Times* called "a new, hybrid agency." Under the law, the president would appoint four commissioners, while the House Speaker (based on the recommendations of the House majority and minority leaders) and Senate president pro tempore (based on the recommendations of the Senate majority and minority leader) would each have two appointments. No more than half of the commissioners could be from the same political party, and both the House and Senate's respective appointments also needed to include commissioners from different parties. Furthermore, the president's selection of chair, vice chair, and staff director was subject to the concurrence of a majority of the commissioners. Politically, this could be a win for Reagan, depending on which nominees were chosen and given his own ability to make four nominations. But structurally, it was a loss. One issue was that Congress had its own nominees. Another was that the commissioners, whose terms would be staggered, would be given for-cause removal protections. They would not, however, be subject to Senate confirmation.[181]

Faced with this outcome, the Reagan administration sought to find a balance between taking a political and policy win, while expressing its concerns over the commission's structural relationship to the executive branch. OMB Director David Stockman's memorandum to President Reagan explained this perspective. Stockman emphasized that the compromise legislation had passed Congress with veto-proof majorities, meaning that even if Reagan wanted to reject the legislation for structural reasons, Congress could override him: "H.R. 2230 was passed by the House in its original form by a vote of 400-24 in August. After extensive debate and amendment, the Senate passed its version by a vote of 78 to 3 in November. The House then adopted the Senate bill by voice vote." Stockman noted that a key part of the compromise was that "the President would be prohibited from removing a member of the new Commission from office except 'for neglect of duty or malfeasance in office,'" while current commissioners "serve at the pleasure of the President." He acknowledged the significant concerns that the DOJ had about the implications of this compromise for the separation of powers:

> Justice, in its enclosed views letter, states that the reconstituted Commission established by H.R. 2230 does not fit clearly within any of the three branches established by the tripartite structure of the Constitution, and that creation of agencies that are not clearly legislative, judicial, or executive, "tends to erode the important structural separation of powers ordained by our

[177] Press Release, Office of the Press Secretary, The White House, October 25, 1983, 1-2, Folder "SMC/Civil Rights Commission," Box 1, OA 11,722, Sherrie M. Cooksey Files, Ronald Reagan Presidential Library and Museum, Simi Valley, CA.

[178] Southern Educational Communications Association, "Resolved: That Affirmative Action Goals For Women And Minorities Should Be Abolished" part I, *Firing Line* Transcript, October 13, 1983, Firing Line Broadcast Records, Herbert Hoover Institution Library and Archives, Stanford, CA.

[179] Judi Hasson, "A federal judge Monday blocked President Reagan from firing…," *UPI*, November 14, 1983, https://www.upi.com/Archives/1983/11/14/A-federal-judge-Monday-blocked-President-Reagan-from-firing/4485437634000/; Robert Pear, "Reagan Signs Bill for Rights Panel," *New York Times*, December 1, 1983, https://www.nytimes.com/1983/12/01/us/reagan-signs-bill-for-rights-panel.html.

[180] Memorandum from Joseph L. Rauh, Jr. to Peter Rodino re: "Civil Rights Commission Extension," November 7, 1983, 1-2, Folder "Civil Rights Enforcement: Commission on Civil Rights Senate Hearings, 1983 (2)," Box 35, CNPR Records. Emphasis in original.

[181] United States Commission on Civil Rights Act of 1983 (PL 98-183, 97 Stat. 1301, November 30, 1983); "Elegant Compromise on Civil Rights," *New York Times*, November 12, 1983, 22; Selin and Lewis, *Sourcebook of United States Executive Agencies*, 99.

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> Constitution," and establishes an unwise precedent that might encourage other deviations. The Department further states that because the appointment procedure for members of the new Civil Rights Commission is inconsistent with the Appointments clause of the Constitution, the Commission may not perform duties that may be performed only by Officers of the United States. Thus, the Commission may perform only functions that are essentially investigative and informative.

As a result, DOJ wanted the president to sign the bill and include a signing statement about those reservations about the structure of the executive branch: "Justice strongly recommends that a signing statement be issued if you approve the bill, expressing reservations regarding the dilution of the President's appointment and removal powers under the bill and the creation of entities not clearly placed in one of the three constitutional branches of the Government."[182]

At the same time, Stockman pressed upon Reagan the political and policy victories he could obtain by signing the bill. In his view, the legislation had "averted the real possibility that the Congress would have established, by concurrent resolution not subject to your approval or disapproval, a Legislative branch Commission to which you would have had no power to appoint any members." Stockman argued that, with new appointees, Reagan could succeed in changing the USCCR's views of civil rights to better align with the administration's stances: "if five members opposed to quotas, busing, etc., as civil rights goals are appointed, the bill can serve as an extraordinary vindication of your original purpose in seeking new Commission appointees: the creation of the country's principal forum for debate over civil rights and civil rights-related matters, on terms which do not automatically assume that quotas, busing, higher social welfare expenditures, etc., advance the interests of minorities." Thus, he recommended approving the bill and issuing a signing statement about the structural issues: "Although the enrolled bill does raise this and other issues—e.g., the limitation of the President's removal authority and the question of congressional appointments to a Commission arguably performing some Executive functions—I recommend that you sign the bill. As is customary under such circumstances, I recommend that you set forth in a signing statement the unique and non-precedential nature of the Commission and the Constitutional reservations expressed by the Justice Department."[183]

There was some internal disagreement over how to approach issuing such a signing statement. Assistant to the President and Deputy to the Chief of Staff Richard Darman noted the DOJ and OMB desired "to put the president on record with respect to the potential constitutional problems implicit in the structure of the reconstituted Commission." Those structural issues "have implications far beyond that controversy, involving the constitutional powers of the Presidency itself. It is important, therefore, that the President's signing statement express his reservations in language that is both accurate and cogent."[184] By contrast, White House Communications Director David Gergen "seriously question[ed] the wisdom of this signing statement as drafted." He complained that the "current draft is very negative in tone and conveys the impression that we want to curtail the powers of the commission."[185] As a result, it was suggested at a Cabinet Council on Economic Affairs meeting that the president should use language placing the onus for defending presidential power on the DOJ: "While I support this compromise, the Department of Justice has raised concerns as to the constitutionality of certain provisions of this legislation. I have appended a list of these reservations."[186]

Rather than just accepting the political win and moving on, then, Reagan issued a signing statement containing DOJ's objections and defending presidential power on unitary grounds. While he was "pleased that the Commission has been re-created so that it may continue the missions assigned to it," Reagan noted that "the Department of Justice has raised concerns as to the constitutional implications of certain provisions of this legislation. I have appended a recitation of these reservations." The DOJ's concerns focused on the appointments process, location of the commission, and for-cause removal protections: "four members of the Commission will be appointed by the President, two members by the President pro tempore of the Senate, and two members by the Speaker of the House of Representatives. The Commission itself is not placed clearly within any of the three branches of government created by the United States Constitution, and restrictions have been placed upon the power of the President to remove members of the Commission." The DOJ suggested that this posed a separation-of-powers concern and was a mistake that should not be repeated: "Agencies which are inconsistent with the tripartite system of government established by the Framers of our Constitution should not be created. Equally unacceptable are proposals which impermissibly dilute the powers of the President to appoint and remove officers of the United States. The Civil Rights Commission is, however, unique in form and function and should therefore not become a precedent for the creation of similar agencies in the future." This "new appointment procedure created by Congress," the DOJ suggested, "has effectively imposed constitutional limitations on the duties that the Commission may perform." Notably, it justified that limitation in unitary terms, emphasizing the president's appointment powers under Article II of the Constitution:

> [B]ecause half of the members of the Commission will be appointed by the Congress, the Constitution does not permit the Commission to exercise responsibilities that may be performed only by "Officers of the United States" who are appointed in accordance with the Appointments Clause of the United States Constitution (Article II, Section 2, clause 2). Therefore, it should be clear that although the Commission will continue to perform investigative and informative functions, it may not exercise enforcement, regulatory, or other executive responsibilities that may be performed only by officers of the United States.[187]

The appointments made to the reconstituted commission were Clarence Pendleton, John Bunzel, Morris Abram, and Esther Gonzalez Buckley (by Reagan), Francis Guess and Blandina Cardenas Ramirez (by the Senate), and Robert Destro and Mary Frances Berry (by the House). Berry and Ramirez were pressed into

[182]Memorandum for the President from David A. Stockman re: "Enrolled Bill H.R. 2230—United States Commission on Civil Rights Act of 1983," November 25, 1983, 2-4, Folder "Civil Rights Commission [3 of 7]," Box 62, OA 11,839, Meese Files.

[183]Ibid., 4.

[184]Memorandum for Richard G. Darman from Fred F. Fielding re: "Revised Draft Signing Statement for Civil Rights Commission Legislation," November 30, 1983, Folder "Civil Rights Commission [2 of 7]," Box 62, OA 11,839, Meese Files.

[185]Memorandum for Richard G. Darman from Dave Gergen re: "Signing Statement on Civil Rights," November 29, 1983, 1, Folder "Civil Rights Commission [4 of 7]," Box 62, OA 11,839, Meese Files.

[186]"Compromise on Civ Rts Com Statement," notes on Cabinet Council of Economic Affairs agenda, November 30, 1983, Folder "Civil Rights Commission [3 of 7]," Box 62, OA 11,839, Meese Files.

[187]Ronald Reagan, "Statement on Signing the United States Civil Rights Commission Act of 1983," November 30, 1983, *The American Presidency Project*, https://www.presidency.ucsb.edu/documents/statement-signing-the-united-states-commission-civil-rights-act-1983.

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accepting reappointment by civil rights advocates. Reagan and congressional Republican leaders ensured the commission had sufficient votes to support the president in making Pendleton chair and Chavez staff director. Notably, this had gone against initial expectations from an informal agreement among the administration, Senator Majority Leader Howard Baker (R-TN), and Senators Bob Dole (R-KS), Specter, and Biden.[188] For Reagan to gain political control, the administration went back on what civil rights groups had viewed as a key part of this agreement—the reappointments of Mary Louise Smith and Jill Ruckelshaus—because, as Berry would later reflect, Smith and Ruckelshaus "could not be relied on to support Pendleton" as chairman or Chavez as staff director.[189] Indeed, Reagan had previously reflected on the appointments issue in his diary: "Clarence Pendleton chairman of Civil Rts. Commission came in re the Congress so called compromise to keep me from making new appointments. The boys are playing games but I think I can snooker them."[190]

Civil rights advocates who had been integral to crafting the compromise recognized they had been defeated given the makeup of appointees. Ralph Neas suggested that there had been a betrayal of a compromise he believed had been made that would have secured the USCCR's independence in the face of changed appointments. In his telling, "Shortly after noon on November 10th, Senator Dole walked out of the Vice President's office, near the Senate chambers, and handed to the assembled civil rights groups a piece of paper with the proposal that became the essence of the compromise. The proposal provided that President Reagan would reappoint Mary Louise Smith, the House Republican Minority Leader would appoint Jill Ruckelshaus, and the Senate Majority Leader would appoint a Republican with strong civil rights credentials." Neas asserted that "the President failed to reappoint Mary Louise Smith because he could not control her votes. And that is what the Commission fight has been all about: the President's efforts to silence voices of dissent and control the Commission." He further argued that the congressional leaders had backed away from the compromise agreement: "it appears that the House and Senate Republican leadership have decided to join President Reagan in repudiating the November 10th compromise and in attempting to destroy the independence of the Commission." Thus, Neas conceded the president had won: "Mr. President, it looks like you have won your battle to pack the Civil Rights Commission."[191] In a later letter to Senator Dole, placed particular blame on Edwin Meese: "we remain certain that the real culprit is Mr. Meese. Regardless of the political costs to the President, Meese had to: (1) stack the Commission with individuals who could pass his litmus test of loyalty; (2) punish Smith and Ruckelshaus for disloyalty; (3) 'beat' the civil rights groups; and (4) try to embarrass congressional Republicans who have established good and productive relationships with the civil rights community."[192]

The Reagan administration acknowledged the importance of Smith's non-reappointment to the president's ability to gain control over the reconstituted commission. Internally, the administration debated whether to respond to Republican state legislators who had petitioned for the reappointment of Smith. Though White House Counsel Fred Fielding felt a "formal response" would be "unnecessary" and possibly "counterproductive," he argued that any reply the administration sent needed to stress the philosophical basis of the decision: "It is too reticent in that it says *nothing* about the underlying philosophical basis of the President's approach to civil rights (i.e., favoring 'equal opportunity,' opposing quotas and the like). if we are going to issue a response we should at least make the points that will appeal to the Americans who *are* likely to support he President—particularly since these points are in fact the basis for the President's decision."[193] Subsequently, the administration's form letter that was sent to the petitioners noted that the president wanted commissioners who shared his views of civil rights policies: "the President considered it especially important that the four members he appointed fully share his commitment to a civil rights policy that emphasizes equality of opportunity for all Americans, under which individuals are judged on their merit, not their race or sex."[194]

Having been reappointed as USCCR chairman, Pendleton viewed the outcome as a political win for Reagan. In December 1983, he wrote to the president to thank him for "ensuring an independent U.S. Commission on Civil Rights." But in the next line of his letter, Pendleton emphasized that Reagan's ideological priorities were now dominant at the USCCR: "Without your sincere commitment and staunch adherence to your personal philosophical goals, we would not have such fine commissioners. The men and women you have selected and those selected by the Congress should make the next six years a new era in civil rights protections for every individual in the United States." Pendleton also credited Edwin Meese for ensuring a more conservative viewpoint on the commission: "Mr. Meese never compromised your shared philosophy. He worked diligently to ensure that the new Commission would include men and women who shared our conservative ideology." And Pendleton specifically told Reagan that the commission would address two policies the administration cared deeply about—affirmative action and busing: "I cannot wait for our first Commission meeting in January so that we may begin to reevaluate issues like mandatory busing and quotas."[195]

By early 1984, it was widely agreed that the administration had won. "A little late for Christmas," stated a *New York Times* report, "President Reagan appears to have finally gotten a long-sought present—a Civil Rights Commission that can be counted on to follow his own inclinations."[196] The ACLU described the USCCR as having "been transformed into an instrument of presidential policy."[197] Neas noted that staff director Linda Chavez had "already recommended the reversal of decisions adopted by the previously

[188]Pear, "Reagan Signs Bill for Rights Panel."

[189]Berry, *And Justice for All*, 212–213.

[190]Ronald Reagan, White House Diaries, November 15, 1983, https://www.reaganfoundation.org/ronald-reagan/white-house-diaries/diary-entry-11151983/.

[191]"Statement of Ralph G. Neas, Executive Director, Leadership Conference on Civil Rights, Regarding the Civil Rights Commission Compromise," December 8, 1983, 1, 3–5, Folder 1, Box 61, Series III, LCCR Records.

[192]Letter from Ralph G. Neas to Robert Dole, January 6, 1984, 2, Folder 9, Box 29, Series II, LCCR Records.

[193]Memorandum for Richard G. Darman from Fred F. Fielding re: "Draft Response to Republican State Legislators Who Petitioned President for Appointment of Mary Louise Smith," December 19, 1983, 1, Folder "Civil Rights Commission," Box 1, OA 12,398, Jane Carpenter Files, Ronald Reagan Presidential Library and Museum, Simi Valley, CA. Emphasis in original.

[194]"12/83 response to petitioners who signed letter calling for the reappointment of Mary Louise Smith—in San Diego," form letter from Lee L. Verstandig, December 1983, Folder "Civil Rights Commission," Box 1, OA 12,398, Carpenter Files.

[195]Letter from Clarence M. Pendleton, Jr. to the President, December 28, 1983, Folder "Civil Rights / Equal Opportunity Policy and Organization (1)," Box 62, OA 11,839, Meese Files.

[196]"Rights Panel Echoes Reagan Point of View," *New York Times*, January 23, 1984.

[197]Spence, "In Contempt of Congress and the Courts: The Reagan Civil Rights Record," 20.

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independent Commission" and asserted that her proposed agenda "reads like the civil rights agenda of the Radical Right."[198] The USCCR soon voted six to two to condemn quotas as having created "a new class of victims."[199] By late summer 1984, Neas claimed the "Commission has become nothing but an extension of the White House press apparatus."[200]

4. Conclusion

Each of the two conflicts examined in this article between the Reagan administration and a civil rights agency involved similar dynamics. In both cases, there were immediate tensions pitting the Reagan White House and DOJ against the EEOC and USCCR over civil rights policies. Those tensions rose as the administration tried to make new appointments, while some agency officials and their supporters in the civil rights community defended their understandings of how to implement civil rights laws. The tensions then escalated into direct confrontations over both civil rights policy (affirmative action) and structure (the nature of the president's relationship to agency). And each conflict led the Reagan administration to articulate formalistic claims to presidential power, asserting key tenets of the unitary executive theory to try to assert more control over the personnel and policies of the civil rights bureaucracy.

To be sure, the outcomes in these cases was mixed. In the EEOC case, the Reagan administration faced some immediate losses on the policy issues of affirmative action, while achieving a notable victory in their assertion of structural control over the commission. By contrast, in the USCCR case, the Reagan administration conceded a structural issue in the reauthorization legislation in exchanged for immediate political and policy victories in gaining ideological control over the commission.

But the legacies of these cases becomes more apparent when considering them in the context of developments in American politics over the past few decades. First, consider that political actors on both sides of the issues in the 1980s saw these cases as key moments in a broader trend toward increasing polarization over civil rights policies.[201] "The national consensus supporting a vigorous effort to overcome centuries of injustice has been firm and clear, and the record of past Administrations has largely been favorable to the vigorous promotion of our national commitment to equality and social justice," one appraisal of civil rights in the mid-1980s stated, but "the civil rights policies and practices of this Administration constitute so marked a break with those of all Administrations of the last quarter century that we can no longer take for granted that there will be vigorous civil rights enforcement and fidelity to the rule of law."[202] For Mary Frances Berry, who was later USCCR chair during the Clinton and George W. Bush administrations, the commission's status had been significantly damaged after "the cynical manipulation begun by the Reagan administration."[203] She reflected that the combination of Reagan eventually "capturing the federal courts and using the Civil Rights Commission to help shape public opinion" helped the administration significantly reframe and redirect civil rights law in the long run."[204] On the conservative side, Edwin Meese reflected on the role of Reynolds in pushing for a different understanding of civil rights, even in the wake of the defeat of Reynolds's later nomination to be associate AG, a loss that was a measure of revenge for the civil rights groups. Whereas some had worried that Reynolds "might not carry out the President's policies" and "might take a business-as-usual approach." Meese believed that he had markedly changed the government's approach: "When others have said that our nation must discriminate against some Americans in order to help others, Brad Reynolds, true to our best ideals as a nation, has insisted that discrimination is wrong, no matter the form it takes."[205] Overall, these episodes demonstrated how it could no longer be assumed that presidents of both parties would have the same—or even similar—visions of civil rights and the role of the civil rights agencies. Those priorities could change significantly from administration to administration.

The legacies of these cases for presidential power are also particularly significant. These episodes were part of a larger, multi-decade project of the conservative legal movement to undermine the independence of the administrative state and assert greater presidential control over it. The Reagan DOJ continued to develop and push its understanding of unitary theory. For example, Reynolds, a key player in both the EEOC and USCCR episodes, later helped lead a DOJ "Conference on Separation of Powers" in January 1987. This conference featured discussions on the idea of a unitary executive and its implications, and attendees included notable officials such as AG Edwin Meese, Solicitor General Charles Fried, Assistant AG for the Office of Legislative Affairs John Bolton (the future ambassador to the United Nations in the George W. Bush administration and national security adviser in the Trump administration), and Assistant AG for the OLC Samuel Alito (the future Supreme Court justice).[206] Other personnel involved in these episodes also became leading luminaries of the conservative legal movement and the unitary executive theory. For example, William Barr advanced the theory in both the George H.W. Bush and Trump administrations. As Assistant AG for the OLC in the Bush administration, Barr issued a famous opinion on "Common Legislative Encroachments on Executive Branch Authority," which noted Reagan's signing statement about the USCCR as an example of the president having to defend executive branch authority.[207] Having then subsequently served as AG in the George H.W. Bush administration, Barr again took that role in the Trump administration, aggressively defending presidential power amid the Russia investigation and Ukraine affair.[208]

[198]"Statement of Ralph G. Neas, Executive Director, Leadership Conference on Civil Rights, Regarding the Independence of the New Civil Rights Commission," January 9, 1984, Folder 10, Box 29, Series II, LCCR Records.

[199]Quoted in Wolters, *Right Turn*, 222.

[200]Letter from Ralph G. Neas to the *Washington Post* Editor, August 14, 1984, Folder 9, Box 29, Series II, LCCR Records.

[201]On the more general significance of civil rights to the rise of nationalized and partisan polarization, see, for example, Eric Schickler, *Racial Realignment: The Transformation of American Liberalism, 1932-1965* (Princeton, NJ: Princeton University Press, 2016); Paul Pierson and Eric Schickler, *Partisan Nation: The Dangerous New Logic of American Politics in a Nationalized Era* (Chicago: University of Chicago Press, 2024).

[202]Statement of the Board of Trustees of the Lawyers' Committee for Civil Rights Under Law, Co-Chairs of local affiliated Lawyers' Committees, and members of the Executive Committee, etc., undated, 3-4, "Folder "Meese, Edwin Confirmation, 1984-85," Box 40, CNPR Records.

[203]Berry, *And Justice for All*, 339.

[204]Berry, "Ronald Reagan and the Leadership Conference on Civil Rights," 113.

[205]Draft "Remarks of the Attorney General, Dinner Honoring Brad Reynolds," November 6, 1985, 2-3, Folder "Wm. Bradford Reynolds Appreciation Dnr, 6 November 1985," Box 16, Meese Papers.

[206]Memorandum to the Attorney General from William Bradford Reynolds re: "Conference on Separation of Powers," January 5, 1987, with attached "Agenda for Conference on Separation of Powers," Folder "'Separation of Powers' Conference DoJ, 9 January 1987—J.W. Marriott Hotel, Washington, D.C.," Box 24, Meese Papers.

[207]"Common Legislative Encroachments on Executive Branch Authority," Opinion of the Office of Legal Counsel, U.S. Department of Justice, July 27, 1989, 249, fn 1.

[208]Skowronek, Dearborn, and King, *Phantoms*, ch. 6, 9.

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Furthermore, Supreme Court Chief Justice John Roberts has been well-positioned to advance judicial doctrines in the ideological direction the Reagan administration had wanted to go, authoring key majority opinions limiting affirmative action in college admissions in *Students for Fair Admissions v Harvard* (2023) and advancing the unitary executive in *Seila Law v. Consumer Financial Protection Bureau* (2020) and *Trump v. United States* (2024). The controversial doctrine of executive branch unity has only become more consequential in recent years, through the assertions of presidential administrations, the adoption of the theory in Supreme Court cases, and the growing influence of an enduring network of conservative elites seeking to transform American law.[209]

In fact, promoters of a unitary executive continued to take on the EEOC and the USCCR. For example, in the George W. Bush administration, those agencies again found themselves in the crosshairs of OLC opinions favoring presidential authority. In a 2003 opinion about the EEOC, the OLC addressed the question of "whether the [EEOC] has the authority to initiate an action in federal court against a public employer to enforce a settlement or conciliation agreement negotiated by the EEOC during its administrative process." The opinion partly pointed to the statute at issue: "because the relevant statutes do not clearly and unambiguously grant the EEOC authority to sue public employers to enforce settlement or conciliation agreements, any such actions must be brought by the Attorney General." But it also used unitary justifications. "Enforcing the nation's laws through litigation is an unquestionable executive function," and the centralization of "federal litigation authority facilitates presidential management and supervision of the policies of Executive Branch agencies and departments as they are impacted in litigation." For good measure, the opinion cited what the 1983 Reagan OLC opinion on EEOC litigating authority had "previously concluded" for justification as well.[210] Similarly, a 2001 OLC opinion about the USCCR also drew on a Reagan-era precedent. The opinion held that the president had removal authority over the agency's staff director—despite the silence in the statute on the matter—because of the "fundamental principle" that, "absent a clear indication to the contrary, the power to remove attends the power to appoint." It cited the 1983 Reagan OLC opinion about the president's authority to remove members of the prior version of the USCCR.[211]

To be sure, while Democratic and Republican presidents may have different visions for civil rights, at some point, they recognize the need to deploy the power of the bureaucracy for their preferred policy objectives.[212] It is revealing, for example, that the Reagan administration's OLC opinion on the EEOC drew partly on Carter-era precedents for the president's structural relationship to that agency, even though Reagan and Carter had significantly different visions for civil rights policy. To take more recent examples, both the first administration of Republican President Donald Trump and the administration of Democratic President Joe Biden highlighted ways in which policy goals and issues of structural control remained intertwined regarding the EEOC. The first Trump administration featured its own DOJ-EEOC clash, as the Solicitor General filed an amicus brief directly at odds with an amicus brief the EEOC had previously submitted in a case about whether Title VII prohibited employment discrimination on the basis of sexual orientation.[213] After Democratic President Joe Biden took office, the EEOC general counsel appointed by President Trump, Sharon Gustafson, who had prioritized cases involving discrimination based on religion and placed less priority on cases involving race or the LGBTQ+ community, refused to resign, and the president subsequently fired her. That act was his way of trying to take back control over the EEOC for his preferred civil rights policy goals.[214]

But conservatives today have been especially strident about how they see the Rights Revolution as having raised issues of presidential control over the bureaucracy. "The biggest institutional part of [the progressive movement] is this large bureaucracy or administrative state, which is insulated from control by the executive or even, increasingly, by Congress," argued Ryan Williams, the president of the Claremont Institute, in 2021: "One of the institutional vehicles for it was the Civil Rights Act of 1964, which was meant to fulfill the promise of the Declaration of Independence for Black Americans coming out of segregation. But the courts and administrative agencies quickly turned against the color-blind, equal-opportunity vision of the founding and toward affirmative action—this calculation of current oppressor or past oppressor, and the pursuit of equity and social justice."[215] Similarly, after Trump won the 2024 election, the conservative activist Christopher Rufo urged the president to take on what he viewed as the bureaucracy's entrenched "diversity agenda" and argued that any "post-electoral opposition" that would come "from inside the executive branch itself" would be "in defiance of Article II of the Constitution, which opens with the unqualified statement: 'The executive Power shall be vested in a President of the United States of America.'" Rufo implored Trump to "end these programs under his executive authority and replace DEI [diversity, equity, and inclusion] with a policy of strict color-blind equality," which would "deliver an immediate shock to the bureaucracy."[216] As he would later succinctly put it, "the right needs to have its own interpretation of civil rights law and it needs to take over the enforcement of civil rights law."[217]

The onset of the second Trump administration has brought these connections between presidential power and the civil rights bureaucracy into sharp relief. In the 2024 campaign, Trump had suggested that he would address "a definite anti-white feeling in this country."[218] The Heritage Foundation's *Mandate for Leadership*

[209] Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (New York: Little, Brown, 2007); Skowronek, Dearborn, and King, *Phantoms*, Part II.

[210] "Equal Employment Opportunity Commission Actions Against Public Employers to Enforce Settlement of Conciliation Agreements," Opinion of the Office of Legal Counsel, U.S. Department of Justice, September 8, 2003, 152–153, 159.

[211] "Authority of the President to Remove the Staff Director of the Civil Rights Commission and Appoint an Acting Staff Director," Opinion of the Office of Legal Counsel, U.S. Department of Justice, March 30, 2001, 103–104.

[212] Jacobs, King, and Milkis, "Building a Conservative State."

[213] Julie Moreau, "Analysis: Justice Department Files Brief Rejecting LGBTQ Workplace Protections," *NBC News*, July 27, 2017, https://www.nbcnews.com/feature/nbc-out/analysis-justice-dept-files-brief-rejecting-lgbtq-workplace-protections-n786996.

[214] Devins and Lewis, "Independent Agency Myth," 1359; Mark Joseph Stern, "Why Biden Fired Trump's Appointee to a Key Civil Rights Job," *Slate*, March 9, 2021, https://slate.com/news-and-politics/2021/03/sharon-gustafson-eeoc-fired-biden-trump-civil-rights.html.

[215] Emma Green, "The Conservatives Dreading—And Preparing for—Civil War," *The Atlantic*, October 1, 2021, https://www.theatlantic.com/politics/archive/2021/10/claremont-ryan-williams-trump/620252/.

[216] Christopher F. Rufo, "Counterrevolution Blueprint," *City Journal*, Winter 2025, https://www.city-journal.org/article/counterrevolution-blueprint.

[217] Ross Douthat, "The Anti-D.E.I. Crusader Who Wants to Dismantle the Department of Education," *New York Times*, March 7, 2025, https://www.nytimes.com/2025/03/07/opinion/chris-rufo-trump-anti-dei-education.html.

[218] Alex Thompson, "Exclusive: Trump allies plot anti-racism protections—for white people," *Axios*, August 1, 2024, https://www.axios.com/2024/04/01/trump-reverse-racism-civil-rights. Such rhetoric on the right is emblematic of what Rogers Smith and Desmond

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report, part of the "Project 2025" initiative, stated that the president "should direct the Department of Justice and Equal Employment Opportunity Commission to enforce Title VII to prohibit racial classifications and quotas, including human-resources classifications and DEI trainings that promote critical race theory." It further argued that the EEOC should "disclaim its regulatory pretensions" and "reorient enforcement priorities toward claims of failure to accommodate disability, religion, and pregnancy (but not abortion)."[219] Once in office, Trump quickly went further than previous Republican presidents in challenging the independence of the EEOC. Not only did he fire the general counsel, but he moved to fire two Democratic commissioners, Charlotte Burrows and Jocelyn Samuels, before the expiration of their terms. In so doing, the president directly raised the question about whether the commissioners were protected from at-will removal from the president and whether such protections would be held to be constitutional by the conservative-dominated Supreme Court.[220] Addressing her firing, Samuels stated that her removal "is unprecedented, violates the law and represents a fundamental misunderstanding of the nature of the EEOC as an independent agency—one that is not controlled by a single Cabinet secretary but operates as a multi-member body whose varying views are baked into the Commission's design."[221]

But the EEOC firings were only one part of a much broader campaign. Indeed, a central motivation in the second Trump administration's drive to exercise control over the executive branch has been its desire to purge policies, programs, and personnel related to diversity, equity, and inclusion throughout the federal government and to wield executive power to challenge them in the private sector. For example, the president issued an executive order directing that "all executive departments and agencies" should "terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements" and "further order[ing] all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities." Another notable part of that directive rescinded President Johnson's 1965 executive order on affirmative action in federal contracting.[222] In the 1980s, key Reagan administration officials had sought to change that policy, with Reynolds arguing that the president could do so "with a stroke of a pen." But amid opposition from within the administration (particularly from Secretary of Labor Bill Brock), from Congress, and from the business community, President Reagan had taken no action.[223] Acting where the Reagan administration had faltered, Trump claimed to have "abolished 60 years of prejudice and hatred with the signing of one order."[224]

It is thus increasingly evident how high the stakes of presidential control over the civil rights bureaucracy are, and this raises important questions going forward. Of course, one natural question might be about how much the civil rights bureaucracy depends on independence or insulation in order to implement its statutory missions. But it is also worth considering how much any potential structural changes can bolster the implementation of civil rights policies without a modicum of consensus on what those policies should be. Arguably, it was the fraying of that political consensus that created the opening for the Reagan administration to press forward with its claims of presidential power over civil rights agencies.[225] Whatever the case, a key lesson of these cases echoes through to today: the implementation of civil rights policies is deeply intertwined with issues of executive branch structure. As the Reagan administration showed, the unitary executive theory has been wielded to contest the reach of the Rights Revolution.

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King have described as a change in the dispute over civil rights policy, from debates over color-blind versus race-conscious policies to now debates over white "protectionist" policies versus policies that would "repair" past injustice. Rogers M. Smith and Desmond King, *America's New Racial Battle Lines: Protect versus Repair* (Chicago: University of Chicago Press, 2024).

[219]Jonathan Berry, "Department of Labor and Related Agencies," in *Mandate for Leadership: The Conservative Promise*, eds. Paul Dans and Steven Groves (Washington, DC: The Heritage Foundation, 2023), 582–583, 586–587.

[220]Matthew Goldstein and Emily Steel, "Trump Fired E.E.O.C. Commissioners in Late-Night Purge," *New York Times*, January 28, 2025, https://www.nytimes.com/2025/01/28/business/trump-eeoc-commissioners-fired.html; Charlie Savage, "Defying Legal Limits, Trump Firings Set Up Tests That Could Expand His Power," *New York Times*, January 29, 2025, https://www.nytimes.com/2025/01/29/us/politics/trump-firings-officials-legal-test.html.

[221]Sean Michael Newhouse, "2 Equal Employment Opportunity Commission Democrats Fired," *Government Executive*, January 28, 2025, https://www.govexec.com/transition/2025/01/two-equal-employment-opportunity-commission-democrats-fired/402568/.

[222]Executive Order 14,173—Ending Illegal Discrimination and Restoring Merit-Based Opportunity," January 21, 2025, *The American Presidency Project*, https://www.presidency.ucsb.edu/documents/executive-order-14173-ending-illegal-discrimination-and-restoring-merit-based-opportunity.

[223]Quoted in Eastland, *Energy in the Executive*, 355. See also Mayer, *With the Stroke of a Pen*, 206–208; Rudalevige, *By Executive Order*, 197–198.

[224]Donald J. Trump, "Remarks in Las Vegas, Nevada," January 25, 2025, *The American Presidency Project*, https://www.presidency.ucsb.edu/documents/remarks-las-vegas-nevada-4.

[225]On the significance of the original political assumptions at the time of the creation of an independent agency, see Devins and Lewis, "Independent Agency Myth."

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