

President Harrison & the Hatch Act

David P. Currie

AS I HAVE NOTED elsewhere in these pages, there is some question who the tenth President of the United States was.¹ There is no doubt who was the ninth: William Henry Harrison, quondam Delegate from the Northwest Territory, Governor of the Indiana Territory, and (briefly) Representative and Senator from Ohio. Best known for the 1811 battle of Tippecanoe (in which he heedlessly camped where the enemy could mount a surprise attack that cost him a fifth of his men)² and for begging Congress to suspend the Northwest Ordinance's ban on slavery in the Indiana Territory (which it refused to do),³ Harrison was, as his biographer wrote, "seldom the initiator of programs, and

... not conspicuous for advocacy of any particular political ideas ...".⁴

As his own career suggested, Harrison was a believer in short terms for federal officers. No one, he insisted in his Inaugural Address, should remain in office so long that he forgot that he was the people's servant, not their master. Until the Constitution could be amended to limit the President to a single term, he selflessly vowed, he would do his part to avoid the evil: As he had promised before, he would never consent to serve more than four years.⁵ With a little help from Providence, this was one promise that Harrison kept in spades, for within a month he was dead. With all due respect, a thirty-day

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1 See David P. Currie, *His Accidency*, 5 Green Bag 2d 151 (2002).

2 See Dorothy Burne Goebel, *William Henry Harrison: A Political Biography* 116-25 (Indiana Library, 1926).

3 See David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801-1829* 89 n.18 (Chicago, 2001) [hereafter cited as *The Jeffersonians*].

4 See Goebel, *Harrison* at 379-80 (cited in note 2).

5 James D. Richardson, 4 *A Compilation of the Messages and Papers of the Presidents* 5, 8-9 (Mar 4, 1841) (US Congress, 1900) [hereafter cited as *Richardson*].

presidential term seems to me to be carrying a good thing too far.

The unprecedented brevity of his service, combined with his dearth of political ideas, made Harrison's Presidency perhaps the least memorable in U.S. history.⁶ In the thirty days afforded him, however, Harrison did manage to do a few noteworthy things. He appointed Daniel Webster Secretary of State; he called a special session of Congress (to deal with the continuing financial crisis) that was to provoke a remarkable series of vetoes by President (or Acting President) Tyler; and (ecco the subject of this essay) he anticipated the Hatch Act by almost exactly a hundred years.

Our story begins with the seventh President, Andrew Jackson. There are three things every school child learns (or used to learn) about Jackson. He was the hero of the Battle of New Orleans; he stood for greater democracy and the rights of the common man; and he introduced the spoils system. If you win the election, you turn your opponents out of government jobs, and you appoint your political friends. To the victor belong the spoils.⁷

I have suggested elsewhere that there are questions about the accuracy of the first two prongs of this conventional wisdom and that there are other things about Jackson that are

more important and more admirable as well.⁸ Historians remind us that Jackson did not simply replace all officers and employees who were of a different political persuasion either. He did, however, dislodge enough of them to provoke bellows of indignation from opposition speakers in Congress, together with a few choice propositions for reform.⁹

Nor was Jackson's patronage system restricted to filling offices with adherents of the right political party. "Before 1829," wrote Leonard D. White, "few federal officeholders had been required to discharge any obligation to the party or faction in power." Thereafter, however,

they were progressively brought under the dominion of the local party machine and subjected to various party requirements as a condition of continuing their employment. Among these were obligations to pay party assessments, to do party work at election time, and to "vote right."¹⁰

It was such practices as these that drew the particular attention of congressional critics.

An 1835 bill offered by South Carolina Senator John C. Calhoun would have attacked the spoils system itself by requiring the President to state his reasons for discharging federal officers.¹¹ As Calhoun explained, no President would admit that he

6 Cf David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U Chi L Rev 466 (1983).

7 This familiar phrase has been attributed to New York Democrat William Marcy, who served, inter alia, as Senator, Governor, and Secretary of War and of State. See Leonard D. White, *The Jacksonians: A Study in Administrative History* 324 (Macmillan, 1954).

8 See David P. Currie, *The Constitution in Congress: Descent into the Maelstrom, 1829-1861* (forthcoming 2003) [hereafter cited as *Descent into the Maelstrom*].

9 See, e.g., White, *The Jacksonians* at 300-08 (cited in note 7); Glyndon G. Van Deusen, *The Jacksonian Era* 35-36 (Harper & Row, 1959); Robert V. Remini, *The Life of Andrew Jackson 185-86* (Harper & Row, 1988); Arthur M. Schlesinger, Jr., *The Age of Jackson* 45-47 (Little, Brown, 1953). Below the policy level, White assures us, necessity protected many career public servants: "The actual conduct of the public business remained after 1829 as before largely in the hands of old-timers who 'knew the ropes.'" White, *The Jacksonians* at 349.

10 *Id.* at 332.

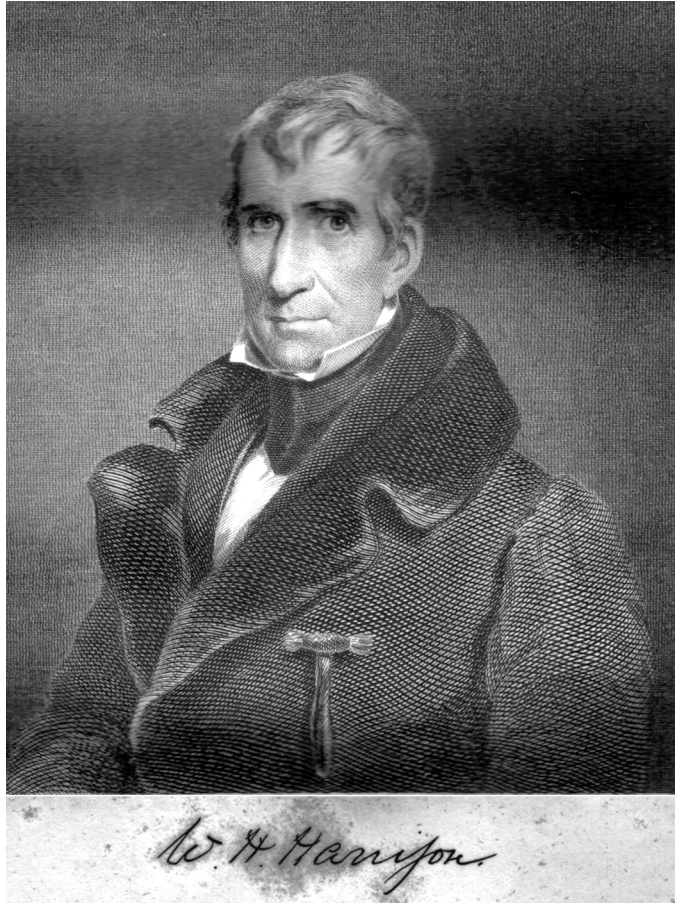
11 Register of Debates in Congress, 23d Cong, 2d Sess 220, 229 (Gales & Seaton, eds, 1835) [hereafter cited as Reg Deb].

had fired a public servant on crass political grounds.¹² Henry Clay would have gone further, proposing to amend the bill to require Senate consent to remove an officer whose appointment the Senate had approved.¹³ All of this prompted a rerun of the 1789 debate over the President's power of removal, which added nothing of significance on the basic question.¹⁴

Several speakers denied Congress's power even to require the President to state his reasons. Since the President had sole authority to remove executive officers, said Ether Shepley of Maine, he was not accountable to the Senate for his actions.¹⁵ Congress could no more require the President's reasons for firing a subordinate, added James Buchanan of Pennsylvania, than the President could demand the Senate's reasons for rejecting a nomination to federal office.¹⁶ Wrong, said Delaware's John Clayton: To pass intelligently on a successor's appointment the Senate needed to know why the previous incumbent had been fired.¹⁷

Calhoun's bill passed the opposition-

controlled Senate but died in the Democratic House.¹⁸ In the next three Congresses the Whigs tried a new tack: Political removals should be condemned outright, and federal



officers should be forbidden to "intermeddle" in federal elections.

The first of these proposals reminds the

¹² Id at 558. See also id at 523 (Sen. Clay).

¹³ Id at 455.

¹⁴ For that debate see David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801*, ch 1 (Chicago, 1997) [hereafter cited as *The Federalist Period*].

¹⁵ Reg Deb, 23d Cong, 2d Sess 454. On similar grounds President Tyler would refuse to provide the House with a list of members of Congress who had sought federal office, and President Cleveland would decline to reveal his reasons for discharging federal officers. See House Journal, 27th Cong, 2d Sess 421; Cong Rec, 49th Cong, 1st Sess 1585 (1886); Edward C. Mason, *The Veto Power* 40-42 (Russell & Russell, 1967) (first published in 1890).

¹⁶ Reg Deb, 23d Cong, 2d Sess 502.

¹⁷ Id at 504, 538.

¹⁸ Id at 576; id at 1457, 1497 (House).

modern reader of the Supreme Court's much later decision in *Elrod v Burns*,¹⁹ the second of the Hatch Act, which Congress adopted a century afterward.²⁰ The leading protagonist of both was Whig Representative John Bell of Tennessee, who would run for President on the Constitutional Union ticket in 1860. He made his case in major speeches to the House in 1837 and 1840.

To remove officers or employees (other than the heads of departments or other "constitutional advisers of the President") on political grounds, Bell's 1840 bill recited, was "manifestly a violation of the freedom of elections; an attack upon the public liberty; and a high misdemeanor."²¹

I am not left free to vote as I please, [Bell told the House in 1837,] ... when I am made to understand that the office or employment which gives me bread, or supplies my family with the comforts of life, will be taken from me if I do not vote for a particular candidate; and the election is not free in which one hundred thousand such votes are given.²²

Since free elections were "the foundation stone of liberty," he added, any attack on free exercise of the franchise was an assault on freedom; and

Madison himself, in supporting the President's constitutional right to remove federal officers, had insisted that "the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust."²³

Bell's rhetoric flirts with *Elrod's* conclusion that to discharge a public servant for partisan political reasons (with exceptions similar to Bell's own) infringes his expressive freedom. To outlaw intimidation of federal workers at the polls might well have been necessary and proper to the conduct of federal elections,²⁴ or (like later Civil Service legislation) to the operation of the Government itself;²⁵ yet Bell explicitly refrained from proposing that political dismissal be made a crime. It would be "injudicious," he initially suggested, to attempt to limit the President's power by statute.²⁶ (Not unconstitutional: three years later he would argue that the Constitution gave the President no right of removal.²⁷) In 1840 he advanced a different explanation: Congress had no authority to punish the President "for any violation of the duties of his station, in any other form than by impeachment – the mode prescribed by the Constitution."²⁸

19 427 US 347 (1976).

20 54 Stat 767 (Jul 19, 1940), 5 USC § 7324(a)(2) (1988). This prohibition has since been watered down considerably. See 5 USC §§ 7323-25 (2002).

21 Cong Globe App, 26th Cong, 1st Sess 830.

22 Reg Deb, 24th Cong, 2d Sess 1465.

23 Id at 1466, quoting 1 Annals of Congress at 517.

24 See Ex parte Siebold, 100 US 371, 382-94 (1880); Ex parte Yarbrough, 110 US 651, 660-62 (1884). Like Civil Service, such a restriction would leave the President free to discharge officers who failed to carry out his instructions, which is the essence of his removal power. See David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986* 193-95 (Chicago, 1990) [hereafter cited as *The Second Century*], discussing *Myers v United States*, 272 US 52 (1926).

25 22 Stat 403 (Jan 16, 1883); 5 USC §§ 632 et seq. Alternatively, Congress might have tried to justify such a prohibition as a means of preventing violations of the Constitution. Unlike the later Fourteenth Amendment, the First contains no explicit enforcement clause. Neither do the fugitive clauses of Article IV, but Congress had found such authority implicit, and the Supreme Court would soon confirm its conclusion. *Prigg v Pennsylvania*, 41 US 539 (1842); *Kentucky v Dennison*, 65 US 66 (1860); see *The Federalist Period* at 170.

26 Reg Deb, 24th Cong, 2d Sess 1474.

27 Cong Globe App, 26th Cong, 1st Sess 830, 832.

28 Id at 830.

If Bell meant the constitutional clauses respecting impeachment made it the exclusive remedy for presidential offenses, he should have taken another peek at them. Because the penalties the Senate may inflict in such a proceeding are insufficient to vindicate the public interest, Article I, § 3 expressly provides that an officer impeached and convicted “shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.”²⁹ Nor was Bell’s argument the same as that which would be bruited about much later in connection with President Clinton’s alleged perjury and obstruction of justice, namely that he could not be distracted from his duties to defend himself in a criminal trial.³⁰ If Bell’s argument against the spoils system anticipated *Elrod v Burns*, his suggestion of presidential immunity from prosecution anticipated *Nixon v Fitzgerald*, where the Supreme Court would hold that the constitutional independence of the Chief Executive demanded his freedom from damage liability, even after he left office, for even deliberate wrongs committed in the course of his official duties.³¹

Instead, like Madison in 1789, Bell’s bill threatened Presidents with impeachment if they discharged subordinates on political

grounds. Whether Congress’s advance definition of “high crimes and misdemeanors” would bind the House or Senate in a later impeachment proceeding may be doubted; one might expect them to insist on interpreting the Constitution for themselves.³²

Bell’s distinct proposal to prevent public servants from intermeddling in elections, he explained, was intended to protect federal officers and employees from pressure by their superiors to do so and thus to preserve their political freedom.³³ The difficulty was that his bills – and a similar Senate measure debated at length in the intervening Congress – went far beyond merely forbidding the Administration to control the political activities of its cadres. The proposed prohibition insulated workers from coercion by forbidding them to act of their own free will. It denied the very rights it was professedly meant to preserve. To borrow a phrase from Mr. Hammerstein’s *King of Siam*, it protected federal officers out of all they owned. Yes, a categorical ban would spare enforcers the daunting burden of demonstrating actual intimidation. The price of prophylaxis, however, was high. The specific examples of “intermeddling” listed in the bill, such as buying votes and using the franking

29 It is not uncommon for officers subject to impeachment for acts committed in the course of their official duties to be convicted of crimes on the basis of the same conduct. See, e.g., *Nixon v United States*, 506 US 224 (1993).

30 Cf *Clinton v Jones*, 520 US 681, 694-96 (1997), rejecting a parallel argument of temporary immunity from civil damage actions. See also *The Jeffersonians* at 133-35, discussing President Jefferson’s claim of immunity from a subpoena in the case of Aaron Burr.

31 457 US 731 (1982). Immunity seems an incomplete excuse for the absence of an express prohibition in the bill. Injunctive sanctions pose no comparable risk of chilling the exercise of official duty, and the same Court that held the President absolutely immune from damages in *Nixon* reaffirmed that other executive officers were insulated only if they acted in good faith. See *Pulliam v Allen*, 466 US 522 (1984); *Harlow v Fitzgerald*, 457 US 800 (1982).

32 Cf *Marbury v Madison*, 5 US 137 (1803); *City of Boerne v Flores*, 521 US 507 (1997); see also *The Jeffersonians* at 137-39, discussing a congressional effort to define treason. Bell seemed to assume his definition would not be binding if enacted, stressing only the prophylactic value of his proposal:

I shall feel quite well assured that no President or head of a Department will venture upon so gross an abuse of his high trust, if it shall once be solemnly settled by a vote of Congress that it is an impeachable offense.

Cong Globe App, 26th Cong, 1st Sess 830.

33 Id at 833. See also id at 708 (Rep. Gentry).

privilege to affect them, were appropriate enough, and Bell disclaimed any intention to forbid the mere expression of opinions. In the same breath, however, he acknowledged that by “intermeddling” with elections he meant to include the “distribution of electioneering matter.”³⁴ Political speech, opponents vociferously argued during the 1839 debates, was the lifeblood of democracy; citizens could not be required to surrender First Amendment rights as a condition of federal employment.³⁵

Proponents argued that the power not to appoint an individual implied the lesser power to determine the conditions of his employment. They pointed out that the Constitution itself deprived officeholders of the right to serve in Congress. They denied that freedom of expression was absolute: Congress could forbid bribery, jury tampering, and challenges to duels. They reported that Thomas Jefferson himself, the paragon of political freedom, had issued a comparable order when he was President:

The President of the United States has seen, with dissatisfaction, officers of the General Government taking, on various occasions, active parts in elections of the public functionaries, whether of the General or of the State Governments. Freedom of election being essential to the mutual independence of governments, and of the different branches of

the same Government ..., it is deemed improper for officers depending on the Executive of the Union to attempt to control or influence the free exercise of the elective right. ... The right of any officer to give his vote at elections, as a qualified citizen, is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others, nor take any part in the business of electioneering, that being inconsistent with the spirit of the Constitution, and his duties to it.³⁶

Bell's focus, as we have seen, was on protecting federal workers from interference with their right to vote. Jefferson's was on the integrity of the election itself, as he had emphasized in an earlier letter to Pennsylvania Governor Thomas McKean: Even voluntary participation by federal officers could “smother[]” the electoral process “by the enormous patronage of the General Government.”³⁷

None of the Whig proposals to limit the political activities of federal officers had a prayer of success so long as the Democrats controlled the Administration and Congress. No sooner was the first of our handful of Whig Presidents ensconced in the Executive mansion, however, than he took the matter into his own hands without waiting for Congress to act. In his inaugural address on March 4, 1841

³⁴ See *id.* at 833. The principle of *eiusdem generis*, strengthened by a presumption against encroachment on constitutional rights, might nevertheless have avoided a construction that would prohibit mere speech.

³⁵ Cong Globe App, 25th Cong, 2d Sess 157-60 (Sen. Wall); *id.* at 175-79 (Sen. Strange); *id.* at 181-83 (Sen. Norvell); *id.* at 185-86 (Sen. Roane); *id.* at 203-06 (Sen. Buchanan); *id.* at 234 (Sen. Calhoun). Even the Sedition Act, opponents argued, had forbidden only false statements; the present bill proscribed ordinary political discussion. *Id.* at 204 (Sen. Buchanan); *id.* at 182 (Sen. Norvell). On the other side of the ledger, Bell's bills had the advantage of what later generations would call viewpoint neutrality; they might muffle the political debate, but they would not distort it by placing a government finger on one side of the scale.

³⁶ See Reg Deb, 24th Cong, 2d Sess 1474 (Rep. Bell), quoting from an unidentified circular that he attributed to Jefferson. See also Cong Globe App, 25th Cong, 2d Sess 403-08 (Sen. Rives); Cong Globe App, 26th Cong, 1st Sess 708 (Rep. Gentry).

³⁷ Jefferson to McKean, Feb 2, 1801, Paul Leicester Ford, 7 *The Writings of Thomas Jefferson* 486, 487 (G.P. Putnam's Sons 1896), quoted by Representative Bell at Reg Deb, 24th Cong, 2d Sess 1473-74. See also Cong Globe App, 25th Cong, 2d Sess 408 (Sen. Rives).

President Harrison indicated his intended course of action:

The influence of the Executive in controlling the freedom of the elective franchise through the medium of the public offices can be effectually checked by renewing the prohibition published by Mr. Jefferson forbidding their interference in elections further than giving their own votes, and their own independence secured by an assurance of perfect immunity in exercising this sacred privilege of freemen under the dictates of their own unbiased judgments. Never with my consent shall an officer of the people, compensated for his services out of their pockets, become the pliant instrument of Executive will.³⁸

Two weeks later Daniel Webster, the new Secretary of State, issued the following order to all Department heads at the President's direction:

The President is of opinion that it is a great abuse to bring the patronage of the General Government into conflict with the freedom of election, and that this abuse ought to be corrected wherever it may have been permitted to exist, and to be prevented for the future.

He therefore directs that information be given to all officers and agents in your department of the public service that partisan interference in popular elections, ... or the payment of any contribution or assessment on salaries, or official compensation for party or election purposes, will be regarded by him as cause for removal.

It is not intended that any officer shall be restrained in the free and proper expression and maintenance of his opinions respecting public men or public measures, or in the exercise to the fullest degree of the

constitutional right of suffrage. But persons employed under the Government and paid for their services out of the public Treasury are not expected to take an active or officious part in attempts to influence the minds or votes of others, such conduct being deemed inconsistent with the spirit of the Constitution and the duties of public agents acting under it; and the President is resolved, so far as depends upon him, that while the exercise of the elective franchise by the people shall be free from undue influences of official station and authority, opinion shall also be free among the officers and agents of the Government.³⁹

Brave words. Self-denying words, in a commendable cause: political freedom and the integrity of the democratic process. Harrison's sources of inspiration were obvious: Jefferson's earlier circular and John Bell's proposals for legislation. Were the costs greater than the First Amendment would allow? John Vining in the First Congress had said they were;⁴⁰ the Supreme Court in sustaining the Hatch Act a century later would say they were not.⁴¹ Webster, like Bell, had improved on Jefferson by making clear that he did not mean to proscribe the mere expression of opinion. Drawing the line between simple expression and "active or officious attempts to influence" voters, however, promised both uncertainty and severe limitations on expressive activities normally within the ambit of constitutional protection. We have come to understand that public employment often gives rise to governmental interests that justify restraints on the activities of public servants that could not be imposed on citizens at large.⁴² To forbid

38 4 Richardson at 5, 13.

39 See *id.* at 52 (Mar 20, 1841). President Tyler, in his Inaugural Address a scant three weeks later, vowed to continue his predecessor's policy. *Id.* at 36, 38 (Apr 9, 1841).

40 See *The Federalist Period* at 62.

41 *United Public Workers v Mitchell*, 330 US 75, 94-104 (1947); *US Civil Service Comm'n v National Ass'n of Letter Carriers*, 413 US 548, 556 (1973).

42 For an exemplary explication of the governing considerations, if applied to produce an arguably less exemplary result, see *American Communications Ass'n v Douds*, 339 US 382, 393-412 (1950); *The*

overt electioneering by judges seems to me entirely appropriate in light of the overriding interest in judicial neutrality.⁴³ Reasonable minds may and do differ as to where the line should be drawn; my own view is that the case for restriction is much weaker when dealing with executive personnel.

Webster's anti-electioneering directive, however, also raised a perplexing question of the separation of powers. Congress might well have authority to enact such provisions, but could they be adopted by executive order? Article I, § 8 vests federal legislative power in Congress, not the President. As Justice Hugo Black would write in the *Steel Seizure Case* a hundred years later, the President's job is to execute the laws, not to make them.⁴⁴

Faithful to the central Whig creed, President Harrison took a generally dim view of executive authority. Presidential interference with the legislative process, in particular, was to be kept at a minimum. The express veto power, he said, should be employed only to prevent unconstitutional or hasty legislation and to protect the rights of minorities; the explicit constitutional injunction that the President recommend measures to Congress did not permit him to draft bills for congressional consideration.⁴⁵ It seemed a little ironic that a President with such a cramped view of his authority to recommend laws should so strikingly assert his power to make them.

A cheap shot, right? For there is a respectable argument that (First Amendment concerns to one side) in limiting the political activities of executive agents Harrison acted within his constitutional authority. Article II vests the executive power in the President and instructs him to see to the faithful execution of the laws. He is thus the boss of the Executive Branch, the manager of the entire Administration. As President Jackson so stoutly maintained during the crisis over removal of the deposits from the National Bank, that means he can tell his subordinates, within the bounds of existing statutes, how to execute the laws.⁴⁶ Absent contrary legislation, he can require bureaucrats to be at their desks from nine to five. He can direct them to travel by coach rather than first class. He can forbid them to make decisions in matters in which they have a conflict of interest. He can discharge them for any reason the Constitution and laws do not prohibit; he can therefore declare in advance what he will deem grounds for their removal. Thus, at least arguably, he can protect them from improper interference with the exercise of their political rights and (subject to the same First Amendment constraints that would limit Congress) forbid them to do anything that would impede the public service, compromise the integrity of elections, or reflect adversely upon the Government.⁴⁷

In short, Webster's circular may not have

Second Century at 355-56.

43 See, e.g., ABA Model Code of Judicial Conduct, Canon 5A. But see the Supreme Court's much later decision striking down limits on campaigning by *candidates* (including candidates who are already sitting judges) in judicial elections. *Republican Party of Minnesota v White*, 122 S Ct 2528 (2002). It may still be permissible to restrict electioneering by judges for a third party. See *id* at 2546 (Kennedy, J, concurring).

44 *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 587-89 (1952).

45 See his Inaugural Address, 4 Richardson at 9-14.

46 For the controversy over the deposits see *Descent into the Maelstrom*, ch 3.

47 Similar considerations may help to explain both President Van Buren's unelaborated executive order prescribing a ten-hour day for persons employed on federal public works (3 Richardson at 602 (Mar 31, 1840)) and the broad managerial authority that Presidents have traditionally exercised, in the absence of meaningful legislative direction, over the use and protection of public lands. See, e.g.,

been inconsistent with Congress's legislative monopoly after all. Unfortunately, however, neither the Secretary of State who penned and distributed that directive nor the President

who ordered it paused to explain how it could be reconciled with the Constitution – or with their own narrow conception of executive authority. *GB*

United States v Midwest Oil Co, 236 US 459 (1915); United States v Grimaud, 220 US 506 (1911).
See United States v Mazurie, 419 US 544, 556-57 (1975):

[L]imitations on the authority of Congress to delegate its legislative power ... are ... less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter