

FRAGMENTED FEATURES OF THE CONSTITUTION'S UNITARY EXECUTIVE

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The assertion that the original Constitution creates a “unitary executive” can be understood as a claim that the Constitution empowers the President to control the execution of federal law. This generic assertion has as many as three sub-claims: that the President, as the “constitutional executor” of the laws,¹ personally may execute any federal law himself; that the President, as Chief Executive, may direct all executive officers in their execution of federal law; and that the President, as the Supreme Executive Magistrate charged with ensuring faithful law execution, may remove executive officers.²

For many advocates of the unitary executive theory, these three mechanisms of control are “absolute” powers.³ Despite Congress’s various legislative powers, it cannot preclude presidential execution of federal law; it cannot bar presidential direction of executive officers or authorize executive officers to disobey presidential instructions; and it cannot prohibit or regulate presidential removal of executive officers.

With their focus on the originalist bona fides of the unitary executive⁴ and the modern administrative state’s numerous violations of the theory,⁵ unitary executives have neglected the Constitution’s

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1. Pacificus No. 1, in *THE PACIFICUS AND HELVIDIUS DEBATES OF 1793-1794*, at 8, 16 (Morton J. Frisch ed., 2007).

2. See Steven G. Calabresi & Saikrishna Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L.J.* 541 (1994).

3. Saikrishna Bangalore Prakash, *A Taxonomy of Presidential Powers*, 88 *B.U. L. REV.* 327, 336 (2008) (describing absolute powers as powers that cannot be altered via legislation).

4. See generally STEVE CALABRESI & CHRIS YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 *U. ILL. L. REV.* 701 (2003); Calabresi & Prakash, *supra* note 2.

5. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *HARV. L. REV.* 1231 (2004).

various constraints on the President's ability to control law execution and the extent to which Congress can make the task of presidential control difficult, if not impossible. This short piece seeks to fill that void. Part I outlines the fragmented features of the Constitution's unitary executive. Part II describes how the President's control of the executive branch is somewhat dependent upon Congress. In particular, it discusses how Congress might thwart and tame the attempts by the Executive Office of the President to control agency decision making. Part III addresses the extent to which recent regulatory review procedures are consistent with constitutional constraints on the unitary executive and concludes that, even from the perspective of the theory of the unitary executive, these procedures are too "unitary."

I. REDISCOVERING THE FRAGMENTED FEATURES

While the aforementioned means of control—personal execution, presidential superintendence, and removal—might seem to grant the President the means of directing even the minutest movements and measures of the executive branch, in fact, the Constitution meaningfully constrains the President's ability to exercise complete control of the executive branch. Before discussing these constraints, we consider the relatively more powerful and independent English Crown. Such reflection will prove useful as we ponder our Constitution's unitary and fragmentary features.

The eighteenth century Crown was responsible for executing English law and conducting foreign affairs.⁶ Because individual monarchs could not undertake these difficult and time-consuming tasks alone, each relied upon a multitude of executive officers. Given the Crown's dependence on its ministers, it was well understood that the "chief royal prerogative was 'that the King names, creates, constitutes, and removes all great Officers of the Government.'"⁷

As William Blackstone noted, the Crown was the "fountain" and "parent" of offices, having the power to create offices unilaterally.⁸ As part of its power to create offices, the executive also determined

6. See Prakash, *Essential Meaning*, *supra* note 3; Saikrishna Prakash & Michael Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L. J. 231 (2001).

7. JOHN BREWER, PARTY IDEOLOGY AND POPULAR POLITICS AT THE ACCESSION OF GEORGE III, at 116 (1976).

8. 1 WILLIAM BLACKSTONE, COMMENTARIES *271.

each office's duties and powers.⁹ Of course, the Crown could not only create offices, it could also make appointments, thereby filling the offices it created. And finally, as noted earlier, the monarch could remove. For good reason, King George III noted that ministers were his "tools" or "instruments."¹⁰

Although the power to create and appoint to office was vital, an equally crucial element of a monarch's control over the executive branch was the "civil list."¹¹ Without the ability to finance the executive branch, the Crown would lack the ability to fill offices and conduct executive affairs. The civil list annuity, typically fixed by Parliament at the outset of a monarch's reign, was supposed to ensure that the new monarch enjoyed a permanent appropriation that could be used to support all civil officers. The civil list was originally conceived as a means of ensuring the Crown's independence because Parliament could not use the discretionary, annual appropriations process as a bargaining tool against the monarch. Well into the eighteenth century, ministers insisted that Parliament had no right to civil list accounts and no control over expenditure. Some members of Parliament agreed, one noting that "the King was the only judge of what officers were necessary to carry on the executive business of government."¹²

Over time, members of Parliament grew upset that the Crown repeatedly asked Parliament to retire debt incurred when the government's expenditures had exceeded the civil list annuity. Moreover, many members believed that the executive was using "corrupting" influence—offering money, offices, and titles—to sway members of Parliament to back the executive policies. By the end of the eighteenth century, these concerns came to a head and Parliament terminated a number of executive offices. Parliament thereby ended the tradition of an unaccountable civil list spent at the discretion of the Crown.

Nonetheless, though Parliament might interfere with how the Crown expended the civil list, the Crown still enjoyed a great deal of discretion. Though the late eighteenth century civil list was less

9. *Id.* at *272.

10. BREWER, *supra* note 7, at 116.

11. For a general discussion of the civil list, see E.A. Reitan, *The Civil List in Eighteenth Century British Politics: Parliamentary Supremacy Versus the Independence of the Crown*, 9 THE HIST. J. 318 (1966).

12. *Id.* at 332.

advantageous than it had been for most of the eighteenth century, it continued to secure some measure of executive independence.

Clearly, the President lacks most of these executive prerogatives. First, notwithstanding the grant of executive power and his ability to commission officers, the President lacks the constitutional right to specify the powers and duties of any executive office. Congress creates the offices and may specify what powers and duties attach to every statutorily created office, executive or otherwise. Second, as is well-known, the President lacks a constitutional right to appoint at will. With respect to all non-inferior officers, the President must secure the Senate's consent, ensuring that the President will not always be able to select his first choice for some office. Third, the Constitution nowhere establishes a civil list that the President can deploy as a means of controlling the executive branch. The President may wish to have funds to defray the projected expenses of the executive branch, but he has no constitutional right to them.

In sum, we might say that the Constitution makes officers responsible to Congress and the President, putting executive officers in the awkward position of having two masters. On the one hand, Congress may decide an office's functions and its resources, ceding it considerable influence over the executive bureaucracy. On the other hand, the President may direct the officer in her exercise of executive powers and duties and may remove her should she stray from the President's policies.

A. *The Creation and Delineation of Offices*

Though the Crown and colonial governors in America had the executive power to create offices, a fair reading of the Constitution suggests that only Congress can do so. The Appointments Clause speaks of presidential appointment to offices created "by law." Because the President cannot create "law," only Congress can create such offices.¹³ Consistent with this view, early Congresses created almost all offices, including Secretaries of War and Foreign Affairs, a Comptroller, District Attorneys, *etc.*

13. There were some who believed that the President could create offices, leaving it to the Senate to decide whether to approve those whom the President might appoint to the offices he created. See generally WILLIAM MACLAY, JOURNAL OF WILLIAM MACLAY, UNITED STATES SENATOR FROM PENNSYLVANIA 1789-91 (Edgar A. Maclay ed., Vale-Ballou Press, Inc. 1927) (1890).

The power to create offices is not merely the limited power to create generic offices, leaving the President to determine each office's functions and duties. Rather, when Congress creates a Secretary of Treasury or a Secretary of the Interior, it may establish the powers and duties of these offices. Likewise, Congress determines the authority and obligations of various non-departmental executive offices, including the various offices within the Executive Office of the President. Sometimes Congress allows the President to determine what functions an officer will serve, as it did when it created the Secretaries of War and Foreign Affairs in 1789. Other times, Congress specifies what functions an executive will perform, as it did with the Secretary of Treasury.

Implicit in any finite list of powers and duties that Congress assigns to an office is that the office is of limited scope. For instance, no one thinks that when Congress statutorily authorizes the Secretary of Commerce to do X, Y, and Z it also implicitly permits the Secretary of Commerce to act as steward of the Department of Defense. Likewise, no one supposes that a Secretary of Defense may, without authorization from Congress, control the State Department.

With the possibility of an interesting exception,¹⁴ the President can neither create offices nor specify their powers and duties. Though the President might wish to combine the functions of the Secretaries of Defense and State into one uber-office, he cannot create a Secretary of Defense and State. Likewise, though the President may believe that the Environmental Protection Agency (EPA) should be able to veto all Department of Defense regulations affecting the environment, he cannot grant the EPA Administrator such a veto. The President cannot even decide that the Attorney General should superintend the district attorneys.¹⁵ Most surprisingly, the President has no constitutional right to decide that the Office of Information and Regulatory Affairs (OIRA), part of the Office of Management and

14. Perhaps the exception to the rule that only Congress can create offices lies in the longstanding ability of the President to create overseas diplomatic postings. See Prakash & Ramsey, *supra* note 6, at 309–10. From the beginning the President decided whom the United States would have diplomatic relations with and whether to send a diplomatic representative to such nation. So the President may decide to have diplomatic relations with Russia and decide what powers and authority the diplomats sent to Russia can exercise. The instructions and commissions given to diplomatic agents delineate the power that they might exercise and their diplomatic responsibilities.

15. Indeed, for the first eight decades, the Attorney General had no statutory authority over the district attorneys. Presidents never conveyed such authority, recognizing that they could not impose a superior officer upon the attorneys.

Budget (OMB), will control the issuance of Transportation Department regulations. OIRA's more limited functions are grounded in congressional statutes.¹⁶

If the President believes that there should be a new office, he must request that Congress create it. Likewise, should the President believe that an executive officer should have additional powers, of whatever sort, he must ask that Congress confer such powers or authorize the President to delegate such powers.¹⁷

Despite the image of the President as a Chief Executive Officer, he must rely upon Congress to create the various executive offices. Moreover, he must abide by statutory constraints Congress imposes on the executive offices it creates. The Constitution does not authorize the Chief Executive to reconfigure or reorganize the executive branch as he sees fit.

B. Appointment to Office

Though the President lacks the constitutional power to create and delineate offices, he may appoint to all offices, both high and low. Though the appointment power might seem to ensure significant presidential influence over the executive branch, the Senate's advice and consent role significantly constrains the President's decision making. More generally, the Senate's interposition between nomination and appointment diminishes the President's ability to control the executive branch.

The Constitution establishes the default rule that the Senate must consent to *all* appointments. When considering whom to appoint to a particular office, the President must consider the Senate's reaction.

16. See Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (1980).

17. None of this is meant to suggest that all executive officers are limited to a niggardly reading of their statutory authority. Indeed, from the beginning, Secretaries did more than just tend to their departmental statutes and personnel. For instance, though the Constitution allows the President to request opinions from the department heads related to their respective duties, early Presidents demanded advice from the department heads about matters clearly outside their departmental purview. President George Washington asked his Secretaries and his Attorneys General for advice and opinions on all manner of things outside their departmental bailiwicks, most famously seeking advice about the constitutionality of legislation creating the first Bank of the United States.

This tradition of generic advice giving continues to this day, perhaps justifiable by the sense that because these Secretaries were created to assist the President in the exercise of his various constitutional powers, it is entirely fitting that they give him advice relating to the exercise of those powers, even when the matters were wholly outside their statutory bailiwicks.

Nominating his first choice for a particular office may backfire upon the President if the Senate rejects the nomination. A Senate rejection is an unwelcome rebuff because any prominent defeat tends to diminish the luster and reputation of the incumbent. As a result, a President generally will eschew nominating someone whom he believes the Senate will reject. Obviously, this means that a President occasionally may nominate someone who is *not* his favorite choice in order to avoid a potentially embarrassing defeat.

The Senate might reject a nominee for any number of reasons, including the fitness of the nominee for the particular office, disagreement with the nominee's apparent policy views (even when they are shared by the President), a sense that the nominee will serve as a pawn of the President, and a preference for other nominees. The last possibility raises interesting questions. Though the Constitution grants the President the formal power to nominate whomever he wishes, the Senate's power to check appointments subtly influences whom the President appoints. This tradition of Senate influence on nominations has waxed and waned over time, sometimes yielding enormous senatorial influence on who the President nominates to particular offices.

The custom of senatorial courtesy is a prime example of such influence. Under senatorial courtesy, senators collectively agree to oppose nominees who are opposed by Senators from the state where the officer will serve. For example, if the New York Senators oppose the nomination of someone to the Southern District of New York, other Senators generally will oppose the nomination as well.¹⁸ This custom has existed from the time of the Washington administration. President John Adams noted that if he nominated someone "without previous recommendations from the senators and representatives" from the relevant state, the Senate would probably reject his nominee.¹⁹ In modern times, Senators issue "blue slips" as a means of implementing the tradition of senatorial courtesy.²⁰ Blue slips have the effect of precluding Senate consideration of a nominee. Apart from blue slips, a Senator may place a hold on a nominee, thereby delaying Senate action on the nominee, often indefinitely.²¹ In the most recent administration, various Senators have either insisted that

18. MITCHELL SOLLENBERGER, *THE PRESIDENT SHALL NOMINATE* 23–33 (2008).

19. *Id.* at 34.

20. *Id.* at 164.

21. *Id.* at 155.

President George W. Bush nominate certain individuals to the federal bench or have had an equal say in bipartisan panels authorized to select individuals that the President would then automatically nominate.²² Essentially, the President has bargained away his power to nominate to particular offices in return for senatorial support on other nominations or other matters.

Although many appointment controversies center on judicial nominations, these senatorial tactics are used in the context of executive offices as well. When President William Clinton assumed office, several Senators picked their state's new U.S. Attorneys.²³ Likewise, senatorial courtesy was "virtually absolute" with respect to President George W. Bush's nomination of U.S. Attorneys.²⁴ Moreover, individual Senators have occasionally convinced Presidents to remove executive officers, presumably because the President desired the Senator's assistance on other matters.²⁵

In short, though the President has the power to nominate to office, he often defers to individual Senators in the hopes of placating them and securing their support for other nominations and legislative matters. The end result is that the President often must appoint and retain individuals not because they are loyal to his administration or adept at implementing his agenda, but because they have powerful Senate benefactors.

The Senate check on appointments not only affects whom the President might nominate and appoint, it also affects whom the President might remove. Knowing that the Senate has this check on appointments should curb the willingness of a President to remove some executive officers. In particular, when the President contemplates the removal of an officer, he has to decide whether he is likely to find someone else whom he prefers more and whom the Senate is likely to approve.²⁶ For instance if the President contemplates the removal of an EPA Administrator whom he regards

22. *Id.* at 163–64.

23. *Id.* at 157.

24. *Id.* at 160.

25. *Id.* at 142–43, 149, and 151.

26. Via statutes, Congress has permitted others within a department to assume the duties and powers of an office that remains vacant. *See, e.g.*, Vacancies Reform Act, 5 U.S.C. §§ 3345–3349d (2000 & Supp. IV 2004). Such statutes have the effect of making it more palatable for the President to remove officers. Under the Vacancies Reform Act, an acting officer may serve up to 630 days in a vacant office. *See* Memorandum for Agency General Counsels, Guidance on Application of Federal Vacancies Act of 1998 (Mar. 22 1999), available at <http://www.usdoj.gov/olc/finalqa.htm>.

as insufficiently vigilant in protecting the environment, he has to realize that if a majority of the Senate wishes to have lax enforcement of the nation's environmental laws, that he may have to replace the incumbent Administrator with a still more lenient Administrator.

The alternative to the Constitution's default rule of Senate approval for appointments also has the potential to constrain presidential control of the executive branch. Under the Constitution's Appointments Clause, Congress may enact laws that vest the appointment of inferior officers with the President, a department head, or a court of law. When Congress vests the appointment of inferior officers with the President, the President's influence over executive officers is enhanced because he need not worry that the Senate might reject his selection. In theory, the President may select whomever he wishes, albeit subject to the normal requests and demands of allies and opponents.

Yet, when Congress vests the appointment with someone other than the President, the President's control over the inferior officers so appointed likely will be diminished. When Congress vests the appointment of an inferior executive officer with a department head, the department head probably has some practical discretion over who will occupy the office. To be sure, the department head is under the President's control, at least under the unitary executive theory. Yet, the statutory grant of authority to the department head may suggest to the department head that she should decide who will occupy the office. After all, the statute specifically grants the department head the appointment power. Indeed, department heads often have great influence over presidential nominations to offices within their departments.²⁷ If department heads have such influence when they have no formal nomination or appointment role, one might think that have even more sway over offices that statutes permit them to fill.

More generally, department heads typically will enjoy some measure of discretion under almost any circumstances. As the person statutorily charged with superintending a department, the department head will no doubt believe that she should exercise everyday control of most departmental decisions with little presidential interference or oversight on routine matters. A President's failure to promise such control at the outset will lead many of the best candidates to decline nominations, because they will perceive that the White House wants

27. Carrie Johnson, *Administration Wanted Loyalist as Justice Dept. Legal Adviser: Top Officials Sought to Defend Interrogation Practices*, WASH. POST, July 17, 2008 at A04.

nothing more than a glorified errand boy. Failure to keep such promises will lead to the hasty exit of the most promising administrators, for they will resent having no genuine bailiwick.

Finally, once a department head appoints to an inferior office, the inferior officer so appointed generally will feel some loyalty to the department head. The appointee often can be expected to further the interests of the department head, even when they conflict with administration policy or directives. In turn, the department head may protect her appointee from White House sanction, threatening to resign if her underling is punished in some way. In short, a department head is likely to regard her department as her political fiefdom and those whom she appointed as loyal vassals.

Whether Congress can vest the appointment of inferior executive officers with a court of law is an interesting question considered in several Supreme Court cases, most recently *Morrison v. Olson*. The Court held that judicial appointment of executive officers is permissible if it neither “impair[s] the constitutional functions assigned to the [executive branch]” nor yields an “incongruity between the functions normally performed by the courts and the performance of their duty to appoint.”²⁸ If the Court’s relatively lax test for cross-branch appointments is appropriate, then Congress may authorize courts to appoint to all inferior offices within the executive branch. Such judicial appointment of inferior executive officers would tend to undermine presidential control of the executive branch because such appointees are less likely to share the policies and preferences of the President. Notwithstanding the threat of presidential removal, executive officers appointed by the courts are less likely to adhere to administration policies than are people appointed via the other appointment processes.

For all these reasons, the Appointments Clause and the actual nomination and appointment process constrain the ability of the President to nominate and control the executive branch. The Senate’s role in major appointments has an undeniable effect on the President’s ability to populate the executive branch with those he believes are most suited to the various offices and with those he regards as most loyal to his policy agenda. Sometimes Senators will demand nomination of their favored candidates, and even when they are less insistent, Senators have the ability to reject the President’s preferred nominees. Moreover, some department heads are likely to regard

28. *Morrison v. Olson*, 487 U.S. 654, 676 (1988).

their departments as their own fiefdoms and to use them to advance their own agenda, sometimes at the expense of the President's. Finally, the appointment of inferior officers by the heads of departments and the courts makes them less likely to serve as the willing instruments of the President and more likely to serve other interests and agendas.

C. Funding Salaries and Expenses of Offices

For executive officers to function effectively, they need salaries and funds to carry their powers and duties into execution. As noted earlier, in late eighteenth century England, Parliament provided the Crown an annual budget, an amount fixed when the monarch took the throne. These funds could then be used by the Crown to fund all the offices, executive and judicial. The civil list was a crucial element of the mixed and balanced English Constitution because, by custom, Parliament could not hold the Crown hostage for funds and thereby use its funding leverage to dictate Crown policy. In other words, by guaranteeing the Crown a set of administrative funds, the Parliament ceded the Crown a measure of independence that would otherwise be lacking in a system of annual appropriations.

Under our constitutional system, the President is not guaranteed any funds for personnel expenses. Instead, he is only guaranteed his personal salary. This assured salary is a significant protection because Congress cannot withhold his salary and thereby hope to avoid a veto of other legislation. During the colonial era, state assemblies would "purchase" the assent of the governors by withholding gubernatorial salaries until the governors agreed not to veto desired legislation.²⁹ Due to the Constitution's salary guarantee and the relative personal affluence of recent Presidents, Congress cannot use presidential salary as a bargaining chip.

Yet the President does operate under a handicap, at least compared to the Crown and colonial governors, for he lacks a guaranteed civil list. If the executive departments are to function, Congress must choose to fund them. While Congress could replicate the civil list by enacting a permanent appropriation at the outset of a President's first term, it has never done so, leaving executive offices and departments at the tender mercies of the annual congressional

29. E.B. GREENE, *THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA 173-75* (Peter Smith Publisher, Inc. 1966) (1898).

appropriation process. This exclusive congressional power to fund the executive branch ensures that Secretaries and other officials pay heed to the views of members of Congress, even when those views are not expressed in statutes.

In short, the President is rather dependent upon Congress to supply funds for the expenses associated with carrying executive branch powers and duties into execution. Absent such support from Congress, the President will lack the support he needs to implement presidential policies and to “take care that the laws be faithfully executed.”

D. The Relationship Between Executive Officers and the Law

Apart from its power over offices and funding, and the Senate’s influence on appointments, the Congress has one last powerful influence on executive officers. Besides having the ability to specify the general functions of an office, Congress may decide the content of the laws that executive officers will execute. Because executive officers owe a duty to the law and to the President, there is the possibility of a conflict between the President’s instructions and the seeming dictates of the laws that executive officers are to execute.

Consider the Secretary who, by statute, may make a certain administrative decision. The Secretary may believe that the statute permits options A and B, but precludes options C and D. The President, who believes that the statute permits all of these options, directs the Secretary to implement option C. The Secretary confronts a dilemma. Will she implement option C because the “constitutional executor” of the laws has so instructed? Or will she refuse option C because she believes it to be ultra vires?

The Constitution admits no easy answer. Perhaps the Secretary must adhere to the President’s instructions or, if she cannot do so in good conscience, resign. Alternatively, maybe the Secretary must defy what she believes is an ultra vires and illegal directive and await the expected (though not inevitable) removal by the President.

Inferior courts face the same difficulty. If the Supreme Court reads a statute or constitutional provision at variance with how a District Judge reads the statute or constitutional section, what must the District Judge do? Practice suggests that most federal judges at least try to appear as if they are adhering to the Supreme Court’s rationale and holdings, even if they regard them as erroneous. But some scholars have suggested that inferior federal courts have a

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higher obligation to their understanding of the Constitution and statutes and must ignore Supreme Court pronouncements that strike them as mistaken.

We need not resolve this conflict between a President's directives and the seemingly contrary requirements of a statute or the Constitution. Suffice it to say that the many instances in which such instructions or directives will seem to conflict inevitably raises the possibility that executive officers occasionally will feel obliged to disobey their Chief Executive. Because the President may wish to retain people who disagree with his reading of the Constitution and statutes, the President occasionally may countenance the refusal of an officer to follow a direct order. He may prefer to retain the officer's experience and stewardship even at the price of stomaching insubordination.

The more general point is that the President can neither sue nor physically force an executive officer to do anything. The President cannot seek a judicial order, compelling an executive officer to execute some statute, move some funds, or appoint someone to an inferior office. Nor can he put some civilian executive officer in the stockade for failing to adhere to presidential instructions. What the President can do is cajole the officer, perform the executive tasks himself as the constitutional executor of the laws, or replace her with a more compliant successor.

E. Two Masters of the Executive Branch

Though the Constitution envisions that there will be a hierarchical executive branch under the control of a Chief Executive, it also erects several hurdles and obstacles on the effective exercise of that control. First, it does not guarantee that there actually will be any executive subordinates. Congress creates offices and thus decides how many executive assistants the President will have. Second, the Constitution does not give the President the right to decide the powers and duties of each executive officer. Once again, Congress may decide what functions an office will perform. Third, the Constitution does not grant the President an unfettered hand in appointing to offices as the Senate has a powerful check. Fourth, the President cannot ensure the continued existence and functioning of an executive office because Congress decides whether an executive office has outlived its purposes and whether the office should continue to be funded. Finally, congressional statutes create the possibility of

conflict between the President and executive subordinates. As should be clear, executive officers are not the mere instruments of the President, but also the instruments of the law as well.

Executive officers are aptly described as having two masters, the President and Congress. The President exerts his control by trying to appoint officers who subscribe to his administration policies and are personally loyal to him and by threatening removal of those who fail to toe the line. These are significant powers that the President wields over the executive branch. Congress (and its members) draws the studied attention of executive officers with its ability to alter statutory responsibilities and its power to set funding levels. Secretaries can see their jurisdictions and budgets cut if they fail to adhere to congressional preferences. They also have a constitutional duty to implement congressional statutes, statutes that often will limit the executive branch's discretion in a number of ways and that will impinge upon the executive branch's unity.

II. THE DEPENDENCE OF THE EXECUTIVE OFFICE OF THE PRESIDENT ON CONGRESS

In the early years of the Republic, Presidents personally could superintend the relatively small departments and their comparatively meager staffs. George Washington held frequent cabinet meetings, made important decisions himself, and issued often detailed instructions to the department heads. This in-depth level of presidential superintendence is no longer possible, given the immense size of the executive branch and the many more complicated issues, both foreign and domestic, that occupy (and often overwhelm) the President's limited time.

In the modern age, when people speak of executive unitariness, the principle instrument of achieving that unity is the Executive Office of the President (the EOP). The EOP consists of a hodge-podge of relatively small offices and agencies that provide advice to the President and help formulate, spread, and impose administration policy upon the rest of executive branch. The EOP is something of a central nervous system of the executive branch. It collects data from the various departments and agencies outside the EOP and uses that data to send signals and instructions to those entities.

The Constitution does not establish an EOP and the President has no constitutional right to one. As noted earlier, the President has no right to particular offices or officers. While the centralizing

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bureaucracy of the EOP is familiar, many forget or are unaware of its relatively recent vintage. Early Presidents had no large apparatus designed to help the President oversee and control the executive branch. It took Congress to establish and fund the EOP. Though the EOP is typically viewed as a creature of the President, since it acts as the nerve center of the executive branch, it is no less a creature of Congress because the latter decides whether to fund it and whether it will continue.

Congress might use its power of the purse to hobble the unitary executive in one of two ways. First, Congress could just abolish the EOP altogether, thereby crippling the President's ability to superintend the executive branch. This would be something of a nuclear option. Second, Congress could retain the EOP but provide that no funds could be used by members of the EOP to superintend decision-making within the executive branch. This option is a little more subtle for the President could still use the EOP to gather information about what transpires within the executive branch and the EOP could still serve other functions, such as helping the President understand bills, issue Statements of Administrative Policy regarding pending bills, and liaise with members of Congress.

If Congress ever took such measures, executive unity would be greatly compromised. First of all, the EOP creates a forum below the President where contradictory policy prescriptions and impulses can be resolved or at least massaged. Without this forum, departments may act at cross-purposes, negating or blunting each other's policies. Second, many people imagine that appointees within the EOP more faithfully reflect the preferences of the incumbent President than do appointees within the executive departments.³⁰ Whatever the reasons for this intuition, if it is accurate and if Congress makes it impossible for members of the EOP to supervise and direct the executive branch agencies, the end result is that the President's preferences will more often be thwarted by the executive branch agencies than would occur in a world with a strong EOP. Indeed, the EOP continues to have the backing of modern Presidents because they recognize that they *cannot* superintend and control the executive branch without the EOP. While

30. Why might this be so? Perhaps more attention is paid to the preferences of those who seek positions in the EOP than is paid to the preferences of those who seek political jobs within the various executive departments. Perhaps agency appointees are "captured," whereby those with preferences close to the President's slowly go "native" as they spend more time within a department serving alongside career civil servants who have deeply ingrained institutional perspectives that differ from presidential policy.

a few personal secretaries who handled correspondence and helped issue occasional presidential directives may have sufficed for George Washington, such minimal staff support is inadequate to the task in the modern world.

To borrow from military parlance, the EOP is a “force multiplier.” Without it, the President would be greatly weakened in his struggle to instantiate his preferences within the executive branch. Notwithstanding the President’s reliance on the EOP, Congress could bar the EOP from helping to implement the Chief Executive’s preferences at the departmental level. In sum, Congress can cripple the modern unitary executive.

III. A LITTLE TOO UNITARY: TROUBLING ASPECTS OF RECENT REGULATORY REVIEW EXECUTIVE ORDERS

Having previously highlighted Congress’s numerous means of influencing the composition and actions of the executive branch, it might be useful to approach the matter from the perspective of the President, particularly as we scrutinize regulatory review executive orders. Despite granting him the “executive Power,” the Constitution suggests that the Chief Executive lacks certain powers. First, the President lacks the constitutional power to delegate his own powers to others. By leaving it to Congress to create offices, the Constitution suggests that the President lacks the constitutional authority to grant his constitutional and statutory authorities to others. Indeed, the U.S. Code authorizes the President to delegate “any function which is vested in the President by law,”³¹ but only to Senate confirmed appointees. Such statutory authority would not have been necessary had the President the constitutional power to delegate his powers freely.³² The Congress that enacted this provision must have had members who recognized that the President otherwise lacked the authority to delegate.

Second, the President cannot transfer functions between offices. For instance, the President could not permit the Secretary of Commerce to make a decision statutorily committed to the Treasury

31. 3 U.S.C. § 301 (2000).

32. The next section of the code provides that “[t]his chapter shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate the performance of functions vested in him by law.” 3 U.S.C. § 302 (2000). Yet there are sound reasons to think that the President lacks the inherent power to delegate because if he could delegate, he would have the power to create offices.

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Secretary. Once again, the power to create offices includes the power to decide what those offices will do and what they may not do. When Congress provides that decision X is committed to the Treasury Secretary, the statute implies that no other executive officer created by statute may make the decision.

Third, the President cannot give another executive officer a veto over a decision statutorily committed to an officer. If a statute permits the Secretary of Defense to take some administrative action, the President cannot grant the Secretary of State a veto on that action. If Congress has not granted the Secretary of State a check, the President cannot augment the Secretary's powers by granting him one.³³

Although there are many controversial aspects of regulatory review, I focus on the constitutional questions here. I limit my consideration to the Clinton Executive Order 12866, and the Bush amendments to it. Surprisingly, I find them both constitutionally suspect.

A. *The Clinton Order*

In many ways, Executive Order 12866 improved upon its predecessor.³⁴ In a clear and welcome embrace of the unitary executive theory, the order made clear that the President could make decisions that statutes arguably left to subordinate executive officers. The order specified that the President could “resolve[]” conflicts between agency heads or between the OMB and an agency about whether a rulemaking was consistent with Executive Order 12866.³⁵ So, notwithstanding that statutes might speak of a Secretary issuing

33. The President may sidestep all three of these constraints by seeking the opinions of others and then implementing their recommendations. For instance, rather than delegating his power to pardon, the President can seek the opinions of the Secretary of Defense and State as to the advisability of pardoning certain individuals and then implement their recommendations. Likewise, instead of transferring statutory functions between departments, the President can seek the opinions of the officer who has his confidence, adopt them as his own, and direct the less favored officer to conform to them. Finally, rather than granting the Commerce Secretary a veto on environmental matters, the President can seek her opinion and direct the EPA Administrator to conform to it. In all these cases, the President essentially adopts someone else's policies and opinions and then uses his constitutional authority as Chief Executive to implement them.

34. Exec. Order No. 12,866, at § 7, 58 Fed. Reg 51,735 (Sept. 30, 1993), available at <http://www.whitehouse.gov/omb/inforeg/eo12866.pdf>.

35. *Id.*

regulations, the President could resolve the matter and decide what those regulations would say.

But Executive Order 12866 had at least one rather problematic feature. Besides the President, the Vice President “acting at the request of the President” could resolve conflicts between agencies or between an agency and OMB.³⁶ Some might regard the Vice President as an alter ego of the President, someone who will press the President’s policies to the fullest. After all, the President and Vice President run as a ticket and the President selects the Vice Presidential candidate placed before voters and the Electoral College. Others might regard the Vice President as an anomalous officer, someone elected with the President as part of a joint ticket, but not in any way constitutionally subordinate to the President. Notwithstanding the changes in how the Electoral College selects the Vice President, the Constitution grants the President no constitutional authority over the Vice President.

For our purposes, what matters is that the Vice President has limited constitutional powers and duties. The Constitution makes the Vice President something of a crown prince, waiting for the demise, resignation, or removal of the President. It also makes the Vice President the presiding officer of the Senate, with the ability to break any tie votes. These powers hardly bespeak any administrative responsibilities. Conspicuously, the Vice President lacks any executive power and seems more like a legislative official waiting for more consequential work. Vice President John Garner had good reason when he complained that the office “wasn’t worth a bucket of warm piss.”³⁷

Can the Vice President assume additional functions, besides the minimal ones the Constitution prescribes? Congress seems to think so. For instance, Congress made the Vice President one of many regents of the Smithsonian.³⁸ Without expressly authorizing presidential delegation to the Vice President, Congress also authorized the use of appropriated funds so that the Vice President may carry out any “executive duties and responsibilities” that the President might assign.³⁹

36. *Id.*

37. JAMES HALEY, *PASSIONATE NATION* 537 (2006).

38. 20 U.S.C. § 42(a) (2000).

39. 3 U.S.C. § 106 (2000).

These federal statutes suggest that both Congress and the President may assign executive tasks to the Vice President. Given this statutory context, the Clinton regulatory review order which permits the Vice President to act as a regulatory czar of sorts is perhaps explainable as a product of its times. The constitutional question is whether the prevailing conception of the Vice President as a surrogate Chief Executive is appropriate.

It seems evident that the President lacks the constitutional authority to create an executive office. The case of the Vice President is a slightly different because the Constitution creates the office of the Vice President. Here, the question is whether the President can add to the constitutional functions of a constitutionally created office by delegating some of his powers. The key matters to be resolved are the same in all cases of delegations. Does the putative delegator have the authority to delegate and does the putative delegee have the authority to accept the delegation?⁴⁰ Assuming for the moment that the Constitution poses no bar to the Vice President's acceptance of delegated power, the President lacks the power to delegate authority to some constitutionally created office. The Constitution assumes that those who will wield executive power will be in offices created by statute by Congress. It also assumes that the Senate will pass on the qualifications of significant executive officers. When the President delegates to the Vice President, he violates both postulates.

Those who believe that the President can delegate his authority to the Vice President must confront a whole host of horrors. For instance, if the President can permit the Vice President to resolve interagency disputes, there is nothing to prevent the President from authorizing the Vice President to reach into any agency matter and make the decision herself, whether or not there is an interagency dispute, just as the President might. More generally, the President might take *any* constitutionally recognized officer and make them a "regulatory czar," with the power to oversee all regulatory decisions of the executive branch. The Constitution establishes the office of the Chief Justice in the same way that it establishes the office of the Vice President. May the President take this constitutionally created office and grant its incumbent all sorts of executive responsibilities? From the perspective of the President, the Chief Justice and the Vice President are constitutional equivalents because while the Constitution generally lays out their functions, it never expressly bars

40. Michael Rappaport has posed these questions before.

either from serving in the executive branch and accepting presidential delegations of power.⁴¹

Finally, once one admits that the President can delegate his authority as the constitutional executor of federal law, there are no limits to what constitutional powers he might delegate. One can imagine a President delegating to the Vice President the powers to veto legislation, to nominate, and to pardon. Indeed, the President might make both the Vice President and the Chief Justice surrogate Presidents, each capable of exercising any constitutional power the President enjoys under the Constitution.

For all these reasons, I believe the Constitution forbids the President from delegating any of his presidential powers to the Vice President, or for that matter to the Chief Justice. But the Constitution hardly makes this obvious and one can see why reasonable people might disagree on this question.

B. The Bush Amendments

The Bush Administration's revisions to Executive Order 12866 eliminated the Vice President's dispute resolution role and thereby eliminated the surrogate Chief Executive.⁴² At the same time, these revisions introduced a new and significant function for "Regulatory Policy Officers" (RPOs). RPOs were a legacy of the Clinton Executive Order. Under the Clinton order, RPOs within individual executive agencies were required to "be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order."⁴³ This vague instruction did not give RPOs any real authority, other than some undefined, generic role in the promulgation of regulations by their agencies.

In the Bush Administration's revisions, RPOs were given additional authority. Specifically, the amendments provided that "no rulemaking shall commence nor be included in the [annual Regulatory Plan] without the approval of the agency's Regulatory

41. Anyone who imagines that a judicial officer (the Chief Justice) is not a fit receptacle of executive power should likewise believe that a legislative officer (the Vice-President) cannot play an executive officer.

42. Exec. Order No. 13,258, at § 12, 67 Fed. Reg. 9,385 (Feb. 26, 2002), available at <http://www.whitehouse.gov/omb/inforeg/eo13258.pdf> (last visited Feb. 8, 2009).

43. Exec. Order No. 12,866, at § 6(a)(2), 58 Fed. Reg. 51,735 (Sept. 30, 1993).

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Policy Officer.”⁴⁴ The only exception to this veto was where the agency head “specifically authorized” the rulemaking or the exclusion from the Regulatory Plan.

This qualified veto given to RPOs arguably makes good policy sense. The agency head might be too busy to superintend all agency rulemaking and might benefit from the RPO’s vigilance. Moreover, when both the agency head and the RPO act to implement the President’s regulatory agenda, that may increase the likelihood that the bureaucracy actually respects and implements that agenda.

Still, the RPO veto is constitutionally troubling. The President does not have the power to grant an executive officer a veto over decisions statutorily committed to another executive officer. If someone below the agency head has statutory authority to commence a rulemaking, the President cannot grant another executive officer the right to block that proposed rulemaking. He could not even grant such authority to the department head, if the statute itself did not permit the inference that the department head would control all regulations issued by those within her department.

The qualified nature of the veto makes it less problematic because the department head may always permit regulatory activity to go forward, whatever the RPO might say. Nonetheless, it still may be the case that sometimes the RPO will prevent the exercise of statutory discretion on no other basis than that the President permitted him to do so. While the President may control the issuance of regulation (subject to the constraints found in law), he rather clearly lacks the authority to delegate this power to officers created by statute.

IV. CONCLUSION

As the theory of the unitary executive becomes institutionalized in successive presidential administrations, there is a risk that the theory will become unmoored from the Constitution. Focusing exclusively on abstract desiderata of the executive—vigor, decision, coordination, and responsibility—obscures both the conspicuous and the subtle anti-unitary features of the Constitution.

This article has argued that the Congress exercises significant control over the executive branch via its powers to create offices and departments and to fund the executive branch. Additionally, the Senate influences who becomes officers within these departments,

44. Exec. Order No. 13,422, at § 4(b), 72 Fed. Reg. 2,703 (Jan. 18, 2007).

limiting the President's ability to select his most favored choices. Finally, Congress creates the laws that executive officers enforce, thereby constraining the discretion of executive officers. These constraints on the unitary nature of the executive branch make Congress something of a second master over the executive branch.

Paying insufficient attention to the Constitution's text and structure, Presidents and their immediate assistants may act as if they can reorganize and restructure the executive branch at will. Recent Executive Orders related to regulatory review, from both the Clinton and the Bush (43) administrations arguably reflect executive overreach as Presidents have imagined that they can delegate and constrain executive functions at will, notwithstanding the Constitution and federal statutes.

Going forward, both unitary executives and skeptics should generate their own lists of the Constitution's anti-unitary features. While these lists will differ from scholar to scholar, considered together, they will help to bring into clearer focus the features of the Presidency, both unitary and otherwise.