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

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 mre(y)-5.5( )5ecu27d1fe bcu27.5(y)-5.6(dec ,3 Tw(direi8d)5ecu27ddecu

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 othe(ght ravoritewathetituof th-1.99480005 Tcc-0.00948

as insufficiently vigilant in protecting the environment, he has to

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.

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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

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.

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 horribles. 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

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 executivists 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.