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The Myth of the Unitary Executive*

CASS R. SUNSTEIN**

MR. ROSS: Our first speaker is Cass Sunstein, who is the Karl Llewellyn Professor of Jurisprudence at the University of Chicago School of Law and Department of Political Science. A prolific author and lecturer on administrative law issues, Professor Sunstein is Vice Chair of the Judicial Review Committee of the American Bar Association Section on Administrative Law and Regulatory Practice. He formerly served in the Office of Legal Counsel at the United States Department of Justice.

PROFESSOR SUNSTEIN: The Council on Competitiveness (Council) certainly has become a very important and controversial entity in a relatively short time. Even though the Council is fairly new, it is a continuation of the 1980's trend toward presidential oversight of the regulatory process, with a view toward reducing costs, introducing a degree of uniformity and centralization, and promoting political accountability in the administrative process. I think that the role of the Council has developed naturally out of mostly excellent innovations by President Reagan with respect to the administrative process. I believe that the Council, or a similar body, is necessary because there should be presidential oversight of the regulatory process, with a particular view toward reducing regulatory costs.

I think it is probably good to say that we start from that significant common ground. It is my hope that the prospective Clinton Administra-

* The following is an edited transcript of Professor Sunstein's presentation at an October 30, 1992 Colloquy, held at The American University's Washington College of Law, on the role of presidential oversight in the administrative process. The background research for this presentation was conducted in preparation for an upcoming publication in the *Columbia Law Review*. See generally Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (developing in-depth notion of considerable legislative authority over administration of Federal Government).

** Karl Llewellyn Professor of Jurisprudence at the University of Chicago School of Law and Department of Political Science. A.B., Harvard College, 1975; J.D., Harvard Law School, 1978. I am grateful to Lawrence Lessig, Assistant Professor of Law, University of Chicago Law School, for his assistance in developing these joint ideas.

tion would continue the concern toward decreasing regulatory costs and ensuring a degree of uniformity and centralization.³ Whoever is the President for the next four, eight, twelve, or thirty years should build on these precedents.

Notwithstanding what I have just said, I do have a major legal claim to offer you, and I offer it with regret. It has become a pervasive view within the executive branch, and to a large degree within the courts, that the original vision of the Constitution put the President on top of a pyramid, with the administration below him. This vision, set out in numerous documents by the Department of Justice's Office of Legal Counsel,⁴ my former home, is not an accurate interpretation of the Constitution. It is basically a fabrication by people of good intentions who have spoken ahistorically.

3. One of President Clinton's first acts was to abolish the Council on Competitiveness, but he vowed to create a more open and accountable system of agency regulatory review. *Clinton Administration Orders Pullback of More Than 50 Last-Minute Regulations*, DAILY EXEC. REP. NO. 14 (BNA), Jan. 25, 1993, at d15. To this end, President Clinton issued Executive Order 12,866 on September 30, 1993, in an attempt to streamline the administrative process and to eliminate the improper influence of parties interested in agency rulemakings. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993).

4. For example, a February 12, 1981 memorandum written by the Office of Legal Counsel (OLC) set out the constitutional basis for Exec. Order No. 12,291, 3 C.F.R. § 127 (1981), reprinted in 5 U.S.C. § 601 app. at 473 (1988) [hereinafter Executive Order 12,291]. See *Role of OMB In Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 152-69 (1981) (reprinting as part of Hearing Record, OLC's Memorandum for Honorable David Stockman, Director, Office of Management and Budget, Regarding Proposed Executive Order on Federal Regulation) [hereinafter Department of Justice Memorandum]. Executive Order 12,291 requires federal agencies to incorporate, to the extent allowed by statute, cost-benefit analyses when promulgating regulations. Executive Order 12,291, § 2. To this end, an agency must prepare a Regulatory Impact Analysis (RIA) and submit it to the Office of Management and Budget when it promulgates a major rule, as defined by Executive Order 12,291, § 1(b). Executive Order 12,291, § 3(a). Among other requirements, an RIA must include: 1) a description of the potential benefits of a rule, and identification of the likely beneficiaries; 2) a description of the potential costs of the rule, and those likely to bear those costs; 3) a determination of the potential net benefits of the rule; and 4) a description of any potentially less costly alternatives, and the legal reasons that these alternatives were not chosen. Executive Order 12,291, § 3(d)(1-4). The Department of Justice Memorandum justified these requirements under the Take Care Clause of the Constitution, U.S. CONST. art. II, § 3, and under the dicta in *Myers v. United States*, 272 U.S. 52, 135 (1926). See *infra* note 22 (quoting *Myers* dicta setting, subject to interpretation, limits of presidential review of agency action).

Given that the strong version of the Unitary Executive idea is an ahistorical myth, the questions that we will be discussing should be mostly ones of policy, not constitutional law. The issue is what policy does it make sense for the Council to implement, not what policy does the Constitution require the Council to follow.

With respect to this policy, I generally agree with the Council on Competitiveness, with one possible exception. I am not sure whether there is a disagreement on this point. I believe that there ought to be full disclosure of private communications with the Council. When members of the Council communicate with private people about the content of rules in a Notice of Proposed Rulemaking, the public should know. There ought to be full disclosure of communications with the private sector to assure the American people that nothing scandalous is happening, and to give them a sense of the actual process. That is my principal policy recommendation.

My beliefs with regard to the constitutional structure come with considerable regret. I wish it were not the case. The executive branch's vision of the Constitution, with the President on top and the administration below, has elegance, simplicity, and tremendous appeal. In the modern climate, I submit that this structure would make much sense. That, however, was not the Framers' original conception. The Constitution does not speak in those terms. It is commonly believed that the Vesting Clause of the Constitution⁵ resolves these issues, but this is not the case. The eighteenth-century conception of executive power was very different from our present views. What has happened is that twentieth-century categories and ideas are being used to give content to an eighteenth-century document.

What I am about to say might seem a little bit historical and technical. It is both, I acknowledge; but it has considerable contemporary importance. I believe that if Congress wants to regulate the Federal Communications Commission in certain ways, by insulating it from the President, and if Congress wants to allow the head of the Environmental Protection Agency (EPA) to make decisions about the environment instead of the President, or the Council on Competitiveness, then Congress is fully entitled to do that. Would it be wonderful if Congress acted in this way? It is hardly clear, but this is something the Constitution does not forbid Congress from doing.

In a nutshell, here is the constitutional argument. It first came to my attention that the President might not be hierarchically superior to every-

5. U.S. CONST. art. II, § 1.

thing we consider "administration," by reading nineteenth-century texts on administrative law. What persists in the nineteenth-century texts is a distinction between execution and administration.⁶ These distinguished mainstream people insisted that this distinction exists, and they said that the Founders perfectly well understood this notion.⁷ The nineteenth-century commentators, basically uncontradicted, said that there is execution, involving foreign affairs issues and certain core executive functions, and there is administration, which is essentially the ordinary policy business of what we now consider the executive branch. The nineteenth-century writers also believed that the Framers thought Congress could control the relationship between the President and the administration.⁸ The nineteenth-century commentators thought that the President had a broad sphere of control over what they called "execution," but that the President did not necessarily have hierarchical control over administration.⁹

It is alarming to people like me, who want to believe in the Unitary Executive, that the nineteenth-century writers thought this was self-evident, and attributed their belief to the Framers. I have not found any nineteenth-century source that has this hierarchical vision on which Presidents Reagan, Bush, and Carter all have relied. At the very least, the absence of nineteenth-century support for the twentieth-century view is alarming, partly because the nineteenth century, by my calendar, is closer to the eighteenth than is the twentieth.

Let us talk now a little bit about what happened in the eighteenth century. I am just going to sketch out some historical facts. As Justice Scalia eloquently argues, if anything ought to be under the President's

6. See Nathan D. Grundstein, *Presidential Power, Administration, and Administrative Law*, 18 GEO. WASH. L. REV. 285 (1950) (surveying historical views of presidential authority over administrative process). See also LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* 73-74 (2d ed. 1987) [hereinafter FISHER, *THE POLITICS OF SHARED POWER*] (discussing Congress's responsibilities in supervising federal agencies).

7. See Grundstein, *supra* note 6, at 285-300 (discussing views of Founders). See generally FISHER, *THE POLITICS OF SHARED POWER*, *supra* note 6 (discussing constitutional basis of President's ability to legislate and Congress's ability to structure administrative state).

8. See Grundstein, *supra* note 6, at 300 (arguing that, as creator and potential eliminator of administrative state, Congress is superior to agencies, except as Congress chooses to delegate authority to President).

9. See Grundstein, *supra* note 6, at 300 (restating theory that if President is delegated authority, he can re-delegate this authority and direct decisionmaking actions at his discretion; but if authority is delegated to agency, President has no discretionary power over decisionmaking process).

control, it is prosecution via the Attorney General.¹⁰ Yet the Framers actually did not put prosecution under the hierarchical control of the President. They created an Attorney General, but they also created District Attorneys who were not subject to the control of the Attorney General or the President.¹¹ Right there, the defenders of the Unitary Executive theory have to hesitate. Prosecution of the laws by Federal Government employees was not under the arm of the President, and as far as I have been able to find, no one thought that violated the Constitution.

There are also the Framers' famous decisions of 1789 on whether and how to put the heads of the Foreign Affairs Department, the War Department, and the Treasury Department under the President.¹² They ended in a closely divided vote that many of the leading participants said was a policy decision not made under constitutional compulsion, although some of the decisions' supporters disagreed with this view. The Framers ultimately did put Foreign Affairs and War under the President's hierarchical control. But if we follow up on history a little bit, things become much more complicated very quickly.

The first Congress had refused to put the Treasury Department formally within the executive branch.¹³ There was a very important public official in the Treasury Department called the Comptroller of the Currency. James Madison, the greatest of the Framers, believed that the Comptroller of the Currency would not be under the President's hierarchical control; because the Comptroller settled legal claims, his office

10. See *Morrison v. Olson*, 487 U.S. 654, 705-06 (1988) (Scalia, J., dissenting) (arguing that because 1) prosecution is executive function, and 2) statute in question vests this function in branch other than executive, statute in question violates Article II of Constitution). Justice Scalia emphasized his belief that government prosecution of crimes is quintessentially an executive function. *Id.*

11. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92-93. See Lawrence Lessig & Cass R. Sunstein, *The President and The Administration*, 94 COLUM. L. REV. 1, 16-22 (1994) (examining federal prosecution practices of late eighteenth century, and how they shed light on fallacy of Unitary Executive model).

12. The Decisions of 1789 refer to the First Congress's debates over presidential removal authority of agency heads, in particular of the Departments of War, State, and Treasury. See LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 60-66 (1985) (reciting highlights of removal debate of 1789). See also EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957, 10-19, 101-02 (Randall W. Bland et al. eds., 5th ed. 1984) (summarizing various executive removal authority options debated by First Congress, and questioning whether result supports Chief Justice Taft's argument in *Myers*).

13. For an instructive discussion of this aspect of the Decisions of 1789, see FISHER, THE POLITICS OF SHARED POWER, *supra* note 6, at 40-41.

contained “too much of the Judicial capacity to be blended with the Executive” and subject to the President’s plenary power.¹⁴ Theodore Sedgwick, another of the Framers, believed that in light of the Comptroller’s close connection to the raising of national revenues, he “seemed to bear a strong affinity” to Congress.¹⁵ Madison believed that this office was distinct from both the executive and judicial branches.¹⁶

If Madison was speaking for many of the Framers, and it appears that he was, this has explosive consequences. The judicial function of the Comptroller was similar to what many administrative agencies now do in one way or another. This suggests that when administrative officials do things that seem to bear a strong affinity to what Congress does—and the EPA is an example in its rulemaking capacity—the agency need not be, as a matter of constitutional compulsion, placed under the hierarchical control of the President. If the settlement of legal claims becomes judicial, and immunized from presidential control, then the defenders of the Unitary Executive idea have a strong historical burden to overcome. This is a real disappointment to any sitting President.

In 1792, the Postmaster General, the person in charge of the mails, was treated similarly.¹⁷ The office was reorganized, and he was given the authority to enter into contracts and to make appointments. It was said around the time of the Framing that this would “combine purse and sword” by giving the President direct power over revenues. As a result, Congress deleted the language putting the Postmaster General under the direction of the President.

Because of all this, there is a big historical burden for the Unitary Executive supporters to surmount. Prosecution was not under the President’s control, the functions of the Comptroller were not under the President’s control, and the functions of the Postmaster were not under the President’s control. The notion that any of this was unconstitutional was barely discernable in this period.

What about the text of the Constitution? There is strong textual support for the view I have just suggested. The Opinions Clause of the

14. FISHER, THE POLITICS OF SHARED POWER, *supra* note 6, at 133 (quoting 1 ANNALS OF CONGRESS 613, 614 (1789)).

15. FISHER, THE POLITICS OF SHARED POWER, *supra* note 6, at 133.

16. FISHER, THE POLITICS OF SHARED POWER, *supra* note 6, at 133.

17. See Grundstein, *supra* note 6, at 299 (arguing that Postmaster’s independence from presidential control is evidence of administrative state’s independence from presidential control).

Constitution¹⁸ gives the President the power to demand the opinions, in writing, of the heads of departments. I used to think that this clause was an indication of strong support for the Unitary Executive view. But if we think about it a moment, this interpretation would be redundant. Why is it that the Framers gave the President the power to demand, in writing, the opinions of department heads if these were people whom he could hire and fire at his will, and whose actions he could direct? This provision would make no sense under the strong Unitary Executive model. The notion that the President must specifically be given the power to demand opinions in writing seems to me very strong textual evidence against the Unitary Executive concept. Furthermore, the Necessary and Proper Clause¹⁹ gives Congress constitutional authority to “enact all powers necessary and proper” to carry into effect not only the powers of Congress, but all other powers vested in the Federal Government. That suggests, at a minimum, considerable congressional control over the organization of the judicial and executive branches.

This is simply the sketch of an argument. It produces, for me, the sad conclusion that the strong Unitary Executive conception is an ahistorical, policy-driven, extremely sensible anachronism that uses twentieth-century ideas on an eighteenth-century document. Because the conclusion that I have reached seems to me so unfortunate, I am trying hard to figure out what can be done about it. Perhaps we should not really be originalists about the meaning of the Constitution. Maybe the views of Judge Bork²⁰ are wrong, in that the Constitution is a changing and living document, with a high degree of flexibility.

Under such an approach to constitutional interpretation, perhaps we have the ingredients of a new Unitary Executive idea. Maybe we can say that “executive” has to be read in twentieth-century ways so as to promote eighteenth-century goals. This seems plausible to me, given the vastly changed character of the executive branch. This idea rests heavily on notions of an evolving Constitution and the need to pay attention to changed circumstances. This argument may be able to bring us towards the Unitary Executive concept, but I do not think it can bring us all the way there.

Let me now talk about some concrete issues that are very important in Washington now and will be regardless of the outcome of the elec-

18. U.S. CONST. art. II, § 2.

19. U.S. CONST. art. I, § 8, cl. 18.

20. See ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 81-83 (1990) (advocating originalism).

tion. I am just going to address them cursorily. One issue is whether the President, or any reviewing entity headed by Vice President Quayle, Gore, or Stockwell, has the power to tell an agency what to do. As I said earlier, the constitutional answer is no. He cannot dictate to an agency head. The proper solution for the White House, at most, is to discharge the agency head. The early opinions of the Attorney General support this view.²¹ The history that I have traced supports this view. The dicta in *Myers v. United States*,²² the most emphatic affirmation of presidential power in the history of the Supreme Court, supports this view. I assume that the Council on Competitiveness is in full agreement with this conclusion. The EPA promulgates the regulations under the Clean Air Act, not the President or the Council.

Incidentally, I should add that it is not clear to me, unlike many critics of the Council, that anything the Council has done is illegal. I do not know enough about the details to challenge or endorse what the Council has done, and my conclusions are no reflection on the Council on Competitiveness.

Let us address the issue of private contacts involving the Council on Competitiveness. If the Council is influencing an agency's decision on the basis of communications with private individuals, it not only has a duty to disclose, but Congress can require disclosure. In fact, I actually think it would be a good idea to disclose. Even if it would not make things fantastically better in terms of, for example, environmental protection, it would increase the legitimacy of our government by notifying the American people of exactly when high-level people are meeting with members of the private sector on the substance of proposed rules. It is part of a very simple idea of open government.

Another issue is time limits for reviewing entities. As long as they are reasonable and give the entity an opportunity to have its say, they are a good idea. It should not be feared that a reviewing entity is killing

21. For an example, see 1 Op. A.G. 624 (1823) (advising President Monroe that he was powerless to review Treasury Department's settlement of Major Joseph Wheaton's account).

22. See *Myers*, 272 U.S. at 135 (stating that:

[o]f course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control.).

regulations through delay. Time limits would respond to that fear. I suggest that there is no constitutional problem with imposing time limits onto the reviewing process.

For me, the most difficult question is the policy issue with respect to internal executive branch communications. Suppose the Council is going back and forth with the EPA. Should Congress require disclosure of these communications? Is there a legal problem if Congress requires disclosure in these instances? If the President or the Vice President is involved, there might be a constitutional problem with requiring disclosure of all relevant contacts. And, certainly, there would be a problem with requiring disclosure if we are talking about core executive agencies, such as the State Department, the Defense Department, and possibly the Justice Department. But I think it is almost certainly the case that, other than in these instances, Congress can constitutionally require disclosure of internal executive branch communications that influence rulemaking proceedings. Thus, the issue becomes one of policy.

I do not like this conclusion with respect to what I would like the Constitution to represent, or as a matter of sound constitutional policy. I think the Council's argument, that the internal deliberative process should be protected from public oversight, is persuasive. I do not agree with the American Bar Association's recommendation that the deliberative process be opened in all respects. Congress would not like an effort to require its internal discussions with its own staff to be opened up. General Motors would not like a requirement that its internal policy discussions be opened up to the public. There is a terrible chilling effect on internal discussion when it is exposed to public scrutiny.

Perhaps drafts that are submitted to the Council on Competitiveness should be disclosed. I understand that is ACUS's position.²³ But requiring disclosure of this kind does not seem to be Congress's highest priority. I think their time is better spent elsewhere.

To summarize on the issue of internal executive contacts, I think that if the President or Vice President is not involved, there is not a constitutional problem with requiring disclosure. In some rare cases, perhaps, there is something of a constitutional problem. Usually it is an issue of policy.

Let me give you my basic conclusion. As an originalist matter, the notion of a strong Unitary Executive has been greatly oversold. We should not be looking at the Constitution, we should be discussing poli-

23. See ACUS Recommendation, *supra* note 2 (outlining ACUS's 1988 recommendation with respect to presidential oversight of agency action).

cy. The notion of presidential oversight of the administrative and executive process, particularly with an eye toward controlling costs, is an excellent policy innovation. In this role, however, the Council on Competitiveness may not dictate rulemaking outcomes. It could be, and should be, required to disclose private contacts. Time limits are fine, as both a constitutional and policy matter. Finally, Congress should not require that internal executive deliberations be disclosed to the public, though there is rarely a constitutional obstacle to this requirement.

Thank you.