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CONGRESSIONAL TESTIMONY

The Rulemaking Process and Unitary Executive Theory

Testimony before the
Subcommittee on
Commercial and Administrative Law
House Judiciary Committee

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Madam Chairman and Members of the Subcommittee: thank you for inviting me here today to discuss this important topic.[1]

"I agree with you, but I don't know if the government will," President John Kennedy is said to have once told a visitor."[2] Kennedy's lament encapsulates in many ways the questions being discussed today. To what extent can – or should -- a president be able to ensure that his views and priorities are reflected throughout the executive branch?

It's not just a matter of constitutional principle. Perhaps the greatest challenge faced by presidents in this regard is a practical one. Charged by the constitution with "tak[ing] care that the laws be faithfully executed," they often find their efforts frustrated by the machinery of the executive branch which they head. Reflecting this frustration, Harry Truman predicted difficulties for his successor, the former general Dwight Eisenhower: "[H]e'll say, 'Do this! Do That!' And nothing will happen."[3]

Nowhere is the challenge been greater than in the area of regulation. More than 50 agencies, ranging from the Animal and Plant Inspection Service to the Bureau of Customs and Border Protection, have a hand in federal regulatory policy. With nearly 250,000 employees, they produce over 4,000 new rules – and some 70,000 pages in the Federal Register – each year.

Managing this regulatory machinery in a way that not only reflects the president's priorities but faithfully executes the will of Congress and the mandates of the courts is no easy task. That is why, starting a generation ago, presidents began to establish systematic review processes for the promulgation of regulations.

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[1] The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

[2] Quoted in Elena Kagan, "Presidential Administration," 114 Harvard L. Review 2245 (2001).

[3] Ibid.

The first such process was created in 1971, when President Richard Nixon required regulatory agencies to perform "quality of life" analyses of significant new regulations. Supervised by the Office of Management of Budget, the analyses were to outline regulatory analyses and their costs.[4]

Gerald Ford expanded on this process, making control of regulatory growth part of his war on inflation, requiring agencies to prepare "Inflation Impact Statements," which were reviewed by the White House Council on Wage and Price Stability. Ford also set up a cabinet-level group to focus on other initiatives to control the cost of regulation.

Despite a different party affiliation, Jimmy Carter continued – and even expanded – regulatory review mechanisms during his Administration, continuing the practice of conducting economic analyses of proposed regulations and setting up a cabinet-level Regulatory Analysis Review Group to review proposed new rules.

Upon taking office, Reagan established a "Task Force on Regulatory Relief," chaired by Vice President George Bush, to oversee review of the regulatory process. In addition, he issued an executive order – E.O. 12291 – detailing the review system. And perhaps most importantly from an institutional point of view, he charged the newly created Office of Information and Regulatory Affairs with oversight of that process.

The Reagan executive order on regulation continued in place during President George Bush's term, with a cabinet-level Council on Competitiveness headed by the Vice President taking the place of the Task Force on Regulatory Relief. OIRA continued to manage the review process, although no permanent OIRA chief was ever confirmed.

In 1993, President Bill Clinton replaced the Reagan-era Executive Order on regulatory review procedures with one of his own, E.O. 12866. Among the changes in the Clinton order were greater transparency requirements and a limitation of review requirements to "significant" rules. But the basic structure of the review system was kept in place.

[4] See, Murray Weidenbaum, "Regulatory Process Reform: From Ford to Clinton," Regulation (1997).

Further reflecting the continuing stability of the review system, President George W. Bush has kept the Clinton executive order in place. During his tenure, however, OIRA has issued a series of guidance documents for agencies – rather from a "best practices" guide for regulatory impact analyses, to expanded requirements for peer review -- to improve the consistency and quality of reviews under the executive order. Most recently, the Administration amended the executive order in several, relatively minor, ways ---- including expanding the role of agency "regulatory policy officers."

Today – 37 years after the first requirements were imposed, and 28 years after the creation of OIRA – centralized regulatory review is an almost universally accepted part of regulatory landscape. Since the first review processes were established, seven Administrations – five Republican and two Democratic – have built upon them. Each changed the system in various ways, most improving upon that of its predecessor, but none has challenged its basic utility or legitimacy.

As six former OIRA Administrators – including Sally Katzen, the administrator under Bill Clinton -- wrote in a 2006 joint letter: "All of us…recognize the importance of OIRA in ensuring that federal rules provide the greatest value to the American people. In our view, objective evaluation of regulatory benefits and costs, and open, transparent, and responsive regulatory procedures, are necessary to avert policy mistakes and undue influence of narrow groups."[5]

And, despite early questions by some, the constitutionality of the idea of centralized White House review of rulemaking is today not seriously challenged. As early as 1981, in fact, the D.C. circuit recognized "the basic need of the President and his White House staff to monitor the consistency of agency regulations with Administration policy."[6]

[5] James C. Miller III, Christopher DeMuth, Wendy L. Gramm, Sally Katzen, John Spotila and John D. Graham, letter the Honorable Susan M. Collins and Joseph Lieberman, September 20, 2006.
[6] Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981).

Moreover, it could be argued that some type of review is constitutionally required in order for the president to reasonably meet his constitutional duty to "take care that the laws are faithfully executed".

To the extent there is any debate over the constitutional legitimacy of the process, it is when it conflicts with congressional assignments of responsibility or discretion to inferior officers within the executive branch. In such cases, some have argued, the president may not substitute his judgment for the judgment of the officer selected by Congress to perform a particular duty. As argued by Peter Strauss of Columbia Law School in previous testimony, the president is not "the decider," but merely the "overseer of decisions by others."[7] While the chief executive oversees the performance of other executive branch officers, it is argued, he may not assume the decisional responsibility granted to them by Congress. Thus, in this view, the executive order's provision that disagreements between a regulatory agency head and the OIRA administrator be decided by the president is unconstitutional.

The problem is that this theory flies in the face of the principle that executive power under the constitution is not shared -- the concept of a "unitary executive." Article II of the constitution flatly states that, "[t]he executive power is vested in a President of the United States of America." Not in plural "presidents", or "a president and other officers designated by Congress," but in "a President".

The unitary executive concept is not an exotic theory, but one of the most commonly-held tenets of our constitutional system. As Steven Calabresi and Saikrishna Prakash have observed: "[T]hat the President must be able to control the execution of federal laws is easily understood and resonates strongly with the very earliest lessons we learn about our constitutional system."[8] And, consistent with those lessons, the framers

[7] Testimony of Peter Strauss before he Subcommittee on Investigations and Oversight, Committee on Science and Technology, April 26, 2007.
[8] Steven G. Calabresi and Saikrishna B. Prakash, "The President's Power to Execute the Laws," 104 Yale L.J. 541 (1994).

of the constitution clearly rejected the idea of a shared executive – rejecting proposals for a multiple presidency and for a decision-sharing council.

In modern America, there are of course many examples of non-unitary executives. Most states, for example, have one or more elected statewide executive officers besides the governor, ranging from attorneys general to insurance commissioners. Christopher Berry and Jacob Gerson of the University of Chicago, in a forthcoming article, write in favor of a similar system for the federal government, suggesting the possibility of a "directly elected War Executive, Education Executive, or Agriculture Executive."[9] However, even to outline the idea of an "unbundled executives" underscores the fact that that is not the system we currently have.

Of course, the differences between the sides in the current debate over the president's powers are not that stark. The unitary executive concept does not deny to Congress the assignment of duties to individual officers within the executive branch, as long as the president is able to exercise ultimate responsibility.

Conversely, few advocate a fully unbundled executive for the federal government. For the most part, even critics of the unitary executive concept recognize the president's power to articulate priorities and views, request adherence to them, and to dismiss those who do not help carry out his agenda.[10]

This is important, since in practice the president almost never needs to issue an "order" to a regulatory officer make a particular decision. Even in cases where the president serves as the final arbiter in a dispute under regulatory review process, the officers involved – being appointees of the president -- almost always accept the articulated priorities of the president. And when they do not, resignation or dismissal is the next likely option.

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[9] Christopher R. Berry and Jacob E. Gersen, "The Unbundled Executive," forthcoming, University of Chicago Law Review.

[10] With Congress in turn, having some ability to prevent such dismissals, the limitations of which are themselves a matter of debate.

In this sense, the theoretical differences in the debate over the unitary executive may not come down to much in practical application. Under most any view, the president can legitimately exercise control over the rulemaking process.

And this is as it should be, for many reasons. The most important of these -- perhaps counter-intuitively – is the check that clear responsibility provides over presidential power. Were authority shared among multiple persons in the executive branch, it would be relatively easy for the chief executive to avoid accountability for his actions. He would always be able to point his finger to some other officer, and mumble "my hands were tied." But with ultimate authority vested in the president, he is held to account for decisions, enabling voters – as well as other policymakers – to assign blame or credit.

It should also be noted that a strong, system of centralized regulatory review, anchored in presidential authority, does not necessarily imply either more or less regulation. It simply means that the president's priorities -- whatever they are -- will be more accurately represented in decision making.

Lastly, none of this means that Congress has no role – or indeed does not have the primary role – in the regulatory policy. Just as the constitution provides the president with executive power, Congress has ultimate legislative authority. If Congress disagrees with how the terms of a statute are applied in rules promulgated by the executive branch, it can simply make the statute more explicit (or even better, make its intent clear in the first instance).

Moreover, under the Congressional Review Act of 1996, a particular regulatory decision may be specifically "disapproved" by Congress. The statute – though so far rarely used -- provides for expedited consideration by both Houses of a resolution of disapproval of a specific rulemaking. If approved by Congress, the resolution can take effect, even over a presidential veto, given sufficient support in Congress.

More generally, Congress's influence over regulatory policy could also be expanded through institutional changes within Congress, including the creation of a "Congressional Regulation Office." While Congress today receives detailed information from the Congressional Budget Office on the state of the budget and on proposals that would affect the budget, it has no similar source of information on regulatory programs. A Congressional Regulation Office would help to fill this gap. Such an office could review the regulatory impact of legislative proposals and report on the effects of rules adopted by agencies. In this way, it could act as both a complement to and a check on OIRA.

Lastly, to minimize the need for White House intervention in agency decision-making, policymakers should strengthen the ability of agencies themselves to evaluate the effects of their own regulations. Review and analysis need not be an adversarial process. Ideally, critical examination of the purpose and effects of proposed rules begins within the agency itself. To facilitate this, policymakers should ensure that each agency has sufficient analytical resources, and well as well-designed internal review office to ensure that those resources are used meaningfully.

Systematic and centralized regulatory review of federal regulations is not only a legitimate use of presidential power, but – given the vast scope of rulemaking – virtually essential to taking care that the laws are faithfully executed. Congress nevertheless retains a primary role in regulatory policy – which can be exercised through more explicit legislation, review of specific rulemakings, and by expanding its own institutional capability to review and analyze the effects of rules.

Thank you for your time. I would be glad to answer any questions.

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