The New York Times https://www.nytimes.com/2025/02/26/opinion/trump-roberts-unitary-executive-theory.html

GUEST ESSAY

This Theory Is Behind Trump's Power Grab

Feb. 26, 2025

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In his opening weeks back in office, President Trump is asserting power in a way that pushes hard on, and sometimes past, the boundaries of executive authority.

One of the most important of those boundaries involves his relationship with independent regulatory agencies. Mr. Trump is the first president since the 1930s to assert control over many of them, and this assertion of power will almost certainly be tested in the Supreme Court.

Mr. Trump is operating under the theory that the executive branch is unitary, in the sense that Article II of the Constitution places executive power in a single person, the president, who gets to control every high-level official who executes federal law (and plenty of lower-level ones, too).

If Mr. Trump succeeds in court, the country will see a significant shift in power from the independent agencies to the White House.

For better or for worse, that shift would be profoundly unsettling. And in some respects it could be dangerous — if, for example, a president is allowed to control monetary policy or if he is in charge of the Federal Communications Commission and thus able to play politics with national communications policy.

The president is not a king. In its most extreme version, the unitary executive theory is a form of invented history, a modern creation that threatens to change and, in important ways, to undermine the operations of the national government.

The theory of the unitary executive means that the president can fire, at his pleasure, the heads of the Federal Trade Commission, the National Labor Relations Board and other independent agencies. In its strongest form, the unitary executive theory means that the president can control the policy choices of those agencies. So if the F.T.C. wants to issue a rule to protect consumers and the president thinks that's a terrible idea, then he can prevent that rule from seeing the light of day.

The unitary executive theory is supported by some distinguished scholars, who point to the Constitution's text. The first sentence of Article II states that "the executive power shall be vested in a president of the United States of America." The same article gives the president, and no one else, the power to "take care that the laws be faithfully executed."

Everyone agrees that at the Constitutional Convention, the founders decided to have just one president, rather than a plural executive. Practically everyone also agrees that the very first Congress, in creating the Departments of Treasury, War and Foreign Affairs, made a momentous decision, widely known as the

Decision of 1789: Their heads would be at-will employees of the president. The Decision of 1789 is often thought to show acceptance of the unitary executive theory.

The current conflict over the president's authority owes its origins to the New Deal period. In a 1935 case, Humphrey's Executor v. United States, the court ruled that Congress could limit the president's power to remove a head of the F.T.C. — and thus that it could create independent agencies.

Until recently, many people agreed that under Humphrey's Executor, independent agencies are just fine under the law and that the president does not have much authority over them. In the early 1980s, I worked in the Justice Department under President Ronald Reagan, whose White House liked the idea of a unitary executive and who wanted to know if he could exert at least some control over the independent agencies.

Lawyers in the Justice Department decided that Humphrey's Executor was settled law — but that it left the president some running room. If he wanted, we said, he could direct independent agencies to submit their regulations to the Office of Information and Regulatory Affairs, the president's regulatory clearinghouse, for a degree of scrutiny and review. We did not think that the president could tell the independent agencies what rules to issue, but we did think that he could require them to subject their rules to a process of comment and analysis by the regulatory office.

Reagan decided not to impose that requirement, partly because of the seriousness of the legal question and partly because of fear of a fierce congressional pushback.

In the past four decades, both Republican and Democratic presidents have followed Reagan's lead. To be sure, they have overseen internal discussions about whether to assert the unitariness of the executive and to require independent agencies to submit their rules to the O.I.R.A.

I was administrator of the O.I.R.A. from 2009 to 2012, and the issue came up. The White House's ultimate judgment was that presidential control would not be a good idea. Some government lawyers thought it would raise serious legal doubts. Other White House officials thought that, for one thing, independent agencies avoided an excessive concentration of power in one person. For another, such agencies reduced the risk of self-dealing (as might occur if, for example, a president rewarded his friends and punished his enemies).

More recently, the Supreme Court has shown a distinct discomfort with the whole idea of independent agencies. In Seila Law v. Consumer Financial Protection Bureau, decided in 2020, the court struck down a provision making the bureau independent on the ground that it was headed by a single person. The court purported to preserve Humphrey's Executor and the multimember independent agencies (like the F.C.C., the N.L.R.B. and the Fed). But at the same time, the court spoke enthusiastically about the unitary executive, and it is reasonable to doubt whether Humphrey's Executor will ultimately survive.

President Trump does not like the idea of independent agencies. He recently fired a member of the N.L.R.B., even though board members can be discharged, under the law, only for "neglect of duty or malfeasance in office, but for no other cause."

His acting solicitor general has said that the Justice Department intends to contest the for-cause protections given to the F.T.C., the N.L.R.B. and the Consumer Product Safety Commission. (Why she singled out those three agencies is not entirely clear.)

The acting solicitor general also said that in certain contexts, the department will contest the idea of independent administrative law judges — adjudicators within the executive branch who do not serve at the president's pleasure.

And the president has directed the independent agencies to submit their rules for O.I.R.A. review, reversing the course set by Reagan and presidential administrations since.

Mr. Trump may ultimately win in court, but the best historical research throws the whole idea of a unitary executive into serious doubt. In the Federalist Papers, Alexander Hamilton, who rejected a plural executive, also insisted that the president lacks unlimited removal power.

And defenders of the unitary executive appear to have misunderstood the Decision of 1789. The most careful evidence suggests that, at the time, a majority of members of Congress did not embrace but actually rejected the view that Congress lacks power to protect subordinate officials in the executive branch from presidential control. Indeed, independent agencies are hardly a creation of the New Deal — they have been with us since the founding era.

It follows that if you are an originalist, you will probably reject Mr. Trump's broadest claims.

Then there's stare decisis, or precedent. The Trump administration's claims would upset law that has been settled for 90 years. It's true that the current court has not always respected stare decisis, but it has yet to undertake the kind of radical revision of national institutions that would come from invalidating independent agencies.

Requiring some independent agencies to submit their rules to the O.I.R.A. would hardly be the end of the world. It could even do some good. The O.I.R.A.'s staff members do a thorough, careful job, and agency regulations are usually improved by the process of review. It would not be unreasonable for the Supreme Court to allow the White House and the regulatory office to comment on and have some degree of control over the regulations of most of the independent agencies.

But the case of the Fed puts a bright spotlight on the potential danger of giving the president unlimited authority over independent agencies. There are strong reasons for its independence. If a president could control interest rates or oversee regulations that are connected to monetary policy, he could manage the economy so as to promote his own short-term political interests.

Or take the F.C.C. A president who oversees its decisions could punish news sources that he didn't like and reward those he loved.

Or consider the claim that the president gets to impound congressionally appropriated funds and choose which ones to spend. That claim would render Congress subordinate to the executive in what might be its most fundamental power: the purse. Impoundment authority, on the part of the president, would go well beyond the idea of a unitary executive. It would be a devastating blow to the separation of powers.

There are decent arguments in favor of reforms that would increase presidential control over the administrative state. But the broadest current claims about executive authority are a creation of the 21st century, not the 18th. They are a form of hubris. They strike at the heart of our founding document.

Cass R. Sunstein is a law professor at Harvard and the author of "Climate Justice" and the forthcoming "On Liberalism: A Defense of Freedom."

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A version of this article appears in print on , Section A, Page 18 of the New York edition with the headline: The Theory Behind the President's Power Grab