

ADMINISTRATIVE & REGULATORY LAW NEWS



Section of Administrative Law & Regulatory Practice

Vol. 37, No. 3

American Bar Association

Spring 2012



Can the President Do That?

Also In This Issue

Chevron Under Dodd-Frank ■ Regulatory Accountability Act of 2011
IGs and National Security ■ The New FOIA.gov
Fracking Regulation in Appalachia
Surveillance Chapter from *The Law of Counterterrorism*
Regulation-Induced Innovation

SPRING CONFERENCE ■ APRIL 20-22, 2012 ■ PRINCETON, NEW JERSEY

Can He Legally Do That?

Does the President Have Directive Authority Over Agency Regulatory Decisions?

By Robert V. Percival*

On September 1, 2011, President Obama summoned EPA Administrator Lisa Jackson to the White House. "The half-hour meeting in the Oval Office was not a negotiation; the president had decided against" tightening controls on smog. John M. Broder, *Re-election Strategy Is Tied to a Shift on Smog*, N.Y. TIMES, Nov. 16, 2011. Jackson was directed by the president to withdraw a draft final rule lowering ozone limits that EPA had submitted for final clearance to the Office of Management and Budget (OMB).

Like most regulatory statutes, the Clean Air Act specifies that an agency head, rather than the President, shall make regulatory decisions. Yet for more than four decades every President has established a program to require pre-decisional review and clearance of agency regulatory decisions, usually conducted by the OMB. On January 18, 2011, President Barack Obama joined his seven predecessors in expressly endorsing regulatory review when he signed Executive Order 13,563. President Obama's regulatory review program generally emulates those of his two most recent predecessors, relying on OMB's Office of Information and Regulatory Affairs (OIRA) to review only the most significant agency rulemaking actions.

Pursuant to this executive order, Cass Sunstein, President Obama's OIRA Administrator, sent Administrator Jackson a "return letter" the day after the Oval Office meeting. "The President has instructed me to return this rule to you for reconsideration. He has made it clear

that he does not support finalizing the rule at this time." The *Times* reported that the ozone rule "provided the perfect opportunity for Mr. Sunstein to make his mark." A Sunstein confidant revealed, "Cass was itching, itching, itching to send a return letter."

Proponents of the unitary executive theory view it as self-evident that the President should have directive authority over agency heads.

OMB review of rulemaking is now well established, but a critical, unresolved legal question is whether the President has the authority to dictate the substance of regulatory decisions entrusted by statute to agency heads. While proponents of a unitary executive argue in favor of presidential directive authority, each President's regulatory review program has purported to disclaim such authority, even though OIRA often has tried to displace agency decisionmaking, as occurred with the ozone rule.

After describing three principal views on whether the President has directive authority, this Article discusses the constitutional foundations of this debate. It then explains why, even though the President has unfettered removal authority over the heads of non-independent agencies, it matters that this removal power does not imply the power to control decision making entrusted by law to agency heads.

Three Views of Presidential Directive Authority

There are three principal approaches to the question of whether the President has directive authority over regulatory decisions entrusted by statute to agency heads. First, the unitary executive theory holds that presidential directive authority is constitutionally required (unitary executive approach). The second approach argues that statutes entrusting regulatory decisions to agency heads should be interpreted to grant the President directive authority unless they expressly restrict it ("directive authority" as an "interpretive principle"). The third approach, which the author has advocated, is that the President does not have directive authority unless a statute expressly gives it to him ("not-so-unitary executive" or "disunitary executive" approach).

Proponents of the unitary executive theory view it as self-evident that the President should have directive authority over agency heads. They infer this authority from the President's ability to remove the heads of non-independent agencies, and they argue that independent agencies are unconstitutional. Justice Scalia embraced this approach in his lone dissent in *Morrison v. Olson*, 487 U.S. 654, 697 (1988), when the Court upheld the constitutionality of the Ethics in Government Act that limited the President's ability to remove independent counsels investigating allegations of crime by high executive officers. Even though *Morrison* represents a clear rejection of the unitary executive theory, Professors Steven G. Calabresi and Christopher S. Yoo have argued vociferously for its revival. In their book *The Unitary Executive: Presidential Power from Washington to Bush* (2008), they maintain that the Vesting Clause of Article II of the Constitution, which vests the executive power in the Presi-

* Robert F. Stanton Professor of Law and Director of the Environmental Law Program, University of Maryland Francis King Carey School of Law. This article is derived from a lengthier article by this author, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?* 79 FORDHAM L. REV. 2487 (2011).

dent, “includes the power to remove and direct all lower-level executive officials.” Reviewing the history of presidential oversight of the executive, Calabresi and Yoo claim that no President has acquiesced to any legislative or judicial encroachment on the unitary executive, despite the Supreme Court’s upholding of the constitutionality of Congress’s creation of independent agencies and placement of limitations on the President’s power to remove their leaders.

In the two decades since *Morrison* was decided, the Court has become more sympathetic to claims of broad presidential removal power. In 2010, by a 5–4 majority, the Court invalidated a restriction on the President’s ability to remove members of the Public Company Accounting Oversight Board (PCAOB) created by the Sarbanes–Oxley Act. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010). The Act provided that the members of the PCAOB could be removed only for cause by the Securities and Exchange Commission whose members themselves can be removed by the President only for cause. Although the Court determined that this double “for-cause” restriction on the President’s removal authority violated Article II’s vesting of executive power in the President, it did not question the constitutionality of independent agencies whose members can be removed only for cause.

The second approach to the question of presidential directive authority was proposed by Elena Kagan, prior to becoming a Supreme Court Justice. In an influential article entitled *Presidential Administration*, 114 HARV. L. REV. 2245 (2001), Kagan argued that where Congress has not acted expressly to restrict the President’s ability to direct an agency decision, regulatory statutes should be interpreted to permit the President to do so. She argued that such an interpretive principle (“presuming an undifferentiated presidential control of executive agency officials”) is a more accurate interpretation of congressional intent when Congress has not restricted the President’s removal powers. As discussed below, precisely the contrary assumption prevails now and did at the time Congress enacted most of

the current federal regulatory statutes. Because it was thought that the President did not have the authority to dictate regulatory decisions entrusted to agency heads by law, all of the executive orders establishing regulatory review programs expressly disclaimed such authority. While OIRA often has tried to dictate the substance of regulatory decisions entrusted to agencies by statute, it has disclaimed such directive authority whenever its actions have been challenged in court.

Yet constitutional text cuts against the notion that the President has directive authority over decisions entrusted by statute to the heads of executive agencies.

Based on a detailed historical review of presidential oversight of agencies, I have described a third vision of our constitutional scheme as reflecting a “not-so-unitary executive” in which the President does not have directive authority over decisions entrusted by statute to agency heads. Although the President’s ability to remove non-independent agency heads at will gives him enormous power to persuade them to accede to his wishes, presidential directive authority cannot be inferred from the removal power. If an agency head refuses to accommodate the President’s policy preferences, there is no constitutional problem with the President removing him from office. But this does not imply that the President has the authority to dictate the substance of agency decisions that regulatory statutes entrust to agency heads.

Directive Authority, the Constitution, and Statutory Interpretation

As the Supreme Court repeatedly has reaffirmed, the President’s authority

over the agencies under him flows from Article II of the Constitution, but can be channeled—within limits—by congressional enactment. However, neither the Constitution nor the regulatory statutes support presidential directive authority.

Directive authority and the Constitution

Article II of the Constitution vests the executive power in the President. Proponents of the unitary executive theory maintain that Article II’s vesting clause and the rejection of a plural executive should be interpreted to give the President both removal at will and directive authority over all executive branch officers, rendering independent agencies unconstitutional.

Yet constitutional text cuts against the notion that the President has directive authority over decisions entrusted by statute to the heads of executive agencies. The establishment of executive agencies is left entirely to legislation in Article II, Section 2, leaving it to Congress to define “the functions, powers, and duties of the heads of such Departments. . . .” Article I, Section 8’s Necessary and Proper Clause refers to “Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,” suggesting that there is no constitutional barrier to Congress vesting powers in agency heads. When the first U.S. Congress established the Department of the Treasury as the second federal agency, it directed the Treasury Secretary to submit reports directly to Congress, and it reserved the right to require information from him unfiltered by the President.

The President’s power under Article II, Section 2 to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices,” implies presidential supervisory authority over agency heads. However, if the Framers deemed it necessary to make this power explicit, it would seem strange not to mention expressly an even more significant directive authority. Article II, Section 2 also provides the President with authority to

continued on next page

appoint officers of the U.S. “by and with the Advice and Consent of the Senate.” This serves as an important check on presidential power that is inconsistent with the notion of presidential directive authority. If the President can control the substance of every agency decision, why would it be necessary to have the Senate confirm his nominees to lead the agencies?

The Take Care Clause of Article II, Section 3 requires that the President “take Care that the Laws be faithfully executed.” This clause also is frequently cited as support for a unitary executive with presidential directive authority. However, in 1823 Attorney General William Wirt issued an opinion declaring that the Take Care Clause had precisely the opposite effect. “If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it . . . he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.” Wirt maintained that if a statute provides for a decision to be made by an agency head, the Take Care Clause does not allow the President “to perform the duty, but to see that the officer assigned by law performs his duty faithfully.”

Directive authority and statutory interpretation

Even if the Constitution does not support the unitary executive theory, proponents of directive authority as an interpretive principle maintain that such authority should be inferred from legislation that does not expressly disclaim it. Yet some statutes specify that the President is to make certain decisions, while providing that other decisions are to be made by agency heads. Justice Kagan maintains that these delegations should be viewed only as establishing who has initial responsibility for the decision, without foreclosing the President from assuming ultimate responsibility for decisions initially entrusted to agency heads.

However, some regulatory statutes expressly specify the circumstances under which the President can suspend decisions made by agency heads. These include conditional delegations that

“expressly condition the grant of authority to an official on the oversight of the President” and agency-specific delegations that specify “the agent through whom the President must act.” Traditional principles of statutory interpretation dictate that if Congress deems it necessary in some circumstances to specify when the President may exercise authority to override an agency decision, such authority should not be inferred when Congress has not so specified. Indeed, the case for inferring that Congress meant something different when it chose not to mention the President or to grant him express directive authority in regulatory statutes is compelling enough to suggest that there is no ambiguity justifying application of principles of constitutional avoidance.

Does Directive Authority Matter?

Proponents of the unitary executive theory claim that because the President has authority to remove executive officers at will, it makes little or no difference whether the President has directive authority because he can remove any officer who resists his direction. Yet the historical record demonstrates that, despite the President’s broad removal authority, the answer to the separate directive authority question matters greatly. It determines whether agency heads have a legal entitlement to refuse to comply with a presidential directive when it directs them to act in a way they believe is illegal, improper, or unwise. The historical record powerfully supports the notion that the absence of directive authority provides an important check on potentially egregious abuses of presidential power. Even if the President’s removal authority enables him to fire the heads of executive agencies at will, requiring him to fire a resistant officer and replace him with an officer who will take the action he desires invariably has substantial political costs.

Directive authority to override Congress’s choice of regulatory decision maker also would undermine the U.S. Senate’s advice and consent power over the confirmation of agency heads, an important constitutional qualification on the President’s appointment power established by Article II, Section 2. The process

of confirmation of agency heads now frequently is used to obtain assurances that presidential nominees will implement their statutory responsibilities with some degree of independence from the President’s political preferences. If the President had directive authority over decisions entrusted by statute to agency heads, it would make little difference whether he appointed officials acceptable to the Senate because he always could override their judgments.

Time after time when White House officials tried to persuade agency heads to make decisions for reasons that deviated from statutory commands, agency heads have resisted. From White House requests for EPA to drop its first enforcement actions against Republican campaign contributors to orders seeking to countermand climate science, the absence of directive authority has afforded the moral high ground to agency officials who are willing take a stand when the White House crosses the line. This is well demonstrated by the refusal of Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus to fire Special Prosecutor Archibald Cox when President Nixon was trying to avoid further inquiry into the Watergate scandal. Most recently, the threat of mass resignations by top Bush Administration officials over the President’s domestic surveillance program forced that administration to make substantial modifications in the program.

As a practical matter the absence of presidential directive authority means that presidents must persuade agency heads when they want to influence regulatory decisions entrusted by law to them. Given the President’s authority to remove at will the principal officers of executive agencies, agency heads usually comply voluntarily with White House directives, even if the President does not have directive authority. This is what EPA Administrator Jackson chose to do with respect to the ozone standard. However, removals have political costs and in the rare case where a presidential appointee so fundamentally disagrees with what the President wants that she resigns rather than complying, the absence of a legal entitlement to direct the appointee’s action provides an important check on presidential abuses of power. ◉