A Federalism Stake in the Heart of the Unitary Executive?

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Leah M. Litman, *Taking Care of Federal Law*, 101 Va. L. Rev. 1289 (2015).

The passing of Justice Antonin Scalia removes from the Supreme Court its most strident modern advocate of the "unitary executive" idea—specifically, the view that Article II's vesting of law execution power in the President forbids Congress to extend any such authority to individuals or entities not subject to "meaningful presidential control." *Printz v. United States*, 521 U.S. 898, 922 (1997). I have long argued that this interpretation cannot be reconciled with our constitutional history. But an insightful, tightly argued new article by Leah Litman, a Harvard Law School Climenko Fellow and Lecturer in Law, demonstrates that this view of the separation of powers can also not be reconciled with the Court's contemporaneous preemption jurisprudence. Put simply, despite the Court's occasional pronouncements in separation of powers cases that "Article II requires the President alone to execute federal law," the "preemption cases suggest that nonexecutive actors may likewise vindicate the public interest in seeing federal law enforced." (P. 1293-94.)

Professor Litman's thesis rests on an astute recognition of the relationship in separation of powers jurisprudence between two core ideas. One is the familiar truth that federal law execution is policy-laden at every stage. Implementing federal law entails the exercise of significant discretion, both in legal interpretation, *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and in deciding whether to move forward in individual cases, *Heckler v. Chaney*, 470 U.S. 821 (1985). Indeed, but for the ubiquitous presence of discretion in federal law execution, the unitary executive ideal would presumably carry very little real-world punch.

The second is that the President's control of law enforcement discretion is implicated not only in disputes about agency design, e.g., *Free Enterprise Fund v. Public Company Accounting Oversight Board* , 561 U.S. 477 (2010), but also in cases involving Congress's decisions to enlist the services of persons outside government in fulfilling government's law execution function, i.e., cases on citizen standing, such as *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The latter cases are important because, barring some contractual relationship, persons outside the federal government are also outside presidential control, thus raising the same problem for unitary executive theory that federal independent administrative agencies pose.

Lujan is the Court's clearest attempt to root the restrictiveness of Article III standing doctrine in Article II's vesting of executive power in the President. Finding the environmentalist plaintiffs' allegations of injury too general and speculative to support standing, the *Lujan* majority denied them a right to sue even in the face of an explicit citizen suit provision of the Endangered Species Act. The ESA authorizes "any person [to] commence a civil suit on his own behalf . . . to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter." 16 U.S.C. § 1540(g). Speaking through Justice Scalia, the Court insisted, however, that the category of persons authorized to sue could not constitutionally include plaintiffs asserting no more than the general "citizen's interest in [the] proper application of the Constitution and laws." To hold otherwise would ignore that "[v]indicating the public interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." 504 U.S. at 576. By necessary implication, if Congress wants help via the judicial

process in upholding the general public interest in observance of the law—that is, in the policy-laden activity of law execution by government—it can turn only to the executive branch of government, not to private citizens.

Yet as Professor Litman goes on to explain, Congress commonly and with the Supreme Court's apparent approval does invite voluntary help from outside the federal executive branch in enforcing federal law, namely, from the states. Among the prominent examples she cites is the federal Immigration Reform and Control Act, which authorizes states to enforce IRCA's prohibitions through "licensing and similar laws." 8 U.S.C. § 1324a(h)(2). In *Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582 (2011), the Supreme Court upheld an Arizona statute that permitted state officials to revoke state-issued business licenses where an entity had violated federal law. As summarized by Professor Litman:

The Court reasoned that although IRCA expressly preempted "any State or local law imposing civil or criminal sanctions . . . upon those who employ . . . unauthorized aliens," Congress specifically authorized [state laws like Arizona's]. Congress therefore intended to "preserve[] the ability of the States to impose their own sanctions through licensing" for violations of federal law. *Whiting* noted approvingly that Arizona had adopted the federal definition for unauthorized persons and relied on the federal government's determination of who qualifies as an unauthorized person, thereby eliminating the possibility of "conflict . . . either at the investigatory or adjudicatory stage." The Court explained, "Congress . . . . in IRCA . . . ban[ned] [the] hiring [of] unauthorized aliens, and the state law here simply seeks to enforce that ban." (P. 1309-10.)

She goes on cite other significant statutes, including the Dodd-Frank Wall Street Reform and Consumer Protection Act, which specifically authorize states and state attorneys general to bring civil actions to enforce federal law against private individuals, even without a showing of particularized harm to the state itself. Why Congress may constitutionally invite voluntary state efforts to help enforce federal law, but not the voluntary efforts of citizen litigants is a puzzle the Court never addresses.

Professor Litman anticipates and convincingly refutes a number of possible doctrinal ripostes to her thesis, but one is especially important. The preemption cases do not impose any constitutional requirement that the states respect presidential policy preferences in enforcing the laws that Congress has invited states to help execute. In other words, the fact that IRCA works to eliminate "conflict [between state and federal authority] either at the investigatory or adjudicatory stage" does not insure the absence of conflict at the *enforcement* stage. Nothing in IRCA or the Arizona law in question precludes Arizona's enforcement of federal law against a business that the federal executive branch has independently decided not to pursue.

Justice Scalia, without elaboration, joined Chief Justice Roberts's opinion upholding the business licensing law at issue in *Whiting*. His apparent indifference in *Whiting* to the potential conflict between state and presidential prosecution policies seems not to have been inadvertent. A year after *Whiting*, Justice Scalia dissented from those parts of a different ruling which invalidated portions of another Arizona immigration law, S.B. 1070, *Arizona v. United States*, 132 S. Ct. 2492 (2012). Among the provisions that the Court invalidated was the creation of a state misdemeanor for noncitizens who failed to comply with federal alien registration law. The Court deemed the law preempted because Congress had entirely occupied the field of noncitizen registration regulation. It further observed with disapproval that, were the statute upheld, Arizona "would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies." *Id*. at 2503. Justice Scalia was scornful of the argument: "[T]o say, as the Court does, that Arizona contradicts federal law by enforcing applications of the Immigration Act that the President declines to enforce boggles the mind," *Id.* at 2521 (Scalia, J., dissenting). So much for any unitary policy control over federal law

enforcement that Justice Scalia might otherwise have attributed to Article II.

Professor Litman's thorough analysis goes on to catalogue benefits that may flow from state involvement in the execution of federal law, notwithstanding the absence of "meaningful presidential control." The bottom line seems to be that the Supreme Court regards it as within the discretion of Congress to weigh the advantages and disadvantages of letting states in on federal law execution. If Congress is constitutionally entitled to conclude that state involvement in vindicating the general public interest in law enforcement is a good thing, it is not obvious why reaching the same judgment as to citizen suits is constitutionally problematic. The basis for restrictive standing does not lie in Article II, which does not demand a unitary executive when it comes to taking care of federal law.

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