# Unifying the Not-So-Unitary Executive

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**Date :** June 17, 2014

Jason Marisam, *The President's Agency Selection Powers*, 65 **Admin. L. Rev**. 821 (2013), available at SSRN.

Jason Marisam's recent article on what he calls presidential "agency selection powers," *The President's Agency Selection Powers*, 65 **Admin. L. Rev.** 821 (2013), provides new insight into a president's capacity to shape regulatory policy even without relying on a so-called "unitary executive" reading of the Constitution.

Should a history of arcane legal debates ever be written, perhaps authors will mark the so-called "unitary executive" debate as one of the strangest. Technically, the controversy centers on whether the President is constitutionally entitled to dictate how all other executive branch officials exercise whatever discretionary functions are vested in them by statute. I have argued that the Constitution embodies no such principle.[1] On the other hand, scholars as otherwise unalike as Steve Calabresi and Cass Sunstein have urged—on originalist and nonoriginalist grounds, respectively—to the contrary.

This sounds like a big deal, and it is—in principle. But the main significance of the doctrine is primarily its potential impact on the ethos of executive power. If the small-"u" unitarians are right, then executive officers are likely to attend as diligently to the president's policy preferences as they do the laws enacted by Congress. In contrast, my negative response to the question is intended as an institutionally potent reminder that much of what the executive is allowed to do is entirely at Congress's sufferance. Administrative power under this view ought to be exercised in a conscientious, well-reasoned way, as attentive to law as to politics. Any Administration's view of the "unitary executive" theory is likely to be an important mood-setting device for governance, pointing in one direction or the other.

There are two reasons, however, for the limited direct operational relevance of unitary executive theory. The first is that it would be both too difficult and too costly for presidents to engage in the pervasive direction of their subordinates' discretion in a heavy-handed way. The "executive establishment," as an Administrative Conference report calls it[2] is simply too complex and, in significant ways, too fractured to function as a domain of unified White House control. Nor would a politically savvy White House always want to bear the risk of trying to make it so.

Conversely, when presidents want to be influential, they by and large don't need unitary executive theory. Besides the influence presidents wield simply by picking sympathetic chief administrators and arguing for White House policy preferences, presidents can effectively assert informal authority to coordinate executive branch activity to insure that legal implementation is efficient and coherent. That authority—coupled with the vast scope of administrative power Congress has vested in the executive branch—gives a president significant influence over executive branch policy output.

Jason Marisam's article highlights a frequently overlooked dimension to the president's coordinating influence. Professor Marisam focuses on three such powers:

> (1) the President's power to subdelegate authority to the agency of his choosing when Congress has expressly delegated that authority to the President; (2) the President's power to delegate his

> constitutional powers to an agency and thereby force Congress's choice of agency to work with the President's choice of agency on particular regulatory matters; and (3) the President's power to reconcile agencies' overlapping jurisdiction by deciding which of the agencies in the shared regulatory space should act.[3]

Different agencies—although operating within the same general framework of policy values—have different priorities, different orientations towards policy and different professional cultures. A president can go far in shaping the exercise of policy discretion not by commanding its exercise, but simply by assigning it.

Of course, the first of Professor Marisam's three categories—presidential subdelegation of authority Congress vests personally in the president—does not require constitutional argument. The Presidential Subdelegation Act of 1951, 3 U.S.C. §§ 301-303, authorizes such moves explicitly. What Professor Marisam contributes, however, to our understanding of this aspect of the subdelegation phenomenon is a thoughtful analysis of why Congress sometimes decides to delegate directly to the president, even when its choice leaves the president, an institutional competitor, with unusual policy-shaping authority.

The second category—which I believe to be quite rare in practice—is constitutionally more interesting. It potentially comprises administrative functions as to which the president may claim independent authority under Article II—military and foreign affairs are the obvious domain—that interfaces, so to speak, with authorities Congress has vested in an administrative agency. In such a situation, a president might direct Congress's chosen agency to interact with another agency that the president has selected in order to help the president in the implementation of his constitutional powers.

Professor Marisam draws our attention to an example of this phenomenon of which I had been quite unaware. Congress enacted statutes in the 1930s requiring would-be U.S. sellers of natural gas or electric power crossing international borders to get permits from the old Federal Power Commission (now, the Federal Energy Regulatory Commission). In response, FDR unilaterally created a requirement that such sellers also obtain a "presidential permit" for such sales. Even today, FERC grants its permits for the cross-border shipment of energy only upon consultation with the Secretaries of State, Energy, and Defense. If those departments cannot agree, Executive Order No. 10485 requires them to submit the question of a presidential permit directly to the president. This is a remarkable example because Article II, of course, conveys no specific authority to the president akin to Congress's express Article I power to regulate commerce with foreign nations.

Professor Marisam's last category involves a less dramatic, but perhaps more pervasive Article II-statutory interaction—namely, designating certain agencies as having lead or supervisory power when Congress has given multiple agencies overlapping regulatory jurisdiction. This may happen over time, for example, as Congress allows Agency A to tackle one aspect of a problem and then, later, Agency B to tackle another. Prior to the creation of the Department of Homeland Security (DHS), border control matters provided an important example. A similar need for coordination may occur, however, when Congress within a single statute vests multiple agencies with joint jurisdiction—frequently, to bring a problem within the purview of multiple congressional oversight committees.

In both situations, a president may wield significant influence over how policy discretion is exercised by deciding which agency takes the lead—for example, centralizing pre-DHS immigration coordination in the Justice Department or, in 2010, having the Department of Energy, not the Mineral Management Service, take the lead in addressing the BP Deep Horizon oil spill. Professor Marisam aligns the first of these moves with the kind of initiative FDR took with regard to cross-border energy transmission, but I think both kinds of "interagency hierarchy," to use Professor Marisam's phrase, belong in the same

category. In these examples, as well as others Professor Marisam cites, the president's initiative of policy coordination rests only on a fairly modest assertion of Article II coordinating power. When Congress creates shared jurisdiction in a single statute, the president may also claim implicit statutory authority to harmonize the process—but what makes any such inference credible is the idea that, with or without implicit congressional approval, Article II coordination authority, within whatever structural or procedural scaffolding Congress provides, already exists.

Without taking an across-the-board normative position on the desirability of presidential agency selection, Professor Marisam concludes his discussion with a careful analysis of its advantages and disadvantages, factors Congress ought to consider in deciding whether to enable or resist presidential agency selection as a tool of administration. All in all, his article stands as a thoughtful contribution to the possibilities for robust "presidential administration" that can exist without regard to the tenets of unitary executive theory.

1. **Peter M. Shane, Madison's Nightmare: How Executive Power Threatens American Democracy** (2009).
2. **David E. Lewis & Jennifer L. Selin, Sourcebook of United States Executive Agencies** 1 (2013).
3. P. 823.

Cite as: Peter Shane, *Unifying the Not-So-Unitary Executive*, JOTWELL (June 17, 2014) (reviewing Jason Marisam, *The President's Agency Selection Powers*, 65 **Admin. L. Rev**. 821 (2013), available at SSRN), https://adlaw.jotwell.com/unifying-the-not-so-unitary-executive/.