Donald Trump and the War Against Independent Agencies

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November 25, 2016

POLITICS (<https://washingtonmonthly.com/politics/>).

In early October, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit issued a ruling that gives Donald Trump the chance to eviscerate federal consumer protection on his first day in office. Unless the full D.C. Circuit or the Supreme Court overrules it, the decision empowers Trump to summarily fire Richard Cordray, head of the Consumer Financial Protection Bureau, effectively stymying future CFPB regulation or regulatory enforcement.

That ruling is but the latest salvo in a constitutional battle that will help determine whether Trump gets to treat the entire federal bureaucracy like the cast of *Celebrity Apprentice*. It is a debate over a dangerous constitutional theory called “the unitary executive.” “Small-u unitarians,” as I call them, believe the Constitution guarantees presidents unlimited authority to say, “You’re fired,” to any federal official, for any reason. Because he is elected to lead the executive branch, the argument goes, the president must be able to dictate how anyone within that branch discharges any discretion the law gives them.

Judges and academics argue constantly about the unitary executive theory, but the sheer obscurity of the technical legal debate hides from the public the dangers that theory poses to governance.

The targets of the unitarians are the so-called “independent agencies,” such as the Securities and Exchange Commission, the National Labor Relations Board, and many others. What makes them “independent” is that the agency heads are not subject to presidential firing “at will.” In enacting the laws that created these agencies, Congress provided that their leaders could be removed only for “good cause.” Good cause does not include partisan affiliation or policy disagreement with the president. A president could fire a member of the Federal Trade Commission for breaking the law, but not because the commissioner is a fan of neoclassical economics, while the president is more of a behavioralist.

This independence ensures that a new president cannot simply wipe the government clean of political opponents. Independent agencies most often have multiple heads—that is, commissioners or board members—and presidents typically choose which one gets to be the chairperson. New presidents also get to nominate replacements to fill vacancies. But the existence of independent agencies acts as at least a modest brake on rank partisanship in government or the complete takeover by any narrow ideological faction.

The unitarians argue that requiring good cause to fire independent agency heads is unconstitutional. It's an "originalist" argument, meaning it's based on a theory of how the Constitution would have been understood when it was ratified in 1789. Because Article II of the Constitution vests "the" executive power in "a" President of the United States, that power cannot be subdivided; it belongs entirely to the single individual who serves as president. Permitting federal law to be implemented by administrators who cannot be removed at will, the argument goes, undermines the complete control of the executive branch that the Constitution supposedly promises to the president.

The battle for unitarianism is an overwhelmingly right-wing campaign that took off during the first Reagan Administration. In the 1980s, its most frequent *bête noire* was the Ethics in Government Act: the statute, now lapsed, that Congress enacted after Watergate to create an independent counsel to investigate potential felonies by presidents and high-level political officials in the executive branch. Once appointed, independent counsel could be fired only by the Attorney General, and only for good cause.

In a 1988 decision, *Morrison v. Olson*, the Supreme Court upheld the Independent Counsel office against unitarian challenge by a 7-1 vote, with Justice Anthony Kennedy abstaining. The dissenting opinion, by the late Justice Antonin Scalia, is now regarded as a near-sacred text by the unitarians, although as many scholars (including me) have argued, Scalia's argument that the Framers would have objected to independent prosecutors is deeply suspect. Of course, what the founders supposedly expected in 1789 might not be a good basis for telling Congress how to structure a modern administrative state of a size and scope the founders couldn't have anticipated. But even from an originalist perspective, there is strong historical evidence that cuts against Scalia's conclusion. State constitutions written roughly at the same time as the U.S. Constitution, for instance, were understood as not giving governors unitary control over state government. Yet they, too, typically vest "the executive power" in "a" or "the" governor.

Congress has been creating independent regulatory agencies since 1887, and the Supreme Court first upheld their constitutionality in 1935. Given this historical and legal pedigree, the constitutional war against independent agencies has required a subtler strategy: death by illogic. Federal judges opposed to the independent agency concept, unable to simply declare it unconstitutional, are instead limiting, in deeply incoherent ways, how Congress can use the independent agency structure. The spoils of these judicial victories for unitarians are twofold: First, each one gathers a bit more power for the President. Second—and this is the really clever part—if enough judicial opinions get written that make no sense given *Morrison v. Olson* and other precedents, the Supreme Court can eventually overturn those precedents on the perverse ground that their logic proved “unworkable.”

Two recent judicial opinions are crystalline examples of the strategy. One is a 5-4 Supreme Court decision from 2010 called *Free Enterprise Fund v. Public Company Accounting Oversight Board*. The Public Company Accounting Oversight Board is a small agency that reports to the Securities and Exchange Commission, which is itself an independent agency protected against at-will firing by the president. PCAOB members can be fired only by the SEC, and only for good cause.

In his majority opinion, Chief Justice John Roberts reasoned that this structure was unconstitutional because the PCAOB’s accountability to the president was too attenuated. To preserve the constitutionality of the PCAOB, the Court held, the protection of its members from being fired at will had to be stricken from the law. What makes this decision so incoherent is that letting the SEC fire PCAOB members at will actually does nothing to increase the PCAOB’s accountability to the president, because *the president can’t make the SEC fire them*.

The second opinion is the one from this past October, *PHH Corporation v. Consumer Financial Protection Bureau*, a case challenging a CFPB enforcement action that resulted in a \$109 million order against a mortgage lender. Although all three judges hearing the case agreed that the action was improper on purely statutory grounds, Judge Brett Kavanaugh, writing for himself and one other judge, went further and held the Bureau’s structure unconstitutional. The CFPB is one of a very few independent agencies headed by a single director rather than a board. Judge Kavanaugh—perhaps the most outspoken champion of unitary executive theory currently on the bench—determined that a single-headed independent agency does not offer constitutionally adequate protection against arbitrary decision making. The director is not subject either to at-will discharge by the president (which Judge Kavanaugh believes the Framers envisioned) or the balancing force of having to deliberate with other administrators. To avoid this constitutional dilemma, he ruled, the president must be allowed to fire the CFPB director at will.

Judge Kavanaugh's opinion is startling for a few reasons, including its reliance on an "arbitrary government" standard that seems to appear out of thin air. But what may be most jarring is the suggestion that Americans are somehow protected against arbitrary decision making when Congress allows presidents to fire the director of a single-headed agency at will. Consider FBI Director James Comey. President Obama could fire him at will, yet that failed to protect Americans against Comey's disregard for Justice Department policy or the appearance of politicizing the Hillary Clinton email investigation. In the real world, whether at-will employment for agency heads is a good or bad thing is likely to turn on a host of personal and political factors well beyond any judge's capacity to calibrate.

The CFPB has appealed to the entire D.C. Circuit to re-hear the case. Unless the full court voids the Kavanaugh panel opinion, Trump will be able to fire Cordray on day one—two and a half years before the end of his statutory term—likely guaranteeing agency paralysis. Of course, Cordray may decide to step down at the end of the Obama presidency anyway, so that issue could be chiefly theoretical.

What is not merely theoretical is the impact of a jurisprudence that treats complete presidential control over all executive branch policy as a constitutional requirement. Judge Kavanaugh's reasoning about the CFPB suggests, for example, that the single-headed independent Social Security Administration may be unconstitutional. Also vulnerable would be the Office of Special Counsel, which enforces sensitive personnel rules, such as the prohibition against improper political activity by government employees. If opinions like those of Justice Roberts and Judge Kavanaugh reach their logical climax—holding all independent agencies, not just those with a single director, unconstitutional—they could upend the independence of the Federal Reserve Board, despite the crucial need for a politically independent central banking system.

The unitarians often appeal to the idea that giving the president full executive control helps enact the will of the people who elected him. But public administration is not a perpetual plebiscite. Running the government requires a mixture of political values and expert judgment, always deployed within the constraints of the law. This would be true even if we had a system of presidential elections that accurately reflected the popular will.

Given that sound administration is always a balancing act, the public interest is best served by a balance between presidential judgment and the expertise of administrators below him. Inviting the president to override all such expert judgment is a dangerous move no matter who is in office. Giving that license to Donald Trump would be downright terrifying.

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(University of Chicago Press 2009).

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