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The Unitary Executive and the Scope of Executive Power

John Harrison

In the Justice Department's Office of Legal Counsel (OLC) in the 1980s, "unitary" meant unitary, as in *e pluribus unum*. When Deputy Assistant Attorney General Samuel Alito and his colleagues in OLC used the phrase "unitary executive," they used "unitary" to convey two kinds of oneness. The executive is headed by a single person, not a collegial body, and that single person is the ultimate policy maker, with all others subordinate to him. In 2000, then-Judge Alito participated in a discussion of executive power, and noted his endorsement of the unitary executive theory that he had espoused while at OLC.¹

Over the next few years, "unitary" in "unitary executive" took on an added meaning: allowed to depart from the law, including the law of war, in some cir-

1. "When I was in OLC, however, we were known, actually, to read the text of the Constitution, in particular Article Two, as well as *The Federalist Papers*. We were strong proponents of the theory of the unitary executive, that all federal executive power is vested by the Constitution in the President. And I thought then, and I still think, that this theory best captures the meaning of the Constitution's text and structure." *Administrative Law & Regulation: Presidential Oversight and the Administrative State*, 2 ENGAGE 12 (2001) (participating in panel discussion). In that presentation, Judge Alito preached "the gospel according to OLC," maintaining that "the President has the power and the duty to supervise the way in which subordinate Executive Branch officials exercise the President's power of carrying federal law into execution," and pointed out that "[t]he Constitutional Convention rejected the concept of a plural executive in favor of a unitary executive." *Id.* When Judge Alito was nominated to the Supreme Court, his response to the Senate Judiciary Committee's questionnaire listed that presentation and attached a transcript. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 72 (2006).

cumstances.² When Judge Alito came before the Senate Judiciary Committee as a nominee to the Supreme Court, he was asked whether his endorsement of the unitary executive meant that he agreed with aggressive claims of executive authority to disregard legal constraints.³

Judge Alito sought to “explain what I understand the idea of the unitary Executive to be” in the face of “some misunderstanding.”⁴ Seated at the witness table, he went on, “I think it’s important to draw a distinction between two very different ideas. One is the scope of Executive power . . . [W]e might think of that as how big is this table, the extent of the Executive power.”⁵ That was distinct from a second question, “[W]hen you have a power that is within the prerogative of the Executive, who controls [it]?”⁶ In his earlier discussions of the unitary executive, he had been talking about the second question. “[T]he concept of [the] unitary Executive doesn’t have to do with the scope of Executive power,” Justice Alito clarified. “It has to do with who within the Executive branch controls the exercise of Executive power, and the theory is the Constitution says the Executive power is conferred on the President.”⁷

Justice Alito’s votes and opinions show that he does not take a maximalist view of the size of the table. He has often joined in rejecting claims of executive power. But he continues to subscribe to the principle that it is the President’s table. That is itself a principle of great importance.

Justice Alito has joined a number of opinions, for the Court and in dissent, that reject claims of presidential and executive power. In *Medellín v. Texas*,⁸ he joined the Chief Justice’s opinion for the Court denying a major assertion of executive power. The Chief Justice concluded that although the United States had an obligation under international law to give *Medellín* review and reconsideration of his claim under the Vienna Convention on Consular Relations, the President’s directive that Texas do so was ineffective as a matter of U.S. domestic law. In *Zivotofsky v. Kerry (Zivotofsky II)*,⁹ Justice Alito joined two opinions that

2. See, e.g., Dana Milbank, *In Cheney’s Shadow, Counsel Pushes the Conservative Cause*, WASH. POST (Oct. 11, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A22665-2004-Oct10.html> [<http://perma.cc/Y7DS-VVGJ>] (“The unitary executive notion can be found in the torture memo.”).

3. E.g., *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 351 (2006) (statement of Sen. Kennedy).

4. *Id.* (statement of Judge Alito) (responding to Sen. Kennedy’s question).

5. *Id.*

6. *Id.* at 352.

7. *Id.*

8. 552 U.S. 491 (2008).

9. 135 S. Ct. 2076 (2015).

denied claims of executive autonomy from Congress as to foreign affairs. At issue in that case was a statute requiring that certain official documents issued by the State Department refer to Jerusalem, Israel. The long-standing position of the executive branch was that the status of Jerusalem remains to be determined. Relying on the President's power concerning recognition of governments and sovereignty, the Solicitor General argued that the statute was unconstitutional. The Court agreed. Chief Justice Roberts and Justice Scalia both wrote dissenting opinions that Justice Alito joined.¹⁰ In *NLRB v. Noel Canning*,¹¹ he joined Justice Scalia's concurring opinion, which maintains that the President's power to make recess appointments is much more constrained than the Court's opinion says it is.¹²

He has also refused to endorse arguments that would have the courts give substantial deference to the executive in legal interpretation. In *Hamdan v. Rumsfeld*,¹³ in which the Court concluded that the system of military commissions created by the President was unlawful, Justice Alito joined only portions of Justice Thomas's dissenting opinion.¹⁴ Two of the three parts that Justice Alito did not join rest on strong deference to the President's judgments. Justice Alito declined to join Section I, which called for "a heavy measure of deference" to "the President's decision to try Hamdan before a military commission."¹⁵ He similarly refused to join Section III-B-III, stating that the courts should defer to the President in interpreting the Geneva Conventions.¹⁶

Justice Alito's skepticism about deference to the executive is not limited to unusual developments like military commissions. In *Perez v. Mortgage Bankers Ass'n*,¹⁷ he announced his readiness to reconsider the quotidian but quite important doctrine according to which executive agencies are given exceptionally strong deference when they interpret their own regulations.¹⁸

10. *Id.* at 2113 (Roberts, C.J., dissenting); *id.* at 2116 (Scalia, J., dissenting).

11. 134 S. Ct. 2550 (2014).

12. *Id.* at 2592 (Scalia, J., dissenting).

13. 548 U.S. 557 (2006).

14. *Id.* at 678 (Thomas, J., joined by Justice Scalia in full and Justice Alito except as to parts I, II-C-1, and III-B-2).

15. *Id.* at 680.

16. *Id.* at 718-19 (stating that the Court's "duty to defer to the President's understanding" is heightened by the fact that the President is acting as Commander in Chief and making a judgment about "the nature and character of an armed conflict").

17. 135 S. Ct. 1199 (2015).

18. A standard authority for the principle that agency interpretations of agency regulations deserve especially strong deference is *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). In his opinion concurring in part and concurring in the judgment in *Mortgage Bankers*, Justice Alito noted the D.C. Circuit's "understandable concern about the aggrandizement of the

Justice Alito's views cannot be attributed to partisan considerations. The Administration to which Justice Thomas would have deferred in *Hamdan* was that of President George W. Bush. *Medellín* involved a claim of presidential power made and defended by that same Administration. The statute at issue in *Zivotofsky II* had been signed by that same President, with a statement that, if the statute were to be interpreted as mandatory for the President, it would be unconstitutional.¹⁹ Justice Scalia's concurring opinion in *Noel Canning*, which Justice Alito joined, departed from the long-standing view held by the executive branch under both parties. Deference to agency interpretation of regulations is routinely invoked by administrations of both parties in support of interpretations adopted by administrations of both parties.

Although Justice Alito does not take a particularly expansive view of executive power, he does continue to believe that the President controls that power. He joined the Chief Justice's opinion for a five-Justice majority in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,²⁰ which found unconstitutional the statutory provision limiting the SEC's authority to remove directors of the Public Company Accounting Oversight Board. Assuming without deciding that the President's authority to remove Commissioners of the SEC is also limited, the Court concluded that the "dual for-cause limitations" on removal "contravene[d] the Constitution's separation of powers."²¹ The Chief Justice's discussion of the removal restrictions begins by quoting the Vesting Clause of Article II and then James Madison's statement in the First Congress that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."²² The opinion maintains that the President must be able to hold subordinate executive officials accountable.²³ Although the Court in *Free Enterprise Fund* was careful not to disturb precedents permitting Congress to impose some limits on presidential removal authority, its opinion contemplates a President who supervises the entire executive.²⁴

power of administrative agencies" that results from the confluence of three factors, including deference under *Seminole Rock*. 135 S. Ct. at 1210. He concluded, "I await a case in which the validity of *Seminole Rock* may be explored through full briefing and argument." *Id.* at 1210-11.

19. 135 S. Ct. at 2082.

20. 130 S. Ct. 3138 (2010).

21. *Id.* at 492.

22. *Id.* (internal citation omitted).

23. "The President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired." *Id.* at 496.

24. See *id.* at 483 (discussing cases that upheld removal restrictions).

Free Enterprise Fund gives important but still limited information about several Justices' views concerning presidential control of executive functions. Chief Justice Roberts wrote, and three more Justices now on the Court joined, the opinion just discussed. That opinion endorses substantial presidential authority without conclusively affirming complete presidential control of executive functions.²⁵ Justice Breyer in dissent, joined by two more current members of the Court, strongly indicated that he thinks substantial limits on presidential control are sometimes constitutional.²⁶

Some doubt remains as to the meaning of the Court's opinion in *Free Enterprise Fund* for most of the Justices who joined it. Justice Alito substantially lessened any doubts about his continuing embrace of the principle of the unitary executive in his concurring opinion in *Department of Transportation v. Association of American Railroads*.²⁷ There, the Association of American Railroads challenged regulatory decisions made by Amtrak. The statute creating Amtrak characterizes it as a private corporation and not part of the government.²⁸ The D.C. Circuit concluded that under the statute Amtrak is a private party and may not exercise governmental power. The Supreme Court found that, despite the statute, Amtrak is part of the government for these purposes, and accordingly vacated and remanded.²⁹

A number of additional constitutional issues were still open on remand, and Justice Alito addressed several of them. One involved the arbitration process Congress had provided to resolve disputes between Amtrak and regulated parties, and the arbitrator who would make decisions under the statute. Explaining that such technical issues can hide real questions about power, accountability, and liberty, Justice Alito said that "[i]f the arbitrator can be a pri-

25. In addition to Justice Alito, Justices Kennedy and Thomas joined the Court's opinion, as did Justice Scalia. Justice Scalia asserted that the President must control executive decisions in his dissent in *Morrison v. Olson*. See 487 U.S. 654, 697 (1989) (Scalia, J., dissenting). While Chair of the Equal Employment Opportunity Commission, now-Justice Thomas gave a speech in which he criticized the Court's opinion in *Morrison* and praised Justice Scalia's dissent. *Confirmation Hearings on the Nomination of Judge Clarence Thomas To Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary Pt. 1*, 102d Cong. 350-51 (1991) (question of Sen. Leahy).

26. According to Justice Breyer, Congress has substantial but limited authority to free executive branch officials from presidential removal: "[D]epending on, say, the nature of the office, its function, or its subject matter, Congress sometimes may, consistent with the Constitution, limit the President's authority to remove an officer from his post." 561 U.S. at 516 (Breyer, J., dissenting). Justices Stevens, Ginsburg, and Sotomayor joined that opinion.

27. 135 S. Ct. 1225 (2015).

28. 49 U.S.C. § 24301(a)(3) (providing that Amtrak "is not a department, agency, or instrumentality of the United States Government").

29. 135 S. Ct. 1233-34.

vate person, this law is unconstitutional.”³⁰ His conclusion rested on the Vesting Clauses of Articles I and II. Congress, he explained, may not delegate the legislative power vested in it.³¹ When statutes enable executive agencies to act with the force and effect of law, strictly speaking the agencies exercise executive and not legislative power.³² “When it comes to private entities, however, there is not even a fig leaf of constitutional justification.”³³ Private entities do not have the legislative power granted by Article I. “Nor are they vested with the ‘executive Power,’ Art. II, § 1, cl. 1, which belongs to the President.”³⁴ Although he was discussing the line between the government and private parties, Justice Alito did not say that executive power is government power. He emphasized that it belongs to the President.

Another feature of the statute’s arbitration mechanism troubled Justice Alito. As he read the statute, the arbitrator would decide without further supervision from any presidential appointee.³⁵ Under the Court’s Appointments Clause cases, only principal officers—those appointed by the President with the advice and consent of the Senate—may stand in that position.³⁶ Inferior officers must be supervised by presidential appointees.³⁷ Arbitrators under the act, however, are not appointed by the President. All this may seem technical and only slightly connected to the unitary executive, but Justice Alito saw a connection. The Appointments Clause “ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people.”³⁸

Justice Alito also thought that another seemingly technical Appointments Clause issue was related to presidential control of the executive. Under the Amtrak statute, eight of nine members of the Amtrak Board of Directors are presidential appointees. The Secretary of Transportation is a member *ex officio*, and seven members are appointed specifically to the Amtrak board by the President with the advice and consent of the Senate. The ninth member, the Presi-

30. *Id.* at 1237.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Ass’n Am. R.R.*, 135 S. Ct. at 1238-39.

36. *Id.* at 1238. The Appointments Clause provides that the President shall nominate, and with the advice and consent of the Senate appoint, all officers of the United States, but that Congress may vest the appointment of inferior officers in the President alone, the courts of law, or the heads of departments. U.S. CONST. art. II, § 2, para. 2. Officers who are not inferior officers are often referred to as principal officers.

37. *Ass’n Am. R.R.*, 135 S. Ct. at 1238.

38. *Id.*

dent of Amtrak, is chosen by the other eight board members.³⁹ The President of Amtrak thus cannot be a principal officer and is at most an inferior officer. But the President participates in the Board's decisions, the Board is a multi-member agency head, and agency heads must be principal and not inferior officers.⁴⁰

Again, so much technicality, but technicality in the service of presidential primacy. In Justice Alito's word, "accountability demands that principal officers be appointed by the President The President, after all, must have 'the general administrative control of those executing the laws,' and this principle applies with special force to those who can 'exercis[e] significant authority' without direct supervision."⁴¹

And that is the gospel according to OLC.

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39. *Id.* at 1239.

40. *Id.*

41. *Id.* (internal citations omitted).