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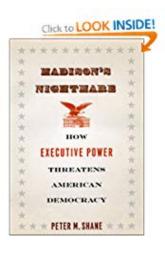
How Has the Presidency Changed Most in the Last 30 Years?

News at Home

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by Peter M. Shane

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If you asked Americans how the institutional Presidency has changed most in the last 30 years, the overwhelming majority would probably be clueless. This has less to do with Americans' low levels of civic knowledge generally than the obscurity of this particular development and its seeming lack of drama. The most important change in the presidency in recent decades is the increasing White House control of domestic rulemaking activity by administrative agencies.

Madison's Nightmare: Executive Power and the Threat to American Democracy (University of Chicago Press, 2009) analyzes the theory and practice of "presidentialism" as they unfolded from 1981 to 2009. The book

argues that American presidents during this period waged an escalating war on checks and balances. They (and their lawyers) advanced ambitious and unsubstantiated claims of vast unilateral executive authority. They claimed to be largely immune to oversight by Congress and the courts. In a sense, their practices might be seen as merely extending a trend towards increased executive power, which has existed since the Depression, World War II, and the founding of the modern national security state. On the other hand, recent claims to presidential authority – including the genuinely audacious theory of "the unitary executive" – have so clearly accelerated the modern trend as to represent a genuinely distinct and dangerous phenomenon.

In our current political atmosphere, the issues this subject brings most readily to mind tend to be questions of war making and national security. One thinks also of the Bush Administration's proliferation of constitutional signing statements and extraordinary pursuit of government secrecy. But the most novel assertion of presidential authority, and one for which Republicans and Democrats have shown equal enthusiasm, has to do with control over the federal policy making bureaucracy.

Under our Constitution, the federal executive branch has no inherent authority to issue general rules on the air we breathe, the water we drink, the food we eat, the drugs we take, the cars we drive, the conditions under which we work and play, our susceptibility to discrimination in schools, in public accommodations, and in the workplace, our entitlements to health care, disability insurance, and income security in our old age — or on any of the other aspects of our individual or collective welfare that are currently subject to administrative regulation. The reason the executive branch regulates in these areas is that Congress, exercising the constitutional powers of the legislative branch, has decided to create administrative agencies and to empower those agencies to issue binding rules as Congress's instruments for accomplishing the legislature's constitutionally authorized objectives.

Up until at least 1980, if a federal administrative lawyer were asked to describe the relationship between the President and the administrative bureaucracy, the lawyer would probably say something like this: The President has powerful influence. He appoints the heads of all agencies (albeit with Senate advice and consent). Under laws enacted by Congress, the President can also fire most agency heads at will – and he can discharge any of them for good cause, such as law breaking. An agency's failure to attend respectfully to the President's concerns may elicit punishment in the

preparation of the agency's future budget. And, of course, the President is the President. By virtue of his office and his personal influence, what he says always carries great weight.

But that lawyer would have added a crucial final point: The President cannot actually order administrative agencies to issue the precise rules and regulations he wants. Agencies can issue rules and regulations that bind the public only insofar as they have legislative authority from Congress to do so. That authority may leave the agency with substantial room for exercising its own judgment in how to develop the very best regulation. In exercising discretion, no sensible agency will be oblivious to the President's policy agenda. But the decision of how best to exercise agency judgment remains with the head of the agency, not the President. That means the President may fire an agency head if he is disappointed too often, but he cannot insist beforehand that the agency head follow the President's policy preferences.

Since 1980, however, a different theory has taken hold. Presidents have increasingly subjected all significant administrative rules to months of painstaking scrutiny by the Office of Management and Budget, effectively second-guessing much of the regulatory work product of the executive agencies. Our Republican Presidents – President Reagan to some degree and, most especially, both Presidents Bush – regarded the system as a logical outgrowth of the theory of the "unitary executive." Under this theory, the conventional legal understanding just described is wrong. "Unitarians" believe the President is entitled to command all administrators in the exercise of their discretionary powers. Contemporary presidentialists believe, in other words, that authority explicitly granted by Congress to agency heads is power actually delegated to the President. This is not just a matter of what Congress wants. It is what the Constitution compels. Congress could not provide otherwise.

The Clinton Administration did not adhere to this constitutional theory, but it embraced its operational equivalent. It interpreted all of Congress's regulatory statutes, except those directed at independent agencies, as approving the presidential direction of rulemaking activity. Congress may not have been constitutionally compelled to defer to the President so strongly, but it has. And so, for President Clinton, as for the Republicans, presidential commands to regulatory agencies were appropriate.

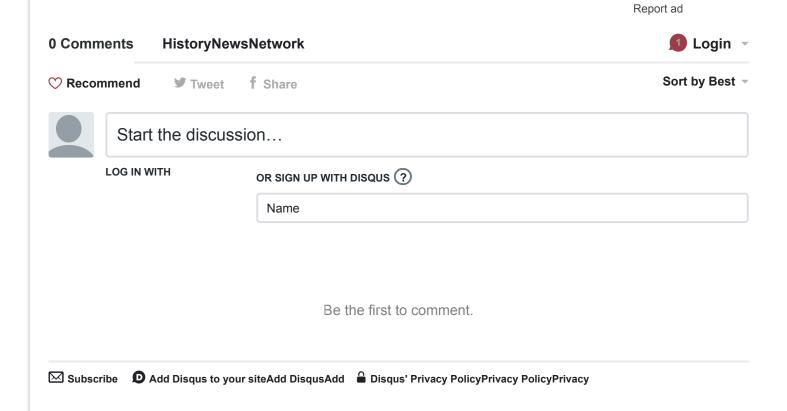
Americans, of course, might not suspect much difference in operation between the pre-1980 view and the view of the presidentialists. Won't an administrator subject to at-will discharge always follow orders? But the answer is, no. An agency head fearful of disappointing the President, even at risk of being fired, is constrained also by other constituencies. She will worry about the congressional committees that oversee her agency. She will worry about industry or public interest groups that monitor and publicize her performance. She will worry about maintaining personal credibility within her agency, with future clients or employers and with the larger public. She will know that the President can fire her, but only at political cost to the President. Thus, the difference in these two views of the presidency can shape many a key decision.

The move towards centralization of policy control in OMB should worry Americans for three reasons. First, a tightly controlled bureaucracy is actually less responsive to public sentiment than a bureaucracy in which administrators enjoy some room for independent judgment. This seems counterintuitive because we elect presidents, but not bureaucrats. The problem, however, is that the President is unlikely to reflect the views of the median voter on each and every issue of significant public concern. Because the President chooses agency heads, they will all share his general policy outlook, but each agency head is somewhat more inclined than the President to respect the median voter's view on the particular issues that his or her specific agency addresses.

Second, the system is potentially less accountable to the public. The more decision making is concentrated in the White House, the easier it becomes to use executive privilege as a shield against disclosure of the decision making process. To be fair, recent Presidents have taken some significant steps to make White House regulatory review more open and transparent than it was in the 1980s, but the potential for changing course towards more secrecy is always present.

Third, the system adds months of delay to the process of issuing new regulations. As I detail in Madison's Nightmare, it has never been demonstrated that the reduction in regulatory costs produced by White House review has adequately compensated for the value of benefits foregone by delaying new health, safety and environmental regulations for periods often lasting six months or longer.

I wrote Madison's Nightmare partly in the hope of explaining persuasively what's wrong with the "unitary executive" as constitutional law and partly in the hope of demonstrating how aggressive presidentialism undermines good governance. Much of the book deals with the dramatic questions of torture, domestic surveillance, and executive secrecy that are so often in the news. I hope that the book also brings at least some greater attention to the centralization of presidential policy making control, which deserves far more public attention and debate than it has seen since its inception.



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