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UNITARY EXECUTIVE INTERPRETATION: A COMMENT

*Frank H. Easterbrook**

These papers on the “unitariness of executive branch interpretation” are anything but unitary. The three authors offer distinctive views of constitutional structure, history, and practice.¹ From Professor Miller we receive a Grand Unified Theory integrating public powers and private liberties. Professor Lessig gives us a refined view of early practice leading to the conclusion that originalism and the unified executive are incompatible, in part because the Founders themselves were not originalists but respected practical accommodations. Professor Herz asks how far a government split among agencies can produce a unified (or sensible) program of regulation.

Despite the great scope of these papers, none tells us what is either a *good* structure or the Constitution’s *actual* structure. Each explicitly postpones these questions to other work; Professor Miller, for example, tells us that his essay “might perhaps be considered as a prolegomenon to future research.”² Two hundred six years after the writing of the Constitution, we are issuing prolegomena—and these qualified by “might perhaps”!

Might this reticence perhaps reflect the limited content of the Constitution, or unwillingness to let that content be dispositive? The Constitution creates the three branches, but aside from laying down a few rules the founding document leaves to political accommodation the actual operation of the national government. Searching in the Constitution for *a* structure of government, as opposed to boundaries on the plenitude of possible structures, is an unrewarding task. The boundaries are few; the living must settle their own affairs. The authors accept this perspective; it accounts for the structure of their work.

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¹ See Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219 (1993); Lawrence Lessig, *Readings by Our Unitary Executive*, 15 CARDOZO L. REV. 175 (1993); Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 CARDOZO L. REV. 201 (1993).

² Miller, *supra* note 1, at 204.

Which makes it all the more curious that in working out how the living should arrange their government to best effect, the authors bypass the insights of public choice—the academic discipline concerned with the consequences of governmental structures. It is a new body of learning, growing out of relatively recent work by Buchanan, Tullock, Olson, and Downs.³ Lawyers have a comparative advantage at understanding legal rules, but once the subject turns to prudence—to “good government”—the comparative advantage lies elsewhere. Still, we can and should be intelligent consumers of this material, which we can enrich by adding lawyers’ insights to social scientists’ models. Attempts to do this have produced an explosion of helpful papers.⁴ Any effort to assess the consequences of particular institutional arrangements must take this scholarship into account. Otherwise we are mere purveyors of anecdotes, each with a view about what is wise and good but none with a reason why anyone else should agree.

When lawyers begin to write about executive interpretation, they turn quickly to litigation—Professor Lessig’s paper is almost exclusively about litigation, and the other authors salt their papers with cases. This might be appropriate if the authors were trying to work out the boundaries of each department’s authority, that core of law that is enforceable despite the absence of a judicial review clause in Article III.⁵ This is not, however, how the authors see litigation. Professor Miller treats courts as kitchen blenders—appliances into which one can drop many flavors of interests and arguments and obtain a puree. Such an approach confuses *wise* government with *legitimate* government; judges are, or ought to be, concerned only with the latter.

Professor Lessig, by contrast, treats litigation as a core function of the executive branch. He has respectable company, but I find it odd to locate a (maybe the?) central power of the President in an ability to beg someone with life tenure to enforce the law. Does any-

³ See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). See generally DENNIS C. MUELLER, *PUBLIC CHOICE II* (1989); DANIEL A. FARBER & PHILIP C. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

⁴ See *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM* (Bernard Grofman & Donald Wittman eds., 1989); *PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS* (James D. Gwartney & Richard E. Wagner eds., 1988); Conference, *The Organization of Political Institutions*, 6 J.L. ECON. & ORG. 1 (1990); Symposium, *Constitutional Law and Economics*, 12 INT’L REV. L. & ECON. 123 (1992); Symposium, *Positive Political Theory and Public Law*, 80 GEO. L.J. 457 (1992); Symposium, *The Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

⁵ See Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 371-80 (1992); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 919-22 (1989-90).

one believe that the President's power to propose legislation⁶ is the bulwark of the executive branch? No more is the power to ask judges for assistance. The "executive Power" under the Constitution, including the power and duty to "take Care that the Laws be faithfully executed," is the power to *do*, not to *ask*.⁷ The President collects taxes, issues patents, carries the mail, pays the bills, investigates crime and arrests criminals, patrols the borders, inspects meat, builds highways, launches satellites, decodes enemies' communications, and sends the Marines. With few exceptions, litigation involving the executive branch is from the President's perspective damage control—fending off intrusions by private parties, judges who want to claim a greater role in government for themselves, and members of Congress who see that by increasing the role of the judiciary they diminish the relative influence of their strongest rival, the President. Litigation on behalf of the polity is shared with private citizens in the United Kingdom and many states (which even today allow private prosecution), and the *qui tam* action, a survivor of the eighteenth century,⁸ shows that litigation has never been a prerogative confined to executive officials.

Let me turn, now, to some brief remarks about the particular papers. Professor Miller invites us to seek a holistic view of the Constitution.⁹ The community of Founders is no longer with us; we can't hear the words of the document as those living in 1787 did; the structure of the entire work therefore is an invaluable source of information about the meaning of particular clauses. Structure is an antidote to tunnel vision. I shall reveal my bias as an adjudicator by asking: does combining roles (the subject of the 1787 Constitution) with rights (the subject of many of the amendments from 1789 to date) offer a useful way to establish limits? A method that offers insight into sound and humane government does not necessarily tell the political branches how they *must* behave; and if it does not do this, it contains no information valuable to litigation, which is apparently where Miller wants to use it.

⁶ "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." U.S. CONST. art. II, § 3.

⁷ The first quotation is from U.S. CONST. art II, § 1, and the second from U.S. CONST. art. II, § 3.

⁸ See *United States ex rel. Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154-55 (2d Cir. 1993), which discusses some of the history.

⁹ In addition to his essay for this symposium, see his *Rights and Structure in Constitutional Theory*, 8 SOC. PHIL. & POL. 196 (1991).

To have enforceable limits, you need a rule of decision. Without a rule, there is no legitimate judicial role, no right to insist that other branches do things in exactly the way judges specify. Recall the rationale of *Marbury*; judicial review is an inference from the nature of the Constitution as law. Professor Miller's project, adding a welter of considerations and interests to the bones of the structure established by Articles I, II, and III, detracts from the status of the document as law. By enlarging the boundaries of the arguable, it diminishes the legitimate role of adjudication.

In the end, trying to combine all of the clauses of the Constitution into one bouillabaisse saps the very structure it means to protect. Our actual Constitution has no Grand Unified Theory.¹⁰ Disparate provisions reflect the compromises of practical people. Powers were parceled out in order to hold a balance between large and small states, between free and slave states, between proponents of strong and weak central government, and so on. The falling out between the Federalists and the Republicans during the Adams administration is a vivid manifestation of the fact that the Founders did not share a theory of government. Not even a unified theory, let alone a Grand Unified Theory, underlies this document. By the time of the Civil War and the Reconstruction amendments, the United States had undergone a revolution in the understanding of the relation between the federal and the state governments, and between the government and the people. No complex system adopted by voting, as this was, can be internally consistent.¹¹

Now one may say that rules have functions, but they are still rules rather than manifestations of a single Theory. That the vote to override a presidential veto is two-thirds of those present, rather than, say, three-quarters of the full membership, is just a rule. That the President rather than the Senate names judges reflects the balance of forces at the Constitutional Convention—a victory of Gouverneur Morris and other proponents of a strong executive over George Mason and those who preferred a weak executive—not a realization that one system rather than the other was implied by a single Theory. On other occasions Mason prevailed. To interpret the assorted, and often arbitrary, compromises in light of some unified, multifactor Theory is

¹⁰ A term imported from physics, where the best minds of the century have so far searched in vain. Current candidates tackle formidable mathematical problems by multiplying the number of dimensions. One approach, for example, requires twelve dimensions, eight of which curled up to sub-atomic size in the first microseconds after the Big Bang. I trust that constitutional theory is not headed in the same direction in order to achieve Unification.

¹¹ This is one of the most profound implications of modern public choice. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

to defeat, by assumption, the actual choice: to have *rules* of decision, which govern so far as they go and leave the rest to the future. To impose a single Theory on each of the provisions accreted over the centuries is to change *all* of the provisions of the real Constitution.¹²

Professor Miller's project encounters trouble even on its own terms. Consider one of his examples: may the Senate deputize a committee to receive evidence when trying articles of impeachment referred by the House? Someone looking at the text of Article I might ask whether such a procedure is a "trial"; an emphasis on Article III might lead to the question whether the judicial branch has any role to play.¹³ Miller wants to enlarge the inquiry by adding the core value of liberty. He asks: does the use of the committee pose a distinct threat to the liberty of the judge or other public official being tried? All this additional ingredient yields is indeterminacy. Why should we care about the liberty of the public official, as opposed to the populace? Does throwing a senator out of office at the end of six years diminish his "liberty"? Public office does not exist for the benefit of the incumbent; the offices, and the limits on their tenure, are designed for the benefit of the people. Nothing in the Constitution, or any Grand Unified Theory of the Constitution, offers so much as a clue about the interaction of committee structures, tenure of office, and the welfare or freedom of the whole population. Any aid in answering this question must come from *outside* the Constitution—for example, from the theory of public choice. Confining attention to the liberty of the person impeached does not improve things. Maybe a committee of twelve senators will pay more attention to the evidence than would the full body, wandering in and out. Maybe the availability of a committee makes impeachment more attractive, because it is not necessary to stop the legislative process to get rid of a wayward district judge. Are extra removals good (because the House will impeach only corrupt, lazy, or senile judges?) or bad (because the House will return to the Nation's beginning and start impeaching judges on political grounds, as it did with Justice Samuel Chase)? Would shortening judges' (effective) tenure aid the population, by cutting down on the self-indulgence that life tenure facilitates, or harm the public welfare by undermining judges' willingness to carry out unpopular laws and constitutional guarantees? Who could tell? And what if it were to

¹² Miller's approach has the weakness characteristic of "balancing" and other theories that exalt indeterminacy and search for possibilities rather than rules. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972-78, 986-92 (1987); Alex Kozinski & Eugene Volokh, *A Penumbra Too Far*, 106 HARV. L. REV. 1639 (1993).

¹³ These are the questions the justices asked in *Nixon v. United States*, 113 S. Ct. 732 (1993), issued after the symposium.

turn out that the best thing for the people's liberty would be to tie the Senate in knots hearing impeachments, so that it would enact fewer bad laws?

Such questions, only the beginning of the sequence necessary to get a handle on the question using Miller's approach, have no legal answer. They pose deep issues of politics, philosophy, or utility theory. The only thing of which I am sure is that even pursuing this Grand Unified approach dishonors the one rule the Constitution surely establishes: that senators rather than judges are entitled to have the final word. Impeachment is a check on the judicial and executive branches. It is designed to protect the public from wicked, or imperial, judges. Such a device, a counterweight to tenure during good behavior, is defeated if judges claim the final word on the propriety of its use. The Constitution is untidy. A Senate with the final word may abuse its power; but then judges, if they have the final word, may abuse theirs. Which actor's word is final cannot be teased out of a Grand Unified Theory. For this you need a more particularistic set of rules.

Second example: Professor Miller is having second thoughts about independent agencies. A few years back he put them under a constitutional pall;¹⁴ now he suggests that specialization, energy, and the avoidance of faction give agencies a new purchase in a Grand Unified Theory.¹⁵ The model implicit in Miller's treatment is of an agency, free from political influence, fearlessly carrying out the law wherever it leads. This is a more romantic view than I anticipated from this careful student of interest-group politics. As his previous scholarly work shows, agencies have their own agendas. It is not simply that they become the captive of factions (or even are created to serve these groups). Agencies start pursuing their own agendas, with tunnel vision adherence to the goal of their statute at the expense of other, equally worthy objectives. Eliminating the President from the process does not make the agency stronger. Commissioners of the XYZ Agency have no power of their own. They can't threaten to veto a bill; they lack access to the levers that facilitate logrolling (no commissioner can promise a member of the House to sponsor a new dam in exchange for his vote on a proposed change to the copyright law); having access only to the trade press (that is, to the interest group press), they can't take their case to a national constituency. What then is going on? An independent, which is to say a weaker, agency increases the *relative* strength of Congress. Subcommittee

¹⁴ See Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41.

¹⁵ See Miller, *supra* note 1, at 210.

chairmen can dictate to commissioners in a way they cannot to secretaries of cabinet departments.¹⁶ Chairmen of committees and subcommittees are, on average, farther from the median of national opinion than are presidents, with their broader constituencies; chairmen have less constitutional license to govern (after all, the Constitution calls on Congress as an institution to legislate, not on single members to browbeat commissioners at hearings). James Madison and his colleagues got it right in prescribing a strong executive as an antidote to the baleful influence of faction. Once again the Grand Unified Theory takes us farther from the real Constitution.

A general equilibrium theory of politics, like a Grand Unified Theory of physics,¹⁷ is well worth seeking but eludes us, and is likely to continue eluding us. Scholars properly devote their lives to these pursuits, but the actual operation of the government depends on the few rules in the Constitution and the ability of practical people to muddle through.

Professor Lessig offers us an historical project more along the Founders' lines. He is entirely convincing in demonstrating the messiness of the original conception and practice (a messiness that, by the way, is one reason why Grand theories can't be Unified). The Framers took practice as seriously as they took text; so too must we.

Still, I do not believe that this recognition puts a big dent in the Unitarians' armor, for several reasons. First, litigation is not a core executive function. Second, none of the examples Lessig mines from our history excluded the President utterly, as some modern statutes do.¹⁸ Unitarians making textual claims need not cower. Not claims based on the "take Care" clause, which is too general to carry much freight, but more specific claims. In historical terms, an independent counsel (i.e., a special prosecutor) is not an "inferior" officer, and therefore cannot be appointed by a court of law. History and the structure of the Constitution reveal that "inferior officers" and "inferior courts" are *subordinate* institutions, not "unimportant" ones. A public official without an immediate superior thus must be appointed by the President; the lesson of history fortifies rather than undercuts this kind of textual claim.

Unitarians making structural rather than textual claims also survive unscathed. Judicial review depends not on the text but on the

¹⁶ Again an implication of public choice, and with data to back it up. See, e.g., Roger L. Faith et al., *Antitrust Pork Barrel*, 25 J.L. & ECON. 329 (1982).

¹⁷ Or, as Douglas Adams would put it: Life, the Universe, and Everything.

¹⁸ I have in mind the independent counsel legislation, the idea of which is to reduce the executive's role to the smallest feasible extent. See *Morrison v. Olson*, 487 U.S. 654 (1988).

structure of the Constitution, so long as we understand the Constitution as law rather than (as Bismark cracked about war) as politics by other means. Intergovernmental tax immunities, state immunities from damages actions at common law, the foreign relations power of the President, and many other features of our constitutional order are inferences from the structure of the document (and the government it established) rather than interpretations of textual passages. Deriving power (and limits on power) from structure is an essential feature of the early practice that Lessig extols. Recall that John Marshall adduced structural rather than textual arguments in the two cases that establish the allocation of powers we still accept: *Marbury v. Madison* (which established judicial review) and *McCulloch v. Maryland* (which treated the Necessary and Proper Clause as a grant of power to Congress rather than a limit on legislative power).¹⁹ How far inferences from structure extend is one of the most delicate questions of interpretation, but the enterprise is reinforced rather than undermined by an understanding of our constitutional history.²⁰

Having devoted my attention to Grand theory and constitutional foundations, I have only a few words to offer about Professor Herz's admirable description of contemporaneous practice. It is good to be brought down to earth by concrete examples. And Professor Herz surely is right in concluding that the executive branch may construe statutes; construction is an essential precursor to *faithful* execution. (Trying to implement a law before interpreting it could hardly be called "faithful.")

Where within the executive does the power of interpretation belong?, Professor Herz asks. To the President, or to the agency (in this case the EPA, a line rather than "independent" agency)? Herz concludes that the logical arguments are a wash, because either may seek to implement a private agenda or take a position at variance with the law.²¹ If one is inclined to do too little in the name of the law, the other may seek to do too much. If the agency head is apt to be captured by the staff (the "Yes, Minister" phenomenon), the President is apt to be distracted by the rush of affairs and have insufficient time to choose wisely (or at all).

I have no quarrel with this analysis in its own terms. But is President vs. Agency the right comparison? Again principles of public

¹⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

²⁰ See also Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

²¹ See Herz, *supra* note 1, at 264.

choice come into play, and the comment about Professor Miller's paper is apropos: the contest is more likely to be Subcommittee Chairman vs. Congress (or Congress plus the President), or Chairman vs. Executive, with the agency as a pawn. Effective separation of the legislative and executive power, designed to dull the influence of faction, implies giving the interpretive power to the person with the broadest base and the strongest political weapons. Shortage of presidential time means that the President needs coordinating instruments (such as the Office of Legal Counsel for law and the Office of Management and Budget for policy) and that these tools must be strong and independent of Congress to serve their function.

These three intriguing papers have much to teach us. But we will learn still more if we carefully respect the distinction between constitutional boundaries and wise choices within these boundaries. Most of today's difficult questions are of the latter kind. Political philosophy, public choice, and practical experience have more to offer than do strictly legal rules. Our world differs greatly from the world of the founding. Sagacious as they were, the Framers did not anticipate telephones, jet travel, and the many other changes that by shrinking the effective size of the United States have transformed the relation between federal and state governments, and expanded the domain of the commerce power. Madison, who in *Federalist No. 10* so clearly saw the dangers of majority factions, did not foresee the strength of minority factions in a republic made smaller by changes in technology. One element of his insight survives: a unitary executive is better at faction control than are scattered legislators and agencies. In the end, the champions of a unitary executive were more right than they knew.

