UNDOING THE NEW DEAL THROUGH THE NEW PRESIDENTIALISM

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My remarks are perhaps the best evidence of Professor Akhil Amar's point that the New Deal is a very big topic, for I come at our subject from a different perspective than my fellow panelists, although you will hear echoes in my remarks–sometimes harmonious; often dissonant–of some of Professor Stewart's and Professor Amar's remarks.

My thesis is that the emergence of the new presidentialism, as a dominant theme in administrative and structural constitutional law, is, at least potentially, a profoundly anti-regulatory phenomenon. This is principally a descriptive enterprise. I will discuss how the new presidentialism threatens the legacy of the New Deal, rather than debating whether that legacy is worth preserving. It will be clear to you that I am in the camp of the preservationists–and certainly this political position heightens my concern–but I want to suggest to you that the new presidentialism has undesirable societal implications, *whatever* level of regulatory activity you believe the federal government ought properly to engage in.

What exactly do I mean by the new presidentialism? Most importantly, I mean the unitary executive thesis: the structural constitutional argument that most of the regulatory enterprise represents the exercise of "executive power" which, under Article II, can legitimately take place only under the control and direction of the President.[1] This is a powerful ideological claim for presidential leadership of the regulatory state. Typically, as in the work of Steven Calabresi and Saikrishna Prakash,[2] it is put forth on strictly originalist grounds;

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1. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

2. *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994). *See also* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995); Saikrishna B. Prakash,

alternatively, as in the work of Cass Sunstein and Lawrence Lessig,[3] it may be defended as the best translation, to modern circumstances, of the original constitutional commitments to energy and accountability in government and the avoidance of faction.

I also include in the new presidentialism the strong pragmatic claim by a range of commentators that the President is uniquely situated to bring to the messy and expensive sprawl of regulatory programs the sorely needed qualities of coordination, technocratic efficiency, and managerial rationality.[4] These latter arguments add the icing of expediency to the constitutional cake, confirming that strong presidential control is the way of wisdom as well as virtue.

How can I possibly assert that such a phenomenon threatens the New Deal legacy? On the ideological level, the modern administrative government born in the 1930s, and nurtured in the 1960s and early 1970s, has been like a brash but deeply insecure adolescent-outwardly insisting that it needs no one's approval but secretly longing for a settled constitutional home. The new presidentialism offers that home. Reconciliation with the Constitution, it promises, does not require dismantling the "veritable fourth branch of the Government, which has deranged our three-branch legal theories,"[5] but rather simply relocating the enterprise squarely within Article II. To be sure, bringing the independent agencies fully into the executive fold, and otherwise consolidating the President's leadership of administrative policymaking, would give Congress the political equivalent of apoplexy. But perhaps that is not such a big price to pay for finally establishing the legitimacy of our

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Note, *Hail to the Chief Administrator: The Framers & the President's Administrative Powers*, 102 YALE L.J. 991 (1993).

3. *See* Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

4. *See, e.g.*, Calabresi, *supra* note 2; Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986); Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219 (1993); Lessig & Sunstein, *supra* note 3, at 93-101; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995); Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180 (1994); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

5. FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

contemporary government. The regulatory state can go forward with its constitutional identity crises finally resolved. Indeed, placed unambiguously under the President's direction, its democratic pedigree becomes impeccable. As Steven Calabresi puts it, "he, and he alone, speaks for the entire American people."[6] Through him, the will of the national majority can triumph over the parochial, special interest politicking that impels congressional oversight.[7]

Moreover, the very singularity that enables the President to avoid collective action problems and to serve as a focal point for democratic accountability makes his leadership clearly superior to that of the other two branches in its capacity to improve the process of regulation: to establish priorities, to eliminate duplication and reduce conflict, to monitor the success of various regulatory strategies, and to make methodological corrections to improve regulatory performance.[8]

How could all this possibly be anti-regulatory? Indeed, is not the new presidentialism Franklin Roosevelt's dream–the belated, but still welcome, legal apologia for the political revolution he and his followers accomplished in the New Deal?

One answer might be that it is anti-regulatory because we are in an era when presidential electoral politics favor Reagans instead of Roosevelts. That would have been an apt response in the 1980s, when the new presidentialism first emerged as a serious ideological contender. Standard wisdom then held that, for a variety of political and demographic reasons, the Republicans would generally control the White House while the Democrats would have a lock on Congress. In that scenario, any systematic shift of regulatory control to the President could safely be predicted to work principally *de*regulatory effects. And surely it was no coincidence that, in the 1980s, the way that conservatives and progressives tended to line up on the question of enhanced presidential power was precisely the opposite of the ideological line-up in the 1930s.

But if the 1980s was the decade of unimaginable international

6. Calabresi, *supra* note 2, at 36.

7. *Id.* at 36-38, 98-99; Lessig & Sunstein, *supra* note 3, at 105-06.

8. *See* sources cited *supra* note 4. For an excellent overview of this literature, see Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827 (1996).

transformations–the fall of the Berlin wall, the dissolution of the Soviet Union, the collapse of communist governments in eastern Europe–the 1990s has been the decade of unimaginable domestic transformations. The Democrats captured, and held, the presidency; the Republicans took over not one, but both, houses of Congress; and the budget moved from intractable deficit to incomprehensible surplus. Long-range political forecasting has proved about as reliable as the typical five-day weather forecast. Therefore, I do not claim that the new presidentialism is likely to undo the New Deal because its beneficiaries, over time, will be disproportionately Republican chief executives.

There is, however, a more subtle sense in which the anti-regulatory climate of the 1980s has permanently altered the legal atmosphere in which the claim is made for enhanced presidential control over regulation. Those of us who watch the development of ordinary administrative-law doctrine realize that some pretty reactionary things have happened, incrementally, in the last fifteen years. The Court has adjusted a variety of justiciability principles to narrow the power of regulatory beneficiaries to challenge agency action and inaction.[9] No comparable narrowing has occurred for unhappy members of the regulated community.[10] In this way, administrative law has developed a marked asymmetry–or perhaps I should say, returned to an asymmetry present earlier in this century, when judicial review was available only to those whose common-law interests were invaded by regulation.[11] Even if it does not affirmatively impede

9. *See* Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) (ripeness); Reno v. Catholic Soc. Servs., Inc., 113 S. Ct. 2485 (1993) (ripeness); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (standing); Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990) (standing & ripeness); Heckler v. Chaney, 470 U.S. 821 (1985) (reviewability); Block v. Community Nutrition Inst., 467 U.S. 340 (1984) (reviewability).

10. Indeed, Justice Scalia in particular has been careful to distinguish and preserve, for *these* interests, access to the courts. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. at 561-62 (asserting that when "the plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question" that he has standing, whereas, for plaintiffs who claim to be regulatory beneficiaries, "standing is not precluded, but it is ordinarily substantially more difficult to establish") (internal quotes omitted); Lujan v. National Wildlife Fed'n, 497 U.S. at 891 (asserting that pre-enforcement review is "ordinarily" unavailable, with the "major exception" being a challenge by the regulated entity of "a substantive rule which . . . requires the plaintiff to adjust his conduct immediately").

11. This growing asymmetry has been noted, and deplored, by administrative law scholars. *See, e.g.*, Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife: *Standing as a*

regulation, this doctrinal environment is far more hospitable to the determined deregulator than to the energetic regulator. Moreover, when you add to this the germinal opinions that might indeed be signaling a period of active doctrinal resistance to federal regulation–*Lopez*;[12] *Seminole Tribe, Coeur d'Alene,* and *Printz*;[13] *Lucas, Nollan,* and *Dolan*,[14] and, from a different, though complementary, direction, the recent *Eastern Enterprises*[15]–the result is a doctrinal playing field that is not level, as between the Roosevelts and the Reagans of the world, even if the two are evenly represented over time in the White House.

Although this doctrinal tilt is real, I do not want to overstate its importance to my thesis. My concern about the anti-regulatory potential of the new presidentialism rests, more broadly, on a set of consequences that may flow from what I see as its central flaw–its tendency towards essentialization and radical oversimplification. In its claims that the President is entitled–as a matter of the original, or translated, constitutional understanding–to unitary control over the executive power of administering regulatory statutes, the new presidentialism oversimplifies our constitutional history and practice. In its claims that the President possesses paramount democratic legitimacy because he alone is elected by the entire nation, it oversimplifies both the constitutional conception of the "will of the people" and the degree of true citizen consensus on public policy questions manifested in presidential electoral politics.[16] In its claim that the President is uniquely situated to resist faction, and to act on a public interest that transcends congressional special-interest politics, it oversimplifies the

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Judicially Imposed Limit on Legislative Power, 42 DUKE L.J. 1170 (1993); Cass Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

12. United States v. Lopez, 514 U.S. 549 (1995) (rejecting Commerce Clause as authority for federal regulatory scheme).

13. Seminole Tribe v. Florida, 517 U.S. 44 (1996), Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997), Printz v. United States, 117 S. Ct. 2365 (1997) (in each case the court takes a narrow view of national government power in face of states' federalism claims).

14. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), Nollan v. California Coastal Comm'n., 483 U.S. 825 (1987), Dolan v. City of Tigard, 512 U.S. 374 (1994) (in each case the court decided to stiffen takings scrutiny in regulatory setting).

15. Eastern Enter. v. Apfel, 118 S. Ct. 2131 (1998) (stiffening substantive due process scrutiny in regulatory settings).

16. I have developed this point more fully elsewhere. *See* Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987 (1997).

motivational structure and political environment of officials in both branches. Finally, in its claim that presidential control can imbue regulatory policymaking with this superior democratic legitimacy and public-regardingness, it overstates both the transparency of the White House oversight establishment and the amenability of the administrative establishment to top-down direction.

Such oversimplification was not surprising in the early 1980s, when the new presidentialism was still primarily a *political* phenomenon supporting, and justified by, the election of Ronald Reagan. We understand that politics is conducted in sound bites. It is harder to explain why this oversimplification continued as the new presidentialism became a serious theme of constitutional and administrative law. My own theory is that this is a sign of how desperately we needed a way to legitimate the regulatory enterprise and to answer growing criticism of the procedural and substantive rationality of regulation. There is a deep appeal–perhaps especially to those sympathetic to the New Deal undertaking–in a prescription that offers to cure the spiritual and material malaise of the administrative state. But this particular remedy may well make the patient considerably worse off.

First, the new presidentialism promises far more than any Chief Executive could possibly deliver. For years, political scientists have been warning about a widening gap between what the American public expects of their President, and what is humanly and politically possible for any particular President to accomplish. A typical statement of this "failure thesis," as it is called in the literature, comes from Bert Rockman:

> [Trends in American political culture] have made presidents more central figures in our political and governing constellation, central enough to publicize agendas, to articulate visions and ideals, to command presence, and to be magnets for criticism. Trends have made more difficult for presidents that which was always difficult but less aspired to–command of the instrumentalities of government and control over policy . . . . And that makes presidents *responsible* without much opportunity for making them *effective*.[17]

17. BERT A. ROCKMAN, THE LEADERSHIP QUESTION: THE PRESIDENCY AND THE AMERICAN SYSTEM 168 (1984) (emphasis added).

The new presidentialism moves the myths of popular political culture into the realm of constitutional and administrative law. If scholars and judges now insist that the Chief Executive is uniquely responsible for saving the regulatory state–from democratic illegitimacy, special interest politicking, wasteful duplication and conflict, and technical irrationality–then law will have added a whole new dimension of meaning to the "failure thesis."

Second, by promising that we can "have it all"–better, cheaper, more democratically responsive regulation at whatever level We, the People, desire at a given political moment–simply by consolidating the leadership power of the Chief Executive, the new presidentialism encourages us to ignore the painful reality of tradeoffs. There are a number of significant trade-offs hidden in a presidential-centered vision of the administrative state, but I will mention just two of the most important.

One is the tradeoff between politics and law, a subject Peter Strauss has recently explored.[18] For better or worse, the American experience with regulation has heavily invested in the proposition that, because agencies are not directly democratically accountable, their power cannot be exercised in the freewheeling political mode that we tolerate in Congress or the President. Although we do not demand of agencies the full legal discipline we expect of courts, modern administrative law doctrine has insisted that the exercise of regulatory power have a significant law-like dimension–it must occur with certain procedural formalities of notice and opportunity for response; it must demonstrate a decisional rationality in collecting and processing relevant information; and it must expressly explain and justify its choices on both normative and technocratic grounds. This commitment, which is itself a central, if not very dramatic, element in the effort to legitimate the administrative state, does not sit easily with a vision in which the President, like some political Jean Luc Picard, conducts his internal decisional calculus, nods his head, and directs the crew of the regulatory Enterprise to "Make it so."

This tension is most obvious in the area of administrative adjudication, and even the most ardent presidentialists have

18. *See* Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965 (1997).

been careful to insist that the Chief Executive could not intervene to direct the outcome of particular cases.[19] However, the forms of administrative action are too protean, the possibilities for the exercise of administrative discretion too chameleon-like, to be able to contain so neatly the law-politics tension within the adjudication-rulemaking boxes. Moreover, even within the area of rulemaking, deference to presidential fiat would be for us a new way of administrative policymaking. Maybe it would be a better way–but, before embracing it, we ought candidly to acknowledge what we are leaving behind.

The other significant tradeoff I want to note is the tradeoff between leadership and responsiveness. Americans have long been deeply ambivalent about whether our political officials ought to lead the nation, or follow the will of the people. As Thomas Cronin and Michael Genovese put it in their recent examination of the state of the American presidency, "We want a lot of leadership, but we are notoriously lousy followers."[20] There are, of course, political moments when this tension disappears, when circumstances give rise to broadly shared consensus, and we enthusiastically follow someone who leads us where we want to go. But those moments tend to be extraordinary and short-lived. In times of ordinary politics, the tension reappears with a vengeance. If we expand the range and number of issues on which the President is expected to direct policy, we inevitably increase the variance of views *among* citizens themselves, and *between* groups of citizens and the President. Proliferate the occasions on which singular leadership is demanded, and the vulnerability of the leader who claims to personify the will of a large, heterogenous population can only become more obvious.

This last point leads to the third anti-regulatory effect that may result from the new presidentialism–the exacerbation of political polarization and institutional conflict. One dimension of the political science "failure thesis" is the observation that the President operates in a complex organizational environment in which he must react to, and anticipate the reactions of, other actors. Even if the Chief Executive has the

19. *See, e.g.*, Lessig & Sunstein, *supra* note 3, at 118; Calabresi, *supra* note 2, at 75-78.

20. THOMAS E. CRONIN & MICHAEL A. GENOVESE, THE PARADOXES OF THE AMERICAN PRESIDENCY 67 (1998).

purest of motives and the optimal level of information and attention–two extremely optimistic assumptions–he simply cannot implement a unilateral, top-down direction of the regulatory process. Our constitutional and bureaucratic structure supports too many competing legal, political, and institutional power centers.

The problem here goes beyond the fact that this complex power structure will prevent the President from *succeeding* in remaking regulatory policy in his own image. It involves the costs of even *attempting* to exert such unilateral control. The new presidentialism arms the President to insist that he, uniquely, possesses the constitutional prerogative, democratic mandate, and managerial competence to direct the administrative state. These claims of singular entitlement and ability to control the regulatory agenda establish a norm of confrontation, rather than collaboration. By raising the stakes for other actors in the system, such hegemonistic claims may trigger an oversight arms race. Indeed, many would say that this is exactly what happened in the 1980s, as Congress reacted to what it perceived as aggressive unilateral White House deregulatory initiatives with a variety of equally aggressive countermeasures–micro-management through hyper-detailed substantive statutory amendments; the imposition of rulemaking deadlines, regulatory hammers, and similar statutory action-forcing mandates; the increase in reports and other oversight data agencies are required to give Congress; the refusal to confirm nominees to key White House oversight positions; and the use of riders in appropriations bills to regain control over specific agency programs.[21] If we encourage political actors to regard regulatory oversight as a battle for the soul of the administrative state, we may be unpleasantly surprised at the weapons each turns out to have available in its arsenal.

Still, we who are students of separation of powers really should not be surprised. We are fond of quoting, as the epigram of our system's genius, Madison's observation that "the great security against a gradual concentration of the several powers in the same department consists in giving to

21. *See, e.g.*, Sidney A. Shapiro and Robert L. Glicksman, *Congress, The Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819 (1988).

those who administer each department the necessary constitutional means, and personal motives, to resist encroachments of the others."[22] A more contemporary articulation of this is Mike Fitts' recent suggestion that the Coase Theorem applies to separation of powers.[23] That is, regardless of the initial, legal allocation of entitlements to control, we will see control reallocated among the actors in the political market place according to where it is most valued. I am not convinced (and I do not understand Professor Fitts to be asserting) that this means that our system always manages, over time, "naturally" to return to a state of equilibrium among the branches. What it does usefully remind us is that the complexity of our system gives many actors an astonishing array of moves, and adaptive countermoves, when they feel threatened. To paraphrase Madison, "[t]he provision for defense [was] in this, as in all other case . . . made commensurate to the danger of attack."[24] The costs to the functioning of the regulatory system from an oversight arms race are high–regardless of your view of the appropriate level of regulatory activity. Few commentators have argued that the control struggles between Congress and the President in the 1980s resulted in a more effective and efficient regulatory process.

These practical institutional costs of the new presidentialism's aggressive stance have a more elusive, but equally important, ideological parallel. If the President claims to speak uniquely in the voice of the national majority, this fundamentally challenges the legitimacy of other voices advocating different policy goals. By interpreting the presidential election as the moment in which We, the People, confer a policy mandate, this strong but extremely narrow conception of democratic representation condemns all those who disagree with the preferences and priorities of the Chief Executive to the status of losers, outsiders, or–worse–"factions"

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22. THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961).

23. Michael A. Fitts, *The Foibles of Formalism: Applying A Political "Transaction Cost" Analysis to Separation of Powers*, 47 CASE W. RES. L. REV. 1643 (1997). Earlier literature had suggested use of the Coase Theorem in separation-of-powers analysis of foreign affairs. *See* John McGinnis, *Constitutional Review by Executives in Foreign Affairs & War Powers*, LAW & CONTEMP. PROBS. (Autumn 1993); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991).

24. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

who would further special interests at the expense of the public good. Again, we can look at the early 1980s as a good example. Ronald Reagan is the closest modern incarnation of the Chief Executive imagined by the new presidentialism. Political science research into public opinion during his presidency reveals that this was a time of extremely high political polarization in our society.[25] Again, it is the difference between a collaborative and a confrontational model. A concept of democratic representation that explicitly envisions House, Senate, President, and perhaps even Judiciary as multiple vehicles through which a diverse citizenry voice their will about government challenges the branches to find, and create, common democratic ground for the regulatory enterprise. By contrast, the conception of a single, best voice of The People encourages an exclusive mindset in which the inevitable political manifestations of our diversity become threats to be neutralized rather than the raw material from which consensus is forged.

Fourth, and finally, by placing the Chief Executive at the center of the regulatory universe, the new presidentialism threatens to divert our collective attention from the other actors whose behavior is, in fact, crucial to the enterprise of regulation. If one insists that legislatures and courts are constitutionally and structurally unfitted for pursuing democratic responsiveness, public-regardingness, managerial efficiency, and technocratic rationality, why bother talking with Congress or the Judiciary about what they ought to be doing to improve the practice of regulatory government? If one conceives of legitimacy and success as qualities conferred upon the system by the leadership at the top, why worry about whether the particular procedures and day-to-day practices of regulation are those most likely to induce government that citizens experience as fair, competent, respectful, and responsive? If one posits that accountability and competence are to be expected, if at all, only from the White House, why should individual members of Congress, or judges, or agency officials, or front-line bureaucrats internalize and attempt to act on a sense of responsibility for the success of regulatory

25. *See, e.g.*, GEORGE C. EDWARDS III & ALEC M. GALLUP, PRESIDENTIAL APPROVAL: A SOURCEBOOK 175-79 (1990) (finding unprecedented polarization in electorate along party, class, racial, and gender lines).

institutions?[26]

In sum, I fear that the new presidentialism–even when advocated with motives sympathetic to the regulatory enterprise–is most likely to mean expectations that will be disappointed, promises that cannot be kept, hard choices that are obscured, damaging conflict that is fomented, inevitable complexity that is denied, and shared responsibility that is ignored. But what if you believe that, in the New Deal, America embarked on a fundamentally wrong path? Should you then welcome a turn in legal-political theory that may hasten the day when widespread public disillusionment forces the regulatory state to collapse of its own weight? Only, I would suggest, if you profess the sort of nihilism that would encourage an overweight, sedentary middle-aged man to take up smoking on the theory that the sooner he has his heart-attack, the sooner he will seriously begin to reform his life. I suspect that most of us are not prepared to adopt such a high-risk strategy. If not, *whatever* we may conceive as the appropriate level of regulatory activity, we have a common stake in articulating a vision of the regulatory state that encourages us to understand legitimacy and competence as a collaborative enterprise that must be pursued through a variety of official actors and institutional practices.

26. *Cf.* ABA Comm. on Gov't Standards, *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 ADMIN. L. REV. 287, 291-93, 334 (1993) (Cynthia R. Farina, Reporter) (developing a "stewardship" model of government service and insisting that "the ethical use of public power can be achieved only if government employees regard themselves as mature professionals who feel a personal commitment to their institution, and who accept personal responsibility for acting with competence and integrity").