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Executive Reorganization and Agency Selection Powers

Who reorganizes and restructures more than 220 components that make up the executive branch? As a formal matter it is Congress, but functionally this is seldom the case given the realities of modern executive administration with its extensive subdelegations, interagency working groups, overlapping jurisdictions, oversight and review procedures, and so on.

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The general consensus is that the organization of governmental entities in the form of departments, agencies, bureaus, offices and other subdivisions lies solely within the ambit of Congress under Article I, Section 8 and the Necessary and Proper Clause. Between 1932 and 1984, Congress also granted special presidential reorganization authority[1] through an expedited review process subject to unicameral legislative veto, until the latter was ruled unconstitutional in *INS v. Chadha* (1983) owing to separation of powers concerns. Since then, said reorganization authority has lapsed without renewal, though it remains on the books in the U.S. Code. Nevertheless, the perception of congressional supremacy, although formally correct, is functionally not the case given the realities of modern executive administration with its extensive subdelegations, interagency working groups, overlapping jurisdictions, oversight and review procedures, and so on.

The phenomenon of *de facto* presidential reorganization was first studied in a systematic way by political scientist David E. Lewis in the early 2000s (*Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946–1997)*. Lewis identified three sources of presidential power in agency design: a) innate Article II authority, b) unanticipated use of delegated authority, and c) creative use of vague statutes. JFK's creation of the President's Committee on Equal Employment Opportunity in 1961 under Executive Order 10925 is an example of a), later superseded by the EEOC. Nixon's creation of the Pay Board and Price Commission as politically appointed commissions without Senate confirmation, both intended to enforce price controls as an anti-inflation measure under the Keynesian theory of cost-push inflation, were done under the auspices of the Economic Stabilization Act as an example of b). JFK's creation of the Food Stamp Program under Executive Order 10914 is an example of c), since it was justified under a loose construction of 7 USC § 612c (Agricultural Act of 1949) authorizing the Secretary of Agriculture to take measures that will encourage exports, encourage domestic consumption, and increase farmers' purchasing power.

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1 "Presidents used this presidential reorganization authority regularly, submitting more than 100 plans between 1932 and 1984. Presidents used the authority for a variety of purposes, from relatively minor reorganizations within individual agencies to the creation of large new organizations, including the Department of Health, Education, and Welfare (HEW), the Environmental Protection Agency, and the Federal Emergency Management Agency (FEMA). The terms of the authority delegated to the President varied greatly over the century. During some periods, Congress delegated relatively broad authority to the President, while during others the authority was more circumscribed."
(Reorganization Initiatives During the 112th Congress: A Brief Overview, by Henry B. Hogue)

Lewis adds, as of 2003: “Since 1946, forty-three new agencies, or 10 percent of all agencies created, were created by executive order. These include the National Security Agency, the Federal Emergency Management Agency, the Central Security Service, and the Domestic Policy Council.”

Sometimes, the President will create a new agency by executive order or memorandum, and then rely on his political capital with Congress to have it subsequently receive formal authorization in an appropriations bill. This is what happened with the Department of Homeland Security, an agency that replaced what had originally been the Office of Homeland Security established by Executive Order 13228 as an entity within the Executive Office of the President.

A 2002 study by Howell and Lewis found that[2]:

> Over the past half-century, presidents have constructed over 240 administrative agencies through executive orders, orders issued by department secretaries or agency heads, and reorganization plans. These agencies represent a solid majority of the listings in the United States Government Manual (USGM).
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> To justify these actions, presidents generally look to some combination of constitutional powers, vague statutes, or expressed delegations of authority. Many of these agencies are among the most importantcreated in the modern era. Among the agencies created by executive order, the National Security Agency and the Peace Corps are clear standouts.
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> The president's political appointees also create agencies by executive action. While less directly attributableto presidential action, these agencies nonetheless are created within the purview of the White House and are designed by executive actors who usually share the president's concern for centralization, hierarchy, and political control. Since 1946, department orders are responsible for creating fully 40% of all new agencies listed in the USGM. Highlights include the Welfare Administration, the Defense Intelligence Agency, and the Bureau of Alcohol, Tobacco, and Firearms.

2 Howell, W. G., & Lewis, D. E. (2002). Agencies by Presidential Design. Journal of Politics, 64, 1095-1114

The Presidential Subdelegation Act of 1951, as codified in 3 USC § 301, provides for a general authorization to delegate functions as follows:

> The President of the United States is authorized to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President: Provided, That nothing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions. Such designation and authorization shall be in writing, shall be published in the Federal Register, shall be subject to such terms, conditions, and limitations as the President may deem advisable, and shall be revocable at any time by the President in whole or in part.

The problem of duplicative delegations and program fragmentation is well-known. Since 2011, GAO has been publishing annual reports on the identification, consolidation and elimination of duplicative government programs (31 USC § 712).[3] In practice, most of GAO's research deals with cost savings through opportunities for program consolidation, as opposed to any intrinsic statutory duplications that give leeway for informal reorganization by the President.

Subdelegation of powers is ubiquitous in modern administration. One may provide a rough typology as follows: a) the primary delegations from Congress to the President and executive agencies; b) the subdelegations from the President to principal and inferior officers *across* agencies; c) the internal subdelegations from principal officers and agency heads to inferior officers and career civil servants *within* agencies; d) the redelegation of powers *between* agencies via memorandums of understanding, interagency agreements, working groups, Economy Act agreements, and so on (the latter being subject to oversight by the Comptroller General). Powers for internal reorganization are often delegated by Congress to agency heads, which are then exercised through secretarial orders. These generally consist in adding and merging offices as

3 Pub. L. 111–139, title II, §21, Feb. 12, 2010, 124 Stat. 29, provided that: "The Comptroller General of the Government Accountability Office shall conduct routine investigations to identify programs, agencies, offices, and initiatives with duplicative goals and activities within Departments and governmentwide and report annually to Congress on the findings, including the cost of such duplication and with recommendations for consolidation and elimination to reduce duplication identifying specific rescissions."

opposed to abolishing them.[4] One example is the power of the Secretary of Defense to designate combat support agencies (10 USC § 191). The authority for departmental orders derives from 5 USC § 301: "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

In order to understand the President's power to carry out reorganizations in such a way as to "complete" statutory gaps and carry out regulatory coordination without encroaching on congressional terrain, it must be emphasized that the power to subdelegate functions, although statutorily granted, also has its independent constitutional basis. Gary S. Lawson has perceptively argued that "congressional statutes that try to limit this power of subdelegation – by, for example, requiring subdelegations to be in writing and published in the Federal Register, see 3 U.S.C. § 301 (2018) – are unconstitutional to the extent that they constrain rather than help 'carry[] into Execution' the President's constitutionally vested power of subdelegation."[5] Consequently, the President possesses what might be called a supplanting power over his principal officers, to be distinguished from the more well-known and much more intensively studied removal power.

It was the opinion of Attorney General Caleb Cushing in 1855 that any delegation of power by Congress to a Secretary or Administrator is at the same time automatically mirrored back into the President as superior, and that indeed the heads of departments were in the last instance alter egos of the President in whom the "executive Power" is vested[6]:

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4 "As a general matter, agency heads are limited in their reorganization actions by the provisions of the authorizing statute for the agencies they head. In some cases, Congress also has selectively limited secretarial reorganization authority by statute. For example, the Secretary of Energy is "authorized to establish, alter, consolidate or discontinue such organizational units or components within the Department as he may deem to be necessary or appropriate." This authority does not, however, extend to the National Nuclear Security Administration (NNSA), which is located within the Department of Energy. Instead, Congress elected to delegate the authority to reorganize NNSA to the administrator of that organization.

Likewise, although the Secretary of Homeland Security has the statutory authority, under Section 872 of the Homeland Security Act, to reorganize most parts of DHS, the Post-Katrina Emergency Management Reform Act of 2006 exempts FEMA from that authority." (Executive Branch Reorganization, Henry B. Hogue. 2017.)

5 Gary S. Lawson, Command and Control: Operationalizing the Unitary Executive, in Fordham Law Review (2023). Available at: https://scholarship.law.bu.edu/faculty_scholarship/3490

6 Relation of the President to the Executive Departments, 7 OP. ATT'Y GEN. 463 (1855)

Take now the converse form of legislation, that common or most ordinary style, in which an executive act is, by law, required to be performed by a given Head of Department. I think here the general rule to be as already stated, that the Head of Department is subject to the direction of the President. I hold that no Head of Department can lawfully perform an official act against the will of the President; and that will is by the Constitution to govern the performance of all such acts. If it were not thus, Congress might by statute so divide and transfer the executive power as utterly to subvert the Government, and to change it into a parliamentary despotism, like that of Venice or Great Britain, with a nominal executive chief utterly powerless – whether under the name of Doge, or King, or President, would then be of little account, so far as regards the question of the maintenance of the Constitution.

Without enlarging upon this branch of the inquiry, it will suffice to say that, in my opinion, all the cases in which a Head of Department performs acts, independent of the President, are reducible to two classes, namely: first, acts purely ministerial; and, secondly, acts in which the thing done does not belong to the office, but the title of the office is employed as a mere designatio personae.

Of the first class are all acts of legal attestation, such as the certificates of copies by Heads of Department, or the signature of warrants as the Secretary of Treasury. . . . These are acts in which the given signature is legally requisite; but as to which, the right to sign at all, depends on the appointment and applied direction of the President.

To the same class belong those acts, the performance of which is compellable by judicial mandamus. It is now perfectly settled that acts of this nature are few in number, being such only as are purely ministerial, it might almost be said mechanical, admitting of no discretion or volition, but prescribed by positive law.

Of duties imposed on a Head of Department, unofficial, and where his name of office appears only as a designatio personae, an example is afforded in the statute which provided "That the Attorney General of the United States shall be, and is hereby authorized and empowered to adjudicate the claims arising under the Convention concluded between the United States and the Republic of Peru.". . .

> I trust enough has been said . . . to establish the general position, that, in their executive acts, instructions, and orders, the Heads of Department speak for and in the authority of the President; that, if the act be within the lawful jurisdiction of such Head of Department, the direction of the President is presumed in law; that, whether to name the President or not, in a departmental order, becomes, in most cases, a matter of discretion, judgment, or taste, according to the subject matter; that, if he be named, it is for emphasis or enforcement, rather than from necessity; that, whether he be named or not, the act or order is to have legal effect as, by construction, the act or the order of the supreme executive authority, civil and military, of the United States.

In a more recent context, legal scholar Nina A. Mendelson has also shown that congressional delegations to the "Secretary" as opposed to the "President" do not reveal any specific intention that the former should receive special insulation from the latter, or that the President's directive authority should so be curbed.[7] Rather, statutory references to "the President" should be construed as generically pertaining to executive administration with any and all implied functions of oversight and direction.

Even though formal reorganization authority has not been renewed since 1984, the President possesses an extensive capacity for control through diffusion and recombination of existing statutory schemes such that new administrative structures can be built out of them. Jason Marisam has written of the President's "agency selection powers,"[8] Daphna Renan of "pooling powers,"[9] all

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7 "Since "President" cannot fairly be read as a generalized congressional expectation of greater presidential control, its omission in a simple delegation is weak support for reading that language as congressional intent to limit presidential control. In addition, such an interpretation does not make sense of some well-known statutory delegations. Those delegations are not consistent with understanding the term "President" to authorize greater presidential direction and the term "Administrator" or "Secretary" to limit that power.

Consider first the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund). That statute delegates most decisions to the President. Delegations under CERCLA to the President include the authority to devise the so-called National Contingency Plan-a plan for responding to releases of hazardous substances into the environment. Presidential delegations also include the power to investigate and to undertake response actions to address hazardous waste contamination at individual sites. Congress's expectation in delegating to the President in CERCLA could not possibly have been that the President would be supervising individual site cleanup decisions-or responding to individual cases of hazardous waste contamination-at the thousands of contaminated sites across the country. Such decision making would simply be infeasible." (Mendelson, Nina A. "Another Word on the President's Statutory Authority Over Agency Action." Fordham L. Rev. 79, no. 6 (2011): 2455-85)

8 Marisam, Jason, The President's Agency Selection Powers (March 18, 2013). Administrative Law Review, Vol. 65, p. 821, 2013, Available at SSRN: https://ssrn.com/abstract=2235088

9 Renan, Daphna, Pooling Powers (September 11, 2015). Columbia Law Review, Vol. 115, No. 2, 2015, Harvard Public Law Working Paper No. 16-22, Available at SSRN: https://ssrn.com/abstract=2659345

in the wake of a wider trend in research inaugurated by Jim Rossi and Jody Freeman's work on agency coordination in shared regulatory space[10], that is to say of interagency agreement mechanisms and the executive's role in fostering them.

Marisam divides the agency selection powers into two broad categories: *constitutional delegation powers* and *agency overlap powers.* The former, grounded on the Take Care Clause, allows for the President to set up oversight bodies in the case of overlapping jurisdiction between Congress and the President, and to create interagency hierarchies. An example of this is the "dual permitting" system under which the transmission of electricity and natural gas across borders requires a statutory permit issued by the Federal Energy Regulatory Commission and a presidential permit issued by FERC with the approval of the Secretary of State and the Secretary of Defense. The regulatory authority for this is founded on Executive Order 10485, in which Eisenhower invoked the Commander in Chief Clause to "complete" the Federal Power Act by interposing the cabinet secretaries on top of the statutory scheme. An example of an interagency hierarchy is Executive Order 13274, in which Bush II established an interagency task force chaired by the Secretary of Transportation so as to centralize environmental permits for transportation infrastructure projects that had been previously fragmented across Commerce, Interior, EPA and the Army Corps of Engineers.

The agency overlap power refers to the deduplication of a duplicative statutory delegation through the selection of a principal agency for a given policy domain. Both the Attorney General and the Office of Management and Budget are involved in settling agency turf wars. An example is Nixon's choice of the Nuclear Regulatory Commission to regulate air and water emissions from nuclear power plants over the competing claim of the EPA, a decision upheld in *Train v. Colorado Public Interest Research Group, Inc.* (1976). In a conflict between Interior's statutory authority to regulate offshore oil drilling and EPA's broad powers to regulate air and water pollution, Carter gave the authority for regulating offshore drilling emissions to EPA. The primary responsibility for regulating GMOs was assigned by the Reagan administration to USDA over FDA for reasons of business competitiveness.

10 Jim Rossi and Jody Freeman, Agency Coordination in Shared Regulatory Space, 125 Harvard Law Review. 1131 (2012)

Duplicative delegations (to be distinguished from *joint* delegations with clearly defined responsibilities) in general are ubiquitous, and hence present wide opportunities for the balance of power across agencies to be reconfigured[11]:

> Some duplicative delegations arise because of overlap created between two broad delegations to two different agencies. For example, the CAA gives the EPA broad authority to regulate emissions of toxins into the environment, and the Occupational Safety and Health Act gives the DOL broad authority to regulate the use of toxins in workplaces. Under the two broad delegations, both agencies have authority to regulate the use of the same toxins by some of the same regulated entities. Other duplicative delegations arise because a broad delegation to one agency may reasonably be construed as encompassing the authority granted to another agency in a narrow delegation. For example, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) has authority under the Federal Alcohol Administration Act to regulate the labeling of alcoholic beverages, while the FDA has broad authority under the Food, Drug, and Cosmetic Act to regulate all food and beverage labeling. The latter power includes the former—thus both agencies have the statutory authority to regulate the labeling of alcoholic beverages.
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> Duplicative delegations also occur even when both agencies have relatively specific delegations—mostly because of complexities in the regulated environment. For example, the EPA has authority under the Toxic Substances Control Act to regulate new genetically modified microorganisms, while the United States Department of Agriculture (USDA) has authority under the Plant Protection Act to regulate "plant pests." However, some new microorganisms are also plant pests. Thus, both agencies have authority to regulate some of the same microorganisms. In all of these examples above, the duplicative delegations emerged in separate statutes.
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> Duplicative delegations may also arise from separate provisions in the same statute, though. For example, § 402 of the Clean Water Act authorizes the EPA to permit discharges of pollutants other than dredged or fill materials into waterways, while § 404 of the Clean Water Act authorizes the Army Corps of Engineers to permit the discharge of dredged or fill materials into waterways. However, because it is unclear in the statute whether "fill materials" include solid waste, either agency could reasonably claim authority to permit the discharge of solid waste.

11 Marisam, J. (2011). DUPLICATIVE DELEGATIONS. Administrative Law Review, 63(2), 181–244.

Pooling of powers, in contrast, happens when interagency coordination amplifies the collective authority of the agencies acting in concert above and beyond their individual statutory schemes alone. Resources across agencies are mixed and matched to produce augmented structures. Often this is necessary in order to bring forth institutional expertise that would otherwise be dispersed across insular agency cultures, or to cross boundaries especially between domestic and foreign intelligence (informally known as "the wall") in the interests of national security. Memorandums of understanding between DHS and NSA that augment the former's cybersecurity capabilities and increase the latter's influence in the domestic sphere are one example of pooling. Another example is "Team Telecom," an interagency group consisting of DoJ, FBI, DoD and DHS, which in turn interacts with FCC. The FCC has the licensing authority for telecom carriers with foreign ownership stakes. Team Telecom interposes itself as a "lever" on top of the FCC's licensing authority to negotiate an additional network security agreement, and FCC tacitly agrees not to grant a license until the agreement with Team Telecom is finalized first. Another example of pooling distinct statutory legal authorities is an interagency task force on workplace safety between OSHA, EPA and DoJ. In effect, whereas the legal remedies under the Occupational Safety and Health Act are fairly limited and consist of small fines for a criminal misdemeanor, the DoJ and EPA inject their own expertise in criminal and environmental law to train OSHA officers into indirectly enforcing workplace safety by those other, more severe means. Hence, OSHA's policy goals are achieved through the intermediation of other agencies.

In summary:

- Although the reorganization of departments, agencies and offices formally rests with Congress, the President functionally possesses a substantial deposit of powers through subdelegations in the executive branch that are ultimately vested at their root under Article II.
- Department and agency heads can prescribe internal regulations under 5 USC § 301, which may include reorganization unless circumscribed by statute. It is sometimes the case that Congress will bless a secretarial reorganization order in an appropriations bill.
- Duplicative delegations and overlapping agency jurisdictions are resolved as a matter of course by the executive, which offers significant discretion to pool resources, form interagency hierarchies, create policy councils and task forces in the Executive Office, designate primary agencies within certain areas of responsibility, and so on. Departmental and agency boundaries are *de facto* reconsolidated through faithful execution of the laws.
- Transfers and reprogramming of funds by the OMB, in addition to interagency transfer agreements under the Economy Act or specific authorizing statutes, can allow for executive-created governmental entities to subsist even without a formal appropriation.
- Temporary structures created by executive order and memorandum are sometimes formalized and blessed after the fact by congressional statute. Both the Peace Corps and Department of Homeland Security were created this way. The President's *de facto* reorganization authority can therefore vary with his political capital.