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Presidency First: The Unitary Executive Governs America

Abstract

While considerable debate has occurred over the founders' original conception of the executive's proper role, most can agree that the unitary executive theory developed during the George W. Bush administration expanded executive power far beyond that original conception. Though a vocal opponent to Bush's expansion of power, President Barack Obama asserted similarly sweeping powers in both foreign and domestic policy. While President Donald Trump demonstrates clear ambivalence towards an all-encompassing rule of law, early indicators suggest that he will exhibit a proclivity for robust assertions of executive power that will rival or surpass his immediate predecessors even if, in some cases, he would prefer to punt politically challenging issues to Congress under the guise of not having the power to act. For its part, Congress has largely appeared unwilling or unable – functional equivalents – of restraining expansions of executive power by any of the three most recent presidents. As such, the unitary executive is alive and well ... and, even if it is not actively expanding under Trump, previous expansions under his predecessors mean there is plenty of executive authority to go around.

Keywords

Executive Power, Unitary Executive, Donald Trump, American Presidency, Executive Orders

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Abstract

While considerable debate has occurred over the founders' original conception of the executive's proper role, most can agree that the unitary executive theory developed during the George W. Bush administration expanded executive power far beyond that original conception. Though a vocal opponent to Bush's expansion of power, President Barack Obama asserted similarly sweeping powers in both foreign and domestic policy. While President Donald Trump demonstrates clear ambivalence towards an all-encompassing rule of law, early indicators suggest that he will exhibit a proclivity for robust assertions of executive power that will rival or surpass his immediate predecessors even if, in some cases, he would prefer to punt politically challenging issues to Congress under the guise of not having the power to act. For its part, Congress has largely appeared unwilling or unable – functional equivalents – of restraining expansions of executive power by any of the three most recent presidents. As such, the unitary executive is alive and well ... and, even if it is not actively expanding under Trump, previous expansions under his predecessors mean there is plenty of executive authority to go around.

On February 6, 2017, John Yoo published an op-ed in *The New York Times* entitled “Executive Power Run Amok” in which he castigated new President Donald Trump for an apparent lack of knowledge of how executive power works as well as a perceived extraconstitutional mandate to ameliorate what Trump called “American carnage” in his inaugural address. This was ironic given that it was Yoo who was the architect of arguably the most dramatic expansion of executive power in American history when he conceived – and codified through Office of Legal Counsel (OLC) memos binding on the executive branch – a virtually unchecked level of authority for President Bush to conduct the “War on Terror.” Executive power has long been at the forefront of the American political conversation, and, in recent years, has seen a huge expansion as America has shifted from an age of congressional government to a new era of presidential government defined by an administrative presidency that governs through executive action. In many respects, Congress has acquiesced – and, in some cases, directly aided – to this expansion in executive power. Both

Presidents Bush and Obama zealously guarded and asserted the authority of the executive to implement consequential policies both in the domestic and foreign realms and exerted singular control over the executive branch as a unitary element. Although President Trump has, at times, struggled to manage the executive branch and has punted key policy decisions to Congress, the opening of his presidency suggests that he has no qualms about asserting unilateral, massive claims of executive power when it is convenient, which likely portends the continued expansion of executive power as robust congressional oversight seems to be an increasingly anachronistic concept.

As they gathered to draft the Constitution in Philadelphia during the summer of 1787, the framers ultimately aimed to strike a balance between the tyrannical executive from whom they had declared independence just over a decade prior and the Articles of Confederation, which essentially established 13 loosely-aligned sovereign states that were thoroughly inept to govern as a cohesive country. After the Constitutional Convention spent the summer drafting Article I, it fell to Alexander Hamilton – an early proponent of a powerful, singular executive – to draft Article II along with a small committee (Warshaw 2005, 1-2). Hamilton subsequently wrote “Federalist No. 70,” which argued that only a unitary executive with power over the entire executive branch could effectively execute the duties of the president; the executive must have “energy” and discharge its duties with “[d]ecision, activity, secrecy, and despatch [sic],” (Hamilton 1788b). Hamilton’s writings inspired constitutional scholars of the late 20th and early 21st centuries to develop the theory of a robust unitary executive whose “executive power” – vested in Article II, Section 1 of the Constitution – is virtually unchecked, particularly in foreign policy (Divoll 2013, 152; Crouch, Rozell, and Sollenberger 2017, 564). While the original unitary executive theory – as developed during the Reagan administration – generally suggests that all executive power is vested in the president, who wields total control of the executive branch, under the George W. Bush administration, OLC lawyers such as John Yoo developed a novel concept that the president’s authority as “commander-in-chief” and his oath to “preserve, protect, and defend” the Constitution of the United States implies that

neither the courts nor Congress can question any action the president says are fulfilling those responsibilities (Crouch, Rozell, and Sollenberger 2017, 564-66; Savage 2007, 123; J. Yoo 2009; J. Yoo 2017). Both at home and abroad, Bush had “a propensity, and a capacity, to go it alone,” (Howell 2005, 418-19).

Historical scholarship such as the magnum opus of Richard Neustadt (1991) suggests that the president inhabits an inherently weak office that draws its only power from a capacity to persuade. While the public expects presidents to “accomplish far more than their formal powers alone permit,” presidents can only accomplish those objectives through persuasion (Kleinerman 2009, 89, 116). William Howell, however, wrote a book entitled *Power Without Persuasion* that argues that persuasion is not a necessary component to wield massive executive power. In a subsequent article (2005), Howell wrote,

The image of presidents striking out on their own to conduct a war on terrorism or reconstruct civil rights policies or reconstruct the federal bureaucracy contrasts sharply with scholarly literatures that equate executive power with persuasion and, consequently place presidents at the fringes of the lawmaking process. (421)

Further, with perpetual gridlock seemingly endemic in Congress over the last few decades as well as the time legislators have to spend on legislating (as the time they spend fundraising, for example, continues to grow) constantly diminishing, presidents have all the more opportunity to take unilateral action (Howell 2005, 425, 436).

No modern president seized these opportunities with more unapologetic fervor than George W. Bush. Even before the terrorist attacks on September 11, 2001, Bush had ordered a massive audit of regulations within federal departments and pioneered the White House Office of Faith-Based and Community Initiatives, an integral component of his “compassionate conservatism” agenda (Howell 2005, 434-35; Warshaw 2009, 88-91). This development came under the auspices of the president’s power to supervise the executive branch and “take care” that the laws be faithfully executed; ample

regulatory space was created by previous legislative ambiguity, and the president seized the opportunity to act, picking up the mantle of Bill Clinton, who had “perfected the art of go-alone governing,” (Howell 2005, 417; Article II, Section 3; Kiefer 1998; Warshaw 2004).

However, Bush’s greatest expansion of the powers of the unitary executive came in the realm of foreign policy after 9/11 (J. Yoo 2009; Yoo, Calabresi, and Colangelo 2005, 722-29; Perine 2006). From holding detainees as “enemy combatants” with no legal rights in an extraterritorial prison camp subject to trial only by military tribunal to a massive new spying program, Bush robustly asserted executive power as commander-in-chief to do what he saw as necessary to protect the American people (Perine 2006; Howell 2005, 418). In fact, John Yoo argued that no other branch had the authority to review the president’s decisions; in a speech, he said, “Congress cannot use ... legislative powers to change the Constitution’s allocation of powers between the president and Congress in the war power,” (Perine 2006). This notion – which underlay some of Bush’s most aggressive expansions of power – has vast consequences ... and, with some, notable exceptions, namely Senator John McCain, who famously declared torture to be out of bounds no matter how heinous the crimes of the alleged offenders nor how absolute the president’s supposed authority by saying, “It’s not about who they are; it’s about who we are,” Congress largely acquiesced, particularly when it was under Republican control (Cole 2005; Perine 2006). Accordingly, the Bush administration, fueled by trailblazing lawyers and hawkish neoconservatives (e.g., Secretary of Defense Donald Rumsfeld and Vice President Dick Cheney), waged a multi-theater war on terror that involved the unprecedented extension of powers of the unitary executive (Warshaw 2009).

On the domestic side, the unitary executive theory was applied in full force as well. Although congressional committee investigations have long been acknowledged as crucial tools to expose “dark places in government” – a characterization that dates at least to the Brownlow Commission’s landmark 1937 report advocating significant expansion in presidential staff – Bush’s unitary executive waged a coordinated campaign to limit cooperation with investigations that might be

harmful politically or otherwise to the administration (Kitrosser 2015, 171). The Office of Management and Budget (OMB) habitually reviewed (and revised, or even rewrote) congressional testimony and upcoming government reports, political staff suppressed agency rulemaking particularly on environmental matters, and, in some cases, political staff also suppressed – or altered – the results of scientific studies (Kitrosser 2015, 181, 185-86; Warshaw 2009, 106). Furthermore, Cheney coordinated a pro-business presidency through the White House (and specifically through a newly integrated Executive Office of the President that eliminated the separate Office of the Vice President, whose deliberations may not have been protected by executive privilege) (Warshaw 2009, 104-08). By using the White House’s Council on Environmental Quality, for example, to spearhead environmental policy rather than the Environmental Protection Agency, internal deliberations were shielded from congressional inquiry, something the White House went to court several times to defend, and policies reflecting the goals of the executive were implemented largely away from public view (Warshaw 2009, 109-14). As Howell noted in 2005, “Bush has not stood idly by while committee chairs debated whether to introduce legislation on his behalf. Instead ... he has seized the initiative, he has acted boldly (some would say irresponsibly, or even unconstitutionally), and then he has dared his political adversaries to counter,” (421).

The other notable realm in which Bush asserted sweeping executive authority is in his penchant for issuing signing statements to define his interpretation of statutes he was signing into law. These almost unreviewable (establishing standing is extremely difficult) statements served, in some cases, as a de facto line item veto (something the Supreme Court ruled unconstitutional in *Clinton v. City of New York* (1998)), and, in others, allowed the president to veto almost the entirety of a statute by stating he would interpret it “consistent with” his authority as commander-in-chief, a favorite phrase of Bush signing statements (May 1998, 72, 95; Savage 2007a). Decades earlier, Cheney had decried the erosion of presidential power in the “Minority Report” on Reagan’s actions in the Iran-Contra Affair; he later penned a separate memo that stated the president has “inherent”

power to exercise Constitutional prerogatives, and it is left to the president's judgment what those prerogatives are (Cheney 1989, 32). The administration's extensive use of signing statements became a flashpoint in the subsequent presidential campaign, and it led many to decry the return of the "imperial presidency," which Charlie Savage included in the title of his 2007 book, an allusion to Arthur Schlesinger's 1973 classic by the same name (2007a; 2007b). Just as Bush did not create the unitary executive theory (at least insofar as the president has sole power to supervise the entirety of the executive branch), Bush did not create the concept of signing statements – their use had been on the rise over the administrations immediately before him – but he harnessed their use to revolutionize their power to alter administrative interpretation of statutes and to subvert Congress's intentions (May 1998, 72-77; Savage 2007b).

When Barack Obama took office, he promised a different approach to executive power that respected the intentions of Congress and was more accountable to the American people (Savage 2007b). A constitutional law professor, Obama explicitly rejected many of Bush's assertions of executive power and seemed to dismiss the unchecked unitary executive theory as the work of overzealous constitutional neophytes. Nevertheless, he ultimately embraced some of its core tenets including the warrantless surveillance program exposed by Edward Snowden as well as extrajudicial killings of American citizens when he ordered the drone strike that killed suspected terrorist Anwar al-Awlaki in 2011 after administration lawyers determined he had requisite executive authority to do so (Savage 2007a; Miller 2014).

Obama was similarly aggressive in taking executive action domestically. After Democrats lost control of Congress in 2010, White House Senior Counselor John Podesta presented Obama with 47 potential initiatives that could commence from the Oval Office without Congress (Gitterman 2017, 40). The next year, Obama unveiled his "We Can't Wait" initiative, under which he took several executive actions without Congress including raising the minimum wage for home-care workers, instituting tax credits for disabled veterans, and expediting renewable energy projects

(White House 2011; White House 2012; Flavin 2011). Obama's penchant for "legislating from the Oval Office" was frequently derided particularly by Republicans in Congress, namely Ted Cruz, but, even with firm majorities in the later years of the Obama presidency, Republicans seldom mustered the ability to stop Obama from implementing sweeping new federal programs such as Deferred Action for Childhood Arrivals (DACA), which Obama signed after Congress failed to pass the DREAM Act (Cruz 2014; Alcindor and Stolberg 2017). Later in his presidency, Obama used his executive authority to enter executive agreements with Iran and the P5+1 powers to curb the development of the Iranian nuclear program as well as to negotiate the Trans Pacific Partnership and the Paris Climate Accords (from both of which Trump would later withdraw, exercising executive authority of his own as the nation's "sole organ" in foreign policy, a power codified in *United States v. Curtiss-Wright Export Corp* (1936)).

With respect to signing statements, Obama committed, upon taking office, to issue them only under specific circumstances, not to subvert congressional intentions, and never for political reasons, a direct rebuke to Bush, but, nevertheless, he issued a panoply of official signing statements (and, as his presidency progressed, more opaque statements of administrative policy and OLC opinions) in many of the same ways as those which, under the Bush administration, drew Obama's harsh criticism (Kelley 2012, 1135; Crouch, Rozell, and Sollenberger 2013, 888-89). Overall, despite public promises to roll back the imperial presidency of Bush, Obama not only continued its policies during his two terms in office, he has expanded its utility into the domestic arena in ways that were previously unimagined. His presidency could rightfully be characterized not only as the "imperial presidency, part three," but also as the "legislating presidency," as he seized the lawmaking mantle that Congress abdicated.

Donald Trump took office determined to "drain the swamp" of Washington insiders and establish a presidency based on "winning" for the "forgotten men and women" of America (Trump 2017c). One unquestioned power of the president is the power to make appointments in the executive

branch. However, particularly in the State Department, the Trump administration has done so at an historically slow pace, which is ostensibly impeding his goal to dismantle the Washington bureaucracy. In recent weeks, Trump has suggested that he may leave many positions unfilled, which is of questionable constitutionality; courts have ruled that when Congress creates an office, the president is obliged to fill it as part of his duty to “take care” that the laws be faithfully executed (*Minnesota Chippewa Tribe v. Carlucci* 1973; Fisher 1997, 27-28; Fonzzone and Geltzer 2017). This may well become a subject of litigation if he indicates that some key positions will be permanently unfilled. Nevertheless, despite his slow pace in assembling a team to help him execute his duties, Trump has taken some major executive action.

Although his first ten months in office provide a limited sample size, already, examples abound that demonstrate Trump’s willingness to robustly assert his own unilateral authority as commander-in-chief to implement his agenda in both foreign and domestic realms. Emboldened by populist advisors Steve Bannon and Stephen Miller, Trump issued a sweeping travel ban just seven days after he took office that barred foreign nationals from seven Muslim-majority countries from entering the United States (2017d; Warshaw 2017). Outside advisor Rudy Giuliani later told FOX News that Trump had asked how to do a “Muslim ban” legally, and this executive order is what a team of Republican lawyers developed (Wang 2017). After a federal court struck down the ban, Trump tweeted on February 4, “The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!” It was this series of events that prompted John Yoo to castigate the Trump administration in a *New York Times* op-ed that called the policy “ill-conceived” and to suggest Trump’s lack of governmental knowledge would undermine his presidency (J. Yoo 2017). However, echoes of Yoo’s theory that the president’s power to protect America as commander-in-chief cannot be reviewed by other branches of government are apparent in Trump’s tweets, even if they are less eloquently articulated. After all, the name of the

executive order was a direct reference to that power: “Protecting the Nation from Foreign Terrorist Entry into the United States.”

While Trump’s apparent undermining of civil institutions earned him rebukes from both sides of the aisle (including then-Supreme Court nominee Neil Gorsuch), he has largely continued to harshly criticize figures within the justice system whom he deems adversarial to his agenda. In fact, he fired Preet Bharara, U.S. Attorney for the Southern District of New York, which raised questions as to whether the decision was influenced by a potential Bharara investigation that would touch the president or his family (M. Green 2017). Previously, he fired Acting Attorney General Sally Yates ostensibly for refusing to defend his travel ban, although he later called her “weak” on immigration, raising further questions as to his underlying motivations (J. Yoo 2017).

C. Yoo, Calabresi, and Colangelo (2005) frame their examination of the unitary executive’s history around three devices: the president’s power to remove subordinate executive branch officials, the president’s power to direct their exercise of discretionary executive power, and the president’s power to veto or nullify subordinates’ exercise of such power (607). As noted, Trump certainly has demonstrated a capacity to fire officials who refuse to enact his agenda, but his record in directing their utilization of discretionary executive power has been less consistent. Trump has repeatedly lambasted Attorney General Jeff Sessions’ decision to recuse himself from the Russia investigation, which ultimately led to the appointment of Robert Mueller as a special counsel (Baker, Schmidt, and Haberman 2017). Ostensibly, Trump has no direct authority to fire Mueller – he would have to first go through Sessions and his deputy, Rod Rosenstein, which would trigger a Nixon-esque “Saturday Night Massacre” situation; accordingly, the unitary executive theory appears not yet to have reached its outer limit, which would seemingly allow for a scenario in which Trump fires Mueller directly (Rudalevige 2006; Schlesinger 1973; Columbus 2017). Although Attorney General John Ashcroft appointed a special counsel during the Bush administration to investigate Karl Rove and Scooter Libby, the circumstances were different since Bush would never come under investigation and he

had no (extrinsic) hostility towards it (Calabresi and Yoo 2008, 410). One example where Trump has had success in directing subordinates to implement his agenda is at the EPA, which has moved quickly to dismantle Obama's legacy of executive action on climate change and renewable energy issues by implementing policies friendly to key industries allied with Trump, namely coal (Davenport and Lipton 2017; Lipton and Friedman 2017). Using Yoo's, Calabresi's, and Colangelo's framework, Trump has had mixed success in enhancing the power of the unitary executive.

Overall, Trump's early executive orders largely seem to be aimed as reflexive rollbacks of Obama policies (White 2017, 15). Interestingly, after Stephen Miller observed that Trump's menagerie of early executive orders constituted him "doing more" in the first three weeks of his presidency than most presidents ever accomplish, Hoover Institution Research Fellow Adam White cautioned,

If the president and his supporters are seduced by the seemingly friction-free ease of signing executive orders, they may become less interested in doing the hard, slow work of engaging the legislative process. That was ultimately the story of the Obama administration; it might become the story of the Trump administration. (21)

Notably, Trump has punted several key (and thorny) political issues to Congress rather than continue executive programs of the past by announcing the end of DACA as well as the cessation of cost-sharing reduction payments under the Affordable Care Act. While Zachary Karabell wrote in *Politico* (2017) that Trump is "throwing away" creative extensions of executive power conceived under prior administrations, which forces Congress to act in realms where it should have acted all along, an equally likely scenario seems to be that Trump, whose presidency is predicated on taking credit for positive things (e.g., the stock market, battlefield gains against ISIS, etc.) and avoiding blame for negative things (e.g., the collapse of healthcare legislation, the potential for the deportation of DREAMers), is simply setting himself up to avoid blame should the congressional action for which he hopes go awry. After the collapse of the Senate healthcare plan, Trump was quick to blame Senate Republicans rather than accept responsibility, but after the House passed a plan, he convened

a celebration in the Rose Garden to take credit, which is emblematic of his early approach to governing. For his part, Karabell wrote, “It is not entirely clear whether Trump ... fully grasps that he is devolving presidential powers rather than seizing them. But it is happening nonetheless,” (2017). Howell would probably counter, however, that presidents have historically taken more significant executive action in periods of congressional gridlock (which would certainly characterize the end of the Obama administration) and less when the majority party is larger and more unified (which would ostensibly characterize the present scenario), and, as such, Congress should have the capacity to address healthcare and immigration without substantive executive action (Howell 2005, 430).

For its part, the GOP-controlled Congress has not conducted much robust oversight of the administration. Though several congressional committees are investigating Russia’s involvement in the 2016 election, no serious oversight of the Trump administration’s day-to-day affairs has yet materialized leaving Trump relative free rein to implement executive action as he sees fit, a similar prerogative to what Bush enjoyed (Perine 2006). That said, Republican Senator Bob Corker convened a hearing in the Foreign Relations Committee to discuss the president’s unilateral authority to launch nuclear weapons (Wilkie 2017). While the hearing may not have yielded new legislation, it does represent a tacit rebuke to Trump’s bombast towards North Korea and Iran from within his own party, which may portend more robust oversight in the future should Trump’s inner-party alienation continue. Already, a few other Republican senators – most notably John McCain – have indicated serious concern with Trump’s temperament and agenda, so future oversight may not be entirely off the table (Phillips 2017). Certainly, a potentially Democrat-controlled Congress after the 2018 midterm elections would likely subject Trump to much more aggressive legislative oversight. In that scenario, the Trump administration would undoubtedly redouble its efforts to design executive action to further its policy goals like it has done at the EPA thus far and like Obama did in the latter part of his term. Further, he may begin to make more frequent use of signing statements, which, to date, he

has done only on a few occasions (most notably in asserting that Congress went too far in restricting executive power on the Russia sanctions bill) (Savage 2017b).

America today is in an era of presidential government where the White House makes policy through executive orders and presidential memoranda. This era has spanned presidential administrations of both parties, and while the outer contours of executive power have ebbed and flowed, nothing in the first ten months of the Trump administration indicates a substantive departure from the status quo, which is that the unitary executive is gradually expanding to compensate for the ever-decreasing capacity of Congress to enact policy through traditional legislation. While Trump may not make forays into new arenas of executive power, the dramatic expansion of the imperial presidency during the beginning of the 21st century has left him with plenty of authority to enact his agenda. More than two centuries ago, the Founding Fathers fled the tyranny of a unilateral executive in Great Britain and devised a system of checks and balances to avoid a repeat in the new United States. These checks and balances have largely eroded as the executive branch has grown stronger in what is generally a zero-sum game with the legislative branch. Only time will tell what the future of the American Presidency holds, but one truth surely endures: a power vacuum always fills itself, and, unless Congress reasserts its lawmaking prerogatives, it may well fade into feckless obscurity, which only enhances a plenary executive authority. Whether Donald Trump can capitalize on that opportunity to make his presidency as consequential as that of his two immediate predecessors remains unclear, but what is abundantly clear is that Trump's early actions as president demonstrate that he embodies what Crouch, Rozell, and Sollenberger (2017) call the "unitary executive mindset" and, likely, Trump will seek only to extend his power whenever it is convenient to do so (570). In effect, the Donald Trump will put the "presidency first."

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