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Absolute Presidency: History and Framework of American Executive Government

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Garrett is a senior seeking a Bachelor of Arts Degree in Political Science. His research interests include American Politics but also cover topics such as church-state relations, the subject of his senior thesis. When writing this paper in the first half of his junior year, he was inspired to explore the true authority and discretionary powers of the President within the executive branch.

In the United States, one of the most important and oldest political debates has been contested since the Constitution was written: the extent of presidential powers. While a quick read of the Constitution may give the reader a simple answer at first glance, the reality of this discussion is quite complex. Not only is the text of the Constitution thoroughly read and analyzed, but documents from a wide variety of sources are routinely examined, ranging from the Federalist Papers to twenty-first century news articles. Indeed, the debate regarding the exact powers of the presidency is not only a matter of legal concern, but a debate — whether accidentally or purposefully — centered on the spirit and values of American identity. But while numerous sources are consulted whenever a discussion of this nature manifests, the discussion is originally based on the beginning words of Article II of the Constitution. The subject of controversy surrounds these words, taken from the article: “The executive Power shall be vested in a President of the United States of America.”¹ What does it mean to have powers “vested” in a person? And for what reason is the word “Power” capitalized; should that imply a special significance? Any reader would surely now realize the language of the Constitution can at times be vague and even nuanced. However, the primary

perspective analyzed in this paper is that of the “unitary executive” theory of American government. According to the scholar Richard Waterman in a journal for *Presidential Studies Quarterly*, the unitary executive theory “posits that the president has the sole responsibility for the control and maintenance of the executive branch.”² How this theory evolved is another question.

A brief exploration of American history will reveal to the reader the true nature of presidential power. Throughout the political eras of the republic, numerous presidents have shown their commitment to unitary executive theory, whether or not they gave it that name. Time and time again, American presidents have maintained their supreme authority within the executive branch.

History of Presidential Power: The Revolution and Independence

Following the onset of war in British North America, the rebellious colonies sought to organize themselves to better combat the Empire’s might. During the Second Continental Congress, the political elites of the American colonies elected to unite the colonies under a central government. This first period of government was guided by the fledgling union’s founding document: the *Articles of Confederation and Perpetual Union* (known thereafter as simply the Articles of Confederation). The Articles of

¹ U.S. Constitution, Art. II, Sec. 1, Cl. 1.

² Waterman, “The Administrative Presidency, Unilateral Power, and the Unitary Executive Theory.”

Confederation was a truly remarkable document. Spurred by the philosophers of liberalism and the fires of revolution, the founders of the union sought to embrace republicanism at every aspect of government. As such, all legislative and executive power was granted to Congress, to avoid the possibility of tyrannical government under one man. While their efforts may easily be called noble, the newborn federal government was essentially ineffective at what it was supposed to do: govern. Indeed, even the official website of Congress admits the Articles had fundamental flaws.³ The years that followed the creation of the Articles of Confederation were characterized by political instability and social unrest; not to mention the War for Independence. Marred with frustration, many pursued change.

The calls for change culminated in what is now known as the Constitutional Convention. Originally convened to revise the provisions of the Articles of Confederation, what ultimately occurred was the nullification of the Articles of Confederation and creation of the Constitution of the United States. The new Constitution, essentially drafted by James Madison, granted significantly more power to the federal government, which now included a single President, who would execute the law. The office of president was a highly controversial one, with both supporters and opponents to the institution publishing essays to convince the Convention and the public. Regarding the presidency, the federalist faction (those who supported strong government) had the essays known as *Federalist Nos. 51* and *67*. The anti-federalist faction (beliefs can be discerned) had the essay known as *Cato No. IV*. In *Federalist No. 51*, Alexander Hamilton — or James

Madison — asserts that “each department [branch of government] should have a will of its own” and should be organized in a way “that the members of each should have as little agency as possible in the appointment of the members of others.”⁴ Those in the anti-federalist faction would balk at such presidential independence, citing the vast array of powers granted to the president by the Constitution; and conclude that “the exercise of these powers therefore tend either to the establishment of a vile and arbitrary aristocracy, or monarchy.”⁵ This poetic and embellished language would then be repudiated by federalists in documents such as *Federalist No. 67*, dismissing it as unfounded defamation.⁶ Ultimately, the federalists won the debate, and the new Constitution was ratified with unanimous consent.

The Decades Following Independence

Although the Constitutional Convention granted extensive powers to the federal government, there was no consensus as to what exactly the president could legally do (even after the Constitution’s ratification). Much of the uncertainty concerned the president’s authority within the executive branch itself. This confusion was not universal, however, as the men who held the office of president in the early days of the republic seemed to all agree that any powers granted to the executive branch were to be derived from the president. According to *The Unitary Executive: President Power from Washington to Bush*, the first seven Presidents understood their “power to control law execution and to remove officials as part of their understanding of the executive’s constitutionally granted prerogatives.”⁷ This even includes Thomas Jefferson, thought correctly by many scholars as an ardent

³ “Intro.6.2 Weaknesses of the Articles of Confederation.”

⁴ Publius, 1788.

⁵ Cato, 1787.

⁶ Hamilton, 1788.

⁷ Calabrisi and Yoo, “The Unitary Executive: Presidential Power from Washington to Bush.”

opponent to strong government. But, “[a]lthough Jefferson hated executive tyranny, he was not opposed to the [idea] that a unitary and independent [executive] should be created.”⁸ The belief in a unitary executive authority continued throughout the years preceding the Civil War, with minor novelties in different presidential administrations.

The Civil War

During the American Civil War, the powers and authority of the president grew from the provisions interpreted by the preceding incumbents. To review history, the years directly before the Civil War were stressful indeed. At the time, the United States was embroiled in a fierce debate regarding the institution of slavery. Understandably, many feared one side or the other would act rashly and dissolve the union. In an attempt to alleviate the stressful situation, lawmakers negotiated the Compromise of 1850. Designed by Senators Henry Clay (Whig) and Stephen A. Douglas (Democratic), the provisions of the Compromise included the following: allowing the Western territories to decide whether or not to permit slavery (dubbed “popular sovereignty”); prohibiting the slave trade in Washington, D.C.; and the Fugitive Slave Act of 1850. This final provision required all escaped slaves, once captured, to be returned to their masters. Additionally, the Act required all officials and citizens to cooperate. While the Compromise of 1850 was intended to calm the national situation, the effects of this legislation fostered the exact opposite. The requirement that fugitive slaves be returned infuriated abolitionists, and the prohibition of the slave trade in the District of Columbia caused outrage among the slavers and Southern population. Additionally, the provision that Western territories decide the status of slavery by popular sovereignty

caused turmoil, especially in Kansas Territory. A few years after the Compromise of 1850 was adopted, Kansas was being considered for statehood. Since it had yet to declare a position on slavery, a great number of proslavery and antislavery Americans rushed to the territory to influence its decision. The resulting Bleeding Kansas conflict would last for seven years and is seen by many as a prelude to the Civil War. Once the war came, many turned to the incumbent president, Abraham Lincoln, for guidance.

According to many scholars, including the authors of *Presidential Power: Forging the Presidency for the Twenty-First Century*, “[d]uring system-threatening crises, such as the Civil War..., the American people have demonstrated a willingness to transform [political structures] into more centralized forms for the purpose of defeating the enemy.”⁹ With the destruction of the union seemingly imminent, the American public — generally speaking — threw their support to Lincoln to preserve their nation, by any means necessary. As such, Lincoln called for the enlistment and readying of thousands upon thousands of soldiers as soon as he entered office. Tensions became increasingly high, and after “the attack on Fort Sumter, the American Union transformed itself into a more centralized war-making apparatus, largely under Lincoln’s direction.”¹⁰ To preserve the union, Lincoln curtailed many American precedents and procedures, causing dismay even to some of his Republican colleagues. Along with the abolition of slavery, this period of war also caused the Lincoln administration to create a stronger and more influential executive.

⁸ Ibid.

⁹ Riley, “The Limits of the Transformational Presidency.”

¹⁰ Ibid.

American Imperialism and the Progressive Era

Following the Reconstruction Era, the United States found itself in a state of relative wealth and stability. And among sovereignties, with wealth and stability comes ambition and expansion. The United States was no exception to this trend and sought to widen its influence throughout the world. As the parent-nation Great Britain had practiced for centuries, the United States grew hungry for a set of colonies to call its own. However, the country had essentially exhausted its continental ambitions in the Americas, since all territory was claimed or controlled by powers the United States respected enough to not challenge. As fortune would have it, a great opportunity presented itself: the sinking of the U.S.S. Maine in Cuba, a Spanish possession. Spurred by outrage, the United States declared war on Spain. Victory was swift; in the span of only four months, the United States had conquered the Spanish territories of Cuba, Puerto Rico, Guam, and the Philippine Islands. One could only imagine the explosion of nationalist sentiment that spread across the country. This story makes total sense when considering who was president at the time: William McKinley. In terms of foreign policy, McKinley was an absolute nationalist. And in domestic terms, it would be no stretch to categorize him as a firm believer in the unitary executive as well. In addition to his heavy-handed approach in government, “McKinley successfully asserted ‘the primacy of the President in foreign affairs.’”¹¹ McKinley’s firm belief in American exceptionalism and his position regarding presidential authority fit neatly together.

President McKinley’s successor, Theodore Roosevelt, would also expand the power of the federal government, but for different reasons. Roosevelt is well-known today as a

continual user of what he called the “bully-pulpit”; he would use his charisma and take-charge attitude to assure the nation that he was protecting them from the slow and inactive Congress.¹² By routinely appealing to the public, Roosevelt could more easily ensure the passage of his policies. President Roosevelt’s appeals to the people were not his only defining characteristic, however. Today, the name “Theodore Roosevelt” conjures images of a mustached man combatting the corporate trusts. Through his “trust-busting” campaign, Roosevelt guided the federal government in breaking the business hegemonies created over the past few decades. There is no doubt that Theodore Roosevelt’s leadership was a prime example of the unitary executive in action; had he been forced to share authority in the executive branch, many of his progressive policies could not have been implemented in any meaningful degree.

The Great Depression and Post-War America

Decades pass and the United States has left the care-free days of the Roaring Twenties and catapulted into the economic and societal starvation that was the Great Depression. The policies of *laissez-faire* government left the United States with a shattered economy and record unemployment. Unsurprisingly, this societal struggle caused many to call for change. At the forefront of this movement was another member of the Roosevelt family: Franklin Delano Roosevelt. The administration of FDR (as he became known) would prove to be one of the most important in American history, due to his robust leadership in combatting both the Depression and the Axis Powers.

Following the “hands-off” approach by successive Republican administrations, in addition to a whole slew of other factors, the United States found itself in the midst of the worst economic disaster in history. Herbert Hoover, the unpopular incumbent, was

¹¹ Calabrisi and Yoo, “The Unitary Executive: Presidential Power from Washington to Bush.”

¹² Calabrisi and Yoo, “The Unitary Executive: Presidential Power from Washington to Bush.”

defeated in the 1932 presidential election by Roosevelt. To restore the stability of the nation, “Franklin Roosevelt adopted as his central task during the early years of his administration economic *recovery*.”¹³ By essentially adopting a single issue to work with, FDR rallied support among the public and his own party members to bring about social reform. In many ways FDR was a proponent of the unitary executive theory of government. As the book *The Unitary Executive* claims, while FDR had shown signs of pluralistic behavior, his decisions ultimately “augmented his power and placed the presidency at center stage in national politics.”¹⁴ This is even more true for his leadership during the Second World War. “Indeed, his views on presidential power became even more expansive following the onset of World War II,” the authors of *The Unitary Executive* note; whenever Congress would be too slow to act, according to the mind of FDR, he would threaten to intervene himself for the betterment of the nation.¹⁵

Arguments Favoring the Unitary Executive

In order to properly understand these hypothetical arguments in favor of unitary executive theory, it is important to review what the theory actually believes. According to the political scholar Richard Waterman, the unitary executive theory “posits that the president has the sole responsibility for the control and maintenance of the executive branch.”¹⁶ Further, believers in this theory would also say, for all that occurs within the executive branch, the president is the sole responsible official. What this means is that all authority and direction should be derived from the President of the United States, according to unitary executive theory. It should be noted, however, that this theory

does not argue for the supremacy of the executive branch among the three branches, but rather argues for the supremacy of the president within the executive branch.¹⁷

By logic, it can be assumed that proponents of the unitary executive would primarily cite ease of governance as a reason to maintain the president’s status as the sole authority in the executive branch. A single, ultimate authority in a hierarchical system of governance — which the executive branch is — surely facilitates quick decision-making. Indeed, in the realm of business this is certainly the case, as employees typically answer supremely to the wishes of the chief executive officers, chairmen, and presidents of their respective corporations. This method also exists in a military context. Subordinate servicemen and servicewomen are entirely beholden to the orders of their superior officers, ensuring that vital decisions for structure and strategy can be swiftly enacted. In times of crisis for the business, military, and even political realms, an unquestioned authority leaves no room for idling or dawdling (at least in theory). However, this explanation of a single authority’s efficiency is certainly not an endorsement of authoritarian government. In the current American system, the people of the United States elect the authority of the executive branch. Also remember that Congress, an elected institution comprised of hundreds of members, has the power to remove the president from office, should it seek to do so. Therefore, by no means should this defense of unitary executive theory be misconstrued as some sort of promotion for tyrannical government. But the merits of such a hierarchical relationship within the executive remain the same.

¹³ Riley, “The Limits of the Transformational Presidency.”

¹⁴ Calabrisi and Yoo, “The Unitary Executive: Presidential Power from Washington to Bush.”

¹⁵ Ibid.

¹⁶ Waterman, “The Administrative Presidency, Unilateral Power, and the Unitary Executive Theory.”

¹⁷ Calabrisi and Yoo, “The Unitary Executive: Presidential Power from Washington to Bush.”

Another defense for the unitary executive theory is the realization that by having a single authority within the executive branch, the United States retains a united voice on policy regarding foreign affairs. Sure, Congress may periodically voice its own opinion in this field, but the President of the United States is unquestionably recognized as the sole “head of state.” A head of state is an individual who officially represents a *state* (as in a nation, country, etc.). Since the head of state is the supreme official regarding foreign policy, it is only reasonable then to conclude that the unitary executive provides a uniform position on foreign policy. This state of affairs is, in the opinion of many, an advantageous one, and for reasons similar to those previously mentioned. With a united foreign policy, the United States has no internal struggle — within each individual presidential administration — regarding its relations with foreign powers. Imagine for a moment if the United States had two presidents, two heads of state. This theoretical situation would prove disastrous indeed, as these two presidents would very possibly formulate two different approaches to foreign policy and would likely disagree on which political actions the United States should undertake. With multiple voices, foreign governments could more easily sway the American executive branch for their own benefit by pitting the voices against one another. With the unitary executive, such a situation is much less likely.

Not only does a single authority in the executive branch prove to be most efficient for governance, but it also proves to be useful for removing a problem. Consider the Constitutional provision of impeachment and removal. The Constitution grants the House of Representatives the power to *impeach* the president, a formal indictment for crimes such as bribery, treason, or other such misdemeanors (in the case of the president or

vice president). The Constitution grants the Senate the power to convict the impeached president. These powers granted to Congress are a substantial check on the actions of the president; with the threat of impeachment and removal ever-looming, the president of the United States is typically careful not to greatly upset the members of Congress (with few exceptions, of course). Whenever a substantial problem should arise within the executive branch, there is essentially only one person to blame: the president. By removing the president from office, the problem is resolved.

The most concrete, and most plain, of any arguments to defend a single authority in the executive branch is the United States Constitution itself, according to many. Just consider the wording of the very beginning of Article II, Section 1: “The executive Power shall be vested in a President of the United States of America.”¹⁸ Nowhere in that sentence, nor anywhere else in the Constitution, is it suggested that the president should distribute his authority among other officers. While the Cabinet does indeed manage much of the executive bureaucracy, the tenure of Cabinet secretaries are bound to the discretion of the president; should the president decide to dismiss a Cabinet secretary, there is no authority to prevent him doing so. To be vested with a power is to be the sole possessor of this power.

Arguments Against the Unitary Executive

Naturally, there are legitimate arguments against the unitary executive. For instance, notable critics of this theory are the authors of a 1994 Columbia Law Review journal titled “The President and the Administration,” Lawrence Lessig and Cass R. Sunstein. In this text, Lessig and Sunstein posit that Constitutional scholars have misinterpreted the original meaning behind the text in Article II.¹⁹ In fact, these authors claim “that much of the conventional reading of Article II’s text is

¹⁸ U.S. Constitution, Art. II, Sec. 1, Cl. 1.

¹⁹ Lessig and Sunstein, “The President and the Administration.”

informed by very modern ideas,” rather than the perspectives of the Framers themselves.²⁰ What these scholars conclude is that the original language of the Constitution, regarding presidential power, suggested something different from our contemporary understanding (which is founded on historical precedent, rather than the text itself). According to Lessig and Sunstein, nineteenth century scholars of the Constitution interpreted Article II as referring to not just “executive” power, but also “administrative” power.²¹ They go even further, claiming the framers of the Constitution had originally conceived of yet more kinds of power; different levels of power, so to speak. By appealing to the Founding Fathers, as so many believers in unitary executive theory do, Lessig and Sunstein attempt to turn the whole argument on its head. Rather than conforming to the popular notion of a single authority and making arguments of principle, Lessig and Sunstein suggest that the common interpretation of the Constitution is incorrect. These claims depend entirely upon another, which is that “[r]ather than constitutionalizing everything, from the top-level governmental functions down through the bottom level administrative details, the framers thought it enough to draw a few clear lines and leave the balance to Congress.”²² What these authors suppose is that the Founding Fathers desired to leave Congress the bulk of administrative duties, while the presidency would simply be relegated to enforcing the law.

In addition to the previous argument, there are other hypothetical and more practical arguments against unitary executive theory. What may first come to mind when considering other arguments is the concern that many have with the president’s control of the military. As commander-in-chief of the

armed forces, the president has absolute discretion on how to use the military. While Congress may have the power to declare war, the executive branch — and therefore the president — retains the power to wage war; one never hears of Congress discussing battle strategies. And one may think that Congress’ sole power to declare war may be enough to dissuade presidential ambition; think again. Consider that every single war the United States has either instigated or been involved following the year 1945 was never actually declared a war by Congress. The Korean War, Vietnam War, Gulf War, and the War on Terror had never actually been declared such by the representatives and senators whose job it is to do so. Presidents have been permitted to take such actions based on the supposition that they were in the interest of national security. Since presidents have discretion on when to use military forces, the possible damages caused by rash actions are extremely high. Now many may think of Section 4 of Amendment 25 to the Constitution, which states that the Vice President and either a majority of the Cabinet or a Congressional committee may remove the powers of the President. While this may alleviate fears in some, the fact of the matter is that presidential orders take but a moment’s time. During the time that the members of the Cabinet could be meeting to take such an action, the president could easily mobilize military forces or launch missiles. Now these extrapolations may understandably seem excessive and full of fearmongering; but these possibilities are still very much real.

Another criticism of the unitary executive may come in the form of the president’s unilateral veto power. Without having to consult any other officials, the president may veto any legislation that is approved by both

²⁰ Ibid.

²¹ Lessig and Sunstein, “The President and the Administration.”

²² Ibid.

Houses of Congress. Now, of course Congress may decide to override this veto with the approval of two-thirds of its members, but such cooperation for important legislation is rare (especially in the contemporary political realm). With the veto power, the president could easily be called a “third House” of Congress.

The president’s absolute authority over the armed forces combined with the power to veto any legislation not overwhelmingly popular make a concerning concoction. With these two powers, a president of the wrong mindset could easily install a tyrannical government, if willing. Sure, there may be opposition to this regime; but with control of the military comes true power. Any attempt to install such a government would invariably violate the very spirit of the Revolution, spitting in the face of Liberty. Thankfully, however, no such legitimate attempt has been made... yet.

Argumentative Assessment and Conclusion

After reviewing the history of the unitary executive theory, its *de facto* practice, and the arguments favoring and against the theory, this study has come to an educated assessment in favor of the unitary executive. Indeed, there are real threats, but American institutions have proven steadfast throughout history. Due to the stability of the United States, this study finds the arguments in favor of a unitary executive to be much more compelling, even if they are not nearly as sensational.

Indeed, the way the executive branch is currently organized makes the execution of the law highly efficient; the president need only give an order to a Cabinet secretary (or equivalent), and this order would be passed down the ladder of responsibility until it reaches practical application, daily life. This study finds great comfort in the way our system is organized so that the people of the United States elect the very one who gives these orders. By being the supreme authority

in the executive branch, there is no room for confusion — on paper — as to whom one should defer. Additionally, this makes the Congressional power of impeachment and removal all the more convenient. Any time there should be a presidential problem significant enough to warrant legitimate outrage, Congress could simply resolve the problem by removing this troublesome president from office. However, as history has shown, this is easier said than done, as every president thus far impeached has not been removed. The lack of presidential removals is due to the Constitution’s provision that two-thirds of the Senate must concur on such a decision.²³ Yet despite this, the convenience of the impeachment power remains the same.

While this study is supportive of unitary executive theory, it should be clear this comes with a certain displeasure with aspects of the way contemporary American government functions. There are two concerns, to be specific: the president’s military discretion and the appointment of Supreme Court justices. Do not misunderstand, the president should definitely be the Commander-in-Chief. However, the president should also be kept on a firm leash by Congress, so to speak. As for the Supreme Court appointments, this study affirms its support for the basic process (wherein the president appoints a justice with advice and consent of the Senate). However, the contemporary political landscape has become far too polarized to allow conceited decisions from politicians. Currently, Supreme Court appointments only require the approval of a simple majority of the Senate (which, in the narrowest of terms, means half of the Senate and the Vice President). A much better alternative is to require each Supreme Court appointee to have the support of at least two-thirds of the Senate for confirmation. By enacting such a law, the Supreme Court would likely bolster its impartiality and fairness. But

²³ U.S. Constitution, Art. I, Sec. 3, Cl. 6.

again, despite these concerns, the unitary executive theory proves to be the most precise interpretation of the Constitution. The Constitution itself states plainly that “[t]he executive Power shall be vested in a President of the United States of America,”²⁴ limiting the scope of any alternative conclusion regarding presidential authority within the executive branch.

Unitary executive theory is the correct interpretation of Article II of the Constitution. While the scholars Lessig and Sunstein do present interesting arguments in their journal for the *Columbia Law Review*, these arguments are only presented with theory and pseudo-history, and without concrete evidence. Additionally, each presidential administration covered in this study is a clear example of the unitary executive in action. From the Revolution to the Depression to today, the President has had supreme discretion within his own branch of government. Were the President required to share his law-enacting authority, there would undoubtedly be great confusion and complication. As the Constitution is currently written, the President of the United States is granted absolute authority within the executive branch.

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²⁴ U.S. Constitution, Art. II, Sec. 1, Cl. 1.