

Trump and the Modern Presidency's Growing Power

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ABSTRACT

“When the president does it, that means that is not illegal,” President Nixon once affirmed in a 1977 interview. From its official establishment in the Reagan Administration to its notorious role in permitting W. Bush’s “Torture Memos” leaked in 2004, the unitary executive theory has become growingly prevalent in modern American policy since the late 20th century. Hinging on Article II, supporters argue that Constitution grants the President to have full authority over the federal executive branch. Yet looking beyond its infamy in the Bush Administration and to the more recent Trump Administration, this paper focuses on the book “The Unitary Executive Theory: A Danger to Constitutional Government” by Mitchel A. Sollenberger, Jeffrey Crouch, and Mark Rozell, highlighting how the president’s power is increasingly becoming immune to traditional checks and balances.

Introduction

“I have an Article II, where I have the right to do whatever I want as president,”¹ Trump declared during a 2019 speech in connection to the Mueller Investigation, asserting his power in spite of the Special Counsel created to investigate him. Yet this idea of Article II giving the president unilateral powers is the core of an increasingly popular Constitutional theory— Unitary Executive Theory. Utilizing the Vesting Clause and Take Care Clause, Unitary Executive Theory states that the President has the right to complete authority over the executive branch. Having been propelled to notoriety with Bush and the War on Terror, Unitary Executive Theory came under much scrutiny in the early 2000s, especially with how it endangered the balance of powers with its strengthening of the executive branch. Then twenty years later, with President Trump’s impeachment trials, authors Jeffery Crouch, Mark Rozell, and Mitchel Sollenberger decided it was proper time for Unitary Executive Theory to be reanalyzed for its meaning and effect on the U.S. government, publishing, “*The Unitary Executive Theory: A Danger to Constitutional Government*” in 2020. The introduction highlights and analyzes three main actions Trump took during his term that consist of the Unitary Executive Theory: Sanctuary Cities, Travel Ban, and the China Trade Process. Broken up into six chapters, the first reviewed other Constitutional theories and unitary executive theory by themselves. The next three chapters explore the domestic powers of the President and how they align with Unitary Executive Theory and the negative implications of such power. The final two chapters examine the foreign powers of the President, calling into question different unilateral acts presidents have made. The conclusion then proposes how the authors believe the government should best function, leaning away from an all-powerful executive and placing more weight on Congress. Being a distinct critique of Unitary Executive Theory, I for the majority agreed with the authors, with every argument sensible and analysis thoughtful. However, when discussing the origins of the Unitary Executive Theory, the authors argued that Unitary Executive Theory is a novel concept and began with the Reagan Administration. I disagree as I believe this debate over what powers the Constitution permits stems back to before the document was even ratified and is key to understanding that the debate is more than just presidential power, but regards the structure of the American government. I

¹ Michael Brice-Saddler, "Trump says Constitution gives him power to 'do whatever I want,'" The Washington Post, last modified July 23, 2019, <https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/>.

will also factor in the Mar A Lago Investigation, analyzing Trump's actions in alignment with Unitary Executive Theory principles, highlighting the continued pattern.

The Trump Administration

The first action the authors, Crouch, Rozell, and Sollenberger discuss was the Trump Administration's response to cities declaring themselves "sanctuary cities" in response to his policies regarding undocumented immigrants. Sanctuary cities describe a city that promises to protect undocumented immigrants from ultimately being deported by the federal government. Following suit, the Department of Justice (DOJ) required state and local authorities to alert federal officials when an undocumented immigrant is preparing to leave their custody. Challenged in federal court, the court determined the action to be unconstitutional, declaring that the federal government could not force the state to act on their behalf in exchange for grants; Trump had proclaimed that they would withhold grant money, allocated by Congress, from "sanctuary cities."² The second act the authors discuss is one of Trump's earliest and most controversial actions—Executive Order 13769 or the "travel ban." The executive order explicitly prevented for four months immigrants from particular Muslim countries. Some states sued for a temporary restraining order and were successful. Thus, when the Ninth Circuit Court of Appeals considered allowing the restraining order to remain in place, the Trump Administration claimed their actions "unreviewable" and pushed for a dismissal—which the Ninth Circuit rejected and criticized the Administration for their claims about review.³ The final action the authors go into detail over is Trump's trade policies with China, justifying its aggressiveness with the president's Section 232 powers of the Trade Expansion Act, which allows the president to establish tariffs in response to threats to national security. The US Court of International Trade upheld the Trump Administration against a challenge from Congress, claiming that the president's power in the Trade Expansion Act was too broad and thus unconstitutional.⁴ The Trump Administration's actions consistently undermine the separation of powers as they seek to cement the executive branch as a superior power with the final say. The authors' argument in regards to the sanctuary cities and the travel ban are the strongest, as they cite specific examples of the executive branch being unreasonably aggressive either to the state governments or the judiciary system. Plus, while they were not being reviewed by the Supreme Court, the Trump Administration's claim that their actions were "unreviewable" are outrageous and go against the Supreme Court—the highest court—as judicial review or the ability to review an executive or legislative action for constitutionality is a vital power of the Supreme Court, and a key check the judicial branch holds. Ultimately, such a claim by the Trump Administration suggests a belief that the executive branch is above the other branches and above checks and balances.

Separation of Powers

This book, rather than being just a long discussion of the Trump Administration, is a broader conversation about broadening presidential power and its implications on checks and balances. Beginning in Chapter two, *Domestic Powers: Part I*, the authors argue that the Constitution does not permit unilateral power from the president and that the power unitary executive theory grants the executive branch violate the separation of powers.⁵ Unitary executive theory

² Jeffrey P. Crouch, Mark J. Rozell, and Mitchel A. Sollenberger, *Unitary Executive Theory : a Danger to Constitutional Government*, 13.

³ David Cole, "The Ninth Circuit Reminds President Trump That There Are Limits to His Executive Power," ACLU, last modified February 10, 2017, <https://www.aclu.org/news/immigrants-rights/ninth-circuit-reminds-president-trump-there-are>.

⁴ Adam Behsudi, "Trump Victorious in Court Case Against Steel Tariffs," POLITICO, last modified March 25, 2019, <https://www.politico.com/story/2019/03/25/trump-steel-tariffs-case-1292005>.

⁵ Crouch, Rozell, and Sollenberger, *Unitary Executive*, 69-70.

in practice undermines the separation of powers outlined in the Constitution as it bars executive action from review and regulation. The authors highlight how unitary executive theory is most applicable in a less Congress-based system, where the structure of government allots absolute control to the executive.⁶ By definition the U.S. is considered a republic, having elected officials with whom the executive has to share power with. With a population of millions upon millions, it is difficult to suggest a single president—person—can represent them all with care. However, elected officials in Congress, especially the House, are closest to the people whom they represent. Undermining Congress's role in government undermines the people and their voices.

Moving onto Chapter three, *Domestic Powers: Part II*, the authors argue that the president cannot unilaterally confirm federal judges, ambassadors, etc. as it is the Senate's responsibility to confirm these appointments.⁷ The authors also discuss the Independent Counsel Act, which worked to keep the president and government in check post-Watergate, up until its expiration in 1991⁸—just two years before President Bush's infamous usage of unitary executive theory in 2001 in enforcing the Bybee memo.⁹ Unitary executive theory, by arguing that the president has the right to unilateral appointment and removal of power, once again undermines the checks and balances outlined in the Constitution. The Independent Counsel Act also provided a strong check on the executive branch by utilizing a separate entity as opposed to internal investigations conducted within and by the executive branch. The authors write how the Office of Special Counsel is currently a part of the DOJ and thus under the executive branch,¹⁰ highlighting an obvious conflict of interest in regard to investigations, especially into the president—the head of the executive—who holds the right to full prosecution power in Article II and can fire a special counsel. Throughout history, presidents have been investigated and will continue to be investigated, with their cases leaving a stark effect on American culture—Nixon and Watergate, Clinton's impeachment trial, and now currently Trump and Maralago—and without independent counsels, special counsels must proceed with investigations knowing the president has the right to remove them, their only protection being the projected public backlash should that occur. The failure to reinstate the Independent Counsel Act undermined a check on the executive branch and further protected executive power from regulation.

Then in the final chapter discussing domestic powers, Chapter four, *Domestic Powers: Part III*, is one of the most complex of the book. The first part of the chapter details legislative and executive powers in implementing policy and the president's "czars." Applicable to federal law, rulemaking refers to the process that agencies use to execute and further define policy passed by Congress and create "rules."¹¹ This allows Congress to then review and control how policy is implemented through the legislative veto. The legislative veto refers to the power Congress holds to nullify an action or rule by an executive agency.¹² It officially stood until the 1983 Supreme Court case, *INS v. Chadha*, which ruled the legislative veto unconstitutional as it violated the Presentment Clause, which outlined the process of a bill becoming law.¹³ Presidents over the decades have issued executive orders that state that agencies must submit proposed rules to the Office of Information and Regulatory Affairs, or the OIRA—resulting in a complicated administrative process as agencies avoid scrutiny from the White House and fly under its busy radar.¹⁴ The next issue the authors go on to define is the president's "czars"—the term first coined by the media in regard to the American government. The authors define these "czars" as executive branch positions that are not subject to Senate confirmation

⁶ Crouch, Rozell, and Sollenberger, *Unitary Executive*, 45-46.

⁷ Crouch, Rozell, and Sollenberger, *Unitary Executive*, 96-97.

⁸ Crouch, Rozell, and Sollenberger, *Unitary Executive*, 98.

⁹ Crouch, Rozell, and Sollenberger, *Unitary Executive*, 173.

¹⁰ Crouch, Rozell, and Sollenberger, *Unitary Executive*, 98.

¹¹ "Rulemaking Process," US Department of Transportation, last modified June 7, 2022, <https://www.transportation.gov/regulations/rulemaking-process>.

¹² "Legislative Veto," Legal Information Institute, https://www.law.cornell.edu/wex/legislative_veto.

¹³ Byron R. White and Warren E. Berger, "INS v. Chadha," Teaching American History, last modified December 31, 1983, <https://teachingamericanhistory.org/document/ins-v-chadha/>.

¹⁴ Crouch, Rozell, and Sollenberger, *Unitary Executive*, 106-111.

but still hold authority over regulation, amplifying the unilateral power the president has over the nation.¹⁵ These positions include managers, assistants, assistant heads, etc., and are all positions that are solely appointed by the president. A notable example is Steven Rattner from the Obama administration, who acted as a “car czar” as he was a chief adviser reporting to the Treasury Department, with the responsibility of deciding which car companies millions of federal funding was to go to when the automobile industry was on the brink of collapse.¹⁶ The authors argue that Congress is more effective at regulating rulemaking as the OIRA, in order to deal with the sheer volume, only really looks at rules marked as “significant.” The authors then highlight how Congress has continued to effectively use legislative vetoes since the eighties, yet I believe their argument for legislative vetoes is ultimately undermined by the standing *Chadha* decision, which deemed them unconstitutional. In contrast, the authors’ argument in regards to controlling the president’s czars is the strongest, as they detail specific examples like Steven Rattner and Carol Browner, who served as the director of the White House Office of Energy and Climate Change Policy. Her position and its responsibilities, like negotiating deals with automakers for lower greenhouse gas emissions, were superior to the EPA head, Lisa Jackson, whose position was actually Senate-confirmed.¹⁷ Yet Jackson never held the influence Browner had within DC. The authors’ distinctive examples of different czars demonstrate the president’s unilateral power and the blockage of checks from other branches of government, these czars out of reach for Congress. These czars can have a great impact not only on the government but with Steven Rattner, the private sector.

Foreign Policy

Chapter five, *Foreign Affairs Powers: Part I*, is the first to focus on the president’s international power, and explores the area where unitary executive theory is most prevalent—national security and the president’s subsequent military decisions. The authors argue that presidential power in recent years has been expanded. They claim that the Commander-in-Chief Clause and the War Clause have become misconstrued, allowing the president to take unilateral military action in the wake of modern terrorism.¹⁸ The Commander-in-Chief Clause establishes the president’s authority over the military, while the War Clause establishes Congress’s power in declaring war.¹⁹ The authors emphasize that while they do not support a weak presidency, the president should not hold certain power that cannot be subjected to checks and balances by the other two branches and ignore the Constitution.²⁰ Ultimately, I think the timing of the argument is important for unitary executive theory, as procedure is more willing to be compromised if an emergency is present. However, the issue is when it becomes standard outside of a time of crisis, with checks and balances forwent. The effectiveness or usage of the principles of unitary executive theory will adapt to national emergencies as it did in the 2000s; a notable and recent global emergency was the Covid-19 pandemic, beginning in 2020 under the Trump Administration. The subsequent chaotic handling of pandemic information by the Trump Administration and its leaders led to a poor and mismanaged response, placing American lives in danger.²¹ Moreover, President Trump’s decision to pull the U.S. from the World Health Organization was met with heavy backlash, as many

¹⁵ Crouch, Rozell, and Sollenberger, *Unitary Executive*, 113.

¹⁶ Maria Shao, "Steven Rattner: The 2009 U.S. Auto Bailout Was Necessary," Stanford Graduate School of Business, last modified March 1, 2011, <https://www.gsb.stanford.edu/insights/steven-rattner-2009-us-auto-bailout-was-necessary>.

¹⁷ Crouch, Rozell, and Sollenberger, *Unitary Executive*, 117-118.

¹⁸ Crouch, Rozell, and Sollenberger, *Unitary Executive*, 135-139.

¹⁹ "Constitution of the United States," U.S. Senate, https://www.senate.gov/civics/constitution_item/constitution.htm.

²⁰ Crouch, Rozell, and Sollenberger, *Unitary Executive*, 159.

²¹ Charles F. Parker and Eric K. Stern, "The Trump Administration and the COVID-19 crisis: Exploring the warning-response problems and missed opportunities of a public health emergency," *Public Administration* 100, no. 3 (September 2022): 626-627, <https://onlinelibrary.wiley.com/doi/10.1111/padm.12843>.

medical professionals believed it would endanger the lives of Americans and others globally, yet Trump still formally signed the withdrawal papers in the summer of 2021.²² Ultimately, with national emergencies that involve the lives of millions, there is too much at stake to allow the president such vast power with little regulation or order.

Then in the final chapter, Chapter six, *Foreign Affairs Powers: Part II*, the authors ultimately argue that unitary executive theory is not an adequate justification for all the over-reaches the presidency has made in areas like torture. Following the terrorist attacks on September 11th, 2001, President George W. Bush had the “Bybee memo” which justified the usage of “enhanced interrogation.”²³ Despite being rejected by Obama, President Trump has made comments indicating he would approve such a memo should it ever fall on his desk.²⁴ Unitary executive theory’s infamy most notably lies in its justification of the torture concerning the September 11th attacks, as they are likely the most shocking utilization of the power to public knowledge. The authors clearly presented the details of what the Bush Administration did post the September attacks, as details can easily become lost in the media sensation, ultimately asserting that Bush approved those memos because he believed the law allowed him to.²⁵ The authors emphasized well in the final chapter what their main point of the book was—highlighting the danger unitary executive theory holds in allowing the president robust power. While I believe the Constitution should adapt best to the times, it is not flimsy and people should be held accountable to it, especially presidents who share the most responsibility to the nation and its people. There was a reason the founding fathers included the Eighth Amendment, barring cruel and unusual punishments, for they knew what it was like to be subjected to an unforgiving monarch—one with unilateral power.

Mar-a-Lago Investigation

On the theme of privilege, at the end of Chapter four, *Domestic Powers: Part III*, the authors consider executive privilege, one of the president’s key defensive agents and tactics to drag out an investigation into an executive department. The authors detail how the executive branch increasingly over the years has become more resistant to investigations, a distinctive check on the presidency, as they refuse to disclose documents with little explanation other than executive privilege.²⁶ I would like to further expand on this pattern the authors have noticed by discussing the events leading up to the search for Trump’s Mar-a-Lago estate in August of 2022. Beginning on May 6th of 2021 following Trump’s reluctant transfer of power to president-elect Biden, The National Archives and Records Administration contacts the Trump Administration, indicating that high-profile documents appear to be missing.²⁷ Despite resistance, fifteen boxes were brought to the agency by January 18th, 2022. However, Trump’s lawyers indicate that not all of

²² Katie Rogers and Apoorva Mandavilli, "Trump Administration Signals Formal Withdrawal From W.H.O.," The New York Times, last modified September 22, 2021, <https://www.nytimes.com/2020/07/07/us/politics/coronavirus-trump-who.html>.

²³ Andrew Cohen, "The Torture Memos, 10 Years Later," The Atlantic, last modified February 6, 2012, <https://www.theatlantic.com/national/archive/2012/02/the-torture-memos-10-years-later/252439/>.

²⁴ David Welna, "Trump Presidency Casts Doubt Over Declassification Of CIA Torture Report," NPR, last modified November 28, 2016, <https://www.npr.org/2016/11/28/503632423/trump-presidency-casts-doubt-over-declassification-of-cia-torture-report>.

²⁵ Crouch, Rozell, and Sollenberger, *Unitary Executive*, 186.

²⁶ Crouch, Rozell, and Sollenberger, *Unitary Executive*, 121-122.

²⁷ Josh Dawsey and Jaqueline Alemany, "Archives asked for records in 2021 after Trump lawyer agreed they should be returned, email says," The Washington Post, last modified August 24, 2022, <https://www.washingtonpost.com/national-security/2022/08/24/trump-records-archives-2021/>.

the documents have yet been turned over.²⁸ Finding the documents in the boxes to be marked as classified, the agency requests an investigation from the DOJ by February 2022.²⁹ In April, the DOJ requested access to the documents as part of an ongoing criminal investigation, and on the same day, Trump's lawyers also requested access to the documents to determine whether executive privilege can be invoked. The DOJ then issues a subpoena in May for the documents with a deadline of June 7th, 2022. Following the subpoena's filing, Trump's lawyer writes to the chief of the Counterintelligence and Export Control Section, stating, "Any attempt to impose criminal liability on a President or former President that involves his actions with respect to documents marked classified would implicate grave constitutional separation of powers issues." Trump's team ultimately complied with the subpoena and handed over a single file of documents from Mar-a-Lago, with 38 documents bearing classification. However, the chief of CES then informs Trump's legal team that he knows more documents are being kept unauthorized at Mar-a-Lago, indicating the documents should be left untouched with the FBI receiving a search warrant on August 5th, leading to the sensationalized search three days later.³⁰ Trump's team exhibits the same pattern that the authors highlighted, how presidents use executive privilege and classification in order to slow down and drag investigations into executive activity. Trump's lawyer ironically tells the CES chief that there would be a great problem with the separation of powers if the investigation attempts to impose criminal liability on the former president, implying that executive power is being encroached upon. Arguably, however, it is the president who is being aggressive with their power, utilizing executive privilege in order to be difficult in complying with different agencies like NARA to the DOJ and keep executive power from being investigated.

Origins of Unitary Executive Theory

Early on in the book, the authors outlined the origins of the unitary executive theory, tracing it distinctly back to Reagan. They argue it is a "recent invention," citing that those who maintain that its roots go way back are those who support the unitary executive theory.³¹ I am critical of unitary executive theory, yet I do not believe the unitary executive theory to be something novel from the past few decades. They note how many scholars cite Roosevelt's presidency as one of the first that justified a more expansive and aggressive form of the presidency. However, the authors instead highlight Reagan. They note the way he expanded the presidency in response to the constraints imposed post-Nixon and diverged from traditional checks and balances, arguing it was during his administration that unitary executive theory was officially defined.³² I argue, however, that the principles of unitary executive theory and the aggressive expansion of the presidency can notably be found in an earlier president: Andrew Jackson and the 1833 Force Bill, which allowed the president to use military force to enforce tariffs. The bill was in response to the nullification crisis, in which states believed they had the right to "nullify" or simply not follow a federal law.³³ While I believe nullification is not a state right and that Jackson was right to enforce federal supremacy, the principles laid out in the Force Bill align with unitary executive theory—expansive presidential power that cannot be easily questioned. The debate of unitary executive theory is reminiscent of the federalist, anti-federalist debate—stemming back to before the Constitution was even ratified. It is ultimately a debate about how much power the president has, and this debate has ingrained itself into the foundation of our government. The debate over how much power the president should

²⁸ Rosalind S. Helderman, "Trump and the Mar-a-Lago documents: A Timeline," *The Washington Post*, last modified October 4, 2022, <https://www.washingtonpost.com/national-security/2022/08/30/mar-a-lago-timeline-trump-documents/>.

²⁹ Dawsey and Alemany, "Archives asked," *The Washington Post*.

³⁰ Helderman, "Trump and the Mar-a-Lago," *The Washington Post*.

³¹ Crouch, Rozell, and Sollenberger, *Unitary Executive*, 29.

³² Crouch, Rozell, and Sollenberger, *Unitary Executive*, 34.

³³ Patricia Bauer, ed., "Force Bill," *Encyclopaedia Britannica*, last modified March 8, 2018, <https://www.britannica.com/topic/Force-Bill>.

have will always exist, for we are only human. However, it is exactly why I believe the checks and balances outlined in the Constitution are so vital, for it acts as a compromise; it grants effective power but prevents it from concentrating itself in one branch or position.

Conclusion

The authors' main aim in writing the book was to highlight how unitary executive theory is putting the U.S. government in jeopardy and presenting the increasing instances of checks and balances being forgotten in favor of the executive. They did an excellent job of chronicling a great amount of information and presenting their arguments logically and clearly. Thus, while I may have one contention with the origins of unitary executive theory, as I believe understanding the roots of its principles is key to understanding the importance of checks and balances, the authors and I share the same consensus—checks and balances must be restored and properly respected—soon. After following one term showcasing expansive use of executive power, Trump in November of 2022, officially announced his plans to re-run in the 2024 presidential elections.³⁴ The president by definition will always have vast power, but the issue of unitary executive theory lies in when that presidential power is unable to be checked—one of the key differences between a president and a monarch—the same regime this nation sought to free itself from.

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³⁴ Domenico Montanaro, "Former President Donald Trump announces he is running again," *NPR*, last modified November 15, 2022, <https://www.npr.org/2022/11/15/1044234232/trump-announces-run-president-2024>.

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