

# *The Law*

## The Unitary Executive Theory and President Donald J. Trump

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*The unitary executive theory first went mainstream during the George W. Bush administration as the president's justification for exercising broad executive powers. Barack Obama did not explicitly embrace the unitary executive theory, but he followed in Bush's footsteps by expanding and augmenting presidential power in new and questionable ways. President Donald J. Trump's campaign rhetoric, coupled with an early, controversial executive order on immigration, suggest the possibility of continued expansions of executive power. Thus, the time is right to examine the unitary executive theory anew. Here, we define the theory as understood by its advocates and then offer a critique. Finally, we highlight the theory's impact on the evolution of presidential powers over the past 16 years and set the stage for evaluating what may come next.*

Keywords: unitary executive theory, executive power, Article II powers, presidential power, separation of powers, George W. Bush, Barack Obama, Donald J. Trump, Federalist Papers

It has been over 10 years since the unitary executive theory first went mainstream during the George W. Bush administration as the president's preferred vehicle for justifying broad executive powers. Since then it has become a critically important topic for scholarly analysis. In a recent book, political scientist John P. Burke catalogued the unitary executive near more established theories of executive power, specifically, "presidential prerogative" as expressed by Abraham Lincoln ("life and limb" theory), Theodore Roosevelt's "stewardship" theory, and William Howard Taft's "literalist" theory (Burke 2016, chap. 3). Lincoln exercised both executive and legislative powers during the Civil War, but he later sought congressional approval for doing so (Crouch and Rozell 2005, 306–07). Taft's "literalist" theory, where the president's actions would be closely tied to constitutional grants of power, clashed with his predecessor's more expansive view that the president should be able to act unless the Constitution dictated otherwise. We believe that the unitary executive theory is an example of the stewardship theory run amok. Of the four theories, it is potentially the most wide ranging—and therefore the most dangerous—of them all.

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Presidents acting according to the unitary executive theory tend to make broad claims for power, which leads to one of two general outcomes. First, the system of checks and balances does not effectively push back against these claims, which then quickly become institutionalized in the presidency and available to successive presidents. Second, checks and balances work effectively, but the president's rhetoric provides his successors with the rationale and support to make claims to vast powers.

As a presidential candidate, Barack Obama promised a more limited approach to executive power than that of George W. Bush (Karl 2014). Obama never explicitly embraced the unitary executive theory, but he still followed in Bush's footsteps through both his actions and his rhetoric by augmenting presidential power in new and questionable ways and failing to decisively break with his predecessor. Since Donald J. Trump won the 2016 presidential race, the unitary executive theory has reemerged in public discourse. Public law scholar Chris Edelson connected Trump directly to the unitary executive theory early on: "A President Trump who determined to act without Congress would have recent precedent to draw on—most notoriously, the unitary executive theory . . . ." (Edelson 2016). As of this writing, very early in Trump's presidency, there are already hints, and one concrete example, of how the president may continue to push for vast expansions of executive power. Even now, there is evidence of the system of checks and balances working to push back against claims of excessive executive power.

We therefore believe the time is right to consider the unitary executive theory anew. Here, we examine the principles underlying the theory as presented by its advocates. Then, we offer a critique. Finally, we highlight the theory's institutionalization within the modern presidency over the latest two presidential administrations and set the stage for evaluating what may come under President Trump.

## The Madisonian Model

The Framers designed the Constitution to address key flaws in the Articles of Confederation. Notably, the Articles had vested all national government power in a legislature and did not provide for either an executive branch or a judiciary. This arrangement was largely a reflection of the colonists' experiences under the tyrannical monarch of Great Britain: Now that they had won their freedom, they did not wish to create an American king, or its equivalent. However, when Shays' Rebellion demonstrated the Articles' flaws, the Framers decided to address the inadequacies of the existing form of government. Their new plan was to divide governmental power among three equal branches of government and create a system of checks and balances where each branch would possess the power to guard and defend itself from the other two branches.

Writing in *Federalist No. 51*, James Madison noted that in order for the three branches "to resist encroachments of the others," each had to be staffed by motivated protectors of institutional powers (Hamilton, Madison, and Jay 1999, 289–90). In other words, "Ambition must be made to counteract ambition" (290). The result of this arrangement would be a rough equilibrium: No one branch of the government would be

able to dominate or control the others. Separation of powers and checks and balances would provide both influence and independence to all three.

This keystone structural arrangement quickly took hold and lasted for over 150 years. Certainly there were presidents who occasionally pushed the accepted governing norms of their time, but they were often held in check by the other two branches of government. However, starting in the mid-twentieth century, the presidency began to rapidly become unmoored from the constitutional system of government. Not only has the presidency grown enormously in size and power, but the ability—and often, the willingness—of Congress and the judiciary to check it has decreased remarkably. The mid-twentieth-century assault received substantial intellectual support from historian Arthur Schlesinger, Jr., who (before writing *The Imperial Presidency* in 1973) believed the evolution of a robust presidency was a positive development. Indeed, political scientist Louis Fisher notes that, while World War II was being waged, “American scholars [first began] trumpeting the need for bold and unchecked presidential leadership” (Fisher 2012b, 22).

Not all members of the academy were as enamored with the growth of the presidency as Schlesinger. In a 1958 book review of Edward S. Corwin’s classic *The President: Office and Powers*, David Fellman took special notice of the public law scholar’s famous assertion in the book that “the history of the presidential office has been a history of aggrandizement” (Fellman 1958, 461). Aware of America’s history of oppression under King George III, Corwin highlighted the dangers represented by a ballooning presidency. While the executive branch grew, Congress did little to resist and has not provided “ambition” sufficient to resist the executive branch’s “encroachments.” As pointed out succinctly by political historian Niels Bjerre-Poulsen, “Congress . . . has been complicit in tipping the balance of power back toward the presidency, either by inaction or by actively promoting presidential aggrandizement” (Bjerre-Poulsen 2012, 16).

Despite Corwin’s warning, political scientist Richard Neustadt proceeded unfazed. In 1960, Neustadt’s *Presidential Power* turned the study of the presidency upside down, in part for its author’s decision to, in Fisher’s paraphrase of Ronald Moe’s words, “jettison institutional, legal and constitutional values, divorcing presidential power from Corwin’s framework of public law” (Fisher 2012b, 23). Many scholars have since provided crucial theoretical justifications for an ever-expanding presidency. Some argue that a burgeoning executive threatens to become unmoored from its constitutional base (Fisher 2006, 1199). Others see an empowered presidency as the key to a more effective federal government (Howell and Moe 2016).

### The Unitary Executive Theory: What Proponents Believe

Those who support increased presidential power have looked for novel theoretical justifications for their beliefs. When one subgroup of presidential power enthusiasts, unitary executive advocates, found insufficient evidence in historical examples adequate to justify their beliefs, they simply reinterpreted settled precedents dating back to the time of the Framers to craft a revisionist view of history that is friendly to ever-expanding presidential power. There are currently at least two versions of the unitary executive theory.

The milder, or more modest, version of the theory seems limited to administrative oversight of the executive branch—but still aggressively pushes a break with long-standing governing norms—and comes from discussions by several lawyers who served decades ago in President Ronald Reagan’s justice department’s Office of Legal Counsel (OLC). One of those lawyers, current Supreme Court Justice Samuel Alito, said in 2001, “We were strong proponents of the theory of the unitary executive, that all federal executive power is vested by the Constitution in the President. . . . Thus, the president has not just some executive powers, but *the* executive power—the whole thing” (Alito 2001, 12). Another Reagan OLC lawyer, Douglas Kmiec, wrote a book about working in the Reagan department of justice under Attorney General Edwin Meese. In chapter 3, “The Unitary Executive,” Kmiec explores “asserting control over the executive branch,” with a closer look at Office of Management and Budget oversight, legislative vetoes, and signing statements (Kmiec 1992, 47–57). Probably the most well-known work on the unitary executive theory to date is *The Unitary Executive* (2008) by another former Reagan OLC lawyer, Steven Calabresi, and Christopher Yoo. However, the authors devote little space in their book to discussing the specific contributions of the George W. Bush administration to the definition of the unitary executive theory (Divoll 2013, 152).

According to Professor Vicki Divoll, a split between “modest” and strong unitary executive theory supporters has occurred because George W. Bush administration figures distorted the theory and tied it to, in Calabresi and Yoo’s words, “implied, inherent foreign policy powers” instead of merely acknowledging it as “presidential authority to remove and direct subordinate executive officials” (Divoll 2013, 152). The George W. Bush administration’s view on executive power stems from the belief that the executive branch was at an institutional low point when Bush first took office. As Vice President Dick Cheney said in a 2005 interview, “Watergate and a lot of the things around Watergate and Vietnam both during the 70s served, I think, to erode the authority I think the president needs to be effective, especially in the national security area” (Stevenson and Liptak 2005). At the time of that interview, Cheney believed that, “especially [regarding] foreign policy and national security matters,” the president’s authority had returned, as the pendulum of power had “swung back” (Stevenson and Liptak 2005). According to journalist Charlie Savage, Bush legal advisors—spearheaded by Cheney, not Bush—had discussed growing executive power as an overriding feature of the administration since Bush’s second day in office (Savage 2009, 306), and following the terror attacks in New York and Washington, DC, “the Bush Administration’s legal team revived the Unitary Executive Theory and dramatically expanded its sweep to encompass matters of inherent power and national security” (Savage 2009, 312).

### The Unitary Executive Theory: What Critics Believe

Critics of the unitary executive theory take issue with the concept because of its origin, rationale, use, and the danger it represents to governmental openness and transparency. The version of the unitary executive theory supported by proponents today is very different from what the Framers discussed over 200 years ago. To the Framers, the unitary

executive was a preference for a structural arrangement: having one person in charge instead of many. Niels Bjerre-Poulsen argues that Alexander Hamilton's mention of "the unity of the executive" in *Federalist No. 70* was not in reference to the "relative strength of the executive branch: He is simply speaking in favor of having one person rather than several lead the executive branch" (Bjerre-Poulsen 2012, 17). And "energy in the executive," as Hamilton mentions, "connotes unity only in the sense of a single manager, as opposed to plural managers" (MacKenzie 2008, 7). There is no indication that Hamilton meant anything else by "unitary executive" aside from expressing the Framers' desire to have a single president, not many, and one who is not shackled to an executive council (7).

The Reagan administration lawyers envisioned a more limited unitary executive who could nevertheless exercise total control over the executive branch, largely through the exercise of administrative authority. The George W. Bush administration later expanded the theory to include foreign/military decision making. There is little evidence that either of these theories squares with what the Framers had in mind. As MacKenzie points out, the unitary executive theory is "devoid of content, not expressed or even strongly implied in foundational documents such as *The Federalist*, not to mention the Constitution" (MacKenzie 2008, 55). Moreover, regardless of its origin, critics believe that the unitary executive theory is, at best, a distortion of the Framers' intentions and, ultimately, a threat to separation of powers and checks and balances. If the president has all of the executive power, then, to take the argument to its logical conclusion, there must not be any executive responsibilities that either the legislature or the federal judiciary can participate in. If this is the case, then we truly have a system of separated powers rather than one of "separated institutions *sharing* powers" (Neustadt 1990, 29).

In a system of purely separated powers in which the president has *all* of the executive power, it is unclear what powers the president should actually be able to call upon. Should the president have inherent powers that cannot be checked by the other two branches of government? Inherent powers are different from the more commonly accepted express or implied powers in that, according to Louis Fisher's reading of *Black's Law Dictionary*, inherent means something that is drawn from someone's particular office, status or position (Fisher 2007, 2). To Fisher, whatever inherent and similar terms actually mean is "so nebulous that [it] invite[s] political abuse and endanger[s] individual liberties" (2). In any case, inherent powers would go far beyond the express and implied powers that the Framers intended for the president to be able to wield.

If the Framers did not discuss the unitary executive theory, then where did it come from? Political scientist Christopher Kelley (see Kelley 2008) explains that Reagan administration lawyers actually first developed the theory. Reagan lawyers used constitutional language relating to the president's duties described in Article II—the "vesting," "oath," and "take care" clauses—to give the theory intellectual support and grounding (Barilleaux and Kelley 2010, 3–4). First, the president is given "the executive power" in Article II without qualification or limit, which differentiates this clause from similar clauses relating to Congress (in Article I) or the courts (in Article III) (3). The "oath" clause is controversial because, to unitary executive supporters, it provides the president with his own ability to evaluate a law's constitutionality by deciding whether to enforce

it (3). Furthermore, the president, as the only executive branch officer directly responsible to the voting public, must “take care” that the laws are being faithfully executed (4).

Such a formulation of presidential powers under the principle of unlimited unitary executive authority is both constitutionally suspect and historically unsound. Charlie Savage rightly argues that “a commander-in-chief who exists above the rule of law . . . run[s] counter to mainstream and traditional understandings of the Constitution . . .” (Savage 2009, 313). The tendencies practiced by unitary executive theory adherents can also be harmful to the republic by keeping the public, and even Congress and the judiciary, in the dark. Much like the other two branches, the executive branch has legitimate needs for secrecy but has increasingly crossed the line with far-reaching claims of exclusive access to information and power. As MacKenzie points out, the mindset of unitary executive adherents can include “[h]abits of secrecy and of hoarding information; the jealous assertion of the exclusive right to decide; and the refusal to share or cooperate with other branches” (MacKenzie 2008, 43).

### President George W. Bush and the Unitary Executive Theory

President George W. Bush seized upon the unitary executive theory as a basis for justifying expansive executive power. His administration was not shy about claiming broad powers in all areas of presidential influence, not just executive branch management. His approach has, for better or worse, helped to develop a template for his successors to follow. One example of Bush’s approach occurred in the realm of executive privilege. In this context, the Bush administration attempted to broaden and mix previously understood types of the doctrine in a manner that would have allowed the president to escape accountability and potentially disrupted the separation of powers system (Rozell and Soltenberger 2013, 45). Another example was the administration’s use of signing statements to overturn the contents of a newly signed law in cases where carrying out the law as written might limit executive power. Charlie Savage reported that the Bush administration used signing statements to ignore over 750 laws (or provisions in laws) (Savage 2006). Christopher Kelley pointed out that earlier Bush signing statements often explicitly mentioned Bush’s responsibility to “supervise the unitary executive branch” (Kelley 2008, 192). To staff top executive branch roles, Bush appointed a number of “czars,” expert overseers for whom Bush did not need to obtain Senate approval (Rozell and Soltenberger 2013, 45–50). He also expanded executive power by the manner in which he approached electronic surveillance, interrogation, military tribunals, and Guantanamo Bay (Lyons 2015, 220). Throughout his presidency, Bush relied on the unitary executive theory to allow his administration to enforce discipline and preserve secrecy.

There is little question that Bush attempted to push the existing boundaries of his office, using the unitary executive theory as his justification for this power grab. Going forward, the end of Bush’s presidency raised several questions about the future of the unitary executive theory: Was Bush’s embrace of the theory simply a product of Bush’s particular circumstances? Given the theory’s lineage in the Reagan and Bush administrations, would it be accepted by a Democratic successor?

## President Barack Obama and the Unitary Executive Theory

When Barack Obama campaigned for the presidency in 2007, he drew bright lines between himself and what he viewed as abuses of power by the incumbent Bush administration. He made it clear to potential supporters that his intentions for the office would lead to a very different type of presidency than that of George W. Bush. Addressing the Bush administration's use of signing statements, Obama said, "I will not use signing statements to nullify or undermine congressional instructions as enacted into law" (Savage 2007). Turning to Bush's military approach, Obama targeted Bush's decision to invade Iraq and criticized him for allegedly acting to increase his own personal influence:

We all know what Iraq has cost us abroad. But these last few years we've seen an unacceptable abuse of power at home. We face real threats. Any President needs the latitude to confront them swiftly and surely. But we've paid a heavy price for having a President whose priority is expanding his own power. The Constitution is treated like a nuisance. (Obama 2007)

In an interview with Charlie Savage in 2007, Obama argued, "The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation" (Savage 2007).

To his credit, Obama recognized the widespread public view that Bush had overstepped his constitutional bounds in several areas. He even cited his own background as a constitutional law professor as a way to provide further reassurance to voters that he, unlike Bush, both understood and respected the Constitution (Farrington 2007). He gave every indication that these views on executive power would guide his actions once in the White House.

Obama's actions as president were in some key areas more consistent with Bush-era practices than with his campaign rhetoric. In contrast to Bush, Obama did not explicitly embrace the unitary executive theory, and some scholars have argued that Obama's approach to executive power may have been more restrained than that of Bush (Spitzer 2013; Tichenor 2015, 195). Still, in several important ways, Obama not only implicitly embraced the unitary executive template established by his predecessor but added to it with his own far-reaching interpretations of executive power.

The list of ways that Obama emulated Bush is not a short one. First, Obama followed Bush's lead by using signing statements to increase presidential power (Crouch, Rozell, and Sollenberger 2013; see also Kelley 2012). As the *New York Times* argued, Obama failed to keep his word regarding domestic surveillance (Editorial Board 2016). Like Bush, he used military commissions (CNN Wire Staff 2011). He also relied on the state secrets privilege (Baumann 2014). Obama inherited from his predecessor the question of how to close the prison at Guantanamo Bay and initially relied on executive power to do so. However, despite signing an executive order in the first few days of his presidency to close the prison, that facility remains open today (Bruck 2016). In fact, according to political scientist Daniel Wirls, Obama basically continued Bush's general

approach to fighting terrorism, pointing out that, other than taking torture off the table, “no other major elements of Bush’s aggressive approach have been fundamentally altered” by Obama (Wirls 2015, 194). Finally, Obama sometimes ignored or dismissed laws when they proved to be inconvenient. Examples include his failure to provide Congress the necessary 30-day notice of the release of Taliban prisoners, as required by the National Defense Authorization Act, and when the president bypassed the War Powers Resolution to engage the U.S. military in Libya.

Each of these examples demonstrates how Obama did not reject Bush-era power grabs supported by the unitary executive theory. In fact, he continued, and in some cases even expanded, already broad interpretations of executive power. His rhetoric reflected his belief in wide-ranging powers, for example, in 2011, when he announced a strategy called “We can’t wait” to address economic concerns despite congressional inaction on those issues (Calmes 2011). Three additional examples illustrate most starkly how Obama’s behavior tracked well with the unitary executive theory and has done much to contribute to its further institutionalization as a commonly accepted feature of the modern presidency.

First, Obama involved the United States in military action in Libya without first obtaining Congress’ support. He cited UN Security Council and North Atlantic Treaty Organization approval as justification, but nevertheless failed to follow long-accepted procedures (Fisher 2012a, 176). The same rationale applies in the case of the war against ISIS (Islamic State of Iraq and Syria). For all of the criticism that George W. Bush endured for long and expensive wars in Afghanistan and Iraq, he at least sought and received congressional approval for military action.

Second, Obama expanded the use of armed drones to eliminate enemies of America, including at least one American citizen in Anwar al-Awlaki. In doing so, he kept much about the process out of the public eye (Jaffer 2016). According to an op-ed by a senior fellow at the Council on Foreign Relations, George W. Bush approved “approximately 50 drone strikes that killed 296 terrorists and 195 civilians in Yemen, Pakistan and Somalia” (Zenko 2016). In contrast, “Obama has authorized 506 strikes that have killed 3,040 terrorists and 391 civilians” (Zenko 2016). Most troubling might be the administration’s rationale for killing al-Awlaki and the implications for a “nearly unbounded” executive power in war (Dehn and Heller 2011, 175).

Finally—declaring, “If Congress will not do their job, at least we can do ours”—Obama revealed his plan to take executive action to allow approximately four million undocumented immigrants to remain in the United States legally despite congressional inaction on immigration policy (Nakamura and Goldfarb 2014). An appeals court eventually stopped this move, and the Supreme Court upheld the lower court on appeal (Liptak and Shear 2016), providing an example of how the separation of powers can constrain presidents despite their efforts to expand executive authority. George W. Bush had also pushed for immigration reform, but acted through the legislative process rather than by executive fiat. He accepted defeat when his plan failed to win Senate approval (Knoller 2014).

In a sense, Obama’s actions as president were simply the latest manifestation of a phenomenon that has repeated itself time and again: in MacKenzie’s words, “A new president of any party might well inventory the accumulated powers—and claims of power—

and decide to try hanging on to them. Presidents do not easily surrender authority, even if they recognize that the authority was illegitimately claimed” (MacKenzie 2008, 57). Another dynamic was also likely at work in Obama’s case: the job of being president looks very different when sitting behind the desk in the Oval Office than it does from the campaign trail.

## President Donald J. Trump and the Unitary Executive Theory

Unlike any of his 44 predecessors, Donald J. Trump won the presidency without having compiled a political or military track record. Thus, it is unclear what the real estate mogul is likely to do as president. However, he made a number of campaign promises that touched on several areas with unitary executive theory implications for our latest two presidents. On the issue of immigration and America’s border with Mexico, Trump promised to build a wall to discourage illegal immigration and guaranteed that the wall would be completely funded by Mexico (Johnson 2016). He also revealed plans to eliminate President Obama’s immigration orders and to locate and deport approximately two to three million undocumented people who have broken American criminal laws (Johnson 2016). All of these measures would reverse Obama-era policies, and some would seem to require congressional cooperation to be successful (Buchanan, Parlapiano, and Yourish 2016). However, Trump hinted that he might unilaterally impose “extreme vetting” of immigrants and turn away those who fail to successfully pass through the screening process. In the realm of national security, Trump said that he would allow Guantanamo prison to remain active and would continue to rely on drones, possibly as part of his policy to immobilize ISIS and their oil fields (Johnson 2016). He flirted with the ideas of reinstating waterboarding, seeking out and possibly killing family members of those suspected of terrorism, and stopping Muslims from other countries from visiting the United States (Johnson 2016).

In the early days of his term, President Trump issued executive orders or memoranda to quickly deliver, or at least give the appearance of delivering (Korte 2017), many of the specific policy changes that he promised as a presidential candidate (Said-Moorhouse 2017). Much like his predecessor inherited the Guantanamo Bay situation, Trump has taken over for Obama in the U.S. war on ISIS, Operation Inherent Resolve. Still, his most controversial move so far has been to issue Executive Order 13,769, which imposed a three-month travel ban on immigrants from Iraq, Iran, Syria, Yemen, Libya, Somalia, and Sudan, all “Muslim-majority countries,” and stopped refugees from entering the United States for four months (Trump 2017a; NPR 2017). This move both surprised and stunned the world (Diamond and Almsy 2017). A federal court noted, “The impact of the Executive Order was immediate and widespread. It was reported that thousands of visas were immediately canceled, hundreds of travelers with such visas were prevented from boarding airplanes bound for the United States or denied entry on arrival, and some travelers were detained” (Canby, Clifton, and Friedland 2017, 4–5). As *The Economist* pointed out, “When a president’s executive order crosses into the realm of policymaking or violates the law, lawsuits pop up” (*The Economist Explains* 2017). This is precisely what has happened.

The states of Washington and Minnesota successfully sued for a temporary restraining order to stop the travel ban executive order from taking effect (Robart 2017). Upset with the decision, Trump lashed out on Twitter, deriding U.S. District Judge James Robart (a George W. Bush appointee) as a “so-called judge” and characterizing the decision as “ridiculous” (Wang 2017). In early February a three-judge panel of the Ninth Circuit Court of Appeals decided whether to leave in place the temporary restraining order that had stopped Trump’s executive order from going into effect (Canby, Clifton, and Friedland 2017). The panel noted the Trump administration’s view, that “the President’s decisions about immigration policy, particularly when motivated by national security concerns, are *unreviewable*, even if those actions potentially contravene constitutional rights and protections” (Canby, Clifton, and Friedland 2017, 13). The Ninth Circuit then rejected the administration’s claim, declaring that “[t]here is no precedent to support this claimed unreviewability, which runs contrary to the fundamental structure of our constitutional democracy” (Canby, Clifton, and Friedland 2017, 14). The panel upheld the lower court’s temporary restraining order.

President Trump’s initial reaction came in the form of a tweet after the decision was handed down: “SEE YOU IN COURT, THE SECURITY OF OUR NATION IS AT STAKE!” (De Vogue and Jarrett 2017). On March 6, Trump issued Executive Order 13,780 (Trump 2017b). Although aimed at addressing some of the shortcomings of the earlier order, it was also blocked—this time by a Hawaii District Court and a Maryland District Court (Watson 2017; Chuang 2017).

The travel ban executive order is a classic example of the unitary executive mindset. Not only did the Trump administration claim superiority in the realm of national security, but it also argued that the court did not have the ability to even review the constitutionality of the president’s action. Such broad claims of executive powers are dangerous to the American system of checks and balances. In a *New York Times* editorial entitled “Executive Power Run Amok,” John Yoo—the same unitary executive advocate who co-wrote the “torture memos” supporting waterboarding in the George W. Bush administration—cited Trump’s immigration order as one reason why “even I have grave concerns about Mr. Trump’s uses of presidential power” (Yoo 2017). If the aggressive stance assumed by the Trump administration here is an indication of how it will confront future separation-of-powers conflicts, there may be even more serious constitutional confrontations ahead.

## Conclusion

Despite what its proponents may argue, the unitary executive theory is not closely aligned with the original design for the executive office created under the Constitution. Indeed, it threatens the delicate balance of powers by justifying power grabs by the president. The unitary executive theory actually began as a 1980s Reagan-era construct that became more fully realized after the George W. Bush administration added a foreign/military policy element to what had generally been accepted to that point as focused on executive branch management.

Today, we have experienced eight years of a Republican president who expanded executive power, followed by eight more years of a Democratic president who, by his actions and his rhetoric, embraced the unitary executive theory's central tenets. As noted earlier, a president who makes decisions consistent with the unitary executive theory may make it easier for his successors to claim broad executive powers, especially when the system of checks and balances does not effectively push back and those claims then become institutionalized in the presidency. The unitary executive theory—even if never officially adopted by the Trump administration—now seems both institutionalized and normalized. Consequently, President Trump has a greater opportunity to push executive power in even bolder directions than his two predecessors.

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