

# THE UNITARY EXECUTIVE THEORY: A DANGER TO CONSTITUTIONAL GOVERNMENT

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# THE UNITARY EXECUTIVE THEORY

A DANGER TO  
CONSTITUTIONAL GOVERNMENT



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Vol. 31 No. 5 (May 2021) pp. 98-102

THE UNITARY EXECUTIVE THEORY: A DANGER TO CONSTITUTIONAL GOVERNMENT, by Jeffrey Crouch, Mark J. Rozell, and Mitchel A. Sollenberger. Lawrence, Kansas: The University Press of Kansas, 2020. 212pp. Paperback \$24.95. ISBN 978-0-7006-3004-2. Hardback \$55.00. ISBN 978-0-7006-3003-5.

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In the book, THE UNITARY EXECUTIVE THEORY: A DANGER TO CONSTITUTIONAL GOVERNMENT, authors Jeffrey Crouch, Mark J. Rozell, and Mitchell A. Sollenberger begin their work by defining the concept of “the unitary executive theory”, which they assign to having originated during the Reagan Administration in the 1980’s and has since more strongly developed with every subsequent presidency, Democrat and Republican. The unitary theory of power views the president as wielding unfettered executive authority that comes into natural conflict with the separation of powers doctrine in the U.S. Constitution, which assumes an equal distribution of power shared between all three branches of government. As the authors postulate, the unitary theory establishes that “the president of the United States controls the entire executive branch of the government and that he occupies a position of primacy in our constitutional system of separated powers and thus may exercise vast unilateral powers for the public good” (p. 2). With this definition in mind, the authors of the book clearly note that they have adopted a negative perception of the unitary theory, denoting that it has caused serious harm to the traditional constitutional balance of powers as intended by the Framers. In an interesting fashion, they equate the unitary theory to the first impeachment proceedings launched against President Donald Trump, dividing the theory into two distinct portions, which they believe mirror the two articles of impeachment presented against the president.

The first portion of the unitary theory assumes that a president wields unlimited unilateral authority over the executive branch to achieve whatever they desire; this theory is related to the first article of impeachment—abuse of power—brought against President Trump for threatening to withhold foreign aid payments to Ukraine in exchange for a personal request. The second portion of the theory assumes that presidents seek to justify their unilateral authority by superseding or absolving themselves from the constitutional restraints placed on the executive branch; this is related to the second article of impeachment—obstruction of Congress—brought against President Trump when it was perceived that he sought to obstruct the Congressional investigation into his proclaimed abuse of power because he viewed his actions with Ukraine as permissible. The authors seem to profusely focus on ways in which President Trump embodies the primary tenets of the unitary theory, while only

partially alluding to other unitary executives that have preceded Trump, such as Abraham Lincoln, Theodore Roosevelt, and Woodrow Wilson, in the book's introduction. It would provide greater foundational reinforcement to their use and examples of the unitary theory if, in their introduction, they would spend more time citing historical examples for how the unitary theory has been wielded by former presidents, to better set the precedent for the historical examinations made in Chapter 1. While the authors, [\*99] provide a versatile assessment of the host of other theories utilized by the aforementioned presidents in Chapter 1, comparing and contrasting these to the unitary executive theory, it seems that the main focus of the book is to critique and assess the unitary theory in lieu of key examples from the Trump Administration.

Crouch, Rozell, and Sollenberger, seem to provide a compelling example of the unitary theory being used to justify broad national security decisions used by presidents. This in reference to President Trump's hard-fought travel ban executive order, citing the uphill struggle he faced against federal courts to eventually impose a temporary ban on the US Refugee Admissions Program, in the case of *TRUMP V. HAWAII* (2018). Prior to winning this case, it is noted that the Trump Administration claimed unfettered authority against the federal courts in handling this national security decision, arguing that the courts could not interfere. The authors' portrayal of the unitary executive theory highlights a more serious rebuke of a president's tendency to usurp Congressional authority and shared Constitutional powers with the legislative branch. They also criticize more moderate and passive depictions of the unitary theory taken by various Constitutional Law scholars, like Christopher Yoo and Cass Sustein; the criticism of which does at times seem warranted as a means of exposing an interpretation of the theory that is dismissive and non-inclusive of the grave threat that such unchecked power poises to the legislative branch.

Chapter 1 of the unitary executive theory appropriately provides an historic examination of the competing theories utilized by previous presidents. These include, the "life and limb" theory used by President Lincoln to justify his executive war time powers in spite of Congressional disagreement; the "stewardship" theory used by President Theodore Roosevelt, which allowed him to achieve legislative-like goals on behalf of providing public service to the people he served amid the Great Depression (likening himself to a steward); and the most prevalent being the "literalist" theory, adopted by President Taft, which persisted for much of the 19th century and represented the antithesis of the unitary executive theory. It would seem insightful to readers that Crouch, Rozell, and Sollenberger, provide an in-depth assessment of these alternate theories, while also describing the origins of the unitary theory emerging under the tenure of Attorney General Edwin Meese and his former staff lawyers, Samuel Alito and Steven Calabresi, during Reagan's presidency.

Two versions of the unitary theory are laid bare, the "weak" vs. the "strong". Supporters of the "weak" unitary executive theory downplay the perceived threats to the balance of powers imposed by a president wielding unchecked authority. They tend to view the unitary theory merely as a means for presidents to efficiently command and direct federal officials within the

executive branch. Supporters of the “strong” unitary executive theory advocate for executive power to be indivisible and immune from encroachment by Congress or the courts. Proponents of this view worked in the George W. Bush Administration, arguing that the president may wield inherent or implied powers to supersede Congressional checks, and possess unlimited executive powers over both domestic and international affairs. The authors reference a quote by Professor Chris Edleson that precisely assesses the strong unitary executive theory, which reads that it is “designed to justify unilateral, unchecked presidential power unaccountable to the rule of law” (p. 40). It is nice that the authors classify the political tools of power [\*100] available to the president in Chapter 2, allowing for a greater understanding into how the unitary theory can be effectively wielded. This includes their explanation of how the use of executive orders further the strong unitary executive theory view, which are powerful tools to control the executive branch and shape federal public policy-making. Another tool mentioned extensively are signing statements, which can be utilized by presidents to cite disagreements with portions of a proposed bill, to single-out undesirable portions of laws that won’t be executed, and to direct federal officials on how to properly act. This method is also reinforced by the strong unitary theory view, advancing views of an unchecked presidency during the George W. Bush Administration.

According to Crouch, Rozell, and Sollenberger, unitary executive advocates believe that presidents possess the absolute power to not only appoint federal officials to various executive departments, but to also remove any number of officials, as well. I found it appropriate to note that this position was championed by scholars such as Christopher Yoo and Steven Calabresi, who advocate for the weak unitary executive theory. The weak theory essentially vests all the Constitution’s executive powers into the president, allowing the Commander-in-Chief to exercise complete control over the entire branch of government. According to the authors, Yoo and Calabresi believed that the cornerstone of the appointment and removal power was found in the Supreme Court decision of MYERS V. UNITED STATES (1926), where Chief Justice Taft ruled for the majority to hold that, “The natural meaning of the term ‘executive power’ granted the President included the appointment and removal of executive subordinates”, which applies to President Woodrow Wilson firing the Postmaster without the express consent of the U.S. Senate. The authors do well to refute proponents of the appointment and removal power, arguing that presidents cannot wield such power in an unfettered manner; instead, they are hampered by statutory and political constraints imposed by Congress over agency officials and judges. This, in addition to the occasional constraint imposed on the president by a Special Counsel investigation into controversial legal matters, which, as the Watergate Scandal taught, ordains that the president is expected to not utilize his executive privileges by interfering with an independent investigation. Despite this examination, Crouch, Rozell, and Sollenberger, could have more thoroughly explained how the presence of a Special Counsel specifically hampers the president’s ability to fire officials who answer directly to the attorney general.

I found it interesting to read about how many unitary executive theory tools possessing a tendency to be wielded by presidents of both parties, such as the presidential appointment of czars, who are officials not mentioned anywhere in the Constitution or confirmed by the Senate, yet “exercise authority to promulgate rules, regulations, and other orders that bind government officials and the private sector” (p. 89). They occupy an important position in the executive branch and a special immunity from Congressional oversight, influencing both George W. Bush and Barack Obama’s continual selection of such officials during their respective administrations. Some powers under the unitary executive theory are implied—wielded by presidents, despite not being expressly stated in Article II of the Constitution—including the invocation of “executive privilege” for the sake of withholding key documents and information from Congressional or judicial review. Despite these above powers being harnessed through the unitary executive theory, the authors make painstakingly clear that they are not absolute or unlimited [\*101] in scope and can often be hindered from checks by the legislative and judicial branches.

Chapter 5 begins a shift from a focus on domestic unitary executive powers wielded by presidents to unitary foreign affairs powers. One of the most prominently explained examples of a misused foreign power that violated the separation of powers doctrine was when President Obama defied the Office of Legal Counsel’s suggestion and the War Power Resolution’s requirement to allow 60 days for an end to hostilities in Libya, before unilaterally ordering the sustained military strikes that killed Muammar Gaddafi. To check the President’s unprovoked action, the House rejected a bill that would have enabled Obama to take further action in Libya. The authors do well to compare this with a similar drone attack launched against Iran by President Trump, which took the life of Qasem Soleimani, in which Trump circumvented Congress to unilaterally order the death of Iran’s top general. This was also met with immediate legislative consequences, though less fruitful when compared to Obama’s Libya situation, as Trump successfully vetoed the proposed war powers resolution approved by both houses of Congress, while the Senators who championed the measure failed to secure enough votes to override the veto. In the concluding pages of Chapter 5, readers are provided with an important warning against plenary/implied powers being utilized as a vehicle to disturb the natural balance of powers between the three branches of government. Citing the Supreme Court case of *ZIVOTOFSKY V. KERRY* (2015), their argument reads in part,

“By bestowing a unilateral power on one branch of the federal government, Kennedy’s opinion in *ZIVOTOFSKY* weakens important, long-standing dynamics between the three branches. For this reason, we contend his opinion should be treated more as an anomaly than as a controlling judicial command. We believe that the framers created a governing system not only to provide autonomy between the branches but, more important, to give each branch the means to counter the power, and particularly the abuses, of the other two” (pp. 124-125).

While the above point made was well stated, the authors could have used additional examples to better reinforce their argument against plenary powers granting unilateral authority to one branch of government in matters of foreign affairs. At the core of the ZIVOTOFSKY case is a dispute over recognition of an individual's place of birth—Jerusalem—being synonymous with its recognition as the capitol city of his home country of Israel, which was essentially resolved years later when President Trump officially recognized Jerusalem as Israel's capitol in December 2017. The authors do well to provide readers with an understanding of how certain foreign powers wielded by the president via the unitary executive theory can be perceived as a violation of the separation of powers. This is evident in Chapter 6, when they, cite the "Bybee memo", which gave justification for the use of torture, despite its statutory ban by Congress; the president could utilize the Commander-in-Chief clause to defy Congressional statutory law if he felt that it interfered with his own constitutional responsibilities. This memo lies at the heart of the powers possessed through the unitary executive theory, as the authors do well to explain.

Upon assessing this work as a whole, I found that Jefferey Crouch, Mark Rozell, and Michael Sollenberger make a strong case to warn against the potential constitutional dangers and threats that the unitary executive theory poises to the [\*102] balance of powers. They do well to cite the traditional unitary executive tools utilized by previous presidents to address pressing foreign and domestic affairs issues, whether based on exercising an implied power or by the interpretation of a power expressly stated in the Constitution. However, the authors do seem to take an extremely deferential favoritism toward the legislative branch, continuously favoring the position taken by Congress whenever engaging in conflict with a president who acted unilaterally on a controversial policy decision. They rarely gave deference to the president in such matters. The authors adopted a very strong support for the balance of powers doctrine enjoyed among the three branches of government and utilized every cited tool of the unitary executive theory (line-item veto, executive czars, executive privilege) as a means of effectively forwarding their argument for how this theory threatens to erode the Constitutional separation of powers by allowing for too much unchecked power to be possessed by the president. Ultimately, the authors did not provide a clear remedy to the unitary executive theory outside of the willingness of future presidents to respect the fact that they share powers with the judicial and legislative branches and should exercise restraint when seeking to act unilaterally. This, in addition to the authors proposing their own idealistic model for how the federal government should best functionally operate, with a primary focus on the representation of the people, and the appointment of governmental officials to uphold the will of the electorate in a legislative capacity, i.e., Republicanism. This reinforces the authors' strong deference toward the perceived political purity of legislative branch, viewing Congress as bearing the purest form of Constitutional representation by and for the people. I recommend this book as an insightful and scholarly guide for anyone interested in a comprehensive study of presidential power and the contested role of the executive branch.

CASES:

TRUMP V. HAWAII, 585 U.S. \_\_\_\_ (2018).

MYERS V. UNITED STATES, 272 U.S. 52 (1926).

ZIVOTOFSKY V. KERRY, 576 U.S. 1059 (2015).

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