

Unitary Executive Theory: Is it Constitutional?

by Sayd Hussain & Robert Marriaga

Introduction

In the movie *VICE*, Dick Cheney was quoted several times throughout the movie as falling in love with the Unitary Executive Theory (UET). This theory is part of constitutional law, Article II, Section I of the U.S. Constitution says, “The executive power shall be vested in a President of the United States of America.”¹ The Constitution also says, “. . . he shall take care that the laws be faithfully executed and shall commission all the officers of the United States.”² Interpreting these two powerful clauses within the Constitution can justify that the President of the United States has the unified powers within the executive branch of Government as a Unitary Executive. Former White House Counsel during the Nixon Administration, John Dean, expressed in his book *Broken Government*,³ “In its most extreme form, unitary executive theory can mean that neither Congress nor the federal courts can tell the President what to do or how to do it, particularly regarding national security matters.”⁴ Using this interpretation, the President has the sole power under the Constitution to be the executive to run the nation’s affairs and it would be unconstitutional to limit the President’s powers

¹ U.S. Constitution, Article II, Section 1, Cornell Law School Legal Information Institute, <https://www.law.cornell.edu/constitution/articleii>, (last visited March 2, 2019.)

² *Id.*

³ John W Dean, *Broken Government: How Republican Rule Destroyed the Legislative, Executive and Judicial Branches*, Penquin (2007), <https://books.google.com/books?id=dj56j5TsNUAC&pg=PA102&dq=%22unitary+executive%22&hl=en#v=onepage&q=In%20its%20most%20extreme%20form&f=false>, (last visited March 1, 2019.)

⁴ *Id.*

to perform his sworn duties. The question is whether the unitary executive theory is constitutional or not?

One example of limited Presidential powers by Congress is the Tenure of Office Act 1876, which prevented the President from firing any of his cabinet members without the Senate's approval.⁵ Although it was repealed in 1887, the 1926 Supreme Court case, *Myers v. United States*, confirmed the supposition that the President of the United States has the executive power to remove executive people from executive positions without any other approval.⁶ Chief Justice William Howard Taft wrote in his opinion, "It gave to the Executive all the executive powers of the Congress under the Confederation, which would seem therefore to have intended to include the power of removal which had been exercised by that body as incident to the power of appointment."⁷

During the Constitutional Convention, Alexander Hamilton supported the concept of the single executive.⁸ However, Edmund Randolph, who presented the Virginia Plan, expressed dissent towards supporting a single executive because it would be modeled too closely upon the British monarchy.⁹ But the Constitutional Convention voted for Hamilton's idea by a vote of 7-3. The Anti-Federalist were largely

⁵ *Tenure of Office Act*, History, <https://www.history.com/topics/reconstruction/tenure-of-office-act>, (last visited March 9, 2019.)

⁶ *Myers v. U.S.*, 272 U.S. 52, 1926, https://www.law.cornell.edu/supremecourt/text/272/52#writing-USSC_CR_0272_0052_ZO, (last visited March 9, 2019.)

⁷ *Id.*

⁸ Lauren Poe, Executive Power: Hamilton and Jefferson on the Role of the Federal Executive, http://thomasjeffersonpersonalitycharacterandpubliclife.org/Lauren_Poe_Executive_Power_Past_and_Present_2.pdf, (last visited March 9, 2019.)

⁹ *The Constitutional Convention debates and the Anti-Federalist Papers*, American History, <http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/>, (last visited March 9, 2019.)

against the unitary executive because they believed that the President should have an official council to advise the President on certain decision making functions.¹⁰ One famous anti-federalist was George Mason, who objected to the final version of the U.S. Constitution.¹¹ Mason objected to the constitutional structure of 1787 because he believed there needed to be a presidential council to advise the President and that it should be made up of six-member, two members from the east, middle and the southern states. However, this proposal never went through to the final draft of the constitution. Mason stated, “The President of the United States has no constitutional council (a thing unknown in any safe & regular government) he will therefore be unsupported by proper Information & Advice; and will generally be directed by Minions & Favourite...”¹² Mason also stated that the lack of a presidential council would give too much power to the Senate to approve executive appointments, a concept that was supported by the Anti-Federalist papers of 1787, which was against the Constitution as drafted by the Constitution Committee.¹³

The Anti-federalist Paper 74 argued that the President would have too much power as a unitary executive by becoming the Commander-In-Chief, in charge of all the armed forces.¹⁴ The Anti-federalist feared this would create a military president or “The President General” because

¹⁰ *Opposition to a Unitary Executive*, American History, [http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/opposition-to-a-unitary-executive-\(june-4\).php](http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/opposition-to-a-unitary-executive-(june-4).php), (last visited March 9, 2019.)

¹¹ *Id.*

¹² <http://edu.lva.virginia.gov/docs/MasonsObjections.pdf>

¹³ *Opposition to a Unitary Executive*, American History, [http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/opposition-to-a-unitary-executive-\(june-4\).php](http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/opposition-to-a-unitary-executive-(june-4).php), (last visited March 9, 2019.)

¹⁴ *Antifederalist Paper 74, The President as Military King*, <https://thefederalistpapers.org/antifederalist-paper-74>, (last visited March 7, 2019.)

the President of the United States would have more military control than any monarch during that time. Furthermore, the papers also suggested that with this type of unrestricted power, future Presidents might act as tyrants, “. . .that he can at any time he thinks proper, order him out in the militia to exercise, and to march when and where he pleases.”¹⁵ The article within the Anti-federalist Papers ends by saying, “And to complete his uncontrolled sway, he is neither restrained nor assisted by a privy council, which is a novelty in government. I challenge the politicians of the whole continent to find in any period of history a monarch more absolute.”¹⁶

There was a clear fear among the anti-federalist that Hamilton’s idea of a unitary executive would create a tyrant within the newly formed United States of America, who fought Great Britain to be free of monarchy. Furthermore, they believed that the branches of government would be continually intertwined, not allowing them to be truly independent from each other. It is that concern that prompted them to continue to ask for an executive council to advise the President as the executive is heavily intertwined with the Senate, when confirming executive appointments, treaties and the judiciary.¹⁷ Hamilton countered these arguments by stating that a strong unitary executive would be more efficient at making important decisions for the country that cannot wait while Congress slowly progresses through their own procedural requirements.¹⁸ The President would be in charge of the military as the Commander-In-Chief, while the House of Representatives would

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ *The Federalist Papers, No. 70*, Congress.Gov, <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-70> (last visited March 9, 2019.)

control how much funding could be allocated towards defense spending and how it could be spent. Furthermore, Hamilton maintained that having an executive council would not be effective since councils can be divided in their opinions making it difficult to arrive at a resolution.¹⁹ If the President needs to act swiftly and efficiently, Hamilton opined, the President could not wait for a council to determine the appropriate action since the President was elected by the people and given respective powers to act on the interest of the country.

Correspondingly, by having a unitary executive in charge, the unitary executive takes on the responsibility and liability within the executive branch. Too many heads in charge, Hamilton argued, would “conceal faults and destroy responsibility.”²⁰ By having a unitary executive, the President would create policy that would be popular among his supporters thus being beneficial for re-election purposes. Hamilton was so confident about having a unitary executive that he ended the Federalist Papers 70 by saying, “I will only add that, prior to the appearance of the Constitution, I rarely met with an intelligent man from any of the States, who did not admit, as the result of experience, that the unity of the executive of this State was one of the best of the distinguishing features of our constitution.”²¹

The unitary executive theory is strongly based on the foundations of Hamilton’s Federalist Paper 70, and it was used several times by Presidents to justify their use of executive power. After President Washington declared the United States neutrality between Great Britain and France, it sparked a vast debate on executive powers. Hamilton wrote the *Pacificus* to support Washington, mentioning that Congress

¹⁹ Id.

²⁰ Id.

²¹ Id.

has the power to declare war while the President has the power to maintain peace till war is declared. “If the Legislature have a right to make war on the one hand--it is on the other the duty of the Executive to preserve Peace till war is declared.”²²

James Madison, on the other hand, claimed Hamilton and others supported the President as monarchs because it was up to Congress to establish foreign policy unless construed otherwise by the constitution, “It will not fail to be remarked on this commentary, that whatever doubts may be started as to the correctness of its reasoning against the legislative nature of the power to make treaties: it is clear, consistent and confident, in deciding that the power is plainly and evidently not an executive power.”²³

Another example of the controversial uses of executive powers was President Lincoln’s power to suspend Habeas Corpus without congressional approval. President Lincoln told Congress that it’s their right to suspend Habeas Corpus, but that in the case of a rebellion Congress might be prevented from meeting, thus justifying the President’s power to also suspend Habeas Corpus during uncertain times.²⁴ When Lincoln issued the proclamation to suspend Habeas Corpus in 1861, Congress did not object until March 1863. Lincoln

²² Alexander Hamilton, *Pacificus, No. 1*, June 1793, http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s14.html, (last visited March 9, 2019.)

²³ *Helvidius Number 1*, National Archives, Founders Online, August 1793, <https://founders.archives.gov/documents/Madison/01-15-02-0056>, (last visited March 9, 2019.)

²⁴ James Dueholm, *Lincoln’s Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis*, Journal of the Abraham Lincoln Association, 2008, <https://quod.lib.umich.edu/j/jala/2629860.0029.205/--lincoln-s-suspension-of-the-writ-of-habeas-corpus?rgn=main;view=fulltext>, (last visited March 9, 2019.)

interpreted the Constitution similarly to the federalist such as Hamilton. Lincoln defied Congress by enacting martial law, suspending Habeas Corpus while ignoring the restrictions of the Habeas Corpus Suspension Act of 1863.²⁵ President Lincoln was able to find loopholes to justify every single executive power he could find, in order to save and preserve the union,²⁶ “In sum, in an area generally thought at the time to be within the congressional domain, he manipulated Congress, challenged its powers, ignored its laws, and imposed his authority and will without ruffling congressional feathers or provoking congressional response.”²⁷

Although Hamilton believed the President must have complete control over its executive powers as the Commander-in-Chief, President Nixon was the President that pushed it too far for Congress and the country to handle. Nixon had expanded the office of the Presidency by ordering strong military action in Vietnam, Cambodia and Laos without congressional consent.²⁸ The irony is that the Soviet Primer had to ask the Politburo, the communist party, before taking military action in Czechoslovakia. Furthermore, Nixon used the office of the Presidency to expand not just foreign policy but domestic policy as well because he believed his powers as a strong President is a “tribute of the people.”²⁹ President Nixon countered his critics in Congress by addressing the people in a radio address in 1968, “The days of a passive Presidency belong to a simpler past. Let me be very clear about this: The next President must take an activist view of his office. He must articulate the

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ John Herbers, *Nixon's Presidency: Expansion of Power*, N.Y. Times, 1973, <https://www.nytimes.com/1973/03/04/archives/nixon-s-presidency-expansion-of-power-scholars-see-a-major-impact.html>, (last visited March 9, 2019.)

²⁹ Id.

nation's values, define its goals and marshal its will. Under a Nixon Administration, the Presidency will be deeply involved in the entire sweep of American public concern. The first responsibility of leadership is to gain mastery over events and to shape the future in the image of our hopes.”³⁰

By gaining public support, he would be acting as a President by the people, for the people. This would also allow him to exercise a stronger executive power within all of America’s policies which were traditionally, congressional powers.³¹ This became a smart tactic because President Nixon won his re-election bid for Presidency by a sweeping 520 electoral college votes, becoming the third largest electoral college victory in U.S. history. The American people fundamentally voted to support President Nixon’s vision for a stronger, powerful Presidency and by winning such a large margin, Nixon was able to prove that he had the people behind him, which apparently gave the President too much confidence.³² Nonetheless, Congress disagreed with his theory and enacted the War Powers Act,³³ overriding the Presidential veto, now requiring the President to consult with Congress before performing his duties as the Commander-in-Chief when engaging the U.S. military in foreign combat.

President Nixon believed that a strong and powerful Presidency is necessary for the future of America. In an interview after his presidency, Nixon agreed that the Constitution does not say that the President is above the law. However, during times of war, the President has

³⁰ Id.

³¹ Id.

³² Id.

³³ *War Powers Act*, History, 1973, <https://www.history.com/topics/vietnam-war/war-powers-act>, (last visited March 9, 2019.)

significant powers to act in the best interest of the country, even if these decisions are illegal within the law. “That it has been, however, argued that as far as a president is concerned, that in war time, a president does have certain extraordinary powers which would make acts that would otherwise be unlawful, lawful if undertaken for the purpose of preserving the nation and the Constitution, which is essential for the rights we're all talking about.”³⁴ Nixon quoted President Lincoln, “Actions which otherwise would be unconstitutional, could become lawful if undertaken for the purpose of preserving the Constitution and the Nation,”³⁵ because it would help justify that his theories on Presidential executive powers is not something new but within the tradition of the presidency during times of war.³⁶ However, President Nixon’s use of executive power was overly extreme in Presidential history, considering the “Saturday Night Massacre.” It angered many Americans and Congress alike, ruining his argument that the use of power he executed was truly in the betterment of the people during a time of war.³⁷

Throughout the history of the United States, there has been a tug of water between executive powers and Congress who can restrict

³⁴ *Nixon’s Views on Presidential Power: Excerpts from a 1977 Interview with David Frost*, Landmark Cases of the U.S. Supreme Court, http://landmarkcases.org/en/Page/722/Nixons_Views_on_Presidential_Power_Excerpt_s_from_a_1977_Interview_with_David_Frost, (last visited March 9, 2019.)

³⁵ *Id.*

³⁶ *Id.*

³⁷ Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, Washington Post, Oct. 21, 1973, <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm>, (last visited March 9, 2019.)

presidential powers, particularly after the Nixon presidency.³⁸ For example, *the Ethics in Government Act of 1978*³⁹ created the U.S. Special Counsel's Office that is charged with investigating officials in higher office such as the President, as well as creating mandatory, public disclosure of financial and employment history of public officials and their immediate families. This means that the President wasn't able to fire the Special Prosecutor, unlike President Nixon, who fired Special Prosecutor Archibald Cox.⁴⁰ However, this Act expired in 1999, giving the responsibilities of the special prosecutor back to the Office of the Attorney General. Furthermore, the *National Emergencies Act of 1976* gives the President the authority to declare a national emergency. However, Congress can undo the emergency declaration if they have a veto-proof majority.⁴¹

Another effort to expand presidential powers was the Line-Item Veto Act of 1996 but was stopped in 1996 with the Supreme Court decision in *Clinton v. City of New York*.⁴² The Line-Item Veto Act of 1996 gave power to the President to amend or repeal parts of Acts that were passed

³⁸ Tom Head, *Imperial Presidency 1010: Unitary Executive Theory and the Imperial Presidency*, ThoughtCo., March 5, 2019, <https://www.thoughtco.com/unitary-executive-theory-the-imperial-presidency-721716>, (last visited March 9, 2019.)

³⁹ *Ethics in Government Act of 1978*, U.S. Code, Cornell University Law School, https://www.law.cornell.edu/uscode/html/uscode05a/usc_sup_05_5_10_sq3.html, (last visited March 9, 2019.)

⁴⁰ Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, Washington Post, Oct. 21, 1973, <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm>, (last visited March 9, 2019.)

⁴¹ *National Emergencies Act*, Pub. Law 94-412, Congress.gov, <https://www.congress.gov/bill/94th-congress/house-bill/3884>, (last visited March 19, 2019.)

⁴² *Clinton v. City of New York*, 524 U.S. 417, (1998), Justia, <https://supreme.justia.com/cases/federal/us/524/417/>, (last visited March 9, 2019.)

by Congress.⁴³ The Supreme Court, in the *Clinton v. City of New York* case, declared the Act to be unconstitutional because it gave the President the power to undo decisions made by Congress.⁴⁴ Executive powers have been debated since the founding of the United States Constitution, but the first administration that used the Unitary Executive Theory was the Reagan administration with the statement on signing the Federal Debt Limit and Deficit Reduction Bill, “If this provision were interpreted otherwise, so as to require the President to follow the orders of a subordinate, it would plainly constitute an unconstitutional infringement of the President's authority as head of a unitary executive branch.”⁴⁵ President Reagan believed that the only way to limit big government was having a stronger Presidency, modeling the Presidency as a CEO of a large cooperation.⁴⁶ This created a movement within conservative institutions such as the Heritage Foundation to provide a legal groundwork for this constitutional theory to become a reality. This conservative foundation released publications advocating for the unitary executive theory because it exemplified the intentions of the founding founders. They argued that the President has more powers than previously examined and that the President can remove subordinates in the executive branch, direct subordinates to take

⁴³ Tom Head, *Imperial Presidency 1010: Unitary Executive Theory and the Imperial Presidency*, ThoughtCo., March 5, 2019, <https://www.thoughtco.com/unitary-executive-theory-the-imperial-presidency-721716>, (last visited March 9, 2019.)

⁴⁴ *Clinton v. City of New York*, 524 U.S. 417, (1998), Justia, <https://supreme.justia.com/cases/federal/us/524/417/>, (last visited March 9, 2019.)

⁴⁵ *Statement on Signing the Federal Debt Limit and Deficit Reduction Bill*, Ronald Reagan Presidential Library & Museum, 1987, <https://www.reaganlibrary.gov/research/speeches/092987d>, (last visited March 5, 2019.)

⁴⁶ Dana Nelson, *The Unitary Executive Question*, Los Angeles Times, Oct. 11, 2008, <https://www.latimes.com/opinion/la-oe-nelson11-2008oct11-story.html>, (last visited March 9, 2019.)

certain actions such as firing the special prosecutor, and may also direct government employees to not enforce Congressional laws. “According to the unitary executive argument, the framers gave presidents far more command authority than past presidents realized. With respect to administration, the unitary executive holds that presidents may remove all subordinates in the executive branch; they may also direct those subordinates to take a particular action; and finally, they can veto any objectionable actions, including those mandated by Congress.”⁴⁷ Furthermore, conservative Justices, such as Justice Scalia and Justice Alito, have expressed the belief that this theory is evident in the constitution.⁴⁸

Although President Reagan believed in a stronger Presidency, President Bush and Vice President Dick Cheney broadened the unitary theory during their time in the White House according to James Pfiffner in his article, *Federalist Papers 70: Is the President Too Powerful?*⁴⁹

Alexander Hamilton’s interpretation of this theory was used periodically during the Bush II administration.⁵⁰ After 9/11, the President was given extraordinary powers by Congress to defend the

⁴⁷ Yen Makabenta, *Unitary executive theory: the President’s power of control over the executive branch*, The Manila Times, Sept. 15, 2018, <https://www.manilatimes.net/unitary-executive-theory-the-presidents-power-of-control-over-the-executive-branch/441634/>, (last visited March 9, 2019.)

⁴⁸ Id.

⁴⁹ James Pfiffner, *Federalist No. 70: Is the President too Powerful?*, George Mason University, 2011, http://pfiffner.gmu.edu/wp-content/uploads/2011/10/Pfiffner_Federalist_70_PAR_2011.pdf, (last visited March 9, 2019.)

⁵⁰ Id.

nation against terrorism with the passage of the Patriot Act⁵¹ and the Authorization for Use of Military Force Act (AUMF).⁵² These bills expanded Presidential powers by allowing the executive branch to have surveillance programs among American citizens in the name of national security. Furthermore, AUMF allowed the President to, “. . . use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”⁵³ President Bush’s lawyer, John Yoo, argued that he never needed Congress to approve military actions, that there were “no limits on the Executive’s judgment.”⁵⁴ Mr. Yoo said that by Congress making a law expanding the President’s power, it indicated that there were no limits on executive judgements during national emergencies.⁵⁵ The unitary theory was interpreted by President Bush to give him the power to wage warrantless-surveillance programs by executive authority.⁵⁶

⁵¹ *The Patriot Act of 2001*, H.R. 3162, Congress.Gov, <https://www.congress.gov/bill/107th-congress/house-bill/3162>, (last visited March 9, 2019.)

⁵² *Authorization for Use of Military Force Act of 2001*, 115 Stat. 224, Congress.Gov, <https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf>, (last visited March 9, 2019.)

⁵³ Garrett Epps, *Constitutional Myth #3: The Unitary Executive is a Dictator in War and Peace*, *The Atlantic*, June 9, 2011, <https://www.theatlantic.com/national/archive/2011/06/constitutional-myth-3-the-unitary-executive-is-a-dictator-in-war-and-peace/239627/>, (last visited March 9, 2019.)

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

President Bush used these executive powers to wage war in both Iraq and Afghanistan, fighting terror in the Middle-East. However, Congress attempted to roll back these additional executive powers, but were met with another obstacle, the power of the President to use a “Presidential Signing Statement.”⁵⁷ Congress then passed by a bi-partisan majority, the Detainee Treatment Act, which limited the use of torture by the U.S. Government.⁵⁸ President Bush signed the bill but included a Presidential Signing Statement, “the constitutional authority of the president to supervise the unitary executive branch as commander in chief.”⁵⁹ This statement indicates that though the act was passed and signed by the President, thereby becoming the law of the land, the President reserves his right to limit the provisions that will be enforced. According to the statement, the President as a unitary executive, can limit the enforcement of a bill if it directly limits the Presidential powers.

President Obama continued the use of the signature statement although he disapproved of this method during the Bush Administration.⁶⁰ Without congressional approval, President Obama intervened in

⁵⁷ Yen Makabenta, *Unitary executive theory: the President’s power of control over the executive branch*, The Manila Times, Sept. 15, 2018,

<https://www.manilatimes.net/unitary-executive-theory-the-presidents-power-of-control-over-the-executive-branch/441634/>, (last visited March 9, 2019.)

⁵⁸ *Detainee Treatment Act of 2005*, 119 Stat. 2739(1),

<https://www.dni.gov/index.php/ic-legal-reference-book/detainee-treatment-act-of-2005>, (last visited March 9, 2019.)

⁵⁹ *The President’s Statement on Signing of H.R. 2863*, Office of the Press Secretary, White House President George W. Bush, Dec. 30, 2005, <https://georgewbush-whitehouse.archives.gov/news/releases/2005/12/print/20051230-8.html>, (last visited March 9, 2019.)

⁶⁰ Tom Head, *Imperial Presidency 1010: Unitary Executive Theory and the Imperial Presidency*, ThoughtCo., March 5, 2019, <https://www.thoughtco.com/unitary-executive-theory-the-imperial-presidency-721716>, (last visited March 9, 2019.)

international conflicts by sending the U.S. Armed Forces into Libya in 2011. The Obama administration sent a report to Congress that the intervention fell short of full-blown warfare.⁶¹ Speaker of the House, John A. Boehner, asked the President to provide a legal justification for passing the 60 to 90-day deadline of the War Powers Act⁶² “The administration’s theory implies that the president can wage war with drones and all manner of offshore missiles without having to bother with the War Powers Resolution’s time limits,” said Mr. Goldsmith, Justice Department Office of Legal Counsel during the Bush administration.⁶³

Furthermore, executive policies such as the creation of *Deferred Action for Childhood Arrivals* (DACA) acquired legal standing within the courts even though this policy was never enacted by Congress.⁶⁴ Finally, President Trump’s use of emergency powers to build a border wall within the Department of Defense remains debatable. However, the use may be permitted by the *Construction authority in the event of a declaration of war or national emergency Act*, U.S. Code 2808.⁶⁵

Nonetheless, if the President does declare a national emergency, it will

⁶¹ Charlie Savage and Mark Landler, *White House Defends Continuing Role in Libya Operation*, N.Y. Times, June 15, 2011, <https://www.nytimes.com/2011/06/16/us/politics/16powers.html>, (last visited March 9, 2019.)

⁶² Id.

⁶³ Id.

⁶⁴ Andrew Wyrich, *Is DACA really unconstitutional as the Trump administration claims?*, The Daily Dot, Sept. 5, 2017, <https://www.dailydot.com/layer8/is-daca-unconstitutional/>, (last visited March 9, 2019.)

⁶⁵ U.S. Code Section 2808, *Construction Authority in the Event of a Declaration of War or National Emergency*, Cornell Law School, <https://www.law.cornell.edu/uscode/text/10/2808>, (last visited March 9, 2019.)

be taken to court to determine the constitutionality of Presidential Powers to declare emergencies within the *National Emergencies Act*.⁶⁶ Future trends may try to restrict Presidential powers. Currently, Congress is rallying support to restrict the President's power to enact tariffs known as the *Bicameral Congressional Trade Authority Act*, which will require the President to request congressional approval before enacting foreign trade policies.⁶⁷ Also, Congress is working on a resolution to use the War Powers Act to limit the executive powers of the President to deploy the military. "If the bill passes, it would mark the first time Congress has ever used the War Power Act of 1973 to curtail a president's ability to deploy U.S. military assets abroad."⁶⁸ The President of the United States has the ability to expand or limit its presidential powers. From Washington to Trump, each president creates their interpretation of presidential powers. The unitary executive theory was a powerful tool for President Nixon to expand Presidential powers. But Congress ultimately reduced those powers after Nixon to weaken the Presidency. The same intent remains today with a trend to weaken the Presidency of Trump.

Analysis

The constitutionality of the unitary executive theory is debatable.

⁶⁶ Charlie Savage, *National Emergency Powers and Trump's Border Wall Explained*, N.Y. Times, Jan. 7, 2019, <https://www.nytimes.com/2019/01/07/us/politics/trump-national-emergency.html>, (last visited March 9, 2019.)

⁶⁷ Chris Prentice, *U.S. Lawmakers move to Curtail President's Power to Levy Tariffs*, <https://www.reuters.com/article/us-usa-trade-tariffs-idUSKCN1PO2ZC>, <https://www.reuters.com/article/us-usa-trade-tariffs-idUSKCN1PO2ZC>, (last visited March 9, 2019.)

⁶⁸ Matt Laslo, *Congress to Introduce a Bill Limiting Trump's Use of Military Power*, Jan. 30, 2019, https://news.vice.com/en_us/article/yw8vz7/congress-is-about-to-introduce-a-bill-to-limit-trumps-use-of-military-power, (last visited March 9, 2019.)

American historians and law professors have written many law journals and scholarly articles on this issue. The opinions are divided and it continues to be controversial. Unitary executive theorists claim that the Founding Fathers meant what they wrote in Article II, Section 1 of the Constitution, “The executive power shall be vested in a President of the United States.”⁶⁹ Unitary executive theorists believe that this section does not have another interpretation other than what is stated. The power of the executive belongs to the President. The President is the elected figure in the branch with the Vice-President, so he has full control of the branch because the people gave him that power through elections and the Constitution. Everyone else working in the executive branch is under the control of the Chief Executive, “All federal officers exercising executive power must be subject to the direct control of the President.”⁷⁰

Law Professors Steven G. Calabresi and Kevin Rhodes wrote that the President serves as the chief of the branch and has the final say over policy and the way its enforced.⁷¹ This means the decisions made by the secretaries of the different departments, like the Secretary of State, Treasury, Interior and all, can be overruled by the President, due to Article II, Section 1 of the Constitution. Lawrence Lessig from Columbia Law Review connects Article II, Section 1 with Article II Section 3, which reads, “. . .he shall take Care that the Laws be faithfully executed.”⁷² This is known as the “Take Care Clause.” Lessig, a law professor at Harvard, believes that the “Take Care Clause” re-

⁶⁹ *U.S. Constitution.*

⁷⁰ Steven Calabresi and Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, Harvard Law Review, Vol. 105, Apr. 1992, https://www.jstor.org/stable/1341727?seq=1#page_scan_tab_contents, (last visited March 9, 2019.)

⁷¹ *Id.*

⁷² *U.S. Constitution.*

enforces the unitary executive theory,⁷³ showing that it's the President's duty to take care of the laws and to execute them properly. The Constitution gives the President full authority over enforcement of the law. This means that whoever tries to interfere with the President's way of executing the law is violating the separation of powers between the branches of government. One of the first court cases that set a precedent was *Myers v. United States*.⁷⁴ The case concerned the removal of Frank S. Myers from his office as First-Class Postmaster by President Woodrow Wilson in 1920. Frank S. Myers believed that President Wilson did not have the power to remove him from office and asked Congress to weight in since it was the Senate who confirmed him. The Supreme Court, by a 6-3 vote, ruled that the President had the authority to remove any officer within the executive branch. The opinion of the court included the statement that the framers gave full executive powers to the President under Article II, Section 1 and, "that Congress could not limit his control, through removal, over members of those departments."⁷⁵

The other way unitary executive theory is implemented is when Presidents justify their actions when doing military operations without congressional authorization by using the Commander in Chief clause. Many law scholars and attorneys justify the Presidential actions as something given by the Constitution in the Commander in Chief Clause, even if Article I, Section 8 gives Congress the powers to declare war. In research done by Attorney Michael John Garcia, he shows that

⁷³ Lawrence Lessig, *What an Originalist Would Understand 'Corruption' to Mean: The 2013 Jorde Lecture*, Ca. Law review, April 29, 2013, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257948, (last visited March 9, 2019.)

⁷⁴ *Myers v. United States*, 272 US 52 (1926), <https://supreme.justia.com/cases/federal/us/272/52/>, (last visited March 9, 2019.)

⁷⁵ *Id.*

most of the justifications given by those that defend the President's power to declare war uses the Commander in Chief clause and claim it's a political question.⁷⁶

The scholars that are against the unitary executive theory argue that the unitary executive theory violates law and is unconstitutional. In an article concerning the unitary executive theory, Professor Julian G. Ku, he acknowledges that when any branch claims exclusive powers, it can be a problem.⁷⁷ "But all claims of exclusive power, as Justice Jackson observed, pose serious dangers to the equilibrium of the Constitution's system of separation of powers."⁷⁸ Exclusive powers can be given in some cases but not in most he argues. "Anytime a branch seeks to claim a Constitutional trump card, they are undermining inter-branch cooperation and setting up almost inevitable inter-branch conflict."⁷⁹ He says that powers should be shared by the legislative and executive in order to not have problems or constitutional crisis. Professor Ku and many scholars explain that unitary executive theory can create imperial presidencies and can increase the power of one branch and weaken the others. The rule of law can be undermined and can be lost because one branch, in this case the executive branch, would be above the law. Louis Fisher, a constitutional law expert, has stated that the unitary executive theory is used to justify constitutional violations and this

⁷⁶ Michael Garcia, *War Powers Litigation Initiated by Members of Congress since the Enactment of the War Powers Resolution*, Congressional Research Service, Feb. 17, 2012, <https://fas.org/sgp/crs/natsec/RL30352.pdf>, (last visited March 9, 2019.)

⁷⁷ Julian Ku, *Unitary Executive Theory and Exclusive Presidential Powers*, 12 U. Penn. J. Const. L. 615 (2010), <https://scholarship.law.upenn.edu/jcl/vol12/iss2/14/>, (last visited March 9, 2019.)

⁷⁸ *Id.*

⁷⁹ *Id.*

makes the theory automatically unconstitutional.⁸⁰ Fisher references the case of the Bush/Cheney Administration from 2001-2009, “The unitary executive model became a convenient framework to justify constitutional and legal violations by the Bush II administration.”⁸¹ He refers to the different military operations done abroad and laws passed after September 11, 2001. Fisher states, “It requires Presidents to understand that they are under the law like every other person.”⁸² This seems to be a common theme by law scholars that are against the unitary executive theory, that the president has supreme authority under this theory and is a problem to the rule of law. These scholars claim that the President has to be just like every other citizen. The unitary executive theory violates the Constitution and law because power is not made for one man only but for the institutions and the balance of powers to lead the actions of government. Otherwise, unitary executive decisions may cause conflicts between branches. Members of Congress have expressed their concern with the chief executive in relations to the Presidential use of the executive order. They claim this is reminiscent of an imperial presidency. In 2014, Speaker John Boehner accused President Obama of being an emperor due to his use of power in relation to immigration when President Obama used executive powers to create immigration policy. Similar words were said by former Attorney General Jeff Sessions. Many scholars claim that executive orders give Presidents the ability to create law on their own. But the most important concern expressed by the scholars that are against the unitary executive theory is that they see this theory as a

⁸⁰ Louis Fisher, *The Unitary Executive and Inherent Executive Power*, 12 *Journal of Constitutional Law* 2, (2010), <http://www.loufisher.org/docs/pip/unitaryexecutive2010.pdf>, (last visited March 9, 2019.)

⁸¹ *Id.*

⁸² *Id.*

loophole that Presidents use to get away with decisions made that are unconstitutional because it allows them to avoid getting Congressional approval. Presidents claim they have exclusive powers and justify it through Article II, Section 1 of the Constitution, and this gives them a blank check to violate the law and exercise unauthorized Presidential power.

Conclusion

The unitary executive theory is a controversial topic. The unitary executive theory can be found in the United States Constitution and in the Federalist Papers. The type of Presidency that the founding fathers were trying to avoid was described in Federalist Paper Number 4.⁸³ John Jay wrote, “Nay, that absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.”⁸⁴ He particularly rejected the image of the figure of a king as President. A monarch fights for his own glory and tries to achieve what is planned in his agenda without any checks and balances. John Jay expressed fear that a monarch would act in its own interest. In that statement, he showed the way unitary figures act when given power. In Federalist Paper Number 69, John Hamilton described how a chief magistrate should have less power than a monarch and should be held accountable and even prosecuted if needed.

⁸³ John Jay, *The Federalists Papers: No. 4*, The Avalon Project, Yale Law School, http://avalon.law.yale.edu/18th_century/fed04.asp, (last visited March 9, 2019.)

⁸⁴ *Id.*

The founding fathers rejected the unitary executive theory.⁸⁵

The first article in the United States Constitution addresses the function of the legislative branch, which is composed of law-makers elected by the people. This article states that the law is made by the people and they order the President to enforce it as its written. If not, law-makers are there to hold the executive accountable. Yes, the President enforces the law, but Congress has oversight and they are entitled to hold the President accountable.

When it comes to appointing executive officials, the President nominates his/her choice, and Congress approves or disapproves them. When going to war, the President through intelligence information and evidence has to prove to Congress that the country needs to go to war, and then Congress approves or disapproves the President's recommendation. When doing treaties or conducting foreign affairs, the President leads negotiations and proposes to Congress the recommended policies that congress will eventually approve or disapprove. One of the most important appointments for a President is to appoint a Justice for the Supreme Court, but Congress can say yes or no. This suggests that the most important decisions are made in partnership with Congress.

Perhaps the best option would be to have a semi-unitary executive approach. The semi-unitary executive theory consists of shared powers but with consent of Congress to let the President govern. Congress on many occasions goes into gridlock and seem like nothing can get passed. This frustrates the executive and makes them act on their own. Then conflicts get sent to the judiciary to get solved and government

⁸⁵ Alexander Hamilton, *The Federalists Papers: No. 69*, The Avalon Project, Yale Law School, 1788, http://avalon.law.yale.edu/18th_century/fed69.asp, (last visited March9, 2019.)

becomes more inefficient. A semi-unitary executive theory would require reforms on the Presidential powers such as following established protocols that allow the President to act but only with the consent of Congress. Similarly, The President should be able to remove executive officials, but only with the consent of Congress. British law allows the Prime Minister to hire and fire ministers.⁸⁶ This allows the Prime Minister to fire without causing any controversy. Approval would still be required by Congress, but the President would have the right to fire an executive member also.

Some issues could be resolved with resolutions, but issues like foreign affairs or military use, war, or oversight of government decisions should be consistent with our Constitution and regulated by the three branches of government. Each branch of government should respect the powers given by the people to the President through their vote.

⁸⁶ *About Parliament*, <https://www.parliament.uk/about/>, (last visited March 9, 2019.)