



## Is Trump's Lawyers' "Unitary President" Claim Constitutional?

In response to Robert Mueller's request that President Trump answer questions about the allegations that he obstructed justice, the president's lawyers insisted that their client "possesses the indisputable authority to direct that any Executive Branch investigation be open or closed because the Constitution provides for a unitary executive with all executive power resting with the President."



The "unitary president" gambit is an old one and well-worn. The theory is that the president can do anything he wants with regard to the Executive Branch as long as he isn't prevented from doing so by Congress or the courts.

As explained by Andrew McCarthy, "If lawmakers believe the president is abusing his power by firing good public servants arbitrarily, they can impeach the president. Or they can try to bend the president into better behavior by cutting off funding, refusing to confirm nominees, or holding oversight hearings that embarrass the administration. Congress has these powerful political tools."

The notion that when it comes to the Executive Branch, the president can say, "it's my way or the highway" (another McCarthy quote), is one hewed to rigidly by the neoconservatives, but not one consistent with the history of the Constitution.

For generations presidents have carried out a plan to consolidate all functions of government into the hands of one "unitary" executive, aggrandizing the office of the president and reducing Congress to mere plaintiffs in lawsuits challenging that all but unlimited authority.

President Trump's lawyers and all Americans concerned about this consolidation should study the words and warnings of our Founding Fathers and their political and philosophical influences regarding the primacy of the separation of powers in a good government.

James Madison, writing as "Publius," stated in *The Federalist*, No. 47: "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. "

Madison himself was restating, in his inimitable style, one facet of federalism that was universally considered to be an essential pillar of liberty.

As the venerable French philosopher Baron de Montesquieu wrote in his influential treatise *l'Esprit des Lois* (The Spirit of the Laws), "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."

"Centinel," the *nom de guerre* of an anti-Federalist opposed to ratifying the new Constitution,



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rephrased for his readers what was already, in the 18th century, a well-settled aspect of good government, writing, “This mixture of the legislative and executive moreover highly tends to corruption. The chief improvement in government, in modern times, has been the complete separation of the great distinctions of power; placing the legislative in different hands from those which hold the executive.”

Another anonymous anti-Federalist commented, “Liberty therefore can only subsist, where the powers of government are properly divided, and where the different jurisdictions are inviolably kept distinct and separate.”

The words of these men are a worthy indicator of the provenance of one of the most potent threats of despotism: the executive branch.

Many of Trump’s predecessors have filled the shoes of a tyrant heel to toe. One after the other, presidents bent on aggrandizing the executive office have demolished the walls of history, law, and constitutional enumerations that separate the executive and legislative powers.

Consider this, too: If the president exercised today only those powers granted to him in the Constitution, there might be a solid argument for the unitary executive.

Sadly, neither the current president nor any of the previous White House denizens for generations have confined their actions to the powers enumerated to that office in the Constitution.

Regarding his scope of authority *vis à vis* the carrying out of laws, Article II of the Constitution grants the president the power to execute laws and to “take care that the laws be faithfully executed.” That’s it. He might not order his thousands of executive-branch lackeys — lackeys whose existence itself is unconstitutional — to issue orders and regulations and expect them to carry the weight of actual legislation.

If the president were only executing laws, there’d be less opposition to the “unitary president” than there is today. Today, not only does the president preside over an army of bureaucrats who promulgate thousands upon thousands of regulations that are put forth as law though they were not passed by Congress, but he is the titular head of thousands of federal law-enforcement officers whose existence and authority are nowhere provided for in the Constitution.

In other words, the president today does not confine himself to executing laws. He executes fiats issued by an unelected and therefore unaccountable bureaucracy. These regulations are not laws and cannot be so.

Why? In Article I of the Constitution, Congress is granted “all legislative power.” That is to say, the only laws that should be obeyed by Americans and carried out by the president are those passed by Congress and signed into law by the president himself.

When the president presumes to command his army of bureaucrats or his army of federal law-enforcement officials to carry out his will, he has roamed well outside of the constitutional boundaries of his powers.

With a genuine *novus homo* occupying the Oval Office, though, there is hope that the walls separating the three branches of the federal government will be rebuilt and that the 45th president will willingly contain his actions within the boundaries placed around his authority in the Constitution.

If his attorneys’ response to requests made by Robert Mueller are any indicator, though, President Trump seems set on continuing the trend to consolidate all power into the Executive Branch and to defy anyone to try and challenge his supremacy. And he appears wiling to deploy his legions of



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unconstitutional underlings in the executive branch to protect this prerogative.

There is hope that he will not continue his predecessors' habit of aggrandizing the office of the president and reducing Congress to mere plaintiffs in lawsuits challenging that all-but-unlimited authority.

What is certain, however, is that without the necessary vigilance, Americans will be generally unaware of any of these usurpations. Most of us will carry on being obsessed with the food and entertainment that have fascinated the formerly self-governing since the days of ancient Rome.

Aside from the mechanisms included in the Constitution by the Framers (impeachment being the most powerful, although not the only such device), the best check on the expansion of executive power is the people of the United States. We would be wise to follow the counsel given to us by the third man to hold the office of president, Thomas Jefferson.

"In questions of powers, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution," Jefferson said.

Just as Donald Trump transitioned from businessman to president, the American people must transition from casual bystanders to engaged sovereigns, always watching those elected to serve us, making sure that the federal beast stays locked inside its constitutional cage.

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