From the “Unitary” to the “Entitled” Executive

On July 25, 2019, when Donald J. Trump conducted his fateful phone call with Ukraine president Volodymyr Zelensky, he no doubt thought he was doing nothing wrong. He later dubbed it a “perfect call.” He surely had no expectation he would ever be held accountable for the contents of his conversation. The president’s insouciance would have been nurtured both by his limitless self-regard and by his numerous prior successes in dodging comeuppance for so many breaches of political norms (and perhaps violations of law) that would have doomed other politicians. But feeding his confidence also would have been the explicit assurances his lawyers had provided in numerous contexts about a president’s place in the American constitutional system. Trump would likely have believed that he need never disclose the contents of any conversation with a foreign leader, that the conduct of foreign diplomacy was his singular prerogative, and that he had unlimited discretion in the direction of the federal government’s investigative powers regardless of his motives.

Trump would have enjoyed such legal assurances because, for the last forty years, the executive branch of our federal government—especially, but not exclusively when in the hands of conservative Republicans—has been in thrall to a constitutional theory that misreads the Constitution’s grant of executive power and threatens American democracy. As I wrote over a decade ago, this theory, which I call aggressive presidentialism, turns out in practice to be a form of institutional ambition that feeds on itself. It reflects and encourages a psychology of entitlement within and beyond the White House. From the Reagan administration forward, various of its proponents have sought to assure skeptical Americans that strong institutional norms and our constitutional system of checks and balances would prevent
presidentialism from slipping into authoritarianism. But the administration of Donald J. Trump dramatized dangers previously treated as hypothetical. Aided and abetted by lawyers willing to make extreme arguments in support of presidentialism, we have seen how a chief executive scornful of competing institutions and conventional governance norms can subvert constitutional democracy.

Even with the Trump administration now behind us, the dangers posed by aggressive presidentialism are real. Voters want presidents to accomplish things, and Trump no doubt acclimated the American people to expect grand claims for what presidents can achieve through unilateral action. To be fair, Trump was to some extent echoing the rhetoric of his immediate predecessors, who sometimes claimed as personal accomplishments what were really the initiatives of a complex federal bureaucracy. Bill Clinton, for example, claimed it was his initiative to authorize FDA regulation of tobacco. George W. Bush took it to be his personal prerogative to decide what stem cell lines should be allowable subjects of federally funded fetal tissue research. But for the number and dishonesty of his misleading claims, Trump stood in a class by himself. Every successor going forward will be aware of the precedents Trump set and of the extent to which he got away with his braggadocio.

Trump’s performance also showed why his behavior would not count as a boon to political accountability even under the least nuanced model of electoral democracy. Although the endorsement of a popular vote majority cannot itself guarantee that a president will represent a national majority on every issue, Trump lacked even that mandate. His brand of partisanship catered chiefly to an extreme minority. His record shows how the combination of big money influence in our elections, the malapportionment built into the electoral college system, the operation of party primaries, and various forms of vote suppression can yield presidents more loyal to a factional party base than to the national electorate as a whole. I will explore this theme in detail in chapter 5.

Notorious for his outsized self-regard, Donald Trump presumably did not need the subservience of misguided lawyers to nurture his personal sense of entitlement. His narcissism and self-dealing were on display long before he launched his political career. But time and again, Americans witnessed how Trump, as president, echoed the rhetoric of his legal counsel to claim some “absolute right” to engage in conduct that was destabilizing and even corrupt. Whether it is the law or an exaggerated sense of personal privilege

4 • AGGRESSIVE PRESIDENTIALISM
that leads any president to undermine democratic norms, Trump’s success in doing so and the legal theories that enabled him have set institutional precedents that may work in support of antidemocratic initiatives in the future undertaken even by “normal” presidents.

In the face of real-world threats to the operation of America’s democratic institutions, it may seem an academic indulgence to point out that the constitutional interpretation on which presidentialism is founded is largely wrong. But it is important to point it out nonetheless. The insistence of presidentialism’s proponents that the constitutional text penned in 1787 compels their conclusions is easily challenged. But a broader claim is just as critical: not only are “originalist” arguments for extreme presidentialism unfounded, but the methods by which contemporary originalists seek to frame the presidency in 1787 terms are wrongheaded in principle. What we are facing, in short, is an accelerating threat of dangerous claims for presidential power based on poor legal arguments that, in turn, reflect an approach to constitutional interpretation that itself is not justified. These bad legal ideas are threatening American democracy.

THE RENAISSANCE OF UNITARY EXECUTIVE THEORY

Looking back to the Reagan administration, it should be not surprising that, for conservative Republicans in 1981, a presidentialist view of the Constitution—a vision in which a president could work his will on public policy without interference from Congress or much accountability to the courts—would have been an easy sell. Although the Watergate scandal and President Gerald Ford’s subsequent pardon of Richard Nixon had laid the groundwork for a Democratic presidential victory in 1976, the White House remained the likeliest point of leverage to move the country in a more right-wing direction. Watergate and the Ford pardon would fade from political salience. Richard Nixon’s electoral strategy of 1968 had not lost its promise. The election of 1980 produced a Republican victory for Ronald Reagan, the dominant right-wing politician of his age.

In returning the presidency to GOP control, Reagan’s win over Jimmy Carter seemed to vindicate the title of a much-discussed 1969 volume, *The Emerging Republican Majority.* In that influential work, political strategist Kevin Phillips had provided a rigorous basis for optimism (among Republicans, at least) regarding near-term Republican dominance of presidential
politics. By way of contrast, even though the 1980 election had returned the Senate to GOP control for the first time since 1955, the House remained in Democratic hands with no obvious prospect for any imminent Republican takeover. Senate filibuster rules combined with Democratic control of the House would mean that any conservative shifts in policy direction initiated by Congress could come only with Democratic support, which would hardly be reliable. As a result, anything truly revolutionary that Republican presidents might be able to accomplish in terms of reversing the country’s moderate-to-liberal national politics would have to be accomplished within the domain of unilateral presidential authority.

This is not to say that either the government lawyers or legal scholars arguing for the “imperial presidency” in the 1980s were the first to promote some version of such ideas or that they were self-consciously arguing in a partisan way. But part of the human condition is the inevitability of what cognitive psychologists call “motivated reasoning.”

We are most likely to take at face value evidence and reasoning consistent with what we want to believe is true. If you think it likely that presidential unilateralism is your surest path to political success, you will find the legal arguments on behalf of presidential unilateralism appealing. You will meet them with too little skepticism. Between 1981 and 1993, the Reagan and then Bush Justice Department became the crucible for honing what has come to be known as “unitary executive theory,” a key pillar of aggressive presidentialism. The basic tenet of “unitary executive theory” is that the president is entitled to tell any and every member of the executive branch of government how to do their jobs and to fire them if they do not comply.

Among the early modern champions of unitary executive theory are two current Supreme Court Justices, Chief Justice John G. Roberts Jr. and Associate Justice Samuel Alito. From 1981 through early 1982, Roberts worked as a special assistant to Reagan’s first attorney general, William French Smith. From 1982 to 1986, the future Chief Justice served as associate White House counsel. Alito, for his part, spent the first Reagan Administration as an assistant to Solicitor General Rex Lee, the lawyer in Reagan’s Justice Department with primary responsibility for shaping the administration’s constitutional arguments to the US Supreme Court. From 1985 to 1987, Alito served as a deputy assistant attorney general in the Office of Legal Counsel under Assistant Attorney General Charles J. Cooper, also a devotee of unitary executive theory. The Office of Legal Counsel, known widely as OLC, provides “outside counsel” to the White House and executive branch
administrative agencies on issues of constitutional interpretation, as well as complex statutory problems.¹³

Meanwhile, with the blessings of such conservative legal figures as Edwin Meese, who served first in the Reagan administration as a counselor to the president and from 1984 on as attorney general, conservative law students at Yale and the University of Chicago in 1982 founded the Federalist Society for Law and Public Policy Studies.¹⁴ Both well-organized and well-funded, “FedSoc” went on to become an influential incubator of constitutional theory—including unitary executive theory—as well as a powerful network for amplifying the visibility and promoting the careers of conservative and libertarian lawyers.

Among FedSoc’s roster of favorite government officials is William Barr, President Donald Trump’s second confirmed attorney general. Barr had done a stint on President Reagan’s Domestic Policy Council in 1982 and 1983, but first became a major Justice Department figure in the George H. W. Bush administration. Starting as assistant attorney general in charge of OLC, Barr rose quickly to be the deputy attorney general and then, from 1991 through the end of the administration, attorney general.¹⁵ It was in his OLC years, however, that he made what is arguably his most important early contribution to unitary executive theory, a 1989 memo entitled, “Common Legislative Encroachments on Executive Branch Authority.”¹⁶ His analysis, prepared for an interagency group of the administration’s agency general counsels, discusses what Barr argued were “a variety of common provisions of legislation that are offensive to principles of separation of powers, and to executive power in particular, from the standpoint of policy or constitutional law.”¹⁷ To anyone familiar with the customary ways in which the federal government has operated over the centuries, some of these claims are startling. Barr argued, for example, that Congress violates the president’s appointments authority by requiring “a fixed number of members of certain commissions be from a particular political party.”¹⁸ Yet such requirements of political balance are a feature of virtually every so-called independent federal agency. Likewise, Congress supposedly violates the Constitution by requiring the president to submit recommendations for its legislative consideration. In Barr’s view, “Because the President has plenary exclusive authority to determine whether and when he should propose legislation, any bill purporting to require the submission of recommendations is unconstitutional.”¹⁹ Again, such legislative requirements have been utterly routine since the founding. Barr’s 1989 memo thus foreshadowed the forcefulness
with which he would be prepared to make even far-fetched constitutional arguments thirty years later on behalf of a President Trump. Barr actually told the Federalist Society in November 2019 that “by the time of the American Revolution, the patriots well understood that their prime antagonist was an overweening Parliament,” not the king. This trivialization of the revolutionaries’ anti-monarchical fervor would have come as no small shock to the patriots signing the Declaration of Independence, who laid out twenty-seven specific grievances against George III. Likewise with Thomas Paine, the author of Common Sense, who described the king as a “hardened, sullen-tempered Pharaoh” and the “Royal Brute of Great Britain.”

THE DOCTRINAL PILLARS OF LEGAL PRESIDENTIALISM

“Unitary executive theory”—the President’s supposed authority to control the entire federal bureaucracy—is one of three key interlocking doctrines or interpretations of the Constitution that undergird twenty-first-century presidentialism. Although the other core claims are not customarily labeled as such, they are easily recognizable. One asserts the unlimited scope of any discretionary power vested in presidents by the Constitution, such as the pardon power. I will call this the “plenary discretion principle.” The other posits the president’s assertedly unilateral prerogative to conduct the nation’s foreign affairs and national security policy making; I will call this principle, “national security unilateralism.” According to their champions, all three are rooted in the original 1787 understanding of Article II of the Constitution, even though all three are deeply opposed to the notion of checks and balances and the principle of presidential accountability to the other branches of government.

Unitary executive theory actually comes in a variety of forms, although its proponents commonly assert at least two propositions. One is that Article II of the Constitution guarantees presidents the power to fire at will any subordinate officer within the executive branch. The second is that, to the extent Congress has vested any administrative official with policy-making discretion of any kind, the president is constitutionally entitled to command that official as to how his or her discretion must be exercised. A good example of the theory in practice involves the Reagan administration’s response to a statute requiring the director of the Centers for Disease Control to prepare and disseminate an informational pamphlet on AIDS without clearance
by any other official or office, including the White House. In an opinion signed by OLC’s Charles Cooper, the Justice Department insisted it would be unconstitutional to keep the president out of the loop, so to speak, even for drafting an expert pamphlet on AIDS: “The Director of the CDC, as a subordinate executive branch officer within the Department of Health and Human Services, is subject to the complete supervision of the President with respect to the carrying out of executive functions.” In asserting the president’s entitlement to edit CDC pamphlets, OLC said: “It matters not at all that the information in the AIDS fliers may be highly scientific in nature.” In other words, any delegation of authority to any agency to do anything is effectively, in the presidentialist view, a delegation of power to the president.

At first blush, these propositions of presidential authority may not seem threatening. Their implications for actual government practice, however, are radical. For one thing, so-called independent administrative agencies, the leaders of which are protected from presidential firing except for good cause, would be unconstitutional under unitary executive theory. Dozens of long-standing agencies, such as the Federal Reserve System, the Federal Communications Commission, and the Federal Trade Commission would be unconstitutional as currently structured. Moreover, the supervisory power to which the unilateralists subscribe would guarantee presidents the authority to control criminal investigations of potential wrongdoing even by themselves and their closest associates.

To make things yet more ominous, enthusiasts for unitary executive theory tend also to be advocates for extensive and unreviewable presidential authority in other respects, including the conduct of national security surveillance and the deployment of US military forces abroad. It is this latter cluster of views that I call “national security unilateralism.” Belief in these views played a major part in Justice Department memos that advised the George W. Bush administration on the “enhanced interrogation” of enemy combatants (including practices that we would surely call “torture” if perpetrated against Americans), Bush’s supposed authority to ignore the Geneva Conventions in America’s treatment of al Qaeda, and the permissibility of engaging in forms of electronic eavesdropping that were then in violation of the Foreign Intelligence Surveillance Act.

In tandem, unitary executive theory and national security unilateralism envision a presidency largely unconstrained by either Congress or the judiciary. But they are bolstered yet further by what I have called the “plenary discretion principle.” The idea is that, if the Constitution vests any
discretionary power in the president, Congress may not regulate its exercise, even indirectly. To put the point differently, the manner in which the president’s constitutionally vested discretion is exercised, no matter how corrupt or in violation of constitutional values, cannot ever be deemed unlawful. This is what Richard Nixon meant when, with regard to the defense of national security, he told interviewer David Frost: “When the president does it, that means that it is not illegal.”

In an extraordinary 2006 address, former vice president Al Gore laid out in compelling detail how the claims of presidential authority by the George W. Bush administration along the lines I just laid out threaten to upend the government of laws ideal. Taking note of how a dangerous theory of constitutional interpretation was enabling the Bush administration’s worst abuses, he spoke in terms even more salient now: “[The Bush] Administration has come to power in the thrall of a legal theory that aims to convince us that this excessive concentration of presidential power is exactly what our Constitution intended.” Gore explained that, once unilateralism spawns disrespect for legal constraint, authoritarianism looms:

Unless stopped, lawlessness grows. The greater the power of the executive grows, the more difficult it becomes for the other branches to perform their constitutional roles. As the executive acts outside its constitutionally prescribed role and is able to control access to information that would expose its mistakes and reveal errors, it becomes increasingly difficult for the other branches to police its activities. Once that ability is lost, democracy itself is threatened and we become a government of men and not laws.

Fortunately, advocacy for an excessively presidentialist view of the Constitution has had to contend over the centuries with a competing tradition rooted in the commitment to checks and balances. Scholars I call “constitutional pluralists” interpret our checks and balances system to emphasize the roles that the Framers assigned to the multiple institutions of our national government in holding each other to account. In the pluralist view, the scope of permissible presidential initiative depends very much on the actions of Congress and the courts. It is through the commitment to checks and balances and the constraining force of the competing branches that the rule of law is preserved.

I am saving for later chapters a more detailed account of how presidential unilateralists misread the Constitution and why the pluralist view is superior. Yet it is important to state at the outset that our modern presidents’
pretensions to power hardly conform to any original consensus as to the design of the presidential office. When scholars or pundits try to persuade you that the presidency of Donald J. Trump somehow vindicated the constitutional design of 1787, beware.

One of the most important scholarly works to date in support of unitary executive theory has the provocative title, *Imperial from the Beginning: The Constitution of the Original Executive.* Its author, Professor Saikrishna Prakash, argues that the Framers created an “elective monarch,” with powers of “law execution; control of foreign affairs; command of the military; and the creation, appointment, and direction of officers involved in implementing” those powers. But in its particulars, the argument is considerably overstated. The eleven-year span between the Declaration of Independence and the Constitutional Convention did witness a renewed appreciation of the value of an efficient executive power not wholly beholden to the legislature. But the idea that Americans, having just overthrown George III, would have embraced a presidency modeled on his powers is more than a little counterintuitive. James Wilson, an early Supreme Court Justice who had signed the Declaration of Independence and who had served as an influential participant in the Philadelphia Convention of 1787, specifically took the view during the convention that “the Prerogatives of the British Monarch” were not “a proper guide in defining the Executive powers.” Despite his role in urging “unity in the executive,” Wilson said that Unity in the Executive instead of being the fetus of Monarchy would be the best safeguard against tyranny. He repeated that he was not governed by the British Model which was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it.

Especially striking among modern-day presidentialists is the opposition to almost any sort of presidential accountability to Congress. For its legal defenders, the logic of presidential resistance often observes the following two-step doctrinal dance. Step Number One: Construe any aspect of how the Constitution describes the presidency as precluding any legislative measure that would impinge on that description. For example, because the Constitution authorizes the president to nominate “Officers of the United States,” it is supposedly unconstitutional to limit the pool of nominees to individuals with particular qualifications. Because the Constitution authorizes the president to recommend to Congress “such measures as he shall