

Reining in the Imperial Presidency: The Case for a Weak Executive

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ABSTRACT: *Over the years, the Executive branch, in particular the presidency, has become extremely powerful. In fact, it has far more power than the Constitution allows. What can be done to limit executive power as the Constitution intended? The powers and functions of the presidency, mainly found in Article II of the Constitution, are actually very limited, but public perception and legal theories have given the institution immense power. In particular, former President Trump and his administration have dangerously increased the power of the executive branch. This piece discusses the theories and actions that have led us to this point, and proposes necessary changes to curb executive power in accordance with the Constitution and founding principles.*

In 1973, in *The Imperial Presidency*, Arthur Schlesinger described an out-of-control, monarchical institution. He argued that the presidency then (Nixon had just begun his second term) had far more power than the Constitution allows. In my view, that is still the case. Former president Trump believed he was above the law, and had a monarchist attorney general to aid him. Both men were fully content to run roughshod over two co-equal branches of government, and that means it is clear that the presidency has spun out of control and that it is time to rein it in. A constitutional amendment or amendments to minimize executive power would be too difficult to enact given the process. Therefore, changes to the law and to legal policy are the only way to limit executive power. Here, I will outline the Constitutional functions of the president, the origins of today's broad view of executive power, and the changes that the next administration and Congress need to make.

Article II of the Constitution defines the powers of the presidency. Article II, Section I states that “the power of the executive branch shall be vested in a president of the United States.”¹⁵⁹ The word “vested” is the basis for the monarchical “Theory of the Unitary Executive”, which holds that the president is the absolute head of the executive branch and holds broad power over its many administrative agencies. Proponents of this theory also argue that the president can intervene on all agency decision-making, including matters in which they have a personal stake, and that he can fire any agency official for any reason. I disagree. While it is true that Executive Branch officials serve at the pleasure of the president, that does not mean they can issue illegal orders or fire them in order to cover up illegal actions, and courts have ruled on presidential immunity in investigations. The Constitution also gives the president the power to appoint members of his cabinet, ambassadors, and judges with the advice and consent of the Senate. Third, the president is the commander in chief of the armed forces, and has the power to pardon. His most important responsibilities are to keep the nation safe, to protect the

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¹⁵⁹ US Const., art. 2 sec. 1. cl.1



Constitution, and to “take care that the laws be faithfully executed.”¹⁶⁰ Some argue that this makes the president the chief law enforcement officer of the United States. This argument fails because implementation and enforcement are two different things. Implementation, or execution, of the law, means that the president is ensuring that the laws take effect. Enforcement means ensuring that people obey the laws once they take effect as well as punishing those who break them. There is no reason to think the president is the chief law enforcement officer.

Not only has executive power itself expanded; so has the belief in a strong, monarchical presidency. This is true in most circles of public life, not only conservative America. The American public looks to the president to lead the nation in times of crisis, and to use the power of his office to better the lives of the citizenry and to protect the national interest:

We want our president to stimulate our national economy while protecting our local ones—and we roundly condemn him when either shows signs of weakness. We call on the president to simultaneously liberate the creative imaginations of private industry and regulate corruption within. We call on the president, as the main steward of the nation’s welfare, to resuscitate our housing and car industries while reducing the national debt. We bank on the president, as commander in chief, to wage our wars abroad while remaining attentive to all emergent foreign policy challenges beyond today’s battlefields. We look to the president, as the nation’s figurehead, to be among the first on the scene at disasters, to offer solace to the grieving, to assign meaning to lives lost and ruined. All this we expect presidents can do. All this we insist they must do.¹⁶¹

Although the Constitution strongly limits what the president can actually do, the public believes that the president to be all powerful and expects the president to use that power. Howell notes that “most Americans see their entire government in the presidency.”¹⁶² This means that Americans are more likely to support a president who seeks to exercise power and perhaps to disregard the Constitution, especially if that president belongs to their own political party. An authoritarian figure may be attractive for that reason. As the public might see it, a weak executive will plunge the country into ruin. After the Great Depression, strong government programs in the New Deal as well as government cooperation with industry led the country out of this collapse. In the 1960s, Lyndon Johnson implemented the Great Society, a master at projecting presidential power. But even American conservatism, supposedly devoted to the principle of limited government, has championed executive power. Conservatives in fact devised

¹⁶⁰ US Const., art. 2, sec. 3 cl.5

¹⁶¹ William Howell, “Thinking About the Presidency: The Primacy of Power”, Princeton, 2015, p.1.

¹⁶² Howell, “Primacy” p.5.



the aforementioned “Theory of the Unitary Executive”. While one might expect originalists, as conservatives often claim to be, to believe in a weaker executive, Steven Skowronek notes that [t]he overall effect [of this new view of executive power] is to authorize the President to capitalize on all that the historical development of national power has created while leaving to others the Constitution’s most rudimentary and combative instruments: term limits and quadrennial elections, congressional control of the purse and Senate review of appointments, judicial intervention and the threat of impeachment.¹⁶³

Conservatives are not against enumerated checks and balances such as impeachment and the advice and consent clause, but they are against unenumerated checks such as general congressional oversight absent impeachment and Congress’s being able to regulate various executive agencies. Similarly, they are against criminal investigations of and lawsuits against a president from outside the legislative branch. Writing for the *Minnesota Law Review*, then-judge Brett Kavanaugh wrote: “Congress might consider a law exempting a President—while in office—from criminal prosecution and investigation, including from questioning by criminal prosecutors or defense counsel.”¹⁶⁴ In line with the conservative stance against other unenumerated checks and balances, the only Constitutional mechanism they accept for punishing the president is impeachment. Therefore, they would argue, a strong executive subject only to these guidelines is Constitutional. Skowronek also notes that conservative proponents of executive power “have reinvigorated traditional conservative arguments for resting power on original understandings of the Constitution.”¹⁶⁵ This belief that the Founders outlined a strong executive in the Constitution has been dominant among conservative lawyers and jurists for decades, and extends into the current day and our current government, including the Department of Justice.

In 2018, Attorney General William Barr¹⁶⁶, at the time a private citizen, wrote a nineteen page unsolicited memo to then Deputy Attorney General Rod Rosenstein. In that memo, Barr argued that Special Counsel Robert Mueller’s supposed application of the obstruction of justice laws would undermine the presidency:

¹⁶³ Steven Skowronek, “The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive”, *Harvard Law Review* vol. 122, 2009, p.2077

<http://harvardlawreview.org/wp-content/uploads/pdfs/skowronek.pdf>

¹⁶⁴ Judge Brett Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, *Minnesota Law Review*, vol.93, 2009, p.1461

https://www.minnesotalawreview.org/wp-content/uploads/2012/01/Kavanaugh_MLR.pdf

¹⁶⁵ Skowronek, “Insurgency,” p.2077

¹⁶⁶ Barr was the Attorney General at the time this piece was written. He resigned on December 23rd, 2020



Mueller should not be permitted to demand that the President submit to interrogation about alleged obstruction. Apart from whether Mueller has a strong enough factual basis for doing so, Mueller's obstruction theory is fatally misconceived. As I understand it, his theory is premised on a novel and legally insupportable reading of the law. Moreover, in my view, if credited by the Department, it would have grave consequences far beyond the immediate confines of this case and would do lasting damage to the Presidency and to the administration of law within the Executive branch.¹⁶⁷

Here, Barr argues that even if Mueller did have a factual basis for questioning President Trump on obstruction of justice, he cannot do so because his theoretical interpretation of the law is wrong. This is a circular argument, because Barr is saying that even if Mueller has a legal basis to interview the president, he has no legal basis to do so. Barr also gives a hint of his maximalist views on the executive, because he asserts that simply allowing an interview with the president on obstruction would be bad for the office. Barr continues by arguing that "the Constitution vests plenary authority over law enforcement proceedings in the President, and therefore one of the President's core constitutional authorities is precisely to make decisions 'influencing' proceedings."¹⁶⁸ Under this theory, a prosecutor cannot imply that interfering in law enforcement proceedings would be obstruction of justice -- when in fact that is the very essence of obstruction of justice. But such an authority -- to make decisions that influence what the Justice Department does -- is not enumerated. Barr's argument renders the president a monarch. If the president can interfere with a law enforcement proceeding or refuse to cooperate with one, that would place them above the law. Barr also argues that obstruction of justice does not apply to "facially lawful act[s],"¹⁶⁹ but this argument also renders the president above the law because it does not matter if something is lawful on its face. The intent of the action is what matters: whether the president is attempting to obstruct the proceeding even if what they do is, as Barr would put it, "facially lawful." Now Barr argues that the impeachment clause still exists as a remedy. However, under a Unitary Executive, investigations that are a roadmap to impeachment, including congressional ones, are unconstitutional, because the Constitution does not have explicit provisions for them. After all, the theory holds that the president has authority over the whole executive branch, not Congress, and is therefore entitled to direct cooperation or lack thereof, with all investigations.

¹⁶⁷ United States Department of Justice, William Barr, Memorandum "re: Mueller's 'Obstruction' Theory," June 8th, 2018, p.1

<https://int.nyt.com/data/documenthelper/549-june-2018-barr-memo-to-doj-mue/b4c05e39318dd2d136b3/optimized/full.pdf>

¹⁶⁸ Barr, "Obstruction," p.9

¹⁶⁹ Barr, p.9



Over the past year, we have seen a runaway executive guided by these theories. After the release of the Mueller Report, the Special Counsel documented 10 instances of potential obstruction of justice. Barr concluded that the evidence was insufficient. Mueller could not even offer a conclusion on that issue because DOJ policy forbids indicting a sitting president and to conclude that Trump committed a crime without an indictment, something that would give him his day in court, would leave the president unable to truly defend himself against such allegations.

So, Congress attempted to investigate further. However, President Trump directed former White House Counsel Don McGahn, a key witness, not to testify before the House Judiciary Committee under subpoena, citing a made-up doctrine of “absolute immunity.”¹⁷⁰ The White House asserted executive privilege over documents across the administration. They also refused to allow many administration officials to testify before Congress. When they did, White House officials directed them not to answer any questions about their time in the White House. In fact, the White House even asserted executive privilege over the testimony of former Trump campaign manager Corey Lewandowski, who never worked in the White House.

Now, the conservative legal movement might argue that these investigations were unenumerated, and therefore, the White House did not have to cooperate. However, the White House also obstructed the House of Representatives’ impeachment inquiry this past year. In a letter to various committee chairs and to House Speaker Nancy Pelosi, White House Counsel Pat Cipollone said that “in order to fulfill his duties to the American people, the Constitution, the Executive Branch, and all future occupants of the Office of the Presidency, President Trump and his Administration cannot participate in your partisan and unconstitutional inquiry.”¹⁷¹ He cited various due process concerns and complained that the process was unfair. He did not, however, assert any legal basis for the White House’s refusal to cooperate. In more finely worded language, he essentially invoked the president’s war cries of “witch hunt” and “presidential harassment.” Nor did he ever assert legal bases for blocking administration officials from testifying in the inquiry, only the nonexistent doctrine of “absolute immunity,” which the Supreme Court rejected earlier this year in *Trump v. Vance*.

This refusal to cooperate with Congressional subpoenas even in an impeachment inquiry allows the president to run roughshod over a co-equal branch of government. The Executive does not get to decide whether it will cooperate with an impeachment inquiry, because under Article

¹⁷⁰ Pat Cipollone, letter to Chairman Nadler re: McGahn testimony, May 20th, 2019
<https://d3i6fh83elv35t.cloudfront.net/static/2019/05/PACLetterJN05.20.2019.pdf>

¹⁷¹ Pat Cipollone, letter on October 9th, 2019, p.2
https://docs.google.com/viewerng/viewer?url=https://www.whitehouse.gov/wp-content/uploads/2019/10/PAC-Letter-10.08.2019.pdf?utm_source%3Dtwitter%26utm_medium%3Dsocial%26utm_campaign%3Dwh



1, “the House shall have the sole power of impeachment.”¹⁷² A refusal to cooperate because of perceived unfairness cannot stand. With no legal bases to adjudicate in the courts, this refusal constitutes a clear obstruction of Congress. There is nothing judiciable in ordering the blanket defiance of subpoenas. Merely ordering a blanket defiance of subpoenas, or as the president would put it, “fighting all the subpoenas” because “these are not impartial people,” is not something that can be litigated. In light of these actions, it is time for Congress and the next Department of Justice to make changes to the law and legal policy in order to restore the Constitutional order.

The first necessary change is to criminalize defiance or ordering defiance of congressional subpoenas absent the assertion of executive privilege or some other verified legal basis. One of the articles of impeachment against Trump was obstruction of Congress. This charge centers on the Trump White House’s ordering current and former administration officials not to comply with subpoenas. As mentioned above, he and Cipollone argued that current and former officials are “absolutely immune” from testifying to Congress, even under subpoena. This doctrine is nonexistent; it both nullifies the power of the legislature and helps to render the executive monarchical. Therefore, it must be illegal to defy subpoenas or to order others to do so.

On the point of cooperation, Congress should pass a law or rule change to authorize the Sergeant-at-Arms, in a committee hearing, to hold any witness in contempt of Congress if necessary without a full vote in either house of Congress or a decision from the Federal judiciary. Lewandowski repeatedly refused to answer questions under subpoena, claiming executive privilege, even though he did not work in the White House. Holding a vote in Congress or going through the court system leads to untenable potentially year-long delays and allows the Executive to stall and run out the clock on legitimate processes. Therefore, this change is also necessary to restore checks and balances.

It is not only the presidency that is out of control, but also the Department of Justice. Currently, the only remedy for crimes committed by the Attorney General of the United States is impeachment. This cannot stand. Because impeachment and removal of any government official is difficult to accomplish, it is nearly impossible to hold the Attorney General to account when he commits a crime such as lying under oath to Congress (as Attorney General Barr did in 2019)¹⁷³. It should not be so difficult to hold the AG accountable, considering that it is a crime for anyone else to lie to Congress.

¹⁷² US Const., art. 1, sec. 2, cl. 5

¹⁷³ In testimony before a Senate subcommittee in April of 2019, Barr stated that he did not know if Mueller supported the conclusions in his March 24th letter to Congress about the Report. However, Barr received a letter from Mueller criticizing this letter, and the two spoke over the phone. Mueller said Barr’s conclusions were not inaccurate but that the press had covered his work incorrectly due to the letter. If Mueller said Barr’s conclusions were not inaccurate, he supported the conclusion. If he said it was inaccurate or incomplete, he did not support the conclusion. Either way, Barr would know.



When an Attorney General chooses to act as the president's personal lawyer, as Barr has done, there is little chance that he will appoint a special counsel to investigate potential illegal activity by the president or their administration. With that in mind, Congress should pass a law allowing a vote in both houses to appoint a special counsel to investigate allegations of presidential misconduct in the event that the Attorney General refuses to do so. A simple majority in both houses should be sufficient to authorize the appointment, and the resolution could originate in either chamber. The law should also require the other house of Congress to take up the resolution and vote on it, within a short time period (thirty days?) if the originating chamber passes it. Any such resolution should designate a specific special counsel, so that the Attorney General will not appoint a paper tiger.

Congress should also consider reviving the Independent Counsel statute, the Ethics in Government Act, which expired in 1999. This law gave the judiciary the authority to appoint a special counsel with the same authority as any special counsel that the DOJ appoints. This allows for oversight by authorities other than the Attorney General. The Attorney General cannot overrule charging decisions by the Independent Counsel, and the President cannot fire the Independent Counsel, which allows them to finish their investigation without interference.

Last, but certainly not least, the next Department of Justice should reverse the Office of Legal Counsel opinion barring the indictment of a sitting President of the United States.¹⁷⁴ Special Counsel Robert Mueller declined to make a traditional prosecutorial judgment on whether President Trump obstructed justice because of this policy. Attorney General Barr was then able to lie about whether the evidence was sufficient, when in fact there was overwhelming evidence to establish that the president obstructed justice. Had Mueller been able to say that, and speak for the evidence rather than letting it speak for itself, Barr could not have lied about it.

Nothing in the Constitution bars the indictment of a sitting president. Some would argue that the policy exists to ensure the separation of powers. They argue that it is the responsibility of the Congress to charge a sitting president with wrongdoing and to remedy such misconduct via impeachment. They argue that an indictment interferes with that power. However, I believe that an indictment and a prosecution are two different things. A prosecution is a proceeding, where the accused must defend themselves in a court of law, while an indictment is an allegation. I agree that a prosecution would interfere with the powers of the Congress, which include the power to impeach. If a president were to be found guilty in an ordinary court of law, no one would be able to remove them from office to serve their sentence since only Congress can vote to remove the president. Impeachment is the only way to remove anyone from office under the

¹⁷⁴ United States Department of Justice, Office of Legal Counsel, "A Sitting President's Amenability to Indictment and Criminal Prosecution: Memorandum Opinion for the Attorney General," October 16th, 2000 https://www.justice.gov/sites/default/files/olc/opinions/2000/10/31/op-olc-v024-p0222_0.pdf



Constitution. An indictment, however, is merely a formal accusation of a crime. The prosecution does not have to take place while the president is in office. In fact, the indictment itself can be a recommendation of impeachment. In that regard, Congress, or the states, might also consider a Constitutional amendment to make indictment the penalty for statutory crimes other than treason or bribery, and in the event of an indictment, a trial can take place, and conviction will result in removal from office.

I believe that all of these changes will lead to a return to a limited executive branch as the Constitution intended. The Founders did intend for the president to have the ability to be decisive, but they did not intend to make the president a monarch. Therefore, they placed strict limits on what the president could do when they crafted the Constitution. Restoring the power of the legislature, the judiciary, and the justice system will bring about a return to the Constitutional system of checks and balances that the Framers designed in order to prevent autocracy.



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