
SYMPOSIUM: THE ROLE OF THE PRESIDENT IN THE TWENTY-FIRST CENTURY

INTRODUCTION

During a 1977 interview with David Frost about the domestic effects of the Indochina war, President Nixon quipped: “Well, when the President does it, that means that it is not illegal.”¹ This all-inclusive conception of executive power was obviously misguided.² But, the question remains: if executive power is not unbounded, what, then, are its bounds?

The contents of this special issue of the Boston University Law Review address this question, and others. The essays contained herein are the product of a symposium on “The Role of the President in the Twenty-First Century,” held on October 11th and 12th, 2007 at the Boston University School of Law. The authors were presented with a daunting task.³ There is little in the way of traditional, legal precedent addressing the President’s powers. More than in most other areas of law, the debate over executive power is animated by considerations of policy and the exigencies of particular circumstances. Indeed, in this so-called “Post-9/11” world, the powers of the President (or, at least, the current President’s own view of his power) have changed quickly, both in rhetoric and substance. As such, defining with precision what “executive power” means is impossible; a more nuanced approach must be taken. In the essays that follow, the authors do just that.

The Scope of Presidential Power

To begin, Professor Saikrishna Prakash⁴ tackles a very practical issue: how people describe “executive power.” Prakash argues that the words people use are imprecise at best (and, at worst, confusing). For example, if someone says

¹ Interview by David Frost with Richard Nixon (May 19, 1977), *reprinted in* N.Y. TIMES, May 20, 1977, at A16.

² The threatened impeachment of Richard Nixon a few years earlier and the actual impeachment of Andrew Johnson over a century earlier and William Clinton two decades later illustrate this point.

³ We would like to thank all the scholars who spoke at the symposium, as well as the entire faculty and staff at Boston University School of Law. We also thank the editors and staff on Law Review for their work in creating this special issue, and Professors Gary S. Lawson, Jack Beermann, and Gerald F. Leonard for organizing this symposium and making it a success.

⁴ Saikrishna Bangalore Prakash, *A Taxonomy of Presidential Powers*, 88 B.U. L. REV. 372 (2008).

that the President has “inherent” powers, what does that mean? That the President’s power comes simply from being the head of the executive branch? Or, could it mean that the power is derived explicitly from the Constitution? Professor Prakash offers a new taxonomy of words to describe the source of executive power, the limits of executive power, and whether executive power is shared. The hope is that with a set of words and phrases replete with concrete definitions, people will be able to communicate unambiguously every nuance of their views on executive power.

Professor Robert Sloane⁵ then introduces the debate over the scope of executive power. Sloane finds the debate centered around the unitary executive theory of presidential power. Drawing on recent accounts by Boston Globe reporter Charlie Savage and former Bush administration insider Jack Goldsmith, Sloane explains how Bush is exercising even broader powers than those posited by the traditional version of the unitary executive theory. Sloane concludes this expansion of power is troubling from both domestic and international perspectives. Not only do Bush’s actions set dangerous precedent for future American Presidents, but as an international law scholar, Sloane also sees Bush’s more brazen exercises of executive power as dangerous precedent for the international community.

Professor Michael Ramsey⁶ concludes this section by asking of the executive a question more familiar in debates about the judiciary: “Must the President respect the limits that the Constitution’s original meaning imposes on presidential powers?” Despite the ambiguity of history and legitimate debates over what exactly constitutes “original meaning,” Ramsey concludes the constitutional theory of originalism would impose an external limitation on presidential power. Ramsey suggests that Senator Harry Reid was searching for such an external, legal constraint when he stated: “The President does not have the authority to launch military action in Iran without first seeking Congressional authorization.” Presidential originalism, then, seems beneficial to Ramsey because it can give more definite shape to the otherwise amorphous policy debate over presidential powers.

Sources of Presidential Power

Professor Gary Lawson⁷ looks at the source of presidential power by examining the constitutionality of the National Security Agency’s surveillance of suspected terrorists’ communications, a program frequently cited by this Symposium’s authors as one of President Bush’s most egregiously unconstitutional acts. Lawson, however, defends the surveillance program. Lawson posits several potential sources of the President’s power to surveil

⁵ Robert D. Sloane, *The Scope of Executive Power in the Twenty-First Century: An Introduction*, 88 B.U. L. REV. 341 (2008).

⁶ Michael D. Ramsey, *Presidential Originalism?*, 88 B.U. L. REV. 353 (2008).

⁷ Gary Lawson, *What Lurks Beneath: NSA Surveillance and Executive Power*, 88 B.U. L. REV. 375 (2008).

suspected terrorists' communications, but presents Article II's Vesting Clause as the best basis for the NSA program's constitutionality. Lawson briefly explains why, despite disagreement within both the government and the legal academy, the Vesting Clause is properly viewed as granting the President broad powers beyond those specifically enumerated in Sections 2 and 3 of Article II. Once the Vesting Clause thesis is accepted, Lawson concludes, "Congress can say 'boo, hiss'" to President Bush's surveillance program, "but it cannot say no." Although Lawson's explicit conclusion may be controversial, a more implicit point seems undeniable: so long as we debate the constitutional *source* of executive power, we are unlikely to agree on the constitutional *scope* of that same power.

Professor Dawn Johnsen⁸ then critiques the critiques of the Bush Administration's role in interpreting the Constitution. While the Bush Administration's position – that of a unilateral executive – is harmful, commentators must be careful how they frame their criticisms and recommendations for reform. For instance, there is some confusion about the difference between a President's personal constitutional views and what a President has legitimate authority to do. Johnsen offers an analysis of a President's constitutional authority to interpret the Constitution (say, through signing statements) as distinct from a President's non-enforcement authority (say, for those statutes that violate *Chadha*). The thrust of her analysis is that Presidents should participate in the dialogue of constitutional interpretation, and that they should never say, like John McCain recently did, that they would "never, never, never, never" issue a signing statement.

Finally, Professor John Yoo⁹ alone among the symposium's authors turns the focus away from the sitting President and his most recent predecessors. Instead, Yoo adopts a historical approach and evaluates President Thomas Jefferson's definition of executive power. Jefferson is traditionally viewed as one of the Nation's greatest Presidents and – as a famous advocate for lean government – is traditionally associated with a narrow conception of executive power. But Yoo demonstrates that, both at home and abroad, Jefferson exercised broad executive powers. Domestically, Jefferson initiated the spoils system by filling even lower executive offices with political patrons, asserted the President's duty to interpret the constitutionality of congressional acts, and advocated for sweeping executive privilege in clashes with the courts. In foreign affairs, Jefferson exercised a "Lockean prerogative" to act swiftly and unilaterally in moments of national crisis or opportunity. Indeed, such swift, executive action resulted in Jefferson's greatest achievement: the Louisiana Purchase. Yoo contrasts the circumstances of Jefferson's achievement with the circumstances of the Jefferson administration's greatest failure: the European Embargo. The success of the Louisiana Purchase resulted from executive

⁸ Dawn E. Johnsen, What's a President To Do? *Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395 (2008).

⁹ John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421 (2008).

action alone, whereas the embargo was the result of congressional and presidential cooperation. Yoo concludes by briefly examining James Madison's presidency and how it could have been improved by a broader, more Jeffersonian definition of executive power. Yoo maintains his historical focus throughout, but the normative implications of his analysis are hard to escape: the most successful presidencies will be those which act upon a broad definition of executive power.

The Contemporary and Historical Significance of the Presidency

Professors Neal Devins and David Lewis¹⁰ begin by asking how far executive power extends to independent agencies; or, more directly: "are independent agencies truly independent of presidential control?" To answer this question, Professors Devins and Lewis look to empirical data – commissioner turn-over rates, commissioners' party loyalty, and commissioner approval time. Their examination reveals a surprising result. It is true that presidential control over independent agencies seems to be increasing, but not because Presidents are able to quickly replace the heads of these agencies. Rather, it is because of party polarization. Once a President is able to appoint a sufficient number of party loyalists to a particular commission, they are more likely than ever before to follow in lock-step with the President's policy choices. Party polarization can also frustrate a sitting President's ability to control an agency: if a President follows an opposition-party President, those commissioners whom the previous opposition-party President appointed are more likely to stay on in their positions. Polarization is even more problematic when a President is confronted with a Senate controlled by the opposition party because the Senate is then likely to stymie the President's ability to seat party-loyal commissioners. In sum, party polarization is likely the single most important factor when defining a President's control over independent-agency decision making.

Extensive executive power, one might think, is a facet of the type of big government that conservatives typically decry. Professor Julian Zelizer¹¹ explains how modern conservatives have nonetheless "embraced" and "privilege[d]" the executive branch of government. Beginning with the Nixon administration and continuing through the Reagan and both Bush administrations, Zelizer sees conservatives concentrating power in the executive's hands. In addition to more recent examples, Zelizer cites Nixon's exercise of strong executive power over military and budget policy and Reagan's deep involvement in the regulatory agenda. Zelizer sees presidential power in conservative hands expanding beyond what can be supported on the accountability-based rationales advanced early in the conservative movement.

¹⁰ Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459 (2008).

¹¹ Julian E. Zelizer, *The Conservative Embrace of Presidential Power*, 88 B.U. L. REV. 499 (2008).

Instead, Zelizer suggests conservatives should “reassess their own anti-government rhetoric” and its consistency with “the enormous expansion of executive power they have promoted.”

Finally, Professor William P. Marshall¹² begins with a simple contention: the power of the Presidency has been expanding ever since the founding of the United States. Professor Marshall then explains why, walking through eleven discreet reasons for the expansion. More importantly, Professor Marshall points out that the power of Congress, while it has expanded, has not expanded at the same rate as the President’s. As a result, “the system of checks and balances that the Framers envisioned now lacks effective checks and is no longer in balance.” To counter this imbalance, Professor Marshall suggests that the role of executive branch precedent should be rethought, the independence of the DOJ should be increased, executive branch secrecy should be reduced, and any reflexive support for a President’s decisions based on political affiliation should be reexamined. In the end, Marshall stresses that final point - that commentators should avoid agreeing or disagreeing with a President’s specific policy decision simply because they agree or disagree generally with the President’s political leanings.

Executive Power: In Perspective and a Comparative Assessment

Dean Harold Krent¹³ picks up where Professor Sloane leaves off, elaborating in detail on the distinctions between the unitary executive theory as traditionally understood and the “unilateral” executive theory as pursued by the Bush administration. Krent evaluates President Bush’s signing statements and executive orders and observes that the President is “attempt[ing] to route through his office all authority delegated by Congress to the executive branch.” Focusing on domestic affairs, Krent illustrates the serious ramifications of Bush’s unilateral maneuvering. In Krent’s view, Bush administration policy threatens the independence of agency adjudication and rulemaking, interferes with Congress’s ability to delegate power directly to subordinate executive officials, and, perhaps, gives the President “carte blanche” to entirely reorganize the executive branch. Bush’s unilateralism is not just problematic; Krent also finds it to be unjustifiable. Whereas the unitary executive theory originally developed to increase governmental accountability, President Bush’s actions go farther and do more damage than can be justified on those same grounds.

Finally, Professor Daniela Caruso¹⁴ takes a comparative approach to the Symposium’s focus by attempting to find a functional equivalent of the United

¹² William P. Marshall, *Eleven Reasons Why Presidential Power Inevitably Expands and Why It Matters*, 88 B.U. L. REV. 505 (2008).

¹³ Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523 (2008).

¹⁴ Daniela Caruso, *(Presidential) Powers in the European Union*, 88 B.U. L. REV. 561 (2008).

States's conception of "executive power" within the structure of the European Union. Specifically, Professor Caruso looks at how the European Union influences geopolitical strategies vis-à-vis the E.U.'s Member States (just as the President can influence geopolitical strategies vis-à-vis the United States), and finds that the key to the E.U.'s international power is its strength in regulating free trade, that is: the ability to regulate goods and the E.U.'s traditional blending of international power with free trade has given its central government considerable influence of geopolitical strategies of its Member States. The observation that the E.U. only has indirect control over the international policies taken by its Member States is worrisome, however, and the E.U. might usurp these powers by a "ratchet-like" effect – where powers are, for example, "locked in and then normalized through practice, judicial endorsement, and Congress's fiat" as we have witnessed with the Bush Administration – rather than, as was proposed by the Draft Constitutional Treaty, through a stepwise delegation of these powers to the E.U. by the Member States.

Conclusion

The first full presidential administration of the twenty-first century is just now concluding. The debate, then, over the role of the President in the twenty-first century is just beginning. The essays included in this symposium seek to inform that debate, not just by offering perspectives on the proper role for the President, but also by encouraging scholars to think about how the debate is moderated. In both respects, we hope this Symposium proves interesting and useful to those considering questions of presidential power.

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