

Modern Presidency and Separation of Powers

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ABSTRACT

Separation of powers plays a key role in preventing abuse of power in American government. This paper evaluates the existing research on the subject of the powers of the U.S. executive branch in relation to the legislative and judicial branches. The opinions on whether presidency has grown too strong, or perhaps is not strong enough, vary, but researchers tend to agree that by putting enormous responsibility on one person only in the executive branch, the Constitutional framers made the presidency unique. This explains why concerns of abuse are more prevalent and understandable in the context of this branch than the others.

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Introduction

Separation of powers is a fundamental principle in American government. The government is divided into three separate branches, so that power is not concentrated in one place. This allows for a system of checks and balances, to prevent abuse of power from happening. While in theory each branch has a distinct area of authority, in reality the boundaries are much more blurred between the branches. The system of checks and balances, as well as certain precedents cause those areas of authority to overlap. Since the branches are supposed to be equal, this overlapping authority makes sense. For example, if the executive was only supposed to execute laws made by the legislative, without any original input it would become its subordinate. The mechanism that is supposed to keep the branches equal is a double-edged sword however, as without clear boundaries, one of the branches can disproportionately overstep its authority. As the president is the head of the executive branch, it is important to examine the president's power in relation to the other branches. As the issue is very important, a variety of articles exist that examine it.

This research critique will assess the state of existing research on the topic of presidential power. Six articles will be assessed in this paper. The research approach taken for these articles varies broadly. The opinions expressed also differ, but there are some common themes that can be seen. In today's polarized political world it is important to hear the opposing arguments, perhaps now more than ever. The articles assembled here include opinions from both sides and from diverse authors that include political scientists, law scholars, Supreme Court scholars and a more subjective source from within the Presidential Administration. Due to the holistic approach the formation of a clearer personal opinion on this matter is possible. The matter of presidential power has been important for a long time, as people have worried about the increase of power in the hands of Franklin Delano Roosevelt, and even earlier during Andrew Jackson's presidency, and is even more relevant today, in 2021.

Overlapping authority and clashes between the branches

The research tends to agree that clashes between the branches are inevitable. After all, the system of checks and balances is meant to keep one branch from abusing its power or dominating the others. In cases where authority is overlapping, there have been disagreements over what which branch can do. An example of such a disagreement is the historical Supreme Court case of *Marbury v. Madison* (1803). This landmark case established the principle of judicial review – simply put, the ability of the Court to decide whether a law or government's decision is constitutional. A more recent example is the fact that impeachment is more frequently considered as a tool that can be used against presidents. In the history of the United States, three presidents have been impeached, but as of yet, none have been convicted. The first one was Andrew Johnson in 1868. In the latter part of the twentieth and early twenty-first centuries, two presidents have been impeached, Bill Clinton and Donald Trump, but more faced the threat of an impeachment. Nixon would have been impeached if he had not resigned from office before that. President Obama was never impeached, but some of his opponents suggested using this method to remove him from office. The most memorable reason some people have argued an impeachment could be based upon was the false claim that Obama was not born in the United States. Increased use of impeachment can probably be seen most clearly by the fact that Donald Trump has been impeached not once, but twice, something that has never happened to American president before. Trump's second impeachment is especially interesting, as it established significant precedent, namely the possibility of convicting a president whose term has ended. There has already been one attempt to impeach President Joe Biden - despite his term starting only recently - by Representative Majorie Taylor Greene. Greene wanted to impeach him for things he allegedly did as vice president.

The power of the President

There is no doubt that the President of the United States holds great power. As political and legal scholars Lee Epstein and Eric A. Posner say: "scholars of presidential power agree that the presidency is an extraordinarily powerful institution, and that it is a far more powerful institution today than it was in the past" (Epstein and Posner, 2018, p. 830). In the other two branches the power and responsibility is more divided between individuals: nine Supreme Court Justices, and even more so between the 535 members of the Congress. While the president of course does not do everything alone, he or she, just one person, is the head of the executive branch. This, as well as more power being delegated to the president in recent times by the other two branches makes it understandable that when Americans worry about the abuse of power, the executive branch is the one that gathers the most attention and is spoken about the most.

Of course, there are different approaches and interpretations of what the responsibilities of the president are and how far his or her authority goes.

Arguments for strong presidency

The first article discussed, *The Role of the Executive* by William P. Barr, expresses the opinion that while the president holds a lot of power, it is exactly what the Framers wanted. This source is an article based on a lecture given by Barr. As Attorney General under president Trump, Barr gives an inside view on the issue, from the perspective of the president and people around him. That also causes the view presented to be more subjective – perhaps partisan. While most of the time it is said that the executive branch has gained power over the other two branches in recent times, Barr presents a different opinion. He speaks of the judiciary and the Congress encroaching on the president’s power. He goes as far as to say that the executive has fulfilled the expectations of the Framers “more than any other branch” (Barr, 2020, p. 606).

Barr addresses the issue of most people having the impression that the executive branch is the one encroaching on the power of the others. He explains that there exists a misunderstanding about who the Framers saw as most likely to abuse power. The common understanding is that they did not want an executive that would be too strong, because they feared it could turn into monarchy. Barr argues however, that by that time monarchical power was in decline. Parliamentary power was becoming the most powerful one. Therefore, Barr argues, “by the time of the American Revolution, the patriots well understood that their prime antagonist was an overweening Parliament” (p. 607). Later on Barr states that there is simply a tendency to see the legislative and judicial branches as the “good guys”.

Barr further argues that under the United States’ first founding document, the Articles of Confederation, there was no executive that would be fully independent from Congress. Framers saw the weaknesses of the Articles, and a too weak executive was one of them. Under the Articles the central government was meant to be weak, so the Congress did not have the power to tax, and while every state had its own militia, the central government was unable to assemble an united military, which caused the United States to be vulnerable on the international stage. The United States had to be taken seriously as a whole. Without a strong leader, there existed an incentive for foreign powers to establish relations with individual states, instead of the Union as a whole. They saw the need to establish a strong executive leadership in the new Constitution during the constitutional Convention of 1787. Barr says that after the Revolution many states created their own constitutions with weak executives, subordinate to legislatures. “Where this had been the case, state governments had proven incompetent and indeed tyrannical,” (p. 608) Barr argues.

Barr backs up his claims by quoting or referring to several prominent figures, such as Thomas Jefferson or English philosopher John Locke. In one such instance, he quotes how according to Jefferson the matter of foreign affairs was “executive altogether”. This connects to the fact that the president indeed has much more of a free hand when dealing with foreign matters instead of the domestic ones. Barr highlights it several times how important it is that the president has the ability to make decisions fast.

Most of the arguments made by the author mentioned above seem compelling. It is important to note that the executive is not the only branch that could possibly become tyrannical; the legislative branch also has that possibility, even if it seems less likely. There is another strong argument that he makes that the Framers could divide the executive between multiple individuals, but chose not to, to make it possible for decisions to be made quickly and to make the leadership strong. In Federalist Paper No. 70 Alexander Hamilton gave convincing arguments supporting unitary executive. According to Hamilton, it would help ensure accountability in government, as well as sufficient “energy”. That last word is used frequently by Hamilton in relations to the executive in Federalist No. 70, claiming for example, that: “energy in the executive is a leading character in the definition of good government”. Obviously the Framers saw the problems that arose from a too weak executive under the Articles of Confederation, and they could have feared a too strong legislature. But that does not mean they did not fear a too powerful executive, as well. I think they feared that any of the three branches could become too overreaching, and tried to balance the three.

While Barr’s arguments are compelling, they also look from one perspective only, and consider the situation favorably for the executive. It is interesting that in the later stages of the article, where Barr speaks of the judiciary and legislative branches encroaching on president’s power, he mostly talks of situations when it happened to President Trump. For example, he names “Senate’s unprecedented abuse of the advice-and-consent process” (p. 616) as an encroachment by the legislative branch. As an instance of the judiciary doing so, Barr says that the judicial branch “has appointed itself the ultimate arbiter of separation-of-powers disputes between Congress and Executive” (p. 622). It is not surprising, with Barr serving under Trump. Therefore, even if it was objectively true that the other branches did in all those instances encroach Trump’s power, it would be one example. Barr’s argument would be stronger if he did not depend so strongly on just one president to back up his claims. However, like stated earlier, Barr being

Attorney General under Trump, this is the example he not only has the reason to talk about, but also is the most familiar with. Moreover, he has an incentive to show presidential power in a positive light. This becomes even more obvious knowing that he was chosen to replace Jeff Sessions as Attorney General because Barr wrote favorably about presidential power.

Barr's article is not the only one that questions the common idea of presidential power growing constantly. It is important to consider how Constitutional scholars view this matter, as Barr is not one, he is a practitioner of the law. The article *The Decline of Supreme Court Deference to the President* by Lee Epstein and Eric A. Posner also questions this point of view. The authors point to a very important question that has to be answered when considering this topic: "how exactly do we measure presidential power?" (Epstein and Posner, 2018, p. 834) The authors also say that "scholars often disagree about whether the president is very powerful or very weak" (p. 834). They explain that it might depend on whether one looks at a president's successes or failures. Those might paint very different pictures of presidential power.

Epstein and Posner state clearly that their measurement of presidential power is based on president's win rate, or rate by which the President's preferred ruling 'wins', in the Supreme Court. This statement adds credibility, as it establishes specific criteria. The authors do not try to take every variable into account. Instead, they measure presidential power in this specific area. They focus on the relationship just between the executive and judicial branches. This provides for a better clarity of research.

The article states that presidents have advantage in disputes with private litigants. However, their research of the success rate showed that president's success rate in the Supreme Court peaked during the Reagan administration, and has been declining steadily since then. To support their claim that the success rate of presidents in the Supreme Court is declining, the article gives the percentages for George H.W. Bush, Clinton, George W. Bush and Obama – 70%, 63%, 61%, 52%, respectively (p. 833). Presented like this, the drop in rate is evident.

This puts into question the idea of presidential power being constantly on the rise. The authors then speculate that it may be that scholars tend to focus on the most noticeable or loud events while disregarding the more dull events in governing, and that is where the idea of presidential power growing so disproportionately came from. They give compelling examples of three presidents: Clinton, George W. Bush and Obama. While the article focuses on executive and judiciary branches, these examples touch upon legislative, also. In the case of Clinton, he went to war with Serbia in defiance of Congress, but was not able to implement key elements of his agenda domestically. Bush could use power aggressively against Al Qaeda, but "relied for authority on an enormous amount of new legislation enacted by Congress while succumbing to congressional pressure over coercive interrogation and other policies where there was disagreement" (p. 833).

These examples, but Clinton especially, fit in well with the fact that the president usually has more freedom in how he acts in the matters of foreign policy. A similar theme, although in a different context, was shown in Barr's article also. The examples of several presidents given by Epstein and Posner make their point convincing, as well as interesting.

Considering the fact that the Supreme Court now has six justices who are considered more conservative, and only three with more liberal leanings, this trend is likely to continue. As President Joe Biden is a Democrat, the six conservative justices are likely to have opinions that differ from his. Biden being pro-choice and wanting to expand health care access are just two examples. The trend might have changed, however, if Donald Trump won reelection.

George Washington and Supreme Court – historical separation of powers precedent

The article *The Historical Presidency: Competing Conceptions of the Separation of Powers: Washington's Request for an Advisory Opinion in the Crisis of 1793* by Nicholas C. Starr also deals with the relationship between the president and the Supreme Court. The author examines the situation that had arisen between President Washington and the judicial branch. When Washington applied to the Supreme Court for an advisory opinion, the Supreme Court refused to provide one. This set an important precedent in the relationship between the two branches of government. As Starr puts it: "Washington's request and the Court's refusal bear directly on fundamental issues regarding the purpose and practice of the separation of powers" (p. 603), setting a boundary between the branches. In many other situations the boundaries are more blurry. Two articles discussed next explain the consequences of such ambiguity.

Ambiguity of powers and potential for abuse

The article *The Recommendations Clause and the President's Role in Legislation* by Benjamin J. Schwartz tells a different story than the previous ones. He writes about the Recommendations Clause and how its “role has outgrown its design” (Schwartz, 2020, p. 815). Recommendations Clause gives the President the power and duty to recommend to Congress measures that he or she deems “necessary and expedient” – for example, but not exclusively, through the State of the Union speech. “The Recommendations Clause gives the President the discretion to judge what measures are necessary and expedient” (Schwartz, 2020, p. 773). He claims that using the Recommendations Clause to exercise negative executive power was never what the Framers had in mind. He gives recent examples of presidents Obama and Trump, who used the clause this way. The examples are well chosen, as this shows that presidents from both major parties have done so, demonstrating that it is not a tactic specific either for Republicans or Democrats. This also shows the effect of precedent and connects to how a power once assumed by president rarely goes away from the future presidents. Another thing that this article shows is how ambiguity can help the president extend his or her powers.

The article *Unilateral Action and Presidential Power: A Theory* by Terry M. Moe and William G. Howell deals with the role of ambiguity as well. The authors ask an important question: what are the foundations of presidential power? They quote Richard Neustadt, a preeminent political scientist who specialized in American presidency and advised several presidents, including Harry S. Truman and John F. Kennedy. Neustadt asked the same question about the foundations of presidential power in the 1960s, and came to the conclusion that the strength of presidential power does not come from formal power, but that the foundation of presidential power is personal, or that it depends on an ability to persuade other political actors to follow his or her agenda. The authors then say that Neustadt’s notion of personal presidency is on the decline, as it “seems increasingly out of sync with the facts” (Moe and Howell, 1999, p. 851). They say that there is a lot of research on presidential power that focuses on specific formal powers. But their article shifts that focus onto unilateral action.

Unilateral action is so powerful, they argue, specifically because it is not specified in the Constitution. Because Article II, specifying Presidential powers, is ambiguous, presidents can push that ambiguity to expand their powers. Moe and Howell say that this is a major force in “making modern presidency modern”. While it is the legislative branch that is supposed to make laws, thanks to unilateral action presidents can and do make laws of their own. Some of those laws and actions can be significant, like the examples of the Louisiana Purchase, or freeing of the slaves.

Their argument is a very interesting one. It does not necessarily contradict Neustadt’s, however. Taking into account that Neustadt made his statement nearly forty years later, the situation has changed. The presidency had to rely more on the personality of the president in the 1960s, but by the 1990s when Moe and Howell wrote, the power relies to a greater degree on unilateral action. Moe and Howell indeed say that Neustadt’s theory is growing out of sync with the facts over time, so it might be that it is just becoming obsolete. Most often, a power once given to the president goes on to his successors. So as the presidents pushed boundaries of ambiguity over time, their successors could depend on unilateral action more and more. One notable exception from the rule is the War Powers Resolution, an attempt by Congress to take back some of the president’s power. Most of the time however, it goes the other way around.

Moe and Howell state that “neither Congress nor the courts are likely to stop” presidents from expanding their powers, because of the nature of their institutions. This statement is contrary to articles by Epstein, Posner and Barr. They also say that “there is presently a small empirical literature on presidential lawmaking centered on executive orders” (Moe and Howell, 1999). More research examining that would definitely be beneficial, specifically concerning presidents Obama and Trump, and possibly president Biden in the future.

This article therefore shows how ambiguity allowed for a shift in the basis of presidential power, which once was grounded in persuasion and now relies much more on unilateral tools. Such a shift may be judged as either good or bad, depending on the point of view, but the most important thing is that such a shift occurred in the first place. This illustrates that the ambiguity allows for multiple interpretations of what counts as a president’s responsibility. Presidential power has changed from what it was several decades ago, and that means that it can continue to change in the coming years. Presidential power is influenced by precedent and how the rest of the society reacts to behaviors of subsequent presidents.

Limits of unilateral powers

The last article, *Unilateral Powers, Public Opinion, and the Presidency* by Andrew Reeves and Jon C. Rogowski, addresses the limitations in the literature cited by Moe and Howell. It shows the limits of presidential unilateral powers. According to the authors, unilateral powers are limited because of public opinion. Specifically, the fact that unilateral powers have usually low public support.

The authors use several surveys to support their claim. This article is unique in that it shows that that power of a branch of government can be constrained not only by the other two branches and the system of checks and balances, but also by the general public. Reeves and Rogowski also say that “voters distinguish the president from the presidency”. The public’s attitudes towards unilateral presidential powers are linked with the general approval of the president. “Presidential approval is associated with increased support for unilateral action while stronger beliefs in the rule of law are associated with lower support for unilateral action”, (Reeves and Rogowski, 2016).

However, because the article is from 2016, the surveys are about president Obama. It would be interesting to see how surveys would look like in relations to president Trump. Obviously the public’s opinion on president Trump himself and opinion on his policies were interconnected. It played a big part in him not winning a reelection. It also connects to the previous study about Neustadt’s idea of personal presidency. Moe and Howell argue that it is on decline. But it is hard to claim that personality does not play an important role for presidents at all now. It plays an important role in establishing public opinion on the president, and it is also important for presidential candidates to become visible enough among others to be seen as a leader in the first place.

Presidents Obama and Trump, as well as presidential candidate Hillary Clinton all evoked strong emotions among voters, and their personalities played a big role in that. While people can have strong opinions on president Joe Biden, he seems more amicable than Trump on some issues. Those include immigration as well as economic issues such as COVID relief programs, or raising minimum wage. As he said in his victory speech, he does not want to deepen the rift in an already strongly polarised nation. Perhaps it is that the voters got too tired of candidates with too aggressive approaches.

Conclusion

As stated at the beginning of this paper, opinions expressed in the articles vary greatly. The conclusion on whether presidential power is too strong depends largely on what facts are emphasized. Both sides can put forth convincing arguments. In the public opinion the viewpoint that the Presidency is too strong seems more prevalent. Some of the claims in the articles saying otherwise might therefore be surprising. Despite the variety of opinions, many ideas connect, however. The Presidency is unique and its power is complex. It might be its uniqueness among the branches that explains its place in the spotlight when it comes to concern about separation of powers.

While some arguments state that the powers of the Presidency have not expanded as much as it is often perceived, as Barr, and to a lesser degree Epstein and Posner suggest, enough evidence has been presented to show that at least the potential of abuse of power in the executive branch is very real – as explained in Schwartz’s article. Therefore, the aforementioned place in the spotlight seems well deserved.

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