

The Unitary Executive



By Paul Engel

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- Can a President fire a member of an independent agency?
- Does the President have to spend money appropriated by Congress?
- Just look in the Constitution and you'll find the Unitary Executive.

There have been a lot of questions lately about the powers of the President. Can a President fire a member of an independent agency? Does the President have to spend money appropriated by Congress? Is it legal for the President to send the National Guard to our cities? Most of these questions can be answered by understanding a single constitutional point: The unitary executive.

Understanding the Unitary Executive

Before we get into the details, I think it's worth spending some time understanding some of the arguments behind those who oppose the idea of a unitary presidency. Let's start with an article I found on [Democracy Docket](#).

Since taking office, President Donald Trump has executed a whirlwind of dismissals across the federal government that violated federal statutes and decreed numerous executive orders, including one that blatantly defied the plain language of the Constitution.

Behind the seemingly scatter-shot opening acts of his second administration, legal analysts see a common goal: to test a

once-fringe legal theory which asserts that the president has unlimited power to control the actions of the four million people who make up the executive branch.

[What Is Unitary Executive Theory? How is Trump Using It to Push His Agenda?](#)

First of all, the very idea that the executive branch has over 4 million employees should disturb all of us. How did the federal government, endowed with limited and enumerated powers by the Constitution, grow so large as to need such a workforce in a single branch? Our goal today is not to debate the validity of the actions of President Trump, but what Democracy Docket calls “a once-fringe legal theory,” commonly called the Unitary Executive. This so-called fringe theory comes directly from Article II of the Constitution.

The executive Power shall be vested in a President of the United States of America. ...

[U.S. Constitution, Article II, Section 1](#)

I’m sure you were taught in school that the federal government is made up of three co-equal branches, but that is not exactly correct. You see, the Constitution states “[All legislative Powers herein granted shall be vested in a Congress of the United States,](#)” “[The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,](#)” and as I’ve already shown, “[The executive Power shall be vested in a President of the United States of America.](#)” In other words, the Constitution not only created what we now consider the heads of the legislative, executive, and judicial branches of government, but vested those heads with their power. The “branches” of government are there to support and assist the entities created by the Constitution. For example, while there are plenty of aides, committees, and functionaries in the legislative branch, it’s the Congress,

consisting of the Senate and House, that actually holds the legislative power. Similarly, while the judicial branch includes all of the clerks and aides, the judicial power is vested solely in the courts. So why would the executive branch be any different?

Executive Power

Even in George Washington's time, the executive power of the United States was more than one person could handle alone. Which is why the Constitution, referring to the President, stated:

and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law:

[U.S. Constitution, Article II, Section 2](#), Clause 2

Furthermore, the Constitution also granted:

The President ... may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices,

[U.S. Constitution, Article II, Section 2](#), Clause 1

So while Congress creates the offices, the President appoints, with the advice and consent to the Senate, who holds those offices, and those officers report to him.

Independent Agencies

The idea of an "independent executive agency," as with so many other unconstitutional ideas, goes back to the early 20th century. In the 1903 Supreme Court Case *Shurtleff v. United*

States, the court found:

In the absence of constitutional or statutory provision, the President can, by virtue of his general power of appointment, remove an officer, even though he were appointed by and with the advice and consent of the Senate. This power (assuming, but not deciding, that Congress could deprive the President of the right to exercise it in such a case as this) cannot be taken away by mere inference or implication, and, in the absence of plain language in the statute, Congress will not be presumed to have taken it away.

[Shurtleff v. United States, 189 U.S. 311 \(1903\)](#)

The fundamental flaw in the court's decision was assuming that Congress has the power to take away from the President his executive power. While there are many things that Congress can do with regards to the Presidency, restricting his executive power is not one of them since that power is established not by Congress, but by the Constitution of the United States.

Then, in 1914 Congress created the Federal Trade Commission (FTC). Setting aside the question of the constitutionality of the FTC, Congress attempted to insulate the commission from the power of the President.

Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

[15 USC §41](#)

The power to execute laws is not vested in Congress, but solely in the President. So Congress does not have the constitutional authority to tell the President how to exercise his executive power, only to punish him for any high crimes or misdemeanors he may commit. Remember, Congress makes the laws and the President executes them, but those laws must be made pursuant to the Constitution to be the supreme law of the land.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;

[U.S. Constitution, Article VI, Clause 2](#)

So when Congress passes a law that infringes on the constitutional power of the Presidency, if that law is not made pursuant to the Constitution it's not only not the supreme law of the land, but as Alexander Hamilton put it in Federalist Paper #78, it's void:

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid.

[Federalist Papers #78](#)

Conclusion

These so-called "independent agencies" are Congress' attempt to fundamentally change the nature and functioning of the federal government. This is done by effectively creating a fourth branch of government: Executive agencies that are not overseen by the executive powers of the United States and are therefore overseen by no one. Furthermore, by investing these agencies with the power to make rules that have the force of law, Congress not only usurped the powers of the President, but abdicated their lawmaking powers, both in violation of the Constitution of the United States. It seems Congress, with the assistance of the Supreme Court and the apathy of the Presidency, have conspired to change the United States from a republic to an oligarchy where groups of unelected bureaucrats have the power to make law without the consent of the governed. And now that one President has stood up to this coup against We the People and the rule of law, some "experts"

claim the plain language of the Constitution is a fringe theory. Since the idea of a unitary President is the supreme law of the land, I guess it's those who think Congress can rewrite the Constitution by legislation that are fringe. Sadly, We the People have kept electing those usurpers in Congress for over a century. How long before the very idea of the Constitution as the supreme law of the land fades into a distant memory?

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