

Trump II and the Presidency 1

The Unitary Executive

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Government and Politics of the US - Lecture xiii

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THE WEATHER

Today, mainly cloudy, breezy, afternoon rain, high 51. Tonight, cloudy, breezy, rain early, low 46. Tomorrow, cloudy, soaking afternoon rain, high 46. Weather map is on Page B12.

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Trump Asserts His Global Power Has One Limit: Himself

*'My own morality. My own mind.
It's the only thing that can stop me.'*

1. Trump in context and the Unitary Executive

1.1 Continuity and change

- Trump second term a challenging combination of
 - there are underlying continuities (little is entirely novel)
 - **but** drastic intensification or innovation
 - Trump II *both* a culmination *and* distinctive (shocking!)

1.2 The Unitary Executive

- Both an example and a core element of this:
 - the **unitary executive**
- a long standing argument
- deployed transformationally

1.3 The modern administrative state

- modern American state sits/C18th constitutional structure
- executive branch almost entirely created through legislation
- systems of Congressional delegation (of power) often with *limits*
- Huq (2014): a **Negotiated Structural Constitution**

1.3 The modern administrative state

- crucial period of relative interbranch calm in mid C20th
 - (unified Democratic control of both chambers and the Presidency for the vast majority of the period 1933–69)
 - relatively unpolarised parties, political conflict outside the party structure
- but:
 - rise of the *Imperial Presidency*
 - decline in unified party rule
 - party polarization

1.4 The unitary executive as a political response

- Nixon/Ford administration vast Democratic-controlled Congresses...
- the idea of a **unitary executive**
- conservative legal argument originating in the Reagan administration
 - (Republican Senate but Democratic House)

1.5 Origins of the unitary executive

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

US Constitution Article II Section 1

1.5 Origins of the unitary executive

- argument this is not truly novel - see Calabresi and Yoo (2008)
- most helpful to see it as having multiple levels - after Tushnet (2010)

weak theory of the unitary executive it's not a Federal Council

strong theory of the unitary executive (Reagan era) this means

Presidential executive power is **fundamentally indivisible**:

'super strong' theory (GWB/GWoT) further *inherent* Article II powers (?)

eg:

1.5 Origins of the unitary executive

“ [statutes cannot] place any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make.”

John Yoo OLC memorandum 25.ix.2001

1.5 Origins of the unitary executive

- the *political* appeal of this approach
- the *strong theory*: under Reagan, the Independent Counsel Act & the DoJ; wider Presidential power to direct the executive in a reconstructive political moment
- the *super strong theory* - under George W Bush the “Global War On Terrorism”

1.5 Origins of the unitary executive

“ [the torture] statute would be unconstitutional if it impermissibly encroached on the President’s constitutional power to conduct a military campaign ... any effort to apply Section 2340A in a manner that interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.”

Jay Bybee OLC memorandum 1.viii.2002

1.6 UE arguments

- three kinds of argument for UE:

originalist history Federalist 70 and “energy” in the executive

structural potential Congressional takeover of the executive

textual Article II vesting clause (etc)

1.7 UE argument 1: originalist history

- not a plural executive council!
- framers responding to the Continental Congress' crisis and desiring a stronger executive
- brevity of Art II could be seen as enabling what it doesn't strictly forbid

1.7 UE argument 1: originalist history

“Energy in the executive is a leading character in the definition of good government...”

That unity is conducive to energy will not be disputed. Decision, activity, secrecy and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number...

This unity may be destroyed [...] by vesting it ostensibly in one man, subject in whole or in part to the controul and co-operation of others... “

Alexander Hamilton, Federalist No. 70

1.8 UE argument 2: limiting Congressional structural power

- Could Congress legislate to take control of the executive entirely?

“JUSTICE KAVANAUGH: could Congress convert all these [...] departments into multi-member commissions, the Commerce, EPA, Department of Homeland Security, Department of State, convert them all into multi-member commissions and make them removable only for cause?”

Transcript of Supreme Court oral argument in *Trump v. Slaughter*

8.xii.25

1.9 UE argument 3: textual interpretation

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

the first sentence of Article II

*“this does not mean **some** of the executive power, but **all** of the executive power.”*

Justice Scalia (in dissent) in *Morrison v. Olson* 487 U.S. 654 at 705 (1988)

1.10 The Supreme Court's changing constitutional stance

- occasional Supreme Court adjudication of these issues
- *Humphrey's Executor v. United States* 295 U.S. 602 (1935).
- The FTC and the Federal Trade Commission Act of 1914: “inefficiency, neglect of duty, or malfeasance in office.”
- No Congressional removal power - *Bowsher v. Synar* 478 U.S. 714 (1986)
- Independent Counsel constitutional - *Morrison v. Olson* 487 U.S. 654 (1988)
- recent turn to Unitary Executive

1.10 The Supreme Court's changing constitutional stance

- *Seila Law LLC v. Consumer Financial Protection Bureau* 591 U.S. 197 (2020)
- see also
 - *Trump v. United States* 603 U.S. 593 (2024)
 - *Trump v. Mazars LLC* 591 U.S. 848 (2020)

“The President is the only person who alone composes a branch of government.”

591 U.S. 848 at 868

1.10 The Supreme Court's changing constitutional stance

- Forthcoming decisions in
 - *Trump v. Slaughter* (?2026)
 - *Trump v. Cook* (?2026)) in which some of the Justice swho are expected to overturn Humphrey's Executor seemed less sympathetic to the arguments as applied to the Fed. (It's not clear what the distinction drawn here would be.) We await that decision too.

2. The Unitary Executive under Trump II: an illustrative example

2.1 Outline of the Trump II as unitary executive

1. Deeply personalistic (qv Roberts' "1-person-branch")
2. Use of unitary executive arguments across the whole of government
3. Rejecting some *norms* of restrained Presidential power in particular areas (technocratic or legal)
4. Pursuit of unitary executive authority beyond any argument about the textual content

summary Presidential power almost unbounded

2.2 The Unitary Executive and the FAA: one example

- statutory framework...
 - Air Commerce Act of 1926 (and much later legislation)
 - (20 serving members of Congress have died or disappeared in air crashes...)
 - since mid-C20th the **Federal Aviation Administration** under the Department of Transport (alongside the National Transportation Safety Board)

2.2 The Unitary Executive and the FAA: one example

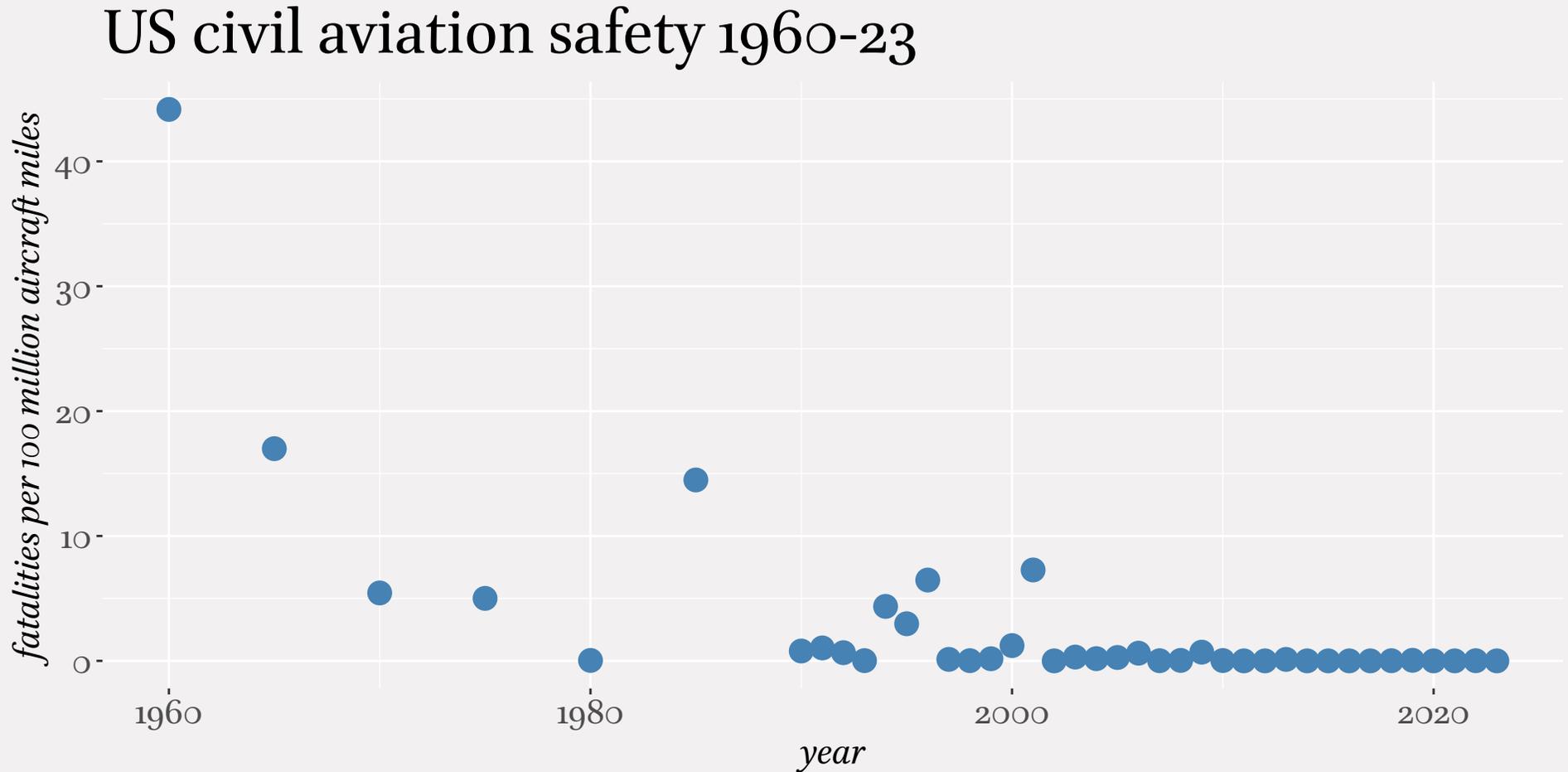


Federal Aviation Administration

“The Administrator of the Federal Aviation Administration shall issue a type certificate for an aircraft ... when the Administrator finds that the aircraft ... is properly designed and manufactured, performs properly, and meets the regulations and minimum standards prescribed...”

49 United States Code §44704

2.2 The Unitary Executive and the FAA: one example



2.2 The Unitary Executive and the FAA: one example

- FAA Administrator (currently Bryan Bedford): Senate-confirmed nomination by the President
 - holds the powers under 49USC
 - type certificates: complex technological/material concerns of manufacturers, airlines, passengers with international (ICAO) component
 - clearly an executive branch post



Donald J. Trump  
@realDonaldTrump

Based on the fact that Canada has wrongfully, illegally, and steadfastly refused to certify the Gulfstream 500, 600, 700, and 800 Jets, one of the greatest, most technologically advanced airplanes ever made, we are hereby decertifying their Bombardier Global Expresses, and all Aircraft made in Canada, until such time as Gulfstream, a Great American Company, is fully certified, as it should have been many years ago. Further, Canada is effectively prohibiting the sale of Gulfstream products in Canada through this very same certification process. If, for any reason, this situation is not immediately corrected, I am going to charge Canada a 50% Tariff on any and all Aircraft sold into the United States of America. Thank you for your attention to this matter!

DONALD J. TRUMP
PRESIDENT OF THE UNITED STATES OF AMERICA

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Jan 29, 2026, 6:29 PM



The Federal Aviation Administration, which issues aircraft certifications in the United States, referred questions about the statement to the White House, which did not respond to a request for clarification. While Mr. Trump said the United States was “decertifying” the aircraft, two industry officials said that federal regulators had advised that the statement was intended only to refer to new certifications. The officials spoke on condition of anonymity because they were not authorized to share the government’s guidance.

In his post on Thursday, Mr. Trump said Canada had refused to certify the Gulfstream 500, 600, 700 and 800 jets. According to Transport Canada's website, Gulfstream 500 and 600 series models are certified in Canada. The 700 was intended to go on sale in 2022, but its F.A.A. certification was delayed until 2024 because of new standards that followed the [737 Max crashes](#). The 800 model only recently received its F.A.A. certification. Transport Canada,

(images from Donald Trump's social media account, and from the New York Times 29.i.26, respectively)

2.2 The Unitary Executive and the FAA: one example

- is there only one real person in the executive branch?
- anonymous briefings?
- what do aircraft operators do?
- rule of law as **regularity** and **predictability**
- (or just ignoring what the President, as unitary executive, says?)

2.3 Trump II year 1 and the Unitary Executive

- qv Skowronek, Dearborn and King (2021)
- norms and the tension between knowledge/expertise/independence as values versus their potential for unwelcome constraint on executive leadership - but also on democratic decision making
- Trump II sweeps aside...

2.3 Trump II year 1 and the Unitary Executive

“[P]revious administrations have allowed so-called “independent regulatory agencies” to operate with minimal Presidential supervision. These regulatory agencies currently exercise substantial executive authority without sufficient accountability to the President, and through him, to the American people. [They] must be supervised and controlled by the people’s elected President.”

Executive Order 14215, 18.ii.25

2.3 Trump II year 1 and the Unitary Executive

- Widespread removals
 - Cook/Federal Reserve Board (“for cause”)
 - Wilcox/National Labor Relations Board
 - Boyle/Consumer Product Safety Commission
 - Slaughter & Bedoya/Federal Trade Commission
 - at least seventeen departmental Inspectors General (Defense, Veterans Affairs, HUD, Energy, Transportation, Interior, HHS, State, Agriculture, Education, Labor)
- ... & many others & much else

2.4 Where do institutions sit - legislature?

Government Accountability Office/Comptroller-General joint control

Architect of the Capitol since 2023 directly appointed by Congress

- but clearly executive functions (eg Capitol Police)

Library of Congress (founded 1800)

- the Librarian
- removing the Librarian
- purporting to replace the Librarian with DAG Todd Blanche
- in order to purport to fire the Register of Copyrights (Copyright Office)
- awaiting decision in *Blanche v. Perlmutter* (2026?)

2.5 Outside the formal executive branch?

US Institute of Peace apparent creation of the “Donald J Trump Institute of Peace”

Smithsonian Institution (founded 1846), national museums...

- a Trust under Board of Regents
 - Secretary of the Smithsonian Institution is elected by the Board.
 - Trump has purported to give instructions to the Secretary
 - purported to fire the Director of the National Portrait Gallery
-

2.5 Outside the formal executive branch?

Election Assistance Commission (EAC)

- Help America Vote Act of 2002

“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”

Article I Section 4

National Mail Voter Registration Form under EAC control (with statutory limits on how changes can be made)

2.5 Outside the formal executive branch?

“the Election Assistance Commission shall take appropriate action to require, in its national mail voter registration form issued under 52 U.S.C. 20508: (A) documentary proof of United States citizenship, consistent with 52 U.S.C. 20508(b)(3); and (B) a State or local official to record on the form the type of document that the applicant presented as documentary proof of United States citizenship, including the date of the document’s issuance, the date of the document’s expiration (if any), the office that issued the document, and any unique identification number”

Executive Order 14248 *Preserving and Protecting the Integrity of American Elections* (25.iii.25) Sec. 2 (a)(i)

2.5 Outside the formal executive branch?

- litigation
 - the Administration lost on the substantive question in Federal District Court in October 2025

case is now on appeal to the DC Circuit Court of Appeals

- What does the existence of these blended institutions say about the Unitary Executive...?

2.6 Next lecture...

- Next in the widening gyre: presidential power more broadly including spending

3. Bibliography and Further Reading

3. Bibliography and Further Reading

Stephen Calabresi & Christopher Yoo (2008) *The Unitary Executive*

Skowronek *et al* (2021) *Phantoms of a Beleaguered Republic*

Aziz Huq, “The Negotiated Structural Constitution,” 114 *Columbia Law Review* 1595 (2014) - see especially section II(A)

Mark Tushnet, A Political Perspective on the Theory of the Unitary Executive, 12 U. Pa. J. Const. L. 313 (2010). Available at: <https://scholarship.law.upenn.edu/jcl/vol12/iss2/4>