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# The Sovereign Presidency: Is This What the Framers Had in Mind?

BY JOSEPH R. STROMBERG

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“Well, when the president does it that means  
it is not illegal.”

—Richard Nixon, interviewed by David Frost,  
May 19, 1977

American government under the Constitution was supposedly meant to work as follows: Congress, staying within delegated powers and the Bill of Rights, passes laws; the president executes the laws; and the courts sort out ensuing wrangles.

This plan ran aground rather early—the 1798 Alien and Sedition Acts, for example—which raises at least two possibilities: 1) The Federalist movement systematically misrepresented its project or 2) the framers’ well-meant “design” fell short of their goals. Figuring this out is difficult, with original sin, human nature, foreign complications, and more tangling up the causal chain.

Even so, the Constitution—read anywhere near its apparent intent—might be worth hanging onto; but how can we get such a reading? Enter a new crop of “conservative” legalists to offer us one under the rubric of “originalism.”

For this crop of presidentialists, which includes John C. Yoo, Roger J. Delahunty, David Addington, Jay S. Bybee, and Attorney General Alberto Gonzales, originalism centers on the Unitary Executive Theory (UET)—a bizarre doctrine of presidential infallibility allegedly prefigured by Alexander Hamilton. Under the UET, America’s president is utterly sovereign in his sphere and sole judge of his own powers.

The merest glance at America’s founding suggests that *no one* really wanted full-bore elective despotism. Nonetheless, American presidentialists apparently find just that in the terms “war powers” and “commander-in-chief,” and in presidential dominance of foreign affairs. Yet their forebear Hamilton conceded that in war the president has “nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy” (*Federalist* 69).

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Presidentialists take John Marshall’s comment, in Congress, that the president is our “sole organ of communication” with other nations as entailing lots of power. And always, presidents *assert* powers and store up precedents. Presidentialists turn presidential *duties*, chores, and everyday practices into powers, and strong figures have built the office.

In the Mexican War (1846–48), President James Polk established the *practical* precedent of maneuvering Congress into war. But it was Abraham Lincoln, above all, who asserted immeasurable war powers belonging (mostly) to the president, by combining the commander-in-chief clause with the president’s job of enforcing the laws. Of this, legal historian Raoul Berger writes in *Executive Privilege*: “[W]hen nothing is added to nothing the sum remains nothing.” But success succeeds, and later presidents—Richard Nixon and George W. Bush among them—have

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eagerly wrapped themselves in Lincoln's mantle of effectively suspending the Constitution to save the country.

After Lincoln presidential war powers rested up until 1898, when President William McKinley wielded them overseas. (McKinley issued a virtual ultimatum to Spain over Cuba a month before Congress declared war.) Theodore Roosevelt thought he could do anything *not prohibited*, at home and abroad, thereby neatly reversing the premise on which the Constitution was sold. Woodrow Wilson, too, had large views, but in 1917–1918 amiably shared with Congress the power of treading liberty under foot (conscriptio, for example), albeit with no new doctrines, merely existing bad ones.

Worse luck, in *United States v. Curtiss-Wright Export Co.* (1936), conservative Supreme Court Justice George Sutherland fancied that during our revolution, George III's prerogative powers somehow lighted on the union, hovering, extra-constitutionally, above successive Congresses, descending finally on the presidency. Berger deconstructed *Curtiss-Wright*, underscoring the *break* with England and the resulting institutional discontinuity. Sutherland's opinion stands, approvingly cited by UE theorists.

As Berger notes, Sutherland championed “a theory of inherent presidential power over foreign relations.” Berger quotes Louis Henkin, who adds that Sutherland's assertion “carves a broad exception in the historic conception . . . never questioned and explicitly reaffirmed in the Tenth Amendment, that the federal government is one of enumerated powers only.”

Presidential power made great strides under Franklin Roosevelt, before and during World War II. FDR's domestic emergencies and his wartime operations added much to the office. The Cold War extended these power-accumulations into an indefinite and interesting future.

The Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer* (1952), during the Korean War, reflected existing realities. Briefly, President Harry Truman, citing war powers, seized the steel industry to end a strike. People across the political spectrum, from organized labor to Republican Senator Robert Taft, denounced the action. The Supreme Court dodged the issue, holding that presidential powers did not go *quite as far* as Truman thought.

## Bottomless Well of Power

Presidentialists take “The executive power shall be vested” (Article II) for a bottomless well. They see the specific duties mentioned as *additional grants of power* open to further (perhaps tortured) interpretation. They find further “*inherent powers*” arising from international law and Marshall's sole organhood, and read the oath—“faithfully execute the office” and “preserve, protect, and defend the Constitution”—as allowing the president to *violate* laws in defense of the Constitution. Yet the charge that the president “take care that the laws be faithfully executed” (Article II, Section 3) seems to prohibit such maneuvers, although presidents have bent the words to their purposes, as when Lincoln “combined” them with the commander-in-chief provision.

Presidential lawyers aggregate or separate clauses to widen power. Political scientist Richard M. Pious writes in *American Presidency* that presidential lawyers, construing *congressional* powers strictly, view “all remaining functions, powers, and duties [as] exercised by the president under doctrines of inherent powers, resulting powers, sovereign powers, and inclusions”—along with emergency and national-security powers. Finally, presidents—as a branch of government—assert a right to interpret the Constitution. Pious shows minimal respect for these notions, commenting that recent, barely elected presidents have felt a need to exploit their “legal” opportunities.

From 1947 on, anticommunist crusading fostered *right-wing* presidentialism. Meanwhile, on other issues the Supreme Court provoked a reaction toward strict construction. Since that was quite incompatible with Cold War policies, something had to give; when it did, right-wing presidentialists hijacked strict construction, reinventing it as absolutist originalism. Midway through this journey, Richard Nixon's cries of “national security”—to becloud the Watergate affair—rang like a fire bell in the day.

In his online paper “Rethinking Presidential Power—The Unitary Executive and the George W. Bush Presidency,” political scientist Christopher S. Kelley writes that, frustrated by ongoing congressional “aggression” against executive power—the War Powers Act of 1973 and congressional “interference” with federal bureaucracies—lawyers in the Justice Department's

Office of Legal Counsel cobbled UE theory together in the 1980s. During war—as everyone “knows”—the feds may freeze the Bill of Rights, provided they thaw it out later. What seems new in UE theory is the assertion that the president is *sole judge* of his powers, with Congress and courts excluded from inquiring into executive undertakings. (Nixon claimed to be sole judge of executive privilege.) This would seem a recipe for tyranny.

UE theorists speak of constitutional text, structure, and history; but their postmodern textual maneuvers, their homemade structures, and their lawyer’s history live on the edge of sudden implosion. In a 2003 paper, “Judicial Review and the War on Terrorism,” John Yoo, who had worked in the Bush 43 Office of Legal Counsel, asserted that while the judicial process exists for issues involving federalism, none exists for issues arising from war. He thereby nodded toward UE theorists’ oft-professed belief in states’ rights while separating all such “domestic” matters from important presidential activities. Yoo praised “the war powers system we have today in which the President initiates war, Congress funds it, and the courts remain aloof.” Further, the president may designate citizens as enemies, with no further proof or process needed.

Elsewhere, in “The President’s Constitutional Authority to Conduct Military Operations against Terrorist Organizations and the Nations that Harbor or Support Them,” Yoo and Roger Delahunty examine Article II of the Constitution where they see the mere words “the executive power shall be vested in a President”—the high-toned “Vesting Clause”—as unveiling a mighty fortress: “*The executive power*” (my emphasis). The authors assign the president “all of the executive power” and “full control” of the military, adducing his power to “repel sudden attacks,” commending his “speed and energy.” Predictably, they hold that Congress has *only* powers “herein granted” and “enumerated,” while the president has “all *other* unenumerated powers.” Backed by “historical practice” and “precedent,” “the President alone” decides war and peace. This is textualism?

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The shades of Wilson, FDR, and Truman must be smiling. Few non-White House supremacists would read texts so *liberally*. A whole generation of conservative constitutionalists now *surpasses* Earl Warren in creative writing. Some conservatives foment empire, militarism, surveillance, and presidential hubris through their *own* juridical and judicial activism.

Such are the raw materials of UET, but there are a few more points of interest.

### Unenumerated Powers Don’t Exist

1. Presidents reach for “all *other* unenumerated powers”; but by a well-known canon of construction, powers *not enumerated* are not “granted” and *do not exist*. The claim *assumes* the very thing to be proven. In *Executive Privilege*, Berger writes that, “lacking an ‘enumerated’ power, action is illegal” and observes that “faithfully executed” implies presidential *accountability* to Congress. Further, “executive privilege” (withholding information) asserts a power *the King had already lost*. He adds that “the Framers vested many prerogatives of the Crown in Congress and denied them to the President.”

Berger remarks on the “meager scope” of the presidency’s projected powers: “The words ‘executive power’ were thus no more than a label designed to differentiate presidential from legislative functions, and to describe the powers thereafter conferred and enumerated. To derive additional authority from this descriptive label is to pervert the design of the Framers. . . .” Further: “Madison and [James] Wilson stated that the rights of ‘war and peace,’ enjoyed by the King, were not included in the ‘executive powers.’ Patently, the Framers were determined to *cut all roots of the executive power in the royal prerogative.*”

Absent royal prerogative, the U.S. president would seem to be *constitutionally* impotent as far as finding and beginning his own wars goes. Practical politics made the office what it is today. In *An Inquiry into the Principles and Policy of the Government of the United States* (1814), John Taylor of Caroline, a serious strict constructionist, char-

acterized the presidency as driving us toward “force and fraud” and “*monarchy, revolution, and an iron government.*” Election was an insufficient guard; for this reason the states put their executives under severe restrictions.

2. Presidential lawyers dig out generalities about emergencies from Hamilton’s Federalist essays but little on who holds the emergency powers. Is it Congress? As an executive officer under George Washington, Hamilton “discovered” what prerogative powers he could, and presidentialists get more mileage from *this* Hamilton. Given *two* Hamiltons, his arguments are somewhat suspect. (On prerogative powers in the Constitution, present or *absent*, see Forrest McDonald’s *Novus Ordo Seclorum: The Intellectual Origins of the Constitution*.)

### Precedent Yields No Right

3. UE theorists dwell on text, practice, and precedent. But whether successful usurpations—some large, some microscopic—amend the Constitution is not proven. Presidents have gotten away with things. As Berger points out, presidential stonewalling, which Congress has resisted for two centuries, yields no “right” of executive privilege. Yet much rests on the larger implications of executive privilege where successfully asserted.

In *Construction Construed and Constitutions Vindicated* (1820), Taylor noted that the Stuarts collected precedents “because, successive encroachments terminate in conquest.” Moreover: “precedents, both good and bad, ought to have weight. . . . But discrimination is as applicable to precedents, as to any other species of evidence . . . [and] no improvement in civil government has ever been made, or can be preserved, but by a subversion of precedents, until a form is discovered incapable of corruption.”

4. UE theorists make much of the president’s job of repelling invasions of American soil. That this seldom happens is, for them, beside the point. Two much-mooted cases—Pearl Harbor and 9/11—drew forth no repelling. In 1846 President Polk was not repelling but was instead provoking. Nor was the Confederate attack

on Fort Sumter, after months of talk, sudden, unexpected, or repelled. Given time, advocates might find some repelling, and so what? If the president failed to repel, defenders would still defend. Where is the mighty *grant* of “executive power”?

Presidentialists hope to convince us that should a president ever *defend* American soil, he would be “making war,” thereby proving—apparently—that he may make war anywhere, anytime, at will.

In “Emergency Powers and the Militia Acts,” legal scholar Stephen I. Vladeck does not concede a presidential power of repelling. Instead, such actions have rested on the Militia Acts of 1792, 1795, and 1807, and their successors, that is, *on delegation by Congress*. This greatly reduces what presidents can reasonably obtain from repelling. Indeed, they just break even with *the states*, which may “engage in war” when actually invaded.

5. For UE theory, “separation of powers” works overtime, albeit rather cynically. Berger writes: “the separation of powers does not create or grant power; it only protects powers *conferred* by the Constitution. . . . [T]o argue from the bare fact of a tripartite system of government, without preliminary inquiry into the scope of each of the three powers, is like invoking the magic of numerology.”

In any case, classic separation took “checks and balances” rather seriously. But if the president has his own *sovereign sphere*, how is he *checked*—or *balanced*?

This brings us to John Taylor’s attack on “spherical sovereignty” in *Construction Construed*. (All emphasis has been added.) In *McCulloch v. Maryland* (1819), Chief Justice John Marshall sustained the supremacy of Congress in its sphere of action. Taylor agreed that “‘sphere’ conveys an idea of something limited,” but wondered “how this word . . . can be converted into a substantive uncircumscribed, by the help of the adjective ‘sovereign.’” He continues: “If the sovereignty of the spheres means any sovereignty at all, it supersedes the sovereignty of the people. . . .”

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Now Taylor is not objecting to spheres, but to *sovereignty* anywhere, since American principles demand actual delegation by real principals to real (and mere) agents. *No one* has “inherent” powers.

Taylor continues: “There is no phrase in the constitution which even insinuates, that the actual divisions of power should be altered or impaired by incidental or implied powers.” Further: “Individual spheres or departments are easily persuaded, like Kings, that a subordination to themselves would be better for a nation, than the occasional collisions produced by a division and limitation of power.” And here was the danger: “A jurisdiction, limited by its own will, is an unlimited jurisdiction.”

Taylor thought “occasional collisions” better than sovereign institutions. Rather than making Congress, executive, or court supreme in some realm, the Constitution created “co-ordinate political departments, intended as *checks upon each other*, only invested with defined and limited powers, and subjected to the sovereignty . . . of the people. . . .”

The Court’s new-fangled “spherical sovereignty” overthrew the division of powers: “A supreme power able to abolish collisions, is also able to abolish checks, and there can be no checks without collisions.” In America we “have preferred checks and collisions, to a *dictatorship of one department*. . . .”

Under “the concurrent power of taxation,” Congress and the states “may each pass a law, both of which may be constitutional, and yet these laws may clash with, or impede each other. . . . For this clashing the constitution makes no provision.”

According to Taylor, the Court was unearthing prerogative powers for Congress, including one to “remove all obstacles to its action.” Marshall sought “to unite an extension of power with an apparent adherence to the words of the constitution.” Under this dodge, “it was necessary to hook every implied, to some delegated power. . . .” This is *still* the practice of a continental state that micromanages the life-world under color of regulating commerce and passes worldwide military empire off as “defense.”

On Taylor’s reading, no branch derives sovereign powers from idealized separateness. Powers, where they exist, were *delegated* by living Americans, not by some cloud-borne eighteenth-century paragraphs “mediating” sovereignty to federal departments.

6. UET’s “flexible system for going to war” (Yoo’s words) seems better fitted for finding and having wars than for actual defense of American soil. Here, where sovereignty and war powers conjure and conspire, UE theorists build on Marshall’s gutting of enumerated powers and Sutherland’s “inherent” prerogatives; but Taylor whipped them before they were born, even on war powers:

. . . [T]he case of war is specially provided for by the federal constitution, because the federal government, as having no sovereignty, could not other wise have declared it. . . . As the powers of making war and peace were necessary, it became necessary also to provide for them, not *as emanations* from the principle of a sovereignty in governments, but *as delegated powers*. . . . No powers in relation to war are derived from . . . sovereignty in governments under our system; and none can be justly inferred from the conclusions of the writers upon the laws of nations. . . .” [Emphasis supplied.]

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7. Presidential “signing statements,” grounded in UET, proclaim a departmental “reading” of what the president is signing into “law.” Unwilling to veto, President Bush says he will enforce the law (or not) as he sees fit. The attempt came before the name. In *President: The Office and Powers*, constitutional scholar Edward S. Corwin wrote of its having been undertaken in 1946–1947: “For a court to vary its interpretation of an act of Congress in deference to something said by the President at the time of signing would be . . . to endow him with a legislative power not shared by Congress.”

Signing statements aim at influencing gullible jurists and, ultimately, at excluding the courts from even their

normally feckless protection of liberty during alleged wars. (On this, see Richard E. Eliel's "Freedom of Speech," *American Political Science Review*, November 1924.)

### Sovereignty, Unknown Powers, Strict Construction

If we forsake "originalism," as we probably should, we need not give up strict construction. Any serious perspective must begin with contemporary comparisons of the Constitution as advertised with the Constitution as put into practice. Taylor, Spencer Roane, and others heard certain promises in the ratifying conventions and saw them broken once the promising parties were in office. Their critique rose from an unavoidable contrast. (For how quickly the Federalists' real program emerged, see *The Journal of William Maclay*, U.S. senator from Pennsylvania, 1789–91, available online and in book form.)

In *Construction Construed*, Taylor went to the fundamentals. He began with "powers of sovereignty and supremacy [that] may be relished, because they tickle the mind with hopes and fears. . . ." Yet "the term 'sovereignty,' was sacrilegiously stolen from the attributes of God, and impiously assumed by Kings . . . [and] aristocracies and republics have claimed the spoil." In any case, the "idea of investing servants with sovereignty, and that of investing ourselves with a sovereignty over other nations, were equally preposterous." (Now, of course, we do both.)

"Sovereignty" was "neither fiduciary nor capable of limitation." In America, we "eradicate[d] it by establishing governments invested with specified and limited powers," under which "the people or the states retain all the powers they have not bestowed . . . [and] ungranted rights remain also with the grantors . . . the people." This canon of constitutional interpretation, by which powers "not granted" are seen as *not granted*—hence nonexistent—failed to impress Marshall and others. With more experience of the Constitution, we might judge Marshall wrong.

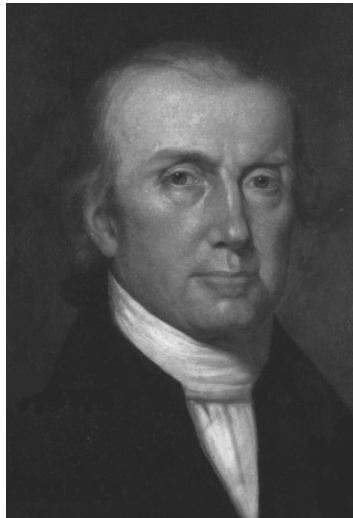
Taylor declined to see the words "To make all laws

which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States" (Article I, Section 8, 18) as a charter of unknown powers; Marshall, however, saw "necessary and proper" as licensing numberless convenient and apposite means, and alongside spherical sovereignty, this was his key innovation.

Lacking certain desired powers, Congress could not simply grasp them by *calling them means* "necessary and proper" for fulfilling actually enumerated powers. Before the Revolution, Taylor noted in *Construction Construed*, Parliament contended for unlimited means of war: "The colonies replied, that it would be more absurd to limit powers, and yet concede unlimited means for their execution . . ." Marshall's repositioning of "means" undid the whole idea of enumeration. Taylor wrote: "As ends may be made to beget means, so means may be made to beget ends, until the co-habitation shall rear a progeny of unconstitutional bastards."

Later court decisions have awarded the president the same "necessary and proper" latitude that it earlier gave Congress. The process is cumulative, but if the doctrine was unsound when aiding Congress, it remains so when fattening the executive.

Marshall undermined *American* political reasoning, said Taylor, "by inferring the powers of sovereignty from a delegated power; as the power of establishing banks, from the power of taxation . . ." But reasoning from international law to American government was a mistake. Where foreign threats existed, "the constitution . . . disregarding . . . the laws of nations, assigns the power . . . to a department [Congress], not as being sovereign, but as being a trustee . . . [which] alone possesses a right to involve the United States in war; and no other department, *nor any individual*, has a better right to do so, than *a constable* has to bring the same calamity upon England. As the laws of nations cannot deprive congress of any power . . . so they cannot invest congress or any other department, with any power not bestowed by the constitution. . . . [Those laws] contemplate the powers of declar-



John Taylor of Caroline

ing war and making peace, as residing in an *executive* department; but the constitution divides them, and *does not intrust the president* with either” (emphasis supplied).

Contesting institutional sovereignty derived from international law, Taylor aimed right at UET theorists’ favorite things: the war powers and their location in the system.

### Can Amendment Rid Us of This Turbulent Office?

Taylor’s point is, very simply, that if the government has some general “sovereignty,” then it, or some branch of it, is the final judge of its actions. If the government is not sovereign, then the unknowably vast powers for war, emergencies, and so on must remain with the people, as individuals, families, or communities—a disturbing thought, even for believers in such powers. Such a theoretical placement might lead to individual civil disobedience and nullification by communities. Short of such drastic experiments, are there any constitutional cures for unitary-executive disease? Perhaps so. This brings us to our only remaining article of faith, the amending power.

Talk about unknown powers! We seem entirely free to abolish the executive in all its unitarity. Amendment, however, would require a train of disasters irrefutably stemming from that office. We have the disasters; the historical dice have been cast, but where will they land?

Meanwhile, on June 29, 2006, the Supreme Court said a few words on our subject, putting a serious dent

in UE theory (*Hamdan v. Rumsfeld, Secretary of Defense, et al.*). According to the majority, the president cannot just set up his own courts with their own procedures tailor-made for producing convictions, even against “unlawful combatants.” If, however, these so-called courts should conform to existing legislation (Uniform Code of Military Justice and such) becoming thereby more court-like, they might pass muster.

On larger questions, the decision moves us back, at best, toward the inconclusive and subjective language of *Youngstown Sheet & Tube Co.*, which, as noted, stated that presidents have large war powers but that Truman had overreached them. The courts, having long ago justified the deeds of Lincoln and others, can only go so far. But the decision is better than nothing, and has forced Congress, though the Military Commissions Act, to sustain the President by legislation. This has partially restored the logic of the system without, however, doing much for our liberties or for U.S. conformity with international law.

And on August 17, Judge Anna Diggs Taylor of the federal district court in southern Michigan struck another blow against UET. In *ACLU v. NSA*, she found the Bush administration’s presidentially initiated NSA surveillance program illegal. The ruling denies that “inherent” presidential powers exist outside the constitution.

This is good, but we shall be waiting to see how the administration gets around it. 