

## **Is the Unitary Executive Theory Spreading to the European Union?**

### **A Comparative Look at the Lisbon Treaty**

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The United States and the member-states of the European Union have decidedly different approaches when it comes to the allocation of executive power. The United States has placed, ever increasingly in the last eight years with the presidency of George W. Bush, more executive power in a sole individual, the President himself. In contrast, the European Union has traditionally refused to place the same level of authority in a sole individual, but in Committees and Commissions comprised of elected individuals or persons chosen by the member-states. The Lisbon Treaty, however, may be a first step down the road of a much stronger European Union “unitary executive.” This paper analyzes the different treatment of the executive in the two systems. Part I analyzes the evolution of power in the chief executive of the United States, in particular the rise of the “unitary executive” theory, while Part II lays out the political institutions at work in the European Union and its increasing acceptance of a stronger executive through the Lisbon Treaty.

#### **I. The United States and its “Unitary Executive”**

In recent years, the role of the President and the executive branch has expanded, making it potentially unrecognizable to the Framers of the Constitution. To some, this expansion places too much power in one person and is contrary to the Constitution’s separation of powers. To others, known as unitary executive theorists, this expansion is a fulfillment of the proper

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presidential role contemplated and created by the Founders.<sup>1</sup> The unitary executive theory asserts that the President should have direct control over all federal officers exercising executive power, including disciplinary and removal powers.<sup>2</sup> This exists simply because the President is the head of the executive department.<sup>3</sup> Conversely, non-unitarians believe “Congress may vest executive power in subordinate officers while simultaneously insulating these officers from the President’s control.”<sup>4</sup> The implications of this argument are compelling.

Beginning with the New Deal, Congress greatly expanded its role in administrative agencies, which often vest executive power in independent agencies.<sup>5</sup> The main consequence of following a unitary executive theory is that if the President possesses all executive power, then agencies and other bodies or officers exercising discretionary executive power without presidential control or oversight are unconstitutional.<sup>6</sup> In other words, the President must have some control over this power as head of the executive department. Because our current government relies heavily on these administrative agencies, a declaration to this effect would be crippling.

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<sup>1</sup> Professor Steven Calabresi, with other constitutional scholars, wrote a series of articles where he details each President’s efforts toward building a strong unitary executive. These articles serve as a basis for much of the background mentioned in this article. These articles include multiple examples of presidential support for the unitary executive theory. *See generally* Steven G. Calabresi & Christopher Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997) [hereinafter *First Half-Century*]; Calabresi & Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL’Y 667 (2003) [hereinafter *Second Half-Century*]; Christopher Yoo, Steven G. Calabresi, & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889-1945*, 80 NOTRE DAME L. REV. 1 (2004) [hereinafter *Third Half-Century*]; Christopher S. Yoo, Steven G. Calabresi, & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601 (2005) [hereinafter *Modern Era*].

<sup>2</sup> Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158 (1992) [hereinafter *Structural Constitution*].

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 31-33 (1995) [hereinafter *Normative Arguments*].

<sup>6</sup> *Structural Constitution*, *supra* note 2, at 1165-66. The word “discretionary” is very important. The Supreme Court in *Kendall v. United States ex. rel Stokes* held the President does not have the authority to deny or control the enforcement of a ministerial act. 37 U.S. (12 Pet.) 524, 610-14 (1838). *See Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515-518 (1840).

In stark contrast to the unitary executive system in America, the executives of the European Union operate a system with elected individuals working together to lead administrative agencies.

The battle lines of the unitary executive argument focus on three issues for disagreement. The first, and arguably most significant disagreement, deals with the meaning of the Vesting Clause of Article II of the U.S. Constitution.<sup>7</sup> Article II's vesting clause states, "The executive power shall be vested in a President of the United States of America."<sup>8</sup> Unitary executive theorists view Article II's vesting clause as a specific grant of power.<sup>9</sup> Their main textual illustration stems from the similarities between Article II's vesting clause and Article III's vesting clause that established the judicial branch.<sup>10</sup> These two constitutional clauses are essentially identical in language and structure. Because Article III's vesting clause is considered a power grant to the judiciary,<sup>11</sup> then, according to unitary executive theorists, so should Article II's vesting clause.<sup>12</sup> Also, contrast Article II with Article I's vesting clause, which employs the phrase "herein granted" when vesting power.<sup>13</sup> Article II's vesting clause does not include such language suggesting that the list of presidential power listed in Article II is non-exclusive.<sup>14</sup>

The second topic for disagreement deals with the interplay between Congress and the President. The Constitution permits the President to appoint inferior officers while Congress can

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<sup>7</sup> *Structural Constitution*, *supra* note 2, at 1158, 1165.

<sup>8</sup> U.S. CONST., art. II, § 1.

<sup>9</sup> Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 570 (1994) [hereinafter *President's Power*].

<sup>10</sup> Article III's vesting clause is as follows: "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." U.S. CONST., art. III, § 1.

<sup>11</sup> *President's Power*, *supra* note 9, at 571

<sup>12</sup> *Id.* at 570.

<sup>13</sup> U.S. CONST., art. I, § 1.

<sup>14</sup> *President's Power*, *supra* note 9, at 574. Professors Calabresi and Prakash list several other textual arguments concerning Article II's vesting clause, which they refer to as the Executive Power Clause. For more discussion on these arguments, *see id.* at 570-80.

place the appointment of certain officers in people other than the President.<sup>15</sup> Article I, however, allows Congress “[t]o make all laws which shall be necessary and proper for carrying into execution” the powers conferred upon them in the Constitution.<sup>16</sup> Congress has broad power under the Necessary and Proper Clause and such power allows them to structure the executive department.<sup>17</sup> Based on this authority, Congress has, at times, created agencies and placed them outside of the reach of the executive department. Unitary executive theorists, however, believe the Necessary and Proper clause does not allow Congress to structure the executive department in such a way where the President has no control over the independent agencies.<sup>18</sup>

Finally, the importance of Article II’s Take Care Clause<sup>19</sup> is under debate. Unitary executive theorists believe Article II’s vesting clause read in conjunction with the Take Care Clause establishes “a hierarchical, unified executive department under the direct control of the President.”<sup>20</sup> After all, the vesting clause mentions “a President,” not a group of executives. Thus, the President, so the argument goes, can “direct, control, and supervise inferior officers or agencies who seek to exercise discretionary executive power.”<sup>21</sup> On the other hand, Article II also includes a provision allowing the President to “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.”<sup>22</sup> As opponents of the unitary executive theory point out, why would the framers place a provision allowing these opinions in writing if the Article II vesting clause

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<sup>15</sup> U.S. CONST., art. II, § 2, cl. 2. (“[The President] 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: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

<sup>16</sup> U.S. CONST., art. I, § 8, cl. 18.

<sup>17</sup> *Structural Constitution*, *supra* note 2, at 1168.

<sup>18</sup> *Id.*

<sup>19</sup> The President “shall take care that the laws be faithfully executed . . . .” U.S. CONST., art. II, § 3.

<sup>20</sup> *Structural Constitution*, *supra* note 2, at 1165.

<sup>21</sup> *Id.* at 1165. See also Gary Lawson, *Changing Images of the State: The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1242 (1994).

<sup>22</sup> U.S. CONST., art. II, § 2, cl. 1.

already gave the President such power?<sup>23</sup> Surely a President who can direct and supervise inferior officers could request an opinion without an explicit declaration in the Constitution. Would the Opinions in Writing Clause not then suggest an inference against broad presidential power, or are we to assume that this clause just further explains what rights and powers the President has? Alexander Hamilton, co-author of *The Federalist* papers, was perhaps the strongest advocate for a strong unitary executive during the founding period.<sup>24</sup> He believed such an inference against a strong unitary executive was incorrect as he considered the Opinions Clause “a mere redundancy in the plan, as the right for which it provides would result of itself from the office.”<sup>25</sup>

Hamilton also believed plurality in the executive would create a lack of accountability that would lead to “buck passing”.<sup>26</sup> According to Hamilton, “[o]ne of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults, and destroy responsibility.”<sup>27</sup> Expanding on Hamilton’s opposition to plurality in the executive, Professor Steven Calabresi, a leading supporter of the unitary executive theory, declared plurality makes it harder for citizens to expose wrongdoing within the executive department because each officer would blame a different person for alleged improper conduct.<sup>28</sup> The United States debated the idea of a plural executive, and this idea was staunchly rejected.<sup>29</sup> Eldridge Gerry favored annexing a council to the executive because he, along with other participants in the Constitutional Convention, was

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<sup>23</sup> *Structural Constitution*, *supra* note 2, at 1165.

<sup>24</sup> “Prior to the appearance of the Constitution, I rarely met with an intelligent man from any of the States, who did not admit, as a result of experience, that the UNITY of the executive of this State was one of the best of the distinguishing features of our constitution.” ALEXANDER HAMILTON, *THE FEDERALIST* No. 70, at 463 (Random House).

<sup>25</sup> *Id.* at 482.

<sup>26</sup> *Normative Arguments*, *supra* note 5, at 42.

<sup>27</sup> HAMILTON, *supra* note 24 AT 459.

<sup>28</sup> *Normative Arguments*, *supra* note 5, at 43-44.

<sup>29</sup> See Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1385. (2008) (citing *Records of the Federal Convention*, in PHILIP B. KRULAND & RALPH LERNER, *THE FOUNDERS’ CONSTITUTION* 491-95 (3d ed., Chicago 1987)).

concerned that a single executive would trend towards monarchy, but that a plural executive would lack sufficient energy and authority. A unitary executive, on the other hand, would be “jealously guarded and watched” and thus more accountable for his actions.<sup>30</sup>

Most of the early presidents had a similar view of accountability for the unitary executive. Andrew Jackson believed he had a responsibility to the American people as their only direct representative.<sup>31</sup> According to Jackson, this made him responsible and accountable to the American people for the entire executive department. Jackson was not the first president to assert such a claim. Washington and Jefferson also “emphasized the president’s independent electoral connection with the [American] people.”<sup>32</sup> According to Jackson, because the President has a special duty to the entire population to ensure the execution of the laws, “it is a necessary consequence that he should have a right to employ agents of his own choice to aid him in the performance of his duties, and to discharge them when he is no longer willing to be responsible for their acts.”<sup>33</sup>

Unitary executive theorists have three potential models regarding the scope of the President’s power.<sup>34</sup> However, they readily admit the text of Article II and historical practice give little help in determining which unitary executive theory model is correct.<sup>35</sup> The strongest model of presidential power allows the President to take action in place of commissioners or officers, even if a federal statute purports to give the officer discretionary executive power.<sup>36</sup> According to this model, because the President has the power to execute the laws (and must “take care” that the laws are faithfully executed), “the President can step into the shoes of any

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<sup>30</sup> *Normative Arguments*, *supra* note 5, at 44.

<sup>31</sup> *First Half-Century*, *supra* note 1, at 1451, 1528.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1548 (*citing* Andrew Jackson, Protest (April 15, 1834) in A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT 1298-99 (James D. Richardson, ed., 1897)).

<sup>34</sup> *Structural Constitution*, *supra* note 2, at 1167.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1166.

subordinate and directly exercise that subordinate's statutory power."<sup>37</sup> Several early Presidents seemed to have this idea in mind during their presidencies. George Washington made all major decisions and had his hand in most minor decisions during his administration.<sup>38</sup> The heads of department during the Adams administration were more properly considered presidential assistants.<sup>39</sup> James Monroe was determined that there be "left no loose ends of administration unconnected with the departments and independent of presidential direction."<sup>40</sup>

A second, slightly weaker form of the unitary executive theory states that while the President may not directly exercise the subordinate's power, he can nullify or veto any action by a subordinate with which he disagrees.<sup>41</sup> Although he cannot directly exercise the subordinate's power, he can force the officer to alter his actions by vetoing the original actions.

Notwithstanding these first two models, the debate over the unitary executive theory in the Supreme Court has focused on whether the President has an unlimited removal power concerning executive officers, which is the third and weakest form.<sup>42</sup> When a subordinate acts in a way contrary to the President's wishes, the President can remove this officer. Under the removal theory, a subordinate's actions prior to removal remain valid even after the officer is removed from his duties. Only a legally appointed successor can revoke the original actions, not the President.<sup>43</sup> Chief Justice Taft in *Myers v. United States*,<sup>44</sup> acknowledged the presidential removal power claiming the president "derived an unlimited presidential removal power over certain subordinate executive officials from, among other sources, the Article II vesting clause

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<sup>37</sup> Lawson, *supra* note 21, at 1243. *See also*, "Take Care" Clause.

<sup>38</sup> *First Half-Century*, *supra* note 1, at 1478.

<sup>39</sup> *Id.* at 1495.

<sup>40</sup> *Id.* at 1515 (*citing* LEONARD WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 74 (1948)).

<sup>41</sup> *Structural Constitution*, *supra* note 2, at 1166. *See also* Lawson, *supra* note 21, at 1243.

<sup>42</sup> *See* Lawson, *supra* note 21, at 1244.

<sup>43</sup> *Structural Constitution*, *supra* note 2, at 1166.

<sup>44</sup> *Myers v. United States*, 272 U.S. 52 (1926).

and the Take Care clause.”<sup>45</sup> When making his decision, Taft also relied on the Decision of 1789, where the early Congress recognized a constitutional, not congressional, basis for the President’s removal power.<sup>46</sup> The Decision of 1789 came out of discussion surrounding the bill creating the Department of Foreign Affairs. Language in an early draft of the bill suggested the power to remove was based on a congressional grant of power to the President. In other words, the President could only remove a subordinate officer if Congress gave him the power. He did not have the power on his own. A Representative later altered this language to erase the implication, and the bill was passed with the amended language.<sup>47</sup> This alteration essentially acknowledged that the President’s removal power stemmed from the Constitution.

Nonetheless, Supreme Court cases dealing with the President’s removal power since then have been contradictory. In *Humphrey’s Executor v. United States*,<sup>48</sup> the character of the office determined whether the President had an unlimited power to remove the officer in charge. More specifically, the President lacked an unlimited removal power when the independent agency was not purely executive.<sup>49</sup> Justice Rehnquist’s majority opinion in *Morrison v. Olson*<sup>50</sup> dismisses the *Humphrey’s Executor* character-based determination and employs a balancing test- which allows congressional limits on the president’s removal power when the limits do not “unduly trammel[] on an executive authority” or “impermissibly burden[] the President’s power to

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<sup>45</sup> *Structural Constitution*, *supra* note 2, at 1167. See *Myers*, 272 U.S. at 176. “The enumeration [of particular authorities in section 2 of Article II] ought therefore to be considered, as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power, interpreted in conformity with other parts of the Constitution, and with the principles of free government.” *Id.* at 138. “The general doctrine of our Constitution . . . is that the executive power of the nation is vested in the President, subject only to the exceptions and qualifications, which are expressed in the instrument.” *Id.* at 138-39.

<sup>46</sup> *First Half-Century*, *supra* note 1, at 1472 n.53.

<sup>47</sup> *Id.*

<sup>48</sup> *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

<sup>49</sup> In other words, when an agency was also quasi-legislative or quasi-judicial, the President had no unrestricted power to remove an officer of such agency. *Id.* at 627-31.

<sup>50</sup> *Morrison v. Olson*, 487 U.S. 654 (1988).



control or supervise” independent officers.<sup>51</sup> Justice Scalia’s dissent in *Morrison* follows the same route as Taft’s did in *Myers* because he affirmed the President’s unlimited removal power based on the power-granting reading of Article II’s vesting clause.<sup>52</sup>

In support of their view, non-unitarians read Article II’s vesting clause as merely a designation of the presidential office and not an independent grant of power to the President.<sup>53</sup> Because Article II, Section 2 enumerates specific presidential powers, the non-unitarian reads the vesting clause as essentially meaningless.<sup>54</sup> Non-unitarians have a broader idea of congressional power and a functionalist theory of the executive power. Specifically, “Congress’s power under the Necessary and Proper clause to structure the executive department allows Congress to insulate subordinate officials from presidential control by creating independent agencies and officers.”<sup>55</sup> Consequently, as long as Congress does not deprive the President of any of the five enumerated powers listed in Article II, they can divest the President of executive power.<sup>56</sup> Non-unitarians focus on two clauses in the Constitution in support of their argument—the Article II power allowing Congress to vest the appointment of inferior officers as department heads and the Article II executive power to obtain opinions in writing.<sup>57</sup> Specifically, non-unitarians claim the first clause would be meaningless if the department heads were completely subject to the President’s preferences.<sup>58</sup> Non-unitarians question the need for the Opinions in Writings clause if Article II vests executive power to the President. Constitutional provisions are not likely to be

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<sup>51</sup> *Id.* at 691-92.

<sup>52</sup> *Id.* 697-98 (Scalia, J., dissenting).

<sup>53</sup> *Structural Constitution supra* note 2, at 1168-69.

<sup>54</sup> *Id.* at 1177.

<sup>55</sup> *Id.* at 1168-70.

<sup>56</sup> *Id.* at 1170. “When Congress does divest the executive power, the President’s only defense is political—his veto power.” *Id.*

<sup>57</sup> *Id.* at 1170.

<sup>58</sup> A. Michael Froomkin, Note: *In Defense of Administrative Agency Autonomy*, 96 YALE L. J. 787, 799 (1987).

redundant, as Hamilton and the unitary executive theorists claim.<sup>59</sup> Additionally, non-unitarians assert the Take Care Clause in the Constitution only requires the President to take care that the laws be faithfully executed. They claim that there is no provision stating who should execute the laws, only that the President must ensure that the laws are faithfully executed.<sup>60</sup>

Perhaps the most compelling argument in favor of an anti-unitarian model comes from Professors Lawrence Lessig and Cass Sunstein. They believe the strong unitary executive theory is “a creation of the twentieth century, not the eighteenth.”<sup>61</sup> Prior to the twentieth century, Abraham Lincoln arguably yielded the most powerful executive: Commander-in-Chief.<sup>62</sup> Yet many scholars believe his increased power stemmed from the exigent circumstances surrounding the secession and the Civil War.<sup>63</sup> Although powerful, Presidents prior to the twentieth century did not exercise as much power as their twentieth century counterparts.<sup>64</sup> Americans in the twentieth century “began to look to the President not simply as an administrator but rather as the focus of political leadership and the predominant voice in shaping public policy.”<sup>65</sup> Presidents were well aware of this shift in American ideology and took an even larger role in the executive department. According to Lessig and Sunstein, these changed circumstances should be considered when determining the scope of executive power.<sup>66</sup>

Plurality has crept into our government, at least in practice. The multitude of administrative agencies running daily government tasks multiplied exponentially during the New Deal era of the 1930s. George Washington claimed “other executive officials existed only because it was ‘impossible for one man . . . to perform all the great business of the State,’ and

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<sup>59</sup> *Id.* at 800-01.

<sup>60</sup> *Id.* at 801.

<sup>61</sup> Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994).

<sup>62</sup> *Second Half-Century*, *supra* note 1, at 718.

<sup>63</sup> *Id.*

<sup>64</sup> *Normative Arguments*, *supra* note 5, at 30.

<sup>65</sup> *Third Half-Century*, *supra* note 1, at 9.

<sup>66</sup> Lessig & Sunstein, *supra* note 61, at 3.

thus the proper role for these officials was merely ‘to assist the supreme Magistrate in discharging the duties of his trust.’”<sup>67</sup> While Washington was right about it being impossible for one man to perform all the business of the United States, the current role of many executive officials and now administrative officers is much more than mere assistance to the President.

While all Presidents supported a strong unitary executive,<sup>68</sup> Franklin Delano Roosevelt was also a strong supporter of a pluralistic view of administration.<sup>69</sup> Roosevelt believed permanent officials were the ideal administrators because they were able “to mediate between the technician, the politician, and the public.”<sup>70</sup> During his presidency, Roosevelt believed his task as President was “to employ pluralistic methods to make bureaucracy an instrument of democracy.”<sup>71</sup> Nevertheless, Roosevelt chastised Congress for interfering with his executive power when the House Un-American Activities Committee tried to have him remove certain bureaucrats from federal employment.<sup>72</sup> In his attempt to reorganize the federal government, Roosevelt wanted all independent agencies consolidated into executive departments.<sup>73</sup>

Richard Nixon also wanted independent agencies placed into a new executive agency.<sup>74</sup> Independent agencies were originally created “to shield regulatory process from the partisanship of the executive branch.”<sup>75</sup> Nixon argued the independent nature of the agencies made them “not

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<sup>67</sup> *First Half-Century*, *supra* note 1, at 1475-76.

<sup>68</sup> Professor Steven Calabresi, with other constitutional scholars, wrote a series of articles where he details each President’s efforts toward building a strong unitary executive. These articles serve as a basis for much of the background mentioned in this article. These articles include multiple examples of presidential support for the unitary executive theory. *See generally First Half-Century*, *supra* note 1, at 1451; *Second Half-Century*, *supra* note 1, at 667; *Third Half-Century*, *supra* note 1; *Modern Era*, *supra* note 1, at 601.

<sup>69</sup> *Third Half-Century*, *supra* note 1, at 79.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 80 (*citing* GEORGE MCJIMSEY, *THE PRESIDENCY OF FRANKLIN DELANO ROOSEVELT*, 290-91 (2000)). The article notes “FDR’s administrative style remained susceptible to all of the classic vulnerability and complexities of pluralism. Mobilizing citizen constituencies often simply provided them with the opportunity to redirect government resources toward their own purposes.” *Id.* at 80.

<sup>72</sup> *Id.* at 82.

<sup>73</sup> *Id.* at 100-01.

<sup>74</sup> *Modern Era*, *supra* note 1, at 662.

<sup>75</sup> *Id.*

sufficiently accountable to either Congress or the executive branch.”<sup>76</sup> For this reason, he called for presidential oversight into these agencies.

While U.S. Presidents continued to claim dominance over the executive department, Congress did not stop in its attempts to influence the execution of the laws and limit presidential power. In addition to independent agencies, the use of legislative vetoes and independent prosecutors attempted to take power away from the President. President Truman began objecting to legislative vetoes when Congress interfered with his desire to reorganize the federal government.<sup>77</sup> Attempting to exert even more presidential power, Truman issued an executive order seizing steel mills after an impending steelworker strike threatened to affect production of steel used in combat against the Koreans.<sup>78</sup> Instead of citing statutory authority for his actions, Truman insisted he had constitutional authority by stating,

Remembering that we do not have a parliamentary form of Government but rather a tripartite system which contemplates a vigorous executive, it seems plain that Clause I of Article II cannot be read as a mere restricted definition which would leave the Chief Executive without ready power to deal with emergencies.<sup>79</sup>

The Supreme Court eventually ruled that President Truman’s actions were erroneous.<sup>80</sup> With several concurrences in the opinion, much debate exists over how much the case limits executive power. Justice Jackson’s concurring opinion, now regarded as controlling precedent employs a non-unitarian ideology by claiming the Article II vesting clause is simply a description of the office of President.<sup>81</sup> Justice Frankfurter, on the other hand, accepted “the notion that long-established custom or usage could be a ‘gloss on the executive power’ vested in

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<sup>76</sup> *Id.* (citing President’s Advisory Council on Executive Organization, A New Regulatory Framework: Report on Selected Independent Regulatory Agencies 14 (1971)).

<sup>77</sup> *Id.* at 618.

<sup>78</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>79</sup> *Modern Era*, *supra* note 1, at 621 (citing Brief in Support of the Government).

<sup>80</sup> *Youngstown*, 343 U.S. at 612.

<sup>81</sup> *Id.* at 641.

the President.”<sup>82</sup> Notwithstanding the uncertainty surrounding the actual holding of the *Steel Seizure Case*, leading unitarians believe the case is entirely consistent with their theory of the unitary executive. They believe Truman went too far under the facts of this case, but “it does not change the fact . . . that the Vesting Clause of Article II is a sweeping grant of power to the President, as the Truman Administration argued it was.”<sup>83</sup>

In an attempt to regain power they believe Congress has taken, Presidents after Truman continued to object to legislative vetoes.<sup>84</sup> While the legislative veto was eventually declared unconstitutional, the grounds for such a declaration came from a lack of congressional power in Article I and not infringement of executive power in Article II.<sup>85</sup> Even though it was not overturned on a unitary executive theory, the lack of a legislative veto increases the power of the executive. In addition, modern Presidents often exert control over independent agencies. The Brownlow Committee’s proposal during the Roosevelt administration declared independent agencies to be a “headless ‘fourth branch’ of government,” completely inconsistent with the separation of powers heralded in the constitution.<sup>86</sup> Because of their vast power for law execution and their lack of supervision by the executive or legislative branches, Roosevelt recommended incorporating the independent agencies into the executive department.<sup>87</sup> Also exerting power over independent agencies, John F. Kennedy’s executive orders imposed ethical standards on independent agencies as well as executive departments.<sup>88</sup> Lyndon Johnson, in his first few meetings with the executive department as President, warned agency commissioners that he would intervene when he disagreed with their policies, regardless of their independent

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<sup>82</sup> *Modern aera*, *supra* note 1, at 622.

<sup>83</sup> *Id.* See *Youngstown*, 343 U.S. at 593-614.

<sup>84</sup> See *id.* at 606-97 (giving examples of Presidents’ refusal to recognize the legislative veto as constitutional).

<sup>85</sup> *Modern Era*, *supra* note 1. See *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>86</sup> *Third-Half Century*, *supra* note 1, at 96.

<sup>87</sup> *Id.* at 97.

<sup>88</sup> *Modern Era*, *supra* note 1, at 643.

nature.<sup>89</sup> As mentioned earlier, Nixon also wanted to reorganize the government by placing independent agencies within the executive department.<sup>90</sup>

After the Nixon Watergate scandal and his abuse of executive power, Congress again tried to place limits on the executive branch through the Ethics in Government Act.<sup>91</sup> This law allowed court-appointed independent prosecutions to investigate wrongdoing within the executive department.<sup>92</sup> While this step may have seemed necessary after the Nixon Watergate scandal, subsequent events in the Clinton administration, ending in his impeachment, caused the executive department and many of the American people in general to dislike independent prosecutors.<sup>93</sup> While the Supreme Court had upheld the constitutionality of independent counsels in *Morrison*,<sup>94</sup> the Ethics in Government Act, authorizing such counsel, was allowed to lapse in 1999 for lack of support from both political parties.<sup>95</sup> In a further attack against perceived legislative encroachment into the executive, former president George W. Bush “insisted on unilateral president power to fire subordinate federal employees” in the recently created Department of Homeland Security.<sup>96</sup>

## II.

Historically, the President of the United States has exercised the executive power as outlined by the U.S. Constitution.<sup>97</sup> Thus, presidents have adhered to the unitary executive theory by maximizing the constitutional power he is entitled.<sup>98</sup> Calabresi, Colangelo and Yoo argue each president has subscribed to this unitary executive theory, making it a constitutionally

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<sup>89</sup> *Id.* at 652.

<sup>90</sup> *Id.* at 662.

<sup>91</sup> *Id.* at 680. *See also* Ethics in Government Act, 5 U.S.C. §§ 101-505 (2000).

<sup>92</sup> *Modern Era*, *supra* note 1, at 679.

<sup>93</sup> *See id.* at 717-21.

<sup>94</sup> *Morrison v. Olson*, 487 U.S. 654, 696-97 (1988).

<sup>95</sup> *Modern Era*, *supra* note 1, at 603-04, 719.

<sup>96</sup> *Id.* at 727.

<sup>97</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>98</sup> *See Modern Era*, *supra* note 1.

permissible action.<sup>99</sup> However, the unitary executive theory is not prominent across the globe.<sup>100</sup> For example, the European Union (EU), made up of multiple sovereign nations,<sup>101</sup> has attempted to establish a supranational level of democracy.<sup>102</sup> Within the several institutions governing the EU, different levels and forms of democracy take hold.<sup>103</sup> However, with the implementation of the Treaty of Lisbon, a new post, President of The European Council<sup>104</sup>, has been created that may rival that of the executive of the United States. Although the creation of President of The European Council is relatively new, the EU already has an executive arm despite being shared by several institutions.<sup>105</sup> This paper will further explore the institutions of the European Union in order to discover if the unitary executive theory is practiced in this relatively new government.

As Henry Kissinger once pointed out, “When you want to talk to Europe, whom do you call?”<sup>106</sup> This “dilemma” represents the underlying dream for modern Europe: unification. From Napoleon to the central powers of World War I and the Axis powers of World War II, the European continent has seen its share of struggles for power by its rulers. Kissinger’s comment finally seems to have an answer within the EU. The political institutions compromising both the

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<sup>99</sup> *Id.*

<sup>100</sup> In contrast to the expansion of political powers taken by the executives in the United States over the last half-century, Tibet’s Dalai Lama is the head of state and has all executive power vested in him, and, he is probably the only ruler in the world who has voluntarily given up political power on his own initiative. See Tsering Kheyap, *Homeless But Not Hopeless: How the Tibetan Constitution Governs a People in Exile*, 36 HASTINGS CONST. L. Q. 353, 357 (2009).

<sup>101</sup> Duncan E. Alford, *European Union Legal Materials: A Guide for Infrequent Users*, 97 LAW LIBR. J. 49, 51 (2005).

<sup>102</sup> Theodora Kostakopoulou, *Democracy-Talk in The European Union: The Need for a Reflexive Approach*, 9 COLUM. J. EUR. L. 411 (2003).

<sup>103</sup> *Id.*

<sup>104</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

<sup>105</sup> Alford, *supra* note 101, at 52. The supranational government system of the European Union has led many to speculate and craft their own theories as to which EU institution fits into the three branches of government found in the United States. (For example, Alford notes this when crafting a table comparing the different governments. Within the executive branch of the EU, Alford includes European Commission and its Directorates General, European Council, and the European Central Bank. This paper will specifically analyze the European Commission, European Council, European Parliament, and the European Central Bank in light of the unitary executive theory.)

<sup>106</sup> Peter E. Herzog, *Treaty-Making Power of The European Community Thirty Years (Approximately) After the ERTA Case -- And Where Does this Leave The United States?*, 30 SYRACUSE J. INT’L L. & COM. 205 (2003).

European Union and the United States bare slight similarities and are, on the whole, entirely different, especially when examined in light of the unitary executive theory. The key institutions and their typical executive functions that this paper will analyze are the European Commission, European Council, European Parliament and the European Central Bank.

#### A. European Union Executive Institutions

In 1992 twelve independent countries (Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, The Netherlands, Portugal, and the United Kingdom) signed the Treaty on European Union (often called the “Maastricht Treaty”) laying the foundation for a united Europe.<sup>107</sup> The Maastricht Treaty calls for the creation of a union “to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them.”<sup>108</sup> This treaty created the institutions we analyze here.<sup>109</sup>

The European Parliament consists of 785 ministers (MEPs) elected directly by voters every five years from the EU member states.<sup>110</sup> Following elections, MEPs align themselves based on political parties as opposed to nationality.<sup>111</sup> Pursuant to the Treaty of Maastricht, the European Parliament will act “jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver

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<sup>107</sup> The Treaty on European Union, 1992 O.J. (C 191) 1, 31 I.L.M. 247. [Hereinafter EU Treaty].

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 288.

<sup>111</sup> Thomas Lundmark, *The Europeanization of America: What Every American Should Know About The European Union*, 45 AM. J. COMP. L. 625, 630 (1997).



opinions.”<sup>112</sup> Because the EU Parliament maintains no practical veto power over the EU Council, any power that is exercised is essentially formalistic in nature.<sup>113</sup>

The European Commission is the highest administrative body in the EU.<sup>114</sup> The Commission concentrates on the supranational functions and governing institutions of the EU. The Commission has the mission of “promoting the general interest of the European Union”.<sup>115</sup> Accordingly, the Commission achieves their mission by proposing laws, overseeing implementation of signed treaties, and carrying out policy.<sup>116</sup>

The Council of the European Union represents the national governments of the various EU member states and, houses the closest semblance of a single executive. The Council represents the member states and one minister attends its meetings from each member state.<sup>117</sup> The ministers that attend a particular meeting vary by the Council’s meeting agenda.<sup>118</sup> For example, if the Council’s agenda calls for discussion of the agriculture policy, then each member state’s agriculture minister or ranking member will attend the meeting. Presently, there are nine different Council configurations.<sup>119</sup> These configurations are as follows: (1) General Affairs and External Relations; (2) Economic and Financial Affairs; (3) Justice and Home Affairs; (4) Employment, Social Policy, Health and Consumer Affairs; (5) Competitiveness; (6) Transport, Telecommunications and Energy; (7) Agriculture and Fisheries; (8) Environment; and (9)

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<sup>112</sup> EU Treaty, 31 I.L.M. at 296.

<sup>113</sup> Paul Spackman, *Grant v. South-West Trains: Equality for Same-Sex Partners in The European Union*, 12 AM. U.J. INT’L L. & POL’Y 1063, 1069-71 (1997).

<sup>114</sup> See George A. Bermann, *Regulatory Cooperation Between the European Commission and U.S. Administrative Agencies*, 9 Admin. L.J. Am. U. 933 (1996) (discussing the administrative control wielded by the European Commission).

<sup>115</sup> See Governance Statement of the European Commission, available at [http://ec.europa.eu/atwork/synthesis/doc/governance\\_statement\\_en.pdf](http://ec.europa.eu/atwork/synthesis/doc/governance_statement_en.pdf).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

Education, Youth and Culture.<sup>120</sup> Each minister in the Council is empowered to commit his or her respective government, but each minister is responsible to his or her own national parliament.<sup>121</sup> The presidents and prime ministers of the member states, along with the President of the European Commission, meet together at least four times a year with the European Council.<sup>122</sup> These meetings are designed to set overall policy for the EU as well as resolving disputes at the lower levels of the EU.<sup>123</sup> The Council's power stems from participating and overseeing each level of EU government.

The President of the European Council may be the single executive counterpart to the President of the United States. Created by the Treaty of Lisbon, The President of the European Council eroded the six-month rotating presidency that had previously presided over the Council.<sup>124</sup> The European Council now elects the President by a qualified majority for a two and a half year term, renewable once.<sup>125</sup> However, the President may not hold national office when serving in this capacity and is only removable for serious misconduct or impediment.

The Treaty of Lisbon, in amending the Treaty on the European Union, sets the authority and scope for the President. Primarily, the President is responsible for pushing forward the Council's work by gaining cohesion and consensus within it.<sup>126</sup> In addition, the President is required to work with the President of the Commission and to present a report to Parliament after each Council meeting.<sup>127</sup> The President also has the authority to convene a special meeting of

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<sup>120</sup> *Id.*

<sup>121</sup> Governance Statement of the European Commission, *supra* note 115.

<sup>122</sup> *Id.*

<sup>123</sup> Council of the European Union, *The Council of the European Union*, (2008), [http://europa.eu/institutions/inst/council/index\\_en.htm](http://europa.eu/institutions/inst/council/index_en.htm)

<sup>124</sup> Mattias Kumm, *To Be A European Citizen? The Absence of Constitutional Patriotism and the Constitutional Treaty*, 11 COLUM. J. EUR. L. 481, 503 (2005).

<sup>125</sup> *Id.*

<sup>126</sup> Treaty of Lisbon art. 1(16).

<sup>127</sup> *Id.*

the Council if the situation so requires and must be the face of the European Union on security and foreign policy issues.<sup>128</sup>

The President's authority on security and foreign policy is deep. The President may convene a special meeting of the Council if international developments require the European Union to "define the strategic lines of the Union's policy in the face of such developments."<sup>129</sup> Additionally, any proposed amendment to a treaty must be sent to the European Council.<sup>130</sup> There, the President has the power to convene a convention with the heads of governments of the member states before accepting the proposal.<sup>131</sup>

Discussions regarding the powers of the President had large member states supporting it and small states opposing.<sup>132</sup> The larger states are also more likely to cede even more power regarding foreign policy to the Union, which leads directly to the President.<sup>133</sup> While the President does share some executive power with the President of the European Commission, the Treaty of Lisbon does not prohibit the powers or the presidencies to merge.<sup>134</sup> If each institution maintains its own separate president, some foreign policy issues, although few, fall under the control of the Commission.<sup>135</sup> However, because the Treaty of Lisbon does not prohibit the merger, a single president presiding over each institution would effectively establish a single executive perhaps leading to a more effective governing system.<sup>136</sup>

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at art. 1(29).

<sup>130</sup> *Id.* at art. 1(56).

<sup>131</sup> *Id.*

<sup>132</sup> Roger J. Goebel, *The European Union in Transition: The Treaty of Nice in Effect; Enlargement in Sight; A Constitution in Doubt*, 27 *FORDHAM INT'L L.J.* 455 (2004).

<sup>133</sup> Eric Engle, *I Am My Own Worst Enemy: Problems and Possibilities of European Foreign Policy Vis-A-Vis The United States*, 18 *ST. THOMAS L. REV.* 737 (2006).

<sup>134</sup> Ingolf Pernice, *The Treaty of Lisbon: Multilevel Constitutionalism in Action*, 15 *COLUM. J. EUR. L.* 349 (2009).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

Arguably the most difficult aspect in the EU is convincing individual sovereign states to believe it is in their best interest to act in betterment of the collective. A comparison of the EU's executive structure (the President of the European Council, the European Council itself, and the European Commission) to the United State's, is necessary to show what power the executive body of the EU has over the EU and its member states in light of the unitary executive theory. The examination includes the traditionally executive areas: appointment and removal powers, foreign policy, and control of independent agencies.

### B. Executive Functions

Appointment and removal powers are key responsibilities of an executive. The U.S. Constitution provides the President with the authority to appoint officers with the advice and consent of the Senate, as well as appoint other inferior officers that Congress allows.<sup>137</sup> As stated above, under the unitary executive theory, the removal of both types of Article II officers rests exclusively with the President because the Constitution does not provide for removal save impeachment. The European Union provides various different avenues for appointments of its officers. For example, the appointment of Commissioners in the European Commission are appointed by the governments of the member states acting in common agreement with one another.<sup>138</sup>

The European Council is composed of representatives of the member states.<sup>139</sup> Each government's minister whose area of responsibility corresponds with the Council's agenda attends the meeting.<sup>140</sup> Each government, therefore, controls the appointment of their respective

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<sup>137</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>138</sup> Damien Geradin, *The Development of European Regulatory Agencies: What the EU Should Learn from American Experience*, 11 COLUM. J. EUR. L. 1, 5-6 (2004-2005).

<sup>139</sup> Council of The European Union, *supra* note 123.

<sup>140</sup> *Id.*

ministers and, as such, each member may be removed or recalled according to the laws in the respective country.<sup>141</sup>

The EU has, therefore, devolved its appointment and removal powers, not to one person, but to the member states. Because each member state appoints its commissioner based on a rotating schedule along with its respective ministers, no one individual with the EU has outright control over appointment or removal. This is in contrast to the United States. This is largely because the EU is a supranational organization and is unrealistically difficult to expect the sovereign states to forgo all power in appointing and recalling its ministers. In order for the EU to maintain its legitimacy as a supranational organization, the EU must allow certain powers to exist within its member states. This is in stark contrast to the power wielded by the President of the United States. The President of the United States, for example, does not work for individual members of the sovereign states, as does the President of the European Council. The power wielded by the President of the European Council is severely lacking to that of the United States.

The level of foreign policy power an executive carries is paramount in determining if the unitary executive theory exists. The U.S. Constitution names the President as the Commander-in-Chief of the Armed Forces and calls for the President to receive ambassadors and other ministers.<sup>142</sup> Under the unitary executive theory, the President maintains broad control over the country's foreign policy and military. Congress, however, maintains very specific powers regarding U.S. foreign policy. Most notably, Congress maintains the power to declare war.<sup>143</sup> This separation of powers theoretically requires consensus of more than one branch of government in order to conduct foreign affairs. The unitary executive theory, however, allows for the President to direct the military, as the Commander-in-Chief of the Armed Forces.

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<sup>141</sup> *Id.*

<sup>142</sup> U.S. CONST. art. II, § 2, cl. 1; U.S. CONST. art. II, § 3.

<sup>143</sup> U.S. CONST. I, § 8, cl. 11. *See also* U.S. CONST. art. I, § 8, cl. 3, 10, 12, 13, and 16.

In contrast, the European Council is the only entity that creates foreign policy.<sup>144</sup> Neither the European Parliament nor the European Commission plays a significant role in creating and implementing the EU's common foreign and security policy.

Evaluated under the unitary executive theory, the European Council is the closest entity to a unitary executive in comparison to the United States. The European Council has the sole role of creating and implementing the EU's foreign policy.<sup>145</sup> Being part of the executive of the EU, the Council most certainly exercises the largest swath of executive power where foreign and security policy is concerned. There still remains the glaring contrast to that of the executive in the U.S. Constitution. While in the United States, the President is the sole individual in charge of the armed forces.<sup>146</sup> In contrast, the EU does not maintain armed forces. The President of the U.S. receives ambassadors and other foreign ministers,<sup>147</sup> and the EU provides for the President of the European Council to represent its interests abroad<sup>148</sup> but no official head of state exists to receive such ambassadors. Moreover, the EU provides no entity authority to declare war or to raise and maintain an army or navy. Perhaps the most significant difference is that the EU is a supranational organization with a common economic goal and entirely lacking armed forces. However, the newly created post of President of the European Council may be headed to unify all of Europe with respect to foreign policy and defense.

The unitary executive theorists believe independent governmental agencies are unconstitutional because those agencies, such as the Federal Election Commission, fall outside the scope of the executive's control over the agency.<sup>149</sup> As noted above, because these

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<sup>144</sup> Treaty of Lisbon art. 1(16).

<sup>145</sup> *Id.*

<sup>146</sup> U.S. CONST. art. II, § 2.

<sup>147</sup> *Id.* § 3.

<sup>148</sup> Treaty of Lisbon art. 1(16).

<sup>149</sup> See *Modern Era*, *supra* note 1, at 628-29 (discussing President Eisenhower's quest to limit agencies' power outside of the executive).

independent agencies either report to Congress or some other governmental entity, the unitary executive theorists believe these agencies as lacking constitutional authority. The executive branch is charged with the execution of the laws and as such any administrative agency aiding in the administration must be directly responsible to the Chief Executive in order to comply with the Constitution.<sup>150</sup> Some argue that the independent executive councils that have emerged have splintered the President's executive power, thus curtailing his powers as an executive.<sup>151</sup> However, in the European Union, independent agencies are responsible to all aspects of the Union, not just one entity.

For example, the European Central Bank (ECB) acts similar to the Federal Reserve Bank in the United States. The ECB evolved from the European Monetary Institute after the Euro became the currency of EU's member states.<sup>152</sup> The ECB serves as the governing bank over the European System of Central Banks (ESCB).<sup>153</sup> More specifically, the ESCB seeks to carry out the following tasks: (1) to define and implement the monetary policy of the Community; (2) to conduct foreign exchange operations; (3) to hold and manage the official foreign reserve of the Member States; (4) to promote the operation of payment systems; and (5) to perform certain advisory functions.<sup>154</sup>

The EU seeks to allow the ECB to have a degree of political freedom in order to act in the best interest of the EU's monetary policy. Because the preeminent goal of the EU is to create

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<sup>150</sup> *Id.* See also Daniel P. Rathbun, *Irrelevant Oversight: "Presidential Administration" From the Standpoint of Arbitrary and Capricious Review*, 107 MICH. L. REV. 643, 649 (2009) (arguing the lack of textual support in constitution for administrative agencies cast their operations in a "suspicious" hue).

<sup>151</sup> See Saikrihma Bangalore Prakash, *Imperial and Imperiled: The Curious State of the Executive*, 50 WM. & MARY L. REV. 1021 (2008).

<sup>152</sup> Dr. Rosa Maria Lastra, *The Division of Responsibilities Between the European Central Bank and the National Central Banks Within the European System of Central Banks*, 6 COLUM. J. EUR. L. 167 (2000).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 170 (quoting ESCB Statute art. 3.1).

a common, viable economic market in the EU<sup>155</sup>, the independence of the EU is perhaps an effective means to an end.

Because the ECB maintains such a degree of independence, this seems to indicate a clear rejection of the unitary executive theory. The ECB creates and implements monetary policy without any consultation to the EU's or the member states governing bodies.<sup>156</sup> While each member state has a small degree of control, the power rests with the Executive Board of the ECB.<sup>157</sup> The only real power the EU maintains over the ECB is the appointment of the board's members.<sup>158</sup> The emphasis is placed on the bank's ability to be independent of any outside political or even economic pressures placed on it by the member states. For the unitary executive theory to apply, the EU executive must have some intimate amount of control over the agency in addition to mere appointment. As it stands, the ECB is all but entirely independent.

#### IV. Conclusion

The European Union lacks the power of a unitary executive as present in the United States. However, the Treaty of Lisbon has laid the foundational blocks for a change in democracy. The new post of President of the European Council and, the subsequent corresponding powers, gives the European Union a single face in international relations. The newly elected President, Herman Van Rompuy, is shouldered with similar duties and responsibilities to that of each head of the member states, but for the entire European Union. Policy areas typically reserved for other branches of the Union or to the member states have now shifted to that of the President.

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 172-73.

<sup>158</sup> Stephen C. Sieberson, *How the New European Union Constitution will Allocate Power Between the EU and Its Member States*, 37 VAND. J. TRANSNAT'L L. 933 n.111 (2004).



The creation of the President of the European Council has increased the single face executive in the Union. However, not all executive powers are under his umbrella of authority. Some of the powers, as documented above, are shared with the President of the Commission, whereas in the United States the President has no other executive branch authority with whom he must share authority.

The Treaty of Lisbon does leave the door open to such control as seen in the United States. Will the European Union seize such an opportunity to have a complete single executive? Will the rest of the world respect the current President of the European Council as a foreign policy leader for all of Europe? Will President Barack Obama expand on his predecessor's move to strengthen the executive branch? With the Treaty of Lisbon too new to see developments, time must be the ultimate judge.