

*The Unitary, or Unilateral Executive?  
Presidential Power in the Bush Administration*

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The Bush administration came to office in 2001 determined to return powers to the president lost largely as a result of Watergate. Key to returning those powers is the unitary executive theory of presidential power—a constitutional theory of power developed by conservatives in the Reagan administration meant to offer the president offensive and defensive opportunities when working with an external environment that is polarized and hostile towards the executive branch. While the theory has been a part of each administration from Reagan through Bush II, it is the Bush II administration that has received the majority of the attention for its aggressive defense of a number of controversial actions by relying on the theory. Among those actions has been the use (or abuse) of the presidential bill signing statement. It is my purpose to argue that the administration has not behaved as a unitarian but as something else entirely, leaving the powers of the office perhaps in worse shape than they found it.

So there it was. President Bush was under attack for gathering a bipartisan coalition of congresspersons to sign a historic agreement of international importance, only to later “quietly” issue a signing statement renege on the compromises he made with the Congress. What followed was intense media coverage of the signing statement and questions of whether it was a proper exercise of constitutional power.

The issue? A bill that allows the United States to trade nuclear materials—including material to make a nuclear weapon—to India despite the fact that India is a signatory to the Nuclear Nonproliferation Treaty. The controversy? The administration worked out a specific agreement with the Congress that placed numerous limitations on what India could do with the nuclear material versus deals made with the Indian Government to further U.S. strategic objectives with India. The choice? President Bush used the signing statement to satisfy both sides of the issue—he held the public signing ceremony to show united support for the bill Congress passed while also privately signing the bill to nullify the parts that proved most upsetting to the Indian government.

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This particular controversy arose at the end of 2006—a year that saw a long list of controversies involving the Bush administration and the use of the signing statement. For President Bush, the signing statement controversy began at the end of 2005 with his signing of a defense appropriation bill that contained an amendment added by Senator John McCain declaring that torture of any stripe is a forbidden form of interrogation. President Bush made a deal with Senator McCain to keep McCain’s amendment, but on New Years Eve, 2005, President Bush issued a signing statement that appeared to take back his concession to McCain.

Just a few short weeks later, during the Senate Supreme Court confirmation hearings for Samuel Alito, it was also learned that the Bush administration embraced another controversial item—the *unitary executive theory* of presidential power—and there seemed to be a connection between the theory and the signing statement.

This article will explain why President Bush’s defense of the unitary executive and the signing statement are so controversial by placing into context both concepts and how they have been misused by the Bush administration. Thus, the article will proceed in the following parts: In Part I, I will provide the definitions for the unitary executive and the signing statement, and offer a brief overview of how each has developed over the last 30 years. In Part II, I will explain how the Bush administration has used each, and why those uses are out of step with tradition. And finally, in Part III, I will offer a conclusion and an examination of where each stands going forward into the new presidency.

### **The Unitary Executive**

The unitary executive theory originated in the Reagan administration as a way to deal with the poisoned political environment left over from Vietnam and Watergate. As a result, the presidency suffered from low public approval ratings, consistent negative coverage from the press, and attempts by Congress to limit the powers of the president.

The unitary executive was designed to be a *defensive* theory of presidential power, providing the president with the requisite means to both ward off unconstitutional encroachments upon the constitutional powers of the presidency and the states, as well as upon the liberties of individuals. It also was designed to protect the political agenda of the president, helping him to work through the Congress whenever possible and around it if necessary.

The unitary executive theory is rooted in Article II of the Constitution. It starts with the Vesting Clause of Article II, section 1, which gives to the president all the executive power. This means all the power listed in Article II as well as *inherent* or *prerogative power*—that power outside the Consti-

tution that allows the president to respond to crisis. Furthermore, because the president is the only nationally elected figure, he is responsible to the electorate for the way in which subordinates exercise executive power, which involves the power to supervise the administration of the law as well as the power to control communications between the executive branch and the Congress.

Second is the power that stems from the Take Care clause found in Article II, section 3. This power directs the president, with the advice and assistance of his inferior officers, to “take care” that the laws are faithfully executed. This gives the president authority over inferior officers to insure they are not pursuing an “independent policy goal” to the benefit of Congress or some special interest (Herz 1993, 252-53). As Elena Kagan, a former domestic policy advisor in the Clinton administration, argued: “When Congress delegates discretionary authority to an agency official, because that official is a subordinate of the President, it is so granting discretionary authority (unless otherwise specified) to the President” (Kagan 2001, 2327). The unitarians simply incorporated the administrative presidency strategy under the take care power—a strategy that examines the efforts by presidents since Nixon to bring the bureaucracy under presidential control.

The third part of the unitary executive theory, and one of the more controversial parts, stems from the Oath Clause in Article II, section 1 of the Constitution. This third provision is designed to shield the presidency from any infraction to the prerogatives of the office or any violation of the Constitution. This third part has also been known as *coordinate construction* or *departmentalism*. James Madison described it in *Federalist #49*: “The several departments being perfectly co-ordinate by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers” (Madison).

### **The Unitary Executive in Practice: Reagan-Clinton**

For every president from Reagan through Clinton, the unitary executive has served as a guide to enhancing presidential power during periods of intense political polarization, brought about in large part because of persistent divided government. The “take care” component encouraged presidents to take greater administrative control of the executive branch to make sure that the various regulatory agencies, for instance, were on board with the president’s political agenda.

Through the use of executive orders, these presidents were able to extend presidential influence throughout the executive branch in significant ways. President Reagan, mostly by concentrating on the *management* side of

the Office of Management and Budget, as well as the placement of presidential loyalists in key executive branch agencies, was able to influence the regulatory process in a way no previous president could. For example, President Reagan's Executive Order 12,291 put in place a cost-benefit analysis rubric that executive branch agencies would have to consider before issuing any new regulations (the benefits would have to outweigh the costs). President Clinton not only continued Reagan's regulatory strategy (though using it to advance social and environmental-friendly regulations post-Republican victory in 1994), but also extended White House influence into the independent regulatory agencies and commissions (Kagan 2001).

As for the protection of the oath the president takes to defend the presidency and the Constitution, the presidential signing statement would become one of the president's preferred weapons, or "power tools" (Cooper 2002). I will turn to a discussion of the signing statement, and its connection to the oath power of the unitary executive.

### **The Presidential Signing Statement: Overview**

The presidential signing statement is any written and/or verbal commentary on a bill after the president has signed it into law (Kelley 2007, 738). Sometimes the president will convene a formal signing ceremony, complete with invited guests flanking the president with the White House Press Corps looking on. Most of the signing statements are in written form and relegated to such publications as the *Weekly Compilation of Presidential Documents* or the *Public Papers of the Presidents of the United States*, as well as available on the Internet at the White House webpage. Since 1986, signing statements have also been included in the "Legislative History" section of the *United States Code, Congressional and Administrative News*.

There are a multitude of uses for the signing statement, which is why it has become a useful device to recent presidents. The signing statement can serve as a rhetorical device to signal the president's appreciation to supporters or important individuals who made the bill possible, or it can be used to berate the opposition in general or to the specific bill being signed. More importantly, the signing statement may be used to instruct bureaucrats on the interpretation of the law (per the "take care" leg of the unitary executive) and to advise judges as to the president's understanding of vague language in the law. Arguably the most controversial use of the signing statement (and tied directly to the Oath protection in the unitary executive theory) is the use of the signing statement to single out sections of a bill as defective, with instructions that are as tame as telling Congress that a fix will be needed in future legislation or as severe as refusing either defense or enforcement of the provision.

### Signing Statement Uses: Reagan-Clinton

The signing statement has a rich history in American politics, dating to the Monroe administration, where Monroe used it to challenge a provision of bill that dealt with reorganizing part of the military. However, it did not become a significant part of the president's cache of devices until recently, beginning with the Reagan administration.

In 1986, the Reagan administration made the decision to add the signing statement to the legislative history of bills it signed into law. This decision came as a result of the success the administration enjoyed in getting the signing statement into the majority opinion of two different Supreme Court decisions. In the first, *INS v. Chadha* (462 U.S. 919 [1983]), the Supreme Court referenced a practice of presidents, dating to the Wilson administration, of objecting to the addition of legislative vetoes in bills the president signed. In the second, *Bowsher v. Synar* (478 U.S. 714 [1986]), the Supreme Court cited President Reagan's signing statement to the Graham-Rudman budget control bill, which objected to, among other things, a legislative officer (the comptroller general) exercising executive power.

In February 1986, attorney general Ed Meese told an audience at the National Press Club that the administration had negotiated an agreement with the West Publishing Company, publisher of the *United States Code, Congressional and Administrative News*, to have the signing statement added to the legislative history of bills signed into law (Kelley 2007). This announcement came at the end of a year-long brainstorming session inside the Department of Justice (the same group who also were on the ground floor of the unitary executive theory) to figure out how to get the signing statement into a more prominent role to influence how bureaucrats and judges interpreted the law.

After Reagan left office, his successors—one Republican and one Democrat—continued to defend the use of the signing statement for purposes of protecting important constitutional powers and liberties. The first Bush administration, Bush 41, used the signing statement to guard against any constitutional infraction, no matter how slight (and a use that would be patterned by his son, Bush 43). Nelson Lund, who served in Bush 41's White House Counsel's office, observed: "The Bush signing statements are pervaded by an amazing scrupulosity about the separation of powers. Even a cursory review of the record suggests that the administration tried to identify and deal with every such issue in every bill that was presented to the president" (Lund 1995, 221).

The Clinton administration issued two legal opinions defending the privilege of coordinate construction as well as the use of the signing statement to defend the president's oath of office. In one opinion, assistant

attorney general Walter Dellinger argued that the president has “enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency,” and must “shoulder the responsibility of protecting the constitutional role of the presidency” (Dellinger 1994). In a second opinion, Dellinger argued that the signing statement challenging what the president believes to be an unconstitutional provision of law “can be a valid and reasonable exercise of Presidential authority” (Dellinger 1993).

Thus, the signing statement came to be an established presidential device to help defend the president’s core prerogatives and policy objectives by the time President George W. Bush took his oath of office in 2001. His predecessors—Republican and Democrat alike—had nurtured the unitary executive theory to the point of institutionalization within the Executive Branch, and with it each strategically used the signing statement to consistently defend important presidential powers—things such as the president’s sole responsibility for foreign policy, to recommend legislation to Congress, to make appointments, and to supervise the activity of inferior executive branch officers. And each president was careful enough with the signing statement to not draw any unnecessary attention. These presidents were careful to pick their battles, never making more than a couple dozen challenges per year.

The George W. Bush administration came to power seemingly with the same concerns of the Reagan administration—to restore the powers and prestige of the presidency after the damage it suffered following Watergate. What is interesting is that the zeal in which it went after that objective may have put the presidency in peril. I will turn next to a discussion of the unitary executive, the signing statement, and the George W. Bush administration.

### **The George W. Bush Administration**

The Bush administration came to office in 2001 under the worst of conditions—having lost the popular vote in the 2000 election and been given the presidency only after the Supreme Court stopped the vote counting in Florida, thus giving Bush the edge in the Electoral College. Most observers predicted that he would need to cautiously govern in that first term given that he had an *unmandate* to lead. It appears that neither Bush nor his advisors got the message.

Immediately upon taking office, President Bush put a two-month hold on all regulatory rules passed in the final days of the Clinton administration (Zaneski 2002). Just weeks after he was inaugurated, he issued an executive order establishing the “Office of Faith Based Initiatives,” a controversial campaign promise that opened up federal money to religious institutions

providing charitable relief. This was after the Congress signaled to the administration that it had no intention of establishing the office by statute. And not more than a month into his presidency, President Bush issued a number of executive orders that undercut the authority of organized labor, in direct provocation of the congressional Democrats (Kelley 2005, 22).

From his first year forward, Bush aggressively asserted the powers of the presidency. For instance, he unilaterally ordered limited federal funding for embryonic stem cell research; he evoked executive privilege to keep congressional Republicans from obtaining information related to the Clinton Justice Department; he removed the United States from the ABM Treaty with Russia and restored funding for the “Star Wars” program; and he drew international condemnation for withdrawing the United States from the Kyoto Protocol relating to the environment. And then there was the response to the 9/11 attacks that came just nine months into his presidency (Kelley 2005, 23).

Behind all of these actions was the unitary executive. To date, President Bush has publicly referred to the unitary executive as justification for the unilateral actions he took in a variety of public pronouncements (signing statements, executive orders, etc.) 148 times. And it is clear that unitarian principles were at play in a number of controversial actions successfully undertaken by Bush. For example, he aggressively controlled the flow of information in and out of the White House. In 2001, Attorney General John Ashcroft issued a memorandum, which still stands, to all executive agencies assuring them that they would have Department of Justice protection should they deny a Freedom of Information Act (FOIA) request (Ashcroft 2001). The administration also increased the number of classified government documents (even re-classifying documents that had been unclassified). From 2001 to 2003, the number of classified documents jumped 50 percent over the level for the *preceding five years* (“Secrecy” 2004). And the Government Accountability Office (GAO) found the Department of Defense classified “about 50 percent of the reports it submitted to Congress” even though only a “small amount of the data contained in each report” was classified (Levin 2005, Preface).

And in two controversial moves to control information, President Bush issued an executive order that augmented the “Presidential Records Act,” allowing former presidents to “assert executive privilege over their own papers” to forbid their release to the public even if the incumbent president disagrees, as well as allowing a sitting president to forbid release of papers from a previous presidency even if that former president wishes their release (Kelley 2005, 46-47).

And second, President Bush successfully prevailed in a Supreme Court decision regarding the protection of information over who attended meetings

of an Energy Task Force convened by the vice president to deal with the energy crisis that plagued the western part of the United States in 2001. This lawsuit initially involved the GAO, which for the first time in its 80-year history had to sue a federal official in an attempt to get information (Aberbach 2003, 60).

The administration also extended its influence into the executive branch in order to push the “take care” leg of the unitary executive. President Bush issued an executive order that allowed him to move political appointees—termed “Regulatory Policy Officers”—into the bureaucratic agencies, to make sure that the White House views on regulations are not just assumed, but clearly understood (A Failure to Govern 2007).

The Bush administration also aggressively defended its “Oath” commitment to the Constitution and to the powers of the presidency. A perfect example of this aggressive defense culminated in a controversy over the Bush administration’s persistent use of video news releases, or VNRs. The VNR is a 90-second video “press release” that executive branch agencies produced and distributed to local news stations all across the United States. These video packages are designed to be indistinguishable from a regular news story, save for the fact that the “reporter” is a political official pushing a particular political agenda, and not someone whose professional code strives towards objectivity and fairness. When the package arrives at the local news station, it is marked so that the station employees know that it was produced by an executive branch agency.

In 2005, two reporters for the *New York Times* found that “at least 20 federal agencies, including the Department of Defense and the Census Bureau” had produced and mailed hundreds of VNRs in President Bush’s first term (Barstow and Stein 2005). The GAO, in a follow-up investigation to the *Times* story, found that many of these VNRs violated a “government-wide ban on the use of appropriated funds for purposes of ‘publicity or propaganda’” (Walker 2005, 2). The placement of a label on the front of the package warning the local station that the story was a government-produced video was not good enough, according to the GAO. The simple fact that “television-viewing audiences did not know that the stories they watched on television news programs *about the government* were, in fact, prepared *by the government*” (Walker 2005, 2). The GAO advised that agencies had the right to inform the public about government programs, but could not use “appropriated funds to produce or distribute prepackaged news stories intended to be viewed by television audiences that conceal or do not clearly identify for the television viewing audience that the agency was the source of those materials” (Walker 2005, 2).

The GAO’s memo was a cease and desist order to the Bush administration. When President Bush was asked whether he would accept GAO’s

order, he referenced a Justice Department opinion that concluded the use of the VNR was legal, and it was the local television station's obligation to inform their viewers if they chose to use the story. In the opinion, Steven Bradbury argued that the VNR was the "television equivalent of the printed press release," and so long as it did not advocate "a particular viewpoint," it was legal (Bradbury 2005, 2).

The Bush administration argued that the GAO, which is an agent of the Congress, had no authority to issue legal opinions or commands to the executive branch—only the president, or his directed officers—could do that. Thus the Bradbury opinion superseded the GAO opinion. In the end, the best Congress could do was to pressure the FCC to inform local television stations that running the VNRs without informing its viewers about the source could be cause for license revocation.

Finally, no action was as tied to Bush's defense of the unitary executive as the constitutional signing statement. As discussed above, this is the type of signing statement where the president signs a bill into law and simultaneously challenges certain provisions for violating the Constitution. The constitutional signing statement became an issue when President Bush reneged on a deal he made with Republican Senators John McCain and John Warner in 2005.

In the fall of 2005, Senator John McCain led a spirited challenge against the Bush administration—and against his own Party—to a provision in a defense appropriations bill that included language that would permit the use of torture, in some circumstances, as an interrogation technique. Senator McCain, who himself had been tortured during the Vietnam War, challenged the provision on legal and moral grounds. The administration sent Vice-President Cheney to the Senate in an effort to pull enough senators to the administration's position (which the House fully supported), but in the end McCain weathered the pressure and the administration officially conceded in early December with a White House photo op.

On December 15, the White House invited John McCain and John Warner (who was also instrumental in beating back the White House) to a "photo-only" meeting with the president, where Bush said he was pleased to work with McCain to "make clear to the world that this government does not torture and that we adhere to the international convention of torture, whether it be here at home or abroad" (Bush 2005a). What Senators McCain or Warner did not know was the administration had not considered the meeting as the final iteration.

On New Years Eve, 2005, President Bush issued a signing statement to the bill that in-not-so-veiled-language appeared to take back the concessions made with McCain and Warner. President Bush wrote that he would construe the McCain provision "in a manner consistent with the constitutional

authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power” (Bush 2005b, 1919).

According to an unnamed senior administration official, this challenge meant that the administration considered it a “valid statute” and would consider themselves “bound by the prohibition on cruel, unusual, and degrading treatment,” but “a situation could arise in which Bush may have to waive the law’s restrictions to carry out his responsibilities to protect national security” (Savage 2006). Many wondered how you could square being bound by the statute but also assert a claim to “waive” the law when no such waiver appeared anywhere in the law Bush signed?

It appears that this controversy was the product of the role the vice president’s office played in this, and nearly every other constitutional signing statement. In particular, it speaks to the power of David Addington, chief of staff to Vice President Cheney. As Jane Mayer tells the story of the New Years Eve signing statement:

Just before Bush signed McCain’s Detainee Treatment Act into law, on December 30, 2005, Addington unsheathed the red pen he kept in his pocket and eviscerated the compromise language that had been worked out between Congress and the White House. . . . It was one of hundreds of similar notes he had insinuated into the legislative record, reserving the President’s right to ignore Congress (Mayer 2008, 321).

Brad Berenson, a former attorney in the Bush White House, argued that the signing statement was a way for Addington to “advance executive power” throughout the bureaucracy, and he would “dive into a two-hundred page bill like it was a four-course meal” (Mayer 2008, 236).

It would appear that the key variable in the aggressive defense of the unitary executive and the constitutional signing statement separating the Bush presidency from his predecessors was Cheney and his staff. Cheney was on the frontline of the decline of the presidency when he served as Gerald Ford’s chief of staff, and he did not hide his desire to restore and even expand the powers of the presidency. And as Charlie Savage writes, “. . . Cheney wanted to permanently alter the constitutional balance of American government, [and] establish powers that future presidents would be able to wield as well” (Savage 2007, 8-9).

David Addington, who had been with Cheney since Cheney’s time in the House of Representatives in the 1980s, would be the chief enforcer of Cheney’s vision. And it was Addington who was behind many of the constitutional signing statements. The tandem of Cheney and Addington inserted themselves into the process in a way that no other executive officer (besides the president) ever did (Gelman 2008).

And while the controversy involving McCain's anti-torture provision was the public's first exposure to the signing statement, it came after Bush had already challenged hundreds of provisions in just his first term alone. To date, President Bush has issued just 172 signing statements, but within those statements, he has made 1,168 objections to provisions that offend the Constitution. In many provisions, President Bush lumped dozens of challenges to a variety of provisions. For example, in signing the "Consolidated Appropriations Act, 2005," President Bush issued 116 objections to nearly every provision of the bill—and in each challenge, the administration claimed a number of violations. For example, Bush wrote:

Many provisions of the Consolidated Appropriations act are inconsistent with the constitutional authority of the President to conduct foreign affairs, command the Armed Forces, protect sensitive information, supervise the unitary executive branch, make appointments, and make recommendations to the Congress. Many other provisions unconstitutionally condition execution of the laws by the executive branch upon approval by congressional committees (Bush 2004, 2924).

The Congress, upon learning about Bush's challenges, attempted to find out just how often the president challenged legislation he signed into law. Senator Patrick Leahy (D-VT) added language to a Department of Justice appropriations authorization bill that required the administration to inform Congress whenever the president refused to enforce or defend a provision of law. The provision also required the administration to report any action it took that may diminish the authority of the Congress. When President Bush signed the bill, he made nine separate challenges, and in one of the challenges he addressed the Leahy amendment by construing it "in a manner consistent with the constitutional authorities of the President to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative process of the Executive, or the performance of the Executive's constitutional duties" (Bush 2002, 1971-73). Next, he instructed the agencies that before they shared any information with the Congress, they would have to check with the White House first—certainly not what Senator Leahy probably meant when he added the provision to the bill.

It would take an agent of Congress to ascertain the influence that Bush's challenges were having on the bureaucratic agencies. In 2007, the GAO examined the signing statements to 11 of the 12 appropriations bills that Bush signed in 2006, and found that 31 percent of those examined were not enforced as Congress intended, although the GAO investigators threw in the inexplicable caveat: "Although we found that some agencies did not execute the provisions as enacted, we cannot conclude that agency

noncompliance was the result of the President's signing statements" (Kepplinger 2007, 20).

After Bush's challenges were publicly exposed in 2006, and after the Democrats took control of the Congress in 2007, the number of signing statements, and the challenges therein, dropped dramatically from the previous years, where the challenges ranged in the several hundreds. In 2007, President Bush issued just 12 challenges and to date in 2008, he has issued just 11, which is closer to the yearly averages of previous administrations.

### Conclusion

Since 2007, Bush has ratcheted down his defense of the unitary executive theory and the number of constitutional signing statements. Bush has gone from challenging legislation that violated his prerogative to "supervise the unitary executive branch" to simply issuing challenges that interfered with this ability to "supervise the executive branch." But it is his constitutional signing statements that have become problematic.

The unitary executive theory's tenet of coordinate construction rests firmly on the ability of each institution to determine constitutional meaning, and to challenge the actions of the other institutions when it determines unconstitutional behavior. This power obligates the institutions to be clear on what they object to. The problem with many of Bush's signing statements are their lack of clarity—deliberately—to make it difficult to ascertain what provisions are being challenged and why. Representative Sheila Jackson Lee (D-TX) laid the problem out thusly:

In general, President Bush's signing statements do not contain specific refusals to enforce provisions or analysis of specific legal objections, but instead are broad and conclusory assertions that the president will enforce a particular law or provision consistent with his constitutional authority, making their true intentions and scope unclear and rendering them difficult to challenge (Lee 2007, 106).

As an example of just how vague and unclear Bush's signing statements became, in the "Consolidated Appropriations Act of 2008," he wrote:

Finally, this legislation contains certain provisions similar to those found in prior appropriations bills passed by the Congress that might be construed to be inconsistent with my Constitutional responsibilities. To avoid such potential infirmities, the executive branch will interpret and construe such provisions in the same manner as I have previously stated in regard to similar provisions (Bush 2007, 1638).

Or in Bush's signature to the "Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009," he wrote:

Finally, this legislation contains certain provisions similar to those found in prior appropriations bills passed by the Congress that might be construed to be inconsistent with my Constitutional responsibilities. To avoid such potential infirmities, the executive branch will interpret and construe such provisions in the same manner as I have previously stated in regard to similar provisions (Bush 2008).

These challenges have a couple flaws: First, the challenges do not point out which section is problematic. In both of these statements, it is nearly impossible to determine exactly what the objection is and what Bush intends to do about it. Second, when making the challenge, Bush does not support it by implicating a single constitutional provision that is threatened, but instead indicates that whatever infraction offends his "Constitutional responsibilities." But what responsibilities?

None of this is consistent with the unitary executive theory, but instead is designed to overwhelm any oversight into the manner of how the laws are executed while also building up a body of precedent whereby challenges are made without objection from those outside the executive branch.

The unitary executive theory of presidential power was designed to protect the president's powers and his place in the constitutional system in response to the aftermath of Vietnam and Watergate, and the assault that took place on the presidency from the Congress, the media, and the public. It was designed as a defensive theory of power to protect his prerogatives while also protecting the promises he makes on the campaign trail to move the country in a particular direction.

What the Bush administration has done is cloak itself in the unitary executive theory while pushing naked unilateralism all in the name of politics and at the expense of its stated goal of leaving the office in better shape than they found it. As Harold Krent correctly notes, "President Bush has confused a unitary ideal for a unilateral one" and this unilateralism "may end up as dangerous to the nation as unilateralism in foreign affairs" (Krent 2008, 50).

The administration has not just been getting flak from its critics at the way in which it has pushed its constitutional powers, but also from its supporters. For instance, Steven Calabresi, an attorney in the Reagan Justice Department and a founding father of the unitary executive, has stated that he "does not recognize the unitary executive theory as Bush is using it" and that the administration has taken "leaps in legal logic" in its attempts to justify unilateralism in the name of the unitary executive (Savage 2007b, 5).

It is clear that the Bush administration's actions will have at least one negative effect on future presidents—the high profile use of the signing statement. As a result of Bush's overuse of the device, there are private citizens who now keep a count and list of all signing statements (present company included), and one public website (The American Presidency Project) has a link to signing statements dating to 1929. When President 44 is faced with a bill that contains defective provisions and uses a signing statement to challenge them, he is not just going to be monitored by a few scholars interested in the presidency, but also the Congress and the press, and indirectly the public. Either way, the new president will be constrained in his decision about the use of signing statements, executive orders, or any other device exercised in the past to protect the unitary executive. And this will be the Bush administration's greatest failure.

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