

Unitary Executive Theory, Signing Statements, and the Expansion of Presidential War Powers under President George W. Bush

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In recent years, President Bush has sparked controversy by issuing “signing statements” on many new laws, declaring his authority to set aside said laws when they conflict with his interpretation of the Constitution. Though previous presidents have used signing statements for similar purposes, President Bush has expanded the scope, character, and usage of these statements. Critics have argued that these statements run “contrary to the rule of law and our constitutional separation of powers.”¹

Earlier presidents used such statements to announce their interpretation of legislation they were signing into law. For example, on May 30, 1830, President Andrew Jackson issued a signing statement stating that he would interpret a law appropriating money for the construction of a road from Detroit to Chicago “with the understanding that the road...is not to be extended beyond the limits of the said territory.”² Modern Presidents have also used these statements to declare entire sections of laws to be unconstitutional and unenforceable.³ For example, in 1971 President Nixon signed a defense appropriations bill, but objected to a provision in it that set a final date for the withdrawal of U.S. forces from Indochina as being “without force or effect.”⁴ President Ford objected to provisions in a defense appropriations bill that required congressional approval as a prerequisite for the obligation of certain funds.⁵ More recently, President Clinton refused to abide by a provision of the 1996 Defense Authorization Act that

required the discharge of HIV positive service members.⁶ Congress later repealed this provision, so the signing statement never actually had an impact.⁷

From George Washington's election in 1789 to the year 2000, presidents produced signing statements containing fewer than 600 challenges to the bills they signed.⁸ President George W. Bush, however, has made at least 800 such challenges within his first seven years in office.⁹ President Bush has greatly expanded their usage, scope, and character,¹⁰ which has sparked political controversy regarding not just the number of challenges he has issued, but the ways in which these signing statements have been used, particularly regarding issues related to President Bush's "War on Terror."¹¹ When defending these statements, Bush has often invoked the unitary executive theory, a relatively new legal doctrine supporting a powerful presidency.¹² The theory is based on parts of the Constitution vesting the President with the "executive power."¹³ For Bush, this legal argument is essential in justifying not only the use of these statements, but their content.

This article examines Bush's use of signing statements by first considering the historical and legal background that led to the use of the statements themselves. In order to determine which statements have had the greatest impact in expanding presidential power, the statements have been grouped by their relationship to both the unitary executive theory and Bush's "War on Terror." The paper finds that the unitary executive theory allowed the president to make broad assertions about presidential power in matters of national security.

The New Imperial Presidency

Over the past seven years, the Bush Administration has sought to expand the power of the Presidency. According to Jack Goldsmith, a former official within the Bush Administration, Vice President Cheney and his top aide David Addington had intended to reverse Congress's "intrusions" on "unitary executive power" long before the September 11, 2001 attacks.¹⁴ He also noted that Addington and Cheney hold extraordinary influence in the White House. Cheney, having served during the Nixon and Ford Presidencies, was displeased with the political consequences of the Watergate scandal. In the early 1970s, Congress imposed restraints, including the 1973 War Powers Act, on the President and his executive authority. In a 2002 interview with Cokie Roberts on ABC's *This Week*, Cheney referred to such restraints as "unwise compromises" that resulted in "a constant, steady erosion of the prerogatives and power of the president."¹⁵ Cheney, along with other conservatives, had set out to restore the Presidency to what he believed was a more proper role in American government. "Restore power & auth to exec branch – need strong leadership. Get rid of War Powers Act – restore independent rights," urged Cheney in a November 1980 handwritten note to James Baker, who was about to become President Reagan's Chief of Staff.¹⁶

President George W. Bush himself expressed his support for greater presidential power upon election. At the beginning of Bush's first term, associate counsel Bob Berenson was told by Alberto Gonzalez, then head White House legal counsel, that he was instructed by Bush "to make sure that he left the Presidency in better shape than he found it."¹⁷ The Bush Administration's lawyers were thereby instructed to seize any opportunity to expand the president's power. "Well before 9/11, it was a central part of the

administration's overall institutional agenda to strengthen the Presidency as a whole," Berenson concluded.¹⁸ In addition, Bush repeatedly made statements indicating his agreement with Cheney's views about executive power. "I have an obligation to make sure that the Presidency remains robust. I'm not going to let Congress erode the power of the executive branch," he noted in 2002.¹⁹

President Bush's repeated use of signing statements reflects his support for a stronger presidency. Both his rhetoric and actions suggest that his Administration views Congress and the President as two entirely separate institutions with few overlapping roles and responsibilities. Since, according to this interpretation, the President is an independent and unitary political actor with his own prerogatives, it is unconstitutional for Congress to interfere with or regulate the conduct of his executive branch. For example, a signing statement issued on October 28, 2004 cites the "separate powers of the Congress to legislate, and the President to execute the laws."²⁰

The Birth of the Unitary Executive Theory

Bush and Cheney's support for the expansion of presidential power was the result of an earlier movement built by a circle of conservative lawyers who favored this agenda. The development of their views should be seen as a conservative reaction to the post-Watergate reforms of the 1970s. This movement manifested itself during the years of the Reagan Administration, when a conservative president sought unilateral methods of circumventing a liberal Congress. Young conservative lawyers developed an organization known as "The Federalist Society." Many of the group's members had worked in the Nixon and Ford Administrations, and many were hired to work in Reagan's Justice Department under Attorney General Edwin Meese III. There they began developing new

legal theories to advance the President's policy goals.²¹ A 1986 internal report disseminated within the Justice Department noted that such conservative activists were "finding separation of powers frustrating because it is sometimes an obstacle to the conservative political agenda."²² It added that these conservatives were inclined to "make an exception to their usual respect for separation of powers and advocate a very strong President – primarily for the practical reason that an activist conservative currently sits in the White House, and they fear he may be the last."²³

These lawyers soon developed a new constitutional doctrine known as the "unitary executive," a legal argument granting sweeping constitutional and policy prerogatives to the President.²⁴ In the words of Kelley (2005), the "unitary executive" theory is based on the power of the president to "resist encroachments on the prerogatives of his office" and to "control the executive branch."²⁵ The theory found one of its strongest advocates in young Federalist Society lawyer Samuel A. Alito Jr., now a Bush-appointed Supreme Court Justice. In 1986, Alito, then a Deputy Assistant Attorney General in the Reagan Administration, wrote a memo recommending that President Reagan use signing statements on a regular basis. The memo broke with previous precedents about presidential signing statements in urging President Reagan to use the statements as "legislative history" for courts to interpret.²⁶

Traditionally, signing statements had been used for a variety of purposes. They often explained to the public the likely effects of a bill's adoption, explained to subordinate officers within the Executive Branch how to interpret the legislation, and informed Congress and the public that the Executive Branch believed that a particular provision would be unconstitutional and would not be enforced.²⁷ Alito, however, advised

the President to move beyond these precedents. “Our primary objective,” Alito wrote, “is to ensure that presidential signing statements assume their rightful place in the interpretation of legislation.” He continued, arguing that “the President’s understanding of the bill should be just as important as that of Congress.”²⁸ Therefore, Alito wrote, presidents should issue “interpretive” signing statements in order to “increase the power of the executive to shape the law” and to “curb some of the prevalent abuses of legislative history.”

Alito only cautiously recommended that President Reagan begin issuing interpretative signing statements. “As an introductory step, our interpretative signing statements should be of moderate size and scope...” he wrote, adding that, “the first step will be to convince the courts that Presidential signing statements are valuable interpretative tools.”²⁹ Although Alito’s memo encouraging the use of signing statements as “legislative history” would largely fail, it nonetheless served as a philosophical basis for the Bush Administration’s expansive use of presidential signing statements. Alito’s argument for a stronger president was a source of inspiration for the “presidentialists” within the Bush Administration.

Steven G. Calabresi, an influential Federalist Society lawyer who served in the Reagan-Meese Justice Department, wrote an article entitled *The Structural Constitution: Unitary Executive, Plural Judiciary*. As one of the fathers of the “unitary executive theory,” Calabresi’s views, as expressed in this article, describe the logical reasoning behind the unitary executive theory.³⁰ Calabresi argues that the Constitution itself bestows the president with the powers of a Unitary Executive. This logic is based on the Vesting Clause of Article II, which reads “The executive Power shall be vested in a President of

the United States of America.” Since the vesting of power in the president places *all* executive power in his hands, the clause thereby creates a hierarchical, unitary executive department under direct control of the President.³¹

Therefore, the Vesting Clause gives the president the authority to supervise and control all subordinate officials that execute existing constitutional and statutory provisions. Moreover, the president possesses “all of the executive power” and can “direct, control and supervise” inferior offices or agencies who seek to exercise discretionary executive power.³² The legal theory renders unconstitutional independent agencies, such as the Social Security Administration, because they exercise power belonging solely to the President.³³ In sum, Calabresi advocated that the federal bureaucracy be placed under the exclusive control of the president himself. In his opinion, “all federal officers exercising executive power must be subject to the direct control of the President.” Congress has no authority in such a case; it cannot “deprive the President of his constitutional power to control the department.”³⁴

Constitutional scholar Sakrishna Bangalore Prakash cites the Constitution’s “Take Care Clause” to argue that the Framers intended the President to be a “Chief Administrator.”³⁵ According to this theory, because the President himself is to be charged with executing federal law, other executive branch officials must therefore submit to his orders and wishes. The proponents of the theory cite the Constitution’s Article II, Section 3, Take Care Clause, which requires the President to “take Care that the Laws be faithfully executed.”³⁶ Although lower level officials may assist him in these tasks, they are ultimately working at his command. At any time the President may overrule or even dismiss them. Furthermore, the theory holds that there is no constitutional basis for

independent and administrative agencies that execute federal law without presidential control and supervision.³⁷ The President alone has the constitutional responsibility to execute federal law. The establishment of independent agencies conflicts with the Constitution, as these agencies constitute an illegitimate “fourth branch” of government.³⁸

The unitary executive theory was tested in a 1988 Supreme Court case known as *Morrison v. Olson*. The case involved a dispute between the Environmental Protection Agency and the Justice Department.³⁹ An independent counsel was appointed to investigate possible abuses of power by the Reagan administration. The executive branch rejected the counsel’s request for documents. Instead, the administration, invoking the unitary executive theory, questioned the constitutionality of the counsel itself, calling it a “fourth branch” of government, and demanded its removal. Subsequently, the Supreme Court rejected the unitary executive theory and upheld the independent counsel.⁴⁰

Justice Antonin Scalia rejected the decision and wrote a legal opinion advocating the administration’s position. In a lone dissent, he argued that the Constitution gives the President control over “all exercises of executive power.”⁴¹ Therefore, he reasoned, the President must also have the authority to remove independent counsels. Scalia supported an “unlimited presidential removal power” over independent counsels.⁴² Other legal scholars such as John C. Yoo extended the unitary executive theory to the President’s war powers. In 1996, Yoo argued that the Framers created a “unitary, independent executive” in the form of the presidency.⁴³ In his opinion, the Framers wanted the president to have “energy and independence” in war.⁴⁴ Yoo argued that the Framers constructed a constitutional framework designed to “encourage presidential initiative in war.”⁴⁵ In terms of its constitutional authority, Congress can only express its opposition to executive war

decisions by exercising its powers over “funding and impeachment.”⁴⁶ Therefore, the “declare war” clause actually does not vest Congress with the power to initiate war. The President alone has the prerogative to make decisions about military deployments and war-making policy.

In Yoo’s opinion, the war making powers of the president were crafted by the Framers to ensure a “unity in purpose and energy in action.” Indeed, Yoo wrote that the Framers intended for *all* federal power to “be given to the President.”⁴⁷ He, like many other unitary executive theorists, invoked Alexander Hamilton’s *Federalist Paper No. 70*:

Decision, activity, secrecy and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number...Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks.

Yoo claimed that Hamilton advocated the centralization of power in the hands of the President. “A unitary executive,” Yoo wrote, “can evaluate threats, consider policy choices, and mobilize national resources with the speed and energy that is far superior to any other branch.”⁴⁸ Yoo would later become a prominent and influential lawyer within the Bush Administration, authoring legal opinions favoring stronger presidential powers.

In sum, the “unitary executive theory” protects the executive from congressional encroachment and establishes a hierarchical and corporate-like environment within the executive branch. The unitary executive theory defends the executive branch from Congressional and legislative interference. It also rejects the notion that Congress can regulate or constrain presidential behavior; it views the legislative and executive branches of government as entirely separate institutions.

Signing Statements and Unitary Executive Theory

The unitary executive theory provides a logical and constitutional basis for the use of presidential signing statements. Since the unitary executive theory holds that the Vesting Clause places all executive power in the hands of one president, it naturally follows that all other executive branch officials who exercise executive power must do so by the implicit delegation of the president.⁴⁹ Furthermore, Calabresi and Lev (2006) argue that signing statements give the president the instrument he needs to provide guidelines to his subordinates within the executive branch.⁵⁰ With these instructions in mind, executive branch officials can understand the ways they must carry out and execute the law. Executive branch officials need these orders to understand the proper way of interpreting legislation approved by Congress. Calabresi and Lev argue that signing statements can be used to direct or order executive officials and are vital to making the executive branch function in practice the way the Constitution says it should.

The Constitution's "Take Care" Clause also serves as a basis for presidential signing statements. Since the "Take Care" Clause implies that the president alone is responsible for taking care that the laws are executed properly, subordinate officials ultimately possess no discretion independent of the president. Thus, the president may need to craft signing statements detailing the ways in which his officials must interpret and execute the law.

The Bush Administration's use of the "unitary executive theory" to justify its signing statements has met with a torrent of criticism in recent years. A 2006 report by the American Bar Association (ABA) denounced presidential signing statements as "unconstitutional," arguing that the President must either sign and enforce a bill or reject and veto it.⁵¹ Additionally, Senator Arlen Specter (R-PA) and Representative Carol Shea-

Porter (D-NH) introduced the Presidential Signing Statements Act of 2007. The bill would prohibit courts from relying on the statements in their dispositions and would give Congress standing to challenge the statements if used.⁵²

Relationship between the Theory and the Statements

In order to find the statements with the boldest assertions of presidential power, I analyzed certain statements according to their content. First, I examined all signing statements, from 2001 to 2007, containing the phrase “unitary executive.”⁵³ I then considered only the statements relating to national security and President Bush’s “War on Terror.” As the table below shows, the number of statements referring to national security is almost the same as those referring to a “unitary executive.”⁵⁴ This correlation exists because, in his signing statements, Bush has used the theory to bolster his national security powers.

Findings

The 63 signing statements vary in their content and substance. Nevertheless, the statements regarding the “unitary executive branch” make some of the boldest assertions of presidential power. It is important to understand the linkage between the statements, the theory, and the War on Terror. The theory not only provides the justification for the use of signing statements, but is also used in the statements themselves. Indeed, one of Bush’s primary reasons for rejecting legislative provisions and expanding his national security powers involves his authority to “supervise the unitary executive branch.” This phrase appears repeatedly throughout the signing statements.

Table 1. Signing Statements Referring to a Unitary Executive and National Security, 2001-2007.

	Number of Signing Statements	Unitary Executive Theory	National Security
2001	24	2	2
2002	34	13	13
2003	29	11	11
2004	25	12	12
2005	14	10	6
2006	23	14	10
2007	5	1	1
TOTAL:	154	63	55

The primary justification that President Bush gave when invoking the unitary executive theory involved legislative provisions that he felt imposed burdensome requirements on the executive branch to make recommendations and proposals to Congress. Of the 132 legislative provisions that Bush rejected, 48 were directly related to the president's responsibility to make recommendations to Congress. For example, in a signing statement issued on November 27, 2002, President Bush rejected section 827 of the Intelligence Authorization Act for Fiscal Year 2003.⁵⁵ That particular section required the Director of the Central Intelligence Agency (CIA) to submit annual reports to Congress about foreign companies who invest in American capital markets while contributing to the proliferation of weapons of mass destruction.⁵⁶ This provision was targeted at Chinese companies thought to be investing in Iranian and Iraqi weapons programs. Despite these concerns about the behavior of such companies, the Bush administration nevertheless issued a signing statement declaring that it would interpret the provision in "a manner consistent with the President's authority to supervise the unitary executive branch."⁵⁷ Such a statement gave the president the right to edit or cancel the

publication of the reports. The unitary executive theory justifies such measures, as it posits that the President has the constitutional authority to exercise control over all executive branch agencies and officials, including the CIA.

The second most common way that President Bush used the unitary executive theory involved legislative provisions that, in his opinion, unfairly required the executive branch to disclose information to Congress. Of the 132 legislative provisions that President Bush decided to challenge, 32 rejected Congressional requirements for the executive branch to make regular recommendations to Congress. For example, on November 2, 2002, President Bush issued a signing statement rejecting section 530(D) of the 21st Century Department of Justice Appropriations Act.⁵⁸ That particular section instructed the Attorney General to: “Submit to Congress a report of any instance in which the Attorney General or any officer within the Department of Justice...establishes or implements a formal or informal policy to refrain from enforcing...any Federal statute.”⁵⁹ This provision, therefore, was intended to ensure that Justice Department officials properly enforce federal laws. By requiring the Department to submit reports about situations in which federal officials refused to enforce the law, Congress was trying to make sure that executive officials carry out the law as it is written.

The Bush Administration, however, rejected this provision. The 2002 signing statement declared that the President would enforce section 530(D) 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 processes of the Executive, or the performance of the Executive's constitutional duties.⁶⁰

The President, therefore, was claiming the right to direct his Attorney General not to obey the requirement about reports. This assertion of presidential prerogatives has its roots in the unitary executive theory, which gives the president full and complete control over the behavior of subordinate executive branch officials, including the Attorney General.

In the wake of the recent U.S. Attorney scandals, this particular signing statement is especially relevant. In 2007, the Democratically-controlled Congress held hearings investigating the possibility that the Justice Department had been politicized and was not properly enforcing federal law.⁶¹ Few noted that the Bush Administration's use of the unitary executive theory might have provided the legal basis for the firing of the U.S. Attorneys, and even fewer realized that the 2002 signing statement might have provided the Administration with the ability to block the oversight that could have prevented the firings from happening. The statement also suggests that the submission of such reports might disclose sensitive information, putting the nation's security in jeopardy. President Bush made the same argument in many other signing statements when he refused to abide by legislative provisions requiring him to submit information and reports to Congress. In these statements, the President cited his constitutional authority to protect the nation.

On November 6, 2003, President Bush made another signing statement rejecting a legislative provision requiring the disclosure of information. Title III of the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, created an Inspector General for the Coalition Provisional Authority (CPA), which at the time was overseeing US military operations in Iraq.⁶² The legislation had intended to "prevent fraud and abuse" in the programs that the CPA was managing.⁶³ It would also keep the CPA informed about problems and deficiencies in its own

programs, thereby encouraging greater efficiency. The Inspector General was to conduct audits and investigations on a regular basis. This would create accountability and transparency, improving the CPA's performance.

The signing statement issued by the Bush administration, however, declared that the Inspector General would refrain from carrying out investigations and audits that might require access to "sensitive information."⁶⁴ Such investigations, the administration argued, "would constitute a serious threat to national security."⁶⁵ As a result, the administration stated that it would interpret the Act "in a manner consistent with the President's constitutional authorities to conduct the Nation's foreign affairs, to supervise the unitary executive branch, and as Commander in Chief of the Armed Forces."⁶⁶ This language provides the administration with an immense amount of latitude and flexibility to interpret the law in whatever way it deems appropriate.

Even though the Bush administration ultimately allowed the Inspector General to perform his tasks and duties, the statement is still significant because it reserved the right for the Administration to disobey the provision. The unitary executive theory gives the president the full authority to control, hire, and fire such officials, including an Inspector General, because they are ultimately part of his executive branch and are subject to his wishes.

Signing Statements and the War on Terror

The Bush administration also used the unitary executive theory to issue signing statements rejecting legislative provisions that it considered to be constraining on the president's "constitutional authority" to command the armed forces. Even though the

phrase “armed forces” appears in only 10 of the 132 legislative provisions, the statements often made broad assertions about the president’s control over the military.

For example, on October 28, 2004, President Bush made a signing statement challenging section 1021 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005.⁶⁷ This particular section banned US military personnel from engaging in combat operations in Colombia except if they were acting “in self defense.”⁶⁸ For years the U.S. military had been providing assistance to the Colombian government, an effort known as “Plan Colombia.”⁶⁹ The section placed parameters on the nature and scope of that assistance. The Bush administration said that the section would be interpreted “in a manner consistent with the President's constitutional authority as Commander in Chief and to supervise the unitary executive branch.”⁷⁰ Again, the administration was arguing that the president, as both unitary executive *and* Commander-In-Chief, had the exclusive authority to control and direct the Armed Forces without interference from Congress. Therefore, the President argued, the executive branch reserved the right to flout the provision.

Perhaps the most controversial of these “Armed Forces” signing statements was issued on December 30, 2005. On that day, the Bush administration issued a statement rejecting Title X of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006.⁷¹ Senator John McCain (R-Arizona), a longtime opponent of torture and coercive interrogation, inserted Title X into the 2006 defense appropriations bill.⁷² It banned the torture and mistreatment of detainees held in U.S. custody. Concerns about the mistreatment of U.S. detainees had been circulating for some time.⁷³ Title X was intended

to reverse any such policies that might have sanctioned torture or coercive interrogation. It read as follows:

No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.⁷⁴

Soon after signing this bill into law, the Bush Administration released a lengthy signing statement. It said that the President would interpret the law “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief.”⁷⁵ The statement effectively argued that the president, as Commander-In-Chief and Unitary Executive, was not bound by this legislative provision and might not enforce it. Senator McCain, as well as Senator John Warner, later condemned Bush’s use of the signing statement in this situation. Their worst fears were confirmed when information later emerged suggesting that the administration had indeed chosen to disobey the ban. The allegations of torture and mistreatment have continued unabated.⁷⁶

The same signing statement also rejected Section 8104 of the 2006 Defense Appropriations bill. Citing the president’s authority as Commander-In-Chief and unitary executive, the statement said the President might not abide by the section’s rules regarding the integration of foreign intelligence information.⁷⁷ That particular section had declared that, “None of the funds provided in this Act shall be available for integration of foreign intelligence information unless the information has been lawfully collected and processed.”⁷⁸ This section is particularly significant because it seems to warn the President, his administration and its agencies that they can not conduct unauthorized surveillance for intelligence purposes. This section was also particularly relevant in

December 2005, during which a controversy concerning illegal surveillance methods had recently emerged. On December 16, 2005, *The New York Times* revealed that just months after the terrorist attacks of September 11, 2001, the President had authorized the National Security Agency to wiretap Americans to search for evidence of terrorist activity without the traditional warrants previously required for domestic surveillance.⁷⁹ The President's signing statement exacerbated the controversy by declaring that he would interpret the legislation in a manner "consistent with the President's constitutional authority as Commander-In-Chief."⁸⁰ Thus, Bush reserved the right to continue his controversial intelligence policies. Later on, it became apparent that the President had indeed chosen not to comply with the intelligence provision, and that warrantless wiretapping may have continued.⁸¹

President Bush again invoked his status as Commander-In-Chief in a signing statement issued on October 28, 2004. This signing statement rejected parts of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. The statement took issue with Section 574 of the Act, which banned officials within the Department of Defense from interfering with the ability of Judge Advocate Generals (JAGs) to give independent legal advice to military commanders.⁸² At the time, this section was particularly relevant because it was issued in the wake of the controversial Abu Ghraib prisoner scandal. The scandal had suggested that torture might have become institutionalized as a policy for interrogating and obtaining information from suspected terrorists.⁸³ Moreover, the grotesque scenes depicting interrogation techniques suggested that perhaps inferior military officials had been given faulty advice from executive branch officials. The legislation had intended to provide military commanders in Iraq with proper

legal advice when interrogating prisoners and suspected terrorists; it would have allowed them to know what the proper interrogation techniques should be. The signing statement, however, seemed to prevent the JAGs from giving advice about proper interrogation techniques, thereby blocking them from providing advice to commanders that might conflict with the administration's own guidelines for the use of interrogation techniques.

President Bush flatly expressed his disagreement with the provision in the October 28, 2004 signing statement. He declared that he would interpret the section "in a manner consistent with the President's constitutional authorities...to supervise the unitary executive branch...and as Commander-in-Chief."⁸⁴ As the Unitary Executive, Bush was claiming he had the authority to subordinate military officials to his executive control and discretion, barring them from giving commanders the important advice they needed.

One of the other ways that President Bush used his signing statements was to exercise complete and full control over his staff, as well as other executive branch officials. Of the 132 legislative provisions that the President decided to challenge with the unitary executive theory, 21 are directly related to presidential control over staff and executive officials. Usually, such signing statements refer to the president's authority to "supervise the unitary executive branch" and reiterate the President's belief in a hierarchical and top-down governmental structure.

For example, on December 13, 2004, President Bush issued a signing statement regarding the passage of the Intelligence Authorization Act for Fiscal Year 2004.⁸⁵ That legislation contained a section, 341(b), requiring the Director of the CIA to act through a particular official when establishing an inspection process for all agencies and departments of the U.S. Government that handle classified information. The process

would determine who was to be given access to classified information.⁸⁶ President Bush, in his signing statement, wrote that Section 341 might not be followed, as it did not recognize the authority “committed exclusively to the President...to faithfully execute the laws and supervise the unitary executive branch.”⁸⁷

In other words, the President was arguing that Congress cannot require his officials to act through other officials when making policy, since their ultimate power resides with him alone. This statement, therefore, may simply reiterate the President’s views on the hierarchical structure of White House decision-making. Nevertheless, the statement also implies that the President can set intelligence disclosure policies himself, without the approval of the CIA Director. Moreover, the statement gives the President the authority to interfere with intelligence disclosure policies and, potentially, decide to set his own set of standards for the release of classified information. He could even overrule the wishes of his own CIA Director when creating these rules and regulations. The statement thereby gives the President the exclusive authority to determine who is given access to classified information.

Another major way President Bush has invoked the unitary executive theory has been through signing statements asserting his constitutional powers to “conduct the Nation’s foreign affairs.” In fact, he has challenged over 24 legislative provisions of this kind. For example, after Congress passed the Palestinian Anti-Terrorism Act of 2006, President Bush issued a signing statement challenging its Section 9.⁸⁸ Section 9 required the United States Executive Director at international financial institutions to vote against financial assistance to the Palestinian Authority.⁸⁹ President Bush rejected this

requirement, declaring that such mandatory requirements would “impermissibly interfere with the President's constitutional authorities to conduct the Nation's foreign affairs.”⁹⁰

Another example can be found in a signing statement issued on September 30, 2002, which regarded the passage of the Foreign Relations Authorization Act, Fiscal Year 2003.⁹¹ The Act's Section 408 required the United States government to prevent violators of “internationally recognized human rights” from attaining membership on the United Nations Human Rights Commission.⁹² In addition, the Act had required the United States to “use its voice and vote” in international financial institutions to support programs “designed to raise the standard of living for the Tibetan people.”⁹³ Also, Section 1343 directed the United States representative to the International Atomic Energy Agency to oppose Agency programs inconsistent with the “nonproliferation and safety goals” of the United States government.⁹⁴ The 2002 signing statement disregarded all of these sections, declaring them to be all “advisory,” not mandatory.⁹⁵ The statement argued that only the President has the constitutional authority to “conduct the Nation's foreign affairs,” and Congress has no authority to direct the nation's foreign policy in any way.⁹⁶

Most Recent Signing Statement

Since the beginning of 2008, Bush has issued only one signing statement. This particular statement was written in regard to the National Defense Authorization Act of 2008. The statement declared that four sections of the law, Sections 841, 846, 1079, and 1222, if followed, would limit the President's ability to “supervise the executive branch, and to execute his authority as Commander in Chief.”⁹⁷ Bush's rejection of Section 1222 was the most controversial part of this statement. The Congressional reaction to this individual signing statement was quite strong. Section 1222 had limited funding for the

construction of permanent military bases in Iraq.⁹⁸ Senator Robert P. Casey (D-PA) implied that the President's signing statement indicated that he would ignore the law's limits on the construction of permanent bases in Iraq. "Every time a senior administration official is asked about permanent US military bases in Iraq, they contend that it is not their intention to construct such facilities," he said. "Yet this signing statement issued by the president yesterday is the clearest signal yet that the administration wants to hold this option in reserve."⁹⁹ Speaker Nancy Pelosi made similar comments, saying she rejected "the notion in his signing statement that he can pick and choose which provisions of this law to execute." "His job, under the Constitution, is to faithfully execute the law - every part of it - and I expect him to do just that," she added.¹⁰⁰

General Trends

President Bush, using the unitary executive theory, has used signing statements to expand his presidential power in the War on Terror. Through these statements, he has asserted his power to detain and interrogate suspected terrorists, exercise full control over the nation's foreign affairs, control the flow of government information, conduct unwarranted surveillance policies, and reject what he views as congressional encroachments on his prerogatives as both unitary executive and Commander-in-Chief. These statements are consistent with his, and the Vice President's, views on the proper separation of powers between the legislative and executive branches of government.

From examining these signing statements, some general trends are observable. For example, the statements grew both bolder and broader in their scope, as time went on. Only in 2007, with the election of a Democratic Congress, did the President seem to scale back his use of signing statements. There were only five signing statements in 2007, with

only one containing a reference to the unitary executive theory. By comparison, 23 statements were issued in 2006. Whether or not this change resulted from a change in Congressional leadership cannot be known for certain, but it can be assumed that the election probably caused a shift.

The Future

Presidential candidates Barack Obama, Hillary Clinton, and John McCain have all pledged not to use signing statements if they are elected to the White House.¹⁰¹ But if a Democratic President is elected in 2008, he or she may find it difficult to control a bureaucracy that has become increasingly dominated by conservative appointees. Even a liberal president might find the signing statement, along with the unitary executive theory, to be useful methods when battling bureaucratic opposition and circumventing a hostile Congress. And in an age of terrorism and national security threats, any president might deem it necessary to reject legislative provisions that might put the nation's security in jeopardy.

If future presidents do indeed continue to use the signing statement, it will be politically difficult for Congress to limit the use of this tool. Unless Congress suddenly confronts the president over issues of presidential power through the mechanisms of impeachment or the cutoff of federal funds, it would be quite unlikely that future presidents would refrain from using the increased level of power that President Bush and Vice President Cheney have brought to the White House. Such a confrontation remains unlikely because Congress, as a large institution that can only make decisions through the aggregation of members' preferences, faces "collective action problems" preventing it from mounting a "consistently effective defense against presidential encroachment."¹⁰² A

confrontation is also unlikely because many of the statements are related to national security; Congress is often reluctant to challenge the president on these grounds.

But a recent report on signing statements, issued by the Government Accountability Office in June 2007, casts doubt on whether the federal government has actually been obeying the president's statements. The report examined signing statements regarding 2006 appropriations acts, finding that the president objected to a total of 160 legislative provisions.¹⁰³ They then determined whether the agencies responsible for their execution carried out the provisions as they were originally written. Of the 19 provisions sampled in the study, only six were not executed as written, with 10 of the 19 provisions being implemented as Congress had intended.¹⁰⁴ Thus, President Bush's signing statements have often been ineffective in reshaping federal law according to his wishes.

Nonetheless, the legacy of President Bush and Vice President Cheney will probably live on long after they leave the White House. These two men have left an indelible mark on American history, fundamentally altering power relationships in Washington. The legal theories they use grant presidents potentially limitless powers. The signing statement is effectively a line-item veto that gives the president the prerogatives of both the judicial and legislative branches of government. In an interview for a History Channel documentary, Vice President Cheney expressed satisfaction with these changes. "I think, in fact, there has been over time a restoration, if you will, of the power and the authority of the president."¹⁰⁵

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²³ Savage, 43.

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