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UNITARY EXECUTIVE THEORY AND EXCLUSIVE PRESIDENTIAL POWERS

*Julian G. Ku**

The Unitary Executive offers a powerful case for the historical pedigree of the unitary executive theory. Offering an account of presidential practice stemming from George Washington to George W. Bush, the book seeks to ground unitary executive theory with exhaustive historical evidence. Although the authors do not purport to present a history of the presidency, they do provide important and compelling evidence of a broad and longstanding understanding by Presidents and Congresses in favor of an exclusive presidential power to remove government officials. In doing so, the authors' primary goal is to bolster unitary executive theory with historical evidence. But they have a second, more subtle goal: to disassociate unitary executive theory from the theories of presidential powers invoked by the administration of George W. Bush.¹ "Despite the current administration's attempt to tie claims of emergency presidential powers to the theory of the unitary executive, the inherent executive power that it seeks to assert has little to do with the framers' decision to vest the executive power in a single person"²

In this essay, I suggest that this attempt to save unitary executive power theory from the Bush Administration is not likely to succeed. While I agree with the authors that there is no necessary correlation between unitary executive power theory and inherent executive power, I think the authors are overlooking a characteristic of unitary theory that is likely to maintain its association with theories of strong and unchecked executive power. In my view, the most troubling and potentially dangerous claims by the executive occur not when Presidents make claims of inherent executive power. Rather, the most difficult claims arise from cases where the President is claiming exclusive presidential power; that is to say, cases where the President argues that he has a constitutional power that cannot be trumped or limited

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1 See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 429–30 (2008).

2 *Id.* at 19.

by congressional action. The best example of the controversial nature of these claims is the use, by both the George W. Bush and Obama Administrations, of signing statements claiming the right to disregard the effect of congressional statutes. I will argue that unitary executive theory, even that version of unitary executive theory expounded by the authors, is a species of this exclusive executive power. For this reason, unitary theory will almost certainly be subject to the same kind of criticism and structural mistrust as other claims of exclusive executive power.

In this brief essay, I will first define what I mean by the terms “exclusive” and “inherent” in the context of executive powers. Then, I will illustrate the controversial nature of exclusive executive power by reviewing the recent controversy over the use of signing statements in both the George W. Bush and Obama Administrations. Finally, I will argue that unitary executive theory, as an exclusive presidential power, is likely to remain a foundation for supporters of executive power and, likewise, remain a target of critics of overexpansive executive power.

I. INHERENT VERSUS EXCLUSIVE EXECUTIVE POWER

Although it is merely a concurrence that reflected the views of only one justice, Justice Jackson’s famous concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* has become a canonical statement about the nature of U.S. presidential powers.³ The core of the opinion is Jackson’s division of presidential power into three categories. In the first category, the President acts at the height of his powers because he acts with the consent of Congress under full statutory authority.

In the second category, the President acts without clear statutory authority, and Congress has not clearly authorized what the President is doing. It is here that the concept of “inherent” executive powers becomes useful. Where Congress has not specifically prohibited a presidential act, the theory of inherent executive powers under the Constitution authorizes the presidential action. An early version of this theory was presented by Alexander Hamilton in his famous debate with James Madison, arguing that the vesting of “executive powers” in the President by Article II results in a general grant of powers.⁴ Jackson’s more pragmatic formulation explains that “congressional

3 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

4 See Alexander Hamilton, *Pacificus* No. 1, in 15 *THE PAPERS OF ALEXANDER HAMILTON* 39 (Harold C. Syrett ed., 1969).

inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”⁵

In the final category, the President acts against the background of express congressional prohibition. This is usually the category that, when teaching this case, I often tell students that the President is going to lose. But Justice Jackson’s formula doesn’t quite say this. Instead, he suggests that courts can “sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.”⁶ He then goes on to warn, “Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”⁷

Jackson’s formulation thus tracks the three main theories of executive power. In category one, the President acts pursuant to an express, delegated power from Congress. In category two, the President acts pursuant to his inherent powers drawn from the Constitution rather than from Congress. Inherent powers invoked in this category, Jackson posits, can be limited or even prohibited by Congress. In category three, the President also draws upon powers granted to him from the Constitution. But in this category, the President might act even against the express will of Congress if the subject is one of his exclusive control.

The power of Jackson’s concurrence is largely descriptive since it does not offer a mechanism for determining which inherent executive powers are also exclusive (category three) and which ones are inherent but non-exclusive (category two). Instead, the Jackson concurrence suggests the resolution of such questions may be intertwined with political considerations and presidential practice.

II. THE CONTROVERSY OVER SIGNING STATEMENTS

In the Jackson formulation, the most troubling and difficult category is the third category. This makes sense intuitively. Unlike inherent power theory, a claim of exclusive presidential power is absolute and cannot be overridden by Congress. For political reasons alone, it is not surprising that Congress should be sensitive to any claim by the President of exclusive powers.

⁵ *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

⁶ *Id.* at 637–38.

⁷ *Id.* at 638.

The controversy over presidential signing statements offers a recent example of this heightened congressional sensitivity. Signing statements are presidential statements attached to legislation upon the signature of such legislation into law. Although signing statements have a long history, the modern practice of using signing statements began with President Reagan and continued through the administrations of Presidents George H.W. Bush, Bill Clinton, and George W. Bush.⁸ Such statements generally offered presidential interpretations of the laws they were signing. These presidential interpretations served at least two purposes. First, these interpretations served to instruct subsequent executive branch officials charged with executing the new law with the President's preferred interpretation.

Second, and much more controversially, Presidents have used signing statements to signal that they believe certain provisions of the statutes are unconstitutional and that they will adopt interpretations that avoid such unconstitutional results or even refuse to enforce certain statutory provisions. Although this second use of signing statements stretched across both Republican and Democratic administrations, signing statements only became a controversial flashpoint during the administration of President George W. Bush. After President Bush attached a signing statement to the Detainee Treatment Act of 2005 limiting the effect of provisions governing the interrogation of detainees, opposition to signing statements became a rallying cry for opponents of the Bush Administration's war on terrorism policies. An ABA Blue Ribbon Task Force, backed by the ABA House of Delegates, issued a report opposing the issuance of presidential signing statements that claim the authority or state the intention "to disregard or decline to enforce all or part of a law the President has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress."⁹

Hence, the focus of the ABA criticism was not on signing statements that purport to instruct the bureaucracy on how the President interprets the law. Rather, the focus was on signing statements that claimed a presidential power to refuse to execute a law passed by Congress and signed (indeed, just signed) by the President. As the ABA report urged:

8 The earliest recognition of the practice by the Supreme Court dates back to *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899). See also AMERICAN BAR ASSOCIATION TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, RECOMMENDATION, 10–18 (Aug. 2006) [hereinafter ABA TASK FORCE RECOMMENDATION].

9 ABA TASK FORCE RECOMMENDATION, *supra* note 8, at 1.

[T]he President [should] confine any signing statements to his views regarding the meaning, purpose and significance of bills presented by Congress, and if he believes that all or part of a bill is unconstitutional, to veto the bill in accordance with Article I, § 7 of the Constitution of the United States, which directs him to approve or disapprove each bill in its entirety[.]¹⁰

The report then singled out for criticism President George W. Bush's signing statements raising constitutional objections to requirements that government officials report directly to Congress on matters ranging from the Patriot Act, a federal nuclear waste facility, the Education Department's statistics on student performance, and the Defense Department's investigations of the Coalition Provisional Authority in Iraq.¹¹ It is striking that the report would single out these signing statements since President Bush was essentially making arguments drawn from unitary executive theory that posited, as Calabresi and Yoo have documented, that Congress cannot interfere with the President's control over subordinate executive branch officials. Indeed, the report singles out the unitary executive theory as an important framework for many of the signing statement objections.

While drawing the ire of the ABA, signing statements were not the most controversial legal opinion of the Bush years. It is safe to say that this dubious honor belongs to the so-called Torture Memos interpreting statutes limiting the abuse or mistreatment of detainees held in the war on terrorism. Indeed, one of these memos was so controversial that calls for the disbarment or prosecution of the authors are commonplace.¹² In the most famous opinion, President Bush's lawyers argued for a narrow interpretation of the statute banning torture, in part because a broad interpretation would encroach on the President's exclusive Commander in Chief powers.¹³ But perhaps the most controversial constitutional argument contained in those memos was the argument that congressional limitations on interrogations might be disregarded if they encroached on the exclusive power of the President under the Commander in Chief clause. The idea that the President could disregard the express will of Con-

¹⁰ *Id.*

¹¹ *Id.* at 14–17.

¹² See, e.g., Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347 (2007). But see Julian G. Ku, *The Wrongheaded and Dangerous Campaign to Criminalize Good Faith Legal Advice*, 42 CASE W. RES. J. INT'L L. 449 (2009) (criticizing efforts to prosecute the authors of such memos).

¹³ Memorandum from Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President on Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A, 36–38 (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

gress (especially on such an explosive issue) contributed to the passion of the memos' critics and the pushback from defenders of congressional powers.

President Obama recently discovered the bipartisan nature of this pushback after he attached the following signing statement objecting to legislation that directed his officers to advocate for certain views when participating in the governance of international financial institutions:

[Such provisions] would interfere with my constitutional authority to conduct foreign relations by directing the Executive to take certain positions in negotiations or discussions with international organizations and foreign governments, or by requiring consultation with the Congress prior to such negotiations or discussions. I will not treat these provisions as limiting my ability to engage in foreign diplomacy or negotiations.¹⁴

Like President Bush before him, President Obama is asserting a right to simply refuse to follow statutes that he believes are unconstitutional. Although the provisions in the bill in question plainly required the Secretary of the Treasury to adopt certain positions during activities at the International Monetary Fund, President Obama simply declared that he would treat those provisions as nonbinding due to their interference in his inherent constitutional authority to conduct foreign relations. He did so without relying on any Supreme Court precedent for his views.¹⁵

The New York Times criticized President Obama's signing statements, especially those that asserted independent presidential power to interpret the Constitution. If he wants to assert such a power, the paper editorialized, "then he should be able to point to court decisions or he should find a way to get the issue into court so the judiciary can make a call."¹⁶ Indeed, the House of Representatives has demonstrated its displeasure with President Obama by voting by an overwhelming margin to take away funding for areas over which the President asserted his independent constitutional authority.¹⁷

14 Statement by President Barack Obama Upon Signing the Supplemental Appropriations Act, 2009, June 24, 2009, 2009 U.S.C.C.A.N. S34, S34, available at <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900512.pdf>.

15 See *id.*

16 Editorial, *On Signing Statements*, N.Y. TIMES, Mar. 17, 2009, at A26.

17 Walter Alarkon, *House Overwhelmingly Rejects Signing Statement*, HILL, July 9, 2009, available at <http://thehill.com/homenews/house/49864-house-overwhelmingly-rejects-signing-statement>.

III. EXCLUSIVE PRESIDENTIAL POWERS AND UNITARY EXECUTIVE THEORY

As the signing statement *contretemps* shows, any claims of exclusive presidential power, no matter how well grounded, can spark condemnation by Congress and the public. The driving force behind such opposition, I argue, is the President's assertion of an exclusive power that Congress cannot limit.

Unitary executive theory is a species of this kind of controversial exclusive presidential power. According to the authors, "The Constitution gives presidents the power to control their subordinates by vesting all of the executive power in one, and only one, person: the president of the United States."¹⁸ They document, exhaustively, an unbroken presidential practice of supporting this view of executive power to appoint, remove, and direct subordinate executive officials. And most importantly, when Congress passes a statute purporting to encroach on this power, as it did during the Andrew Johnson administration's Tenure of Office Act, the authors condemn such laws as unconstitutional. But such laws could only be unconstitutional if the executive power to remove officials was an exclusive, and not merely an inherent, presidential prerogative.

To be sure, the potential for abuse of such powers is not quite the same as when the President seeks to coercively interrogate detainees. But all claims of exclusive power, as Justice Jackson observed, pose serious dangers to the equilibrium of the Constitution's system of separation of powers. So all need careful attention. Anytime a branch seeks to claim a constitutional trump card, they are undermining inter-branch cooperation and setting up almost inevitable inter-branch conflict.

I have argued elsewhere that there should indeed be exclusive executive powers in some cases and that courts have recognized this as such.¹⁹ But I do agree with Justice Jackson that such claims pose serious challenges to the Constitution. The reaction of the public and commentators to such claims during the Bush Administration, and of Congress during the Obama Administration, reflects the gravity of the problem in part. And it is for this reason that I doubt that the Calabresi and Yoo project of separating the unitary executive from controversial theories of strong executive power will ultimately succeed.

¹⁸ CALABRESI & YOO, *supra* note 1, at 4.

¹⁹ See Julian G. Ku, *Is There an Exclusive Commander-in-Chief Power?*, YALE L.J. (THE POCKET PART), Mar. 2006, <http://www.thepocketpart.org/2006/03/ku.html>.

