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## The Administrative Presidency, Unilateral Power, and the Unitary Executive Theory

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*This essay examines a major change that has occurred in recent years with regard to the relationship between the president and the bureaucracy. It is a change that relies on a greater use of the president's unilateral powers to influence the bureaucracy. It is based on a theory of presidential power that is striking in its scope and implications: the unitary executive theory. In many respects, the theory fundamentally changes the nature of presidential–bureaucratic relations, yet it has received scant attention in scholarly journals. Examination of its potential impact is long overdue.*

The essays in this symposium examine the administrative presidency strategy. That leadership strategy originally was initiated by the Richard M. Nixon administration as an attempt to accomplish administratively what it could not do legislatively (Nathan 1983; Waterman 1989). While the idea of the administrative presidency remains politically controversial, it is mostly based on solid constitutional principles. The strongest constitutional foundation is the president's ability to appoint loyalists to positions throughout the bureaucracy. While the debate over whether a president should promote loyalty rather than competence as the main criterion for making appointments is certainly controversial, there is a sound constitutional basis for this practice, even when presidents use their recess power to make late-term appointments.

Presidents have been on solid legal ground as well in removing officials who were judged to be insufficiently loyal to them or to their policies. As long as these officials held appointments that ultimately were responsible to the president and served at the president's pleasure, they could be legally subject to removal at any time. Abuses of power occurred, however, when the Nixon administration attempted to remove civil servants or to deploy them to remote locations. Later, though, Ronald Reagan was able to use newly

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emerging powers emanating from Jimmy Carter–era civil service reform legislation to transfer career employees to less amenable locations, which forced them to resign if they wished not to relocate. These steps, taken during the Reagan administration, while politically controversial, were nonetheless legal, and the results often advanced the policy interests of the president. While controversial and maybe even undesirable, these personnel actions were legally permissible and fell within the ambit of executive authority delegated by the Civil Service Reform Act.

A different idea, however, arose in the form of the unitary executive theory. It posits that the president has sole responsibility for the control and maintenance of the executive branch, further extending the debate on the scope of the president's removal power (Calabresi and Yoo 1997, 2003; Fitts 1996). Proponents of the theory have sought to repudiate the Supreme Court's decision in *Humphrey's Executor v. United States* (1935), which prohibits presidents from removing officials, such as the commissioners of the independent regulatory commissions, from office for political reasons. The unitary executive theory proclaims the president to be the sole responsible official for all that occurs within the executive branch. In consequence, all of the executive branch must be responsible to its chief executive. This new theory of presidential leadership, propounded in some conservative legal circles (the Federalist Society) and regularly cited by the George W. Bush administration in signing statements, has been presented as a legal justification for more expansive presidential power. In particular, it has increased the traditional authority presidents have employed since Nixon's presidency with regard to the administrative presidency strategy. It raises serious legal questions about the boundaries of presidential power and Congress's ability to limit presidential discretion. By asserting that Congress does not have the right to enact laws that limit the president's powers as chief executive or commander in chief, the unitary presidency provides presidents with broad unchecked power in the personnel removal area. This is but one way in which the unitary executive theory changes what, to date, has been a practice based on accepted constitutional premises.

Another component of the administrative presidency approach is the use of the budget to control agencies. Presidents are on solid constitutional ground when they do so in consort with Congress by approving new spending limits in congressionally enacted legislation. Presidents also can and have aggressively used the provisions of the Budget and Impoundment Act of 1974 to defer or rescind spending. While the 1974 law outlawed impoundments—whereby a president refuses to spend congressionally allocated funds without congressional permission—it also created the deferral and rescission process, which provides presidents with extraordinary flexibility to control bureaucratic spending, particularly when the president and Congress are in the hands of the same political party. The Reagan administration flooded Congress with such requests. It also used the same law's reconciliation process to force Congress to accept budget reductions the administration favored. Thus, presidents have a series of constitutionally and legally prescribed ways to control spending on bureaucratic agencies.

The unitary executive theory and other instruments of unilateral power further expand the realm of presidential power. In his extravagant use of signing statements, for example, George W. Bush unilaterally created what essentially amounted to a line-item

veto. This allowed the president to sign a particular bill and then quietly, in a signing statement that generally received less public scrutiny, assert that the president would ignore certain provisions of the bill with which he disagreed. This mechanism provides yet another means of skirting the constitutional structure and avoids the perils of governing in a world of separated powers. If a president does not like a bill's provision, rather than withhold funding, presidents can merely assert that they will not enforce the law, a dubious claim given the mandate of their oath of office and their duty to "take care" that laws are faithfully executed. Although much time and effort has been focused on the constitutional mechanisms at the president's disposal, to date, less attention has been paid to the implications of this new and expansive theory of presidential power. What, then, are the implications of the greater use of unilateral power and the unitary executive theory for the administrative presidency?

### Unilateral Power and the Administrative State

Presidents have consistently used their unilateral powers to influence the bureaucracy. Presidents can create agencies through executive orders. According to Howell and Lewis (2002) and Lewis (2003), when they do so, they create structures that are more amenable to presidential control. On the other hand, agencies tend to be more insulated from presidential power when they are created by Congress.

Presidents also use executive orders to directly influence policy making at the administrative level. Reagan used executive orders to devise a system, managed through the Office of Management and Budget, by which all major rules and regulations had to pass a cost-benefit test before they could be implemented. Not surprisingly, most proposed regulations were rejected because of cost concerns, particularly in policy areas that were not favored by the Reagan administration (e.g., the environment). Reagan also used an administrative order to set up a more efficient central clearance procedure for all new rules and regulations, again monitored by the Office of Management and Budget and again generally stifling new policy initiatives. Reagan's innovations, with some modifications, have been enacted and implemented by his successors, thus establishing clear precedents for presidential action using executive orders to control the bureaucracy.

Since the Reagan administration, presidents also have made greater use of presidential signing statements. Journalist Charlie Savage, first in a series of articles that garnered the Pulitzer Prize, then later and more expansively in a book (Savage 2007), had noted that presidents use signing statements to directly inform the bureaucracy as to how it is expected to enforce laws passed by Congress. In many cases, bureaucrats are specifically advised *not* to enforce the law. This goes far beyond the practice of using executive orders to prescribe who in the bureaucracy is responsible for policy implementation, a long-standing practice. The use of signing statements essentially orders bureaucrats not to enforce the law, on the authority of the president.

Signing statements provide a bold new mechanism for controlling the bureaucracy, one with dubious constitutional support. Savage writes,

Among the laws challenged included requirements that the government provide information to Congress, minimum qualifications for important positions in the executive branch, rules and regulations for the military, restrictions affecting the nation's foreign policy, and affirmative action rules for hiring. In his signing statements, Bush instructed his subordinates that the laws were unconstitutional constraints on his own inherent power as commander in chief and as head of the 'unitary' executive branch and thus need not be obeyed as written. (2007, 237)

Bush also said he "could bypass laws requiring him to tell Congress before diverting money from an authorized program in order to start a secret operation, such as funding for new 'black sites,' where suspected terrorists were secretly imprisoned around the world."

While scholars focus on the traditional mechanisms of the administrative presidency strategy, a revolution of sorts has occurred without much notice or comment, one that employs unilateral powers to impact bureaucratic behavior in ways that often are not subject to public scrutiny. With laws passed and monies appropriated, most policy makers turn their attention to other issues, not noticing the significance of the president's signing statement declarations.

The main theoretical basis for such broad presidential action is the unitary executive model. The theory posits that, by creating a single president, the founders intended for the president to have complete and unfettered control over all aspects of the executive branch. This reasoning ignores the clear constitutional powers that Congress possesses over the executive branch, such as its legislative and appropriation powers, as well as those inferred from the "necessary and proper" clause of Article I of the Constitution. It also threatens the ability of the legislative branch to perform meaningful oversight, as the president can order bureaucrats to refuse to comply with congressional requests for information. Particularly interesting is the theory's central assumption that any law passed by Congress that seeks to limit the president's ability to communicate or control executive branch relations is unconstitutional and therefore need not be enforced. The theory also posits that the president has the same authority as the courts to interpret laws that relate to the executive branch. Thus, the president can interpret the law and unilaterally decide to ignore it, without legal sanction or redress.

In this process, legal memoranda written by the Justice Department's Office of Legal Counsel provide presidents and their executive branch subordinates with a legal shield from prosecution. Any official who is challenged by Congress can assert that he or she is following a direct dictate from the president and that it is the Office of Legal Counsel's opinion that it is legal to do so.

This new and expanded use of presidential power represents a quantum expansion of the president's administrative authority, moving us far beyond the constitutionally prescribed boundaries of the initial administrative presidency approach to control of the bureaucracy. Initially, the administrative presidency model provided presidents with greater responsiveness at the bureaucratic level. As Moe (1985) correctly notes, this is both a reasonable and a rational response for presidents who seek greater control of the bureaucracy. As much empirical research has demonstrated, the tools of the administrative presidency indeed increased presidential power and influence (see Wood and Waterman 1991).

But if the ideas of the administrative presidency are conjoined with the expansive claims of inherent presidential power as represented by the unitary executive theory, then the concept of presidential accountability will be sacrificed. In terms of future empirical research on the bureaucracy, then, scholars need to pay greater attention to the content of presidential signing statements and executive orders, as well as to the number of citations of the unitary executive theory as a justification for presidential control. They also need to scrutinize the opinions of the Justice Department's Office of Legal Counsel—that is, when these opinions are available for public scrutiny. Unilateral power and the unitary executive represent the new frontier of presidential attempts to control the bureaucracy. While the George W. Bush administration greatly expanded presidential power in this realm, it is likely that his successors (from both parties) will invoke these precedents, when politically convenient, to further maximize their authority—that is, unless the courts decisively reject the assumptions of the unitary executive. Greater attentiveness to this important change in presidential–bureaucratic relations should be high on the agendas of those who focus on the nexus between the presidency and the executive branch.

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