

## THEORY AND CONSEQUENCE

The unitary executive has come a long way for a theory that has a hole in its heart and no basis in history or coherent thought. It simply is devoid of content, not expressed or even strongly implied in foundational documents such as *The Federalist*, not to mention the Constitution. If “energy in the executive” meant overpowering force, or if Hamilton’s “unity” meant unitary executive rather than a one-person chief executive, the unitarians might have the makings of a case based on originalism and history, but all that appears upon inspection is a heartfelt yearning for the founding documents to mean more than they say. This applies to both branches of the theory as they have evolved, the domestic and bureaucratic brand of exclusive executive control, and the global, royal, commander-in-chief unilateralist variety.

Supreme Court decisions have twice demolished the unitary executive as a matter of constitutional reason, first in *Morrison v. Olson* in 1988 and then in *Hamdan v. Rumsfeld* in 2006. *Morrison* shattered the claim that the vesting of “the executive power” in a president under Article II of the Constitution created a hermetic unit free from checks and balances apart from the political community. It firmed up the power of Congress to shape executive departments and adjust presidential controls according to their mission, and safeguarded the independent administrative agencies from subordination to the White House. *Hamdan* reaffirmed that the unitary executive claims for unilateral, royalist power are not the

American way of governing. The rule, espoused by many justices over time but ingeniously and simply described by Justice Jackson in the *Steel Seizure* case, requires presidential interaction with Congress: "The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. . . . Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."<sup>1</sup>

So the Supreme Court has reset the checks and balances, yet the national executive has remained unchecked and unbalanced.<sup>2</sup> This is mainly because the Bush administration has pressed an agenda in which power itself has always been one of the main objectives, while Congress, partly from political deadlock and largely for lack of institutional energy, has simply rolled over.

The pursuit of "presidential power for its own sake" was integral to every Bush administration action that came to the attention of Jack Goldsmith, the conservative scholar who headed the Justice Department's Office of Legal Counsel in 2003 and 2004.<sup>3</sup> Despite sympathy for the administration's war aims and even some of its methods, Goldsmith found himself unable to support the Yoo-generated torture memo of August 1, 2002, and an undisclosed number of others as well. He found Yoo's writings poorly reasoned, even "wildly broader than was necessary to what was actually being done."<sup>4</sup> Goldsmith ridiculed Yoo's definition of torture as inducing a near-death experience by noting that key terms were lifted from a totally unrelated statute covering eligibility for medical benefits.<sup>5</sup> When brought to public view, the Justice memos "made it seem as though the administration was giving official sanction to torture," and brought "dishonor to the United States."<sup>6</sup>

Goldsmith, who resigned after officially repudiating the memos, blamed several factors, among them genuine fear of terrorist attacks and an evolving legal culture that encouraged hindsighted recriminations and criminal liability for actions that might later be deemed unlawful. Additionally he blamed pressure from the White House, dominated in the detail work by David Addington, whose "judgments were crazy."<sup>7</sup> The net effect of the Bush unilateralism, Goldsmith concluded, was to weaken the presidency, quite the opposite effect intended by the Cheney-Addington programs.

Goldsmith's attempts to clean up the government's policy on harsh interrogation bordering on torture seemed destined to prove temporary

only. On October 4, 2007, the *New York Times* reported that after Goldsmith's departure his successor, Steven Bradbury, secretly signed an Office of Legal Counsel memo restoring authority for the harsh techniques.<sup>8</sup>

To give credit to the Bush-Cheney lawyers and lobbyists, once the high court had made the rules plain in the *Hamdan* decision, they applied the *Youngstown* formula of interdependence and sought—and obtained—from Congress the powers the Court said were unavailable unilaterally. Congress did not kick the Court, as John Yoo triumphally declared. The administration sensibly read *Hamdan* as both a demand and an invitation to seek out Congress. Congress then gave Bush all he asked, including the authority to write his own rules for compliance with the Geneva Conventions, and creating the military commissions. An obedient Congress also virtually abolished habeas corpus, trying to exclude any useful judicial review, for detainees.

Such a transfer of power makes the constitutional landscape look much as it did when Bush and Cheney launched their civic aggressions, at least politically, since in theory Congress could always try to undo its obliging work. Through no virtue or energy of its own, Congress has won the power and a stake in the **unitary executive fight**. **Will Congress** achieve health and energy in its own right to establish balance and checks?

While waiting for Congress, anyone hoping that a regime change in the White House would cure matters might be dreaming. A new president of any party might well inventory the accumulated powers—and claims of power—and decide to try hanging on to them. Presidents do not easily surrender authority, even if they recognize that the authority was illegitimately claimed.

Yet presidential candidates must be asked their view of these questions, whether they understand them and whether they can identify any Bush administration claims they could envision renouncing. That issue has begun to emerge. In a debate among Republican candidates, contestants were asked whether the president could unilaterally bomb or invade Iran or whether he would need Congress's assent.<sup>9</sup> Hillary Clinton, accusing the Bush-Cheney administration of a "power grab," said in an interview with the *Guardian* newspaper that she would "absolutely" renounce some of Bush's claims of unilateral power, though she said the specifics must await "a review that I undertake when I get

to the White House,” an only partly reassuring stance, but a modest beginning.<sup>10</sup>

Any new president had better be realistic about the way those powers are flexed, even undisputed powers. For example, the White House travel office staff served “at the pleasure of the President,” but arbitrary firings brought shame to the early Clinton administration. Similarly, United States attorneys serve “at the pleasure of the President,” yet arbitrary, bungling, insulting dismissals can ignite investigations and firings of more higher officers, including the **attorney general himself**, than of those initially dismissed. Absolute power, including undisputed executive power, corrupts absolutely, in more ways than one.

Is Congress worth waiting for? One test of worthiness would be whether Congress, if only to restore its own honor, recaptures the habeas corpus rights it gave away in the Military Commission Act of 2006. By stripping access to federal courts for detainees, Congress may have compounded constitutional violations beyond all court remedies. Article I, Section 9, says, “**The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.**” **The administration claims that all the world is the battlefield in the terror war, but there is no pending claim of rebellion or invasion.** So while the illegitimacy of Congress’s elimination of the writ is plain, the question is whether the Supreme Court will find a way to reach the issue.

The Supreme Court may yet revive the Great Writ and rescue the Constitution and Congress from Congress’s craven behavior.<sup>11</sup> Though litigation is sometimes difficult to mount, it has never been true, contrary to John Yoo’s constitution, that “**the courts have no role whatsoever.**”<sup>12</sup> With the encouragement of Federalist Society allies, a rightward-veering Court has not been shy about asserting itself—**disturbingly in commerce clause cases,**<sup>13</sup> alarmingly in decisions restricting legislative enforcement of Fourteenth Amendment values,<sup>14</sup> and notoriously in *Bush v. Gore*,<sup>15</sup> halting the recount of the 2000 presidential election and the operation of the regular constitutional machinery for electing the president. **When a justice can cast the deciding vote to halt the recount with the explanation that irreparable damage would ensue for candidate Bush and the country “by casting a cloud upon what he claims to be the legitimacy of his election,”**<sup>16</sup> we have a decidedly interventionist Supreme Court, one that should not blink at declaring what the law of habeas corpus is.

Congress must, as usual, reform itself.<sup>17</sup> In both houses and in both political parties, it needs numerous members willing to recognize White House assaults and stand up to them. Mere partisan battling will not save the institutions, but however it is **accomplished, the Senate**, for example, needs to guard the Supreme Court from nominees who excessively worship the executive branch, **whether or not they subscribe to the unitary executive theory. As it is, Justices Scalia and Thomas have** invoked the theory, Justice Alito has celebrated it in the past, and Chief Justice John G. Roberts voted with the Court of Appeals majority that the Supreme Court overturned in the *Hamdan* decision. The Senate, which nodded in letting the Justice Department appoint “interim” **United States attorneys for virtually unlimited terms**, needs to guard against such end runs, including many recess appointments. The Senate’s Democratic majority made a good start by convening pro forma floor sessions during the 2007 Thanksgiving Break<sup>18</sup>

Both houses must continue to pursue inquiries like the United States attorney cases and other power abuses, and learn institutional vigilance, guarding against abuses, without regard to party affiliation. Legislators must demand information and proof of need before surrendering any more authority for surveillance of Americans. And if the White House insists on issuing voluminous, open-ended, and cryptic signing statements to legislation, both houses should call the occupants over to explain the ambiguities and state whether and how they are enforcing the laws they claim the right to “construe” **out of existence**.

The nomination of Michael Mukasey to succeed Alberto Gonzales as attorney general created a new theater for the contest over power. Originally greeted as a rescuer of the Justice Department from ignominy, incompetence, mendacity, and blind obedience to White House commands, Mukasey stirred unease among Democrats and moderate Republicans, chiefly over the specifics of one form of torture. Ultimately, the Senate’s hope for a competently led, law-abiding Justice Department prevailed over its revulsion at Mukasey’s refusal to declare that the interrogation technique of waterboarding amounted to unconstitutional, illegal torture.

Mukasey, a retired federal judge with wide legal experience and acquaintance with terrorism-related issues, was nominated September 17, 2007, and confirmed November 8 by a vote of 53 to 40. His confirmation hearings aroused an increasingly engaged body of senators.

Mukasey pleased many by declaring, for instance, that he found Jack Goldsmith's book, *The Terror Presidency: Law and Judgment Inside the Bush Administration*, brilliant. He agreed with Goldsmith that the torture memos were both unconstitutional and unnecessary. He testified that no presidential signing statement could override Congress's declaration that the nation's military may not engage in practices declared to be torture. Among other agreeable positions, he supported the return to the practice of limiting the number of Justice Department and White House employees authorized to communicate with each other, tolling a disorderly practice that allowed lower-level operatives to bypass their chiefs and network their ideologies.

While promising to be an attorney general for the people, as distinct from the president's lawyer, he stiff-armed Congress with an implied limitation on the legislature's ability to extract information from the executive through enforcement of contempt citations. He said the Justice Department might well decide against bringing misdemeanor contempt charges, as seemingly required by statute,<sup>19</sup> if it appeared that the balking official relied in good faith on higher executive authority that withholding the information was legal. Such contempt proceedings have been rare in recent years, yet the assertion of their futility was a depressing signal for cooperation between the branches. It echoed the Justice Department's advance notice to Congress not only that executive privilege would be strongly asserted in resisting White House testimony and documents concerning the firing of United States attorneys, but also that Congress could not constitutionally compel the Justice Department to enforce the criminal law to gain compliance.<sup>20</sup> Principal legal authority for this position comes from a 1984 Office of Legal Counsel opinion<sup>21</sup> supporting the department's refusal to file charges against officials involved in the Environmental Protection Agency (EPA) scandal over administration of the Superfund to clean up industrial waste sites. That opinion was signed by Theodore B. Olson, the assistant attorney general, who soon thereafter was investigated by an independent counsel in the EPA case that led to the *Morrison v. Olson* decision rejecting the unitary executive claims of constitutional power to ignore congressional regulation (discussed in Chapter 4).

Though not unprecedented, the Justice Department's stance, which could exalt executive privilege claims above Congress's right to information without a fight, was a classic unitary executive position. "The

president has pretty much absolute power in this area,” David Rivkin, a unitary executive advocate and former Bush administration lawyer, said.<sup>22</sup>

In confirming Mukasey without a confrontation on this issue, the Senate may have squandered the opportunity simply to withhold its stamp of approval until the White House produced the evidence. Congress could try other approaches, including one that has long been recommended, to give both chambers civil enforcement authority, scraping the inappropriate criminal route. Or Congress could invoke its own authority, long in disuse, to conduct its own contempt proceedings. An energetic, imaginative Congress could find effective ways to overcome the intransigence of the unitary executive.

As for torture issues, Mukasey agreed broadly with Jack Goldsmith, the reluctant reviser of memos based on presidential omnipotence. He based his hesitation to pronounce on the legality of waterboarding in large part on the same concern Goldsmith had expressed. He found waterboarding, an ancient system of smothering that could drown the detainee if maintained, personally “repugnant.”<sup>23</sup> But to declare it torture officially could subject its practitioners—and their superiors—to criminal liability, even the death penalty, for deeds deemed legal by previous official legal opinions, however erroneous they may have been.

This issue and others foretold for Mukasey many a rendezvous with his own legal reasoning and, where his opinion differed from that of Dick Cheney and David Addington, many a White House confrontation. Some senators who voted for Mukasey with mixed feelings hinted that they knew his personal legal views and expected him to disagree fundamentally with the White House. Their call for him to stand independent of his president could have been mere wishful thinking, but there was strong basis to hope that, unlike Alberto Gonzales, he would start by using his own mind rather than meekly acquiescing in the programs of the most devout unitarians. Although Mukasey might agree with many White House positions, it is hard to imagine any White House official addressing him in disgust, as Goldsmith said Addington once addressed him, “If you rule that way, the blood of the hundred thousand people who die in the next attack will be on your hands.”<sup>24</sup>

Did the Senate once again surrender too meekly to a determined executive? Many Democrats thought so. Others excused the vote to affirm on the nominee’s high reputation in the bar, his strong intellect, his

pledge to restore order to the demoralized department, and above all, the president's threat to send up no other nominee, leaving the department to run on ideology. If shown powerless to have his choice confirmed, Bush turned that weakness into a kind of strength, threatening passively not to show up for this fight during his dying second term, leaving the Senate just as helpless as he. As Yogi Berra opined, "If the fans won't show up, we can't stop them."

The confirmation vote was decided by half a dozen Democrats in an otherwise party-partisan vote. It was another contemporary example of how polarized politics has become, how rare it is for legislators to vote the interest of Congress as an institution rather than hew to a party line.

The unitarians have lost and won of late. Their theory, always based on a loose construction of gossamer historical evidence, has gone down the drain, but they can cheer on their unitary president's rulemaking and even his legislative victories. The true believers may never surrender their seats in the cheering section, which means they will persist in animating and rationalizing the imperiousness of the executive. An excellent example arose from the ashes of Alberto Gonzales's resignation, in the form of an opinion article incanting "**There Is Only One Executive,**" advising the next attorney general to resist congressional assault on the power of the presidency. Instead of berating the disgraced attorney general for squandering executive prestige and power, the writers called the issues of surveillance, Guantanamo, signing statements, and the U.S. attorney dismissals part of "**the anti-Gonzales crusade.**"<sup>25</sup>

That philosophy, embodied in all branches of the unitary executive theory—**tight bureaucratic control domestically and expanding power to launch wars and stiff-arm Congress—in turn helps fuel a unilateral approach to world affairs. This is of a piece with the claim of running all of our government with all the powers of an imperial chief, whose only interaction with the rest of government is dominance. Americans must seek a strong, energetic executive—but one who places a higher value on interdependence, reciprocity, and statesmanship.**

## 9. THEORY AND CONSEQUENCE

1. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952), Jackson, J., concurring.

2. For a comprehensive description of the pre-*Hamdan* imbalance, see Frederick A. O. Schwarz and Aziz Z. Huq, *Unchecked and Unbalanced* (New York: The New Press, 2007).

3. Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* (New York: W. W. Norton, 2007), p. 89.

4. *Ibid.*, pp. 148–49.

5. Goldsmith, *The Terror Presidency*, p. 145.

6. *Ibid.*, p. 165.

7. *Ibid.*, p. 129.

8. Scott Shane, David Johnston, and James Risen, “Secret U.S. Endorsement of Severe Interrogations,” *New York Times*, October 4, 2007, p. A1.

9. See, e.g., Adam Nagourney and Marc Santora, “Romney and Giuliani Spar as New Guy Looks On,” *New York Times*, October 10, 2007.

10. Jim Rutenberg, “Clinton Plans to Consider Giving Up Some Powers,” *New York Times*, October 24, 2007.

11. *Boumediene v. Bush*, No. 06-1195, *Al Odah v. United States*, cert. granted June 29, 2007.

12. John C. Yoo, “The Continuation of Politics by Other Means: The Original Understanding of War Powers,” *California Law Review* 84, no. 2 (March 1996): 170, reproduced in John C. Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago: University of Chicago Press, 2005).

13. For example, *Lopez v. United States*, 514 U.S. 549 (1995).

14. For example, *City of Boerne v. Flores*, 521 U.S. 507 (1997).

15. 531 U.S. 98 (2000).

16. *Bush v. Gore*, 531 U.S. 1046-7 (Scalia, J., concurring in the issuance of stay), December 9, 2000.

17. See Thomas E. Mann and Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (New York: Oxford University Press, 2006).

18. Carl Hulse, “Democrats Move to Block Bush Appointments,” *New York Times*, November 21, 2007.

19. Title 2, Section 192 of the United States Code provides that willful refusal to produce documents in response to a congressional subpoena is a misdemeanor. Section 194 provides that if such a failure is reported to either house of

Congress it “shall” be certified to the “appropriate United States attorney whose duty it shall be to bring the matter before the grand jury for its action.”

20. Dan Eggen and Amy Goldstein, “Broader Privilege Claimed in Firings,” *Washington Post*, July 20, 2007, p. A1.

21. 8 U.S. Op. Office of Legal Counsel 101 (1984).

22. Peter Baker, “White House Will Deny New Request in Attorneys Probe; Bush to Defy Congress, Sources Say,” *Washington Post*, July 8, 2007, p. A3.

23. Scott Shane, “Nominee Describes Harsh Interrogation as Repugnant,” *New York Times*, October 31, 2007.

24. Goldsmith, *The Terror Presidency*, p. 71

25. David B. Rivkin, Jr., and Lee A. Casey, “There Is Only One Executive,” *Wall Street Journal*, August 28, 2007.