

TRANSCRIPT: EIGHT THINGS I HATE ABOUT THE UNITARY EXECUTIVE THEORY¹

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I want to thank the leaders of the conference and everyone else who has helped make it a success, particularly Molly Gray who has been my point of contact. She has been great. It is a terrific conference. It has been a lot of fun for all of us to be here, and we have been treated very well.

That said, I would like to take issue with the title of this panel: *How Far Can the Executive Go to Defend the Constitution?* I would rephrase it to say: *How Far Can the Executive Go to Defend the American People Without Violating the Constitution?* In other words, how aggressive can the President's national security policies be without either violating the scope of his Article II powers by exceeding them, or violating individual rights guaranteed by the Constitution in his use of those executive powers granted to him? It is not the President's job to interpret the Constitution. We have framers who debated this question quite eloquently and concluded that it is the Supreme Court's job to decide what the Constitution means.² So the President defends the American people and defends the nation, he was not given the task of interpreting the Constitution. He must, of course, interpret the Constitution along the way in order to perform his duties, but he is not the last word on it. Certainly, lest there be any doubt about the framers' intent, we have known this since 1803 when the Court ruled in *Marbury v. Madison*.³

So my talk today is called: *Eight Things I Hate About the Unitary Executive Theory*. There could be five, or there could be twenty-five; but

1. See *Defining Boundaries: How Far Can the Executive Go to Defend the Constitution*, YOUTUBE (Mar. 27, 2013), <http://www.youtube.com/watch?v=w9t8tdzhuNE&feature=youtu.be>, for a video recording of this speech.

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2. *Compare* The Essays of Brutus: No. XI, N.Y. J. (1788), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 417, 418–20 (Herbert J. Storing ed. 1981) (deriding the untrammled power Article III would give the Supreme Court to interpret the Constitution), *with* THE FEDERALIST NO. 78, at 355 (Alexander Hamilton) (Pa. State Univ. Elec. Classics Series ed., 2001), *available at* <http://www2.hn.psu.edu/faculty/jmanis/poldocs/fed-papers.pdf> (opining that the Constitution, as the word of the people, ought to be construed solely by the Supreme Court to protect against legislative overreaching).

3. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

my list of eight covers the most salient problems while avoiding redundancy.

First of all, the Unitary Executive Theory is the theory relied upon by Professor John Yoo, and others in the George W. Bush administration, to justify the approach taken by President Bush in the exercise of his presidential powers after September 11, 2001, particularly and most extensively in the area of national security.⁴ But we have to remember that it has been called the “Unitary Executive Theory” for a reason—it is just a theory. It is one theory that lawyers and law professors like to write about and talk about in order to justify very broad, frankly unlimited, presidential power. But it is not a doctrine, it is not a law, it is nothing but an intellectual discussion. Unfortunately, President Bush, on advice of counsel, put this inchoate theory into practice. The Unitary Executive Theory has never been accepted as a valid interpretation of the Constitution by the Supreme Court, nor any federal court.⁵ Later in this talk, I am going to discuss that, in fact, the theory has been expressly *rejected* by the Supreme Court and other courts on a number of occasions.

The second thing I hate about this theory that purports to bolster the very broad view of the powers of the President is that the arguments are circular and self-serving. One of the few textual references that the theory’s proponents make to the Constitution is the Vesting Clause of Article II. The theorists argue that the Commander-in-Chief powers granted to the President are somehow enhanced, in a substantive way, by the existence of this Vesting Clause—that the two clauses must be read together. But Articles I, II, and III all have Vesting Clauses, of course, and there is no rationale to support the notion that the one in Article II carries more significance than the other two—that it is somehow a *source* of power. The Vesting Clauses were derived from the Lockian notion: all governmental authority flows from power naturally possessed by the people and granted by them to the sovereign.⁶ When you write a constitution, a social contract, you take the power that belongs to the people and “vest” it in different parts of the new government you are creating.⁷ So Article II simply vests executive power in a President, as opposed to another part of government.

4. Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487, 487, 493 (2001).

5. Allan Ides & Karl Manheim, *The Unitary Executive: Federal Courts Have Almost Always Rebuffed Assertions of Unchecked Power by the Executive Branch*, L.A. LAWYER, Sept. 2006, at 24, 24–26 (citing *Mistretta v. United States*, 488 U.S. 361, 381 (1989); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986)).

6. JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT § 95, 97, 99 (1690).

7. *Id.*

Now the theorists see great significance in the fact that there is *a* President, only one. They argue that having one President, as opposed to a committee, somehow adds substantively to the power base of the office.⁸ The framers considered having the Executive Branch consist of a committee, but they decided against it.⁹ So, of course, the executive power is vested in a single President simply because the framers decided to have only one. And all legislative power is vested in our Congress and judicial power is vested in our Supreme Court and such inferior courts as Congress shall create. These are repositories of power. They are not sources of power. Nor do the three Vesting Clauses define the scope of the power of each branch in any way, shape, or form.

The third thing that I don't like about the arguments made by the unitary executive theorists is that they rely primarily on historical precedent, rather than legal precedent. In fact, they never rely on law. They love to cite historical anecdotes about past Presidents' use of their powers.¹⁰ I would say that law is precedent and history is anecdote—nice stories. Elaborating on how “this President did this” and “that President did that” is interesting, but it does not tell us much about the proper constitutional scope of executive power. It tells us that Presidents throughout history have acted powerfully—maybe rightly, maybe wrongly. Maybe they got called on it. Maybe they did not. But it does not prove a thing in terms of the scope of the executive power under the United States Constitution. In our system, constitutional interpretation is not determined anecdotally; it is determined by the dispatched judgment of the Supreme Court. Moreover, the unitary executive theorists cherry pick moments in history to bolster their view of executive power.¹¹ They choose those statements by persons in American history, including our founders, and ignore others that undermine or contradict their theories. As any historian will tell you, we learn as much, or more, about what *not* to do from the actions of our past leaders, as we learn about what *to* do.

For example, these theorists rely on Thomas Jefferson's comments, or something that Franklin Delano Roosevelt did, or signing statements by this President or that.¹² But one thing you will never hear them talk about is

8. Delahunty & Yoo, *supra* note 4, at 493.

9. Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 772–74 (2003).

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

11. Richard W. Waterman, *Assessing the Unilateral Presidency*, in *THE OXFORD HANDBOOK OF THE AMERICAN PRESIDENCY* 477, 491 (George C. Edwards III & William G. Howell eds., 2009).

12. See CALABRESI & YOO, *supra* note 10, at 278–302 (providing anecdotal evidence of President Roosevelt's expansion of executive power, using the Brownlow Committee and the

Federalist 69. And of course, the Federalist Papers, as opposed to historical anecdote, are used by courts, as well as historians, to help interpret the Constitution. And though they are never dispositive, they are properly informative of what was in the minds of some of the Framers. Interestingly, Federalist 69 was written by the beloved father of the Federalist Society movement—Alexander Hamilton. And I love the Federalist Society, some members of which are big supporters of the Unitary Executive Theory. The Harvard Federalist Society—the birthplace of the movement—generously invited me to write a law review article in their journal, the *Harvard Journal of Law and Public Policy*. And I take on the Unitary Executive Theory in my article relying, in part, on Federalist 69, which John Yoo and other Unitary Executive Theory advocates consistently ignore. Federalist 69 states:

[T]he executive authority, with few exceptions, is to be vested in a single magistrate. This will scarcely, however, be considered as a point upon which any comparison can be grounded; for if, in this particular, there be a resemblance to the king of Great Britain, there is not less a resemblance to the Grand Seigneur, to the khan of Tartary, to the Man of the Seven Mountains, or to the governor of New York.¹³

In other words, Hamilton was saying that vesting the executive power in one person does not confer power in and of itself. The President's power comes from other sources in Article II—not the Vesting Clause. Federalist 51, for example, sets forth the separation of powers structure of our government, including the fact that the three branches balance one against the other.¹⁴ Some unitary executive theorists would have you believe, particularly as articulated by John Yoo and the Bush Administration, that in the area of national security, and at a time when we are under great threat, that the President is all powerful. The essence of their argument is that, despite the structure described in Federalist 51, the President can ignore the Congress and the courts in times of national danger.¹⁵ The President is not bound to follow the laws passed by Congress—not even laws he himself

Reorganization Act of 1939 as a case study); Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981-2000*, 89 *DENV. U. L. REV.* 197, 210–12 (2011) (explaining the use of signing statements to bolster Unitary Executive Theory); John Yoo, *Jefferson and Executive Power*, 88 *B.U. L. REV.* 421, 423 (2008) (quoting Jefferson to support increased executive power and authority).

13. THE FEDERALIST NO. 69, *supra* note 2, at 306 (Alexander Hamilton).

14. *Id.* NO. 51, at 231–33 (Alexander Hamilton or James Madison).

15. Delahunty & Yoo, *supra* note 4, at 502, 517.

has signed.¹⁶ Of course, President Bush is famous for having signed bills into law, and then issued signing statements that he is not bound to follow aspects of those laws—relying on boilerplate language in each statement based on notions derived from the Unitary Executive Theory.¹⁷

Of course, the President had already been granted a great power by the framers to push back against Congress. It is called the veto power.¹⁸ He may exercise that power and slap down Congress, or he may sign the law and follow it.¹⁹ He does not have any other options granted by the Constitution. Unitary executive theorists, however, like to give the President more options than our framers did.

The fourth flaw in the theory relates to the fact that the Supreme Court has, in fact, spoken on the validity of the Unitary Executive Theory of presidential power. An important case that you will never hear these theorists speak of is *Morrison v. Olson*.²⁰ It is a Reagan-era case involving the rejection of the Unitary Executive Theory as applied to the *removal power* of the President.²¹ In the Ethics in Government Act, Congress had taken away the power from the President to remove a special prosecutor appointed and confirmed to prosecute government officials.²² The Reagan Administration challenged the law, arguing that it is a core power of the President to say who is going to work for him, including the power to remove.²³ The Court rejected the unitary executive theories put forth by the Government to support its position, and upheld the law.²⁴ So, significantly, *Morrison* is the only case in which the Court has considered such theories and the Court outright rejected them. But the unitary executive theorists do not try to distinguish the case—they just ignore it. I would argue that the Court in *Morrison* rejected the theory in the context of a mere procedural question, not a substantive one: removal of an employee. It seems to me

16. See Charlie Savage, *Bush Challenges Hundreds of Laws, President Cites Powers of His Office*, BOSTON GLOBE, April 30, 2006, http://www.boston.com/news/nation/articles/2006/04/30/bush_challenges_hundreds_of_laws/ (discussing President Bush's philosophy that the President may disobey a statute if it does not comport with the President's interpretation of the Constitution). But see T.J. HALSTEAD, CONG. RESEARCH SERV., RL33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 9 (2007) (finding that George W. Bush issued a comparable number of signing statements to Presidents Reagan, Bush I, and Clinton.). See *infra* note 32 and accompanying text for a discussion of the qualitative difference between Bush II's signing statements and his predecessors'.

17. HALSTEAD, *supra* note 16, at 9, 11.

18. U.S. CONST. art. I, § 7.

19. *Id.*

20. *Morrison v. Olson*, 487 U.S. 654 (1988).

21. *Id.* at 691.

22. Ethics in Government Act § 601(a), 28 U.S.C. § 596 (2006).

23. *Morrison*, 487 U.S. at 673, 688–89.

24. *Id.* at 689–92; see also *id.* at 689–90 nn.27 & 29.

that the Court's reasoning would be even more powerful in the face of the John Yoo version of the Unitary Executive Theory, which relates to the *substantive powers* of the President. But the theorists never address that problem with their approach.

The fifth problem with the theory is that the unitary executive theorists are divided into at least two big camps. And they hate each other as far as I can tell. The Reagan-era unitary executive theorists were very modest. They were the people who put forth the removal theory discussed above. They lost in Court, so even their modest theory lacks support. These Reagan-era theorists, Professor Steven Calabresi and Professor Christopher Yoo (no relation to John), have written extensively on the removal power theories and they appear to be quite appalled by the President George W. Bush-era unitary executive theorists and view them as a pox on their beloved theory.²⁵ Indeed, in a recent book by Calabresi and Christopher Yoo, they spent one page out of 544 pages talking about the brand of Unitary Executive Theory practiced by President Bush, and principally advocated by John Yoo while at the Department of Justice, and after.²⁶ And they said:

George W. Bush's reliance on the advice of Berkley law professor John Yoo to make sweeping claims of implied, inherent presidential power in the War on Terror . . . push[ed] the envelope of presidential power to its outer limits. Although Bush deserves a lot of credit for steps to safeguard the country, the cost of the bad legal advice that he received is that Bush has discredited the theory of unitary executive by associating it not with presidential authority to remove and direct subordinate executive officials but with implied, inherent foreign policy powers, some of which, at least, the president simply does not possess.²⁷

That is a powerful quote, because it is one camp of unitary executives yelling at the other camp for abusing, and thereby undercutting, their beautiful theory.

The sixth, and in my view fatal, flaw is the dirty little secret of the unitary executive theorists. If you take the theory to its logical extension, not only can the President reject acts of Congress that he has himself signed, as an improper limit on his own power, he can reject the Supreme

25. Richard J. Pierce, *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of The Unitary Executive by Steven G. Calabresi and Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593, 593–94 (2010).

26. CALABRESI & YOO, *supra* note 10, at 429.

27. *Id.*

Court's rulings as well. If he can reject one branch, because his power is vested in such a way that he is all-powerful when the nation is in danger, then he can reject the courts too. This, of course, means that the Court could never rein him in, which means no one can rein him in. The theorists do not say that, but if pushed they must admit it—it is the only logical extension of their theories. Of course, the notion that the President can interpret the scope of his own powers and that neither of the other two branches has the power to challenge him is an untenable interpretation of separation of powers, as described carefully in Federalist 51.²⁸ Under this view, the delicate house of cards that is our system comes tumbling down.

Moreover, the theorists do not like to talk about Article I, Section 9 very much either: the “power of the purse,” which is vested in Congress.²⁹ For example, Congress wrote a law in 1978 stating that the executive cannot electronically eavesdrop inside the United States without a judge's order. President Bush, relying once again on John Yoo at the Department of Justice, concluded that he did not have to follow that law, and implemented a surveillance program without court approval.³⁰ But Congress could have chosen, in response, to pass an appropriation bill stating that no money may be spent on such a program. Congress did not do that and I do not know what unitary executive theorists would have said if they had. Article I, Section 9 says that the executive cannot spend funds unless appropriated by Congress³¹—would the theorists say that the executive power trumps the Section 9 power of the purse too?

Finally, more smoke and mirrors. We have already talked about the veto power versus the signing statement power, but I will say one thing about the signing statements that Professor Robert F. Turner referenced earlier today. Again, unitary executive theorists love historical anecdote, and Professor Turner notes that other Presidents have used signing statements to define parts of laws they are signing that they do not plan to follow because of perceived constitutional flaws. But President Bush's conduct has no historical precedent. First of all, he challenged over a thousand statutory provisions, not a few dozen like other Presidents have done.³² Secondly, unlike the other Presidents who have judiciously used

28. THE FEDERALIST NO. 51, *supra* note 2, at 232 (Alexander Hamilton).

29. U.S. CONST. art. I, § 9.

30. Memorandum from John Yoo, Deputy Assistant Att'y Gen., to John Ashcroft, Att'y Gen. (Nov. 2, 2001) (on file with the Department of Justice).

31. U.S. CONST. art. I, § 9.

32. HALSTEAD, *supra* note 16 (“[Bush's] signing statements are typified by multiple constitutional and statutory objections, containing challenges to more than 1,000 distinct provisions of law.”). Although President Clinton issued more signing statements than Bush, Clinton rarely challenged statutory provisions. *See id.* (stating that only 18% of President Clinton's signing statements challenged

signing statements, the constitutional flaw that President Bush cited in his statements—and he used boilerplate language in all of them—was not that the law in front of him violated the First Amendment, or the Equal Protection Clause, or some other constitutional principle. President Bush's complaint, rather, was that the provisions he was refusing to enforce violated *his own* powers—the expansive view of his powers that the Supreme Court rejected and no court since has accepted.³³ His use of signing statements was self-serving, and not a refusal to enforce a law that he believed would trample on individual rights.

The bottom line is that we are a nation of laws, not historical anecdote. If a President is going to refuse to follow the law, he better conjure up more than the John Yoo version of the Unitary Executive Theory to support his actions. A Supreme Court ruling supporting this theory would be nice, but I submit that the Court has already spoken, and it is highly unlikely that the justices will change their minds on this one. Thank you.

laws on constitutional grounds compared to 78% of President Bush's statements); *see also* John T. Woolley, *Presidential Signing Statements: Frequently Asked Questions*, THE AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/signingstatements.php> (last visited Oct. 8, 2013) (archiving presidential signing statements from Hoover to Obama, stating President Clinton issued 383, President G.W. Bush 162, and President Obama 24 presidential signing statements to date).

33. *Id.* (documenting 133 signing statements by President G.W. Bush citing Unitary Executive Theory and constitutional authority as grounds for statutory interpretation or selective enforcement by the President). In his statement accompanying the signing of the Intelligence Reform and Terrorism Prevention Act of 2004, President Bush asserted:

Many provisions of the Act deal with the conduct of United States intelligence activities and the defense of the Nation, which are two of the most important functions of the Presidency. The executive branch shall construe the Act, including amendments made by the Act, in a manner consistent with the constitutional authority of the President to conduct the Nation's foreign relations, as Commander in Chief of the Armed Forces, and to supervise the unitary executive branch, which encompass the authority to conduct intelligence operations.

Statement on Signing the Intelligence Reform and Terrorism Prevention Act of 2004, 40 WEEKLY COMP. PRES. DOC. 2993, 2993 (Dec. 27, 2004).