

# Has Barack Obama Embraced the Unitary Executive?

Ryan J. Barilleaux, *Miami University of Ohio*

Jewel Maxwell, *Gordon College*

As a candidate for president in 2008, Barack Obama harshly criticized George W. Bush's use of executive power. He attacked Bush for riding roughshod over the civil liberties of terrorist suspects, for circumventing Congress, and for generally centralizing power in the presidency (Benson 2014). In several campaign appearances, he repeated the same essential point, as follows:

I take the Constitution very seriously. The biggest problems that we're facing right now have to do with George Bush trying to bring more and more power into the executive branch and not going through Congress at all, and that's what I intend to reverse when I'm President of the United States of America (Karl 2014).

Although critical of Bush's actions, then-Senator Obama was more ambiguous on Bush's justification for assertions of executive power. Bush's conduct in office was especially controversial for invoking unitary executive theory, a constitutional doctrine advanced by conservative legal scholars and promoted by government lawyers in the Reagan administration (Barilleaux and Kelley 2010a).

Unitary executive theory has been much discussed in the media but is poorly understood. Perhaps the best statement of its tenets was offered by Waterman (2009), who explained it as follows:

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.

Candidate Obama never actually addressed his views on unitary executive theory or the sources of executive power. However, he did project the distinct impression that he would "dial back" presidential unilateralism from the excesses of the Bush 43 presidency.

The Obama presidency turned out differently, however; Mr. Obama embraced unilateral actions as his own. Not only did he retain most of the security-related actions of the Bush presidency (i.e., the state-secrets doctrine, targeted killings of terrorist suspects, and warrantless wiretapping), he also went even farther in some areas (e.g., drone strikes). Moreover, he used unilateral powers across an array of domestic-policy

areas, alarming his opponents and confusing many of his supporters. Unilateralism became President Obama's preferred method for getting things done in Washington.

Does President Obama's frequent recourse to unilateralism mean that he shares George W. Bush's commitment to unitary executive theory? If so, what does that commitment mean for the future of the American presidency? The answers will surprise Mr. Obama's friends and opponents.

## OBAMA'S UNILATERALISM

President Obama's unilateralism was not simply a strategy borne of frustration with a Republican-dominated Congress—although he tried to characterize it that way—but rather was a method of governing that he had begun using even while Democrats controlled both houses of Congress. He maintained most of Bush's unilateral antiterrorist policies and even expanded some measures. In domestic affairs, despite warm congressional support, President Obama named numerous "czars" to centralize policy making in the White House; appointed Elizabeth Warren to dual advisory positions in the White House and Treasury Department to facilitate creation of the Consumer Financial Protection Bureau without congressional involvement; and made more than a dozen recess appointments to executive positions despite enjoying a filibuster-proof majority in the Senate (Kelley, Marlowe, and Barilleaux 2011).

President Obama justified his unilateral actions in three overlapping ways. First, he downplayed unilateral action as an uncontroversial move to address a specific problem. For example, when enforcement of the employer-mandate requirement of the Affordable Care Act (ACA) was delayed until 2015, the administration portrayed it as nothing more than a technical move. The action was announced in a blog post by an Assistant Treasury Secretary and was presented as simply a commonsense response to complications experienced by employers trying to obey the law (Kliff 2013).

Second, President Obama frequently cited Republican obstruction and asserted that "we can't wait" for Congress to act. He presumed that congressional inaction necessarily meant that the president was empowered to do what was necessary for the common good. This rationale was displayed in his 2012 unilateral implementation of the DREAM Act (Obama 2012) and in his 2014 order granting amnesty to millions of undocumented immigrants.

Third, President Obama justified unilateral action by his responsibilities as chief executive. Buchanan (1978) identified

the feeling of responsibility as the “common central predisposition of presidents in office...” This sense of responsibility explains why Obama and other presidents have tried to stretch the limits of their constitutional authority as they sought power commensurate with the obligation they felt for the nation.

Not surprisingly, the guidance stimulated significant controversy because it applied to public schools across the nation. Because it defined the administration's interpretation of statutory law and regulations, it offered the White House an opportunity to shape law through fiat, subject to review only in federal court. The strategy was typical of unilateral actions

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President Obama's unilateralism is not unique, although he has pursued it more aggressively than several of his predecessors. He is certainly a unilateralist, but does he adhere to unitary executive theory? Relying on Waterman's (2009) summary of the theory, a good case can be made that several of President Obama's unilateral actions conform to the unitary executive theory, including the following:

- recess appointments that involved declaring that *pro forma* sessions of the Senate were, in fact, recesses (overturned by the Supreme Court in *NLRB v. Noel Canning*, 2014)
- delays in implementing or enforcing provisions of the ACA
- broad interpretation of prosecutorial discretion to implement the DREAM Act and grant amnesty to a large class of illegal immigrants
- use of signing statements to shape implementation of laws
- aggressive control over administrative rulemaking, especially a high-profile 2011 action in which the president killed the Environmental Protection Agency's proposed ozone-pollution rule, and pressured the Federal Communications Commission (FCC) to declare the Internet a public utility subject to FCC regulation
- Executive Order 13563, which revised the process for reviewing administrative rulemaking
- use of White House “czars” in ways that violate law and the Constitution, as demonstrated by Sollenberger and Rozell (2012)

A good example of President Obama's unilateralism is his administration's 2016 guidance letter on the use of public-school restrooms and locker rooms by transgender students. This letter to school administrators, jointly issued by the Departments of Education and Justice, interprets the requirements of the 1972 Education Amendments and related regulations to include gender identity as a protected class (“Dear Colleague Letter: Transgender Students” 2016). In an interview a few days after the letter's release, the president made it clear that it reflected “our view” of what the law requires (“BuzzFeed News Exclusive Interview with the President” 2016).

taken by President Obama and other recent presidents: using unilateral control over federal-agency actions to advance an agenda that would be blocked in Congress. If upheld as a legitimate exercise of administrative interpretation, the guidance would stand as the controlling understanding of legal requirements for public schools. The Obama administration gambled that the courts would defer to such an interpretation, under judicial doctrines granting deference to federal agencies in their rulemaking and interpretation of law and regulations (Martin and Super 2007).

Regardless of whether President Obama explicitly invokes the unitary executive, he has been a practitioner of the theory. In this, he is consistent with the practice of presidents since Reagan (Barilleaux and Kelley 2010b). If this is the case, what does it mean for the presidency and for unitary executive theory? The answer leads in a surprising direction: it means that President Obama, like his predecessor, appears to have embraced Richard Nixon's constitution.

**HAS PRESIDENT OBAMA EMBRACED THE SPIRIT OF NIXON'S CONSTITUTION?**

Richard Nixon's constitutional theory was expressed most bluntly in his famous 1977 interview with David Frost. Frost pressed Nixon on the legality of the so-called Huston plan to use wiretappings, burglaries, and infiltration to monitor the activities of groups critical of the Vietnam War and the Nixon administration more generally (Genovese and Morgan 2012). In his defense, Nixon admitted that authority to undertake the actions ideally would have been granted through legislation, but doing so was politically and practically impossible. Therefore, he asserted, he had the authority to act unilaterally, even if it involved doing something illegal, because “when the President does it, that means that it is not illegal” (“Richard Nixon Interview with David Frost Transcription” 2016). Nixon advanced a doctrine of constitutional necessity, claiming that the president is authorized to do whatever must be done for the good of the nation.

Nixon's assertion has been widely criticized, but the spirit of his constitution seems to haunt unitary executive theory. Presidents Bush and Obama both embraced what Krent (2008) called a “super-strong” version of unilateral executive power, which gave their critics ammunition to attack each chief

executive for embracing a Nixon-like view of the president's constitutional authority.

Critics of President Obama point to his November 2014 granting of amnesty to millions of illegal immigrants as evidence that he has taken the view that "when the President does it, that means that it is not illegal." According to this charge, President Obama repeatedly told immigration activists and others pressing him to grant amnesty that he lacked the legal authority to do so. Despite such statements, critics charge, the president went ahead and took the action that he had said he had no authority to take. The action was now legal because the president gave himself the authority to do it. After taking this action, President Obama behaved as if he had not previously declared otherwise. Moreover, he downplayed his unilateralism by ordering the policy change through presidential memoranda rather than executive order (Korte 2014). He insisted that he had the authority to act as he did and that if Republicans did not like his executive action, they should pass a bill instead.

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Was this reversal an example of President Obama embracing Nixon's constitution? The evidence is mixed but suggestive. Whereas the White House and its supporters argue that the 2014 action was essentially an extension of prosecutorial discretion, critics charge that it is much closer to a case of the president taking an action that he had repeatedly denied he had the authority to take. According to this charge, President Obama's earlier demurrals on immigration were part of a cynical attempt to hold off immigration activists until after the 2014 congressional elections, when the politically explosive action would not hurt Democratic candidates. As the watchdog website *FactCheck.org* observed (Farley 2014): "Obama said he lacked the legal authority to suspend deportation of family members. Now, he says he has just such legal authority." The *Washington Post* "Fact Checker" column awarded Obama's demurral on the reversal "an upside-down Pinocchio" (indicating a clear flip-flop) (Kessler 2014).

It is certainly the case that the president reversed himself on his legal authority, but does that constitute a Nixon-like view of presidential power? President Obama's attempt to pretend that there was no discrepancy between his prior statements on immigration and his November 2014 action certainly lends support to the view that he—like George W. Bush—has embraced the spirit of Nixon's constitution. Whatever the president's intentions, he armed his critics by taking the *de facto* position that he could redefine what is or is not legal by his own action.

This view of presidential power points directly to the heart of a debate that has been raging in American politics since the Founding: the extent and limits of presidential power. The doctrine embodied in Nixon's interpretation of the Constitution

leads to a president-centered political system. As Bickel (1974) characterized it, Nixon's vision of the American political system was that of:

...a Gaullist Presidency, making war, making peace, spending, saving, being secret, being open, doing what is necessary, and needing no excuse for aggregating power to itself beside the excuse that it could do more effectively what other institutions, particularly Congress, did not do very rapidly or very well, or under particular political circumstances would not do at all.

Forty years later, critics of George W. Bush and Barack Obama can make the case that Bickel's characterization is relevant to the contemporary presidency.

#### THE UNITARY EXECUTIVE AND THE FUTURE

Not long ago, political and scholarly attention focused on George W. Bush's practice of the unitary executive. Much of the commentary implied that it was a Republican phenomenon,

or even a "Bush thing," but that it was unlikely to remain in a post-Bush White House. That was what many of Candidate Obama's supporters thought in 2008. President Obama's embrace of the unitary executive, however, suggests that the theory is likely to remain for a long time. Indeed, it points to the following three lessons about unilateralism, Obama's legacy, and the future of the presidency (Barilleaux and Kelley 2010b):

- (1) *Assertive presidential unilateralism is here to stay.* Despite his campaign promises, President Obama turned out to be just as aggressive—if not more so—in using unilateralism as his predecessor. A key feature of President Obama's legacy is to solidify aggressive unilateralism as conventional presidential practice. There is no reason to think that the next president, feeling the tug of responsibility and drawing on ample precedents, will act differently.
- (2) *Congressional responses to executive unilateralism will be too late and too strong and, in turn, will stimulate a new round of executive assertiveness.* In the "congressional revolution" of the 1970s, Congress overreacted to Vietnam and Watergate. The short-term result was a period of congressional dominance (or attempted dominance) that complicated the presidencies of Ford and Carter. However, the long-term result was a bipartisan presidential project to restore and expand executive power. As various scholars have demonstrated, every president since Nixon has worked to expand presidential power.

There might be another 1970s-style congressional revolt in the future, but congressional reaction against recent unilateralism has been ineffective. Under George W. Bush,

congressional efforts to rein in the president had little effect. Under Barack Obama, efforts by congressional Republicans—including a government shutdown—only intensified the president's determination to act unilaterally. There is no reason to expect the dynamics of executive–congressional interactions concerning unilateralism to change much in the future. Obama's legacy is to reinforce Bush's legacy for presidential power.

- (3) *Some form of unitary executive theory will become the prevailing view of presidential power.* This prediction is coming true sooner than anyone thought possible at the end of the Bush presidency. President Obama may not have used the term “unitary executive,” but it is clear from the evidence of his actions that he has embraced the super-strong unitary executive practiced by George W. Bush. President Obama's legacy for his successors will be to make the unitary executive safe for Democrats.

No matter what it is called, some version of unitary executive theory is rapidly becoming the conventional view of executive power. President Obama institutionalized a super-strong unitary executive. Future presidents will work within this legacy. Campaigning for the 2016 Democratic presidential nomination, former Secretary of State Hillary Clinton made it clear that she intended to “go further” than President Obama in using executive power to institute immigration reform (Lovelace 2015). Donald Trump also indicated he would use unilateralism to circumvent Congress: “I won't refuse it. I'm going to do a lot of things.” Pointing to President Obama's precedent, Mr. Trump made it clear that “he's led the way, to be honest with you” (Simendinger, 2016). What Bickel called the “Gaulist presidency” of the Nixon years appears to have returned. ■

#### REFERENCES

- Barilleaux, Ryan J. and Christopher S. Kelley. 2010a. “What Is the Unitary Executive?” In *The Unitary Executive and the Modern Presidency*, ed. Ryan J. Barilleaux and Christopher S. Kelley, 1–16. College Station: Texas A&M University Press.
- . 2010b. “Going Forward: The Unitary Executive, Presidential Power, and the Twenty-First-Century Presidency.” In *The Unitary Executive and the Modern Presidency*, ed. Ryan J. Barilleaux and Christopher S. Kelley, 219–30. College Station: Texas A&M University Press.
- Benson, Guy. 2014. “Obama Slams Bush for Expanding Executive Power, Ignoring Congress.” *Townhall.com*, February 13. Available at <http://townhall.com/tipsheet/guybenenson/2014/02/13/pure-gold-obama-slams-bush-for-expanding-executive-power-ignoring-congress-n1794535>. Accessed January 5, 2016.
- Bickel, Alexander. 1974. “Watergate and the Legal Order.” *Commentary*, January 1: 19–25.
- Buchanan, Bruce. 1978. *The Presidential Experience*. Englewood Cliffs, NJ: Prentice-Hall.
- “BuzzFeed News Exclusive Interview with the President.” 2016. Available at [www.youtube.com/watch?v=WVqZ269kUr8](http://www.youtube.com/watch?v=WVqZ269kUr8). Accessed May 18, 2016.
- “Dear Colleague Letter: Transgender Students.” 2016. US Department of Justice, Civil Rights Division, and US Department of Education, Office for Civil Rights, May 13. Available at [www.ed.gov/ocr/letters/colleague-201605-title-ix-transgender.pdf](http://www.ed.gov/ocr/letters/colleague-201605-title-ix-transgender.pdf). Accessed May 18, 2016.
- Farley, Robert. 2014. “Obama's Immigration Amnesia.” *FactCheck.org*, November 18. Available at [www.factcheck.org/2014/11/obamas-immigration-amnesia](http://www.factcheck.org/2014/11/obamas-immigration-amnesia). Accessed April 18, 2016.
- Genovese, Michael and Iwan W. Morgan. 2012. *Watergate Remembered: The Legacy for American Politics*. New York: Palgrave Macmillan.
- Karl, Jonathan. 2014. “Obama's Long-Lost Campaign Promise.” *Abcnews.go.com*, February 17. Available at <http://abcnews.go.com/blogs/politics/2014/02/obamas-long-lost-campaign-promise>. Accessed April 19, 2016.
- Kelley, Christopher S., Melanie Cook Marlowe, and Ryan J. Barilleaux. 2011. “President Barack Obama: Unilateralist.” In *The Obama Presidency: Change and Continuity*, ed. Andrew J. Dowdle, Dirk C. Van Raemdonck, and Robert Maranto, 77–90. New York: Routledge.
- Kessler, Glenn. 2014. “Obama's Royal Flip-Flop on Using Executive Action on Illegal Immigration.” *Washington Post*, November 18. Available at [www.washingtonpost.com/blogs/fact-checker/wp/2014/11/18/obamas-flip-flop-on-using-executive-action-on-illegal-immigration](http://www.washingtonpost.com/blogs/fact-checker/wp/2014/11/18/obamas-flip-flop-on-using-executive-action-on-illegal-immigration). Accessed January 6, 2016.
- Kliff, Sarah. 2013. “White House Delays Employer Mandate Requirement until 2015.” *Washington Post*, July 2. Available at [www.washingtonpost.com/blogs/wonkblog/wp/2013/07/02/white-house-delays-employer-mandate-requirement-until-2015](http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/02/white-house-delays-employer-mandate-requirement-until-2015). Accessed January 5, 2016.
- Korte, Gregory. 2014. “Obama Issues 'Executive Orders by Another Name.'” *USA Today*, December 17. <http://www.usatoday.com/story/news/politics/2014/12/16/obama-presidential-memoranda-executive-orders/20191805/>. Accessed September 15, 2016.
- Krent, Harold. 2008. “From a Unitary to a Unilateral Presidency.” *Boston University Law Review* 88: 523–59.
- Lovelace, Ryan. 2015. “Hillary Clinton: I Would 'Go Further' than Obama on Immigration.” *Washington Examiner*, May 15. Available at [www.washingtonexaminer.com/hillary-clinton-i-would-go-even-further-than-obama-on-immigration/article/2564050](http://www.washingtonexaminer.com/hillary-clinton-i-would-go-even-further-than-obama-on-immigration/article/2564050). Accessed February 3, 2016.
- Martin, Graham G. and David A. Super. 2007. “Judicial Deference to Administrative Agencies and Its Limits.” *Clearinghouse Review* March–April: 596–609.
- NLRB v. Noel Canning*. 2014. 573 U.S. \_\_\_\_\_. [https://www.supremecourt.gov/opinions/13pdf/12-1281\\_mc8p.pdf](https://www.supremecourt.gov/opinions/13pdf/12-1281_mc8p.pdf). Accessed September 15, 2016.
- Obama, Barack. 2012. “Remarks on Immigration Reform and an Exchange with Reporters.” June 15. Gerhard Peters and John T. Wooley, *The American Presidency Project*. Available at [www.presidency.ucsb.edu/ws/?pid=100991](http://www.presidency.ucsb.edu/ws/?pid=100991). Accessed January 5, 2016.
- “Richard Nixon Interview with David Frost Transcription.” 2016. *Lybio.net*. Available at <http://lybio.net/tag/richard-nixon-interview-with-david-frost-transcription>. Accessed February 10, 2016.
- Simendinger, Alexis. 2016. “Obama Picks Up Pace of Executive Actions.” *RealClearPolitics*. May 26. [http://www.realclearpolitics.com/articles/2016/05/26/obama\\_picks\\_up\\_pace\\_of\\_executive\\_actions\\_130671.html](http://www.realclearpolitics.com/articles/2016/05/26/obama_picks_up_pace_of_executive_actions_130671.html). Accessed May 27, 2016.
- Sollenberger, Mitchell A. and Mark J. Rozell. 2012. *The President's Czars*. Lawrence: University Press of Kansas.
- Waterman, Richard. 2009. “The Administrative Presidency, Unilateral Power, and the Unitary Executive Theory.” *Presidential Studies Quarterly* 39 (2): 5–9.