

The Unitary King George

Homeland Security Presidential Directive: an Unconstitutional Bombshell

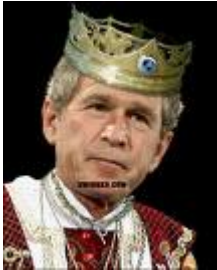
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As the nation focused on whether Congress would exercise its constitutional duty to cut funding for the war, Bush quietly issued an unconstitutional bombshell that went virtually unnoticed by the corporate media.

The National Security and Homeland Security Presidential Directive, signed on May 9, 2007, would place all governmental power in the hands of the President and effectively abolish the checks and balances in the Constitution.

If a “catastrophic emergency” – which could include a terrorist attack or a natural disaster – occurs, Bush’s new directive says: “The President shall lead the activities of the Federal Government for ensuring constitutional government.”

What about the other two co-equal branches of government? The directive throws them a bone by speaking of a “cooperative effort” among the three branches, “coordinated by the President, as a matter of comity with respect to the legislative and judicial branches and with proper respect for the constitutional separation of powers.” The Vice-President would help to implement the plans.

“Comity,” however, means courtesy, and the President would decide what kind of respect for the other two branches of government would be “proper.” This Presidential Directive is a blatant power grab by Bush to institutionalize “the unitary executive.”

A seemingly innocuous phrase, the unitary executive theory actually represents a radical, ultra rightwing interpretation of the powers of the presidency. Championed by the conservative Federalist Society, the unitary executive doctrine gathers all power in the hands of the President and insulates him from any oversight by the congressional or judicial branches.

In a November 2000 speech to the Federalist Society, then Judge Samuel Alito said the Constitution “makes the president the head of the executive branch, but it does more than that. The president has not just some executive powers, but the executive power — the

whole thing.”

These “unitarians” claim that all federal agencies, even those constitutionally created by Congress, are beholden to the Chief Executive, that is, the President. This means that Bush could disband agencies like the Federal Communications Commission, the Food and Drug Administration, the Federal Reserve Board, etc., if they weren’t to his liking.

Indeed, Bush signed an executive order stating that each federal agency must have a regulatory policy office run by a political appointee. Consumer advocates were concerned that this directive was aimed at weakening the Environmental Protection Agency and the Occupational Safety and Health Administration. The unitary executive dogma represents audacious presidential overreaching into the constitutional province of the other two branches of government.

This doctrine took shape within the Bush administration shortly after 9/11. On September 25, 2001, former deputy assistant attorney general John Yoo used the words “unitary executive” in a memo he wrote for the White House: “The centralization of authority in the president alone is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch.” Six weeks later, Bush began using that phrase in his signing statements.

As of December 22, 2006, Bush had used the words “unitary executive” 145 times in his signing statements and executive orders. Yoo, one of the chief architects of Bush’s doctrine of unfettered executive power, wrote memoranda advising Bush that because he was commander in chief, he could make war any time he thought there was a threat, and he didn’t have to comply with the Geneva Conventions.

In a 2005 debate with Notre Dame professor Doug Cassel, Yoo argued there is no law that could prevent the President from ordering that a young child of a suspect in custody be tortured, even by crushing the child’s testicles.

The unitary executive theory has already cropped up in Supreme Court opinions. In his lone dissent in *Hamdi v. Rumsfeld*, Justice Clarence Thomas cited “the structural advantages of a unitary Executive.” He disagreed with the Court that due process demands an American citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker. Thomas wrote, “Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But it is crucial to recognize that judicial interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive.”

Justice Thomas’s theory fails to recognize why our Constitution provides for three co-equal branches of government.

In 1926, Justice Louis Brandeis explained the constitutional role of the separation of powers. He wrote, “The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.”

Eighty years later, noted conservative Grover Norquist, describing the unitary executive

theory, echoed Brandeis's sentiment. Norquist said, "you don't have a constitution; you have a king."

One wonders what Bush & Co. are setting up with the new Presidential Directive. What if, heaven forbid, some sort of catastrophic event were to occur just before the 2008 election? Bush could use this directive to suspend the election. This administration has gone to great lengths to remain in Iraq . It has built huge permanent military bases and pushed to privatize Iraq 's oil. Bush and Cheney may be unwilling to relinquish power to a successor administration.

Marjorie Cohn is a professor at Thomas Jefferson School of Law and president of the National Lawyers Guild. Her new book, Cowboy Republic: Six Ways the Bush Gang Has Defied the Law, will be published in July. See <http://www.marjoriecohn.com>.

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