

Rethinking Presidential Power—The Unitary Executive and the George W. Bush
Presidency.

Paper prepared for the 63rd Annual Meeting of the Midwest Political Science Association
April 7-10, 2005
Chicago, IL

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Abstract:

Since the Nixon administration, modern presidents have had a difficult time relying upon the traditional powers of bargaining and persuading offered by the “Modern Presidency” theory of presidential power. As a result, presidents have relied on numerous unilateral actions in order to protect the prerogative of the office and to advance the president’s policy preferences by controlling the executive branch. The “unitary executive” theory offers such an explanation of presidential behavior that some regard as “imperial.” In this paper, I explain what the unitary executive theory is, how it has developed, and how the current Bush administration has fully embraced the theory in helping it govern since the very first day of office in 2001. I will focus on the use of signing statements, executive orders, and the OIRA to advance the administration’s objectives.

Keywords: Unitary Executive, Signing Statements, Executive Orders, OMB, OIRA

Dana Milbank, the former White House reporter for the “Washington Post,” wrote in an October 11, 2004 column profiling David Addington, Vice-President Cheney’s counsel, about an obscure theory of presidential power that permeated the Bush White House. The article described the detail to which Cheney and Addington had paid to preserving presidential power, from the now-famous “torture” memo to international law governing torture to withholding information about the energy task force formed in 2001 to deal with the country’s energy problem. Milbank wrote: “Even in a White House known for its dedication to conservative philosophy, Addington is known as an ideologue, an adherent of an obscure philosophy called the unitary executive theory that favors an extraordinarily powerful president.”¹

Milbank cannot be faulted for referring to it as obscure since the Bush administration is the first to make explicit reference to the theory. In fact, President Bush has made so many references to the term, it is surprising that more reporters and scholars have not taken note of it.

Since President Bush came to office in 2001, he has used the term 95 times (See Appendix A), when signing legislation into law or issuing an executive order or responding to a congressional resolution. In some cases, President Bush has used the term multiple times in the same document. For instance, when President Bush signed the controversial Medicare and prescription drug act in the fall of 2003, he complained about two sections that interfered with his constitutional prerogative to “supervise the unitary executive branch.” For example, Section 1014 of the Act established a “Citizen’s Health

¹ Milbank, Dana. “In Cheney’s Shadow, Counsel Pushes the Conservative Cause.” *The Washington Post*. October 11, 2004. pg. A21.

Care Working Group” designed to “provide for a nationwide public debate about improving the health care system to provide every American with the ability to obtain quality, affordable health care coverage....”² The members of the commission would be appointed by the Comptroller General, an agent of the Congress, and according to section (j)(3) of the act, the Working Group would be able to “secure directly from any Federal department or agency such information as the Working Group considers necessary to carry out this section. Upon request of the Working Group, the head of such department or agency shall furnish such information.”³

In objecting to the Working Group, President Bush argued that any order to turn over executive branch agency information to a Working Group created mostly by the Congress would have to be construed “in a manner consistent with the constitutional authorities of the President to supervise the unitary executive branch...”⁴

Further, in a number of additional sections of the Act⁵, there is a requirement that either President Bush or executive branch officials “submit to the Congress proposals for legislation.”⁶ Bush wrote in his signing statement that the “executive branch shall construe these provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the

² “Medicare Prescription Drug, Improvement, and Modernization Act of 2003.” Public Law 108-273 Section 1014 (b)(1).

³ Ibid. Section (j)(3).

⁴ Bush, George W. “Statement on Signing the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.” *Weekly Compilation of Presidential Documents*. December 8, 2003. pg. 1774.

⁵ See Section 802, 801(a)(2), 101(b), 109(d)(2), 410A(e), 434(f), 507(c)(3), 645(a)(2), 649(g), 651(d)(2), 911(f), and 1014(o).

⁶ Bush, George W. pg. 1774.

consideration of the Congress such measures as the President judges necessary and expedient.⁷

Is Milbank correct and the Bush administration seems to be practicing some obscure theory of presidential power that makes it different from previous administrations? Or, is the current Bush administration simply formalizing a process that has been building over the last several decades? In this paper, I will argue that the current Bush administration has simply formalized a process that really began with the Reagan administration and is a result of the assault on the presidency following Watergate and the fear of an “imperial presidency.”

This paper will proceed as follows: in the next section (section two) I will discuss the historical overview of the unitary executive. Further, I will explain how the unitary executive, as a theory of presidential power differs greatly from the strategic presidency, which emphasizes the softer sides of presidential power—particularly the importance place upon bargaining and persuading. Finally I will focus on the key pieces of the unitary “puzzle” that were put in place by the Reagan, Bush (I), and Clinton presidencies which have aided the current Bush administration immensely.

After first describing the key “Unitarian” influences in the Bush administration, I will turn to a discussion of the means in which the Bush administration has exerted unitary control over the executive branch. First, I will discuss the use of the presidential signing statement, and how the Bush administration has advanced how the signing statement is used. In this discussion, I will compare the Bush administration’s use of the signing statement with the Reagan, Bush (I), and Clinton use of the signing statement.

⁷ Ibid. pg. 1774.

Second, I will examine how the Bush administration has gained unilateral control over the executive branch. In doing so, I will look at the role the Office of Management and Budget (OMB) has played, in particular the Office of Information and Regulatory Affairs (OIRA). This will focus on how the administration has exerted influence over the regulatory process and how it has controlled the flow of information out of the White House.

In the fourth section, I will conclude with a discussion of the unitary executive and what it means for those who are not just interested in presidential power, but also are interested in our constitutional system of separation of powers. In particular, I will discuss the power of precedent to executive branch actions, and why it is important for us to not only pay attention to what has been happening within the executive branch but also to explain why it is important to challenge presidential unilateral action.

Part II: Historical Overview of the Unitary Executive

The unitary executive rests upon the “approach” of “departmentalism” or “coordinate construction”:

This approach holds that all three branches of the federal government have the power and duty to interpret the Constitution and that the meaning of the Constitution is determined through the dynamic interaction of all three branches.⁸

The importance of departmentalism to the unitary executive is it provides a constitutional underpinning for the president’s interpretive power, which lies at the heart of the unitary executive. Departmentalism can be traced to “Federalist 49,” in which Madison writes: “The several departments being perfectly co-ordinate by the terms of

⁸ Yoo, Christopher S., Steven G. Calabresi, and Anthony Colangelo. “The Unitary Executive in the Modern Era, 1945-2001.” <http://law.vanderbilt.edu/faculty/pubs/yoo-unitaryexecinmodernera.pdf> pg. 6.

their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.”⁹

Departmentalism has the support of at least one Supreme Court justice. In a 1987 concurring decision, Justice Antonin Scalia wrote that “...it was not enough simply to repose the power to execute the laws (or to appoint) in the President; it was also necessary to provide him with the means to resist legislative encroachment upon that power. The means selected were various, including a separate political constituency, to which he alone was responsible, and the power to veto encroaching laws...or even to disregard them when they are unconstitutional.”¹⁰

It is important to understand departmentalism in order to understand the unitary executive. The unitary executive rests upon the independent power of the president to resist encroachments upon the prerogatives of his office and to control the executive branch. The three integral components of the unitary executive are “the president’s power to remove subordinate policy-making officials at will, the president’s power to direct the manner in which subordinate officials’ exercise discretionary executive power, and the president’s power to veto or nullify such official’s exercises of discretionary executive power.”¹¹

The first component was settled, for the most part, a long time ago. It was the struggle between Andrew Johnson and the Congress over the “Tenure in Office” act and finalized, for all intents and purposes, by the Supreme Court in 1926 in the case “Myers v

⁹ Madison, James. “Federalist 49.” *The Federalist Papers*. <http://www.constitution.org/fed/federa49.htm>. Accessed May 16, 2002.

¹⁰ Scalia, Antonin. *Freytag v. Commissioner* (90-762), 501 U.S. 868 (1991).

¹¹ Yoo et. al. pg. 7

U.S.”¹² The second and third components are the source of the real conflict that has existed between the president and a number of external actors since Watergate and will be the focus of most of the discussion of this paper.

The unitary executive largely draws from two sources within the Constitution—the “Oath”¹³ and “Take Care”¹⁴ clauses of Article II. The “Oath” requirement acts as a sort of shield, protecting the president from enforcing things he independently determines is unconstitutional. The “Oath” clause directs the president to “faithfully execute the Office of the President and [to] preserve, protect, and defend the Constitution of the United States.” It is mostly the duty of the attorney general to protect the prerogatives of the president, but it is not limited to the attorney general. Currently, in addition to the Department of Justice, there are a number of White House officials who insure that none of the president’s Article II powers are infringed upon or that the president is not enforcing or defending sections of law deemed to be unconstitutional.

An example of how the “Oath” clause gives the president an independent power to decide what is and is not constitutional can be found in the recent controversy surrounding the executive branch’s use of the “prepackaged news story” or in common parlance, the “video news release,” or VNR.

The VNR is technically a press release in video form. It is a 90-second video piece that, in this case, the executive branch agencies put together and then distributed to local news stations all across the country. On the envelope it was marked that it was a news story put together by one of the executive branch agencies, but in the news segment itself the VNR was virtually indistinguishable from a standard news story.

¹² 272 U.S. 52. 1926.

¹³ Article II, Section 1.

¹⁴ Article II, Section 3.

Two reporters for the *New York Times* found that “at least 20 federal agencies, including the Defense Department and the Census Bureau, have made and distributed hundreds” of these VNR’s during President Bush’s first term.¹⁵ In nearly every instance, the local television station did not inform its viewers that the news piece was actually made by a government agency.

The Government Accountability Office (GAO) had found a number of these VNR’s violated a “governmentwide ban on the use of appropriated funds for purposes of ‘publicity or propaganda.’”¹⁶ Simply affixing a label on the envelope describing the VNR as a government produced video piece is not good enough, according to the GAO. The fact that “television-viewing audiences did not know that stories they watched on television news programs *about the government* were, in fact, prepared *by the government*.”¹⁷ The GAO report went on to find that agencies had the right to provide the public with information about government programs, but “may not use appropriated funds to produce or distribute prepackaged news stories intended to be viewed by television audiences that conceal or do not clearly identify for the television viewing audience that the agency was the source of those materials.”¹⁸

In a press conference, President Bush was asked whether the executive branch agencies would cease using the VNR in light of the report from the GAO. President Bush, however, referenced a Justice Department opinion that found the use of the VNR to

¹⁵ Barstow, David and Robin Stein. “Under Bush, a New Age of Prepackaged Television News.” *The New York Times*. Sunday, March 13, 2005. pg. 1.

¹⁶ Walker, David M. “Memorandum for Heads of Departments, Agencies, and Others Concerned *Re: Prepackaged News Stories*.” United States Government Accountability Office. February 17, 2005.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

be completely within the law, and perhaps it was the problem of local television stations in failing to tell their audiences that the VNR was prepared by the government.¹⁹

In an opinion by the Justice Department's OLC²⁰, and circulated to the executive branch agencies by the OMB,²¹ Steven G. Bradbury argued that the VNR was the "television equivalent of the printed press release" and so long as there was not "advocacy of a particular viewpoint" they were perfectly legal.²² So despite the finding of the GAO, the investigative arm of the Congress, that the executive branch had violated the law, the president (through the OLC) independently interpreted that the executive branch had not.

The "Take Care" clause requires the president, with the advice and assistance of his inferior officers, to take care that the laws are faithfully executed. As Michael Herz has argued, the "Take Care" clause insures that the president will not only execute the law personally, but also it obligates him to oversee the executive branch agencies to insure that they are faithfully executing the laws.²³ And this explicitly means that the agencies are executing the law according to the president's wishes, "as opposed to some independent policy goal."²⁴ Why is this? It is because the president is the only nationally elected official and as such, is independently responsible to the electorate. As Elena Kagan argues, "When Congress delegates discretionary authority to an agency official,

¹⁹ Bush, George W. "Press Conference." March 16, 2005.

<http://www.whitehouse.gov/news/releases/2005/03/20050316-3.html>

²⁰ Bradbury, Steven G. "Memorandum for the General Counsel's of the Executive Branch. *Re: Whether Appropriations may be Used for Informational Video News Releases*. U.S. Department of Justice, Office of Legal Counsel. March 1, 2005.

²¹ Bolton, Joshua B. "Memorandum for Heads of Departments and Agencies." Office of Management and Budget. March 11, 2005.

²² Bradbury.

²³ Herz, Michael. "Imposing Unified Executive Branch Statutory Interpretation." *Cardozo Law Review*. 15:1-2. October, 1993. pp. 252-53.

²⁴ *Ibid.* pp. 252-53.

because that official is a subordinate of the President, it is so granting discretionary authority (unless otherwise specified) to the President.”²⁵ After Congress has passed a bill, it lacks the ability of oversight, thus leaving it to the president to ensure it is faithfully executed.

There are some who argue that the unitary executive has existed since the Washington administration. In particular, Steven Calabresi and Christopher Yoo have launched an ambitious project (in part with other scholars) to date the unitary executive to the Washington administration.²⁶ They attempt to examine a variety of presidential actions—the presidential removal power to the independent counsel statute—to highlight how presidents have always aggressively pushed the principles of the unitary executive. While others have challenged their argument,²⁷ it is not my intent to use this paper to engage that debate. My purpose is to argue for the last 30 years, something changed within the American political environment that made it very difficult for any president to govern. And it is in this time period in which the unitary executive theory is the most explanatory.

I have argued in other places²⁸ that the twin circumstances of Vietnam and Watergate profoundly changed the American presidency, over and beyond the other

²⁵ Kagan, Elena. “Presidential Administration.” *Harvard Law Review*. 114:8 June 2001. pg.2327.

²⁶ Calabresi, Steven G. and Christopher S. Yoo. “The Removal Power: The Unitary Executive during the First Half-Century.” *Case Western Reserve Law Review*. 47:1451. Summer, 1997; Calabresi, Steven G. and Christopher S. Yoo. “The Unitary Executive during the Second Half-Century.” *Harvard Journal of Law and Public Policy*. 26:668. 2003; Calabresi, Steven G., Christopher S. Yoo, and Laurence Nee. “The Unitary Executive during the Third Half-Century: 1889-1945.” *Notre Dame Law Review*. 2004; and Calabresi, Steven G., Christopher S. Yoo, and Anthony Colangelo. “The Unitary Executive During the Modern Era: 1945-2004.” *Iowa Law Review*. 2004.

²⁷ See, for example, Froomkin, Michael. “The Imperial Presidency’s New Vestments.” *Northwestern University Law Review*. 88:1346. 1994; as well as Sunstein, Cass R. “The Myth of the Unitary Executive.” *American University Administrative Law Journal*. 7:299. Summer, 1993.

²⁸ Kelley, Christopher S. ed. Executing the Constitution: Putting the President Back into the Constitution. NY: SUNY Press. 2005.

changes it brought to the political system.²⁹ In one respect, the faith and trust placed into the presidency was broken as a result of the lies of Vietnam and Watergate. Congress unleashed an assault on presidential prerogatives, seeking to rein in the “imperial presidency.” It was up to some very creative people who worked either in the White House or in the Department of Justice (particularly the OLC) to fight back all of these attempts to strip the president of his powers. Thus by the end of the 1970s many feared that an imperial presidency had become an “imperiled” presidency.³⁰

On the other end, presidents were still expected to lead, but leading in this new environment would be nearly impossible. If the president would be unable to reach out to the Congress in the manner he once had, then he would have to turn inwards and govern through administrative actions. An administrative strategy would allow the president to accomplish through the executive branch agencies what he was unable to accomplish legislatively. Thus it was during this period that all sorts of creative “power tools”³¹ were used extensively—the executive order, administrative clearance, unilateral policy declarations, signing statements, and so forth.

The unitary executive has mostly been championed by the founding members of the “Federalist Society,” a group of conservative lawyers who nearly all worked in the

²⁹ Such as the decline of the political party, the rise of interest group politics, the change in the mass media, the change in elections, and so forth.

³⁰ After Watergate and the publication of Arthur Schlesinger’s The Imperial Presidency Boston, Houghton Mifflin, 1973, the public and the Congress sought to rein in presidential power. The presidencies of Ford and Carter caused many to worry that the presidency was hobbled to the extent that the separation of powers was tilted dangerously towards the Congress. See, for example Genovese, Michael A. The Power of the American Presidency: 1789-2000. Oxford, 2001. Chapter 7. The term, “imperiled presidency” was highlighted by Gerald Ford, who proclaimed in a 1980 interview for “Time” magazine that “[We] have not an imperial presidency but an imperiled presidency. Under today’s rules... the presidency does not operate effectively... That is harmful to our overall national interests”. Wasser, Hartmut. “Politics and Politicians in Current Democratic Systems or: Democracy and its Discontents.” A paper presented at Democracy and the New Millennium International Conference Malibu, California October 2000. http://www.civiced.org/german_conference2000_wasser.html. Accessed 7/16/02.

³¹ See, for example, Cooper, Phillip. By Order of the President: The Use and Abuse of Executive Direct Action. Kansas: University of Kansas Press. 2002.

Nixon, Ford, and Reagan White Houses and who understood the type of political climate the president operated in and understood what it took in order to succeed. Thus, the individuals who have written the most prolifically towards the unitary executive theory were also former members of the Reagan legal team—Calabresi, Ed Meese, Michael Stokes Paulsen, Douglas Kmiec, and Johnathan Yoo, to name a few.

Presidential Power: Hard or Soft?

The dominant explanation of presidential power still resides in Richard Neustadt's "Modern Presidency,"³² with its emphasis on the ability of a president to bargain and persuade.

Neustadt envisioned a weak president who was constantly under pressure from domestic interest groups, foreign governments, members of his own party, his cabinet appointees, the media, the American public, and especially the Congress. Even more problematic, the office of the presidency provided very few powers for the president to navigate this hostile terrain. Hence, power rested upon the ability of the person who occupied the office to see to it that others came to share his vision if the presidency was to be successful. Ever since the FDR presidency, presidential scholars have measured presidential power by the president's standing with the public (public opinion polls) or his success in the Congress (number of members who vote with the administration's plan). It was deemed a failure if a president had to rely upon the presidential veto since that indicated an inability of a president to bargain and persuade.

The unitary executive theory is fundamentally different. It assumes hostility in the external political environment and seeks to aggressively push the constitutional

³² Neustadt, Richard E. Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan. New York: Free Press. 1990.

boundaries to protect the prerogatives of the office and to advance the president's policy preferences—something Ryan Barilleaux terms “venture constitutionalism.”³³

We can witness the hard power of the unitary executive to protect the prerogatives of the presidency in such instances as the battle against the legislative veto, against comptroller general (an agent of Congress) involvement in executive branch affairs, and a battle against the attempt by Congress to establish executive branch departments and officers immune from presidential control. It also involves the unilateral attempt by the president to gain control over the executive branch regulatory process.

Defense of Prerogatives

1. The Legislative Veto

The legislative veto was used extensively in the 1970s when Congress would delegate power to the executive branch but stipulate that whenever the power was used the executive branch agency would need to inform the Congress, or just one house and in some instances one committee, for approval or disapproval of the use of the power.³⁴

Beginning with the Carter administration, the executive branch took the position that it was not obligated to defend or enforce the legislative veto because “[O]nce a function has been delegated to the executive branch, it must be performed there, and cannot be subjected to continuing congressional control except through the constitutional process of enacting new legislation.”³⁵

³³ Barilleaux, Ryan. “Venture Constitutionalism” in Kelley, Christopher S. ed. Executing the Constitution: Putting the President Back into the Constitution. NY: SUNY Press. 2005.

³⁴ See Korn, Jessica. The Power of Separation: America Constitutionalism and the Myth of the Legislative Veto. New Jersey: Princeton University Press. 1996.

³⁵ Civiletti, Benjamin. “Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President.” 4A Op. O.L.C. 21, 27. 1980, quoted in OLC “Memorandum for the General Counsels of the Federal Government.” <http://www.usdoj.gov/olc/delly.htm>.

The Reagan administration would continue to challenge the legislative veto (despite a pledge during the 1980 campaign promising it would not) by taking over the case initiated by the Carter administration challenging the constitutionality of the legislative veto. In “INS v Chadha”,³⁶ the Supreme Court found the legislative veto in violation of the Constitution and relied in part in its decision on a history of presidential objections to the use of the device by Congress.³⁷

2. *The Comptroller General*

In the mid-1980s, in the face of soaring budget deficits, President Reagan was forced to sign legislation that would eliminate the deficit by the early 1990s. “The Balanced Budget and Deficit Control Act, 1985,”³⁸ or more popularly known as “Gramm-Rudman-Hollings,” ordered the comptroller general to sequester funds should the Congress and the president fail to produce a balanced budget in each year after the law went into effect.

When President Reagan signed the bill,³⁹ he issued two constitutional objections to sections of the bill. First, in an objection rooted in the separation of powers, he argued that both the directors of the Congressional Budget Office and the comptroller general were given executive powers, yet were not appointed by the president and as such could not be considered executive officers under the Constitution. Second, he argued that the responsibilities given to the comptroller general to sequester appropriated money violated the Supreme Court’s ruling in *Chadha*.

³⁶ 462 U.S. 919 (1983).

³⁷ See footnote 13 of the decision.

³⁸ P.L.99-177.

³⁹ Reagan, Ronald. “Statement on Signing H.J.Res 372 into Law.” *Weekly Compilation of Presidential Documents*, Vol. 21. December 12, 1985. pp. 1490-91.

In 1986, in a challenge⁴⁰ to Gramm-Rudman-Hollings, the Supreme Court agreed with President Reagan and even relied on his objections when he signed the bill into law.⁴¹

3. *Control of Inferior Departments and Officers*

Finally, in the late 1990s the Clinton administration was embarrassed by security breaches at the nation's nuclear laboratories. In response, the Congress established the "National Nuclear Security Administration" and provided it with a director who would enjoy semi-autonomy from the Secretary of Energy (and ostensibly from the president as well) to care for "the safety, reliability, and effectiveness of the U.S. nuclear weapons stockpile, nuclear non-proliferation, and naval nuclear reactors."⁴² Further, the Congress mandated the only way in which the new Director may be removed would be for "inefficiency, neglect of duty, or malfeasance in office."⁴³ When President Clinton signed the bill, he objected to the infringement upon his power to control inferior officers and further objected to the stipulations on which individuals may be removed. He defined "neglect of duty" to mean "among other things, a failure to comply with the lawful directives of policies of the President."⁴⁴

Control over the Executive Branch Regulatory Process

The second way we can witness the hard power of the unitary executive is in the manner in which the president has gained leverage over the executive branch regulatory

⁴⁰ *Bowsher v Synar*, 478 U.S. 714 (1986).

⁴¹ See footnote one of the decision

⁴² Spence, Floyd D. "Statement of Chairman Floyd Spence, Full Committee Hearing on National Nuclear Security Administration." March 2, 2000.

<http://www.house.gov/hasc/openingstatementsandpressreleases/106thcongress/00-03-02spence.pdf>

⁴³ "Making appropriations for the Departments of Veterans Affairs and Housing and Urban Development, and for sundry independent agencies, boards, commissions, corporations, and offices for the fiscal year ending September 30, 2001, and for other purposes." P.L. 106-377. October 27, 2000.

⁴⁴ Clinton, William J. "Statement on Signing the Fiscal Year 2001 Appropriations Legislation—H.R. 4635." *Weekly Compilation of Presidential Documents*. Vol. 36, No. 44. November 6, 2000. pg. 2660.

process. It was the Nixon administration that deserves credit as the first presidency to attempt to systematically gain control over the executive branch agencies, a strategy that ended up failing in large part due to Watergate.⁴⁵ All was not lost, however. The Ford and Carter administrations steadily added to the efforts of the Nixon administration, yet the first president to gain leverage over the executive branch agencies was the Reagan administration.

The executive branch agencies had consistently proven to be an obstacle to the policy objectives of any president, Democrat or Republican. In the years following Watergate, with all the cards stacked against the presidency, it was imperative that if a president were to lead, he would have to work through the bureaucratic agencies.

For the Reagan administration, this would involve a two-part strategy of strategic appointments and boosting the authority of the OMB to insure the executive branch agency heads made decisions with the president's preferences in mind.

The plan to gain control over the bureaucracy was laid out for the Reagan administration prior to Reagan's inauguration in 1981. The Heritage Foundation released a report, Mandate for Leadership⁴⁶ which urged the new administration to aggressively assert control over administration discretion if it was to be effective. This meant picking Reagan loyalists for key bureaucratic positions and to centralize policymaking within the Executive Office of the President.

On the first, former Attorney General Ed Meese stated: "[W]e sought to ensure that all political appointees in the agencies were vetted through the White House

⁴⁵ See Nathan, Richard P. The Plot that Failed: Nixon and the Administrative Presidency. New York: Wiley. 1975.

⁴⁶ Heatherly, Charles L. Mandate for Leadership: Policy Management in a Conservative Administration. Heritage Foundation. Washington, D.C. 1981.

personnel process, and to have a series of orientation seminars for all high-ranking officials on the various aspects of the Reagan program. We wanted our appointees to be the President's ambassadors to the agencies, not the other way around."⁴⁷ As I will discuss below, this has been a similar strategy used by the current Bush administration to ensure the executive branch, as much as possible, speaks and thinks similar to the president.

The second strategy involved a greater role for the OMB in administrative clearance—a form of gatekeeping to insure that the executive branch was following the president's lead and not, for example, being led astray by external forces such as powerful members of Congress or particularized interest groups.

In order to do this, President Reagan relied on a tool that has recently sparked a great deal of scholarly interest, the executive order.⁴⁸ In two executive orders, Executive Order 12,291 and 12,498 the Reagan administration was able to gain a strategic advantage over the executive branch regulatory process.

Executive Order 12,291⁴⁹ had two key components. The first, which required "major" rules (defined as those having a projected economic impact in excess of one hundred million dollars per year) to be submitted to the OMB's Office of Information and Regulatory Affairs (OIRA)—the entity that the Reagan Director referred to as "the toughest kid on the block"⁵⁰—sixty-days before the publication of the notice in the *Federal Register*, and than again thirty-days before their publication as a final rule. The

⁴⁷ Meese, Edwin. With Reagan: The Inside Story. Washington: Regnery Gateway. 1992. pg. 77.

⁴⁸ See Mayer, Kenneth R. With the Stroke of a Pen: Executive Orders and Presidential Power. N.J.: Princeton University Press. 2001.

⁴⁹ 46 Federal Register 131937. February, 1981.

⁵⁰ Cooper, Joseph and William F. West. "Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules." *Journal of Politics*. 50:4, November 1988. pp. 873-74

second component, which dealt with non-major rules (those that cost less than one hundred million dollars per year), required their submission to the OMB ten days prior to notice in the *Federal Register* and ten days prior to final publication. The OMB was empowered “to stay the publication of notice of proposed rulemaking or the promulgation of a final regulation by requiring that agencies respond to its criticisms, and ultimately it may recommend the withdrawal of regulations which cannot be reformulated to meet its objections.”⁵¹

Executive Order 12,498⁵² enhanced the value of 12,291. 12,498 was designed to influence agency rulemaking prior to the analysis of a potential rule—that is to say, regulators would now be required to submit to the OIRA any regulation that they might consider in the coming year.

When the two were put together it allowed the Reagan administration a “good deal of informal monitoring and communication.”⁵³ In the words of one EPA staffer, “...you don’t spend two years thinking about a regulation without thinking about whether OMB is going to shoot it down.”⁵⁴ An added bonus for the president’s control over administrative discretion came by way of the Supreme Court. In *Chevron v the Natural Resources Defense Council*,⁵⁵ the Court allowed the executive branch agencies to exercise reasonable statutory interpretation in the absence of congressional intent. In essence, for the Reagan administration this meant that in the absence of congressional intent,

⁵¹ Ibid. pp. 870-71.

⁵² 50 Federal Register 1036. January, 1985.

⁵³ Cooper and West. pg. 876

⁵⁴ Ibid. pg. 876.

⁵⁵ 467 U.S. 837, (1984) at 837.

interpretation of the law was up to political officers under the direction of the White House.⁵⁶

Despite Congresses attempt in the first Bush administration to temper the control that OMB had exercised during the Reagan era by refusing to reauthorize OIRA or to confirm Bush's nominee of OIRA's director, the Bush administration simply pushed regulatory control into the White House Office. The Council on Competitiveness was extremely effective in pushing the Bush administration's policy preferences through the regulatory agencies, in many instances enabling the administration to win battles lost in Congress.⁵⁷

President Clinton did more to move the executive branch agencies closer to White House control⁵⁸ than either the Reagan or Bush presidencies. When President Clinton suffered the 1994 midterm defeat and loss of party control of Congress, an administrative strategy would be necessary to accomplish a number of President Clinton's policy objectives.

On his first day in office, President Clinton issued a memorandum that terminated the Council on Competitiveness and subjected all regulations to the approval of "an agency head or the designee of an agency head who, in either case, is a person appointed by me and confirmed by the Senate."⁵⁹ Less than a week after he was inaugurated he signed an executive order that centralized control over U.S. economic policy within a

⁵⁶ Email interview with Douglas Kmiec, April 23, 2001.

⁵⁷ For example, see Herz, Michael. "Imposing Unified Executive Branch Statutory Interpretation." *Cardozo Law Review*. 15:1-2. October, 1993.

⁵⁸ Kagan, Elena. "Presidential Administration." *Harvard Law Review*. 114:8 June 2001. pg. 2317.

⁵⁹ Clinton, William J. "Memorandum on Review of Regulations." *Weekly Compilation of Presidential Documents*. Vol. 29, No. 4. January 21, 1993. pg. 93.

handful of political appointees in the White House.⁶⁰ Further, in September, 1993 President Clinton issued a memorandum to all department and agency heads that was designed to streamline the relationship the president had with bureaucratic agency heads, including connecting with the heads of the independent regulatory agencies, which to this point had been relatively free of executive branch pressure.⁶¹

Clinton's most significant action came in October, 1993 when he issued Executive Order 12,866.⁶² 12,866 replaced Executive Orders 12,291 and 12,498, though it incorporated some of their key provisions that dealt with the regulatory oversight role of the OMB as well as the annual regulatory planning process. Cost-benefit analysis was still a criterion to judge whether a new regulation or a change to an existing regulation was necessary, and OIRA was still allowed to block any regulation actions from proceeding to final publication in the *Federal Register*.

The key differences it had with the Reagan orders was it made the rulemaking process more transparent by publishing all communications made between OIRA and any outside group, and the cost-benefit analysis approach was tempered in some policy areas by such qualitative measures as health, safety, and the environment.⁶³ But the most important change to the previous executive orders is the involvement of the independent regulatory agencies in the planning process. As one Bush administration official observed, the Clinton administration accepted and perfected "the Unitarian premises of

⁶⁰ Clinton, William J. "Executive Order 12,835—Establishment of the National Economic Council." *Federal Register*. Vol.58, No. 16. January 27, 1993. pp. 6189-90.

⁶¹ Clinton, William J. "Memorandum on Streamlining the Bureaucracy." *Weekly Compilation of Presidential Documents*. Vol. 29, No. 37. Washington D.C.: Government Printing Office September 11, 1993. pg. 1738-39

⁶² Clinton, William J. "Executive Order 12,866—Regulatory Planning and Review." *Federal Register*. Vol. 58, 190. Washington D.C.: Government Printing Office. October 4, 1993. pp. 51735-51744.

⁶³ *Ibid.* Section 4(C)(D). pg. 51739.

the Reagan and Bush administrations.”⁶⁴ It was clear that with this new executive order, the president’s priorities would be front and center in the agency decisionmaking process.

Thus as Clinton policy advisor Elena Kagan notes, the Clinton administration was able to influence the regulatory agencies in a couple of ways: “At the front end of the regulatory process, Clinton regularly issued formal directives⁶⁵ to the heads of executive agencies to set the terms of administrative action and prevent deviation from his proposed course. And at the back end of the process (which could not but affect prior stages as well), Clinton personally appropriated significant regulatory action through communicative strategies that presented regulations and other agency work product, to both the public and other governmental actors, as his own, in a way new to the annals of administrative process.”⁶⁶

Thus far I have explained what the unitary executive is and the two constitutional principles upon which it stands. Further, I have explained that it has been important to the presidency since Watergate to protect the prerogatives of the executive branch and to advance the president’s policy preferences through the executive branch agencies, all the while making sure that agency heads responded to the president and not to any external actor. I have illustrated these two concepts by focusing on key developments in the Reagan, Bush, and Clinton presidencies. I have done this in order to set up how the George W. Bush presidency would be able to take advantage of the work done by those three presidencies that came before, but even more important how the current Bush

⁶⁴ Blumstein, James F. “Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues.” *Duke Law Journal*. Vol. 51, No. 851. December, 2001. pg. 874.

⁶⁵ Professor Kagan notes that once the directive was issued, the White House paid close attention to the agency to make sure that the “agency officials complied in a timely and effective way with the directive’s terms and exercised any discretion left to them consistently with its objectives.” Kagan. “Presidential Administration.” pg. 2298.

⁶⁶ *Ibid.* pg. 2249.

presidency has perfected the unitary presidency. I will now turn my focus to the unitary executive and the current Bush presidency.

Part III: The Unitary Executive and the Bush Presidency

This section will focus on how the unitary executive has been perfected in the current Bush presidency. I will start by demonstrating just how the Bush team approached the challenges of governing after the 2000 election and how this differs from the Neustadt approach. I will then discuss how the Bush administration has aggressively protected presidential prerogatives via use of the presidential signing statement, before turning my attention to how the administration has gained leverage over the executive branch, both in pushing its policy preferences as well as protecting information from outside forces, such as Congress or public watchdog groups.

Background

The liberal executive branch watchdog “OMBWatch” wrote in the February 22, 2005 issue of the “OMB Watcher” that the

“White House has provided many examples of imperial presidency gestures throughout the Bush administration, from the decision in the first term to constrict the applicability of the Freedom of Information Act to the recent request in the Iraq war supplemental for over \$5 billion in unrestricted foreign aid that senators from both parties are decrying as a ‘slush fund.’ The consequences of an imperial presidency are tremendous for openness and government accountability, of course, but a few key recent examples of proposed and anticipated measures suggest the public interest consequences of an imperial presidency for regulatory protections.”⁶⁷

⁶⁷ “Emperor Bush?” *OMB Watcher*. Vol 6, No. 4. February 22, 2005. <http://www.ombwatch.org/article/articleprint/2692/-1/321/>

From the moment that the Bush administration took office in January 2001, journalists, Democrats, and academics have had a difficult time explaining the manner in which the Bush administration has governed. Following the 2000 presidential election, in which Governor Bush lost the popular vote but won after a Supreme Court decision⁶⁸ intervened and stopped the recount in Florida, it was expected that the new Bush administration would govern cautiously from the center. The reason for this had everything to do with the focus on the “Modern Presidency,” noted above. Power, according to this theory, came to a new administration from winning a decisive election. Decisive elections meant the support of the public, and the support of the public would bring the ability to influence the Congress to follow the president’s policy preferences. Clearly in an election in which the candidate lost the popular vote, his ability to govern would be greatly diminished.

The Bush administration however took a different route. Immediately upon taking office he put a two-month hold on all the rules passed in the waning days of the Clinton administration in order to give his people time to review them.⁶⁹ Further, less than a week later he issued an executive order establishing an “Office of Faith-Based Initiatives,”⁷⁰ a controversial campaign promise that opened up federal money for religious institutions in addition to private charities. Less than a month later, President Bush issued a series of executive orders,⁷¹ all on the same day, designed to undercut the authority of organized labor, a direct provocation of his opposition.

⁶⁸ Bush v Gore, 531 US 98. 2000.

⁶⁹ Zaneski, Cyril T. “Rule Breakers.” *Government Executive*.
<http://www.govexec.com/features/0102/0102s4.htm>

⁷⁰ Bush, George W. “Executive Order 13199—Establishment of White House Office of Faith-Based and Community Initiatives.” *Federal Register*. Vol. 66, No. 21. January 29, 2001.

⁷¹ Bush, George W. “Executive Order 13201—Notification of Employee Rights Concerning Payment of Union Dues or Fees.” *Federal Register*. Vol. 66, No. 36. February 17, 2001; “Executive Order 13202—

Further, in the course of his first year in office, his administration sought to terminate offices Clinton established that dealt with AIDS and race; he unilaterally ordered limited federal funding for embryonic stem cell research, and then only on lines that were in existence at the time of his decision; he frustrated Congressional Republicans by evoking executive privilege when the House Committee on Government Reform wanted information relating to the Clinton Justice Department.

Internationally, he removed the United States from the ABM Treaty with Russia and commenced funding of the “Star Wars” program; and he upset most of the world, including our allies, when he withdrew from the Kyoto Protocol. Then of course following the “9/11” attacks against the United States, he exercised great constitutional latitude in detaining citizens and non-citizens and denying them access to the courts, blocked the U.S. based finances of those individuals and institutions suspected of terrorism, and pushed through the Congress the “PATRIOT Act” which gave the administration extensive powers to investigate those suspected of terrorism and defend the United States against future terrorist attacks.⁷²

Given what the “Modern Presidency” model tells us about presidential power under the circumstances in which President Bush was elected, how could he possibly have been so bold to execute the numerous actions he did in his first year alone? Part of it has to do with the “9/11” attacks, but clearly even without those attacks, the Bush

Preservation of Open Competition and Government Neutrality Towards Government Contractors’ Labor Relations on Federal and Federally Funded Construction Projects.” .” *Federal Register*. Vol. 66, No. 36. February 17, 2001; “Executive Order 13203—Revocation of Executive Order and Presidential Memorandum Concerning Labor-Management Partnerships.” .” *Federal Register*. Vol. 66, No. 36. February 17, 2001; “Executive Order 13204—Revocation of Executive Order on Nondisplacement of Qualified Workers Under Certain Contracts.” .” *Federal Register*. Vol. 66, No. 36. February 17, 2001.

⁷² Simendinger, Alexis. “Results-Oriented President Uses Levers of Power.” *Government Executive Magazine*. <http://www.govexec.com/dailyfed/0102/012502nj2.htm>. January 25, 2002.

administration still would have acted unilaterally wherever it could, consistently pushing the boundaries of presidential power.

Vice-President Cheney offers the most cogent explanation to the question raised above. Prior to Bush's second inaugural, Cheney argued that once installed as the president in 2001, the administration governed as if it did have a mandate: "Even after we went through all of that [2000 election], he never wanted to allow...the closeness of our election to in any way diminish the power of the presidency, lead him to make a decision that he needed to somehow trim his sails, and be less than a fully authorized, if you will, commander in chief, leader of our government, president of the United States."⁷³

Cheney and a number of Bush's lieutenant's understand the importance of the president governing from a position of power and it is largely a result of these people that the Bush administration has been so forcefully "Unitarian" in its approach to presidential power.

Cheney, who served as Ford's chief of staff understands what it means to work in an administration that is under assault from external political forces. You could argue that his time in the Ford administration, then as in the minority in Congress during the Reagan years, and finally as a Secretary of Defense during the administration of the George H.W. Bush has had a psychological effect on his view of the presidency. Cheney told the "Washington Post's" Dana Milbank last fall: "I have repeatedly seen an erosion of the powers and the ability of the president of the United States to do his job," arguing that it had been wrong for previous president's to give in to congressional demands.⁷⁴ For

⁷³ Woodward, Bob. "Cheney Upholds Power of the Presidency." *Washington Post*. January 20, 2005. pg. A07.

⁷⁴ Milbank, Dana. "In Cheney's Shadow, Counsel Pushes the Conservative Cause." *Washington Post*. October 11, 2004. pg. A21.

instance, Cheney referred to the Iran-Contra investigation, which dealt a severe political blow to the Reagan administration, as an attempt by Congress to “criminalize a policy difference between the president and Congress.”⁷⁵

In addition to Cheney, his chief counsel David Addington, who has been with Cheney since his days as Secretary of Defense, also is zealous in his pursuit of the unitary executive. Addington played the point man on the torture memo, has been a prime advocate of detaining suspects connected to terrorism without access to the courts, and has been vigorous in his defense of withholding information from Congress and the public.⁷⁶ For instance, it was Addington who lead the charge to keep secret the details of the “Energy Task Force” formed in 2001, and the focus of a Supreme Court decision in 2004.⁷⁷ Addington scrutinizes every page of the federal budget looking for anything that might infringe upon presidential power (discussed below), and meets daily “with [the] White House counsel” to discuss the varied ways in which legislation may infringe upon the authority of the president.⁷⁸

Bush’s White House Counsel’s office and his OLC have also been instrumental in aggressively pushing the principles of the unitary executive. First, there were the two memos written by deputy attorneys-general in the OLC that lead to the justification of torture of suspected terrorists.⁷⁹ In those memos, the lawyers for the OLC argued that international law prohibiting torture that the U.S. had long respected could not in any way interfere with the president’s constitutional prerogative to manage a military campaign.

⁷⁵ Woodward. pg. A01.

⁷⁶ Milbank. pg. A01.

⁷⁷ “Cheney v United States District Court for D.C.” 03-475. June 24, 2004.

⁷⁸ Milbank. pg. A01.

⁷⁹ See Yoo, John. “Memorandum to The Honorable Alberto R. Gonzales.” *Office of Legal Counsel*. August 1, 2002; Bybee, Jay S. “Memorandum for Alberto R. Gonzales: *Re: Standards of Conduct for Interrogation under 18 U.S.C. Sections 2340-2340A*.” *Office of Legal Counsel*. August 1, 2002.

It was this “Unitarian” perspective that left Anthony Lewis perplexed when he wrote in a “New York Review of Books article: “The assertion in the various legal memoranda that the President can order the torture of prisoners despite statutes and treaties forbidding it were another reach for presidential hegemony. The basic premise of the American constitutional system is that those who hold power are subject to the law...[the] Bush lawyers seem ready to substitute something like the divine right of kings.”⁸⁰

The memos, however, reflected what one should expect in a unitary executive approach to power. And it doesn’t stop with the OLC. One of President Bush’s more ardent supporters of the unitary executive was his friend and then-White House Counsel Alberto Gonzales. In a speech Gonzales gave in 2002 before the American Bar Association, he summed up the unitary executive approach nicely when he said:

The President, as head of the executive branch and the Commander-in-Chief of our armed forces and the only political leader directly accountable to all Americans, has the unique personal responsibility to ensure the safety and security of our citizens. The Framers in the *Federalist Papers* spoke explicitly about the need for a unitary executive presidency precisely to allow for bigger effectiveness and accountability in the conduct of our foreign and military affairs.⁸¹

The Unitary Executive in Practice

The Signing Statement

The presidential signing statement has gotten very little attention by most presidency scholars, who have long regarded them as nothing more than rhetorical devices. They have been taken very seriously by presidents as a means to advance both

⁸⁰ Lewis, Anthony. “Making Torture Legal.” *New York Review of Books*. Vol. 51, No. 12. July 15, 2004.

⁸¹ Simendinger, Alexis. “Results-Oriented President Uses Levers of Power.” *Government Executive Magazine*. <http://www.govexec.com/dailyfed/0102/012502nj2.htm>. January 25, 2002.

of the key principles of the unitary executive argued in this paper—to protect the prerogatives of the office and to control the executive branch to insure it works towards the president’s policy preferences.

The presidential signing statement dates back to the Monroe administration, in which Monroe refused to enforce a section of a law he had just signed because it infringed with his appointment powers.⁸² They came into extensive, systematic use during the Reagan administration when Reagan looked for ways in which he could protect the prerogatives of his office from a Democrat-controlled Congress. He also used the signing statement as a way to instruct the executive branch agencies on how they should interpret vague or ill-defined sections of a law absent congressional intent.

To do this, the Justice Department in 1986 added the signing statement to the “Legislative History” section of the “United States Code, Congressional and Administrative News.” This was done, according to Attorney-General Ed Meese:

To make sure that the President’s own understanding of what’s in a bill is the same...or is given consideration at the time of statutory construction later on by a court, we have now arranged with West Publishing Company that the presidential statement on the signing of a bill will accompany the legislative history from Congress so that all can be available to the court for future construction of what that statute really means.⁸³

Further, by inserting the signing statement into the legislative history had another advantage in providing guidance for executive branch agencies on what the president’s position was on a particular provision of law. Douglas Kmiec, who worked in the OLC

⁸² Kelley, Christopher S. The Unitary Executive and the Presidential Signing Statement. Unpublished dissertation on file at <http://www.ohiolink.edu/etd/view.cgi?miami1057716977>.

⁸³ Quoted in Garber, Marc N. and Kurt A. Wimmer. “Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power,” *Harvard Journal on Legislation* 24:263, pg. 367.

during the Reagan administration, said of the signing statement's inclusion: "It was crucial for the administration to give executive top-down on inevitable interpretation, rather than relying solely upon the far less transparent judgment of someone in an executive agency applying the law for the first time."⁸⁴

I have already noted above how valuable the signing statement was in protecting the prerogatives of the Office of the Presidency. The Supreme Court twice in the 1980s relied upon the president's defense of his prerogatives in deciding two important cases—the *Chadha* decision and the *Bowsher* decision. To demonstrate its importance in providing guidance to the executive branch agencies, one need only look at how the Reagan administration used it to win back policy that was important for a key Reagan constituency—the business community.

During the congressional battle over immigration reform in the 1980s, the Congress was able to hammer out a bill⁸⁵ in 1986 that overhauled immigration law in the United States. One section of the bill, which was highly contentious, dealt with the firing of individuals and protection against discrimination. The section⁸⁶ of the bill was added by Congressman Barney Frank (D. MA) arguing that anyone who was let go because of discrimination could gain recourse through the federal courts. The burden of proof in the Frank provision was left to business to prove that a person was fired for reasons other than race, religion, ethnicity, personal handicap, or country of origin. However, in the Senate there was no such provision to the bill and when the bill went to conference, the Frank provision was left in but the definition of discrimination was stripped out.

⁸⁴ Email interview with Kmiec, April 23, 2001.

⁸⁵ "Immigration Reform and Control Act, 1986." Public Law 99-603. 1986.

⁸⁶ Section 247B.

When the bill was sent to President Reagan, he defined discrimination in his signing statement in a way that shifted the burden of proof upon the employee who had been let go, something Frank protested as “intellectually dishonest” and as telling “the bigots how to be smart and evade the law.”⁸⁷

The signing statement, because of the aggressiveness to which the Reagan administration pushed it as an important tool to advance presidential power, became standard fare for all administrations that followed. In fact, both the Bush I administration and the Clinton administration made sure to not only aggressively use the signing statement to protect presidential prerogative but also as a policy tool.

One way to insure the signing statement would become institutionalized was to continue to aggressively use it to push presidential power. The Bush I administration, for example, worked with fellow Republicans in Congress to create an alternative legislative history on important bills. The alternative legislative history would contain certain policy or principles that the administration had lost in its negotiations with the Democrats. Thus when President Bush signed the bill into law, he would use the signing statement to direct executive branch agencies to the alternative legislative history as guidance of congressional intent.⁸⁸

A second way to insure institutionalization of the signing statement was to issue legal opinions building support for their use, both historically and contemporarily. The OLC during the Clinton administration issued two⁸⁹ sweeping opinions in defense of the

⁸⁷ Killenbeck, Mark R. “A Matter of Mere Approval? The Role of the President in the Creation of Legislative History.” *Arkansas Law Review*. 48: 239. 1995. pg. 272.

⁸⁸ See for example Tiefer, Charles. *The Semi-Sovereign Presidency: The Bush Administration’s Strategy for Governing without Congress*. Boulder: Westview Press. 1994.

⁸⁹ Dellinger, Walter. “Memorandum for Bernard N. Nussbaum: *Re: The Legal Significance of Presidential Signing Statements*.” *Office of Legal Counsel*. <http://www.usdoj.gov/olc/signing.htm>. November 3, 1993; Dellinger, Walter. “Memorandum for the Honorable Abner J. Mikva. *Re: Presidential Authority to Decline*

presidential signing statement. Both noted the historical use of the signing statement and more importantly argued that principles of “coordinancy” suggested a role for the president to independently interpret the constitutionality of legislation for himself:

If the President may properly decline to enforce a law, at least when it unconstitutionally encroaches on his powers, then it arguably follows that he may properly announce to Congress and to the public that he will not enforce a provision of an enactment he is signing. If so, then a signing statement that challenges what the President determines to be an unconstitutional encroachment on his power, or that announces the President's unwillingness to enforce (or willingness to litigate) such a provision, can be a valid and reasonable exercise of Presidential authority.⁹⁰

The third and final way to insure institutionalization of the signing statement was to aggressively use it whenever signing bills into law. Prior to the Reagan administration, the use of the signing statement in a serious way—to protect presidential prerogatives and to signal to the bureaucracy the president’s interpretation of a bill—was sporadic at best. Most of the signing statements were rhetorical in nature, as a way to congratulate certain members of Congress for their work on a bill or to admonish the Congress for not following the president’s wishes. However, with the Reagan administration, all of this changed.

From the Monroe administration to the Carter administration, the executive branch issued a total of 75 signing statements that protected presidential prerogatives and

to Executive Unconstitutional Statutes. Office of Legal Counsel. <http://www.usdoj.gov/olc/nonexecut.htm> November 2, 1994.

⁹⁰ Ibid.

a total of 34 statements instructing the executive branch agencies on the interpretation of sections of the bill.⁹¹ From the Reagan administration through the Clinton administration, the numbers in both categories jumped dramatically. The number of statements protecting executive branch prerogatives went from a total of 75 for all presidents up to the Carter administration to 322, and the number of instructions to executive branch agencies on the interpretations of provisions of the law went from a total of 34 to 74.⁹² This demonstrates the importance those three presidents placed upon “Unitarian” principles and it has been lost, for the most part, on nearly all of us who are interested in presidential power.

How has the current Bush administration stacked up? How has it used the presidential signing statement? Has it continued the upward trend from the previous administrations? The answer is clearly in the affirmative.

The Bush administration has far surpassed previous administrations in its reliance upon the signing statement as a valuable resource in protecting the prerogatives of the president and in controlling the executive branch agencies. Most of the Bush strategy reflects the attention to detail in which David Addington and others pay to any encroachment upon presidential power.

In Bush’s first term alone, he made 435 statements, mostly objecting to encroachments upon presidential prerogatives. In a number of bills, President Bush has made dozens of objections within one bill alone. This mostly reflects the nature of the legislation presented to the president, which often takes the form of large omnibus bills containing appropriations for a variety of different programs. For example, in signing the

⁹¹ Kelley, Christopher S. The Unitary Executive and the Presidential Signing Statement. Unpublished dissertation on file at <http://www.ohiolink.edu/etd/view.cgi?miami1057716977>.

⁹² Ibid.

“Consolidated Appropriations Act, 2005”⁹³, President Bush issued 116 specific objections to nearly every provision of the bill. For instance, President Bush writes:

Many provisions of the Consolidated Appropriations act are inconsistent with the constitutional authority of the President to conduct foreign affairs, command the Armed Forces, protect sensitive information, supervise the unitary executive branch, make appointments, and make recommendations to the Congress. Many other provisions unconstitutionally condition execution of the laws by the executive branch upon approval by congressional committees.⁹⁴

A second bill to demonstrate how the administration varies its objections to a particular bill, no matter how innocuous the bill may be, can be found in the signing statement that accompanied the “Vision 100-Century of Aviation Reauthorization Act.”⁹⁵ In that Act, President Bush made ten separate objections that covered appointment violations, interference with his right to supervise the executive branch, and provisions that ran afoul of his political opposition to affirmative action programs.

For example, on the interference with his ability to make appointments, President Bush objected to Section 106(p) (7) (B) (iii) of the Act because it “...purports to limit the qualifications of the pool of persons from whom the President may select ATSC (Air Traffic Services Subcommittee) members in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the office.

Congressional participation in such appointments is limited by the Appointments Clause

⁹³ Public Law No. 108-447.

⁹⁴ Bush, George W. “Statement on Signing the Consolidated Appropriations Act, 2005.” *Weekly Compilation of Presidential Documents*. December 8, 2004. pg. 2924.

⁹⁵ Public Law 108-176. December 12, 2003.

of the Constitution ...[and he shall] construe the provisions...as is consistent with the Appointments Clause.”⁹⁶

In another section of the law, President Bush seeks to make sure that two specific executive branch agencies award scholarships based on merit and nothing more: “The executive branch shall implement sections 702 and 703 of the Act, which relate to the award of certain government scholarships, in a manner consistent with the equal protection requirements of the Due Process Clause of the Fifth Amendment to the Constitution.”⁹⁷

Section 702 directed the FAA administrator to create a “Federal Aviation Administration Science and Technology Scholarship Program” in order to “recruit and prepare students for careers in the FAA,”⁹⁸ while Section 703 directed the Administrator of NASA to “establish a National Aeronautics and Space Administration Science and Technology Scholarship Program” to “recruit and prepare students for careers in NASA.”⁹⁹

In the Committee Reports¹⁰⁰ for both sections referred to in Bush’s signing statement, part of the criteria in awarding the scholarships was not just academic merit, but also for “financial need and the goal of promoting the participation of individuals identified in section 33 or 34 of the Science and Engineering Equal Opportunities Act.”¹⁰¹

Title 42 U.S.C 1885 (a) & (b) require federal agencies that deal with the sciences to do more to bring about more women and minorities in science, engineering, and technology

⁹⁶ Bush, George W. “Statement on Signing the Vision 100—Century of Aviation Reauthorization Act.” *Weekly Compilation of Presidential Documents*. Monday, December 22, 2003. pg. 1796.

⁹⁷ *Ibid.* pg. 1796.

⁹⁸ Public Law 108-176, Title VII, Section 702.

⁹⁹ *Ibid.* Section 703.

¹⁰⁰ House Report 108-334. “Vision 100—Century of Aviation Reauthorization Act;” House Report 108-240. “Vision 100—Century of Aviation Reauthorization Act.”

¹⁰¹ House Report 108-334, Section 703 (a)(2); House Report 108-240, Section 702 (a)(2).

and it is this provision in which President Bush orders the FAA and NASA to award the scholarships based on merit only, despite what existing law says to the contrary.

All of these signing statements issued by the President did not go without notice by the Congress. In an instance of provoking a congressional response, the Bush administration attempted to narrow an important provision of a bill that had significant congressional and public support.

In the wake of the corporate scandals that roared through the United States in 2001-2002, the Congress passed the “Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002,” better known as “Sarbanes-Oxley.”¹⁰²The aim of the Act was to restore public trust in corporate accountability by forcing corporations to be more transparent in their auditing procedures and to guarantee broader protections for whistleblowers.

When President Bush signed the bill into law, he issued two separate signing statements—a formal signing statement¹⁰³ that was 1,527 words and an informal statement¹⁰⁴ that was 298 words in length. Presidents dating to the Reagan administration had instituted the practice on significant legislation of issuing a formal signing statement, mostly in a Rose Garden assembly, that was intended for public consumption. The ceremony was both grand and “flowery,” in which the president outlines the importance of the bill, signals his support for its principles, and applauds those members of Congress for their hard work. It is this statement in which most scholars viewed the relative

¹⁰² Public Law No. 107-204. July, 2002.

¹⁰³ Bush, George W. “Statement on Signing the Sarbanes-Oxley Act of 2002.” *Weekly Compilation of Presidential Documents*. July 30, 2002. pp. 1283-1285.

¹⁰⁴ Bush, George W. “Statement on Signing the Sarbanes-Oxley Act of 2002.” *Weekly Compilation of Presidential Documents*. July 30, 2002. pg. 1286.

importance of the signing statement itself—a rhetorical device used by communications strategists inside the administration to symbolize the president at work.

It is the informal statements that are worthy of attention, however. They are, as Ross Perot would say, the “devil in the details.” In his written statement, the president argues:

Given that the legislative purpose of section 1514A of title 18 of the U.S. Code, enacted by section 806 of the Act, is to protect against company retaliation for lawful cooperation with investigations and not to define the scope of investigative authority or to grant new investigative authority, the executive branch shall construe section 1514A(a)(1)(B) as referring to investigations authorized by the rules of the Senate or the House of Representatives and conducted for a proper legislative purpose.¹⁰⁵

This set off a firestorm inside the Senate with two members that had devoted a great deal of work on the bill: Senators Charles Grassley (R.IA) and Patrick Leahy (D.VT). They objected to what they perceived as a chilling effect on whistleblowers in only reporting wrongdoing to an appropriate congressional committee that was already conducting an investigation on the particular issue at hand. On July 31, they sent a letter to the President expressing their “shared concern made by the White House staff only hours after you signed the Act into law.” They called the President’s interpretation a “narrow interpretation...at odds with the plain language of the statute and risks chilling corporate whistleblowers who wish to report securities fraud to Members of Congress.”¹⁰⁶ The following day, Alberto Gonzales, White House Counselor to the

¹⁰⁵ Ibid. pg. 1286.

¹⁰⁶ Leahy, Patrick and Charles Grassley. “Letter to the Honorable George W. Bush.” July 31, 2002. <http://www.pogo.org/m/gp/gp-Gonzales-2002731.pdf>.

President responded to the Leahy-Grassley letter by stating “the President shares your view of the importance” of the whistleblower protections and is “committed to strong enforcement of this provision, as well as the other provisions of the Act.”¹⁰⁷ He argued that the President’s statement “provides guidance to the executive branch in construing the provision only on a single, very narrow point” that dealt with what would be construed as an “investigation” for the purposes of the Act.¹⁰⁸

This seemed to cause more confusion than clarity for the two Senators. On the very same day they received the Gonzales letter, they sent back a letter in response “to ensure there is no confusion on this matter, and in light of seemingly broader interpretations provided by White House spokespersons.”¹⁰⁹ They noted that their “desire is to protect the well-intentioned employee who contacts his elected representatives (or any representative for that matter) and NOT require that employee to consult the *Congressional Directory* and *Congressional Record* prior to making his call to determine whether he/she will be afforded the whistleblower protections of the Act.”¹¹⁰

Additionally, outside public interest groups also filed letters with President Bush asking him to reconsider the narrow interpretation given when he signed the bill into law. The Government Accountability Project, a nonpartisan organization that has long been active in lobbying for comprehensive whistleblower protections. They wrote that

¹⁰⁷ Gonzales, Alberto R. “Letter to The Honorable Patrick J. Leahy and The Honorable Charles B. Grassley.” August 1, 2002. <http://www.pogo.org/m/gp/gp-Gonzales-2002731.pdf>.

¹⁰⁸ Ibid.

¹⁰⁹ Leahy, Patrick J. and Charles E. Grassley. “Letter to The Honorable Alberto R. Gonzales.” August 1, 2002. <http://www.pogo.org/m/gp/gp-Gonzales-2002731.pdf>.

¹¹⁰ Ibid.

President Bush's interpretation in effect was more akin to a veto even though he signed it into law.¹¹¹ Their legal director, Thomas Devine wrote:

We are concerned your statements could have a severe chilling effect that dilutes the law's potential to combat corporate fraud most effectively. Understandably, would-be whistleblowers may choose to remain silent observers instead of bearing witness, if they think they continue to proceed without rights at their own risk. If your statements were taken literally, that would continue to be a whistleblower's reality except in the most climatic circumstances of congressional oversight.¹¹²

This was the last that the Senators heard on the matter until October, when an action taken by the Acting Solicitor for the Department of Labor drew their ire once more. The Acting Solicitor, Eugene Scalia, the son of Supreme Court Associate Justice Antonin Scalia, filed an amicus brief¹¹³ with the Department of Labor administrative review board "seeking to overturn a \$200,000 punitive damage award won by Assistant U.S. Attorney Gregory C. Sasse of Ohio in a whistle-blower case against the Justice Department."¹¹⁴

The case dealt with contacts Sasse had with Congressman Dennis Kucinich (D. OH) regarding toxic waste that was dumped on federal property with the knowledge of the Department of Justice. Once the Department of Justice learned that Sasse had been the person who blew the whistle, his "supervisors downgraded his performance reviews,

¹¹¹ Devine, Thomas. "Letter to The Honorable George W. Bush." *Government Accountability Project*. http://www.whistleblower.org/corporate/sox_bush_letter.htm. August 1, 2002.

¹¹² Ibid.

¹¹³ Gregory C. Sasse v Office of the United States Attorney, United States Department of Justice. ARB Case Nos. 02-077 and 02-078; ALJ Case No. 1998-CAA-7. 2002. http://www.peer.org/docs/dol/scalia_amicus_brief.pdf.

¹¹⁴ Lee, Christopher. "Whistle-Blower Case at Issue; Senators Deery Intervention by Labor Department Solicitor." *Washington Post*. October 25, 2002. pg. A27.

failed to grant him training opportunities and removed him from some cases” in retaliation.¹¹⁵

In Scalia’s brief, he applied the narrow construction used in President Bush’s signing statement of “Sarbanes-Oxley.” He tried to argue that since Kucinich was not part of any on-going congressional committee investigation, Sasse’s discussions with the Congressman was not protected under the whistleblower provisions of the Act.

Senator Grassley, outraged by this interpretation, sent another letter to Alberto Gonzales noting his disappointment for not receiving a response to his and Leahy’s August letter and further noting that Scalia’s interpretation “would limit protections to only those whistleblowers lucky enough to find the one Member of Congress out of 535 who is the Chairman of the appropriate committee who also just happens to be already conducting an investigation.”¹¹⁶

After continued pressure, the administration finally relented by January, 2003 to accept the more expansive reading of the whistleblower provision of “Sarbanes-Oxley.” The new Acting Solicitor for the Department of Labor, Howard M. Radzely, reversed the Scalia interpretation and sent notice to Senators Grassley and Leahy noting:

It is the Department’s view that under Sarbanes-Oxley, complaints to individual Members of Congress are protected, even if such Member is not conducting an ongoing Committee investigation within the jurisdiction of a particular Congressional committee, provided that the complaint relates

¹¹⁵ Ibid. pg. A27.

¹¹⁶ Grassley, Charles E. “Letter to The Honorable Alberto R. Gonzales.” October 31, 2002. <http://grassley.senate.gov/releases/2002/p02r10-31.htm>.

to conduct that the employee reasonably believes to be a violation of one of the enumerated laws or regulations.¹¹⁷

This episode left a particularly poor taste with Senator Leahy. In an amendment to the “21st Century Department of Justice Appropriations Authorization Act,”¹¹⁸ Leahy added a section¹¹⁹ to title 28 of the United States Code that required the Department of Justice to inform Congress in any instance in which the executive branch either refused to enforce a section of law it deemed to be unconstitutional or refused to defend a statute that it determined to be unconstitutional. It also required the executive branch to report any unilateral action the executive branch took that had the possibility of diminishing the authority of the Congress. It is clear that Leahy had no idea the ramifications of presidential unilateral action and was looking to get a handle on how many times the executive branch was deliberately disobeying the wishes of Congress as expressed in legislation presented to the president for his signature or by way of memoranda, executive orders, or presidential directives.

It is not clear whether Leahy was even aware¹²⁰ of the signing statement President Bush made to the Department of Justice appropriations authorization bill. In it, President Bush issued nine separate challenges to the bill, one of which focused upon Leahy’s amendment. President Bush wrote:

Section 202 of the Act adds a new section 530D to title 28, United States Code, that purports to impose on the executive branch substantial obligations for reporting to the Congress activities of the Department of

¹¹⁷ Radzely, Howard M., Acting Solicitor, Department of Labor. “Letter to The Honorable Charles E. Grassley and The Honorable Patrick J. Leahy.” <http://grassley.senate.gov/releases/2003/p03r01-27b.htm>. January 27, 2003.

¹¹⁸ Public Law No. 107-273.

¹¹⁹ Section 530D

¹²⁰ I have filed a FOIA request with the Attorney General’s office in order to determine how often they have complied with this section of the law.

Justice involving challenges to or nonenforcement of law that conflicts with the Constitution. The executive branch shall construe section 530D of title 28, and related provisions in section 202 of the Act, in a manner consistent with the constitutional authorities of the President to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. To implement section 202(b)(3) of the Act, the Attorney General, on my behalf, shall advise the heads of executive agencies of the enactment of section 202 and of this direction concerning construction of that section and section 530D of title 28. Furthermore, section 202(a) requires that the President report to the Congress the issuance of any "unclassified Executive Order or similar memorandum or order" that establishes or implements a policy of intra-circuit non-acquiescence or of refraining from enforcing, applying, or administering a Federal statute, rule, regulation, program, or policy on the ground that it is unconstitutional. Based upon the text and structure of this section, the executive branch shall construe this reporting obligation to cover only unclassified orders in writing that are officially promulgated and are not included in the reports of the Attorney General or other Federal officers to whom this section applies.¹²¹

Controlling the Executive Branch

The second crucial part of the unitary executive is the ability for the president to control the executive branch—whether it is to control information from outside actors, such as the Congress, the news media, or public interest groups or to control the regulatory process so that it benefits presidential policies or key constituencies.

¹²¹ Bush, George W. Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act." *Weekly Compilation of Presidential Documents*. November 2, 2002. pp. 1971-1973.

The Bush administration has excelled in this second part to the chagrin of its opponents. This section will look first at the manner in which the Bush administration has used the OMB—especially the OIRA—as a means to control the regulatory process, using a variety of tools given to it by the Clinton administration, and second it will examine the emphasis the administration has placed on controlling information and oversight.

Controlling the Regulatory Process

As I discussed earlier, beginning with the Reagan administration, there has been a concerted effort by presidents to gain leverage over the executive branch as a means to achieve policy goals when dealing with a hostile Congress. Further, since Watergate, Congress has taken more of an interest in oversight into executive branch activities, prompting presidents to be more vigorous in protecting the deliberative process that takes place in the executive branch.

The Clinton administration, as I suggested earlier, revised the means by which the president monitored the executive branch in issuing Executive Order 12,866, which overturned the Reagan orders giving more central regulatory oversight to the OIRA. The Bush administration, rather than revising the Clinton order, has actually embraced it as a powerful tool in managing the regulatory process.

President Bush appointed Dr. John Graham as his Administrator of OIRA. Graham, who had been the head of Harvard's Center for Risk Analysis, issued a Memorandum to the executive branch agencies in which he interpreted for them the meaning of Executive Order 12,866.¹²² Graham interpreted 12,866 to reflect his interest

¹²² Graham, John D. "Memorandum for the President's Management Council: *Re: Presidential Review of Agency Rulemaking by OIRA*." September 20, 2001. http://www.whitehouse.gov/omb/inforeg/oira_review-

in cost-benefit analysis. He highlighted the importance of Regulatory Impact Analysis (RIA) as a way of helping agencies to choose those regulatory approaches that provide the “maximum net benefits.”¹²³ To help agencies prepare their RIA’s, each agency is required to submit a draft to be reviewed “by agency economists, engineers, and scientists” prior to their submission to OIRA for approval.¹²⁴ OIRA had final say when an agency could issue a final rule.¹²⁵

The memo also included a description of procedures that would allow OIRA a greater role in influencing the outcome of the final regulations—the “return” letter, the “post-review” letter and finally the “prompt” letter.¹²⁶

The “return” letter, which had always been a part of the Executive Order, allowed OIRA to send a rule back to the agency for reconsideration: “Such a return may occur if the quality of the agency’s analyses is inadequate.”¹²⁷ During the eight years of the Clinton administration, OIRA had sent a total of nine “return” letters to executive branch agencies compared to the 16 “return” letters the Bush OIRA had sent in 2001 alone.¹²⁸

The “post-review” letter “allow the agency to proceed to issue the proposed regulations, but they do critique the options proposed and/or the regulatory analysis supporting the draft proposal.”¹²⁹ To date, the Bush OIRA has issued nine¹³⁰ of these letters to the various executive branch agencies, and all complain that the rule does not

process.html. Interestingly enough, Andrew Card had issued a Memorandum the same day to the heads of the executive branch agencies stating that Graham’s memo would serve as a temporary order until the President issued his own executive order revising the Clinton order. That order has never been issued.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ All of these can be found at the OMB’s webpage at <http://www.whitehouse.gov/omb/inforeg/regpol.html>.

¹²⁷ Graham, John D. “Memorandum for the President’s Management Council: *Re: Presidential Review of Agency Rulemaking by OIRA.*”

¹²⁸ Dudley, Susan E. “Bush’s Rejuvenated OIRA.” *Mercatus Reports*. Winter, 2001. pg. 6.

¹²⁹ Ibid. pg. 6.

¹³⁰ “Post-Review Letters.” *RegInfo.gov*. <http://www.reginfo.gov/public/jsp/EO/postReviewLetters.jsp>.

present a net benefit to society and question whether the administration should work with the Congress for a revision of the law in order to provide regulatory relief.

And finally, the “prompt” letter was created out of Graham’s interpretation of what 12,866 meant by extending OIRA’s influence over the agencies “foreseeable regulatory priorities.”¹³¹ The purpose of the “prompt” letter, according to Graham, “is to suggest an issue that OMB believes is worthy of agency priority.”¹³² It allows the OMB to identify worthy regulations and move them ahead due to their benefit to society. In one such “prompt” letter, for example, OIRA identified an OSHA proposed regulations dealing with defibrillators in the workplace, which the prompt letter notes that “[R]ecent articles in the *New England Journal of Medicine* found they increased lifesaving effectiveness by 38% over workplaces that did not have the device.¹³³ As one OMB watchdog group notes, the “prompt” letter on its own does not represent a problem, and in fact some may be helpful. The problem it raises is OIRA involving itself in the agency decision making process when OIRA does not have the expertise on staff to decide which rules should be expedited and which should not. For example, in the “prompt” letter mentioned above “seems to have been sent because Graham happened to have read a couple of journal articles. This hardly seems a sound foundation on which to base agency priority setting.”¹³⁴

It has been clear that the use of Executive Order 12,866, along with a number of other measures used by the administration and its supporters in the business community

¹³¹ Graham, John D. “Memorandum for the President’s Management Council: *Re: Presidential Review of Agency Rulemaking by OIRA.*”

¹³² Ibid.

¹³³ Graham, John D. “Letter to the Occupational Safety and Health Administration, *Re: Automated External Defibrillators.* September 18, 2001. http://www.reginfo.gov/public/prompt/osha_prompt_letter.html.

¹³⁴ “Graham Reasserts White House Regulatory Review.” *OMB Watch.* <http://www.ombwatch.org/article/articleview/416/1/4/. 2/20/02>.

has enabled the administration greater leverage over the regulatory process. For example, the *Washington Post* and *The New York Times* last summer devoted an extraordinarily detailed series of articles¹³⁵ on the connection between the business community and the OMB (in particularly OIRA) to write regulations (or rewrite regulations) in a manner that benefited the business community.

The articles found, for example, that the “administration, at the request of lumber and paper companies, gave Forest Service Managers the right to approve logging in federal forests without the usual environmental reviews.”¹³⁶ Or, that OSHA, during Bush’s first term, had “eliminated nearly five times as many pending standards as it has completed, [nor] has it started any major new health or safety rules, setting Bush apart from the previous three presidents, including Ronald Reagan.”¹³⁷ And finally the administration, along with industry and other anti-regulation groups have exploited a little known law “slipped into a giant appropriations bill in 2000 without congressional discussion or debate...directing the OMB to ensure that all information disseminated by the federal government is reliable.”¹³⁸ “The Data Quality Act,” which was written by Jim Tozzi of the “Center for Regulatory Effectiveness”¹³⁹ when he was a congressional staffer, allows anyone to challenge any regulation by claiming that the science backing the regulation is not reliable nor has reached a level of scientific certainty. The use of the

¹³⁵ Brinkley, Joel. “Out of Spotlight, Bush Overhauls U.S. Regulations.” *The New York Times*. August 14, 2004. <http://www.nytimes.com/2004/08/14/politics/14bush.html>; Goldstein, Amy and Sarah Cohen. “Bush Forces a Shift in Regulatory Thrust.” *Washington Post*. Sunday, August 14, 2004. pg. A01; Weiss, Rick. “Data Quality’ Law is Nemesis of Regulation.” *Washington Post*. Monday, August 16, 2004. pg. A01; and Warrick, Joby. “Appalachia is Paying Price for White House Rule Change.” *Washington Post*. Tuesday, August 17, 2004. pg. A01.

¹³⁶ Brinkley, Joel. “Out of Spotlight, Bush Overhauls U.S. Regulations.” *The New York Times*. August 14, 2004. <http://www.nytimes.com/2004/08/14/politics/14bush.html>.

¹³⁷ Goldstein, Amy and Sarah Cohen. “Bush Forces a Shift in Regulatory Thrust.” *Washington Post*. Sunday, August 14, 2004. pg. A01.

¹³⁸ Weiss, Rick. “Data Quality’ Law is Nemesis of Regulation.” *Washington Post*. Monday, August 16, 2004. pg. A01.

¹³⁹ <http://www.thecre.com>.

Act by the administration caused a number of scholars in the scientific community, many Nobel prize winners, as well as some Members of Congress to accuse the administration of politicizing science.¹⁴⁰

Controlling Information

On the other side of this issue is the leverage the Bush administration exerts in withholding information from the Congress, the media, public watchdog groups, and the general public.

As one report found, “[T]here are three main categories of federal open government laws: (1) laws that provide public access to federal records; (2) laws that allow government to restrict public access to federal information; and (3) laws that provide for congressional access to federal records. In each area, the Bush Administration has acted to restrict the amount of government information that is available.”¹⁴¹ Among the many restrictions the report cited was administrative efforts to hinder “Freedom of Information Act (FOIA)” requests of executive branch agencies, which included anything from raising fees on materials that each agency copied to a memo issued by John Ashcroft that assured executive branch agencies that they would have Department of Justice protections should they deny a FOIA request.¹⁴²

¹⁴⁰ See for example Union of Concerned Scientists. “Scientific Integrity in Policymaking: Further Investigation of the Bush Administration’s Misuse of Science.” July 2004. http://www.ucsusa.org/global_environment/rsi/index.cfm; And “Politics and Science in the Bush Administration.” United States House of Representatives Committee on Government Reform—Minority Staff Special Investigations Division. August 2003. http://www.house.gov/reform/min/politicsandscience/pdfs/pdf_politics_and_science_rep.pdf.

¹⁴¹ “Secrecy in the Bush Administration.” Minority Staff Special Investigation Division—United States House of Representatives Committee on Government Reform. September 14, 2004. <http://www.democrats.reform.house.gov>.

¹⁴² Ashcroft, John. “Memorandum for Heads of All Federal Departments and Agencies, *Re: The Freedom of Information Act*.” <http://www.usdoj.gov/04foia/011012.htm>. October 12, 2001.

The Bush administration has also increased the number of records that are classified, especially following the 9/11 attacks. For example, from 2001 to 2003, “the average number of original decisions to classify information increased 50% over the average for the previous five years.”¹⁴³ In addition, a recent GAO report found that the Department of Defense classified “about 50% of the reports it submitted to Congress” despite the fact that “only a small amount of the data contained in each report is actually classified.”¹⁴⁴ This not only has a negative impact on the democratic need for openness in government, but it also has a monetary cost to society that comes with overclassification—classified material “involves special handling procedures [that] must be used by those congressional staff with the appropriate clearances event to access the unclassified” parts of the report.¹⁴⁵ The GAO estimates that the DOD classification of data for FY 2003 alone cost the government \$454 billion.¹⁴⁶

A third area that drew the ire of the scholarly community was Bush’s issuance of Executive Order 13223 which superseded President Reagan’s Executive Order 12267. Both Executive Orders dealt with the 1978 “Presidential Records Act,” which established procedures for the release of presidential papers after the occupant had been out of office for twelve years.

Under Bush’s Executive Order, “former presidents may assert executive privilege over their own papers, even if the incumbent president disagrees. [It] also gives a sitting

¹⁴³ “Secrecy in the Bush Administration.” Minority Staff Special Investigation Division—United States House of Representatives Committee on Government Reform. September 14, 2004.

<http://www.democrats.reform.house.gov>. pg. vi.

¹⁴⁴ “Defense Acquisitions: Information for Congress on Performance of Major Programs Can be More Complete, Timely, and Accessible.” United States Government Accountability Office, Report to the Subcommittee on Defense, Committee on Appropriations, U.S. Senate. <http://www.fas.org/sgp/gao/gao-05-182.pdf>. March, 2005.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

president the power to assert executive privilege over a past administration's papers, even if the former president disagrees."¹⁴⁷ To overcome the standard established by the Bush Executive Order, a person would have to demonstrate a "specific need for president records," a higher standard than contained in the 1978 Act.¹⁴⁸ As Mark Rozell argues, "[I]n a nutshell, the administration is trying to expand executive privilege substantially to cover what existing statutes and regulations already cover."¹⁴⁹ Better safe than sorry.

Finally, the fight to gain access to Vice President Cheney's Energy Task Force represents just how serious the administration takes the protection of executive branch information and prerogatives.

On January 29, 2001, President Bush made remarks in support of a memorandum he had just issued establishing the National Energy Policy Development Group to come up with recommendations with what the President described as energy needs that outstripped supply.¹⁵⁰ Vice President Cheney was given oversight of a group that would consist of "six cabinet secretaries, as well as several agency heads and assistants to the President."¹⁵¹ Further, the Vice-President was "authorized to invite 'other officers of the Federal Government' to participate as appropriate."¹⁵²

¹⁴⁷ Rozell, Mark J. "Executive Privilege in an Era of Polarized Politics" in Kelley, Christopher S. ed. Executing the Constitution: Putting the President Back into the Constitution. SUNY Press. 2005.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ "Remarks by the President at Energy Policy Meeting." January 29, 2001. <http://www.whitehouse.gov/news/releases/20010129-1.html>.

¹⁵¹ "In re: Richard B. Cheney, Vice President of the United States, et al." United States Court of Appeals for the District of Columbia. No. 02-5354. Argued April 17, 2003. Decided July 8, 2003. <http://laws.findlaw.com/dc/025354a.html>.

¹⁵² Ibid.

In May 2001, the Energy Task Force released its report¹⁵³ to the President amid a great deal of controversy. Critics charged that the report was “heavily biased in favor of the most polluting fossil fuels -- coal and oil -- at the expense of the environment and public health.”¹⁵⁴ One claim in particular dogged the administration—that the energy plan was actually the work of big energy companies to the exclusion of a more balanced approach.

Prior to the release of the report, in April 2001, members of Congress began to send letters to the Task Force asking for information on who was attending these meetings. For example, on April 19, 2001, Representatives John Dingell and Henry Waxman sent a letter to Andrew Lundquist, Executive Director of the National Energy Policy Development Group, noting that a number of meetings “were taking place behind closed doors and exclude certain parties from participation in its discussions may violate the letter and the spirit of the Federal Advisory Committee Act (FACA).”¹⁵⁵ The two members asked Mr. Lundquist to turn over the names of those non-federal officials who had attended any meeting of the Task Force. Two days later, Representatives Dingell and Waxman also sent a similar letter to David Walker, Comptroller General of the GAO, asking Mr. Walker to “immediately undertake an investigation of the President’s energy policy task force” in order to find out which non-governmental individuals attended the meetings of the Task Force and what, if any, sorts of things were discussed.¹⁵⁶

¹⁵³ “Reliable, Affordable, and Environmentally Sound Energy for America’s Future.” Report of the National Energy Policy Development Group. May 17, 2001. <http://www.whitehouse.gov/energy/>

¹⁵⁴ “Slower, Costlier and Dirtier: A Critique of the Bush Energy Plan.” Natural Resources Defense Council. May 17, 2001. <http://www.nrdc.org/air/energy/scd/scdinx.asp>.

¹⁵⁵ Letter from Representatives John Dingell and Henry Waxman to Andrew Lundquist, Executive Director of the National Energy Policy Development Group. April 17, 2001. http://www.house.gov/commerce_democrats/press/107ltr42.htm

¹⁵⁶ Letter from Representatives John Dingell and Henry Waxman to the Honorable David Walker, Comptroller General. April 19, 2001. http://www.house.gov/commerce_democrats/press/107ltr41.htm

Over the course of several weeks, Representatives Dingell and Waxman, along with officials in the GAO, continued to press the Task Force for information on who attended those meetings and what was discussed, with the Task Force continuing to respond that the GAO, as well as members of the Congress, had no authority to make the request.¹⁵⁷

On July 18, 2001, Walker wrote to the Vice President personally and demanded that the Energy Task Force release the information that was being questioned, arguing that the focus was on “factual information, not the deliberative process, regarding how the policy was developed, including the participants, meetings held, their purpose, information gathered, and cost incurred.”¹⁵⁸ In a reply, Vice President Cheney appealed to the Congress, arguing that the Comptroller General had exceeded his authority and that the Energy Task Force was protected by statute and the constitution in not turning over any information it deemed sensitive to the deliberative process.¹⁵⁹

The issue would continue until the tragic events of 9/11, and thus the urgency of the requests would be placed on a back burner while the country struggled to come to terms with and respond to the attacks. At that time, a constitutional suit between the GAO and the Energy Task Force seemed inappropriate. It did not disappear, however. In January 2002, David Walker sent notice to Richard Gephardt that the GAO, after being denied its basic requests for nearly a year, intended to sue the Energy Task Force in an

¹⁵⁷ See, for example, David Addington’s Letter to Anthony Gamboa, General Counsel, GAO: “It appears that the GAO may intend to intrude into the heart of Executive Deliberations, including deliberations among the President, the Vice President, members of the President’s immediate assistants, which the law protects to ensure the candor in Executive deliberations necessary to effective government.” May 16, 2001. http://www.house.gov/commerce_democrats/press/vp.ltr.pdf

¹⁵⁸ Letter from David Walker, Comptroller General of the GAO to Vice President Richard Cheney. July 18, 2001. http://www.house.gov/commerce_democrats/press/gao.demand.ltr.pdf

¹⁵⁹ Letters from Vice President Richard Cheney to the House of Representatives and the United States Senate. August 2, 2001. http://www.house.gov/commerce_democrats/press/cheney.rsp.802.pdf

effort to get the information it requested.¹⁶⁰ On February 22, 2002, the GAO, for the first time in its history, sued the executive branch in an effort to obtain the material it had requested. As David Walker noted in a press release from the GAO, "...given GAO's responsibility to Congress and the American people, we have no other choice."¹⁶¹

Joel Aberbach argues that the suit by the GAO was unusual for three additional reasons other than it was the first time in the GAO's 80 year history that it has had to sue a federal official for information. First, it was unusual considering the fact that David Walker, the Comptroller General bringing the suit, is a Republican and was a delegate to the Republican National Convention in 2000. Second, the GAO is not a partisan entity of the Congress, but rather has been widely regarded over history to be a nonpartisan instrument for the Congress to collect information needed to perform its duties. Third, and most important, the action by Vice President Cheney to reject GAO requests without an assertion by President Bush of executive privilege was an unprecedented assertion of administrative prerogatives.¹⁶² In December 2002, amid controversy, the lawsuit was dismissed by a federal district court because "neither house of Congress (nor any of its committees) had issued a subpoena for the information or formally authorized a suit", thus leaving no standing to sue.¹⁶³

¹⁶⁰ Letter from David Walker, Comptroller General of the GAO, to The Honorable Richard A. Gephardt, Democratic Leader, House of Representatives. January 30, 2002.

http://www.house.gov/commerce_democrats/EnergyTaskForce/13002gaoltr.pdf

¹⁶¹ "GAO Statement Concerning Litigation." Comptroller General's Office. February 22, 2002.

http://www.house.gov/commerce_democrats/EnergyTaskForce/gao-022202.pdf

¹⁶² Aberbach, Joel D. "The State of the Contemporary American Presidency: Or, Is Bush II Actually Ronald Reagan's Heir?" in Campbell, Colin and Bert A. Rockman. The George Bush Presidency: Appraisals and Prospects. Washington D.C.: Congressional Quarterly. 2003. 60.

¹⁶³ Ibid. 60. Additionally, according to *The Hill*, David Walker apparently was pressured not to appeal the decision by Republicans in Congress. The "threat" came in the form of having GAO appropriations cut off if he decided to appeal the decision. See Brand, Peter and Alexander Bolton. "GOP Threats Halted GAO Cheney Suit." *The Hill*. February 19, 2003. <http://www.hillnews.com/news/021903/cheney.aspx>

Meanwhile, during this same period, outside organizations such as the Sierra Club and Judicial Watch were also requesting information, largely in response to the press reports generated about the activities of the task force, about who was in attendance and what was discussed. The claims were made both under the Federal Advisory Committee Act (FACA) and the Freedom of Information Act (FOIA), and these claims were met with the same resistance by the Energy Task Force. Both organizations sued the Energy Task Force, and to simplify the process, the lawsuits were combined and heard in the Federal District Court for the District of Columbia.¹⁶⁴

The administration sought to have the lawsuit dismissed, claiming that the “FACA does not authorize private cause of action, that the Vice President cannot be sued under the [Administrative Procedures Act] APA, and that ‘[a]pplication of FACA to the NEPDG’s operations would directly interfere with the President’s express constitutional authority including his responsibility to recommend legislation to Congress and his power to require opinions of his department heads.’”¹⁶⁵

The federal district court ruled that Judicial Watch and the Sierra Club were entitled to “limited” discovery to determine whether there were indeed private individuals who had taken part in the work of the task force that would have brought the work under the guidance of the FACA. If, after looking over the evidence the court determined that there was not sufficient evidence, the suit would be dismissed.¹⁶⁶ This was all intended to resist the sort of separation of powers claims that the Vice President was making, since

¹⁶⁴ Judicial Watch, Inc. v National Energy Policy Development Group. Civ. Action. 01-1530; Sierra Club v Vice President Richard Cheney, *et al.* Civ. Action 02-631. November 26, 2002.

¹⁶⁵ “In re: Richard B. Cheney, Vice President of the United States, et al.” United States Court of Appeals for the District of Columbia. No. 02-5354. Argued April 17, 2003. Decided July 8, 2003. <http://laws.findlaw.com/dc/025354a.html>.

¹⁶⁶ Greenhouse, Linda. “Justices will Hear Appeal on Cheney’s Energy Panel.” *New York Times*. December 16, 2003. December 16, 2003. <http://www.lexisone.com/news/nlibrary/n121703b.html>

the district court ruled that the Vice President would not have to release information to the public, but would rather release very specific pieces of information to the Court for an *in camera* review.

Rather than submit to the order for limited discovery, the Vice President appealed the decision seeking relief from the lower court decision. The Vice President's appeal rested on two arguments: first "...extending the legislative and judicial powers to compel a Vice President to disclose to private persons the details of the process by which a President obtains information and advice from the Vice President raises separation of powers problems of the first order."¹⁶⁷ Second, the "President should not be forced to 'consider the privilege question' in response to unnecessarily broad or otherwise improper discovery."¹⁶⁸

On the first question, the separation of powers issue, the appellate court ruled that the argument that the administration was making was "hypothetical", since no action by the administration had been taken. If, after the administration had released documents to the Court and the trial was ordered to go forward, only then would the separation of powers claim apply. As it was, the administration had appealed a decision that required an action that the administration had not taken. On the second question, the executive privilege doctrine does not protect the administration from the potential of assertion. It only protects the administration *after* the assertion had been made. Up to this point, the administration had decided not to make an executive privilege claim. Thus, as the appellate court correctly noted, if the courts were to protect an administration from ever

¹⁶⁷ "In re: Richard B. Cheney, Vice President of the United States, et al." United States Court of Appeals for the District of Columbia. No. 02-5354. Argued April 17, 2003. Decided July 8, 2003. <http://laws.findlaw.com/dc/025354a.html>.

¹⁶⁸ Ibid.

invoking executive privilege, the doctrine would be transformed from one that is “designed to protect presidential communications into virtual immunity from suit.”¹⁶⁹ Drawing on *US v Nixon*¹⁷⁰ and *Clinton v Jones*,¹⁷¹ the appellate court ruled that executive privilege does not make the president exempt from the law.

The Vice President, rather than accept the decision of the circuit court, appealed to the Supreme Court for relief from the initial district court decision to provide for limited disclosure of the task force meetings. In December 2003, the Supreme Court agreed to hear the case on appeal. In the Supreme Court decision,¹⁷² delivered June 24, 2004, the Supreme Court overruled the judgment of the lower courts and sided with the administration’s claim that it did not need to exert executive privilege to protect the information of the Energy Task Force.

Part IV—Conclusion

This paper set out to explain a different theory of presidential power that would enhance our understanding of what has taken place in the presidency over the last 25 years. It was not the intent of this paper to make broad claims about the new dominant paradigm to understanding presidential behavior—rather, it has been my hope that an understanding of the unitary executive will help us understanding why presidents have behaved as they have when the ability to bargain and persuade has broken down.

To restate, the unitary executive argues that the president has aggressively pushed the boundaries of constitutional power in order to protect the prerogatives of the Office and to control the executive branch agencies. It has developed over the course of three

¹⁶⁹ Ibid.

¹⁷⁰ 418 U.S. 683 (1974)

¹⁷¹ 520 U.S. 681 (1997)

¹⁷² “Cheney, Vice President of the United States et. al. v. United States District Court for the District of Columbia et al.” No. 03-475. June 24, 2004.

presidencies—Reagan, Bush I, and Clinton. It has only been in the Bush II administration that the unitary executive has fully developed.

President Bush, since the first day of his presidency, has been very aggressive in his defense of presidential power, much to the dismay of his critics and opponents, who have underestimated his administration since the Supreme Court decision in “Bush v. Gore.”

Through the use of presidential signing statements, executive orders, and memoranda, the Bush administration has often governed unilaterally when faced with political and/or constitutional obstacles. While the “Modern Presidency” fails to explain such aggressive use presidential power, the unitary executive does not. I would expect that the theory will continue to be developed through the remainder of Bush’s second term in office, particularly as he comes to be seen more of a lame duck as the political spotlight moves on to the 2008 election. We only need to recall the dramatic use of executive power in the waning days of the Clinton administration to guess what the end of the Bush presidency will look like.

The unitary executive thesis helps us to understand presidential behavior across presidencies, which is an additional reason why we should understand its core tenets. In the first term of the Bush presidency there were a number of criticisms regarding the emergence of a “new imperial presidency.” The fact of the matter is, in the course of the Clinton administration the same sorts of criticism could be heard, only from a different group of opponents.¹⁷³

¹⁷³ See Gaziano, Todd F. “The Use and Abuse of Executive Orders and Other Presidential Directives.” Legal Memorandum #2, *Heritage Foundation*. <http://www.heritage.org/Research/LegalIssues/LM2.cfm>

The problem in these idiosyncratic criticisms of the presidency is it fails to understand how and why presidents push the envelope of constitutional power. And the danger in this is that unilateral actions taken by a president that go unchecked establish a precedent for the benefit of future presidents. And when a precedent is established, the courts are reluctant to find the action unconstitutional if it has gone unanswered by the Congress.

Thus for the current Congress, while it may be seen as a plus to have a co-partisan in the White House who aggressively asserts constitutional power, the problem occurs in the future when their political fortunes turn and a Democrat comes to occupy the White House. Then any chance to check the presidency is difficult since a pattern has been established.

I hope that this paper serves as a signal to all of us interested in our constitutional system of separation of powers and presidential power, that this theory of the unitary executive will help us understand the evolution of power over the past 25 years as well as why a president behaves the way he does when presented with obstacles in his path.

Appendix One
Chronological list of all statements made by George W. Bush containing the term
“unitary executive.”¹⁷⁴

2002

Statement on Signing the Energy and Water Development Appropriations Act, 2002. November 12, 2001

Statement on Signing the National Defense Authorization Act for Fiscal Year 2002. December 28, 2001

2003

Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act. November 2, 2002

Statement on Signing the Homeland Security Act of 2002. November 25, 2002

Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003. September 30, 2002

Statement on Signing the Maritime Transportation Security Act of 2002 November 25, 2002

Statement on Signing the Small Business Paperwork Relief Act of 2002 June 28, 2002

Statement on Signing the National Science Foundation Authorization Act of 2002 December 19, 2002

Statement on Signing the Export-Import Bank Reauthorization Act of 2002 June 14, 2002

Statement on Signing the Intelligence Authorization Act for Fiscal Year 2003 November 27, 2002

Statement on Signing the Sudan Peace Act October 21, 2002

Statement on Signing the E-Government Act of 2002 December 17, 2002

¹⁷⁴ These were taken of a search of the “Weekly Compilation of Presidential Documents” using the search terms “Statement on signing” AND “unitary executive.” <http://www.gpoaccess.gov/wcomp/search.html>

Statement on Signing Legislation To Provide for Improvement of Federal Education Research, Statistics, Evaluation, Information, and Dissemination, and for Other Purposes November 5, 2002

Statement on Signing the Bob Stump National Defense Authorization Act for Fiscal Year 2003 December 2, 2002

Executive Order 13277--Delegation of Certain Authorities and Assignment of Certain Functions Under the Trade Act of 2002 November 19, 2002

2003

Statement on Signing the Intelligence Authorization Act for Fiscal Year 2004 December 13, 2003

Statement on Signing the National Defense Authorization Act for Fiscal Year 2004 November 24, 2003

Statement on Signing the Vision 100--Century of Aviation Reauthorization Act December 12, 2003

Statement on Signing the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 December 8, 2003

Statement on Signing the Federal Law Enforcement Pay and Benefits Parity Act of 2003 December 19, 2003

Statement on Signing the Animal Drug User Fee Act of 2003 November 18, 2003

Statement on Signing the 21st Century Nanotechnology Research and Development Act December 3, 2003

Letter to Congressional Leaders Certifying Actions Responsive to Ratification of the Joint Convention on Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management

Statement on Signing the Energy and Water Development Appropriations Act, 2004 December 1, 2003

Statement on Signing the Strengthen AmeriCorps Program Act July 3, 2003

Statement on Signing the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004 November 6, 2003

Executive Order 13313--Delegation of Certain Congressional Reporting Functions July 31, 2003

Executive Order 13302--Amending Executive Order 13212, Actions To Expedite Energy-Related Projects May 15, 2003

2004

Statement on Signing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005

Statement on Signing the Intelligence Reform and Terrorism Prevention Act of 2004. December 17, 2004

Statement on Signing the Consolidated Appropriations Act, 2004 January 23, 2004

Statement on Signing the Intelligence Authorization Act for Fiscal Year 2005

Statement on Signing the Consolidated Appropriations Act, 2005 December 8, 2004

Statement on Signing the Veterans Health Programs Improvement Act of 2004 November 30, 2004

Statement on Signing the Comprehensive Peace in Sudan Act of 2004 December 23, 2004

Statement on Signing the Department of Homeland Security Appropriations Act, 2005 October 18, 2004

Executive Order 13333--Amending Executive Order 13257 To Implement the Trafficking Victims Protection Reauthorization Act of 2003

Statement on Signing the NASA Flexibility Act of 2004 February 24, 2004

Statement on Signing the Veterans Benefits Improvement Act of 2004 December 10, 2004

Statement on Signing the Coast Guard and Maritime Transportation Act of 2004 August 9, 2004

Statement on Signing the Specialty Crops Competitiveness Act of 2004

December 21, 2004

Statement on Signing the Military Construction Appropriations and
Emergency Hurricane Supplemental Appropriations Act, 2005 October 13, 2004
Statement on Signing the Miscellaneous Trade and Technical Corrections
Act of 2004 December 3, 2004

Executive Order 13361--Assignment of Functions Under the United States
Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 November 16,
2004

Executive Order 13346--Delegation of Certain Waiver, Determination,
Certification, Recommendation, and Reporting Functions July 8, 2004

Statement on Signing the Department of Defense Appropriations Act, 2005
August 5, 2004

Executive Order 13345--Assigning Foreign Affairs Functions and
Implementing the Enterprise for the Americas Initiative and the Tropical
Forest Conservation Act July 8, 2004