

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

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 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.” 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.”

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 unitary executive largely draws from two sources within the Constitution—the “Oath” 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.

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. 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 "government-wide ban on the use of appropriated funds for purposes of 'publicity or propaganda.'" 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*." 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."

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 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.

In an opinion by the Justice Department's OLC, and circulated to the executive branch agencies by the OMB, 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. 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, because that official is a subordinate of the President, it is so granting discretionary authority (unless otherwise specified) to the President." After Congress has passed a bill, it lacks the ability of oversight, thus leaving it to the president to ensure it is faithfully executed.

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I have argued in other places that the twin circumstances of Vietnam and Watergate profoundly changed the American presidency, over and beyond the other changes it brought to the political system. 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.

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

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.

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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 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. 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 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. 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"—sixty-days before the publication of the notice in the *Federal Register*, and then again thirty-days before their publication as a final rule. The 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."

Executive Order 12,498 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." 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." 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, interpretation of the law was up to political officers under the direction of the White House.

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.

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." Less than a week after he was inaugurated he signed an executive order that centralized control over U.S. economic policy within a handful of political appointees in the White House. 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.

Clinton's most significant action came in October, 1993 when he issued Executive Order 12,866. 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. 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 the Reagan and Bush administrations." 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 directives 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."

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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

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 decision 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. Further, less than a week later he issued an executive order establishing an “Office of Faith-Based Initiatives,” 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, all on the same day, designed to undercut the authority of organized labor, a direct provocation of his opposition.

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

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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. 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. 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. 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. 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. 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.”

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.

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 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. 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.

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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 a total of 34 statements instructing the executive branch agencies on the interpretation of sections of the bill. 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. 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. . . . 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.

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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.

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. * * *

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 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 articles 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.” 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.” 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.” “The Data Quality Act,” which was written by Jim Tozzi of the “Center for Regulatory Effectiveness” 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 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.

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.” 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.

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.” 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.” 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.

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 president the power to assert executive privilege over a past administration's papers, even if the former president disagrees." 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. 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." Better safe than sorry.

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Part IV—Conclusion

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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 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.

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.