

The Unitary Executive and the Presidential Signing Statement

In January 2006, there was a confluence of events—unrelated—that brought about intense scrutiny and concern over the ways in which the Bush administration was asserting power. The first event involved a high profile meeting in the Oval Office involving President Bush and Senators John Warner (R. VA) and John McCain (R. AZ). The reason for the meeting involved the use of torture by the American military at the Abu Ghraib prison in Iraq and at the Guantanamo Bay Naval facility, where suspected terrorists were held. In addition to the evidence (some of which was photos taken by American military personnel that showed some military personnel abusing prisoners), Americans also earlier learned that the legal advisers to the President had interpreted domestic law and international treaties in a way that allowed for torture in certain instances.¹ These events moved Senator McCain, himself abused by the North Vietnamese as a P.O.W during the Vietnam War, to add language to a defense appropriations bill that established the policy of the United States to not torture prisoners of war or conflict in any circumstances. President Bush told the press during the meeting:

Senator McCain has been a leader to make sure that the United States of America upholds the values of America as we fight and win this war on terror. And we've been happy to work with him to achieve a common objective, and that is to make it clear to the world that this government does not torture and that we adhere to the international convention of torture, whether it be here at home or abroad. And so we have worked very closely with the Senator and others to achieve that objective, as well as to provide protections for those who are on the front line of fighting the terrorists.²

Yet when President Bush signed the legislation, he took back the compromise he had made with Senator McCain. In President Bush's signing statement of the appropriations bill, he claimed:

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief...[in order to protect] the American people from further terrorist attacks.³

¹ See the collection of Bush administration memos the "Washington Post" has accumulated to demonstrate the creative ways in which domestic law and international treaties were interpreted. <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> Accessed June 1, 2006.

² "President Meets with McCain & Warner, Discusses Position on Interrogation." December 15, 2005. <http://www.whitehouse.gov/news/releases/2005/12/20051215-3.html> Accessed May 29, 2006.

³ Bush, George W. "Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006." *Weekly Compilation of Presidential Documents*. December 30, 2005. 1918-1919.

This caused a great deal of public furor because it seemed to upset our “textbook” understanding of how the system of checks and balances work. To most Americans, including members of the press and even of Congress, the Constitution mandates that the Congress passes law, the president executes the laws (or vetoes bills), and the courts interpret the laws. What we were presented with was all three of these functions wrapped up into one body—the president. So the first big question that came from this confluence of events asked: **What is a signing statement, how often had the Bush administration used the signing statement in order to nullify provisions of law, and did President Bush’s actions make him stand apart from previous presidents?**

The second event came as a result of the Supreme Court confirmation hearing of Samuel Alito, a court of appeals judge picked to fill the vacancy of Supreme Court Justice Sandra Day O’Connor. In mid-December, the Bush administration released a number of documents related to Alito’s time in the Reagan administration. The documents revealed a strategy to use the signing statement in a way that allowed the president to control the bills he signed into law. Further, a speech given by Alito before the Federalist Society, a conservative legal organization started during the Reagan administration, demonstrated his commitment to a theory known as the *unitary executive*. In the speech, Alito argued that he, and his colleagues in the Reagan Justice Department were “strong proponents of the theory of the unitary executive, [which vests] all federal executive power” in the President.⁴ He proceeded: “...I thought then, and I still think, that this theory best captures the meaning of the Constitution’s text and structure...”⁵

This theory of the unitary executive also seemed relevant to the Bush administration. Through December 2005 President Bush had used the phrase *the unitary executive branch* 110 times in signing statements, executive orders, and presidential proclamations.⁶ Thus, the second big question to arise from the confluence of events focused on the theory of the unitary executive: **What is the unitary executive, how does it tie in with the signing statement, and is the Bush administration the first to adhere to the theory’s key principles?**

The Unitary Executive

In this part I will explain the core principles of the unitary executive theory. I will start with a definition, and then a discussion of the framework from which the theory explains power, and how this is different from the way in which presidency scholars understand presidential power.

The unitary executive theory is a theory of presidential power that is deeply rooted in the Constitution, particularly Article II, and a theory that encourages both a

⁴ Alito, Samuel. “Administrative Law & Regulation: Presidential Oversight and the Administrative State.” *Engage*. Volume 2, November 2001. 11.

⁵ *Ibid.* 11

⁶ Bravin, Jess. “Judge Alito’s View of the Presidency: Expansive Powers.” *Wall Street Journal*. January 5, 2006.

vigorous interpretation of the meaning of separation of powers and also a defense of intra and extra constitutional prerogatives of the presidency. This defies the way in which many presidency scholars understand presidential power.⁷ According to the contemporary theory, presidential power does not lie in the Constitution, but rather in the way in which the president is able to bargain and persuade others—Congress, the public, the press—in order to get what he wants. The measure of success—support in Congress, public opinion polling, electoral mandates—is how many mainstream presidency scholars talk about presidential power. The problem with this theory is that it has failed to fully take into account what has happened to American politics in the last thirty years. Following Watergate, the ability of a president to bargain and persuade was next to impossible as a resurgent Congress flexed its muscle by establishing committees to conduct oversight, adding numerous legislative vetoes to bills sent to the president, even after the legislative veto was considered unconstitutional by the Supreme Court, and using appropriations to curb executive actions.

It is out of this tumult that the unitary executive theory is born. The “fathers” of the theory worked in the Reagan Justice Department, and would also go on to form the Federalist Society, a group of conservative legal scholars dedicated to “...the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.”⁸ For Steven Calabresi, an attorney in the Reagan Justice Department, a founding member of the Federalist Society, and one of the original proponents of the unitary executive theory, he and others have made the case that the theory itself can be used to explain presidential power since the Washington administration.⁹

The key tenets of the unitary executive begin with the “Vesting” clause of Article II. Proponents of the unitary executive theory are quick to point to the language of the “Vesting” clause of Article II versus the “Vesting” clause of Article I. In Article I, Section I, it reads: “All legislative powers herein granted shall be vested in a Congress of the United States...” In Article II, Section I it reads: “The executive power shall be vested in a President of the United States of America.” The distinction is meant to convey the belief that the president was granted extraordinary powers by the Founders. Not only does he have the power specified in Article II, but he also has “prerogative” powers in order to deal with extraordinary circumstances. “Unitarians” (as proponents of the theory are often called) point to the actions of President Lincoln during the Civil War as an example of acting beyond the language of Article II in order to preserve the Union.

⁷ See generally, Neustadt, Richard. Presidential Power and the Modern Presidents: The Politics of Leadership. Free Press: New York. 1990.

⁸ From the “About Us” section of the Federalist Society homepage, <http://www.fed-soc.org/ourpurpose.htm>. Accessed 5/29/06.

⁹ See Calabresi, Steven and Christopher Yoo. “The Unitary Executive During the First Half-Century.” *Case Western Law Review*. 47:1451. 1997; Calabresi and Yoo. “The Unitary Executive During the Second Half-Century.” *Harvard Journal of Law and Public Policy*. 26:667. 2003; Calabresi, Steven, Christopher Yoo, and Laurence Nee. “The Unitary Executive During the Third Half-Century.” *Notre Dame Law Review*. 80:1. 2004; Calabresi, Steven, Christopher Yoo, and Anthony Colangelo. “The Unitary Executive During the Modern Era: 1945-2004.” *Iowa Law Review*. 90:601. 2004-2005.

After the “Vesting” clause, there are two additional provisions of Article II that gives the unitary executive theory muscle. Those provisions are the “Oath” clause, which acts as a shield, protecting the president from unconstitutional encroachments upon his powers, the powers of the states and the rights of the individuals; and the “Take Care” clause, which argues that since the president is the only nationally elected figure in the United States as well as the head of the executive branch, to insure accountability, all rules issued by executive agencies should be done with the president’s policy position in mind. Furthermore, the “Take Care” clause also allows him to control internal deliberations as well as to control the way in which differences between executive branch agencies are adjudicated.

The Oath Clause

In Article I, Section I the president takes an oath that requires him to “...preserve, protect and defend the Constitution of the United States” in addition to “faithfully” executing the office of the President.

It is under the “Oath” clause where presidents argue the right to independently interpret all provisions of law, and refusing to defend or enforce those provisions that the president determines is unconstitutional.

It is the responsibility (mostly) of the Office of Legal Counsel (OLC) within the Department of Justice to advise the president on how to proceed on all laws he has signed, or is about to sign. Beginning with the Reagan administration, the Department of Justice and the OLC began to vigorously push an idea known as *Coordinate Construction*, or simply *Departmentalism*. Those who push this idea draw their strength from the “Federalist Papers #49. In “Federalist #49,” Madison argued that 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.”¹⁰ What this means is each branch has the constitutional obligation to insure that each is being faithful to the Constitution. The counter to those who push the idea of judicial supremacy by the language in Marbury is that the Constitution established three co-equal branches of government. By allowing one to have the final say over constitutional interpretation is to establish *primus inter pares*, and thus to upset the delicate balance of the Constitution.

It was in the Reagan administration, and particularly within the Justice Department headed by attorney general Ed Meese, that this position of coordinate construction was pushed. In 1987, for instance, in a speech given to an audience gathered at Tulane University, Meese argued:

¹⁰ Madison, James. “Federalist 49.” *The Federalist Papers*. <http://www.constitution.org/fed/federa49.htm>. Accessed May 29, 2006.

Constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government.

The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution -- the executive and legislative no less than the judicial -- has a duty to interpret the Constitution in the performance of its official functions. In fact, every official takes an oath precisely to that effect.¹¹

In the George H.W. Bush administration, assistant attorney general and head of the OLC William Barr issued a legal opinion to all executive branch agencies explaining the ten most common types of legislative encroachments that they all needed to be aware of, because "...by consistently and forcefully resisting such congressional incursions can Executive Branch prerogatives be preserved."¹²

And continuing the practice of coordinate construction despite being a Democrat administration, the OLC in the Clinton administration issued a couple of legal opinions defending the right of the president to determine the constitutional legitimacy of law. In a 1994 opinion, for example, Walter Dellinger, the head of the OLC, wrote that the president has "...enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency. Where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment. [However], if resolution in the courts is unlikely and the President cannot look to a judicial determination, he must shoulder the responsibility of protecting the constitutional role of the presidency."¹³

By the time President George W. Bush became the President in 2001, the executive branch agencies, in particular the Department of Justice, were institutionalized to believe and enforce the idea that the president was not obligated to defend or enforce provisions of law he independently determined was unconstitutional. This belief can best be described in the case involving the controversy over the use of video news releases, or VNRs.

The VNR is little more than a video press release that executive branch agencies (or private companies) package to run on local television news. The VNR looks exactly like a straight news piece all the way down to an actor who claims to be reporting on the particular event. In 2005, the *New York Times* found that "at least 20 federal agencies, including the Defense Department and the Census Bureau, have made and distributed

¹¹ Meese III, Edwin. "Perspectives on the Authoritativeness of Supreme Court Decision: The Law of the Constitution." *Tulane Law Review*. 61:979. April, 1987. 985-86.

¹² Barr, William P. "Common Legislative Encroachments on Executive Branch Constitutional Authority." *Opinion of the Office of Legal Counsel*. 1989. 248.

¹³ Dellinger, Walter. "Presidential Authority to Decline to Execute Unconstitutional Statutes." *Opinion of the Office of Legal Counsel*. 1994. 201

hundreds” of these VNR’s during President Bush’s first term.¹⁴ 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), which is an agent of Congress, found that these VNRs violated a federal ban placed in appropriations bills against propaganda and ordered executive branch agencies to stop sending them out.¹⁵

The OLC, however, thought otherwise and sent out its own memo to the executive branch agencies telling them to ignore the opinion of the GAO since it had no authority or constitutional right to tell the executive branch to do anything.¹⁶

The “Take Care” Clause

In Article II, Section III it states, in part, that the president “shall take care that the laws be faithfully executed...” Michael Herz, a law professor at Carodozo Law School has argued that the “Take Care” clause insures that the president will not just execute the laws personally, but he will also oversee the executive branch agencies to insure that those laws are faithfully executed the way he believes they should be executed.¹⁷ Elena Kagan, who served as a domestic policy advisor in the Clinton administration and is currently the Dean of Harvard Law School explained the “Take Care” mandate as follows: “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.”¹⁸

The process of executive branch oversight began in the Nixon administration with the creation of the Office of Management and Budget (OMB) out of the former Bureau of the Budget. The reason for the change was to create a mechanism within the White House Office that would allow the president to exercise a bit of oversight in the way in which policy was being carried out. Even though Nixon’s efforts were short-circuited by Watergate, the existence of the OMB did not share the fate with Nixon. In the Reagan administration, the OMB would be the center of executive branch oversight and especially administrative clearance—before any final rule was issued by an executive branch agency, the OMB would be given discretion to insure the rule was in accord with the president’s policy preferences.

The key mechanism used to give the OMB this type of role was the executive order. The executive order is a device president’s use in order to direct agencies to carry out a particular assignment. In the Reagan administration, two key executive orders, EO

¹⁴ Barstow, David and Robin Stein. “Under Bush, a New Age of Prepackaged Television News.” *The New York Times*. Sunday, March 13, 2005. pg. 1.

¹⁵ Walker, David M. “Memorandum for Heads of Departments, Agencies, and Others Concerned *Re: Prepackaged News Stories.*” United States Government Accountability Office. February 17, 2005.

¹⁶ 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.

¹⁷ Herz, Michael. “Imposing Unified Executive Branch Statutory Interpretation.” *Cardozo Law Review*. 15:1-2. October, 1993. 252-53.

¹⁸ Kagan, Elena. “Presidential Administration.” *Harvard Law Review*. 114:8 June 2001. 2327.

12,291 and 12,498, gave to the OMB a gatekeeping role. For all rules of a certain cost to the economy had to first get precleared by the Office of Information and Regulatory Affairs (OIRA), called “the toughest kid on the block” by President Reagan’s first OMB Director.¹⁹ The effect was clear. When the head of executive branch agencies knew that the administration was looking over their shoulders, they were more apt to think twice about issuing a final rule that contradicted the president’s position.

As it stood, the two Reagan-era executive orders applied only to the executive branch agencies and not the independent regulatory agencies and commissions. When President Clinton came to office, he immediately issued his own executive order, EO 12,866 that revoked the two Reagan orders. Clinton’s order incorporated the oversight provisions of the two Reagan orders and extended regulatory planning out to the independent regulatory agencies and commissions. Now the entire executive branch had to clear a year’s worth of planning with the OMB. It is no wonder that when the Bush administration took over in 2001, one of the Clinton plans that they did not get rid of was EO 12,866.

The Signing Statement

The other thing that drew a great deal of attention in January and of course recently has been President Bush’s use of the signing statement. Both Professor Phillip Cooper and I (in two separate studies) have found that through 2005, President Bush has issued a total of 505 separate challenges to provisions of laws he independently determines to be unconstitutional. From the discussion about the unitary executive theory above, this type of signing statement mostly clearly falls under the president’s oath to protect and defend the Constitution. Even though this type of signing statement—one that challenges the constitutionality of law—has received a great deal of attention, it is not the only type of signing statement a president may use. What I will do in this section is to define what we mean by a “signing statement,” discuss the various types of signing statements that are used, describe the history of the signing statement, and finally put into context the current Bush administration use of the signing statement.

The signing statement is simply a statement the president adds to a bill at the moment he signs it into law. Many of us envision a public ceremony, perhaps in the Rose Garden or flanked by numerous supporters of the bill, where the president takes time to thank all those who made the bill happen. It is this image, I have surmised, that explains why most Americans have never given a second thought to the real power of the signing statement. In general, these public signing ceremonies are a tiny fraction of all signing statements issued by the president.

More typical, the president issues a private signing statement, without the glare of the news media or members of Congress, and not read out loud. These signing statements contain the importance behind this particular device, where the president challenges certain provisions or directs agency heads to interpret vague provisions in

¹⁹ 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. 873-74

certain ways. It is this type of signing statement that has recently gotten a lot of attention, where the president has a very public display of compromise and then in private takes back the things he compromised (such as the torture amendment discussed above).

Just a quick explanation of what scholars mean when they speak of a president issuing x number of signing statements. The signing statement literally means the complete statement the president adds to a bill he has just signed into law. Contained within that statement are the details that scholars are most concerned about. When we say that President George W. Bush issued 505 challenges through December 2005, we are talking about the specific challenges the president has made to provisions contained within a law. Thus, a president may make only one challenge or may make 100 separate challenges to provisions within the bill. We are counting those separate challenges in order to come up with a number that we can use for analysis.

The signing statement comes in four different types. The first type of signing statement is referred to as a *rhetorical* signing statement. This type of signing statement is what members of the press, the Congress, and even the scholarly community typically has thought about when thinking of the signing statement. This is where the president takes time to thank supporters or admonish opponents. This is the type of signing statement where the president holds a public ceremony. Generally speaking, this type of signing statement does not hold much interest because it is viewed as something akin to a press release. I found that this type of signing statement does have some strategic importance. In a study of the rhetorical signing statement from Truman to Clinton, I found that the number of rhetorical statements go up and down with the electoral cycle. A president will issue more rhetorical signing statements when there is a federal election—either midterm or presidential—and they go down in off-election years.

A second type of signing statement is directed towards influencing the federal courts. In 1986, attorney general Ed Meese told an audience gathered at the National Press Club that the administration had made an agreement with the Westlaw Publishing Company to have the signing statement added to the legislative history of those bills he signs into law. Almost immediately legal scholars pounced on this as an attempt to influence the decision of federal judges. Even attorney general Meese said as much. At the press conference, he explained that the decision was designed 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...so that [the entire history] can be available to the court for future construction on what that statute really means.”²⁰ In fact, a great deal of discussion in law journals in the late 1980s and early 1990s focused on whether judges were influenced by legislative history, a debate between the so-called textualists and originalists

A third type of signing statement is designed to instruct executive branch agency officials as to the president’s understanding of provisions of the law. This reflects the importance that recent presidents (starting with the Reagan administration) have had on

²⁰ Garber, Marc N. and Kurt A. Wimmer. “Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power.” *Harvard Journal on Legislation*. 24:363. 1987. 367.

administrative oversight. The Reagan administration benefited from a 1985 Supreme Court decision²¹ that concluded when agency heads, at the point of interpretation, had clear guidance of the intent of Congress when looking at the legislative history, it had to follow the intent of Congress. However, where the intent is vague or absent, the Court mandated that these agency heads should use their own judgments of what the best interpretation of the bill should be. Thus when Meese made his statement to the National Press Club, getting the signing statement placed in the legislative history of any bill was aimed not just at federal judges, but also individuals in the federal bureaucracy. When I spoke with Douglas Kmiec, who was in the OLC during the Reagan and Bush presidencies, about the legislative history strategy being directed more at the bureaucracy than the federal courts, he confirmed that this was part of the effect they hoped for. He said: “I do think the initiative was successful insofar as it conveyed presidential direction to members of the executive branch at the earliest possible point of implementation. In other words it let agencies know that their work product under new law was not only to reflect their considered judgment, but also that of the President, who unfortunately can sometimes seem like a distant abstraction when one works in a sprawling administrative agency.”²²

The fourth type of signing statement is the type largely under focus here. This type singles out constitutional defects that need some sort of correction—either it needs remedial legislation to correct defects, or the president will instruct the attorney general to not defend the provision should it be challenged, and the more extreme, the president “severs” or nullifies a provision or provisions—in effect he uses an “iron clad item veto.”

This particular signing statement fits nicely under the “Oath” clause provision of the unitary executive theory. It is the obligation of the OLC as well as advisors to the president to identify potential encroachments upon presidential prerogatives, and then advise a course of action. Further, the advisors will also identify infringements upon the rights of the states and the individuals, and advise the president on an appropriate course of action. Even if the president decides to enforce the objectionable provision, it is important that a history of objections exist. Why? So if the day comes when the provision is challenged, the courts can find a history of objections by the president in which they can rely on. For example, when the Supreme Court found²³ the legislative veto unconstitutional, in the thirteenth footnote the majority found a history of objections dating to the Wilson administration in which presidents found that the legislative veto violated the “Presentments” clause of the Constitution.

The History of the Signing Statement

I wish to turn next to the history of the signing statement in order to give you an idea of the context in which we can judge the Bush administration. Hopefully this will enable us to answer the question: “Has the practice of the Bush administration been out

²¹ *Chevron v Natural Resources Defense Council*, 467 U.S. 837 (1985).

²² Email with Doug Kmiec. April 23, 2001. On file.

²³ *INS v Chadha*. 462 U.S. 919. (1983).

of step with the historical practices of past presidents, and if so, how? If not, then how is he in line with the historical trends in the use of the signing statement?

While many place the first use of the signing statement in the Jackson presidency, I, and Loyola Law School Professor Christopher May, have found that the first use of the signing statement came during the Monroe presidency. President Monroe issued two separate signing statements, where both dealt with the United States military. In one of the statements, Monroe rebuked a demand by Congress that deal with the selection of new officers. In his signing statement, Monroe argued that the president and not the Congress had the constitutional responsibility of appointing officers.

When John Tyler used the signing statement on a bill that dealt with congressional apportionment, the House of Representatives (where the bill originated) sent back a strongly worded rebuke, starting with their displeasure that the president was trying to inject himself into a matter that dealt with the Congress only, and the Congress let him know it. Representative John Quincy Adams, who had previously been president, declared that the signing statement should be seen as nothing more than "...a defacement of the public records and archives."²⁴

In the twentieth century, there was a greater tendency for presidents to challenge provisions of law that they either constitutionally or politically disagreed with. It really wasn't until the Reagan administration that the signing statement became *strategically* important. The step up in the sheer numbers of objections demonstrates how the Reagan administration, and those that came after, found the signing statement useful. For example, from Monroe to Carter, presidents made a total of 109 (out of 1294 signing statements) challenges to the constitutionality of provisions of law. Yet from Reagan through Clinton, those presidents made a total of 467 (out of 881 statements), a marked jump from all those presidents who came before. If you compare the current Bush administration's constitutional challenges with the challenges made between Reagan and Clinton, the comparison is 505 (2001-2005) compared with 467 (1981-2000). Thus the current Bush administration has been vigorous in its challenges to the constitutionality of various provisions of law. I turn next to how the Bush administration fits with the practice of those previous presidents, starting with President Reagan, that have had to govern unilaterally in many cases due to the effects from Watergate as well as the high degree of polarization inside the Congress, and increasingly within the American populace.

Bush and the Unitary Executive

As I noted above, the Bush administration has fully embraced the tenets of the unitary executive, moreso than any administration before it. President Bush had used the term 110 times through December 2005, mostly in bill signing statements, but also in executive orders (6 times) and in proclamations (1). In comparison, the phrase "the unitary executive branch" was never part of official documents in the Clinton

²⁴ H.R. Rep. No. 909, 27th Congress, 2d Session. 1842.

administration, and mentioned six times in George H.W. Bush's administration, and mentioned only once in the Reagan administration.

The current Bush administration has taken special care to put in practice the key tenets of the unitary executive. The first sign that they put the theory to work is in the number of times, described above, that they mention the phrase *the unitary executive branch*. As I discuss elsewhere, this is not a throwaway term nor is it done for purely rhetorical reasons. It is deliberately done to describe, in my opinion, its approach to governing.

In brief, in what ways have the unitary executive in action in this Bush presidency? Currently, I am working on a manuscript that addresses this very question. I have found that the Bush administration, from the very start has stuck to the script of the unitary executive. I will spend most of this section examining the use of the signing statement, but just briefly, the Bush administration:

- **Came into office bent on controlling the executive branch to insure the president's policies are implemented through the administrative agencies.** They kept Clinton's EO 12,866, which allowed the OMB to continue executive branch management. Additionally, the White House has placed their choice of public relation specialists within the executive branch agencies. Traditionally this was the choice of the Cabinet secretary, but the Bush administration changed this to insure message control. Further, there have also been some high profile news stories where the administration has placed political officers in particular scientific agencies in order to screen the findings in reports and reword or eradicate language that contradicts policy. There have been news stories which tell of government scientists who were pressured to hold or even spike findings that contradict administration policy or key constituencies. For instance, there have been reports from government scientists involved in global warming research that have been leaked to the press that show whole paragraphs that were either rewritten or redacted. In other cases, government websites have taken down information that is perceived to be negative or embarrassing to the administration. In one case that involved the USAID, an agency involved in providing international assistance to poorer countries. In 2004, a speech given by the administrator at USAID and placed on the agency's website was removed because a monetary figure estimating the cost to American taxpayers of aid to Iraq in the aftermath of the US invasion "apparently angered White House staff, especially when the cost rose much higher."²⁵
- **The Bush administration has clamped down on the flow of information.** President Bush issued two key executive orders that allowed him to control access to information. In EO 13233, which revoked an executive order previously issued by his father, President Bush restricted access to the records and papers of previous presidents. This executive order was issued just as papers from the Reagan administration were set to be released. Critics charged that the order allowed the

²⁵ "Government Web Pages Altered to Hide Information." *OMBWatch*. 2004.
<http://www.ombwatch.org/article/articleview/1995/1/205/> Accessed 3/14/2004.

papers and records from all previous presidents to be restricted for as long as the order stood. Despite complaints by conservatives (who wanted access to papers from the Clinton administration) and a lawsuit (*American Historical Association v National Archives and Records Administration*), the order is still in place; With the second executive order, EO 13,292, the Bush administration asserted the privilege to classify, and even *reclassify* information that it deems sensitive to national security. This order came on the heels of nearly a decade in which the government had been declassifying a great deal of information and documents that were deemed no longer relevant or sensitive to national security. The order revoked a 1995 Clinton order (EO 12,958), and many critics²⁶ have claimed that this order has come at a tremendous cost to society—a cost just over \$7 billion to US taxpayers, according to the federal Information Security Oversight Office.²⁷

- **Emphasis on controlling internal deliberations.** Part of the evolution of Unitarian principles in the executive branch was the attempts to place as much internal discussions as possible out of the listening range of the news media and particularly the Congress. An example that is in line with this provision involved the meetings of the Energy Task Force, led by Vice-President Cheney in 2001 to overcome the energy problems that plagued parts of the country in the late winter/early spring, 2001. The Democrats asked the GAO to obtain information about the meetings of the task force, especially who was involved and what was said. When the administration refused to provide this information, it led to a suit in federal court. When the federal court ruled in favor the administration, the Republicans in Congress refused to authorize an appeal of the decision and the GAO dropped its suit. Two outside groups, however, had also sued the administration with similar results. The significance in the end of this case was the establishment of executive privilege to the vice-president as well as the president. In the end, some documents were released, but not all, and the administration had earned an extra privilege from the Supreme Court ruling that granted executive privilege to the vice-president. Many in the Bush administration also crowed a bit louder, claiming that they restored the privilege power after the Clinton administration had diminished it when he tried to cover up his relationship with Paula Jones.

The signing statement

Finally I want to examine the use of the signing statement. The administration has relied upon the signing statement to protect a variety of executive branch prerogatives in a way not seen since President Bush's father was in office. Some ask whether the use of the signing statement by the Bush administration is unprecedented or unique from the

²⁶ See Waxman, Henry A. "Secrecy in the Bush Administration." Minority report for the House Government Reform Committee. September 14, 2004.
<http://www.democrats.reform.house.gov/Documents/20050317180908-35215.pdf> Accessed 6/1/06;
Federation of American Scientists, Project on Government Secrecy.
<http://www.fas.org/sgp/bush/index.html> Accessed 6/1/2006.

²⁷ See the web page the Federation of American Scientists put together that explains the Information Security Oversight Office at <http://www.fas.org/sgp/isoo/> Accessed 6/1/2006.

way in which it was used in previous administrations. The answer is not clear cut. In some ways it is extraordinary. How?

First, and most obvious, is the numbers. There has not been a president yet who has objected to as many provisions in one bill as the Bush administration has objected. For instance, when President Bush issued his bill signing statement to a consolidated appropriations measure, he issued 116 specific challenges to provisions in the bill, many of the challenges taking the same language: “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.”²⁸

Second is the way in which President Bush is willing to use the signing statement to directly take away compromises made with members of Congress or to interpret key provisions of important legislation in a manner not understood by legislators who worked on those sections. And this is done while his Party has controlled both chambers of Congress for nearly his entire six years in office. I have already described the way in which President Bush has taken back promises made with members of Congress.

The way in which he tried to interpret a key provision of legislation in a way not meant by the Congress—and with a fairly high profile bill—came in 2002 when he signed “Sarbanes-Oxley” into law. The bill was designed to curb the abuses in corporations that bilked millions of dollars from investors, or in the case of Enron, also put thousands of Americans out of work, in addition to lost pensions. “Sarbanes-Oxley” contained a “whistleblower” protection that allowed individuals in corporations to come forward and report corporate malfeasance. When President Bush signed the bill into law, he issued a narrow interpretation of the whistleblower protection to only protecting those individuals who report problems to a congressional committee already engaged in an investigation of the company. This caused Senators Charles Grassley (R. IA) and Patrick Leahy (D. VT) to send a letter to the administration challenging the interpretation. This communication went back and forth until December 2002, when the administration finally acquiesced to Congress’s interpretation. But had this not been a high profile bill with a lot of attention, the Congress may never have known the interpretation took place. At least this is what Senator Patrick Leahy thought. In a separate appropriations bill for the Department of Justice, Senator Leahy added language that required the Department of Justice to report to the Congress every time they made a challenge to provisions of legislation, particularly when that challenge is to refuse to abide by the language of legislation. When President Bush signed that bill, he issued a challenge to the Leahy amendment nullifying the mandate that he provide information to the Congress on constitutional challenges made to provisions of law.²⁹

²⁸ Bush, George W. “Statement on Signing the Consolidated Appropriations Act, 2005.” *Weekly Compilation of Presidential Documents*. December 8, 2004. 2924-26.

²⁹ Bush, George W. “Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act.” *Weekly Compilation of Presidential Documents*. November 2, 2002. 1971-73.

On the other side, Bush uses the signing statements in the same issue areas as his predecessors. Previous presidents had used the signing statement to challenge provisions that infringed upon the deliberative process, the “Recommendations” clause, because of legislative vetoes, infringements upon the appointment power, infringements upon clear areas of prerogatives, such as foreign policy, national security, or Commander-in-Chief. Previous presidents also used the signing statement, albeit not as common as in the other ways, to protect the rights of states and the rights of individuals. Professor Phillip Cooper has described the areas in which President Bush has issued his challenges in signing statements, and they generally fall into the same categories as previous presidents.³⁰

President Bush also has not gotten as creative in the use of signing statements as his father did. President George H.W. Bush, on at least two occasions, deliberately created an “alternative legislative history” on important bills where the administration had lost big in the legislative process, and the bill was too important or he did not have the political capital to succeed in a veto. The administration would work with fellow partisans in the Congress who would engage in a colloquy on the floor that would define key provisions of the bill. When President Bush signed the bill, he would then direct the executive branch agencies to refer to the alternative legislative history when interpreting the provision of the bill.³¹ It may very well be that President Bush has been blessed with his Party’s control of both chambers, and thus no need to be this creative?

Conclusions

This overview has provided the reader with the information needed to understand exactly what the theory of the unitary executive is, where it came from, and how it works in practice. Further, the reader has received an overview of the presidential bill signing statement. This overview provides the reader with an understanding of the differing types of signing statements, this history of the signing statement, and the strategic use of the signing statement since the Reagan administration. Finally the reader has gained a sense of how these two concepts: the unitary executive and the signing statement have come to define the Bush administration’s approach to presidential power. This memo should provide the “next steps” in writing opinion pieces in our leading newspapers and magazines, in testifying as an expert before Congress, and appearing on radio/television talk shows in order to provide the public with a better understanding of why all of this is important.

In thinking about where we go from here, there are three disparate actors who should consider the role they play in informing the public and insuring the constitutional balances of power are in order. Those actors are:

³⁰ See Cooper, Phillip. “George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements.” *Presidential Studies Quarterly*. 35:3 September 2005. 522.

³¹ See Tiefer, Charles. The Semi-Sovereign Presidency: The Bush Administration’s Strategy for Governing Without Congress. Boulder: Westview Press. 1994.

The Congress: The Congress obviously has the most to gain or lose with respect to the role they play in making sure that the presidency has not slipped the bonds of the Constitution and accrued more power than the Founders envisioned. In the last six years, the Congress has done a fairly poor job in monitoring and checking the executive branch. During the eight years of the Reagan administration, the four years of the first Bush administration, and during the eight years of the Clinton administration, the Congress was fairly aggressive in checking presidential power. What the Congress needs to do in the remaining years of the Bush presidency and beyond, is to conduct more oversight of executive branch activities. Congress has the power to subpoena executive branch officials to testify, and if those individuals refuse, the Congress may find the individual in contempt of Congress, as it did in the first term of the Reagan administration.³² Further, if the executive branch refuses to abide, Congress has the power of the purse to force the executive branch to comply. As Professor Michael Stokes Paulson has noted, the Congress, if it wishes, may reduce the President to little more than a bureaucrat drawing a fixed salary, vetoing bills, granting pardons, and receiving foreign ambassadors—but without funds for hosting a state dinner (or even taking the ambassador to McDonalds).³³ Of course, the ultimate weapon that Congress may use is the Impeachment and removal power.

The Press: The press needs to cover the way in which the president has accumulated power as well as to cover these unique “power tools” that the executive uses in order to gain advantages over legislation or to act unilaterally. For instance, the high profile fight over the “whistleblower” provisions in “Sarbanes-Oxley” should have tipped the press off as something unusual that the president was doing. The bill signing statements are out there in the public, easily accessible to anyone with an Internet connection.³⁴ Simply typing the phrase: “Statement on signing” (with quotations) will retrieve the signing statements per year searched. Recently we have seen better press attention to the unitary executive as well as to the signing statements, which has generated a great deal of public interest. One of the better ways to curb the abuse of power (if abuse exists) is to bring public attention by way of press coverage. What we have seen since January is a positive step in the right direction.³⁵

The Scholarly Community: I see two key problems here. First, there had been a great deal of scholarly attention to the unitary executive and to the signing statement in the law

³² Congress issued a contempt of Congress charge against Anne Gorsuch, who at the time was President Reagan’s Director of the EPA.

³³ Paulsen, Michael Stokes. ““The Most Dangerous Branch: The Executive Power to Say what the Law is.” *Georgetown Law Review* 83:217. December 1994. 322.

³⁴ The *Weekly Compilation of Presidential Documents* back to 1993 are available at the web site of the Government Printing Office, <http://www.gpoaccess.gov/wcomp/>

³⁵ For example, see Bravin, Jess. “Judge Alito’s View of the Presidency: Expansive Powers.” *Wall Street Journal*. January 5, 2006. <http://online.wsj.com/article/SB113642811283938270.html?emailf=yes> accessed 6/2/2006; Egelko, Bob. “Executive Authority: How Bush Redefines the Intent of the Law...” *San Francisco Chronicle*. May 7, 2006 <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/05/07/SIGNING.TMP> accessed 6/2/2006; Savage, Charlie. “Bush Challenges Hundreds of Laws.” *Boston Globe*. April 30, 2006. http://www.boston.com/news/nation/articles/2006/04/30/bush_challenges_hundreds_of_laws/ accessed 6/2/2006.

journals. In the late 1980s through the early 1990s, a lot was written on both of these concepts.³⁶ The problem is the audience for these journals has mostly been law students, law faculty, judges, and others interested in the law. This wide discussion was mostly missed by political scientists and presidency scholars. There needs to be a better way that political scientists and legal scholars can share their work, either by more shared conferences or journals dedicated to the interconnect between the two. The second problem I see from a political science standpoint has to do with the dominant theory that presidency scholars use to examine presidential power. As stated above, this theory does not use a public law approach to power, but rather looks to quantitative measures to demonstrate power. Since the signing statement seemed to be nothing more than a rhetorical device used to gain the president press coverage, nearly every political scientist that I have encountered at conferences could not comprehend how or why the signing statements were significant. Only now, as a result of the coverage they have obtained, have political scientists come around to the significance of the signing statement.

³⁶ See for example the entire October 1993 Issues 1&2 of the *Cardozo Law Review*, which was devoted to Executive Branch Interpretation of the Law.

**Select Bibliography of the
Unitary Executive and the Signing Statement**

- Alito, Samuel A. Jr.** “Change in Continuity at the Office of Legal Counsel.” *Cardozo Law Review* 15:507, October 1993.
- Baker, Nancy V.** Conflicting Loyalties: Law and Politics in the Attorney General’s Office, 1789-1990. Kansas: University of Kansas Press, 1992.
----- . “The Attorney General as a Legal Policy-Maker: Conflicting Loyalties” in Cornell W. Clayton. Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics. Kansas: University Press of Kansas. 1995.
- Barr, William.** “The Appropriations Power and the Necessary and Proper Clause.” *Washington University Law Quarterly* 68:595, 1990.
----- . “Attorney General’s Remarks, Benjamin N. Cardozo School of Law, November 15, 1992. *Cardozo Law Review.* 15:1-2. October, 1993.
----- . “Common Legislative Encroachments on Executive Branch Constitutional Authority.” Opinion of the Office of Legal Counsel 1989 OLC LEXIS 28; 13 Op. O.L.C. 299 July 27, 1989.
----- . “Issues Raised by Foreign Relations Authorization Bill.” Opinion of the Office of Legal Counsel. 1990 OLC LEXIS 51, *; 14 Op. O.L.C. 37
----- .
- Branum, Tara L.** “President or King? The Use and Abuse of Executive Orders in Modern-Day America.” *Journal of Legislation.* 28 J. Legis. 1. 2002.
- Brownell, Roy E. II.** “The Unnecessary Demise of the Line Item Veto Act: The Clinton Administration’s Costly Failure to Seek Acknowledgement of ‘National Security Rescission.’” *American University Law Review.* 47:1273. June, 1998.
- Breyer, Stephen.** “Symposium: Agency Autonomy and the Unitary Executive.” *Washington University Law Quarterly.* 68:3 1990.
- Burgess, Christine E.** “When May a President Refuse to Enforce the Law?” *Texas Law Review* 72. 631-667.
- Calabresi, Steven G.** “Some Normative Arguments for the Unitary Executive.” *Arkansas Law Review.* 48:23, 1995.
----- . "Advice to the Next Conservative President of the United States." *Harvard Journal of Law and Public Policy.* 24:369. Spring, 2001.
- Carro, Jorge L. and Andrew R. Brann.** “The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis.” *Jurimetrics Journal.* 22:294. Spring, 1982.
- Carroll, Kristy L.** “Whose Statute is it Anyway?: Why and How Courts Should Use Presidential Signing Statements when Interpreting Federal Statutes.” *Catholic University Law Review* 46:475 1997.

- Clayton, Cornell W.** The Politics of Justice: The Attorney General and the Making of Legal Policy. New York: M.E. Sharpe, Inc. 1992.
- Colby, Paul L.** "Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions." *Tulane Law Review*. 61:1041. 1987.
- 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.
- Cooper, Phillip J.** By Order of the President: The Use and Abuse of Executive Direct Action. Kansas: University of Kansas Press. 2002.
- , "Power Tools for an Effective and Responsible Presidency." *Administration and Society*. 29:5. November, 1997.
- , "Testimony before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, U.S. House of Representatives." Washington D.C. October 28, 1999. <http://www.house.gov/judiciary/coop1028.htm>.
- , "George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements." *Presidential Studies Quarterly*. 35:3 2005.
- Cross, Frank B.** "The Constitutional Legitimacy and Significance of Presidential 'Signing Statements.'" *Administrative Law Review*. 1988. 40:209-238.
- Davies, Susan M.** "Congressional Encroachment on Executive Branch Communications." *University of Chicago Law Review*. 57:1297. Fall, 1990.
- Dessayer, Kathryn Marie.** "The First Word: The President's Place in 'Legislative History.'" *Michigan Law Review*. 89:399. November, 1990.
- Devins, Neal.** "Defending Congress's Interests in Court: How Lawmakers and the President Bargain over Department of Justice Representation." *Presidential Studies Quarterly*. 32:1. March 2002.
- , "Political Will and the Unitary Executive: What Makes an Independent Agency Independent?" *Cardozo Law Review*. 15:1-2. October, 1993.
- Eastland, Terry.** Energy in the Executive. 1992. New York: The Free Press.
- , "Symposium: Agency Autonomy and the Unitary Executive." *Washington University Law Quarterly*. 68:3 1990.
- Elliot, E. Donald.** . "Symposium: Agency Autonomy and the Unitary Executive." *Washington University Law Quarterly*. 68:3 1990.
- Fisher, Louis.** "The Appropriations Power and the Necessary and Proper Clause." *Washington University Law Quarterly* 68: 595, 1990.
- , Constitutional Conflicts between Congress and the President. 1991. Kansas: University of Kansas Press.
- , The Politics of Shared Power: Congress and the Executive. 2d. Washington D.C.:Congressional Quarterly Press. 1987.

-----.President and Congress: Power and Policy. New York: The Free Press.
1972.

Froomkin, A. Michael. "The Imperial Presidency's New Vestments." *Northwestern University Law Review.* 88:1346. Summer 1994.

Gaziano, Todd F. "The Use and Abuse of Executive Orders and Other Presidential Directives." *Texas Law Review.* 5: 267. Spring, 2001.

Garber, Marc N. and Kurt A. Wimmer. "Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power." 1987 *Harvard Journal on Legislation.* 24:363-395.

Golden, Marissa Martino. What Motivates Bureaucrats? Politics and Administration During the Reagan Years. New York: Columbia University Press. 2000

Goldstein, Joel K. "The Presidency and the Rule of Law: Some Preliminary Explorations." *Saint Louis University Law Journal.* 43:791. Summer, 1999.

Gussis, Chrysanthe. "The Constitution, the White House, and the Military HIV Ban: A New Threshold for Presidential Non-defense of Statutes." *University of Michigan Journal of Law Reform.* 30:591. Winter/Spring, 1997.

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

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

Kelley, Christopher S. Executing the Constitution: Putting the President Back into the Constitution. NY: SUNY Press. July, 2006.

Killenback, Mark R. "A Matter of Mere Approval? The Role of the President in the Creation of Legislative History." 1995. *Arkansas Law Review* 48: 239-308.

Kmiec, Douglas W. "Judges Should Pay Attention to Statements by the President." *The National Law Journal.* November, 1987.

-----."OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive." *Cardozo Law Review.* 15:1-2. October, 1993.

Koby, Michael H. "The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique." *Harvard Journal on Legislation.* 36:369. 1999.

Labunski, Richard. "The 'Dangerous' Views of Ed Meese." *The Chicago Tribune.* November 6, 1986. pg. C27.

Levinson, Sanford. "Perspective on the Authoritativeness of Supreme Court Decision: Could Meese be Right this Time?" *Tulane Law Review*. 61:1071, 1987.

Lund, Nelson. "Guardians of the Presidency: The Office of the Counsel to the President and the Office of Legal Counsel" in Cornell Clayton, Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics. Kansas: University of Kansas Press. 1995.

-----."Lawyers and the Defense of the Presidency." Brigham Young University Law Review Number 17. 1995.

Luttig, J. Michael. "Constitutionality of Subsection 4117(b) of Enrolled Bill H.R. 5835, the 'Omnibus Budget Reconciliation Act of 1990." Opinion of the Office of Legal Counsel. 1990 OLC LEXIS 46, *; 14 Op. O.L.C. 154.

-----."Prohibitions and Penalties Under Section 582 of the 1990 Foreign Operations, Export Financing, and Related Programs Appropriations Act." Opinion of the Office of Legal Counsel. 1990 OLC LEXIS 62, *; 14 Op. O.L.C. 84.

May, Christopher N. Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative. 1998. Connecticut: Greenwood Press.

-----."Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative." 1994. *Hastings Constitutional Law Quarterly*. Summer: 865-1011

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

McGinnis, John O. "Appointment of Members of the Board of Directors of the Commission on National and Community Service." 1990 OLC LEXIS 58, *; 14 Op. O.L.C. 157

-----."Introduction." *Cardozo Law Review*. 15:1-2. October, 1993.

McGreal, Paul E. "Unconstitutional Politics." *Notre Dame Law Review*. 76:519. January, 2001.

Meese, Edward. "Symposium: The Appropriations Power and the Necessary and Proper Clause." *Washington University Law Quarterly* 68: 595, 1990.

-----."Perspective on the Authoritativeness of Supreme Court Decision: The Law of the Constitution." *Tulane Law Review*. 61:979. April 1987.

Merrill, Thomas W. Government Lawyering: High-Level 'Tenured' Lawyers." *Law and Contemporary Problems*. 61:83. Spring, 1998.

-----."Judicial Opinions as Binding Law and as Explanation for Judgments." *Cardozo Law Review*. 15:1-2. October, 1993.

Miller, Arthur S. and Jeffrey H. Bowman. "Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem." *Ohio State Law Journal*. 40:51, 1979.

- Miller, Randall K.** “Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege.” *Minnesota Law Review* 81:631 February, 1997.
- Moe, Terry M. and William G. Howell.** “The Presidential Power of Unilateral Action.” *Journal of Law, Economics, and Organization*. 1999. 15:1. 132-79.
------. “Unilateral Action and Presidential Power: A Theory.” *Presidential Studies Quarterly*. 1999. Volume 29, Number 4. December. pg. 850-872.
- Monaghan, Henry P.** “The Protective Power of the Presidency.” *Columbia Law Review*. 93:1, January 1993.
- Nathan, Richard P.** The Administrative Presidency. New York: John Wiley and Sons. 1983
------. The Plot that Failed: Nixon and the Administrative Presidency. New York: John Wiley and Sons. 1975.
- Note.** “Executive Discretion and the Congressional Defense of Statutes. *Yale Law Journal*. 92:970 May, 1983.
- Paulsen, Michael Stokes.** “The *Merryman* Power and the Dilemma of Autonomous Executive Branch Interpretation. *Cardozo Law Review*. 15:1-2. October, 1993.
------. “The Most Dangerous Branch: The Executive Power to Say what the Law is.” *Georgetown Law Review* 83:217. December 1994.
- Popkin, William D.** “Judicial Use of Presidential Legislative History: A Critique.” 1991 *Indiana Law Journal* 66:699-722.
- Rivkin, David B. Jr.** “The Unitary Executive and Presidential Control of Executive Branch Rulemaking.” *Administrative Law Journal*. 7:309. Summer, 1993.
- Schoenbrod, David.** “Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, and Delegations of Rulemaking Authority.” *Washington University Law Quarterly* 68:533, 1990.
- Scigliano, Robert.** “The President’s ‘Prerogative Power.’” in Inventing the American Presidency. Thomas Cronin ed. Kansas: University Press of Kansas. 1989.
- Shane, Peter M.** “Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking.” *Arkansas Law Review*. 48:161, 1995.
- Shane, Peter M. and Harold H. Bruff.** The Law of Presidential Power. North Carolina: Carolina Academic Press. 1988.
- Shanks, Robert B.** "Office of Legal Counsel—The President’s ‘Outside’ Law Firm" in The Department of Justice Manual. New Jersey: Prentice Hall. 1990-91.
- Silverstein, Gordon.** Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy. New York: Oxford University Press. 1997.

- Stehr, Steven D.** “Top Bureaucrats and the Distribution of Influence in Reagan’s Executive Branch.” *Public Administration Review*. January/February 1997.
- Strauss, David A.** “Presidential Interpretation of the Constitution.” *Cardozo Law Review*. 15:1-2. October, 1993
- Strine, Michael.** “Counsels to the President: The Rise of Organizational Competition” in Cornell W. Clayton. *Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics*. Kansas: University Press of Kansas. 1995.
- Thornburgh, Dick.** “The Presidency and Congress: Constitutionally Separated and Shared Powers.” *Washington University Law Quarterly*. 68:3 1990.
- Tiefer, Charles.** “Government Lawyering: The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client.” *Law and Contemporary Problems*. 61:47 1998.
- . *The Semi-Sovereign Presidency: The Bush Administration’s Strategy for Governing Without Congress*. Boulder: Westview Press. 1994.
- Waites, Brad.** “Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements.” *Georgia Law Review* 21: 755, 1987.
- Wald, Patricia M.,** “The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court” *American University Law Review*. 39:277.
- Wayne, Stephen J., Richard L. Cole and James F. C. Hyde, Jr.** “Advising the President on Enrolled Legislation: Patterns of Executive Influence.” *Political Science Quarterly*. 94:2, Summer 1979.
- Yoo, John C.** “The Continuation of Politics by Other Means: The Original Understanding of War Powers.” *California Law Review*. 84:2, March 1996.