CHAPTER 4

The Unitary Executive Theory and the Bush Legacy

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A key part of the George W. Bush legacy will be his administration's attempts to vastly expand the powers of the presidency. Under the "Unitary Executive" theory that espouses the inherent authority of the president to act unilaterally in a number of areas, the president adopted broad-reaching and in some cases unprecedented efforts to expand his powers. We address two critical areas in which President Bush made far-reaching claims of independent presidential powers: executive privilege and appointments of executive branch czars. To establish the framework, we begin with a brief description of the controversial unitary executive theory.

Advocates of the unitary executive theory contend that "the president, given 'the executive power' under the Constitution, has virtually all of that power, unchecked by Congress or the courts, especially in critical realms of authority." This theory has its roots in the works of many forceful advocates of expanded presidential power in the academic and political worlds. In 1960, Richard E. Neustadt suggested that the office of the chief executive is essentially divorced from the Constitution and that "presidential power is the power to persuade." This viewpoint directly countered what had been the dominant view of such presidential scholars as Edward S. Corwin who believed that presidents could only exercise powers that were outlined in the Constitution.[1] Neustadt thought that such a narrow view did not adequately explain the many dimensions of actual presidential power.

After a period of aggressive assertion of presidential power by Lyndon B. Johnson and Richard M. Nixon, some scholars began to rethink the Neustadt model. In *The Imperial Presidency*, Arthur M. Schlesinger Jr. argued that the president had gained more power than the Constitution provided, but, he added, "The answer to the runaway Presidency is not the messenger-boy Presidency. . . . We need a strong Presidency—but a strong Presidency *within the Constitution*."[2]

Despite pushing against an imperial presidency, Schlesinger nonetheless left open the intellectual justifications that would later be advanced by unitary executive advocates. Scholars who defend a unitary model contend that they believe in a constitutional-based strong presidency. The problem is that Article II of the Constitution, according to unitary advocates, does not limit executive power but instead expands it indefinitely through the use of the Vesting, Take Care, Oath, and Commander in Chief clauses.

In *The Unitary Executive*, law professors Stephen Calabresi and Christopher Yoo, leading proponents of more assertive chief executives, contend that "all of our nation's presidents have believed in the theory of the unitary executive." In fact, they say that the "Constitution gives presidents the power to control their subordinates by vesting all of the executive power in one, and only one, person: the president of the United States." "The executive branch's repeated and persistent opposition to any limits on the president's power to control the execution of federal law forecloses," according to them, "the argument that a 'gloss' on the meaning of the words 'the executive Power' has emerged, allowing Congress to create a headless fourth branch of government wielding executive power outside presidential control."[3]

The Bush administration adopted the unitary executive model and acted in a purposeful and even aggressive way to expand presidential powers. Revealing comments by Vice Pres. Richard Cheney—often seen as the leading architect of the administration's efforts in this regard—early in 2002 lend support to this understanding of the Bush presidency. Cheney argued that the administration would be dedicated to restoring the balance of powers in the system of separated powers to ensure that Bush would be able to fully exercise his rightful authority. He proceeded to assert that the modern era has been characterized by legislative encroachments on executive powers combined with presidential acquiescence in the face of such congressional power grabs.[4]

The unitary executive theory provided the rationale for President Bush's agenda to defend and expand presidential powers in a variety of areas as well as to protect the executive branch from what he and Vice President Cheney perceived as an overly intrusive Congress. And it is no coincidence that the vice president himself was a central character in a number of the most conten-

tious efforts by the administration to achieve these goals. We now examine two key areas in which the Bush administration relied on the unitary executive theory to expand the scope of presidential powers: executive privilege and the appointment of executive branch czars.

Executive Privilege

Executive privilege is the constitutional-based power of the president and high-level executive branch officers to withhold information and testimony from Congress, the courts, and ultimately the public.[5] Executive privilege is controversial because it is not explicitly mentioned in the Constitution, and also, a number of presidents have misused this power, giving it a bad name. Nonetheless, it is indeed a long-recognized principle, established in constitutional theory, practice, and legal judgments, that presidents have the right to maintain secrecy when it is in the public interest to do so. Executive privilege is not an unlimited power. Frequently, claims of privilege must yield to the needs of those who have compulsory power—particularly congressional committees, federal courts, and, in the past, special prosecutors and independent counsels.

Bush's executive privilege actions had far-reaching consequences for the exercise of presidential powers. He did not act on executive privilege matters merely to legitimize and protect his well-established right to claim this constitutional-based authority under certain circumstances. Rather, the president used the privilege to broaden the scope of executive powers in ways that reached well beyond his predecessors' actions.

To take one example, toward the end of his administration Bush declared executive privilege to conceal from Congress documents regarding an Environmental Protection Agency (EPA) decision to deny the state of California the authority to regulate the greenhouse gas emissions of vehicles. Bush reasoned that because the EPA decision involved White House discussions, he could withhold the documents. This action expanded executive privilege to include not only documents that deal directly with presidential decision making—the normally accepted limit to that power—but also ones concerning decisions made by agency officials. If executive privilege were accepted as so broad in scope, then whenever White House staffers advise an agency, the president can protect any related documents from disclosure. Acceptance of such a broad concept of the privilege would have far-reaching consequences for Congress's ability ever to conduct investigations of executive departments and agencies.

Bush's action in this case thus went well beyond the normal confines of executive privilege. Traditionally departments or agencies have not been able to guard information from Congress by claiming that they were advised by White House staff. Executive privilege in nearly all of its forms can be overcome by showing congressional need for information or in cases of alleged wrongdoing. In this situation the Bush administration attempted to pull an agency and its decision-making processes into the executive office of the president in order to control the release of information to Congress. An understanding that either a presidential delegation of decision making into departments and agencies or White House assistance in nonpresidential decisions can somehow guard the executive branch from releasing information to Congress not only violates principles of interbranch cooperation, but it also sets a dangerous precedent that future presidents can wall their administrations off from congressional oversight.

Atty. Gen. Michael Mukasey supplied the legal arguments for Bush's executive privilege claim in the EPA case. He maintained that the documents were drafted "for the purpose of assisting the President in making a decision" about ozone regulation. Mukasey added that "communications that do not implicate presidential decision-making" are protected from disclosure.[6] Executive privilege does expand outside of the president and his immediate advisers; however, the deliberative process privilege has a lower threshold of protection for the executive branch. It is misleading to note that executive branch officials are protected and then not acknowledge that there is a difference between presidential and agency- or department-level documents. For support of this assertion Mukasey referenced a number of Office of Legal Counsel, an entity housed within the Justice Department, memorandums. Repeated citations of self-serving executive branch documents do not add up to a valid legal basis for privilege, no more so than, say, the House of Representatives defining its constitutional powers based on references to multiple internal congressional staff memoranda.

Mukasey noted that for Congress to overcome a claim of executive privilege it must show "that the subpoenaed documents are 'demonstrably critical to the responsible fulfillment of the Committee's functions.'" He determined that the committee had not met that standard. Mukasey declared, "it is difficult to understand how the subpoenaed information serves any legitimate legislative need." He concluded that the executive branch's strong interest in protecting these documents outweighed the committee's need for disclosure.[7]

There are two overriding problems with Mukasey's point. First, merely because the executive branch discloses many documents does not mean that the most relevant documents were provided. With that argument a future president would only have to release multiple boxes of material that have nothing to do with the congressional investigation in order to meet the fallacy of this non

sequitur. Second, the fact that the attorney general is the one who made this determination raises a question of bias. Mukasey is not a neutral and detached decision maker and cannot through executive fiat say certain information should be withheld from Congress.

The overarching goal of Mukasey's legal reasoning was to protect not only presidential decision making from congressional disclosure but all executive branch information. Such an argument would guard communications that were not even connected to a presidential act. Although Congress has been delegating power to agencies since the latter part of the nineteenth century, that does not necessarily mean a president has the responsibility of direct supervision. There are incidences when the enabling legislation is sufficiently unclear as to create a practice where a head of an agency might consult with the president or his White House advisers. Unitary executive advocates argue this point while claiming that the president's duty to see that all "laws be faithfully executed" provides additional evidence for this understanding.

Neither of these arguments gives a president the power to counter federal law or use congressionally created agencies and officials in an attempt to withhold information from Congress. In this case, the Clean Air Act empowers the EPA administrator to evaluate state motor vehicle standards. In short, environmental regulations are not core presidential powers. The Supreme Court has weighed in on the question of congressional and presidential powers in this type of situation before. *In Kendall v. United States*, the argument had been made that the president could direct and control the postmaster general "with respect to the execution of the duty imposed upon him" by law. That belief was based on the obligation imposed on the president "to take care that the laws be faithfully executed." The Court declared that this "is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power which has no countenance for its support in any part of the Constitution, and is asserting a principle, which, if carried out in its results to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress and paralyze the administration of justice."[8]

The Court's decision directly counters what would eventually be known as the unitary executive argument made in that case, but, more important, it lends support to the understanding that the president does not have direct control and authority over the EPA administrator in the current situation. There is an expectation of autonomy from presidential control if the congressional delegation of power is given solely to an agency official and it does not interfere with a constitutional power of the president. As the Supreme Court announced in *Kendall*, "To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution is a novel construction of the Constitution, and entirely inadmissible."[9] In the case of executive privilege, the president cannot force an agency official to withhold information from Congress that has no relationship to the president's core constitutional duties. Even if the decision-making issue at hand were a delegation of presidential authority to the EPA—which it was not—a president cannot properly conceal such documents with a claim of privilege.

Incidents like this one were not rare during the Bush era. From the start the president attempted to put his own unitary stamp on the presidential power of secrecy. In 2002, Bush directed his administration to refuse to release documents related to former president Bill Clinton's last-minute pardons. Although Bush never made a formal claim of executive privilege, the administration used the codified version of the presidential communications privilege exemption found in the Freedom of Information Act (FOIA) to block access to the pardon files. This incident parallels closely with the energy task force controversy involving Vice President Cheney where the White House made secrecy claims based indirectly on executive privilege. In protecting the administration from releasing information regarding the energy task force hearings, Bush directed the vice president to invoke many of the traditional bases of a formal privilege claim.[10]

The problem of withholding these pardon documents was that they were in the possession of the Justice Department's pardon office, and they had never been seen by the president or any White House official. The question came down to whether the FOIA privilege exemption could be expanded to include documents that had never been directly associated with the president. A Justice Department official remarked that "The pardon power is exclusively granted to the president," and any "information, any advice and any memos would be part of the deliberative process. We want to preserve the integrity of that process."[11] As with the EPA case, this claim reached beyond the traditional executive privilege areas of presidential communications and deliberative process. It was a more expansive position from what previous administrations had asserted in that it provided protection to all executive branch officials regardless of their association to the president or to the White House more generally.

In 2003, US District Court for the District of Columbia Judge Gladys Kessler accepted the Bush administration's argument. The case was appealed to the US Court of Appeals for the District of Columbia, where, writing for the majority, Judge Judith Rogers noted the importance of striking "a balance between the twin values of transparency and accountability of the executive branch on the one hand, and on the other hand, protection of the confidentiality of Presidential decision-making and the President's ability to obtain candid, informed advice." Rogers acknowledged that Congress had placed great

emphasis on disclosure in FOIA requests. With that in mind, she declared that the presidential communications privilege only applies to documents "solicited and received" by the president or "his immediate White House advisers who have 'broad and significant responsibility for investigating the advice to be given the President.'" Limiting the definition of executive privilege, the court said, recognized certain "principles underlying the presidential communications privilege" and conceded "the dangers of expanding it too far."[12]

More specifically, Rogers believed that an "extension of the privilege to internal Justice Department documents that never make their way to the Office of the President on the basis that the documents were created for the sole purpose of advising the President on a non-delegable duty is unprecedented and unwarranted." She warned that "a bright-line expanding the privilege could have the effect of inviting use of the presidential privilege to shield communications on which the President has no intention of relying on exercising his pardon duties, for the sole purpose of raising the burden for those who seek their disclosure."[13] Rogers thus correctly balanced the competing needs for candor in presidential-level discussions and the goal of openness in government established in the FOIA provisions.

President Bush continued to aggressively use the unitary executive model and made multiple claims of executive privilege to conceal White House documents and to prevent current and former administration aides from testifying before Congress about the decision to force the resignations of a number of US attorneys. His claims of absolute immunity for current and former presidential aides led Congress to issue several subpoenas, a contempt resolution, and, finally, to seek a judicial resolution. At the heart of this controversy was the administration's decision to remove several US attorneys, allegedly for reasons of poor job performance. After reports surfaced in early 2007 that political considerations had come into play, the House and Senate Judiciary Committees launched investigations. The president made four executive privilege claims to block the disclosure of testimony and documents. The White House reasoned that Bush made these claims "to protect fundamental interests of the Presidency" by not revealing internal decision-making processes.[14]

After repeated attempts to obtain testimony and documents, the House Judiciary Committee held former White House counsel Harriet Miers and White House Chief of Staff Joshua Bolten in contempt of Congress. The House of Representatives voted 223 to 32 to issue the contempt citations. The administration refused to enforce the contempt charges, and the House filed a lawsuit in the US District Court for the District of Columbia. The House requested that the court declare that Miers was not immune from testifying before a congressional committee and also sought the disclosure of documents withheld by Bolten.[15]

A central focus of this suit was Bush's claim of absolute immunity and that the "separation of powers principle" not only makes the president himself immune to testimony, but it also applies "to senior presidential advisers" and former presidential aides. The district court rejected this argument. Indeed, Judge John D. Bates eviscerated the administration's argument: "The Executive's current claim of absolute immunity from compelled congressional process for senior presidential aides is without any support in the case law." Bates noted the novelty of Bush's broad interpretation of his powers: The executive branch "cannot identify a single judicial opinion that recognizes absolute immunity for senior presidential advisers in this or any other context. That simple yet critical fact bears repeating: the asserted absolute immunity claim here is entirely unsupported by existing case law." Bates's decision repudiated the theory that the president and his advisers could act without regard to Congress or the judiciary. Bates dismissed a White House request to delay testimony by Miers, but the US Court of Appeals for the District of Columbia granted an appeal and issued a temporary stay. The court suggested that the case would become moot because the subpoenas would expire at the end of that Congress, therefore giving "the new President and the new House an opportunity to express their views on the merits of the lawsuit."[16] The ruling set an unfortunate precedent that gives future presidents clear guidance on evading congressional oversight through stalling tactics and the use of baseless constitutional and legal theories to ensure that executive branch actions remain secret.

One of President's Bush's most controversial claims of executive privilege concerned a congressional request for an interview transcript with Vice President Cheney and several Federal Bureau of Investigation (FBI) reports on the leaking of the name of Valerie Plame who had been a Central Intelligence Agency (CIA) operative. Bush claimed executive privilege right before the House Oversight and Government Reform Committee was scheduled to vote on a resolution citing Attorney General Mukasey in contempt. In a letter to Chairman Henry Waxman (D-CA), the administration claimed the reports "deal directly with internal White House deliberative communications relating to foreign policy and national security decisions faced by the President and his advisers, communications that lie at the absolute core of executive privilege." Additionally, the congressional inquiry "raises a serious additional separation of powers concern relating to the integrity and effectiveness of future law enforcement investigations by the Department." Disclosing reports that contain voluntary interviews with the vice president and senior White House staff "would significantly impair the Department's ability to conduct future law enforcement investigations where such investigations would benefit from full and voluntary White House cooperation."[17]

Mukasey once again announced the underlying justifications for an assertion of privilege. He said that a claim of privilege would not be about hiding an act of wrongdoing but rather protecting the separation of powers as well as the integrity of future Justice Department investigations of the White House. "I am greatly concerned about the chilling effect that compliance with the committee's subpoena would have on future White House deliberations and White House cooperation with future Justice Department investigations," Mukasey wrote.[18]

Mukasey claimed that executive privilege "extends to all Executive Branch deliberations, even when the deliberations do not directly implicate presidential decision-making." He noted that the information requested is protected by the presidential communications privilege, deliberative process privilege, and the law enforcement component of executive privilege. Moreover, the committee "has yet to identify any specific legislative need for the subpoenaed documents, relying instead on a generalized interest in evaluating the White House's involvement in the Plame matter as part of its review of White House procedures governing the handling of classified documents."[19]

Mukasey combines the different threshold standards of executive privilege together in a way that is confusing. There is in fact a clear distinction between the president and the rest of the executive branch in terms of what can and cannot be protected from a congressional investigation. In addition, repeating that Congress has not met the "demonstrably critical" need does not mean it is so. A deliberative process claim, which most of the documents in question fall under, cannot stand up to a showing of government misconduct or wrongdoing.[20] The unlawful release of a CIA agent's name clearly meets this threshold standard. It is also not accurate that the law enforcement privilege protects information from closed investigations.

What the Bush administration tried to do in this case is expand executive privilege to protect the attorney general from disclosing nonpresidential documents to a congressional committee. The administration even declared that if the committee did not move ahead and cite Mukasey for contempt, then the Justice Department was "prepared to continue the accommodation approach."[21] This offer borders on a bribe to Congress, and even if it is not illegal it is certainly unethical. Moreover there was clearly a conflict of interest on the part of Attorney General Mukasey in giving executive privilege advice to President Bush on a contempt of Congress vote that applied directly to the attorney general. The resulting executive privilege claim protected Mukasey from having to respond to a contempt citation.

This executive privilege claim was an attempt to protect the release of an FBI interview by Vice President Cheney to a congressional committee. The information requested by Congress did not involve a discussion between the president and vice president that dealt with a core presidential power. Instead it was an interview of Cheney conducted by a government attorney and FBI agents that was not protected by grand jury secrecy requirements or with any expectations that the information given would remain sealed or not be disclosed to Congress.[22] The refusal to release the interview and other information was an attempt to expand executive privilege to provide increased protection of the vice president and the executive branch. Case law on executive privilege and its many precedents do not provide support for such an expansive definition of this power. Congress has the authority to conduct its oversight duties over all areas of the executive branch including the president and vice president's offices. Nothing in the Constitution, case law, or interbranch practice counters that point.

From these cases, it becomes clear that one of the key areas of contention over presidential powers in the Bush administration was the president's broad rationales for, and exercises of, executive privilege. The president could have made a valid case that because of the taint of its exercise during the Watergate and Clinton-Lewinsky scandals, executive privilege, a legitimate and sometimes necessary presidential power, had earned an unfair bad reputation and needed to be restored. Yet the Bush-era claims of executive privilege and rationales reached far beyond the customary exercises of that power. The administration, under the guidance of the unitary executive theory, sought to vastly expand and combine the traditional categories of executive privilege in ways that, if successful, would have ultimately walled off the executive branch from any system of accountability. Such efforts, had they succeeded, could have had profound long-term consequences for the delicate system of balances built into the Constitution.

Although the Congress and judicial entities held back many of the administration's most far-reaching efforts in this area, the administration picked up a few significant victories along the way, either through the courts (Energy Task Force case) or due to delay tactics (US attorneys firings case).[23] These victories create some temptation for Bush's successor to make similar efforts when doing so might temporarily benefit the agenda of the Barack Obama administration.

Executive Branch Czars

On January 29, 2001, President Bush announced a proposal to create a new White House office that would be responsible for allocating federal funds for the needy through faith-based organizations. Entitled the White House Office

of Faith-Based and Community Initiatives (WHOFBCI), the office was headed by a director who became widely known as the "faith-based czar." The president created this new office and director by executive order. He appointed as the office's first director John DiIulio, a political science professor.[24]

Congress took up the charge of developing the scope and parameters of the new faith-based initiative. But in the face of considerable political opposition, legislative proposals repeatedly failed. So in December 2002, after nearly two years of legislative wrangling, the president issued an executive order to allow federal tax dollars to be given to religious-based charities. In their book on the faith-based office, scholars Formicola, Segers, and Weber described the office's creation: "It took at least a year for the Bush White House to clarify what it meant by its 'faith-based initiative.' The proposal floundered in Congress. The initiative fared better in the executive branch, where the president could invoke executive powers to create agencies and order them to implement existing laws. By the end of his second year in office, the president had done just that—operationalized a controversial office through executive fiat."[25]

Black, Koopman, and Ryden, the authors of another book on the faith-based office, in describing the shift from failure to approve the office's powers legislatively to a presidential executive order settling the whole matter, phrased it rather bluntly: "Because the president had power to act unilaterally in the executive branch, the policy fared better there." In creating the new office, Bush also established five faith-based cabinet centers (later increased to seven) for the purpose of implementing such programs and regulations throughout the government. In their detailed account of the faith-based initiative, Black, Koopman, and Ryden tellingly explain that while the whole proposal stalled in Congress, WHOFBCI and cabinet center staff already "were quietly beginning to change regulations, earmark money for faith-based organizations, and generally transform the relationship between the executive branch and religious groups."[26]

It offends constitutional principles when a president creates new units and makes new policies and regulations through executive fiat, especially when he does so after having failed to achieve some of the same goals legislatively. Bush created the new office by executive order, but he had initially waited on Congress to give legislative sanction and substance to the office's core functions. When that did not work, he simply issued another executive order and took Congress out of the equation. By the accounts of the two leading scholarly books on the topic, the president had wanted and expected a legislative victory here to strengthen his hand. The effectiveness of the political opposition to creating a faith-based initiative, which had had a part of its origins in a Clinton-era program and had been supported by both major party presidential nominees in 2000, took the president and his staff by surprise.

The Bush faith-based czar had authority over policy and regulatory matters, although the office admittedly spent more time on outreach to faith organizations and enabling them to compete for federal grants. Many critics of the office nonetheless complained that the existence of a faith-based office and czar violated principles of church-state separation. More importantly, the creation of the new office and czar established a precedent. Bush's successor could have decided that the faith-based initiative violated church-state separation or that it was not an appropriate role for the White House and canceled the office and czar position. Instead, he significantly expanded the roles of each.

On September 20, 2001, nine days after the terrorist attacks on the United States, President Bush addressed Congress and announced, among other initiatives, the creation of a new Cabinet-level Office of Homeland Security (OHS) with a director that reported directly to him. Bush named Pennsylvania governor Tom Ridge to this new post. Only weeks later did the president issue an executive order that set forth the duties of the OHS director, who widely became known as the homeland security czar.[27] A major role of the new czar was to coordinate communications and policy responses among multiple federal agencies and different levels of government.

Ridge thus was a new presidentially appointed officer holding Cabinet-level status without Senate confirmation. Bush used this arrangement to wall off Ridge from dealing openly with Congress. When Senators Robert C. Byrd (D-WV) and Ted Stevens (R-AK) invited Ridge to testify before the Appropriations Committee, Bush refused because Ridge held status as a presidential adviser and not as a full cabinet officer. Byrd and Stevens objected that Ridge was far more than a mere adviser to the president and that the homeland security czar was "the single Executive Branch official with the responsibility to integrate the many complex functions of the various Federal agencies in the formulation and execution of Homeland security programs."[28] The president still refused to allow Ridge to testify.

Ridge relates in his memoirs that he was himself extremely uncomfortable with this arrangement. "Our influence on new spending became a point of contention with Congress. Committees on the Hill called upon me to testify, and I would have been happy to go." Ridge added that he thought it was important to cooperate with Congress given the substantial changes in government structure being introduced by the creation of his office and its activities. "But that kind of partnership seemed out of bounds." The president's chief of staff Andrew Card exclaimed to Ridge: "You're working for one person and one

person only!" Ridge then adds the key point about the constitutional troubles with his new office: "Indeed, the president prohibited my testimony, holding to the tenet that Oval Office advisers are not subject to congressional subpoena power under the theory of executive privilege." As Ridge reports, when asked by reporters about this arrangement, the president retorted: "He's a part of my staff, and that's part of the prerogative of the executive branch of government, and we hold that very dear."[29]

As a substitute for open testimony, the president instructed Ridge to pay private visits to members of Congress and also to give informal briefings to two House committees. Numerous lawmakers of both parties objected to this arrangement. Ridge recounts one telling episode in which he visited Senator Byrd, who proceeded to pull out a well-worn copy of the Constitution to show the homeland security czar that it is Congress that possesses the power of the purse. As Ridge reports, Byrd objected to the private briefing arrangement and said he would insist on public testimony: "I am unaware of any instance in which a private briefing has been used as a substitute for responding to a Senate Appropriations Committee request for testimony concerning a funding need." Ridge makes it clear that he actually agreed with Byrd and other congressional critics of the Bush administration approach of concealing the homeland security czar from testifying. "I was caught in a highly visible pickle."[30]

He should not have been. Ridge was heading a new government unit that was coordinating and making policy, restructuring entire federal departments and their interactions, and spending large sums of public money. This arrangement especially required legislative involvement. Congress responded appropriately by pushing for the establishment of a Department of Homeland Security (DHS) that would be accountable. As Louis Fisher explained, such a law "would override the president's executive order and neutralize White House arguments about Ridge functioning as a presidential adviser."[31]

Bush initially opposed the idea, but over time he came around to supporting it for practical reasons. Lacking strong support throughout the government, Ridge's office was ineffectual at coordinating the activities of multiple agencies. Congress deemed it necessary to put forward a more coherent reorganization plan for federal departments and agencies involved in aspects of homeland security. Also, the president was left with little choice, as Congress was determined to pass a reorganization plan creating the DHS. As the person commonly called the terrorism czar and also cyber security czar, Richard Clarke wrote in his own memoir that Bush had the choice of eventually signing a bill "named after the man whom the majority of voters had wanted to be Vice President just twenty months earlier" (Sen. Joseph Lieberman, D-CT), or he could champion the idea and name it the "Homeland Security Act."[32] The newly created Department of Homeland Security was headed by a presidentially appointed and Senate-confirmed director. Ridge retained the moniker of czar, although he and his successor Michael Chertoff were then more often referred to as homeland security secretary.

In April 2004 Bush issued an executive order creating within the Department of Health and Human Services (HHS) the national health information technology coordinator, a position that became known as the health IT czar. Bush's order gave the HHS secretary the authority to make the appointment "in consultation with the President or his designee."[33] As established, the position was not Senate confirmed, although it operated with an annual budget of about sixty million dollars and set up advisory commissions and awarded contracts to providers of health care information technology. The health IT czar position has been continued under the Obama administration with a new director and a larger budget and broader scope of authority.

The appointment of czars has proven at times to be an invitation to cronyism. In 2004, in reaction to fears of bioterrorism and epidemics, HHS created a new position of assistant secretary for public health emergency preparedness that variably was called the bioterrorism czar and the bird flu czar. The choice of attorney Stewart Simonson elicited howls of protest given his lack of expertise or of any real background at all in the fields of bioterrorism, medical research, or health crisis management. He had been a protégé of HHS Secretary Thompson prior to his presidential-appointed czar post. Simonson also was an example of a dual appointee—he had status as a Senate-confirmed assistant secretary in HHS and simultaneously held a White House adviser position. In 2006, Congress passed the Pandemic and All-Hazards Preparedness Act establishing the assistant secretary for preparedness and response position and subjecting it to Senate confirmation.[34]

What is very troubling is that not only are presidents using these positions to consolidate power, but in some cases interest group pressures generate the push to create a new czar position. Even when existing governmental units have the authority to deal with a crisis, many people demand the creation of a new entity that operates outside the normal governmental structure. Such was the case after the Katrina disaster that devastated the coastal areas of the Gulf states. President Bush initially did not appoint a Katrina disaster czar. He didn't think it was necessary to do so. But most Americans were highly critical of the president for what they perceived as his slow and tepid response to the crisis. The incompetent responses of the Federal Emergency Management Agency (FEMA) and its director Michael Brown became a topic of widespread national derision. Pressure built for Bush to appoint a czar in the aftermath of the disaster. Americans had lost faith in the ability of FEMA to do its job—and with good reason.

On November 1, 2005, the president issued an executive order that created the position of coordinator of federal support for the recovery and rebuilding of the Gulf Coast region. He appointed the former chairman of the Federal Deposit Insurance Corporation (FDIC), Donald E. Powell, to the position that commonly became known as the Gulf Coast reconstruction czar. A profile story in the *Washington Post* described Powell's duties as "to set goals and policies for everything from restarting the New Orleans economy to rebuilding infrastructure." Powell had a staff of twelve, and he made a number of policy and spending decisions that affected the Gulf region recovery. A *New York Times* article about his departure from the czar post in March 2008 reported that "Louisiana officials credited him with freeing up federal money at critical points."[35]

There is no disputing that the enormity of the Katrina disaster required a major federal response. Some federal institutions exist for the purpose of responding to natural disasters. It makes little sense that if an existing entity performs poorly that the corrective is to have a new presidentially created unit that lacks normal democratic control measures. In this case, an executive branch czar was making policy and grant funding decisions that could have been handled elsewhere in the government.

Members of Congress should especially be wary of presidents appointing czars. Time and again, czars have become vehicles for cutting Congress out of the policy and budgetary processes. Political pressures to respond to crises and troubling situations create the impetuses for elected officials to resort to calling for new czars. In response to the perceived failings of federal, state, and local governments to respond adequately to the health impacts on workers who responded to the 9/11 attacks and those who worked the massive cleanup of the Word Trade Center site, some members of Congress lobbied Bush to appoint a 9/11 health czar.[36]

In February 2006 the president appointed the director of the National Institutes for Occupational Safety and Health, John Howard, to the additional position of federal coordinator of the government's response to Ground Zero health impacts. The former position is Senate confirmed, but the latter is not. He became known as the 9/11 health czar. He exercised considerable authority over the coordinating of government responses among multiple federal agencies and also among different levels of government. Howard became a strong advocate for the 9/11 workers in ways that put him at odds with the Bush White House. Consequently, Bush did not continue Howard's position when it was up for renewal in July 2008. In 2009 Pres. Barack Obama reappointed Howard to the 9/11 health care czar position.[37]

Conclusion: Bush and the Unitary Executive

An enduring legacy of the Bush era, sure to be discussed and debated for years, is the appropriation of the unitary executive theory in defense of presidents acting outside the normal system of constraints on their powers. According to that theory, presidents claim constitutional, and even inherent, authority to act unilaterally when they deem it in the public interest to do so. Contrary to former Vice President Cheney's contention noted earlier, there is a growing tendency of presidents to find mechanisms by which they can exercise direct authority without negotiating their decisions with other policy actors in the system.

We examined two of the important areas in which President Bush made expansive uses of the unitary executive theory to try to evade processes of accountability: executive privilege and the appointments of executive branch czars. Regarding executive privilege, at times President Bush and Vice President Cheney invited interbranch conflicts and judicial rulings, and they stood firm in their belief that they were defending a core executive branch prerogative. The president's appointments of various executive branch czars were another strategy for concentrating power in the executive and shielding the White House from congressional checks on its authority.

In both of these areas Bush established dangerous precedents. Once new powers are created or existing ones expanded, it is too tempting for a future president not to exercise them. Indeed, despite promises to effect significant change from such Bush-era practices that concentrated powers in the executive, Pres. Barack Obama, much to the disappointment of advocates of a balanced constitutional system, has not differed greatly from his predecessor. To his credit, Obama did issue an executive order overturning Bush's expansion of executive privilege in the case of requests for access to presidential records. But overall, at least through 2012, Obama has mostly followed Bush's secrecy practices. Obama has also vastly expanded the use of executive branch czars beyond Bush's practices. Most likely Obama was sincere when he expressed in the campaign context in 2008 that he would behave differently from his predecessor. Yet like many presidents before him, he discovered the utility of having certain powers at his disposal. And there lies the danger with the unitary executive theory and the continued trajectory of expanded presidential powers. As the system of delicately balanced powers envisioned by the constitutional framers gives way to increasing executive dominance, it becomes ever more difficult to turn the clock back and restore the system of genuine checks and balances.[38]

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CHAPTER 5

The Leadership Difference between Steadfast and Stubborn

How Bush's Psyche Drove Failure in Iraq

Robert Maranto

In contrast to the "all hat and no cattle" stereotype, there is nothing dumb about George W. Bush. Bush has psychological characteristics, however, that limited his competence as a "decider" (to use his term) and ultimately undermined his record. President Bush had strategic competence: a vision of where he wanted to push government that was compatible with national needs. And after the devastating 9/11 attacks, he certainly had opportunities for regime change at home. He thus could have become, to use the terms of Nelson, a president of achievement. Indeed initial judgments of the Bush presidency were favorable, even among liberal political scientists. However, the president lacked the tactical competence to implement his vision. President Bush had bad luck in Hurricane Katrina, and White House insiders and Bush himself believe that the Democratic opposition would attack no matter what the president did. Hyper-partisanship is in fact a feature of the political landscape. Yet psychological inflexibility played an even greater role in what Jacob Weisberg calls *The Bush Tragedy*. The impacts of leader psychological characteristics are magnified in foreign policy and in crisis, when power concentrates in the hands of the "decider."[1] President Bush lacked the tactical flexibility to adjust when initial plans failed in Afghanistan, just after Hurricane Katrina, and most importantly (and unforgivably) in Iraq. Failure in Iraq, with its fiscal impacts and its erosion of national confidence and international standing, likely

Taking the Measure

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Edited by Donald R. Kelley & Todd G. Shields

2013

Texas A&M University Press • College Station