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Lawyers and the Defense of the Presidency

*Nelson Lund**

I am not afraid to say that the doctrine of self-interest properly understood appears to me the best suited of all philosophical theories to the wants of men in our time and that I see it as their strongest remaining guarantee against themselves. Contemporary moralists therefore should give most of their attention to it. Though they may well think it incomplete, they must nonetheless adopt it as necessary.¹

I. INTRODUCTION

President Clinton's first White House Counsel,² Bernard Nussbaum, was pressured into resigning his post after a special prosecutor began looking into meetings he had held with officials of an independent regulatory agency. These meetings, which dealt with the agency's investigations of financial dealings in which the President and his wife had been involved before they came to Washington, were immediately and almost universally denounced. Clearly bitter at having lost his job because of a standard of conduct having more to do with appearances of impropriety than with legal rules, Nussbaum claimed that he was the victim of people "who do not

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While serving at the White House as associate counsel to the president from 1989 to 1992, I participated in many of the matters discussed here; all facts directly relied on for this analysis are matters of public record or common knowledge. For helpful comments on an earlier draft, I am grateful to Neal Devins, Harvey Flaumenhaft, Stephen G. Gilles, Mara S. Lund, John O. McGinnis, Geoffrey P. Miller, Stephen G. Rademaker, and Nicholas P. Wise. Generous financial support was provided by the Sarah Scaife Foundation and the John M. Olin Foundation, and William Loeffler offered able research assistance. The author retains responsibility for errors.

1. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 572 (J.P. Mayer ed., 1969).

2. Throughout this article, I will use "White House counsel" interchangeably with the more formal term "counsel to the president."

understand, nor wish to understand the role and obligations of a lawyer, even one acting as White House Counsel."³

Nussbaum seems to have believed that the job of a lawyer—any lawyer—is to act as aggressively as possible to protect the interests of the individual who retains him, so long as his actions are “consistent with the rules of law, standards of ethics, and the highest traditions of the Bar.”⁴ Nussbaum’s view was soon attacked by his predecessor from the Bush administration, C. Boyden Gray, who said: “He confused his fiduciary role as a temporary occupant of that office with the no-holds-barred role a private litigant would have. He is not [the Clintons’] private lawyer. He is the lawyer for the Oval Office.”⁵ Nussbaum’s successor, Lloyd Cutler, also rejected the applicability of the private-lawyer model. When the President announced his appointment, Cutler said:

The Counsel is supposed to be counsel for the President in office and for the Office of the Presidency, as many people have said. Most of the time, those two standards coincide. Almost always the advice you would give the President is advice that is in the interest of the Office of the Presidency. . . . When it comes to a President’s private affairs, particularly private affairs that occurred before he took office, those should be handled by his own personal private counsel and, in my view, not by the White House Counsel.⁶

As this is written,⁷ the Clintons and Nussbaum have steadily maintained that they committed no illegal or unethical acts. Although this article is not concerned with the events surrounding Nussbaum’s resignation, those events provide a striking illustration of the somewhat uneasy professional and institutional relationships between presidents and their closest legal advisors. Whatever may come to light in the continuing investigations of the Clinton administration, we can be sure that this will not be the last eruption of controversy about the proper relationship between presidents and their legal advisors

3. See *The Whitewater Inquiry: Text of Resignation Letter and Clinton Reply*, N.Y. TIMES, March 6, 1994, § 1, at 23, col. 1.

4. *Id.*

5. Naftali Bendavid, *Whitewater Meets the Washington Legal Culture*, LEGAL TIMES, March 14, 1994, at 1, 14 (quoting C. Boyden Gray).

6. Remarks Announcing the Appointment of Lloyd Cutler as Special Counsel to the President and an Exchange With Reporters, 30 WKLY. COMP. PRES. DOC. 462, 465 (March 8, 1994).

7. November 1994.

in the government. Ever since Watergate made the distinctions among the president's various personal and official interests in his office a subject of close public scrutiny, the history of that office has looked as much like a battle among lawyers as it has a contest between presidents and their political opponents.

One legacy of Watergate has been an intense interest, often politically motivated, in the ethics of those who serve in the upper reaches of government, along with a proliferation of new laws ostensibly aimed at curbing unethical conduct by government officials.⁸ And one consequence of that legacy has been a growth in the size of the office of the White House Counsel, which plays a preeminent role in seeking to prevent ethical embarrassments from impeding the president's substantive agenda.⁹ Mr. Nussbaum's government career foundered on the treacherous ethical rocks that have been thrown around the shores of the presidency, a fate that has become almost commonplace among senior officials during the last two decades.¹⁰

The preoccupation with ethics in government is the most obvious lingering effect of the Watergate affairs, but it may not be the most important. This article will consider a less visible aftermath of Watergate: the increasing significance of disputes that generally fall under the rubric of separation of powers. President Nixon, of course, tried unsuccessfully to invoke the

8. The most important of these laws is the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of 2, 5, 18, and 28 U.S.C.). Other major examples include: Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 (codified as amended in scattered sections of 5 U.S.C., 5 U.S.C. app., and 39 U.S.C.); Presidential Records Act of 1978, Pub. L. No. 95-591, 92 Stat. 2523 (codified at 44 U.S.C. §§ 2201-2207); Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (codified in scattered sections of 2, 3, 5, 18, 28, & 31 U.S.C.).

9. For an insightful summary of the history of this aspect of the White House Counsel's office, see Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, LAW & CONTEMP. PROBS., Autumn 1993, at 63, 72-76. The many functions performed by the Office of the Counsel to the President in recent years are described briefly in BRADLEY H. PATTERSON, JR., THE RING OF POWER 141-50 (1988).

10. The course that led Nussbaum to the White House Counsel's office began when he worked as a staff lawyer for the House Judiciary Committee as it was considering the impeachment of President Nixon, where he worked with a young staff aide named Hillary Rodham. Stephen Labaton, *New Role for White House Counsel: De Facto Attorney General*, N.Y. TIMES, March 9, 1993, at A14, col. 1. Further research would be needed in order to determine whether the connection between Nussbaum's two ventures into national politics constitute an odd coincidence, or an example of poetic justice.

constitutional separation of powers to prevent his own downfall. As emboldened congresses and a more belligerent press have sought to subject subsequent presidents to tighter and tighter controls, those presidents have also invoked the Constitution to protect themselves from encroachments on their freedom of action. Some of these disputes have arisen from the post-Watergate ethics laws,¹¹ but they have not by any means been limited to this context. Because recent turf fights between presidents and their adversaries have often been waged in legal and constitutional terms, lawyers who specialize in the separation of powers have become much more prominent than they once were. The function of articulating a principled defense of presidents and the presidency—mostly from congressional incursions—is carried out primarily by those who serve in the Office of the Counsel to the President at the White House and in the Justice Department's Office of Legal Counsel ("OLC"), to which the Attorney General's legal advisory function has largely been delegated.¹² The rise of this species of presidential lawyer is worthy of considerable attention, both for its intrinsic intellectual interest and because it can be expected to have continuing effects on the political life of our nation.¹³

The comments that Gray and Cutler offered when Nussbaum resigned his office¹⁴ exemplify the conventional wisdom among this new breed of presidential lawyer about the proper relationship between them and their client. Cutler and Gray agree that government lawyers may not properly serve as the president's personal attorney, and in this they are surely correct. But they also agree that the office of the presidency should, at least to some extent or in some circumstances, be

11. *E.g.*, *Morrison v. Olson*, 487 U.S. 654 (1988) (constitutional challenge to the Independent Counsel provisions of the Ethics in Government Act of 1978).

12. OLC is a small office, headed by an Assistant Attorney General, which is usually staffed by twenty-odd lawyers. The office acts as general counsel for the Department of Justice and as outside counsel for the White House and for the executive departments and agencies.

13. As Professor Geoffrey P. Miller has pointed out, legal bureaucracies that deal with separation of powers issues have grown up in both the executive and legislative departments of government, so that disputes that might once have been resolved through political accommodation are now more likely to be channeled into the courts. See Geoffrey P. Miller, *From Compromise to Confrontation: Separation of Powers in the Reagan Era*, 57 GEO. WASH. L. REV. 401 (1989). If this trend continues, the law of the separation of powers should become more complex and more practically significant.

14. *Supra* text surrounding notes 5 and 6.

regarded as the real client to whom the president's lawyers owe their professional loyalty. I believe this is incorrect in several respects. First, it has no basis in the law. Second, it exaggerates the professional obligations and constitutional role of the lawyers, while suggesting an unduly restricted view of the president's own role and obligations. Third, the moralistic romanticism of the Gray and Cutler vision obscures the economy of incentives that actually determines much of what presidents and their lawyers actually do.

This article seeks to present a more realistic understanding of the work that is and can be done by those who advise the president about his constitutional rights and responsibilities. I argue that the role of lawyers in defending the presidency is determined primarily by the operation of ordinary incentive structures, rather than by legal requirements or professional norms. The potential influence of these lawyers, moreover, is sharply constrained by those same incentive structures, and especially by the fact that the president faces different incentives than his legal advisors. I conclude that as a result of these constraints, the principled defense of the office of the presidency cannot become a significant element of any president's agenda, even if the president wants it to be. For the reasons suggested by Tocqueville,¹⁵ this analysis is not the enemy of professional obligation or constitutional responsibility, but their friend. The doctrine of self-interest properly understood may be incomplete, but it is the strongest guarantee against our lawyers and our presidents.

Part II explains the analytical framework used in this article, and contrasts it with other approaches that dominate the existing academic literature. The following sections of the article provide a detailed case study to support the conclusions suggested by the analysis used here. Part III explores the Bush administration's unprecedented effort to implement a serious and systematic legal strategy for the defense of the presidency. This strategy unquestionably had visible results, but it also generated compromises that were often more important, though much less conspicuous. Part IV examines three major incidents in which the administration's legal strategy was simply abandoned. I argue that these incidents were, on the whole,

15. *See supra* note 1.

more significant than the cases in which the strategy was actually pursued. Part V analyzes the Bush administration's single most aggressive attempt to carry out its program, and explains how and why it completely missed its goal, leading instead to a setback for the program. Part VI offers some concluding observations.

II. FRAMEWORK FOR THE ANALYSIS

The increased legalization of ethics and the increased legalization of turf battles between the legislature and the executive have a common origin in Watergate, but they have also had a common effect: enhancing the influence of lawyers in the White House and in OLC. To see why this has occurred, consider for a moment the roles played by most of the senior political appointees in the executive departments and agencies, such as cabinet secretaries. In theory, these are supposed to be the president's representatives in the permanent bureaucracy, giving policy direction in the light of an agenda set by the single popularly elected possessor of the executive power of the United States.¹⁶ In practice, these officials inevitably serve both as the president's representatives in the agencies and as representatives to the White House for the bureaucracies and their congressional and interest-group overseers. These conflicting roles can be balanced in different ways, and with greater or lesser success, depending on a great variety of circumstances. What is important for present purposes is simply to note that the remedies for failing to balance these roles successfully are entirely political. Political appointees can be fired by the president, and can be subjected to various lesser kinds of pressure and embarrassment from the White House. Similarly, an agency's congressional superintendents can often exert a considerable countervailing influence on its political managers because of legislators' discretion to grant and withhold appropriations, provide desirable enabling legislation, inflict unflattering publicity through hearings and investigations, and take other steps that will cause political appointees to appear as successes or failures.

16. For obvious reasons, I am not referring in the present context to the so-called "independent agencies," which have been statutorily insulated from the president's control through restrictions on his removal power.

The president's principal legal advisors have an apparently very different set of roles. Unlike the various interests that political managers are expected to balance politically, the law binds everyone, including the president. As oracles of the law, therefore, attorneys can in effect issue commands to their nominal superiors in a way that others cannot. As ethics laws have become increasingly complex and arcane, those who are expert in their interpretation have naturally become more important and more powerful. And, as disputes over the allocation of power between the executive and the legislature have become more legalistic, experts in this branch of constitutional law have also become more important and more powerful. The most important authorities on ethics and separation of powers, moreover, are largely found in the same small group of people who work at the White House Counsel's Office and in OLC.¹⁷

17. Within the White House, the Counsel's office handles both ethics and separation of powers issues. OLC is well known for its role in separation of powers issues, and somewhat less well known for its role on ethics issues. The government is permeated with "designated agency ethics officers" (often an agency's general counsel), who provide day-to-day ethics advice. There is also a specialized Office of Government Ethics that serves primarily as a source of technical knowledge and advice about ethics issues. OLC, however, routinely makes final decisions about particularly important or sensitive issues involving the interpretation of the ethics statutes, just as it does with respect to other laws. For samples of important ethics rulings by OLC, see Application of Conflict of Interest Rules to Members of Advisory Committees, 14 Op. Off. Legal Counsel 87 (1990) (preliminary print); Application of Federal Bribery Statute to Civilian Aide to the Secretary of the Army, 13 Op. Off. Legal Counsel 244 (1989) (preliminary print); Applicability of 18 U.S.C. § 211 to Department Monetary Awards, 13 Op. Off. Legal Counsel 332 (1989) (preliminary print); Ethical Considerations Regarding Charitable or Political Activities of Department Spouses, 13 Op. Off. Legal Counsel 422 (1989) (preliminary print); Whether the One Year Bar Prohibiting Certain Former Government Employees from Contacting Their Former Agency Contained in 18 U.S.C. § 207(c) Applies to Former Government Employees Who are Working for the President-elect's Transition Team, 12 Op. Off. Legal Counsel 339 (1988); Waiver of the Application of Conflict of Interest Laws for Members of the President's Commission on Strategic Forces, 7 Op. Off. Legal Counsel 10 (1983); Restrictions on a Federal Appointee's Continued Employment by a Private Law Firm, 7 Op. Off. Legal Counsel 123 (1983); Review of Agency Schedule C Appointments by the Executive Office of the President, 6 Op. Off. Legal Counsel 114 (1982); Attribution of Outside Earned Income Under the Ethics in Government Act, 6 Op. Off. Legal Counsel 124 (1982); Payment of Expenses Associated with Travel by the President and Vice President, 6 Op. Off. Legal Counsel 214 (1982); Acceptance of Legal Fees by United States Attorney, 6 Op. Off. Legal Counsel 602 (1982); Procedures for Investigating Allegations Concerning Senior Administration Officials, 6 Op. Off. Legal Counsel 626 (1982); Payment of Legal Fees in Connection with a Cabinet Member's Confirmation Hearings, 5 Op. Off. Legal Counsel 126 (1981); Computation of 90-Day Period for Preliminary Investigation Under the Special

If lawyers were, or could be, simply the voice of the law, it might be appropriate to treat them very differently from other political officials in the government. But politically appointed lawyers obviously have interests and obligations that are quite similar to those of political managers, such as protecting and advancing their own reputations and promoting the president's agenda. To appreciate the special role played by lawyers who specialize in the separation of powers, one must begin by understanding more precisely how they differ from other political appointees, and how they are the same.

A. Legal Ethics and the Role of the President's Legal Advisors

Among the more salient features of most commentaries on the advisory function of the presidential lawyer is the exaggeration of the deep and inherent tensions that are supposed to exist between the political and professional obligations of those responsible for providing the president with legal advice. Real tensions between these obligations undoubtedly do exist, but the dilemmas that result are typically specious. Lawyers who work for the president without fully sharing his political goals, for example, have an obvious incentive to wrap their own political agenda in the guise of professional obligations. Similarly, those who wish to influence an administration's conduct have an obvious incentive to encourage the president's lawyers to

Prosecutor Act, 5 Op. Off. Legal Counsel 397 (1981); Constitutionality of the Disclosure Provisions of the Ethics in Government Act as Applied to Officials' Spouses, 4B Op. Off. Legal Counsel 340 (1980); Applicability of Criminal Statutes and "Whistleblower" Legislation to Unauthorized Employee Disclosures, 4B Op. Off. Legal Counsel 383 (1980); Application of Conflict of Interest Rules to the Conduct of Government Litigation by Private Attorneys, 4B Op. Off. Legal Counsel 434 (1980); Supersession by the Ethics in Government Act of Other Financial Disclosure Requirements, 4B Op. Off. Legal Counsel 566 (1980); Severance Agreement Between a Prospective Federal Appointee and His Law Firm, 4B Op. Off. Legal Counsel 605 (1980); The President—Interpretation of 18 U.S.C. § 603 as Applicable to Activities in the White House, 3 Op. Off. Legal Counsel 31 (1979); Ethics in Government Act—Financial Report—Application to Spouses and Children of Reporting Official (5 U.S.C.A. App 1), 3 Op. Off. Legal Counsel 280 (1979); Conflict of Interest—18 U.S.C. § 207—Applicability to the General Accounting Office, 3 Op. Off. Legal Counsel 433 (1979); Conflicts of Interest (18 U.S.C. § 207)—American Bar Association Code of Professional Responsibility, 2 Op. Off. Legal Counsel 162 (1978); The White House Office—Expenditure of Appropriated Funds—Handling Mail for Members of the President's Family, 2 Op. Off. Legal Counsel 343 (1977); The White House—The Vice President—Gifts (3 U.S.C. §§ 110, 111; 16 U.S.C. § 6a), 2 Op. Off. Legal Counsel 349 (1977); Conflict of Interest—Status of an Informal Presidential Advisor as a "Special Government Employee," 1 Op. Off. Legal Counsel 20 (1977).

resist his agenda in the name of supposedly professional considerations. Exaggeration of the tension in the role of presidential legal advisor has had real effects on the public discourse about the role of lawyers in government, and on the academic literature about the functioning of legal bureaucracies.¹⁸

The principal alternative views about the professional obligations of the president's legal advisors are illustrated by the quotations in Part I from the three lawyers who have recently served as White House Counsel. Gray and Cutler are clearly right in one respect. Those who serve in this position are government employees, who cannot properly act as personal counsel for their supervisors. In this respect, however, they are no different from lawyers retained or employed by institutional clients in the private sector. There are circumstances in which the distinction between the interests of a corporation and the personal interests of its principal officers is genuinely difficult to draw. And counsel to a private corporation will sometimes be tempted to substitute loyalty to an officer who controls the disposition of the firm's legal work for loyalty to the firm. Painful ethical dilemmas can arise and mistaken choices may be made by lawyers in these circumstances just as they may in the government. Such problems are inherent in the business of representing institutional clients, however, and the underlying standard of conduct is the same in the public and private sectors: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."¹⁹ Thus, if Nussbaum undertook

18. Perhaps the most spectacular recent example of the distortions that can result is Lincoln Caplan's *The Tenth Justice*. LINCOLN CAPLAN, *THE TENTH JUSTICE* (1987). This extended attack on President Reagan's second Solicitor General, who is supposed to have compromised the "rule of law" by accommodating the President's policy goals in briefs to the Supreme Court, is based largely on information and accusations provided by anonymous career government lawyers possessed by an extraordinarily expansive view of the rights conferred on them by their professional status. These accusations, many of which are accepted by Caplan, were manifestly motivated by disagreements with Reagan administration policy, rather than by allegiance to actual standards of professionalism. For discussions of the biases and conceptual mistakes in Caplan's book, see Roger Clegg, *The Thirty-Fifth Law Clerk*, 1987 DUKE L.J. 964; James Michael Strine, *The Office of Legal Counsel: Legal Professionals in a Political System* 8-14 (1992) (unpublished Ph.D. dissertation, Johns Hopkins University).

19. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(a) (1992). The rule recognizes that, in order to fulfill his obligations to the organization, a lawyer may sometimes have to refer a matter to the highest authority that can act on behalf of the organization. Where the highest authority insists upon proceeding in

to represent the President or his wife (or both) in their personal capacities while he was on the public payroll, he was acting improperly. This judgment does not depend on any peculiar ethical tensions created by government service in general or by the special demands of employment in the White House.²⁰ The same impropriety would exist if Nussbaum, after returning to private practice, were to bill a corporate client for services performed in behalf of the personal interests of the client's chief executive officer.²¹

If it is clear that government employees may not properly represent the personal interests of those who hire them, it is not nearly so clear exactly what interests they *are* supposed to represent. Gray and Cutler differ on this question, and their views represent the two alternatives most frequently presented. According to Cutler, the White House Counsel must seek to balance the interests of the president as a politician against the interests of the office he holds. When these interests diverge, as they occasionally must, Cutler suggests that the lawyer must decide which is more important in the case at hand. Good judgment—a sensitivity to the competing demands of politics and

a manner "that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign." *Id.* Rule 1.13(c). The ABA's comment on Rule 1.13 indicates that government lawyers may operate under additional constraints imposed by statute and regulation and that "a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved." *Id.* Rule 1.13 cmt. (1992). This vague and unexceptionable remark is consistent with my contention that the basic standard of ethics is the same in the public and private sectors. For more detailed discussions of the professional obligations of government lawyers, see Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991) (civil litigation attorneys in Department of Justice); Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 447-52 (1993) (Attorney General); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987) (agency lawyers).

20. There are, of course, special circumstances in which an organization may serve its own interests by paying a lawyer to represent the personal interests of an individual. Some employers, for example, may agree to provide their employees with certain kinds of personal legal services as part of their compensation package, in much the same way that they cover certain medical services. Such arrangements, in which an individual is clearly and properly treated as the lawyer's client, are not analogous to cases in which an organization's lawyer substitutes the interests of an influential individual for those of the client-organization.

21. Other questions, which I am not addressing here, are raised by a separate aspect of the incidents that cost Nussbaum his job: White House involvement in specific cases, possibly involving the President or his family, that are being handled by independent regulatory agencies.

principle, and an ability to resolve concrete dilemmas in a way that serves the interests of the nation as a whole—is thus considered the hallmark of excellence in a presidential legal advisor. Cutler's view is neither quirky nor indefensible. It is, for example, essentially the view taken by Professor Nancy V. Baker in her extended study of the history of the Attorney General's office.²²

Gray articulates what seems at first to be a sharply different and more glorified view of the White House lawyer's job: that his client is the presidency itself, an entirely abstract entity whose needs and interests transcend the desires and concerns of any individual who happens to get elected to that post. When fully elaborated, this view provides a theoretical justification for the ascent, and in many ways the ascendance, of government lawyers who specialize in the separation of powers. Tracing their intellectual roots to Alexander Hamilton, whose theory of the executive gives intellectual respectability (and even a certain air of timelessness) to their endeavors, these lawyers present themselves as agents of the Constitution itself and guardians of an office whose significance to our nation far outstrips the petty political disputes that consume the daily life of most of those around the president. Important elements of an academic theory supporting Gray's view are presented by Terry Eastland, who contends both that the Constitution itself largely dictates how presidents should conduct themselves in office and that these constitutional duties are largely bound up with defending the prerogatives of his office.²³

What unites the views expressed by Cutler and Gray—and in my view unites them in error—is the assumption that mere lawyers should be deciding how the president ought to accommodate his political and policy agenda with the obligations he has to the office he occupies. Like clients in private practice, the president is responsible for his own decisions, and in fact he has the authority either to make his own legal determinations without consulting any of his lawyers or to proceed in the face of contrary advice from any lawyer he does consult.²⁴ It is

22. NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE* (1992).

23. TERRY EASTLAND, *ENERGY IN THE EXECUTIVE* (1992).

24. Presidents have been quite willing to exercise this right. *See, e.g.*, GRIFFIN B. BELL & RONALD J. OSTROW, *TAKING CARE OF THE LAW* 24-28 (1982) (discussing President Carter's decision to ignore a Justice Department opinion objecting, on constitutional grounds, to a proposal that public funds be used to pay the salaries

true that the president has legal obligations that differ from those of any private citizen, or indeed from any other government official. But they are *his* obligations, not those of his lawyers or subordinates.²⁵ If, for example, the president decides that his political and policy agenda is more important to the future of the country than defending his office from constitutionally dubious legislative restrictions, no lawyer anywhere in the government has the authority to displace that determination. Like anyone else, his lawyers may argue that a particular judgment by the president is mistaken, and they may sometimes be right. But when lawyers assume to substitute their own judgment for the president's—as they must if “the Oval Office” (Gray) or the “office of the presidency” (Cutler) is their client—they are acting without legal warrant.

Though the president's lawyers have no legal right to substitute the presidency for the president as their client, they have the right to negotiate with the president for the privilege of making such a substitution. Lloyd Cutler may have done just that, for it appeared when he was appointed that President Clinton needed his services far more than Cutler wanted the job.²⁶ But even apart from such special circumstances, there

of certain persons working in church schools); Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353 (1953) (discussing President Franklin Roosevelt's rejection of his Attorney General's suggestion that legislative vetoes are permissible under the Constitution). Similarly, presidents feel free to overrule Justice Department legal determinations with which they disagree. *See, e.g.*, Paul M. Barrett, *Clinton Orders Justice Agency To Withdraw Brief*, WALL ST. J., Sept. 16, 1994 (reporting that Department of Justice withdrew previously filed appellate brief in bankruptcy case, and quoting the Department as saying: “The President has concluded that [the DOJ brief] adopted a narrower view of the Religious Freedom Restoration Act than his understanding of the meaning of the new statute.”); Linda Greenhouse, *Bush Reverses U.S. Stance Against Black College Aid*, N.Y. TIMES, Oct. 22, 1991, at B6 (reporting that President Bush ordered Department of Justice to file a Supreme Court brief contradicting constitutional interpretation advocated in preceding brief).

25. Unlike other state and federal officers, who must commit that they will “support” the Constitution, the president is constitutionally required to take a unique oath pledging that “I . . . will to the best of my Ability, preserve, protect and defend” the Constitution. *Compare* U.S. CONST. art. VI *with id.* art. II, § 1. Although the president's oath implies that he has a special obligation to the Constitution that goes beyond the obligations of other government officials, it does not authorize any of those officials—be they lawyers, judges, or ethics specialists—to dictate how he should meet that obligation. The only legal method for enforcing the president's oath is through impeachment proceedings.

26. Cutler, who had served previously as President Carter's White House Counsel, was apparently unwilling to give President Clinton at least one commitment that the President wanted. During the press conference at which the Pres-

are persistent forces encouraging presidents to allow their closest legal advisors to view themselves as counsel for the presidency. If those forces were to produce a settled expectation that the president should be treated by his chief legal advisors merely as a kind of caretaker for the institution of the presidency, to which they owe their true allegiance, it might not much matter whether there is a legal basis upon which the president's lawyers could rely in presuming to set themselves up as judges of his fidelity to his constitutional oath of office. Such an arrangement might even be thought to benefit presidents more than their lawyers, since it is after all the president who gets to employ the authority that the lawyers would be dedicated to defending and expanding.

The Bush administration provides a useful case study through which to explore the tensions between advising a president and advising the presidency. When George Bush was elected president, a variety of factors had established a pattern of conflicts in which unsettled constitutional issues involving the separation of powers provided the terms of debate for a struggle over control of the basic mechanisms of governance. In addition to the continuing repercussions of the Watergate scandals and the 1974 elections, these factors included both the seemingly fixed disinclination of the voters to establish either political party in command of both the legislative and executive departments of government and the fresh tensions generated by the Iran-Contra affair. Coming into office without a well-articulated substantive agenda, but with a strong sense of the disorder that can arise from congressional attempts to exercise naturally executive functions, President Bush took what must be the unique or very unusual step of directing that a legal strategy be developed for enhancing the defense of his office. The record of this effort to close the gap between constitutional principle and administration policy can help illuminate both the possibilities open to presidential legal advisors and the limits on their role in government.

ident announced his appointment, Cutler said: "I am a senior citizen, you can see, and from direct experience, I know the intensity and the rigors of this job. And I have, therefore, limited my commitment with the President's permission—I had to negotiate hard for it—to a period of months." Remarks Announcing the Appointment of Lloyd Cutler as Special Counsel to the President and an Exchange With Reporters, 30 WKLY. COMP. PRES. DOC. 462 (March 8, 1994).

B. The Existing Literature and an Alternative Approach

A close study of the Bush administration's record on separation of powers issues also offers an opportunity to supplement a growing body of scholarship dealing with the behavior of legal bureaucracies. This scholarship, which has been produced mainly by political scientists, attempts to explain the behavior of lawyers in government in terms of a variety of personal, institutional, and historical forces. Professor Nancy V. Baker, for example, focuses on individual Attorneys General and seeks to explain their performance in office according to whether they behaved more as a neutral law officer or as the president's advocate and supporter.²⁷ Professor James Michael Strine's detailed study of OLC concludes that both continuity and change within that office can be explained by its institutional structures, norms, roles, and rules.²⁸ Professor Cornell W. Clayton emphasizes the impact on legal policy-making at the Justice Department of wider historical and political forces such as the nationalization of governmental power, the judicialization of large areas of public policy, and the institutionalization of partisan conflict.²⁹

The information included in these studies can explain a great deal, for government lawyers operate in environments that are severely constrained by a variety of factors including the norms and expectations of the legal profession, the balance of power that obtains among various political factions in and out of government at any given time, and the sheer growth in the size and complexity of the federal administrative state. In my view, however, the existing literature does not adequately explain the operation of these factors because it gives insufficient attention to the way in which incentive structures affect the choices made by individual lawyers and those with whom they deal.

The absence of serious inquiry into the incentives that affect individual choice in legal bureaucracies appears to result in part from constraints that the subject matter places on those who undertake these studies. First, the most accessible sources of information about the way legal bureaucracies operate are the memoirs of those who have served in high positions in the

27. BAKER, *supra* note 22.

28. Strine, *supra* note 18, at 1, 318.

29. CORNELL W. CLAYTON, *THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY* (1992).

government. Such memoirs are unreliable because their authors face an extremely strong temptation to understate the degree to which they engaged in self-serving or mistaken behavior while in office. When researchers try to supplement such sources through interviews with more obscure officials, their research cannot escape the underlying problem. Many government lawyers take the confidentiality of their work seriously, and are therefore reluctant to speak in useful detail about what they and others in the government do. Those who do choose to speak with researchers, especially when they speak anonymously, cannot be assumed either to constitute a fair sample or to be unbiased reporters. On the contrary, it would be safer to suppose that many who are willing to provide information to outsiders do so because they have an axe to grind.³⁰

Documentary evidence in legal archives will rarely be able to provide much assistance in correcting the problems described above. The documents that underlie the legal advice presidents receive are seldom available to researchers until after the decisions to which they relate are long past, and they often never become available.³¹ Much advice, moreover, is formulated in meetings and discussions that are never recorded, among people who will never have a reason to offer complete, or completely candid, accounts of what was said.

These limitations can to some extent be overcome through sufficient study of the public record, which contains a great deal of information about what presidents and their lawyers actually do, and about their efforts to explain publicly what they do. Not only does the public record contain a great deal of information, but it has the very important advantage that research based on it can be checked by anyone who wants to verify the claims made by those who rely on it. Unfortunately, the public record has not been thoroughly scrutinized in the existing literature, and for very understandable reasons. Light reading it is not, and much of it can be confusing to those who are unfamiliar with the specific bodies of law out of which par-

30. For an example of a study in which this supposition was not adopted, see CAPLAN, *supra* note 18.

31. Cf., e.g., John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 376 (1993) (reporting that OLC library files contain many unpublished opinions).

ticular legal issues arise. And yet, one cannot meaningfully evaluate what happens when the president is given legal advice on important issues unless one can evaluate the strengths and weaknesses of the legal arguments involved. Without such an evaluation, one is not likely to understand the relationship between the legal and the extra-legal components of the advice, or the real causes of any ensuing decisions.

The Afterword to this article gives examples of the difficulties that can arise from insufficient skepticism about information from sources within legal bureaucracies and from insufficient familiarity with the law with which these bureaucracies deal. These difficulties can be especially serious when academic analysts are intent on formulating lessons that they wish to urge on policy-makers, as most students of this subject have been. Professor Clayton, for example, is extremely harsh in criticizing what he considers the "politicization" of the Justice Department under Presidents Reagan and Bush, and he concludes that serious consideration should be given to removing that Department from the president's control.³² Professor Jeremy Rabkin, conversely, reviews most of what little is known about the history of the Office of the Counsel to the President, and concludes by attacking the Clinton administration for relying insufficiently on the institutional wisdom of the Justice Department.³³

Such recommendations, however, can hardly be distinguished from political advice unless they are grounded in adequate explanatory models. The models employed in the literature, however, are ill-defined, and the scholarship in this area is very short on testable predictions. Indeed, one rarely sees any analysis that gets much beyond such self-evident points as the following: when the executive and legislative departments are controlled by different political parties, conflicts over separation of powers increase;³⁴ increasing conflicts between the executive and the legislature tend to increase the involvement of the judiciary in issues involving the control of governmental institutions;³⁵ executive officials have less success in pursuing aggressive agendas if their private financial dealings create op-

32. CLAYTON, *supra* note 29, at 236.

33. Rabkin, *supra* note 9, at 95-97.

34. CLAYTON, *supra* note 29, at 7.

35. *Id.*

portunities for their adversaries to attack their ethics;³⁶ and legal advisors who do not champion the president's agenda lose influence with the president while those who do champion his agenda invite attacks from the president's political adversaries.³⁷

I have tried to overcome some of the limitations in the existing literature. First, I employ a simple and fairly well defined model of human behavior, drawn from the science of economics, which has proven useful in explaining a wide range of human conduct. I assume, as a hypothesis, that the president's legal advisors and the other people with whom they deal in their professional lives behave as rational utility maximizers in an environment characterized by limited resources. This model implies, most importantly for present purposes, that people cannot have as much as they want of the most obvious things they desire—such as money, prestige, power, and leisure—and that they will respond to changes in their environment by changing their own behavior in an effort to maximize their self-interest. Using this model does not require one to assume that truly disinterested, or even self-sacrificing, behavior never occurs. Nor need one assume that acts of insanity or irrational zealotry never occur. The approach adopted here simply makes the provisional assumption that such conduct is rare enough in certain contexts (in this case, the business of government during the late twentieth century in the United States) that events will largely proceed *as if* self-sacrificing or irrational behavior were nonexistent.³⁸

Use of the rational-choice model seems particularly suitable in examining the behavior of people operating in a system that was consciously designed to promote an identity (though necessarily an imperfect one) between duty and interest.³⁹ An-

36. BAKER, *supra* note 22, at 100.

37. *Id.* at 172, 175-76.

38. Thus, I emphatically do not contend or assume that human behavior generally, or the behavior considered in this article, can be fully understood through the application of rational-choice analysis alone. Such claims have been cogently criticized. See, e.g., Herbert J. Storing, *The Science of Administration: Herbert A. Simon*, in *ESSAYS ON THE SCIENTIFIC STUDY OF POLITICS* (Herbert J. Storing ed., 1962); cf. Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 *SUP. CT. ECON. REV.* 1 (1993) (applying a rational-choice model to "ordinary" life-tenured judges but leaving open the possibility that the behavior of judicial "titans," "Prometheans," or "genius-saints" would require a more complex analysis).

39. This theme recurs throughout the *Federalist Papers*, but the best known

other reason for regarding this model as especially useful in the present context is that it helps direct attention to important causal influences that those who create the public record on which we must rely have a motive to conceal, even from themselves. People who serve in public office are both expected and inclined to explain their own behavior by reference to the "public interest" or "the law" or "the Constitution," rather than in terms of their self-interest. Abandoning this expectation and discouraging these inclinations would not elevate public discourse or improve the operation of government. But neither can it advance the understanding of government to accept such protestations of disinterestedness, at least without critical examination. Government lawyers, in particular, may be less driven by self-interest than those who compete with other people in the worlds of business or electoral politics, but such a happy fact is one that would need to be proved rather than assumed.

One of the more obvious dangers in the use of a rational-choice model, of course, is that one will be tempted simply to discount appeals to standards such as "the law" or "the Constitution" as so much self-serving camouflage, without giving sufficient attention to the fact that people can include fidelity to the law in their own utility functions.⁴⁰ The law and legal principles, like the dictates of loyalty and justice, can and do operate as meaningful constraints on lawyers' behavior even

formulation is probably the following:

Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

40. Cf. THE FEDERALIST NO. 77, at 458 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude."). Venality, of course, is not the same as self-interest, but Hamilton's criticism of inverse sentimentality is an apt warning to anyone who employs economic analysis in the study of politics.

though this surely happens less often than lawyers say it does when they are explaining their own actions. I have tried to avoid the pitfall of unjustified cynicism by examining the strengths and weaknesses of the legal arguments offered by the individuals whose conduct is being considered, and by comparing what they actually did with the explanations they offered for what they did.

The rational-choice model of human behavior generates a simple but somewhat counter-intuitive prediction about the subject-matter of this article: *a president should prove unsuccessful if he attempts to make the defense of the presidency an important element of his administration's agenda.* The rewards for a consistent and forceful defense of the legal interests of the office of the presidency would be largely abstract, since they would consist primarily of fidelity to a certain theory of the Constitution. To the extent that the rewards could be translated into actual increased power to accomplish policy and political goals, those rewards would mostly be reaped at some remote period of time, after the defenders of the theory had left office. The costs of pursuing a serious defense of the presidency, however, would tend to be immediate and tangible. These costs would include the expenditure of political capital that might have been used for more pressing purposes, the unpleasantness of increased friction with congressional barons and their allies, and the sheer expenditure of time by extremely busy people on uninvitingly dry legal issues.

Presidential lawyers who specialize in the separation of powers would tend to collect a large share of the benefits in the form of increased glory and increased job satisfaction, but the specialization of functions that produces this result also means that the costs would largely be borne by others in the government, above all by the president. Therefore, when the costs to the president (and to those of his advisors with a broader responsibility for governance than that allocated to separation-of-powers lawyers) become significant, we should expect the lawyers' legal principles to be compromised or abandoned. And because the costs of adhering to those principles tend to be highest in the most important cases, we should expect to find a pattern in which the principles are adhered to only primarily in relatively trivial cases. The following sections of this article are devoted to testing these predictions.

The approach sketched here necessarily requires a level of analysis that is more detailed than one ordinarily finds in stud-

ies of the operation of legal bureaucracies. I have therefore limited the study in two dimensions. First, only issues involving the separation of powers are considered. Second, the analysis is confined almost exclusively to George Bush's four years in office.⁴¹

III. THE EFFORT TO IMPLEMENT CONSTITUTIONAL PRINCIPLE

In 1987, Vice President Bush was introduced at a meeting of a group of conservative lawyers by C. Boyden Gray, who had served as his Counsellor throughout the Reagan administration. The Vice President then delivered a speech arguing that congressional "micromanagement" of foreign policy was an improper substitution of the legislature's properly political oversight responsibilities with an unduly legalistic "regulatory" regime. Bush believed both that this was a serious practical problem because it threatened to "destroy our government's ability to function effectively," and that its amelioration required practical steps to establish relationships of trust between officials in the executive and legislative departments of government. Significantly, however, Bush contended that these practical steps should be taken in the context of a reexamination of the intent of the Framers of the Constitution and the "objective principles embodied in the law" they created.⁴²

After becoming president, one of Bush's very first public statements dealt with this same issue: "I am concerned about the erosion of presidential power, particularly in the fields of national defense and foreign policy, but I want to work with Congress," Bush said. "If they want in on the take-off, fine. I've got to make the decision. I have constitutional responsibilities and they have theirs, largely in the purse strings."⁴³ The Pres-

41. Similarly, detailed studies may usefully be made of other issue clusters and of other eras. One corollary of the argument presented in this article, for example, is that we should expect to find that significant expansions of presidential power, and serious resistance to congressional efforts to restrict that power, might sometimes occur, but almost always as a by-product of presidents' efforts to accomplish other substantive objectives. This proposition should be tested against the historical record, but that project is beyond the scope of this article.

42. George Bush, *The Interaction of the Legislative, Judicial, and Executive Branches in the Making of Foreign Policy*, 11 HARV. J.L. & PUB. POLY 1, 1-3 (1988).

43. *Bush Pledges to Work with Congress but Warns of Firm Hand*, UPI, Jan. 21, 1989. See also Robert Shogan, *Bush's Dilemma in Dealing with a Contrary Hill*, L.A. TIMES, April 16, 1989, pt. 5, at 3, col. 2 ("As he struggled last year for the GOP presidential nomination, Bush bitterly complained about the 'chaos' pro-

ident also moved quickly to establish a special team of lawyers to devise legal strategies for carrying out his interests in these matters.⁴⁴ The ranking members of this group were C. Boyden Gray and William P. Barr, the Assistant Attorney General for OLC, who was often described as Gray's protégé.⁴⁵ Barr's reputation at OLC came to rest largely on his aggressive defense of presidential authority,⁴⁶ and he enjoyed a meteoric rise from almost complete obscurity to the office of Attorney General.

Defense of the constitutional authorities of the presidency continued to receive considerable attention throughout Bush's presidency. In a major address on the Constitution midway through his term, for example, the President talked mainly about relations between the president and Congress. In this address, he claimed that he had possessed the "inherent power" to use the armed forces in the Gulf War without congressional authorization; he said that when Congress takes aggressive legislative action against specific presidential powers, "the President has a constitutional obligation to protect his Office and to veto the legislation"; and he boasted of having said on many occasions "that statutory provisions that violate the Constitution have no binding legal force."⁴⁷ At the very end of his term, moreover, President Bush engaged in an unusually direct and personal effort to assert authority over a federal agency

duced by congressional 'micromanagement' of foreign policy. 'You got 535 secretaries of state up there,' he declared. 'The world outside observes and loses faith.')

Gerald F. Seib, *Bush Will Attempt to Trim Powers of Congress, Particularly on National-Security Policy Issues*, WALL ST. J., Feb. 1, 1989.

44. See R.W. Apple, *A Balance of Bush, The Congress and the Contras*, N.Y. TIMES, April 2, 1989, § 4, at 1, col. 1 ("[T]wo weeks ago [Bush] and a group of key aides decided to create a working group to combat what they termed 'the erosion of Presidential authority'").

45. Many sources treat Barr's relationship with Gray. See, e.g., Sharon LaFraniere, *Barr Takes Center Stage at Justice Department With New Script*, WASH. POST, March 5, 1992, at A19; Phil McCombs, *Counsel's Last Hurrah: The Final Furious Days of C. Boyden Gray*, WASH. POST, Jan. 16, 1993, at G1; Michael Wines, *A Counsel With Sway Over Policy*, N.Y. TIMES, Nov. 25, 1991, at A16, col. 1.

46. See e.g., David Johnston, *Washington at Work; Political Lifeguard at the Justice Dept.*, N.Y. TIMES, Aug. 30, 1990, at B8, col. 1; Daniel Klaidman, *Barr Takes Hard Line On Executive Power; Senate Mulls AG Nominee's Record*, LEGAL TIMES, Nov. 11, 1991, at 1; Sharon LaFraniere, *For Nominee Barr, an Unusual Path to Attorney General's Office*, WASH. POST, Nov. 12, 1991, at A6.

47. Remarks at Dedication Ceremony of the Social Science Complex at Princeton University in Princeton, New Jersey, 27 WKLY. COMP. PRES. DOC. 589, 590-91 (May 10, 1991).

(the U.S. Postal Service) that Congress had sought to insulate from the president's control.⁴⁸

This very high-level interest in shoring up the legal defense of the presidency distinguished the Bush administration from its predecessor. President Reagan's first Attorney General, in a rare criticism of the president he served, wrote in his memoirs:

If there was one area in which the White House was deficient during my years in office, it was in the protection of presidential power. Decisions there were made on the basis of the substance of individual issues. There was no effective concern or review of the impact that issue or the position taken with respect to it would have on presidential power. Nor was there any effort to identify governmental activities elsewhere that, if developed, would adversely affect the province of the executive. Nor, to be candid, was the bully pulpit used to provide leadership or defense of that vital institution.⁴⁹

This is not to say that the Reagan administration ignored the separation of powers or that it was unwilling to act in defense of the presidency.⁵⁰ Indeed, Reagan's constitutional lawyers—primarily those at OLC—had worked out a detailed jurisprudence that was scarcely revised or supplemented during the Bush years.⁵¹ Bush's new initiative may be viewed merely as

48. See *infra* part V.

49. WILLIAM FRENCH SMITH, LAW AND JUSTICE IN THE REAGAN ADMINISTRATION 222 (1991). The Meese Justice Department was somewhat more aggressive than its predecessor on separation-of-powers issues, and the pattern of White House behavior described by Smith may have changed somewhat as a result of the particularly close relationship between Reagan and Meese. What seems to set the Bush administration apart is the personal interest that the President himself took in the concerns that Smith identified in the passage quoted above.

50. Nor is this to say that the separation of powers and the defense of presidential prerogatives had been insignificant prior to the Reagan-Bush years. Democratic and Republican administrations alike, for example, had consistently objected on constitutional grounds to legislative vetoes and to certain provisions of the War Powers Resolution. See *INS v. Chadha*, 462 U.S. 919 (1983) (a case in which both the Carter and Reagan administrations challenged a legislative veto); John W. Rolph, *The Decline and Fall of the War Powers Resolution*, 40 NAVAL L. REV. 85 (1992); Strine, *supra* note 18, at 195-206.

51. OLC began contributing heavily to the legalization of separation-of-powers disputes at least as early as the Carter administration. Strine, *supra* note 18, at 195-206. During the Reagan administration, however, the importance of OLC's role seems to have increased. Cf. Miller, *supra* note 13, at 410-12 (recounting the aggressive resurgence of the presidency under Reagan as compared to his predecessors).

an elevation of the Reagan administration's jurisprudence to the status of administration policy. Or, one could say, Bush was endorsing the concerns and goals of OLC in a way that would allow the body of legal principles developed in that office to be given a fair test outside the rarefied and insular atmosphere of OLC itself. If we want some idea of what can happen when a president allows, and even encourages, his leading lawyers to devote themselves to the interests of the presidency itself, the Bush administration offers an almost perfect case study.

I have argued elsewhere that OLC faces a set of constraints and incentives that prevent it from developing an institutional mission of the kind that is often observed in government bureaucracies, including such legal bureaucracies as the Office of the Solicitor General.⁵² It is even more obvious that the White House Counsel's office—which is completely reconstituted with each new administration and which each president is free to shape in whatever way he sees fit—cannot be assumed to be driven by a stable institutional or bureaucratic culture. It is nonetheless possible that some “missions” are so inherently appropriate or attractive to presidential legal advisors that they will be adopted with a kind of inevitability that does not depend on the operation of bureaucratic imperatives of the usual kind. For OLC, the defense of the presidency seems to be an obvious candidate for such a mission, and separation of powers does seem to be regarded as the soul of that office's work.⁵³ For those who serve in the office of the White House Counsel, moreover, adopting the mission of defending the presidency would seem to offer them a way of taking the edge off their slightly unsavory reputation for politically driven lawyering.⁵⁴ The Bush administration should therefore show us what can happen when lawyers with a commitment to the separation

52. Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437 (1993).

53. This is illustrated in two recent articles written by OLC alumni: Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337 (1993); McGinnis, *supra* note 31, at 432-35. Professor Kmiec's article discusses seven major examples of OLC's work, six of which are analyzed primarily as problems in defining the scope of the president's authority. Similarly, Professor McGinnis's only extended discussion of OLC's substantive legal analysis involves that office's effort to make a silk purse out of the earful that the Supreme Court gave the executive in *Morrison v. Olson*, 487 U.S. 654 (1988).

54. See, e.g., PATTERSON, *supra* note 9, at 141; Strine, *supra* note 18, at 117-18 & n.35.

of powers are elevated, or get themselves elevated, to the role of serious policy players.

The record of the Bush administration also provides an opportunity to test an important hypothesis derived from game theory. As Professor John O. McGinnis has pointed out, the actual practice of separation of powers can be described through "a model in which governmental powers are often distributed [not by the formal rules set out in the Constitution, but] by the branches themselves through bargains and accommodations that maximize their respective interests."⁵⁵ One corollary of this model seems to be that the president should be able to strengthen his bargaining position through a "pre-commitment strategy": by committing his prestige to the defense of a set of publicly articulated principles, the president can strengthen his own hand in future negotiations because everyone will know that departures from those principles will be more costly to the president than they would be if his prestige were not already committed.⁵⁶ Under this view, President Bush's visible elevation of the role played by his constitutional lawyers could be seen as serving the president's interests at least as much as it served those lawyers' interests: "By articulating the principles that the executive will not concede, OLC generates commitments for the future that may strengthen the president's bargaining position vis-a-vis the other branches."⁵⁷ If this plausible suggestion about the usefulness of "pre-commitment strategies" helps explain the development of the separation of powers, we should expect to observe significantly more resolute and uncompromising behavior by the Bush administration than by the Reagan administration. The theory and evidence presented in this article, however, suggests that other incentives operating on the president and his advisors render a pre-commitment strategy untenable.

A. *Implementation of the Legal Strategy: Veto Messages and Signing Statements*

President Bush's interest in promoting a coherent and forceful legal strategy for defending the presidency had observ-

55. John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, LAW & CONTEMP. PROBS., Autumn 1993, at 293, 294.

56. See *id.* at 313-14 & n.106.

57. *Id.* at 314.

able effects. Perhaps the most visible results of the initiative emerged in his veto messages and in the signing statements he issued when approving new legislation. The President vetoed forty-six bills, citing constitutional objections in at least eleven instances. In five of these eleven cases, the bills would have been vetoed for independent policy reasons, and might well not have been vetoed on constitutional grounds alone.⁵⁸ In two of the eleven cases, however, the principal grounds for the President's objection to the bill were constitutional in nature,⁵⁹ and in four other cases constitutional objections were the only apparent reason for his veto.⁶⁰ Remarkably, *every*

58. See Message to the Senate Returning Without Approval the Cable Television Consumer Protection and Competition Act of 1992, 28 WKLY. COMP. PRES. DOC. 1860 (Oct. 3, 1992) (stating First Amendment objections but giving greater emphasis to concerns that the bill would increase consumer costs); Message to the Senate Returning Without Approval the National Voter Registration Act of 1992, 28 WKLY. COMP. PRES. DOC. 1201 (July 2, 1992) (mentioning constitutional doubts about the existence of congressional authority to supplant state regulation of elections while emphasizing the problems that the bill might create); Message to the House of Representatives Returning Without Approval the National Institute of Health Revitalization Amendments of 1992, 28 WKLY. COMP. PRES. DOC. 1132 (June 23, 1992) (emphasizing ethical, fiscal, administrative, and philosophical grounds for objections as well as concerns relating to the Appointments Clause and to interference with the president's authority to supervise his subordinates); Message to the Senate Returning Without Approval the Congressional Campaign Spending Limit and Election Reform Act of 1992, 28 WKLY. COMP. PRES. DOC. 822 (May 9, 1992) (noting concerns with corruption and incumbency advantage as well as First Amendment objections); Message to the House of Representatives Returning Without Approval the Textile, Apparel, and Footwear Trade Act of 1990, 26 WKLY. COMP. PRES. DOC. 1531 (Oct. 5, 1990) (noting adverse impact on consumers as well as interference with president's discretion in foreign affairs and with president's discretion under Recommendation Clause).

59. See Message to the House of Representatives Returning Without Approval the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, 25 WKLY. COMP. PRES. DOC. 1783 (Nov. 19, 1989) (interference with president's discretion in foreign affairs); Message to the Senate Returning Without Approval the Bill Prohibiting the Export of Technology, Defense Articles, and Defense Services to Codevelop or Produce FS-X Aircraft With Japan, 25 WKLY. COMP. PRES. DOC. 1191 (July 31, 1989) (interference with president's discretion in foreign affairs and with president's authority to supervise his subordinates).

60. See Memorandum of Disapproval for the Morris K. Udall Scholarship and Excellence in National Environmental Policy Act, 27 WKLY. COMP. PRES. DOC. 1877 (Dec. 20, 1991) (Appointments Clause objection); Memorandum of Disapproval for the Intelligence Authorization Act, Fiscal Year 1991, 26 WKLY. COMP. PRES. DOC. 1958 (Nov. 30, 1990) (interference with president's discretion in foreign affairs); Memorandum of Disapproval for the Omnibus Export Amendments Act of 1990, 26 WKLY. COMP. PRES. DOC. 1839 (Nov. 16, 1990) (interference with president's discretion in foreign affairs); Message to the House of Representatives Returning Without Approval the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, 25 WKLY. COMP. PRES. DOC. 1806 (Nov. 21, 1989) (interference with

veto that was based solely or primarily on constitutional grounds involved a claimed invasion of the constitutional authority of the president's office, while at least two other bills that the President deemed unconstitutional (although not a threat to his office) were allowed to become law.⁶¹ President Reagan, by way of contrast, seemed *never* to have vetoed a bill on the ground that it infringed on the president's authority,⁶² although he sometimes included objections to such infringements in messages dealing with vetoes that were based primarily on policy grounds.⁶³ Reagan, however, did veto at least two bills on constitutional grounds unrelated to presidential authority, including one that simply codified a regulation that the Supreme Court had previously upheld.⁶⁴ Reagan frequently ap-

president's discretion in foreign affairs).

61. See Statement on the Children's Television Act of 1990, 26 WKLY. COMP. PRES. DOC. 1611 (Oct. 17, 1990) (First Amendment); Statement on the Flag Protection Act of 1989, 25 WKLY. COMP. PRES. DOC. 1619 (Oct. 26, 1989) (First Amendment). In both cases, it should be noted, Bush allowed the bills to become law, but withheld his approval. Despite Bush's refusal to approve the flag bill, however, his Department of Justice enforced it and defended its constitutionality in court. See Brief for the United States, *United States v. Eichman*, 496 U.S. 310 (1990) (Nos. 89-1433, 89-1434).

62. Professor Douglas W. Kmiec seems to imply, contrary to my claim, that the Whistleblower Protection Act of 1988 was vetoed on constitutional grounds. Kmiec, *supra* note 53, at 343. The President's statement explaining his veto, however, indicates that his principal objection to the bill was that it would have enabled "employees who are not genuine whistleblowers [to] manipulate the process to their advantage simply to delay or avoid appropriate adverse personnel actions." The President also discussed certain "serious constitutional concerns," but he went no further than to say that these provisions "could not have been implemented" to the extent they were inconsistent with the Constitution. Memorandum of Disapproval for the Whistleblower Protection Act of 1988, 24 WKLY. COMP. PRES. DOC. 1377 (Oct. 26, 1988).

On at least two occasions, President Reagan vetoed bills that contained provisions to which he objected because they improperly permitted entities other than the Congress to exercise legislative functions. See Memorandum of Disapproval of S. 2166 (Indian Health Care Legislation), 20 WKLY. COMP. PRES. DOC. 1583 (Oct. 19, 1984); Message to the House of Representatives Returning H.J. Res. 338 (Desegregation Funds for the Chicago Board of Education) Without Approval, 19 WKLY. COMP. PRES. DOC. 1133 (Aug. 13, 1983). This may or may not have reflected a principled concern with the separation of powers, but it does not imply a vigorous defense of the presidency.

63. See, e.g., Message to the House of Representatives Returning H.R. 4868 Without Approval, 22 WKLY. COMP. PRES. DOC. 1281, 1282 (Sep. 26, 1986); Memorandum of Disapproval of H.R. 7336, 19 WKLY. COMP. PRES. DOC. 38 (Jan. 12, 1983); Memorandum of Disapproval of S. 2623, 19 WKLY. COMP. PRES. DOC. 7 (Jan. 3, 1983).

64. See Memorandum of Disapproval for the Children's Television Act of 1988, 24 WKLY. COMP. PRES. DOC. 1456 (Nov. 5, 1988) (First Amendment objections); Message to the Senate Returning S. 742 Without Approval, 23 WKLY. COMP. PRES.

proved bills containing constitutionally dubious restrictions on his authority,⁶⁵ and he signed into law at least four bills that his administration later challenged in the courts as violations of the president's constitutional powers.⁶⁶

A pattern similar to that found in Bush's veto messages can be found in his signing statements. Unlike the President's veto messages, which are required by the Constitution, the statements that presidents sometimes issue when they approve new legislation are completely discretionary. Many presidents have issued such statements from time to time, but serious efforts to use them as a tool for advancing a coherent legal strategy began only in the Reagan administration.⁶⁷ Signing statements can serve as such a tool in three principal ways: by interpreting ambiguous statutory language in a manner that the president hopes will be treated by the courts as a legitimate form of legislative history;⁶⁸ by instructing the president's subordinates in the executive agencies to resolve

DOC. 715 (June 19, 1987) (First Amendment objections). S. 742 would have codified the so-called "fairness doctrine," which had been promulgated as a regulation by the FCC and then sustained against a constitutional challenge in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). President Reagan's veto message recognized the holding in *Red Lion*, but openly disputed it. The President concluded: "S. 742 simply cannot be reconciled with the freedom of speech and the press secured by our Constitution. It is, in my judgment, unconstitutional." 23 WKLY. COMP. PRES. DOC. at 716.

65. See, e.g., Statement on Signing a Bill on Veterans' Benefits, 24 WKLY. COMP. PRES. DOC. 1548 (Nov. 18, 1988); Statement on Signing S. 1874 Into Law, 22 WKLY. COMP. PRES. DOC. 1045 (Aug. 4, 1986); Remarks on Signing S. 2603 Into Law, 20 WKLY. COMP. PRES. DOC. 1476, 1476-77 (Oct. 9, 1984); Statement on Signing H.R. 5712 Into Law, 20 WKLY. COMP. PRES. DOC. 1201, 1201-02 (Aug. 30, 1984); Statement on Signing H.R. 3222 Into Law, 19 WKLY. COMP. PRES. DOC. 1619 (Nov. 28, 1983).

66. See *Morrison v. Olson*, 487 U.S. 654 (1988) (independent counsel statute); *Bowsher v. Synar*, 478 U.S. 714 (1986) (statute that assigned an agent of Congress authority to determine cuts in the federal budget); *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 809 F.2d 979 (3d Cir. 1986) (statute assigning a role in government procurement to an agent of Congress), *cert. dismissed*, 488 U.S. 918 (1988); *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988) (same), *decision withdrawn in part*, 893 F.2d 205 (9th Cir. 1989); *National Fed'n of Fed. Employees v. United States*, 688 F. Supp. 671 (D.D.C. 1988) (statute restricting president's authority to protect confidentiality of national security information), *vacated sub nom. American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153 (1989).

67. See Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential Signing Statements*, 40 ADMIN. L. REV. 209, 210-12 (1988); Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L. & ECON. 217, 226 (1992).

68. Such hopes have rarely been fulfilled. See, e.g., Cross, *supra* note 67, at 234-35; William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 702-03 & nn.14, 17 (1991).

statutory ambiguities in a way favored by the president;⁶⁹ and by creating a record that can be used later to refute claims that the president has approved of constitutionally dubious provisions in bills that the president has chosen to sign because of his desire to see other provisions of the legislation become law.

During the Bush years, the constitutional issues addressed in signing statements dealt mostly with questions of presidential authority, and they seem designed mostly to serve the third purpose listed above, namely avoiding the appearance that the President approved of objectionable provisions in legislation he signed. This concern with appearances is quite striking: Bush's signing statements are pervaded by an amazing scrupulosity about the separation of powers that becomes at times almost comical. Even a cursory review of the record suggests that the administration tried to identify and deal with every issue, no matter how small, in every bill that was presented to the President. The lengths to which the Bush administration was prepared to go in applying legalistic analysis to enrolled bills, moreover, are suggested in the following droll passage from the signing statement for the 1991 defense authorization bill:

[S]ection 1409(a) refers to a classified annex that was prepared to accompany the conference report on this Act and states that the annex "shall have the force and effect of law as if enacted into law." The Congress has thus stated in the statute that the annex has not been enacted into law, but it nonetheless urges that the annex be treated as if it were law. I will certainly take into account the Congress' wishes in this regard, but will do so mindful of the fact that, according to the terms of the statute, the provisions of the annex are not law.⁷⁰

Similarly, the President claimed in another signing statement that provisions in a bill that purported to give the force of law to language in a classified annex to the bill were legal nullities because the annex was not presented to the President along with the bill.⁷¹

69. See, e.g., Statement on Signing the Civil Rights Act of 1991, 27 WKLY. COMP. PRES. DOC. 1701 (Nov. 21, 1991).

70. President's Statement on Signing the National Defense Authorization Act for Fiscal Year 1991, 26 WKLY. COMP. PRES. DOC. 1766, 1767 (Nov. 5, 1990).

71. Statement on Signing the National Defense Authorization Act for Fiscal Years 1990 and 1991, 25 WKLY. COMP. PRES. DOC. 1841, 1842 (Nov. 29, 1989).

This kind of hyperlegalistic interpretation was complemented by a grand attempt at comprehensive scrutiny. Each year, for example, the President issued a statement claiming that all legislative veto provisions would be treated as legal nullities.⁷² Numerous signing statements challenged the legal validity of provisions that restricted the president's discretion, and the President sometimes seemed to threaten that he would act in defiance of the objectionable provisions. On at least four occasions, he went so far as to obtain a legal opinion from OLC concluding that it would be lawful for him to disregard a statutory provision,⁷³ and he apparently acted contrary to statutory direction in at least one case.⁷⁴ Although the President's constitutional objections to statutory provisions arose most often in the context of Bush's principal interest, foreign affairs,⁷⁵ many

72. See Statement on Signing the Treasury, Postal Service, and General Government Appropriations Act, 1993, 28 WKLY. COMP. PRES. DOC. 1873, 1874 (Oct. 6, 1992); Statement on Signing the District of Columbia Mental Health Program Assistance Act of 1991, 27 WKLY. COMP. PRES. DOC. 1575 (Oct. 31, 1991); Statement on Signing the Department of the Interior and Related Agencies Appropriations Act, 1991, 26 WKLY. COMP. PRES. DOC. 1768, 1769 (Nov. 5, 1990); Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1990, 25 WKLY. COMP. PRES. DOC. 1669, 1670 (Nov. 3, 1989).

One student of the legislative veto has counted more than 200 newly enacted legislative vetoes between the time of the Supreme Court's *Chadha* decision in 1983 and the end of the 102nd Congress in 1992. Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, LAW & CONTEMP. PROBS., Autumn 1993, 273, at 288.

73. Compare Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992, 27 WKLY. COMP. PRES. DOC. 1529 (Oct. 28, 1991) with Issues Raised by sec. 129 of Pub. L. No. 102-138 and sec. 503 of Pub. L. No. 102-140, 16 Op. Off. Legal Counsel 18 (1992) (preliminary print); Compare Statement on Signing the National and Community Service Act of 1990, 26 WKLY. COMP. PRES. DOC. 1833, 1834 (Nov. 16, 1990) with Appointment of Members of the Board of Directors of the Commission on National and Community Service, 14 Op. Off. Legal Counsel 173 (1990) (preliminary print); Compare Statement on Signing the Omnibus Budget Reconciliation Act of 1990, 26 WKLY. COMP. PRES. DOC. 1764, 1765-66 (Nov. 5, 1990) with Constitutionality of subsection 4117(b) of Enrolled Bill H.R. 5835, the Omnibus Budget Reconciliation Act of 1990, 14 Op. Off. Legal Counsel 170 (1990) (preliminary print); Compare Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, 26 WKLY. COMP. PRES. DOC. 266, 267 (Feb. 16, 1990) with Issues Raised by Section 102(c)(2) of H.R. 3792, 14 Op. Off. Legal Counsel 38 (1990) (preliminary print).

74. Despite a statutory requirement that representatives of a legislative body be included in the United States delegation to the Conference on Security and Cooperation in Europe, these negotiations appear to have proceeded without the inclusion of such legislative representatives. See McGinnis, *supra* note 55, at 310 n.81 (citing interview with former staff member of the National Security Council).

75. See, e.g., Statement on Signing the National Defense Authorization Act for Fiscal Year 1993, 28 WKLY. COMP. PRES. DOC. 2073 (Oct. 23, 1992); Statement on

dealt with matters, such as the arcana of the Appointments and Recommendation Clauses, in which he could not possibly have taken a passionate interest.⁷⁶

It is impossible to assess with certainty whether the Bush administration's veto and signing statement strategy will prove to have any lasting effects. The strategy was defensive, consisting almost entirely in resisting new congressional encroachments into areas that were thought to be reserved by the Constitution to the Executive's discretion. In order to measure the consequences of this resistance, one would need to determine what precedents would have been created but for the resistance, and to determine what significance those precedents would have had in the future. Once the Clinton administration begins to establish its own approach to veto messages (if there prove to be any) and signing statements, some useful comparisons may begin to emerge. On the evidence that now exists, however, it remains quite possible that the Bush administration's strategy amounted to little more than a kind of gesturing through which it sought to signal its intention—or reserve its rights—to seize ground from Congress if the opportunity to do so ever arose. Absent evidence that such opportunities arose and were taken, it is difficult to see how Bush's veto messages and signing statements could have any real or lasting importance.

B. Compromise of the Constitutional Vetoes

The four Bush vetoes that were apparently based solely on constitutional grounds reinforce this suspicion. They are therefore worth examining in some detail, for their contribution to legal and political developments can only be understood by examining the reasoning on which they were based and by observing how the President subsequently dealt with what proved to be ongoing disputes.

Signing the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, 27 WKLY. COMP. PRES. DOC. 1526 (Oct. 28, 1991); Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, 25 WKLY. COMP. PRES. DOC. 1810, 1811 (Nov. 21, 1989).

76. See, e.g., Statement on Signing the Reclamation States Emergency Drought Relief Act of 1991, 28 WKLY. COMP. PRES. DOC. 413 (March 5, 1992); Statement on Signing the Bill Modifying the Boundaries of the Alaska Maritime National Wildlife Refuge, 26 WKLY. COMP. PRES. DOC. 1897 (Nov. 21, 1990).

1. *The Appointments Clause*

One minor piece of pork barrel legislation sponsored by a Democratic Senator was vetoed solely because of provisions that violated the Appointments Clause.⁷⁷ This bill, which was named in honor of former Congressman Morris Udall, would have assigned authority to make determinations about eligibility for Federal funds to a board dominated by members not appointed by the president. President Bush emphasized in his veto message that his refusal to approve the bill was based solely on constitutional grounds and that he had no substantive or policy objections to the legislation. But when the President was presented with a successor bill that he deemed constitutionally invalid because of a different type of Appointments Clause violation, he signed it anyway.⁷⁸ Fidelity to the constitutional analysis that provoked the first veto thus proved less than thoroughgoing.⁷⁹

President Bush's concession in this case can usefully be contrasted with another incident in which he was more successful in getting what he wanted. When he approved the National and Community Service Act of 1990,⁸⁰ Bush issued a signing statement discussing what he regarded as constitutional defects in the provision establishing a commission created by the statute to administer the most important programs established in the act. Under the statute, various restrictions were placed on the president's freedom to choose nominees for this commission. The President regarded these restrictions as violations of the Appointments Clause, and said that they were "without legal force or effect."⁸¹

77. See Memorandum of Disapproval for the Morris K. Udall Scholarship and Excellence in National Environmental Policy Act, 27 WKLY. COMP. PRES. DOC. 1877 (Dec. 20, 1991).

78. See Statement on Signing the Morris K. Udall Scholarship and Excellence in National Environmental and Native American Public Policy Act of 1992, 28 WKLY. COMP. PRES. DOC. 507 (March 19, 1992). Adding insult to injury, the second bill treated the President's pocket veto of the first bill as a nullity by purporting to repeal legislation that Bush had purported to veto. See *id.*

79. The Senator who sponsored the bill was chairman of the appropriations subcommittee with jurisdiction over the Office of Management and Budget, which may help explain the President's lack of policy objections to the bill as well as his compromise on the constitutional issues. For accounts of the influence of the Director of the Office of Management and Budget during the Bush administration, see CHARLES KOLB, *WHITE HOUSE DAZE: THE UNMAKING OF DOMESTIC POLICY IN THE BUSH YEARS* (1994); JOHN PODHORETZ, *HELL OF A RIDE: BACKSTAGE AT THE WHITE HOUSE FOLLIES 1989-1993* (1993).

80. Pub. L. No. 101-610, 104 Stat. 3127 (1990).

81. Statement on Signing the National and Community Service Act of 1990,

So long as the President refused to nominate candidates for the commission, the congressionally mandated programs could probably not have been administered.⁸² In his signing statement, the President also indicated that while he was not particularly enthusiastic about the programs that this commission was to implement, he strongly favored a separate part of the act that authorized funding for one of his own favorite programs.⁸³ Congress therefore had reason to believe that the President might very well refuse to make the nominations required by the statute. In a burst of speed that would otherwise be mystifying, Congress passed remedial legislation bringing the statute into conformity with the President's view of the Appointments Clause early in the next legislative session.⁸⁴ What distinguishes this case from the one involving the Udall bill is that here the President's political and policy interests were firmly aligned with his interest in the Appointments Clause, whereas the objections to the Udall bill seem to have been rooted solely in constitutional principle.

2. *Presidential control over foreign policy*

In late 1990, President Bush vetoed a bill dealing with export controls on certain goods with military applications because of provisions requiring that sanctions be imposed on countries that use or distribute chemical and biological weapons. The President did not object to such sanctions on policy grounds, and he made this clear by signing an executive order that directed the imposition of the same sanctions contained in the bill.⁸⁵ What he did object to was the "rigid" and "mandatory" imposition on him of a legal obligation to impose the sanctions, which interfered with what he called his "constitutional responsibilities" to conduct the nation's foreign policy.⁸⁶

26 WKLY. COMP. PRES. DOC. 1833, 1833-34 (Nov. 16, 1990).

82. See Appointment of Members of the Bd. of Directors of the Comm'n on Nat'l and Community Serv., 14 Op. Off. Legal Counsel 173 (1990) (preliminary print).

83. 26 WKLY. COMP. PRES. DOC. at 1833.

84. See National and Community Serv. Technical Amendments Act of 1991, Pub. L. No. 102-10, 105 Stat. 29 (1991).

85. The executive order was signed before the bill was vetoed, and was referred to in the President's veto message.

86. See Memorandum of Disapproval for the Omnibus Export Amendments Act of 1990, 26 WKLY. COMP. PRES. DOC. 1839, 1839 (Nov. 16, 1990).

Although the President's objection to the export control bill was clearly rooted in his understanding of the constitutional separation of powers, he did not claim that such interference violated the Constitution. His constitutional objections were also not clearly distinguishable from his concerns about immediate practical consequences that the bill might have during what proved to be the prologue to the Gulf War: "The mandatory imposition of unilateral sanctions as provided in this bill would harm U.S. economic interests and provoke friendly countries who are essential to our efforts to resist Iraqi aggression."⁸⁷ The relative importance of these practical concerns was confirmed, after the Gulf War had been successfully prosecuted, when the President signed a bill with mandatory-sanctions provisions that differed little from those to which he had objected earlier.⁸⁸ This outcome, together with the attenuated nature of the President's original constitutional objections, makes it impossible to regard his veto of the original version of the mandatory sanctions as an important sign of commitment to constitutional principles.

3. *Congressional responses to Iran-Contra*

The two other vetoes that President Bush exercised on constitutional grounds were more significant, but they, too, were followed by compromises that substantially undercut their importance. The vetoed bills were part of a highly complex struggle between the Bush administration and the Congress over legislative efforts to prevent a repetition of certain activities that had occurred in connection with the Iran-Contra affair. In simplified form, many individuals on the Hill were determined 1) to require that Congress be kept fully and contemporaneously informed about covert actions (like the arms sales to Iran); and 2) to ensure that when Congress placed limits on the president's ability to take certain foreign policy actions directly (like the limits placed at times on assisting the Contras), the president would not be able to take those same

87. *Id.* The bill was presented to the President only a few weeks before American and allied troops invaded Iraq.

88. See Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Title V, Pub. L. No. 102-138, 105 Stat. 647, 722 (1991); Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, 27 WKLY. COMP. PRES. DOC. 1526 (Oct. 28, 1991).

actions indirectly by imposing on other nations to carry out activities prohibited by U.S. law.

In late 1989, President Bush was presented with a bill that made it a felony for anyone in the Executive to "assist" others (including foreign governments) in carrying out diplomatic initiatives that the Executive itself is prohibited by statute from pursuing directly. The bill also required the president to notify Congress whenever anyone in the Executive "advocates, promotes, or encourages" the provision of material assistance by others for activities that the Executive itself is forbidden by statute to assist with or undertake.⁸⁹ As President Bush noted when he vetoed this bill, its vague and sweeping provisions threatened to interfere with the conduct of foreign affairs by exposing diplomats and other officials to the threat of imprisonment for engaging in discussions that might later be found to constitute a prohibited form of "assistance." President Bush also observed that the threat to the president's constitutional role in conducting foreign relations was heightened by the fact that those who serve in Congress would remain free to engage in the very diplomatic activities forbidden to the Executive.⁹⁰ The resulting timidity and disarray in the conduct of foreign policy, said the President, would be "wholly contrary to the allocation of powers under the Constitution."⁹¹

The following year, President Bush vetoed another bill that would have had similar effects. This second bill contained a complex set of provisions designed to force the president to notify Congress about covert actions more promptly than President Reagan had informed the legislature about the secret arms sales to Iran during the 1980's.⁹² As part of this effort to ensure greater congressional involvement in the conduct of covert actions, the bill defined such covert actions to include any "request" by our government to a foreign government or private citizen to conduct a covert action on behalf of the

89. The full text of the provision, which is summarized here, can be found in section 109 of H.R. 1487, which was vetoed on November 21, 1989. A complete legal analysis of this provision would require a more extended discussion of various terms and qualifications than is necessary here.

90. See Message to the House of Representatives Returning Without Approval the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, 25 WKLY. COMP. PRES. DOC. 1806 (Nov. 21, 1989).

91. *Id.* at 1806.

92. The full text of the provisions can be found in Section 602 of S. 2834, 101st Cong., 2d Sess. (1990), which was vetoed on November 30, 1990.

United States. This definition was sufficient to provoke the President's veto (although the provisions dealing with notifications to Congress about covert actions were no less important).⁹³ In language reminiscent of that used the previous year, President Bush criticized the bill's vagueness about the meaning of reportable "requests," and complained that this vagueness "could have a chilling effect on the ability of our diplomats to conduct highly sensitive discussions concerning projects that are vital to our national security."⁹⁴ Because the contested provision of this bill did not forbid diplomatic discussions but only required that they be reported, and because it did not include provisions for criminal sanctions, it could not easily be characterized as unconstitutional (and the President's veto message did not use that term). President Bush's decision to veto the bill therefore seemed to reflect a serious determination to resist congressional meddling in the prerogatives of his office and to preserve the traditional separation of powers even beyond what he saw as the strict requirements of the Constitution.

It should come as no surprise that President Bush was most aggressive in his defense of the authority of his office in the field of foreign relations, where his expertise and interest were greatest. The veto messages dealing with prohibited forms of "assistance" and with reportable "requests" reflect this emphasis, and they are also typical of the highly nuanced and sophisticated constitutional analysis that runs consistently

93. The provisions of the bill dealing with the timing of the president's obligatory notification of covert actions were part of a separate constitutional and policy dispute between the Congress and the President. The story of that dispute's origins and development is quite complicated, but the result can be summarized in simple terms: President Bush reluctantly made concessions on this issue, as he did on the others reviewed in this article. Compare *The President's Compliance with the 'Timely Notification' Requirement of Section 501(b) of the National Security Act*, 10 Op. Off. Legal Counsel 159, 173-74 (interpreting the National Security Act to leave the president "virtually unfettered discretion" to choose when to notify Congress of covert actions) with Pub. L. No. 102-88 § 602, 105 Stat. 429, 441-44 (1991) (reenacting the operative language on timely notification); H.R. REP. NO. 66, 102d Cong., 1st Sess. (1991) (conference report on the bill that became Pub. L. No. 102-88) (rejecting OLC's conclusion and interpreting the reenacted language to require notification "within a few days"); Statement on Signing the Intelligence Authorization Act, Fiscal Year 1991, 27 WKLY. COMP. PRES. DOC. 1137, 1137 (Aug. 14, 1991) (expressing pleasure that the revised provision on timely notification "incorporates without substantive change the requirement found in existing law").

94. See Memorandum of Disapproval for the Intelligence Authorization Act, Fiscal Year 1991, 26 WKLY. COMP. PRES. DOC. 1958 (Nov. 30, 1990).

through almost all of the Bush veto messages and signing statements. Viewed in isolation, however, these two veto messages could be quite misleading. First, it should not be overlooked that the group of officials most directly threatened by these two bills was composed of career foreign service officers, a potent interest group within the government and one that counted among its own the man then serving as Deputy Secretary of State (and later as Secretary). More important, the Bush administration proved willing to compromise, and in a very serious way, exactly the principles that seemed to be at the center of the President's decisions to veto these two bills.

To see how this happened, one has to begin by examining yet another bill that was vetoed in 1989. Two days before he vetoed the bill that would have prohibited American officials from "assisting" others in certain foreign policy activities, President Bush had vetoed an appropriations bill that contained two provisions that he said were unacceptable. One of those provisions had to do with funding for abortions in countries receiving U.S. foreign aid. The other provision, which was sponsored by Representative David Obey and which closely resembled the vetoed ban on "assistance," would have prohibited the use of certain appropriated funds either "for the purpose of furthering any military or foreign policy activity which is contrary to [express prohibitions in] United States law" or "to solicit the provision of funds by any foreign government (including any instrumentality or agency thereof), foreign person, or United States person, for the purpose of furthering any military or foreign policy objective which is contrary to [express prohibitions in] United States law."⁹⁵ The Obey Amendment also contained provisos that purported to leave U.S. officials free to express their own views or those of the president. When he vetoed the bill, President Bush acknowledged that these provisos might allow the Obey Amendment to be construed in a way that he would consider constitutionally acceptable. He nevertheless complained that "the section as a whole remains sufficiently ambiguous to present an *unacceptable risk* that it will chill the conduct of our Nation's foreign affairs."⁹⁶

95. The full text of the provision is set out in H.R. 2939, which was vetoed on November 19, 1989.

96. Message to the House of Representatives Returning Without Approval the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, 25 WKLY. COMP. PRES. DOC. 1783, 1784 (Nov. 19, 1989) (emphasis added).

The President's decision to veto this bill because of ambiguities in the Obey Amendment that created an "unacceptable risk" of chilling the conduct of our foreign relations, however, did not turn out to be the end of the story. Because this amendment was a rider to an appropriations bill sent to the President near the end of a congressional session, the legislature had to respond to the President's veto by passing a new bill. Two days later, the President signed a new version of the bill, from which the controversial abortion-funding provisions had been removed. The Obey Amendment, however, remained in the bill in a slightly modified form. Under the new version, American officials were barred from providing appropriated funds to any foreign government or other person "in exchange for" that government or person undertaking an action that U.S. law expressly prohibited the American officials themselves from engaging in.

President Bush's signing statement recognized that the new version of the Obey Amendment, though less sweeping than the first, had the same kind of potential to chill the conduct of foreign affairs: "Many routine and unobjectionable diplomatic activities could be misconstrued as somehow involving a forbidden 'exchange.'"⁹⁷ Why then did the President sign the bill? Following a pattern characteristic of many Bush signing statements, in which he interpreted objectionable provisions so as to render them consistent with his view of the Constitution (though often completely inconsistent with the statutory language),⁹⁸ the President contended that the Obey Amendment

97. Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, 25 WKLY. COMP. PRES. DOC. 1810, 1811 (Nov. 21, 1989).

98. See, e.g., Statement on Signing the Reclamation Projects Authorization and Adjustment Act of 1992, 28 WKLY. COMP. PRES. DOC. 2232, 2233 (Oct. 30, 1992); Statement on Signing the Futures Trading Practices Act of 1992, 28 WKLY. COMP. PRES. DOC. 2185 (Oct. 28, 1992); Statement on Signing the National Defense Authorization Act for Fiscal Year 1993, 28 WKLY. COMP. PRES. DOC. 2073 (Oct. 23, 1992); Statement on Signing the Reclamation States Emergency Drought Relief Act of 1991, 28 WKLY. COMP. PRES. DOC. 413 (March 5, 1992); Statement on Signing the Coast Guard Authorization Act of 1991, 27 WKLY. COMP. PRES. DOC. 1873 (Dec. 19, 1991); Statement on Signing the National Defense Authorization Act for Fiscal Years 1992 and 1993, 27 WKLY. COMP. PRES. DOC. 1769 (Dec. 5, 1991); Statement on Signing the National Earthquake Hazards Reduction Program Reauthorization Act, 26 WKLY. COMP. PRES. DOC. 1843 (Nov. 16, 1990); Statement on Signing the National Defense Authorization Act for Fiscal Year 1991, 26 WKLY. COMP. PRES. DOC. 1766 (Nov. 5, 1990); Statement on Signing the North American Wetlands Conservation Act, 25 WKLY. COMP. PRES. DOC. 1949 (Dec. 13, 1989);

covered only transactions "in which U.S. funds are provided to a foreign nation on the *express* condition that the foreign nation provide specific assistance to a third country."⁹⁹ The signing statement also maintained that because the Obey Amendment applied only where U.S. law "expressly prohibits" American officials from taking an action, it would not apply where U.S. statutes "merely limit funding to undertake such an action."¹⁰⁰

The President's interpretation was in some respects simply irreconcilable with the statutory language. The Obey Amendment, for example, unambiguously referred to exchanges with any "foreign person or United States person," not just to exchanges with "foreign nations."¹⁰¹ Similarly, the Obey Amendment prohibited U.S. officials from inducing others to undertake "any action" that the American government is forbidden from taking, not just actions in which a foreign nation "provide[s] specific assistance to a third country." Where the President's interpretation of the Obey Amendment's text was not preposterous, it was far-fetched. The natural and obvious meaning of the phrase "in exchange for" clearly covers implicit agreements as well as transactions based on an express condition, especially in a statutory provision that carefully distinguishes implicit from express prohibitions. And there is precious little room in the statute's language for the President's claim that laws which limit funding for certain activities do not expressly prohibit U.S. officials from providing funding in excess of those limits; on the contrary, it has for a very long time been a felony, pursuant to an express and general statutory prohibition, for government officials to make expenditures beyond the limits set in appropriations legislation.¹⁰²

In a desperate attempt to shore up his utterly implausible interpretation of the Obey Amendment's language, President Bush sought to rely on the amendment's legislative history to

Statement on Signing the Department of Defense Appropriations Act, 1990, 25 WKLY. COMP. PRES. DOC. 1809 (Nov. 21, 1989).

99. Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, 25 WKLY. COMP. PRES. DOC. 1810, 1811 (Nov. 21, 1989) (emphasis added).

100. *Id.*

101. Compare Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, Pub. L. No. 101-167, 103 Stat. 1195 (1989) with 25 WKLY. COMP. PRES. DOC. at 1811.

102. 31 U.S.C. §§ 1341, 1350.

show that his interpretation reflected congressional intent. But he had little to rely on. Flouting standard canons of statutory construction, the Bush signing statement ignored those portions of the legislative history that courts consider the most reliable indicia of legislative intent, such as statements by the sponsor of the provision in question (which in this case was Representative Obey, who chaired the appropriations subcommittee with jurisdiction over the bill). Instead, President Bush referred vaguely to statements by Representative Mickey Edwards (the ranking Republican on the subcommittee), and to a colloquy between two Republican Senators (Kasten and Rudman).¹⁰³

When one examines the legislative history of the Obey Amendment, the flimsiness of the administration's legal argument becomes even more apparent. Representative Obey made it clear that the intent of his amendment was to prohibit appropriated funds from being "expended in any way to promote or entice other governments to support policies which would be illegal if followed by the United States."¹⁰⁴ Representative Edwards, moreover, who helped negotiate the final version of the Obey Amendment and on whom the Bush signing statement purports to rely, never said that the Amendment requires an express agreement. Edwards said that a violation of the provision would have to be based on a "quid pro quo," which is just another way of describing the provision of funds "in exchange for" some action.¹⁰⁵ The term "quid pro quo" no more

103. 25 WKLY. COMP. PRES. DOC. at 1811.

104. 135 CONG. REC. H9088 (daily ed. Nov. 20, 1989). *See also id.* at H9089 (amendment says that "if this administration wants to try to accomplish a foreign policy purpose, which is contrary to a specific prohibition in U.S. law, it cannot use money in this bill to do it") (statement of Mr. Obey).

105. *See id.* at H9089 (statement of Mr. Edwards). There is one statement in the *Congressional Record* that might seem to offer some support for the President's interpretation. The day after the bill containing the Obey Amendment was passed by the House of Representatives, Obey went on the floor and declared (on behalf of himself and Representative Edwards) that "the word 'exchange' should be understood to refer to a direct verbal or written agreement." 135 CONG. REC. H9231 (daily ed. Nov. 21, 1989). This statement does not go as far as the Bush signing statement, for a "direct" agreement would not necessarily have to be an "express" agreement, but it does go further in the direction favored by the President than prior statements by Obey and Edwards had gone. Under standard canons of statutory construction, however, the statement of November 21 would be difficult to use as a meaningful indicator of congressional intent because it was made *after* legislative action on the bill had been completed.

excludes implicit agreements than the statutory "in exchange for" language does.¹⁰⁶

The President's invocation of Representative Edwards' statements to support his narrow construction of the Obey Amendment was baseless, and his reliance on a colloquy between Senators Kasten and Rudman was not much better. Immediately after the House passed the bill containing the Obey Amendment, the Senate debate began. At the end of that debate, Senator Kasten offered a substitute amendment that would have replaced the Obey provision with language forbidding U.S. officials from providing appropriated funds pursuant to agreements under which, "as an express condition for receipt of such assistance," the recipients would undertake military or foreign policy activities that are illegal under American law.¹⁰⁷ Kasten, who was openly serving as the Bush administration's agent on this issue, withdrew this amendment after engaging Senator Rudman (who had generally opposed the administration's position on related issues) in a planned colloquy. According to the transcript of the colloquy in the *Congressional Record*, Rudman asserted that violations of the Obey Amendment should not give rise to criminal penalties, and that the words "in exchange for" should be understood to refer to agreements under which U.S. aid is provided on the "express condition" that the recipient undertake an action that U.S. officials are legally forbidden to carry out.¹⁰⁸

Because no objections were raised to Senator Rudman's interpretation, which the record indicates was offered on the floor immediately before the bill containing the Obey Amendment was passed by the Senate, the Kasten-Rudman colloquy

106. See, e.g., *Evans v. United States*, 112 S. Ct. 1881, 1892 (1992) (Kennedy, J., concurring in part and concurring in the judgment):

The requirement of a *quid pro quo* means that without pretense of any entitlement to the payment, a public official violates § 1951 if he intends the payor to believe that absent payment the official is likely to abuse his office and his trust to the detriment and injury of the prospective payor or to give the prospective payor less favorable treatment if the *quid pro quo* is not satisfied. The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it.

Id.

107. 135 CONG. REC. S16361 (daily ed. Nov. 20, 1989).

108. *Id.* at S16362-63.

may not be completely worthless as an indicator of the Senate's intent.¹⁰⁹ Even if one assumes that the colloquy firmly establishes that the Senate's interpretation of the Obey Amendment was the same as the President's, however, the record in the House does not support that interpretation, at least with respect to whether a violation must be based on an express agreement. And since the meaning suggested by the debates in the originating chamber is more consistent with the language of the provision, a disinterested interpreter such as a court would almost certainly reject the construction put on the statute in the Bush signing statement.

It is true that the second version of the Obey Amendment was less threatening to the president's conduct of foreign affairs than either of the predecessor versions that President Bush used his veto to stop. The President's signing statement, moreover, may have helped prevent the new law from being used as a tool of partisan or ideological combat. But President Bush gave up a great deal when he signed the bill containing the second version of the Obey Amendment. To see how much he surrendered, one need only look at his signing statement's claim that the Senate record made it clear that "neither the criminal conspiracy statute, nor any other criminal penalty" would apply to violations of the Obey Amendment.¹¹⁰ Even if one assumes, perhaps somewhat heroically, that the courts would apply the rule of lenity (which counsels that ambiguous statutes should be construed in favor of criminal defendants), such legislative history could not prevent an Independent Counsel from procuring indictments based on the general con-

109. One commentator has attempted to make the Kasten-Rudman colloquy seem irrelevant by falsely asserting that "their colloquy concerned an amendment that Senator Kasten himself withdrew when it faced rejection by Congress." CHARLES TIEFER, *THE SEMI-SOVEREIGN PRESIDENCY: THE BUSH ADMINISTRATION'S STRATEGY FOR GOVERNING WITHOUT CONGRESS* 39 (1994). Although Kasten's amendment was before the Senate when the colloquy took place, the colloquy itself "concerned" the Obey Amendment. Kasten, moreover, withdrew his own amendment because he accepted the colloquy as an adequate substitute for his own amendment, and Tiefer does not demonstrate that "it faced rejection by Congress." While it would be naive to think that the Kasten-Rudman colloquy could possibly have served the administration's interests as well as the Kasten Amendment would have, it would equally be naive (or tendentious) to assume without proof that the Obey Amendment could have been enacted without the concession to the President that was embodied in the Kasten-Rudman colloquy.

110. Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, 25 WKLY. COMP. PRES. DOC. 1810, 1811 (Nov. 21, 1989).

spiracy statute.¹¹¹ Lawrence Walsh had done this and more when he prosecuted Oliver North and others for conspiring to obstruct government functions by evading two of the so-called Boland Amendments (which put restrictions on aid to the Nicaraguan Contras).¹¹² Everyone concerned clearly understood that the Obey Amendment was an effort to make it easier (not more difficult) to discourage government officials from engaging in activities like those engaged in by the targets of Walsh's investigations. Nor could anyone who was involved in the conduct of foreign policy during this period have had less than an acute awareness of the costs that an Independent Counsel can impose on his targets even when he fails to make his criminal charges stick. Neither the president nor anyone else could assure American diplomats either that similar indictments for violating the Obey Amendment would not be brought or that the courts would rule against the validity of such prosecutions.¹¹³ To the extent that American diplomats chose to take their legal advice from the President's signing statement, or from the more elaborate but equally dubious legal opinion subsequently issued by OLC,¹¹⁴ the Obey Amendment could have had little chilling effect. But when one considers how reckless or self-sacrificing it would have been to take the President's statement as legal advice, any notion that the President's concession in signing the Obey Amendment into law was an unimportant surrender dissipates like the insubstantial haze of the legal analysis in the signing statement itself.¹¹⁵

111. 18 U.S.C. § 371 (Supp. 1995). This statute authorizes prosecutions for conspiracies to commit offenses that are not themselves criminally punishable. See *United States v. Hutto*, 256 U.S. 524 (1921).

112. Technically, Walsh did not charge North and the others with conspiracy to violate the Boland Amendments, but this seems only to have been a matter of trial tactics. In his final report, Walsh said: "Independent Counsel could as a matter of law have framed the conspiracy charge in that fashion, and its evidence at trial would have proved that the conspirators violated the Boland Amendment." LAWRENCE E. WALSH, *IRAN-CONTRA: THE FINAL REPORT* 67 (1994).

113. The President's signing statement, together with a legal opinion based on it, see *Criminal Penalties Under Pub. L. No. 101-167, Section 582*, 14 Op. Off. Legal Counsel 93 (preliminary print 1990), that was later issued by the Justice Department, might have been sufficient to justify the Attorney General in refraining from seeking the appointment of an Independent Counsel for alleged violations of the Obey Amendment. As the Iran-Contra prosecutions illustrated, however, an Independent Counsel appointed because of *other* alleged legal violations would be free to procure an indictment based on violations of the Obey Amendment.

114. *Id.*

115. The Obey Amendment has been reenacted in subsequent appropriations bills. The current version can be found in Pub. L. No. 103-87, § 533, 107 Stat. 931

C. *The War Powers Resolution*

President Bush's use of veto messages and signing statements—which articulated, without insisting on, an aggressive view of his constitutional prerogatives—resembles his approach to the War Powers Resolution.¹¹⁶ Section 4(a)(1) of this statute, which was enacted over President Nixon's veto in 1973, requires that the President file a report with Congress within forty-eight hours after U.S. forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."¹¹⁷ A report under this section of the statute triggers a sixty-day deadline within which the president is required to terminate the use of military forces unless Congress authorizes their continued deployment.¹¹⁸ The president is also required to report certain other kinds of military deployments in foreign nations, but these do not trigger a deadline that would force him to seek congressional authorization.

Like other presidents beginning with Nixon, President Bush regarded the sixty-day limit as unconstitutional. Except for one ambiguous reference to section 4(a)(1) by President Ford after the Mayaguez incident, no president has ever submitted a report acknowledging that the sixty-day clock had been triggered.¹¹⁹ While technically complying with a narrow construction of the reporting requirements of the War Powers Resolution, President Bush was relatively aggressive in asserting the statute's irrelevance to his conduct. After using American air power to help suppress a coup in the Philippines, for example, Bush notified Congress of the actions he had taken, but sought to avoid conceding that his military decisions could be constrained by that statute:

This measured action by U.S. Forces was taken at my direction in accordance with recognized principles of international

(1993). When he signed this legislation into law, President Clinton made no mention of the Obey Amendment. See Statement on Signing the Foreign Operations Appropriations Legislation, 29 WKLY. COMP. PRES. DOC. 1945 (Sept. 30, 1993).

116. 50 U.S.C. §§ 1541-1548 (1988).

117. *Id.* § 1543(a).

118. *Id.* § 1544(b).

119. Thomas M. Franck, *Rethinking War Powers: By Law or By "Thaumaturgic Invocation"?*, 83 AMER. J. INT'L L. 769 & n.13 (1989). The Ford administration conceded that the evacuation of Saigon fell within section 4(a)(1), but this concession came after the time had lapsed for a report under that section. Overview of the War Powers Resolution, 8 Op. Off. Legal Counsel 271, 278 (1984).

law and pursuant to my constitutional authority with respect to the conduct of foreign relations and as Commander in Chief. I am mindful of the historical differences between the Executive and Legislative branches and the positions taken by me and all my predecessors in office with respect to the constitutionality of certain provisions of the War Powers Resolution. I am sharing this information with you consistent with that Resolution.¹²⁰

A few weeks later, the President ordered the invasion of Panama. Once again noting that his report was "consistent with" (not "pursuant to") the War Powers Resolution, the President said the invasion:

was necessary to protect American lives in imminent danger and to fulfill our responsibilities under the Panama Canal Treaties. . . . The military operations were ordered pursuant to my constitutional authority with respect to the conduct of foreign relations and as Commander in Chief.¹²¹

The following year, after Iraq's invasion of Kuwait, the President grew bolder still. In his letter notifying Congress of substantial troop deployments to the Gulf, he said that Iraq's military was "capable of initiating further hostilities with little or no additional preparation," and that "Iraq's actions pose a direct threat to neighboring countries and to vital U.S. interests in the Persian Gulf region."¹²² Despite this reference to further hostilities, however, the President implied that the sixty-day clock in the War Powers Resolution had not been triggered, and that in any event the statute would not affect the President's military decisions:

I do not believe involvement in hostilities is imminent; to the contrary, it is my belief that this deployment will facilitate a peaceful resolution of the crisis. If necessary, however, the Forces are fully prepared to defend themselves. Although it is not possible to predict the precise scope and duration of

120. Letter to the Speaker of the House and the President Pro Tempore of the Senate on United States Military Assistance to the Government of the Philippines, 25 WKLY. COMP. PRES. DOC. 1867, 1868 (Dec. 2, 1989).

121. Letter to the Speaker of the House and the President Pro Tempore of the Senate on United States Military Action in Panama, 25 WKLY. COMP. PRES. DOC. 1984, 1985 (Dec. 21, 1989).

122. Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of United States Armed Forces to Saudi Arabia and the Middle East, 26 WKLY. COMP. PRES. DOC. 1225 (Aug. 9, 1990).

this deployment, our Armed Forces will remain so long as their presence is required to contribute to the security of the region and desired by the Saudi government to enhance the capability of Saudi armed forces to defend the Kingdom.

I have taken these actions pursuant to my constitutional authority to conduct our foreign relations and as Commander in Chief.¹²³

Despite frequent claims that Bush and other presidents have evaded the War Powers Resolution, or deliberately avoided compliance with it,¹²⁴ the statute's language has made it fairly easy for presidents to engage in what they saw as appropriate military actions without having to flout its terms or even to acknowledge that the constitutionally questionable sixty-day clock had begun to run.¹²⁵ As the examples above illustrate, President Bush took full advantage of the statute's wording to avoid the risk of acting in clear contravention of its terms. Events in the Gulf, however, finally closed off this path.

As it became clear that Iraq was unlikely to surrender its ambitions in the face of threats and economic sanctions alone, the President was apparently undecided about the advisability

123. *Id.* After a large deployment of additional forces later that year, President Bush again notified Congress of what he had done. In this case, however, he did not even mention the War Powers Resolution. He did, however, restate his belief that hostilities were not "imminent." Letter from President George Bush to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, 26 WKLY. COMP. PRES. DOC. 1834, 1835 (Nov. 16, 1990).

124. *See, e.g.,* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 39, 133, 190 (1990); McGinnis, *supra* note 55, at 316 & n.117, 319; Rolph, *supra* note 50. *But cf.* KOH, *supra*, at 112, 126-27 (seeming to acknowledge that there has been a high degree of presidential compliance with the strict terms of the War Powers Resolution). Presidents have certainly construed every ambiguity in the War Powers Resolution in their own favor, and one can make plausible arguments against some of these presidential interpretations. *See, e.g.,* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 49 & n.10 (1993); ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 122 (1991). While the Presidents' interpretation of the statute (as of the Constitution) may be disputable, so are the interpretations of the presidents' critics. No court has ever held that any president has violated the War Powers Resolution, and Congress itself has never voted to tighten its language or to impose new requirements that were omitted from the existing version.

125. This is not to say that the War Powers Resolution has had no effect. Some military operations, for example, may have been conducted in a way calculated to avoid triggering certain provisions of the statute. *See, e.g.,* TURNER, *supra* note 124, at 137 (American military advisers in El Salvador forbidden to carry M-16 rifles).

of seeking congressional authorization for a military offensive. Administration officials had consistently maintained that such authorization was not legally required,¹²⁶ and the Secretary of Defense is said to have worried that prosecution of the war would become impossible if Congress voted against authorizing the use of force.¹²⁷ The President, however, decided to seek congressional authorization before attacking Iraq, and he succeeded in obtaining it.

The President's decision may have been politically prudent, and it may even have reflected a consensus among his legal advisors.¹²⁸ Subsequent events, however, by no means disproved the argument attributed to Secretary Cheney: that if the use of force turned out to be successful and the costs were reasonably low, it would not matter what kind of debate or vote there had been in Congress, whereas if the military operation failed or the costs of victory were very high, prior congressional authorization would not save the President from taking the blame.¹²⁹

President Bush, moreover, clearly passed up an obvious opportunity to frustrate congressional efforts to establish a precedent adverse to his claims about the unconstitutionality of the War Powers Resolution. When he asked Congress for legislation, the President was careful not to ask for statutory "authorization," but only for a bill stating that Congress "supports the use of all necessary means to [liberate Kuwait]."¹³⁰ And

126. *E.g.*, David Hoffman, *Baker Says Iraq Is Abusing Hostages; Health of American 'Human Shields' Reported to Be Deteriorating*, WASH. POST, Oct. 30, 1990, at A1 ("Bush said yesterday he believes he has ample authority to act in the gulf without prior approval from Congress. 'History is replete with examples where the president has had to take action,' Bush said. 'And I've done this in the past and certainly . . . would have no hesitancy at all.'"); *U.S. Policy in the Persian Gulf: Hearings Before the Senate Committee on Foreign Relations*, 101st Cong., 2d Sess. (Oct. 17, 1990) (testimony of Secretary of State Baker); *Crisis in the Persian Gulf Region: U.S. Policy Options and Implications: Hearings Before the Senate Committee on Armed Services*, 101st Cong., 2d Sess. (Dec. 3, 1990) (testimony of Secretary of Defense Cheney).

127. BOB WOODWARD, *THE COMMANDERS* 343-44 (1991).

128. One journalist reports that there was general agreement among the President's legal advisors about the desirability of obtaining congressional authorization. Apparently reflecting this consensus, the Deputy Attorney General (who at that time was William P. Barr) is said to have advised the President that he had the authority to proceed unilaterally, but nonetheless recommended that congressional authorization be obtained because "[w]ar is in the gray zone." *Id.* at 344-46.

129. *Id.* at 344.

130. Letter to Congressional Leaders on the Persian Gulf Crisis, 27 WKLY. COMP. PRES. DOC. 17, 18 (Jan. 8, 1991).

when he was presented instead with legislation expressly providing the legal authorization required by the War Powers Resolution,¹³¹ the President's signing statement emphasized that

my request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution.¹³²

The President may not have conceded that he needed this resolution as a legal matter, but after he requested a mere resolution of support and then signed this one instead, his claims about the legal irrelevance of the War Powers Resolution could themselves only look quite irrelevant.

D. Summary

President Bush's signing statements and veto messages, like his statements about the War Powers Resolution, displayed a consistent and relatively aggressive approach to the separation of powers issues that arose from congressional efforts to subject the administration to a variety of statutory restrictions. In this sense, the Bush record represents a kind of triumph for the academically oriented lawyers responsible for crafting the President's statements.¹³³ Upon closer examination, however, this victory appears to have been one more of form than substance. The aggressive signing statements do not appear to have reflected much actual resistance to congressional control, and each of the vetoes based on constitutional objections was followed by substantial compromise of the principles on which those vetoes were based. With respect to the War Powers Resolution, President Bush simply (though per-

131. Pub. L. No. 102-1, 105 Stat. 3 (1991).

132. Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, 27 WKLY. COMP. PRES. DOC. 48 (Jan. 14, 1991).

133. For many years, OLC has attracted lawyers with prestigious educational records, and many have gone on to academic careers. McGinnis, *supra* note 31, at 422, 424 & n.185. During the Bush administration, C. Boyden Gray (himself a former Supreme Court clerk) broke with prior practice by hiring people with similar paper credentials to work in the White House Counsel's office. See *The True Believers*, 23 National Journal 2018 (Aug. 17, 1991).

haps sensibly) flinched when presented with circumstances in which he could have put his bold words to a test.

IV. THREE RETREATS FROM THE ADMINISTRATION'S CONSTITUTIONAL PRINCIPLES

If the lawyers' "successes" do not seem to suggest that their role in the development of separation of powers law was particularly important, the lawyers' "failures" provide even stronger evidence that their influence did not amount to much. The Bush record shows that his administration was simply unwilling to defend its theories of the Constitution on several important occasions. A brief look at some of these departures from the principled jurisprudence articulated in the Bush signing statements and veto messages will help to illuminate the forces that discourage a thoroughgoing implementation of a principled jurisprudence of the separation of powers.

A. *Legislative Vetoes*

Early in its tenure, the Bush administration sought to be done with the contentious matter of the Nicaraguan Contras, which had been inherited from President Reagan. After investing a significant amount of his own time in negotiations, the Secretary of State reached an agreement with congressional leaders that provided temporary funding to support the Contras. Part of these so-called "Central American Accords" required the administration to promise in writing that no money would be used to support the Contras after a date certain unless the chairmen of four congressional committees approved the continued funding in writing.¹³⁴ Neither OLC nor the Counsel to the President (nor for that matter the State Department's own Legal Adviser) was consulted about this arrangement,¹³⁵ which incorporated a formal legislative-veto device that would clearly have been unconstitutional under the *Chadha* decision had it been adopted in legislation.¹³⁶ There was speculation in the press that personal factors may have

134. See Robert Pear, *Unease is Voiced on Contra Accord*, N.Y. TIMES, March 26, 1989, at A1, col. 5. Although the Central American Accords between the President and Congress were published by the Executive, the part of the agreement discussed here was omitted from the published version. See *Bipartisan Accord on Central America*, 25 WKLY. COMP. PRES. DOC. 420 (March 24, 1989).

135. See Pear, *supra* note 134.

136. See *INS v. Chadha*, 462 U.S. 919 (1983).

contributed to the absence of advance consultations, and it can hardly be doubted that the Secretary of State and the Counsel to the President had an uneasy relationship.¹³⁷ But there was no suggestion that the agreement's impact on the president's ability to protect the authority of his office was overlooked. On the contrary, one State Department official who took part in the negotiations was quoted as saying that "the precedential aspects of this agreement were well and truly understood" by Secretary of State Baker and other negotiators.¹³⁸ Instead, it appears that the President decided that resolving the very contentious issue of aid to the Contras was simply more important than maintaining a principled opposition to the use of legislative vetoes. The fact that the newly inaugurated President felt quite free to make this decision without consulting OLC, the Counsel to the President, or any other legal officer in the government, is a striking illustration of how unlikely it is that a president would ever allow the concerns that lawyers have with the interests of his office to determine his conduct in that office.

The flap over the agreement to comply with a non-statutory legislative veto attracted considerable attention because the Counsel to the President made the mistake of voicing his objections in the press.¹³⁹ During the ensuing years, however, no attention at all was paid the fact that President Bush routinely signed bills containing *real* legislative vetoes that clearly violated the *Chadha* rule, unlike the Contra funding agreement (which was not technically unconstitutional). Although the President also routinely issued statements denouncing the congressional practice of including such "legal nullities" in bills that were presented to him,¹⁴⁰ I have found no recorded example of the Bush administration's refusing to comply with any of the innumerable legislative vetoes to which it was subjected. Nor does the Bush administration seem to have taken any

137. See, e.g., Bernard Weinraub, *Gray-Baker Vendetta: A Long-Running Tale Of Potomac Intrigue*, N.Y. TIMES, March 29, 1989, at A16, col. 1.

138. Pear, *supra* note 134; see also Helen Dewar & David Hoffman, *Baker Denies Contra-Aid Agreement Sets Precedent for Power-Sharing: Draft Letter on Assistance Plan Circulating Among Hill Leaders*, WASH. POST, April 8, 1989, at A9; R.W. Apple Jr., *A Balance of Bush, the Congress and the Contras*, N.Y. TIMES, April 2, 1989, at D1, col. 1.

139. See Pear, *supra* note 134; Bendavid, *supra* note 5, at 14 ("I was right to object," Gray maintains. "But Secretary Baker was mad, understandably so, because I had talked to the press before raising the matter in-house.")

140. See *supra* note 72.

other action that might have discouraged the Congress from flouting one of the few apparently significant post-Watergate Supreme Court victories for the office of the president.¹⁴¹

B. *The Appointments Clause*

It is easy to imagine why President Bush might make the trade-off between politics and principle that he accepted in the Central American Accords, especially when one considers that the arrangement did not involve an actual violation of the Constitution. The same cannot be said, however, of another departure from well-settled principles of the separation of powers. On August 9, 1989, President Bush signed into law the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), which effected a massive restructuring of the regulatory regime governing the savings-and-loan industry. As part of that restructuring, an independent agency known as the Federal Home Loan Bank Board ("FHLBB") had most of its functions transferred to a new entity, called the Office of Thrift Supervision ("OTS"), which was located within the Department of the Treasury. When he signed the bill, President Bush did not mention that the new statute contained a provision that purported to appoint as the first Director of OTS the individual who had been Chairman of the FHLBB.¹⁴²

Such a provision, under which an officer of the United States is appointed by statute, is about as clear a violation of the Appointments Clause of the Constitution as one could hope to find. If one were familiar only with the fastidious attention to Appointments Clause issues that pervades the Bush

141. For a detailed study of the struggle within the Reagan administration over the litigation strategy that led to the successful attack on the legislative veto, see BARBARA HINKSON CRAIG, CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE (1988). The post-*Chadha* pattern, in which legislative vetoes are usually imposed in appropriations bills rather than in substantive legislation (probably because of the special powers of intimidation possessed by appropriators), suggests that the principal effect of *Chadha*, to the extent it has had any at all, may have been a slight shift in the relative power of congressional appropriations committees in comparison with authorizing committees. Legislative vetoes, especially committee vetoes, have of course also continued to be exercised through extra-statutory mechanisms, as *Chadha* clearly permits. Neither Bush nor any other president seems to have made much of an effort to curb this practice, which could hardly be less objectionable than the Contra funding agreement. For examples of the use of extra-statutory mechanisms, see Fisher, *supra* note 72, at 288-91.

142. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 301, 103 Stat. 183, 278.

administration's signing statements and with the President's decision to veto one bill solely because of a less clear-cut violation of the Appointments Clause,¹⁴³ acquiescence in the statutory appointment of a federal officer might be surprising, or even shocking. The President's failure to object to this element of the bill when he signed it, however, becomes easier to understand when one recognizes the still more extraordinary fact that the Bush administration had *itself* proposed the same kind of illegal statutory appointment in a savings-and-loan bill it had transmitted to the Congress a few months earlier.¹⁴⁴

This blunder led directly to litigation brought by a thrift whose assets OTS was threatening to seize.¹⁴⁵ In the course of the law suit, which challenged the authority of OTS to act on the ground that its director had been unconstitutionally appointed,¹⁴⁶ the Director resigned and was eventually replaced by an official appointed in the constitutionally prescribed manner. Before that happened, however, the Bush administration put forward the desperate argument that the statutory appointment was valid because the chairmanship of the FHLBB and the directorship of OTS were the same office, a position emphatically rejected by the district court.¹⁴⁷ This litigation, which threatened serious disruption of OTS' regulatory work,

143. Memorandum of Disapproval for the Morris K. Udall Scholarship and Excellence in National Environmental Policy Act, 27 WKLY. COMP. PRES. DOC. 1877 (Dec. 20, 1991).

144. 135 CONG. REC. S1513, S1535-36 (daily ed. Feb. 22, 1989).

145. Olympic Fed. Savs. & Loan Ass'n v. Director, Office of Thrift Supervision, 732 F. Supp. 1183, 1191-92 (D.D.C.), *dismissed as moot*, 903 F.2d 837 (D.C. Cir. 1990).

146. The plaintiff that brought the constitutional challenge was represented by Charles J. Cooper, who had been Assistant Attorney General for OLC during the Reagan administration.

147. 732 F. Supp. 1183, 1192-93 (D.D.C. 1990). The court also rejected a number of efforts by the government to evade the Appointments Clause through bootstrapping arguments based on the Vacancies Act and on an alleged "inherent power" of the president to fill vacant offices without regard to the Appointments Clause. These efforts, too, were rejected by the court. *Id.* at 1193-1200.

Ironically, one of the greatest differences between OTS and the FHLBB is that OTS falls clearly under the president's legal control, while the FHLBB did not. It is difficult to imagine, however, that the long-term benefits to the constitutional order that might be thought to result from the abolition of a single independent agency could outweigh the risks to that order that were presented by the Justice Department's defense of the statutory appointment. Apparently, this thought eventually made an impression on the Justice Department itself, which went out of its way in a subsequent case to endorse the position adopted by the District Court in the FIRREA litigation. See Brief for the Respondent, 1991 WL 521272, at *40, *Freytag v. Commissioner*, 501 U.S. 868 (1991) (No. 90-762).

became moot when a new Director was confirmed by the Senate and appointed by the President.¹⁴⁸

Given the Bush administration's scrupulous attention to the Appointments Clause in other contexts, including one veto that was based solely on an Appointments Clause objection,¹⁴⁹ its flagrant disregard of constitutional forms in this case is quite striking. William P. Barr, who served at the head of OLC when the President signed the bill enacting the violation into law, has publicly stated that OLC "recognized an Appointments Clause problem" in the bill.¹⁵⁰ He also reports that many people in the Treasury Department and Congress thought it was "absurd" to worry about such an issue, so that "the views of the Department of Justice were overridden. Political deals were made, and the bill passed."¹⁵¹ Read carefully, Barr's account is highly revealing. First, it refers only to a bill in which OLC "recognized" a constitutional "problem." No mention is made of the fact that the Bush administration itself had formally proposed adopting the blatantly unconstitutional statutory appointment mechanism. Second, there is no suggestion that OLC's constitutional objections were communicated to the President or to the White House Counsel. Nor is there any suggestion that the Department of Justice recommended that the President veto the bill, despite Barr's statement in the very same paragraph that "[w]hen a provision raises constitutional difficulties, in most cases the Attorney General should recommend veto."¹⁵² It is hard to resist the inference that the De-

148. *Olympic Fed. Savs. & Loan Ass'n v. Director, Office of Thrift Supervision*, 903 F.2d 837 (D.C. Cir. 1990), *cert. denied*, 499 U.S. 907 (1991).

149. See Memorandum of Disapproval for the Morris K. Udall Scholarship and Excellence in National Environmental Policy Act, 27 WKLY. COMP. PRES. DOC. 1877 (Dec. 20, 1991). The President also expressed his concern with the Appointments Clause in his signing statements. *E.g.*, Statement on Signing the Bill Modifying the Boundaries of the Alaska Maritime National Wildlife Refuge, 26 WKLY. COMP. PRES. DOC. 1897 (Nov. 21, 1990); Statement on Signing the National and Community Service Act of 1990, 26 WKLY. COMP. PRES. DOC. 1833 (Nov. 16, 1990).

150. William P. Barr, *Attorney General's Remarks, Benjamin Cardozo School of Law, November 15, 1992*, 15 CARDOZO L. REV. 31, 38 (1993).

151. *Id.*

152. *Id.* In conjunction with this statement, Barr went on to say that an Attorney General who believes that a bill is unconstitutional should recommend that it be vetoed even if he also believes that the courts would uphold it. He then cited an academic article (written by an OLC alumnus) contending that the president is *obliged by the Constitution* to veto such bills. *Id.* at 38 n.33 (citing Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 771-76 (1983)). Absent from this passage is any discussion of whether the Assistant Attorney General for OLC might have an obligation to ensure that his view of the

partment of Justice was cutting its own "political deals" with those at Treasury and on the Hill who thought OLC's concerns were "absurd."

What might the "political deals" involving the unconstitutional appointment provision have involved? Press speculation centered on the theory that the Bush administration—as the price for bringing the functions performed by the FHLBB under the control of the Treasury Department—acquiesced in a scheme to install the Chairman of the FHLBB, who had close personal ties to a powerful Republican Senator, as Director of OTS. Under this theory, the unconstitutional appointment (which was strongly opposed in the House of Representatives) was necessary to avoid confirmation hearings involving someone who had been intimately involved in the operation of the FHLBB. The reason for this, in turn, was that such hearings had the potential to embarrass other Senators who were suspected of having improperly interfered with regulatory decisions of the FHLBB.¹⁵³ None of this suggests what interests the Justice Department (in contradistinction to the Treasury Department) might have had in participating in any political deals, though one could easily come up with plenty of hypotheses. The most important conclusion for present purposes, however, does not require a choice among such hypotheses. What the FIRREA episode suggests is that circumstances can arise in which the president's constitutional lawyers themselves bargain away the interests of his office for purposes of their own even in an administration in which the president himself has made the defense of that office an important goal. That this may have happened during the Bush administration is a reminder that the president's lawyers have interests other than serving their client—even (or especially) if their client is assumed to be the presidency itself. The Justice Department's acquiescence in the unconstitutional statutory appointment may therefore be usefully compared with the phenomenon illustrated by the Contra funding incident. Just as the presi-

Constitution's requirements is conveyed to the president.

153. See, e.g., Robert A. Rosenblatt & Sara Fritz, *S&L Bailout Compromise Returns to Haunt Congress*, L.A. TIMES, April 6, 1990, at D1, col. 2; Editorial, *Trying Days for the Thrift Bailout*, CHRISTIAN SCIENCE MONITOR, March 27, 1990, at 20; Editorial, *Another S&L Delay*, WASH. POST, March 26, 1990, at A10; *Court Gives Thrift Agency A Reprieve*, WASH. POST, March 24, 1990, at D12; Jerry Knight, *Court Ruling Disrupts Thrift Bailout: Judge Holds Top Regulators' Appointments Unconstitutional*, WASH. POST, March 22, 1990, at A1.

dent has interests that he must weigh against those of the office he holds, so his lawyers may be tempted to forego the interests of his office to pursue an agenda of their own.

C. *The Mask of "Complicated and Indirect Measures"*

The Contra-funding and FIRREA examples expose some important forces that necessarily limit any single-minded pursuit of the institutional interests of the presidency. Whatever intrinsic importance one may attach to the principles at stake in these incidents, however, neither departure from principle was likely to produce a truly large or enduring effect on the structure of government or on the law of the separation of powers. For an illustration of the Bush administration's abandonment of constitutional principles when something very significant was actually at stake, it is useful to examine the history of the Supreme Court's decision in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.* ("Airports Case").¹⁵⁴ This case proved to be an important victory for the interests of the president's office—in fact, it was probably the most important case involving those interests decided during the Bush administration. But the outcome was one that the President's lawyers actually *opposed* in the courts.

The *Airports Case* arose from a congressional effort to create an ingenious substitute for the legislative veto device that the Supreme Court had declared unconstitutional in *Chadha*. To the extent relevant here, the story begins in 1984, when a consensus developed that capital improvements at Washington National and Dulles Airports could best be carried out if operating control and financial responsibility for the airports were transferred from the federal Department of Transportation to some sort of newly created state, local, or interstate entity.¹⁵⁵ In 1986, after consultations among executive agencies and interested congressional staffers over the best means of effecting such a transfer, OLC reviewed three different proposals that would have given Congress substantial pow-

154. 501 U.S. 252 (1991).

155. See *Citizens for the Abatement of Aircraft Noise v. Metropolitan Washington Airports Auth.*, 718 F. Supp. 974, 976 (D.D.C. 1989), *rev'd*, 917 F.2d 48 (D.C. Cir. 1990); Plaintiffs' Exhibit 2 in the Joint Appendix filed with the Supreme Court in the *Airports Case*. Dulles and Washington National were the only two civilian airports operated by the federal government.

ers to supervise the new entity.¹⁵⁶ These powers were in the nature of legislative vetoes, and were manifestly intended to substitute for the informal oversight powers that Congress and certain of its officers and committees had been exercising in the normal course of administration while control of the airports was vested in the Department of Transportation.

Under one proposal, state authorities would have been authorized to operate the airports, but Congress would have created a board of review comprising several members and officers of Congress; this board would have been empowered to veto the most important decisions of the new operating authority. OLC emphatically rejected this proposal because it would constitute a legislative veto in violation of *Chadha*. Under a second proposal, Congress would have required Virginia and the District of Columbia to establish the same kind of review board under state law, as a condition of their being allowed to gain control of the airports. Characterizing this proposal as one that presented "complex and novel questions involving the relationship between federal and state grants of authority," OLC gave an elaborate legal analysis and concluded, despite its "grave reservations" about the proposal's constitutionality, that "a colorable argument" could be made in its defense.¹⁵⁷

The third proposal was similar to the second proposal except that a) the members of the review board would serve in their "personal capacities" as users of the airport and not as representatives of Congress, and b) the members of the review board would be members of Congress appointed by the new state operating authority from a list of names submitted by the congressional leadership. OLC declared that this proposal would probably withstand constitutional scrutiny, and declined to object to it on legal grounds.

156. See Plaintiffs' Exhibit 3 in the Joint Appendix filed with the Supreme Court in the *Airports Case*. This document is a letter from the Assistant Attorney General for Legislative Affairs to the Chairman of the House Subcommittee on Aviation of the Committee on Public Works and Transportation. The detailed constitutional argumentation in the letter, however, could hardly have been provided by any office other than OLC. And OLC does in fact routinely draft such letters. Kmiec, *supra* note 53, at 338. Although the letter characterizes the three proposals reviewed in it as "alternatives proposed by your staff," there had apparently been some prior consultations and it is not clear that all the ideas reflected in these alternatives necessarily originated with congressional staff. On the contrary, it is quite conceivable that OLC itself devised one or more of the alternatives.

157. OLC's reservations arose largely from *INS v. Chadha*, 462 U.S. 919 (1983), and *Bowsher v. Synar*, 478 U.S. 714 (1986).

The provision finally enacted in 1986 closely resembled the third proposal, which had been cleared by OLC earlier that year. After Virginia and the District of Columbia enacted the required enabling legislation, and the Secretary of Transportation entered into long-term leases with the new operating authority, the board of review was appointed from lists provided by the congressional leadership. In 1988, a citizens' suit was brought, challenging the new arrangement on the ground that the veto power granted to the board of review was unconstitutional.¹⁵⁸

In 1989, after George Bush became president, the District Court ruled that the legislative veto device created through the statute was constitutional. Appeal was taken, and the Department of Justice intervened in the Court of Appeals to defend the constitutionality of the statute.¹⁵⁹ The Court of Appeals, however, reversed the district court, holding that the device violated the separation of powers because the members of the board of review were in reality agents of the Congress.¹⁶⁰

At this point, the Justice Department began behaving in an equivocal manner. Although it had intervened in the Court of Appeals to defend the constitutionality of the statute, it declined to join the airport authority's petition for certiorari.¹⁶¹ When the Supreme Court granted the petition, the United States automatically became a respondent,¹⁶² and it filed a brief on the merits that offered the Court little more than an expression of the government's ambivalence.

This ambivalence might more accurately be described as incoherence. On the one hand, the Justice Department¹⁶³ argued that the mere fact that the board of review was created pursuant to state law did not preclude its being characterized as an agent of Congress, and therefore invalid under *Chadha* (which forbids legislative vetoes) or under *Bowsher* (which forbids agents of Congress from exercising executive authori-

158. See 718 F. Supp. at 975.

159. See the docket entries in the Joint Appendix filed with the Supreme Court in the *Airports Case*.

160. *Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Auth.*, 917 F.2d 48, 56-57 (D.C. Cir. 1990).

161. See *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 262-64 (1991).

162. *Id.* at 264 & n.12.

163. Because the Solicitor General was disqualified from this case, the brief was filed by one of his deputies.

ty).¹⁶⁴ The Justice Department's brief correctly observed that treating the board of review as a mere creature of state law would open "a massive loophole in the separation of powers." To permit such influence laundering would allow Congress to require the states, as a condition of receiving federal financial assistance, to appoint members of Congress to state offices controlling the administration of virtually all roads, schools, housing, and health care, thereby completely supplanting the federal agencies through which the president performs his central function of executing the federal laws. In a stunning effort to evade the compelling logic of this argument, however, the Justice Department then claimed that the statute at issue in the *Airports Case* was constitutionally valid. Noting that members of Congress on the board of review were supposed to serve in their "personal capacities," the Justice Department contended that such individuals were especially well suited to represent the interests of all other users of the airports because members of Congress must make frequent trips between Washington and their home districts. The Court was invited to imagine that members of Congress would somehow be appropriate representatives of airport users because they use the airports heavily, while they would not be appropriate representatives of those who use roads, schools, and hospitals because they merely partake in those programs to the same extent as other citizens.

The Supreme Court understandably dismissed this argument by observing that the facts of the case "belie the ipse dixit that the Board members will act 'in their individual capacities.'"¹⁶⁵ Rather than accept this "individual capacity" fiction, the Court affirmed the Court of Appeals, holding that the board-of-review device, although difficult to characterize, logically must be either an effort to exercise legislative power in violation of *Chadha* or an attempt to exercise executive power in violation of *Bowsher*.¹⁶⁶ Repudiating the Justice Department's unprincipled suggestion that the Court uphold the statute while essentially confining the case to its facts, Justice Stevens forcefully explained why such ad hoc constitutional decision-making should be avoided:

164. *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986).

165. 501 U.S. at 267.

166. *Id.* at 275-76.

One might argue that the provision for a Board of Review is the kind of practical accommodation between the Legislature and the Executive that should be permitted in a "workable government." Admittedly, Congress imposed its will on the regional authority created by the District of Columbia and the Commonwealth of Virginia by means that are unique and that might prove to be innocuous. However, the statutory scheme challenged today provides a blueprint for extensive expansion of the legislative power beyond its constitutionally-confined role. Given the scope of the federal power to dispense benefits to the States in a variety of forms and subject to a host of statutory conditions, Congress could, if this Board of Review were valid, use similar expedients to enable its Members or its agents to retain control, outside the ordinary legislative process, of the activities of state grant recipients charged with executing virtually every aspect of national policy. As James Madison presciently observed, the legislature "can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." Heeding his warning that legislative "power is of an encroaching nature," we conclude that the Board of Review is an impermissible encroachment.¹⁶⁷

Perhaps the best that can be said about the Justice Department's brief is that it supplied the Supreme Court with the key argument needed for understanding the threat that the board-of-review device posed to the separation of powers. By contending that the argument did not apply in this case, however, the Government's brief created a risk that the Court would misapprehend how serious that threat was. The significance of that risk is suggested by the fact that three dissenting Justices emphasized how odd it was that the Court was reaching out to protect the president's authority from a threat that the President's own lawyers denied was real: "Should Congress ever undertake such improbable projects as transferring national parklands to the States on the condition that its agents control their oversight, there is little doubt that the President would be equal to the task of safeguarding his or her interests."¹⁶⁸

167. 501 U.S. at 276-77 (footnote and citation omitted).

168. *Airports Case*, 501 U.S. at 293 (White, J., dissenting) (citation omitted). Justice White did not explain the distinction between national parklands and national airports.

How can the strange behavior of the Justice Department be explained? The first crucial step obviously came in 1986, when OLC approved the scheme that was eventually invalidated by the Supreme Court. This approval seems manifestly inconsistent with OLC's institutional propensity to resist congressional efforts to undermine the principles articulated in *Chadha* and *Bowsher*, and it is easy to imagine that OLC's 1986 decision reflected policy pressures from the Department of Transportation and the Office of Management and Budget. These agencies would undoubtedly have been more concerned with paying the price demanded by Congress for relieving the government of financial commitments and onerous operating responsibilities than with the niceties of constitutional law. Once OLC's clearance was obtained, and the statute was enacted, it is not the least bit surprising that the Justice Department's litigating divisions defended the scheme when it was challenged in court. The Department's litigation bureaucracies are strongly predisposed to defend the constitutionality of federal statutes, and they would have had little or no incentive to second-guess OLC's earlier approval of this one.

Surprisingly, the Justice Department continued to take this approach even after President Bush came into office and gave the defense of the presidency the kind of apparently serious backing that it had lacked during the Reagan administration. The Bush administration was notorious for its efforts to avoid being perceived as "Reagan's third term,"¹⁶⁹ and it would have been easy to abandon the Reagan-era OLC position when the Justice Department first entered the case in 1989. Even if one assumes that the case did not at that time receive the kind of serious attention within the Department that this

In other cases, too, the Justice Department displayed an unwarranted faith in the president's ability or inclination to protect the interests of his office. See, e.g., Brief for Respondent, 1991 WL 521272, at *27, *Freytag v. Commissioner*, 501 U.S. 868 (1991) (arguing that president and Executive Branch "can be expected vigorously to challenge legislative encroachments on presidential prerogatives under [the Appointments] Clause"). The FIRREA case discussed above was a recent and striking illustration of how dubious this proposition is, but it was by no means unique. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 119 (1976) (illustrating an instance in which the Executive defended an invasion of the president's prerogatives under the Appointments Clause). In both the FIRREA and *Buckley* cases, the courts at least partly rescued the legal interests of the Executive from the Executive's effort to impair its own powers.

169. Cf. Peggy Noonan, *Why Bush Failed*, N.Y. TIMES, Nov. 5, 1992, at A35, col. 2 (analyzing the results of these efforts).

would have required, it would have been perfectly possible for the Department to change its position after the Court of Appeals bestowed upon the President a significant and unasked-for victory. Such confessions of error by the government are not common, but they are a traditional and well-accepted element of the Justice Department's practice.¹⁷⁰ So long as they do not become so frequent as to undermine the Government's credibility in the courts, their only negative effect is the embarrassment they cause to whichever individuals approved the position later abandoned by the Government.¹⁷¹ Thus, the fear of such embarrassment is the likeliest cause of the Justice Department's failure to change its position in the *Airports Case*.¹⁷²

170. See, e.g., Kenneth W. Starr, *Perspectives on the Judiciary*, 39 AM. U. L. REV. 475, 484-85 (1990); John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 807 & n.45 (1992).

171. President Bush himself demonstrated no reluctance to order the Justice Department to change its position in the Supreme Court when something he really cared about was at stake. After meeting with representatives of interests materially affected by a case that was before the Court, President Bush ordered his Solicitor General to file a brief contradicting the position that the Solicitor General had taken in an earlier brief to the Court in the very same case. See Reply Brief for the United States, 1991 WL 538730, at *9-10 & n.*, *United States v. Mabus*, 502 U.S. 936 (Nos. 90-1205, 90-6588). Linda Greenhouse, *Bush Reverses U.S. Stance Against Black College Aid*, N.Y. TIMES, Oct. 22, 1991, at B6; Ruth Marcus, *Bush Shifts Stand on Aid to Black Colleges; Administration Now Supports Increased State Funding in Mississippi Case*, WASH. POST, Oct. 23, 1991, at A6; cf. Linda Greenhouse, *U.S. Changes Stance in Case on Obscenity*, N.Y. TIMES, November 11, 1994, at A15. col. 1 (Solicitor General's position disavowed in subsequent brief signed by the Attorney General).

172. This suggestion is reinforced by the history of another separation of powers case that arose during the Bush administration. Pursuant to the statutory provisions governing the operation of the Tax Court (which is an Article I tribunal), the chief judge of the Tax Court appoints "special trial judges" to hear and decide certain kinds of cases. When the constitutionality of these appointments was challenged, the Justice Department at first defended their legitimacy on the theory that the Tax Court is a "court of law" within the meaning of the Appointments Clause. Upon realizing that the President himself had publicly rejected just such a characterization in a signing statement for a bill dealing with an analogous Article I tribunal, the Justice Department changed its position and began arguing that the chief judge of the Tax Court is the "head of a department" for purposes of the Appointments Clause. Although it might seem obvious and inevitable that the Justice Department would revise its position to conform with the President's (especially since the President's position was undoubtedly formulated by the Justice Department itself), this apparently did not happen without a battle royale between OLC (which favored the interpretation more favorable to the interests of the presidency) and the Justice Department's Tax Division (which would have been the source of the original "court of law" interpretation). See *Petition for Writ of Certiorari*, App. G, *Freytag v. Commissioner*, 501 U.S. 868 (1991); Daniel Klaidman, *Barr Takes Hard Line on Executive Power; Senate Mulls AG Nominee's Record*, LE-

If inertia was propelling the Justice Department to defend this statute in the courts, the Court of Appeals' decision does seem to have introduced a bit of wobble into the trajectory, for the Justice Department declined to seek certiorari after that decision. But the Department was never actually deflected from its course, even though its own brief in the Supreme Court clearly showed why a decision upholding the statute would pose a serious threat to the interests of the presidency. The fact that the Court of Appeals and the Supreme Court were both far more willing than President Bush's own Justice Department to defend the institutional interests of the presidency in this case is highly suggestive, especially when this incident is considered together with the *FIRREA* case. Judicial precedents are by nature more powerful than the kinds of precedents about which the administration was so scrupulous in its signing statements and veto messages. Despite the Bush administration's rhetorical commitment to the legal defense of the presidential office, the most enduring victory for that office was imposed by the courts in the face of *outright resistance* by President Bush's lawyers. Thus, when the outcome mattered most, the Bush administration was at its weakest in defending the president's constitutional interests.

Lest one think that bureaucratic glitches or other special circumstances within the Justice Department are sufficient to explain the way the *Airports Case* was handled, the adminis-

GAL TIMES, Nov. 11, 1991, at 1. If it was difficult for the Justice Department to change its litigating position in this case—where different components of the Department had already taken different positions on the critical issue (probably without either of them knowing what the other was doing), and where the President himself had already addressed the issue (albeit without knowledge of the incipient dispute)—it would presumably have been far more difficult to procure a change of position in the airports litigation. And, since there were apparently no overriding political imperatives in either case, it is reasonable to suppose that the different outcomes in the two cases resulted from the interplay of normal forces of bureaucratic inertia and personal vanity.

It should also be noted that although the Justice Department did manage in the Tax Court case to present the Supreme Court with a constitutional analysis that was more consistent with the president's interests than its original position, a bare majority of the Court nonetheless adopted the conclusion that the Justice Department had originally advocated, and the Court's opinion took note of the change in the government's position. See *Freytag v. Commissioner*, 501 U.S. 868, 888 n.5 (1991). The portion of the *Freytag* opinion dealing with this issue is so poorly reasoned (and was so incisively criticized in Justice Scalia's opinion concurring in the judgment) that it is entirely conceivable that its conclusion was able to attract a majority of the Court only because the government itself had originally advocated the same conclusion.

tration later confirmed that deeper forces were at work. A few months after the Supreme Court refused the invitation to create what the President's own lawyers called "a massive loophole in the separation of powers," Congress passed a bill amending the airport statute in response to the Court's decision. This bill included yet another desperate effort by Congress to retain its control over Dulles and Washington National by creating a new board of review that differed only superficially from the one that had been invalidated. Although membership on the new board was not in terms restricted to members of Congress, the board's members had to meet certain qualifications that few people outside Congress would possess, and the congressional leadership was given complete control over choosing candidates for the board. The new board also lacked an absolute veto over the operating authority's decisions, but it was given the power to delay (for up to six months) important actions with which it disagreed.

This congressional persistence in the pursuit of an unconstitutional goal can probably be explained by a strong and bipartisan fear that a state-controlled airports authority might inconvenience members of Congress by shifting some flights from the overburdened facilities at Washington National to Dulles Airport (which is several miles farther from the Capitol). Members may also have been concerned that they might lose the reserved, free parking places that they now enjoy at both airports.¹⁷³ Although the President said that he considered this new device unconstitutional, he signed the bill into law anyway, blandly commenting that the courts would have to deal with the constitutional problem.¹⁷⁴ This latest congres-

173. On April 20, 1994, the Senate rejected a proposal that would have invited the airport operating authority to stop providing free parking near the Dulles and Washington National terminals to members of Congress. See 140 CONG. REC. S4511-19, S4524 (daily ed. April 20, 1994). Five days later, the airport operating authority removed the signs at the reserved parking areas that read: "Reserved Parking/Supreme Court Justices/Members of Congress/Diplomatic Corps." The reserved parking areas for members of Congress remained exactly where they had always been, but new signs were installed that say: "Restricted Parking/Authorized Users Only." Karen Foerstel, *Signs Designating Members' Parking Are Removed From Both Airport Lots*, ROLL CALL, May 16, 1994.

174. See Statement on Signing the Intermodal Surface Transportation Efficiency Act of 1991, 27 WKLY. COMP. PRES. DOC. 1861 (Dec. 18, 1991). The Bush administration appears never to have cleared up its pathetic confusion about the *Airports Case*. Shortly before leaving office, the President issued a signing statement evincing both an inability to articulate the principle of law for which the *Airports Case* stands and an inability to distinguish between construing a statute

sional gambit was eventually invalidated by the courts, which concluded that it violated the separation of powers under the analysis set forth in the *Airports Case*.¹⁷⁵ Although the courts did curb this congressional overreaching again—an overreaching apparently motivated by the pettiest kind of self-interest—it will never be possible to accuse the Bush administration of having been a significant contributor to that outcome.

D. Summary

The three examples discussed in this section show that the Bush administration was willing to tolerate and even advocate substantial losses of presidential legal authority in response to perfectly ordinary—and in some cases remarkably trivial—political pressures. As the examples suggest, such pressures sometimes operated directly on the president and sometimes they seem to have had their effect at lower levels of the government. When one looks at these incidents—together with the results of the administration's strategy of using signing statements, veto messages, and presidential addresses to articulate an ambitious agenda for defending the presidency—there appears to be no evidence that the President's agenda was significantly furthered or even seriously pursued. Not only did the Bush administration fail to carry out a "precommitment strategy" of the kind described by Professor McGinnis, but it may have undermined its credibility on the Hill by wrapping itself rhetorically in high-flown constitutional "principles" that were abandoned as soon as adhering to them became inconvenient.

V. DEBACLE IN THE COURTS

Perhaps the most remarkable example of the Bush administration's reluctance to act on its stated principles transpired after the President became a lame duck in the autumn of 1992. In a well-publicized series of judicial decisions growing out of an arcane dispute over the litigating authority of the U.S. Postal Service, President Bush and his Justice Depart-

to avoid constitutional issues and declaring a statute unconstitutional. See Statement on Signing the Reclamation Projects Authorization and Adjustment Act of 1992, 28 WKLY. COMP. PRES. DOC. 2232 (Oct. 30, 1992).

175. *Hechinger v. Metropolitan Washington Airports Auth.*, 36 F.3d 97 (D.C. Cir. 1994), cert. denied 115 S. Ct. 934 (1995).

ment suffered serious setbacks on several important issues involving presidential legal authority.¹⁷⁶ These losses are significant for present purposes not so much because they occurred, but because they could likely have been avoided if the administration had proceeded in a timely fashion according to the principles that it claimed to treasure.

On January 22, 1991, the U.S. Postal Service filed suit against the Postal Rate Commission in the Court of Appeals for the District of Columbia Circuit. Although such suits are specifically authorized by statute, they are constitutionally questionable because they assume that disputes within the executive establishment can be resolved by an entity outside the president's control. The principle at stake—that the executive department of government is a unitary entity subject to the president's control and supervision—implies that a suit brought by one executive agency against another is a kind of absurdity, like a person bringing suit against himself. It is also a principle that is central to the constitutional vision to which President Bush committed himself at the beginning of his administration, and which he affirmed in numerous signing statements throughout his term.¹⁷⁷

Despite the centrality of the unitary executive in the jurisprudence adopted by the Bush administration, the theory has

176. The discussion below presents a simplified account of an extraordinarily complex dispute. For a more complete presentation of the legal and factual details, and a thoughtful analysis of the issues, see Neal Devins, *Tempest in an Envelope: Reflections on the Bush White House's Failed Takeover of the U.S. Postal Service*, 41 U.C.L.A. L. REV. 1035 (1994).

177. See, e.g., Statement on Signing the Housing and Community Development Act of 1992, 28 WKLY. COMP. PRES. DOC. 2186, 2186-87 (Oct. 28, 1992); Statement on Signing the President John F. Kennedy Assassination Records Collection Act of 1992, 28 WKLY. COMP. PRES. DOC. 2134, 2134-35 (Oct. 26, 1992); Statement on Signing the Energy Policy Act of 1992, 28 WKLY. COMP. PRES. DOC. 2094, 2096 (Oct. 24, 1992); Statement on Signing the Treasury, Postal Service, and General Government Appropriations Act, 1993, 28 WKLY. COMP. PRES. DOC. 1873, 1874 (Oct. 6, 1992); Statement on Signing the Federal Deposit Insurance Corporation Improvement Act of 1991, 27 WKLY. COMP. PRES. DOC. 1873 (Dec. 19, 1991); Statement on Signing the Joint Resolution Settling the Railroad Strike, 27 WKLY. COMP. PRES. DOC. 459, 459-60 (April 18, 1991); Statement on Signing the Bill Modifying the Boundaries of the Alaska Maritime National Wildlife Refuge, 26 WKLY. COMP. PRES. DOC. 1897 (Nov. 21, 1990); Statement on Signing the Energy and Water Development Appropriations Act, 1991, 26 WKLY. COMP. PRES. DOC. 1771, 1771-72 (Nov. 5, 1990); Statement on Signing the Omnibus Budget Reconciliation Act of 1989, 25 WKLY. COMP. PRES. DOC. 1970, 1970-71 (Dec. 19, 1989); Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1990, 25 WKLY. COMP. PRES. DOC. 1669, 1669-70 (Nov. 3, 1989).

met with a chilly reception in the courts, which have taken a relaxed attitude to the creation of independent agencies that are legally insulated from presidential control (at least when those agencies perform functions that do not seem to be at the core of the president's own constitutional responsibilities).¹⁷⁸ When confronted with the Postal Service lawsuit, the administration therefore had two obvious choices. It could let the suit go forward, hoping that nobody would notice the retreat from administration principles. Or it could try to use the President's claimed authority over the two agencies to force them to resolve their dispute outside the courts.

This should have been an easy decision. The Postal Service is controlled by an eleven-member Board of Governors that comprises nine part-time Governors together with the Postmaster General and the Deputy Postmaster General (who are chosen by the Governors). At the time of this dispute, all of the Governors had been appointed by Presidents Reagan and Bush, and a majority were Republicans. Although the Postmaster General and his Deputy could have been expected to resist presidential control because they were full-time officials with a vested interest in their statutory independence, it should have been political child's play for a then-popular president to persuade a sufficient number of the part-time Governors to avoid a confrontation with him over an obscure legal issue that he considered important. Had this occurred, a useful administrative precedent would have been created, and without the risk of any adverse judicial decisions. If the President had failed to persuade the Board of Governors to go along with his wishes, the administration could then have made a considered decision whether to risk litigation or to retreat to the passive role embodied in the first option.

The Bush administration took neither of the obvious paths. Instead it entered a prolonged period of dithering, during which it relied on what one commentator has aptly called a

178. See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958); *Morrison v. Olson*, 487 U.S. 654 (1988); *Mistretta v. United States*, 488 U.S. 361 (1989).

There is a large academic literature dealing with various issues raised by the theory of the unitary executive. Good introductions to the underlying arguments on which the Bush administration's position must ultimately rest can be found in Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992).

strategy of "delay, threats, and prayers."¹⁷⁹ The public record does not indicate who was responsible for this "strategy," but there can be no doubt that it was adopted. In any event, as the delay continued the threats began to look empty, and the prayers went unanswered. Finally, some twenty months later, further stalling became impossible, and the Justice Department formally directed the Postal Service to withdraw its lawsuit. After this extremely tardy directive was predictably ignored, President Bush at last took action. On December 11, 1992, a president whose political resources had largely evaporated when he lost his bid for re-election took the extraordinary step of personally directing the Board of Governors to withdraw the lawsuit, on pain of dismissal. The Board voted six to five to defy the President, and the winning majority immediately went to court seeking an order to block their threatened removal. The President responded by attempting to use his recess appointment power to replace one of the Governors, which might have led to a reversal of the Board's narrow decision to ignore his directive.

The upshot of this litigation was a total victory for the Postal Service and a complete loss for the President. First, President Bush was subjected to an unprecedented court order forbidding him to discharge presidential appointees.¹⁸⁰ Second, the court of appeals ruled that the Postal Service had the authority to bring suit against the Postal Rate Commission even in defiance of the president.¹⁸¹ The court firmly rejected the Justice Department's theory of the unitary executive, concluding that the judiciary may resolve disputes arising among executive agencies when authorized by statute to do so.¹⁸² Finally, although the Clinton administration continued to defend Bush's recess appointment, that issue was also resolved against the presidency.¹⁸³

179. Devins, *supra* note 176.

180. Mackie v. Bush, 809 F. Supp. 144, 148 (D.D.C. 1993), *dismissed as moot sub nom.* Mackie v. Clinton, 10 F.3d 13 (D.C. Cir. 1993).

181. Mail Order Ass'n of Am. v. United States Postal Serv., 986 F.2d 509, 527 (D.C. Cir. 1993).

182. *Id.* at 527 & n.9. The Justice Department had also attempted to persuade the court that it had a statutory right to prevent the Postal Service from filing the lawsuit, but this argument, too, was rejected. *Id.* at 522.

183. Mackie v. Clinton, 827 F. Supp. 56, 58 (D.D.C. 1993), *vacated in part as moot*, 1994 WL 163761 (D.C. Cir. 1994).

Thus ended George Bush's experiment with presidential commitment to the theories developed by the constitutional lawyers who saw themselves as the guardians of the presidency. The Bush administration arrived where the Reagan administration had so often found itself: begging the courts for relief from impositions that might have been avoided through the exercise of political will. One difference, however, is that while the Reagan administration at least achieved some notable victories through litigation, as in *Chadha* and in *Bowsher*, the Bush administration seems to have contributed less than nothing to the few legal gains that the presidency made during its four years in office.

VI. CONCLUSION

Perhaps the most obvious question raised by the Bush record on separation of powers is whether the absence of signal successes in enhancing or defending the office of the presidency resulted more from incompetence or from the operation of incentives that caused the administration to put greater value on achieving other goals. Examples like the postal service case and the airports litigation suggest that ineptitude played a significant role, for in neither case does any strong overriding political or policy goal seem to explain the administration's failure to defend the interests of the presidency. Poor execution of policy, however, occurs in all administrations (and all other large organizations), so examples like these are not necessarily very revealing.

In this case, incompetence is not likely the sole or even principal explanatory factor even for those incidents in which it probably played an important part. In the airports matter, for example, the Justice Department became institutionally invested in defending the congressional board of review during the Reagan administration. One would therefore have expected this defense to have continued during the Bush administration, as it did, unless the new President's special commitment to policing the separation of powers had been taken quite seriously. What this incident suggests more strongly than anything else is that the commitment communicated by the President was not strong enough to overcome ordinary forces of bureaucratic inertia and personal egotism at the Justice Department. Similarly, the Postal Service case is probably best explained in terms of an unwillingness by the Justice Department to request that the President take action in a matter that involved *only*

separation of powers principles (with no prospect of collateral political or policy benefits), during a period when both the President and the Department's senior officials had more politically promising and seemingly urgent items competing for their time and attention. Both cases might have seemed quite important to lawyers whose principal concern was constitutional law and the long-term effects of that law on the structure of government, but neither case promised the President or the Attorney General any immediate political or policy payoff. The same kind of explanation seems to fit the Bush record taken as a whole. Consider each group of incidents analyzed in this paper: the compromises that followed the four vetoes that were based on objections to legislative encroachments on the president's authority; the Administration's support of the unconstitutional statutory appointment in the FIRREA legislation; and the virtual absence of a willingness to violate the many unconstitutional provisions (such as legislative vetoes) contained in legislation signed by the President. Taken together, all of these suggest that the defense of the presidency never assumed real importance in the Bush administration.

The President's public pronouncements, however, as well as the prominent role that he assigned in his administration to lawyers known especially for their interest in separation of powers issues,¹⁸⁴ and the extremely scrupulous attention that was given to these issues in his signing statements and veto messages, suggest that these issues were *deemed* quite important by President Bush. Since Bush had little or nothing to gain from feigning this interest in the defense of his office, there is no reason to suppose that his intellectual commitment to the issue was anything other than genuine. His administration's strong pattern of significant concessions, inaction at crucial moments, and downright self-destructiveness, therefore suggests that a more resolute pattern of behavior would have imposed short-term costs that the President and others around him simply proved unwilling to pay. One should

184. The Counsel to the President, C. Boyden Gray, was generally considered to be among the most influential members of the White House staff. See, e.g., Anne Kornhauser, *Boyden Gray: Not Just George Bush's Lawyer*, LEGAL TIMES, Nov. 12, 1990, at 1. Bush's first Assistant Attorney General for OLC, William P. Barr, became known while in that office primarily for his defense of presidential authority, and was eventually promoted to Attorney General. Barr's successor at OLC, J. Michael Luttig, was one of only three officials in the Bush Justice Department to receive a coveted appointment to a United States court of appeals.

expect other presidents and other administrations to be subject to the same incentives, and one should expect them to respond to those incentives in a similar manner. What makes the Bush administration unusual is only that the President and some of his lawyers seemed to think at the outset that this time things could be different.

Those who hoped to assist President Bush in strengthening the office he temporarily held must have been personally disappointed in the outcome. Some of them may even have been disappointed in the President himself. Should other citizens share this sense of a missed opportunity? I suspect not, and I believe the reason has implications that go beyond the particular incidents that so preoccupied the lawyers during the Bush administration. Whether in the context of the separation of powers or in that of ethics—and sometimes in both at once, as with Iran-Contra—the increased lawyerization of political disputes since Watergate has often submerged real disputes about substantive choices beneath distracting contests over abstract principles. This has probably had some healthy effects, for distractions can sometimes avert potentially destructive clashes. And there would be poisonous long-term consequences if disputes over ethics issues and separation of powers were fought out as naked trials of political strength. But more of a good thing is not always better. The logic of reframing political disputes in legal terms can ultimately draw lawyers into the role of the client, a result that lawyers seldom find disagreeable. But it would be irresponsible for a President to let his lawyers determine how far he should push the defense of his constitutional prerogatives, just as it would be to cede the definition of those prerogatives to Congress. The professional training and professional obligations of lawyers do not qualify them for that task, however valuable and necessary their *advice* on the subject may be.

George Bush and his administration may not have made all the right decisions in trying to balance the president's substantive goals and his constitutional responsibilities to his office. That would hardly distinguish his presidency from any other, and it ought not to obscure the fact that he at least did not leave his office significantly weaker in legal terms than when he assumed it. It is obvious that Bush might have weakened the presidency by offering too little resistance to an aggressive Congress. But it is equally true, and much less obvi-

ous, that he might also have weakened it by letting his lawyers effectively assume an office to which they were not elected.

AFTERWORD: A NOTE ON SOURCES AND METHODS

The analysis presented in this article is based on a study of the public record, and those who are skeptical about its conclusions can test the evidence presented here against that record. This point deserves some emphasis because I worked in the Office of the Counsel to the President during the Bush administration, and in OLC during the Reagan administration. Anyone with such a background might reasonably be supposed to have the usual biases that arise when one has been involved with events and institutions that one later seeks to explain.¹⁸⁵ It should not be thought, however, that lack of direct involvement in government provides any assurance of impartiality in the study of government. Those who devote their time to the study of their own country's political institutions are not likely to be unaffected by their own political opinions, and those opinions need to be disciplined for the same reason and in much the same way as the biases of the former participant.

The difficulties in preventing one's political beliefs from distorting one's analysis are particularly acute in the study of legal policy and separation of powers, where there is nothing like a political or academic consensus about the basic criteria that one could use to judge the performance of government officials and institutions. For that reason, scholars who work in this area cannot easily escape the necessity of acquiring a detailed familiarity with the legal issues and materials that legal policy-makers must grapple with in their own work. Such familiarity is also needed to avoid a different kind of shortcoming, because adequate analysis also requires independence from the explanations offered by policy-makers for their own conduct. This afterword provides illustrations of both points, using examples drawn from two of the most detailed recent studies of the operation of the legal bureaucracies that have primary responsibility for separation of powers issues.

Professor Cornell W. Clayton's critique of the Bush administration's approach to legal policy illustrates some of the pitfalls that can trap those who do not acquire a sufficient

185. For an example of an uninhibitedly polemical account of the separation of powers controversies that took place during the Bush administration, one may consult TIEFER, *supra* note 109. Mr. Tiefer, a lawyer employed by the House of Representatives, views the Bush administration virtually as a reprise of the failed monarchies of Charles I and James II. All three, according to Mr. Tiefer, were characterized by the pathologies of "the doctrine of personal rule." *Id.* at 20.

familiarity with the law.¹⁸⁶ Professor Clayton, who sees the Bush approach to legal policy as an ill-advised extension of the Reagan administration's misguided efforts to increase its control over the administrative state (and thereby to diminish congressional influence), concludes that a new alliance between the Justice Department and a conservative Supreme Court has implications that are "potentially far more dangerous to the rule of law" than previous presidential efforts to supervise legal administration.¹⁸⁷ Although this threat to "the rule of law" remains obscure in Professor Clayton's analysis, it seems to proceed from a notion that the "politicization" of legal policy by recent conservative presidents constitutes an improper evasion of congressional will.¹⁸⁸ The best solution, Professor Clayton suggests, may be for Congress to remove the Justice Department from the president's control.¹⁸⁹

Leaving aside the implausible suggestion that the Supreme Court's separation of powers jurisprudence would permit the president's authority over the Justice Department's core law enforcement functions to be taken away,¹⁹⁰ the legal materials that Professor Clayton uses to support his thesis do not in fact support his claims. I will limit myself here to two examples that are especially relevant to this article because they involve the Bush administration's approach to separation of powers.

186. CLAYTON, *supra* note 29, at 226-36.

187. *Id.* at 236.

188. By "politicization," Professor Clayton apparently means that Reagan and Bush tried to ensure that the Justice Department acted on the President's views about legal policy rather than on the views held by career lawyers and congressional liberals. *See, e.g., id.* at 204 ("By forgoing a [civil rights] legislative strategy and engaging in guerrilla warfare against Congress, the [Reagan] Justice Department created friction within the bureaucracy and isolated itself from congressional support."); *id.* at 224 ("In a system that vests legislative authority in Congress, any model of strong presidential leadership cannot afford to set itself up as a competitor with Congress. If it does, the likely outcome will be stricter congressional control of administration and greater judicial oversight of the executive."). Thus, Professor Clayton seems to think that strong leadership consists of preemptive surrender and that the rule of law is fostered by presidents acquiescing in measures that they regard as illegal.

189. *Id.* at 236.

190. Professor Clayton seems to think that the Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988), implies that such an action would be permissible, but he quotes nothing from Chief Justice Rehnquist's opinion to support this suggestion. Actually, the Court emphasized that its holding was limited to sustaining the validity of certain statutory restrictions on the president's right to appoint and remove "Independent Counsel" who are chosen to conduct specific investigations into allegations of misconduct by government officials who might otherwise be able to prevent the enforcement of the law against themselves.

First, after claiming that the Bush administration went farther than its predecessors in using "signing statements to gut congressional policies with which it disagreed,"¹⁹¹ Professor Clayton offers as his *only* example a draft signing statement that the President *never issued*:

In the most egregious example of this practice, Boyden Gray circulated a statement interpreting the 1991 Civil Rights Act so as to gut several key provisions, even before the bill was signed. . . . [The Gray directive] specifically attacked race preference policies and would have ended the use of preferences and quotas in federal hiring. The directive was clearly an attempt to achieve administratively what the administration was not able to achieve in its fight with Congress over the wording of the Civil Rights Act.¹⁹²

Not only was the draft signing statement described here never issued,¹⁹³ but Professor Clayton's characterization of it is demonstrably inaccurate. Gray's draft would have required federal agencies to terminate programs "that may be inconsistent with the new law or with the principle of discouraging quotas and unfair preferences. So-called 'race norming' of the General Aptitude Test Battery, for example, is plainly forbidden by section 106 of the new Act."¹⁹⁴ The Gray draft would also

191. CLAYTON, *supra* note 29, at 234.

192. *Id.*

193. Gray's draft signing statement was circulated within the government through a standard interagency review process, which it survived. After the draft was leaked to the press, the President decided not to issue it. KOLB, *supra* note 79, at 258. In a television interview, the President later indicated that his decision was based on apprehensions about the effects that misinterpretations of the document would have:

MR. FROST: And is that why you stopped the Boyden Gray directive, because that would have gone too far?

PRESIDENT BUSH: That had the appearance—it was an internal letter that went out to ask for comments from the various departments, which is all right to do. But it looked like, it looked like that it was positioning me as opposed to affirmative action. And it wasn't supposed to do that, and so we tried to correct all that.

The President and Mrs. Bush '...Talking with David Frost,' (Jan. 3, 1992) (LEXIS, Nexis Library, FedNew File).

The Gray draft is reprinted in David A. Cathcart & Mark Snyderman, *The Civil Rights Act of 1991* 316-18 (Feb. 13, 1992) (study materials Q204 for Video Law Review sponsored by the American Law Institute-American Bar Association Committee on Continuing Professional Education and cosponsored by the Federal Judicial Center).

194. *See supra* note 193.

have directed federal agencies to begin work on new employee selection guidelines, to be "established under section 105 and other provisions of the Act," and it would have directed federal agencies to cease inducing employers "to violate the laws" by adopting quotas, preferences, and set-asides "on the basis of race, color, religion, sex, or national origin."¹⁹⁵ In addition to the fact that the document focused on requiring federal agencies to conform with the Civil Rights Act of 1991, including such specific provisions as the statute's flat prohibition of "race norming," there is not one word in that statute authorizing the kind of "quotas and unfair preferences" described in the draft. On the contrary, the statute specifically and expressly forbids "any employment practice [in which] race, color, religion, sex, or national origin [is] a motivating factor . . . even though other factors also motivated the practice."¹⁹⁶ Thus, the statute plainly and on its face dictates exactly the policy that Professor Clayton castigates Gray for recommending.

This misinterpretation seems to have arisen from unfamiliarity with the relevant legal materials and background. At one point, for example, Professor Clayton makes the following statement about the Bush Justice Department: "In *Wards Cove v. Antonio* [sic] (1989), *Patterson v. McClean Credit Union* (1989), and *City of Richmond v. Croson* (1989), the department argued and finally won a majority of the Court to accept its position that the use of disparate impact evidence under Title [VII] should be restricted."¹⁹⁷ This sentence contains several

195. See *supra* note 193.

196. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075. In a carefully worded proviso that is rife with deliberate ambiguities, the statute also declares that nothing in it should be "construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law." *Id.* § 116, 105 Stat., 1071, 1079. It may be possible to construct an argument, resting in part on section 116, for construing section 107 to mean the opposite of what it says, but that would hardly be a sufficient basis for concluding that Gray was trying to "gut congressional policies" when he proposed a directive implementing the exact policy commanded by the plain language of a new law that Congress had just passed. For completely opposing views on what the "congressional policy" underlying these two provisions was, see 137 CONG. REC. S15472, S15476, S15477-78 (daily ed. Oct. 30, 1991) (memorandum submitted by Sen. Dole on behalf of himself, thirteen other Senators, and the Bush administration); *id.* at H9526, H9529, H9530 (memorandum submitted by Rep. Don Edwards).

In any event, even if one assumes that section 107 means something completely different from what it says, there is absolutely nothing in the Civil Rights Act of 1991 or anywhere else in the law requiring the president or the federal agencies that he supervises to implement or encourage the kind of quota hiring or other "unfair preferences" described in the Gray draft.

197. CLAYTON, *supra* note 29, at 231 (endnote omitted). Professor Clayton's

errors. First, none of these cases was briefed or argued during the Bush administration. Second, *Patterson* had nothing to do with disparate impact evidence or with Title VII, and the Court *rejected* the position advocated by the Justice Department in that case. Third, the *Croson* decision had nothing to do with either of these issues or with any other federal statute. In a note appended to this sentence, Professor Clayton says that "Congress overturned these decisions by passing the Civil Rights Act of 1991."¹⁹⁸ The 1991 statute in fact *codified* large parts of *Wards Cove*, including its holding, and unambiguously "overturned" only one relatively minor dictum. The 1991 Act overturned *Patterson*, but in doing so it *adopted* the position advocated by the Bush administration throughout the legislative debate, which in turn was consistent with the position taken by the Justice Department in the *Patterson* litigation itself. Finally, the 1991 Act contains no provisions that have anything to do with the legal issue in the *Croson* case.

A second example of difficulties that can ensue when complex legal issues are treated in too summary a fashion arises in Professor Clayton's discussion of the relation between the Supreme Court's *Chevron* doctrine (which requires judicial deference to federal agencies' interpretations of statutes in certain circumstances) and Justice Scalia's views on the use of legislative history in statutory construction. According to Professor Clayton, the Bush Justice Department was engaged in a "quest to get the Supreme Court to place more stringent limitations on lower court review of administrative action."¹⁹⁹ The key to this effort, we are told, was Justice Scalia, who has "championed broad application of the *Chevron* standards" and who "has argued that lower courts should ignore congressional intent altogether as a basis for reviewing administrative action."²⁰⁰

At best, these are caricatures of Justice Scalia's positions. Taking the second allegation first, Professor Clayton cites two of Scalia's opinions (one for the Court and one concurring in the Court's judgment) to support his description of Scalia's position on congressional intent.²⁰¹ But neither case involved

book refers to "Title VI" rather than to Title VII, but I presume that this was a typographical error.

198. *Id.* at 231, 238 n.28.

199. *Id.* at 234.

200. *Id.*

201. *Id.* at 234-35 (discussing *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991), and *West Virginia Univ. Hosp., Inc. v. Casey*, 499 U.S. 83 (1991)).

a review of any federal administrative interpretation, and neither opinion advocates ignoring congressional intent. In neither case, nor anywhere else that I am aware of, has Scalia even suggested that lower courts should adopt different principles in interpreting statutes than the Supreme Court should. Nor do I believe that Scalia has ever contended that any court should "ignore congressional intent altogether."

Professor Clayton's notion that Scalia wants to "ignore congressional intent altogether" seems to proceed from a misunderstanding of Scalia's views about the use of legislative history in statutory construction: "According to [Scalia's] view, all that is important is the language of [the] statute, not Congress' efforts to explain what its statutes mean through committee reports or legislative histories."²⁰² So far as I am aware, however, Scalia has never asserted that courts should ignore the legislative history of a statute when it provides the most probative evidence of a statute's meaning, and Professor Clayton cites no such assertion. Scalia has argued, in considerable detail and in a variety of contexts, that courts should not unnecessarily substitute inferences drawn from the legislative history of statutes (which consists of statements by entities *other* than Congress, such as congressional committees and individual members) for inferences drawn from the statute itself (which is the only thing that Congress has actually voted on). Some of what Scalia has said about the complex and difficult subject of statutory construction is controversial, and it deserves debate. One cannot, however, properly evaluate the validity of Scalia's views, or understand their relation to various doctrines involving the separation of powers, unless one begins with what he has actually said.

Professor Clayton's depiction of Scalia as a champion of a "broad application" of the *Chevron* doctrine is more surprising than his rendition of Scalia's views on legislative intent. *Chevron* was decided, by a unanimous Court, before Scalia even became a Justice.²⁰³ Scalia has adhered to that precedent, and he appears to regard it as a sound decision.²⁰⁴ But he is

202. CLAYTON, *supra* note 29, at 234.

203. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

204. *See, e.g.*, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452-55 (1987) (Scalia, J. concurring in the judgment); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

not a champion of an especially "broad application" of the doctrine. On the contrary, Scalia seems exceptionally *unlikely* to find that particular statutes are sufficiently ambiguous to trigger *Chevron* deference.²⁰⁵ He has, moreover, forcefully argued *against* extending deference to agency interpretations of statutes (and rejected interpretations by the Reagan and Bush administrations) in circumstances not directly governed by *Chevron*.²⁰⁶ The only decision involving *Chevron* that Professor Clayton discusses, however, is *Rust v. Sullivan*,²⁰⁷ a case in which Scalia did not write a single word of any of the four opinions that were filed.

Rust is also an odd case to use as evidence of a "quest to get the Supreme Court to place more stringent limitations on lower court review of administrative action."²⁰⁸ As Professor Clayton acknowledges, the Court's decision was "consistent with the *Chevron* precedent."²⁰⁹ *Rust* generated considerable controversy, on and off the Court, but the serious questions that were raised had to do with abortion and the First Amendment, not with *Chevron*. And even on those questions, Professor Clayton's analysis misses the mark.

Rust arose from an agency's re-interpretation of a statute that forbids the use of certain federal funds "in programs where abortion is a method of family planning."²¹⁰ These

205. See, e.g., *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 136-38 (1990) (Scalia, J., concurring); *K Mart Corp. v. Cartier, Inc.* 486 U.S. 281, 318-28 (1988) (Scalia, J., concurring in part and dissenting in part); Scalia, *supra* note 204.

206. See, e.g., *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment); *NLRB v. International Bhd. of Elec. Workers*, 481 U.S. 573 (1987) (Scalia, J., concurring in the judgment).

207. 500 U.S. 173 (1991).

208. CLAYTON, *supra* note 29, at 234. In *Rust*, the Supreme Court affirmed the judgments reached by both of the lower courts in that case.

209. *Id.* at 235.

210. The fact that the agency had previously interpreted the statute differently, a fact that appears to bother Professor Clayton considerably, was not an important issue in *Rust*. *Chevron* itself upheld a regulation that had reversed the agency's previous position. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). Subsequent case law has confirmed that agencies are free to revise their interpretations of ambiguous statutes without thereby triggering increased judicial skepticism:

To be sustained as reasonable, the agency interpretation need not be the only permissible one, and if reasonable it will be upheld even though the court might have construed the statute differently. The agency may change its view, provided the new interpretation is consistent with the statute and reasonable, and the change was based on reasoned decision-

funds were directed at caring for women who were not pregnant; if a pregnancy occurred the woman was referred to other programs that were not governed by the statutory restriction at issue. Based on its interpretation of this statute, the agency issued regulations forbidding federally funded family-planning clinics from promoting abortion. Among the forbidden activities were counselling women who became pregnant to procure an abortion, and referring them to other clinics that specialize in performing abortions. The regulations allowed patients to be given lists of pre-natal care providers, which might include providers who performed abortions, but patients were not supposed to be "steered" toward those that offered abortion as a method of family planning.

A narrowly divided Supreme Court upheld the validity of these regulations, concluding that the regulations were based on a permissible interpretation of the statute; that the regulations did not infringe the First Amendment rights of those who were forbidden to use federal funds to promote or procure abortions; and that the Court's abortion jurisprudence did not compel the government to subsidize abortion-related activities. Colorable arguments could be made against the Court's decision, as they were by some of the dissenting Justices. Those arguments, however, cannot be properly evaluated unless one separates the legal issues from whatever strong feelings one may have about the propriety of using public funds to promote abortion.

Professor Clayton's analysis, unfortunately, does not begin with the requisite separation of legal from political issues. First, his off-handed description of the regulations as a "gag rule"²¹¹ obscures the legal issue. Many laws and regulations restrict the ability of federal grantees to use the money they receive for certain kinds of advocacy. Few of these are ever

making, adequately explained. Thus, there need be no single true and enduring interpretation. Where Congress has not definitively spoken, agency interpretation is largely a matter of discretionary policy-making, the "wisdom" of which is of no concern to a reviewing court.

Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 YALE J. ON REG. 1, 27-28 (1990) (footnotes omitted); see also Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1671 (1991) ("[I]t is generally understood that *Chevron* has removed the stigma from agency flip-flops [in cases where the statute is ambiguous].").

211. CLAYTON, *supra* note 29, at 236.

challenged, and they are rarely condemned with epithets like “gag rule.” This is political rhetoric that even the most passionate of the dissenting Justices in *Rust* did not employ. Second, it is highly misleading to say that the Court “allowed the administration to attach an otherwise unconstitutional condition to the receipt of public funds.”²¹² This use of the word “otherwise,” without further discussion, clouds one of the more legally important issues in the case. All the Justices, like everyone else who is familiar with the relevant precedents, agreed that the government may sometimes attach “an otherwise unconstitutional condition to the receipt of public funds.”²¹³ The difficult questions, on which the Court was divided in this case, have to do with when such conditions are permissible and when they are impermissible.²¹⁴ Third, there is not one statement in the *Rust* Court’s opinion to support Professor Clayton’s claim that the Court was willing “to abandon what it thinks Congress intended.”²¹⁵ Finally, it is difficult even to imagine what is meant when Professor Clayton says, after noting that President Bush vetoed a bill that would have overruled *Rust*, that the Court’s willingness to “stand idly by while the President uses his veto to prevent corrective legislation must be viewed with alarm.”²¹⁶ For over two centuries, the courts have been standing “idly by” when presidents have used the veto. This is because the Constitution contains no provisions authorizing the courts to overrule presidential vetoes, any more than it contains provisions authorizing the courts to overrule congressional failures to enact legislation. One can safely predict that the sudden assumption of such authority by the courts would be viewed with considerably more alarm by informed observers than anything that happened in connection with the *Rust* decision.

212. *Id.*

213. Justice Blackmun’s dissent, for example, correctly noted that the case raised an issue about “the extent to which the Government may attach an otherwise unconstitutional condition to the receipt of a public benefit,” and observed that this issue “implicates a troubled area of our jurisprudence.” *Rust v. Sullivan*, 500 U.S. 173, 209 (1991) (Blackmun, J., dissenting) (emphasis added).

214. The majority, for example, acknowledged that its analysis was not meant “to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify government control of the content of expression.” *Id.* at 205 (majority opinion).

215. CLAYTON, *supra* note 29, at 236.

216. *Id.*

Professor Clayton's critique of the Bush administration thus illustrates some of the difficulties that can arise because of the relative inaccessibility of legal materials to researchers trained in other fields. It may be possible to defend some parts of his thesis, but doing so would require finding evidence far more powerful than anything he has provided.

Professor James Michael Strine's analysis of OLC illustrates a different kind of constraint on students of legal bureaucracies. Professor Strine's ambitious study seeks to avoid the oversimplifications of prior scholarship by using social role theory to show how "[v]alues of professionalism and political responsibility provided relatively enduring institutional constraints in the growth of the Justice Department."²¹⁷ By focusing on what he calls "psychological role strain," Professor Strine tries to show that the behavior of OLC can best be explained as the product of ongoing efforts by individual lawyers to resolve an inherent tension between professional norms that seem to call for "an idealized, neutral administration of law" with the demands of other governmental actors (most notably the White House Counsel's office) for allegiance to the president's agenda.²¹⁸

Professor Strine's approach offers a valuable supplement to previous efforts because of its focus on the interplay between the choices made by government lawyers and the constraints of the environment in which they operate. His study of this interplay also recognizes the difficulties imposed by the confidential nature of OLC's work. In an effort to overcome these difficulties, Professor Strine undertook detailed case studies of several major legal controversies in which OLC was involved, relying heavily on documentary evidence available from sources such as congressional hearings and presidential archives, as well as on interviews with people who had been involved with OLC. The discipline imposed by this method had worthwhile results, and many of Professor Strine's conclusions are unexceptionable. In certain respects, however, I believe the analysis was carried astray because his methodology was not able to compensate adequately for the constraints imposed by the sources.

One example can be found in the sympathy that Professor Strine displays for the OLC lawyers who he believes must make difficult choices between their professional obligations

217. Strine, *supra* note 18, at 30.

218. *See id.* at 30-33.

and the political demands placed on them by others in the government. At one point he says:

For lawyers in the OLC, independence differentiated them from the presidential sycophants in the White House Counsel. Searching for a role in the wake of organizational turmoil, lawyers at the OLC abandoned the practice of balancing political and professional values in favor [of] an ethic of independent, principled interpretation of the law. The OLC lawyers believed in their independent conception of the Constitution and the professionalist ideology of the legal process. The result of these changes was an OLC willing to adjudicate inter-agency disputes and pursue direct legal confrontations with Congress.²¹⁹

It is no doubt true that some OLC lawyers have regarded those who worked in the White House Counsel's office as "presidential sycophants," and believed that their own motivations were finer and purer. Uncritical acceptance of this view of OLC lawyers, however, obscures the possibility that OLC lawyers have sometimes used this image of themselves to justify actions taken at least in part for other reasons.

Professor Strine's view of OLC "professionalism" also fails to distinguish between the incentives operating on OLC staff lawyers (who have strong incentives to adopt an "ethic of independent, principled interpretation of the law") and the incentives operating on OLC's Assistant Attorney General (who ordinarily has even stronger incentives to play ball with the "presidential sycophants" in the White House).²²⁰ One consequence of Professor Strine's acceptance of the flattering self-image that OLC lawyers like to project is that he has great difficulty in explaining why the supposedly institutionalized conflict between OLC and the White House Counsel's office—whose development through several decades of administrative history he chronicles in great detail—seems to have suddenly and inexplicably evaporated with the advent of the Bush administration.²²¹ As I have tried to show in this article, simple self-

219. *Id.* at 312-13.

220. For a detailed analysis of the incentive structures that shape OLC's behavior, see Lund, *supra* note 52.

221. Thus, for example, Professor Strine states that "[c]hanges in lawyers at the White House and the Justice Department did not stop the rising rivalry between the two counsellors." Strine, *supra* note 18, at 314. Elsewhere, however, he acknowledges that "[t]he unity of opinion between Bush's White House Counsel and

interest provides a better explanation for the behavior of those who provide legal advice to the president than psychological role strain. The economic model of human behavior has an important advantage over Professor Strine's theory of psychological role strain. While Professor Strine's model may throw some light on the behavior of some individuals at certain times, it does not supply a general explanation of the mechanisms by which the social environment influences individual choice, and it is not well suited for making testable predictions.

I hope that this article has illustrated how the use of economic analysis and detailed case studies of legal policy-making can avoid some of the problems encountered by Professors Clayton and Strine. My own analysis, of course, should be tested against all of the available evidence, and it should be rejected in favor of any better approach that can be devised.

the Justice Department extended to all separation of powers issues." *Id.* at 298. Professor Strine offers no examples from the Bush administration suggesting that the two offices operated on the basis of different conceptions of the proper function of a presidential legal advisor.