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## FROM A UNITARY TO A UNILATERAL PRESIDENCY

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### INTRODUCTION

President Bush's administration has been accused of creating a unilateral presidency.<sup>1</sup> He has disdained allies<sup>2</sup> and, more than any President in recent memory, has refused to use Congress as a partner in fashioning national policy.<sup>3</sup> His eavesdropping campaign on citizens avowedly bypassed the Foreign Intelligence Surveillance Act (FISA),<sup>4</sup> the congressionally created

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<sup>1</sup> See, e.g., Keith Olbermann, *Countdown: Bush Owes Troops an Apology, Not Kerry* (MSNBC television broadcast Nov. 1, 2006), available at <http://www.msnbc.msn.com/id/15519404> (“[President Bush] has spread any and every fear among us in a desperate effort to avoid that which he most fears – some check, some balance against what has become not an imperial, but a unilateral presidency.”).

<sup>2</sup> See Editorial, *War in the Ruins of Diplomacy*, N.Y. TIMES, Mar. 18, 2003, at A32; Glenn Kessler, *Forceful Tactics Catch Up with U.S.; Efforts to Build Support on Iraq Stymied by Two Years of International Resentment*, WASH. POST, Feb. 16, 2003, at A26; Steven R. Weisman, *South Korea, Once a Solid Ally, Now Poses Problems for the U.S.*, N.Y. TIMES, Jan. 2, 2003, at A1.

<sup>3</sup> See 152 CONG. REC. H52, 212-16 (daily ed. July 13, 2006) (statement of Rep. Frank) (describing Bush's presidency as a “plebiscitary presidency” whereby the President acts without congressional cooperation).

<sup>4</sup> Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811, 1821-1829, 1841-1846, 1861-1862 (2000).

structure for obtaining information from suspected terrorists.<sup>5</sup> Without first obtaining congressional authorization, President Bush established military commissions to try al-Qaeda members and sympathizers.<sup>6</sup> In time of war, he has stated that the Constitution grants Presidents virtually unfettered power to pursue measures deemed necessary to preserve the nation, irrespective of congressional determination.<sup>7</sup> President Bush's assertions of a strong executive brook little compromise with international obligations or with other domestic political institutions.

Less remarked upon, President Bush's claims of broad powers have marginalized not only international entities and Congress, but also other actors within the executive branch.<sup>8</sup> More than any recent President, he has attempted to route through his office all authority delegated by Congress to the executive branch.<sup>9</sup> President Bush's centralization efforts, even in routine administrative matters, have stretched our understanding of the unitary executive almost beyond recognition.

Accordingly, this Essay assesses President Bush's conception of the unitary executive in the administrative sphere.<sup>10</sup> Based on President Bush's signing statements and other pronouncements, it concludes – contrary to a leading account<sup>11</sup> – that President Bush's view of the unitary executive in the administrative sphere is extreme even by comparison to those forwarded by his father, and Presidents Clinton and Reagan. In short, President Bush apparently has theorized that the President, as the officer at the apex of Article II, must be

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<sup>5</sup> For commentary on how Bush has bypassed FISA, see Bruce Fein, *The Comey Conundrum*, WASH. TIMES, May 22, 2007, at A14.

<sup>6</sup> Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918, 918-21 (2002).

<sup>7</sup> See Elizabeth Drew, *Power Grab*, N.Y. REV. BOOKS, June 22, 2006, at 10, 12; Jane Mayer, *The Hidden Powers*, NEW YORKER, July 3, 2006, at 44; Bruce Schneier, *Unchecked Presidential Power*, STAR TRIB. (Minneapolis), Dec. 21, 2005, at A21. And, if the war is ongoing, like the war on terrorism, then the Commander-in-Chief power confers on the President a continuing mantle of authority to pursue whatever steps can strengthen the country, subordinating other constitutional provisions to that mandate. See Schneier, *supra*.

<sup>8</sup> For two analyses that deal extensively with this issue, see generally Peter L. Strauss, *Overseer, or "the Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) [hereinafter Strauss, *Overseer, or "the Decider"*]; Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001).

<sup>9</sup> See *infra* Part II.C.

<sup>10</sup> I reference President Bush synonymously with the Bush administration as a whole, recognizing that the President's policies are shaped by many around him and that elements within the administration do not always agree.

<sup>11</sup> Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 312 (2006) (concluding that "[f]or the most part, the claims made in President Bush's signing statements – including claims relating to the 'unitary executive' – are similar to the claims by other recent presidents").

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the principal decision maker for all authority vested by Congress in the executive branch, irrespective of Congress's choice of delegate. According to President Bush, under Article II, the President retains the authority to supplant the discretion vested in officers inferior to him and exercise that authority directly. To that end, he has decried congressional efforts to delegate "final" authority to subordinate executive branch officials, lambasted congressional efforts to seek proposals for new legislation directly from subordinate officers in the executive branch, and deployed "regulatory policy officers" to oversee the administrative work of agency officials appointed by the President and approved by the Senate.<sup>12</sup> President Bush's views are coherent, yet radical in expanding the unitary executive ideal beyond his predecessors' conceptions. To President Bush, Article II demands not merely a unitary, but a unilateral presidency, requiring Congress to funnel all delegated authority through the President.

The Essay then explores the potential ramifications of such a sea change in the unitary executive vision. The Bush perspective would jeopardize so-called independent agencies, undermining the independence critical to agency adjudication and, to a lesser extent, rulemaking.<sup>13</sup> Moreover, the Bush theory would obviate the President's need to remove from office officials who failed to follow his policy for he could simply exercise the duties himself.<sup>14</sup> Furthermore, it might give the President carte blanche to reorganize the executive branch and thereby blunt Congress's interest in creating offices and delegating particular tasks to officeholders.<sup>15</sup> In sum, the new unitary executive would uproot much of the current administrative state's structure.

This Essay concludes with a brief inquiry into the significance of this changed view of the unitary executive. In President Bush's view, the unitary executive ideal has become a tool not only to enhance accountability in the public eye for executive branch actions, but also to centralize power in the President himself. Prior justifications of the unitary executive stemmed largely from the public's need to trace particular actions from subordinate executive branch officials to the President, not to ensure that the President is the only officer Congress can task with making reports, recommending legislation, or executing particular laws. As a consequence, President Bush's view demeans the role of presidential appointees approved by the Senate and threatens to seal off much of the executive branch from dialogue with Congress.

#### I. THE UNITARY EXECUTIVE IDEAL

The idea of a unitary executive is neither new nor radical. The Framers rejected several proposals to split the executive, and there have been adherents

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<sup>12</sup> See *infra* Part II.

<sup>13</sup> See *infra* Part III.A.

<sup>14</sup> See *infra* Part III.B.

<sup>15</sup> See *infra* Part III.C.

of a strong centralized executive ever since, from George Washington to William Howard Taft to Ronald Reagan.<sup>16</sup> The language of Article II seemingly embraces some form of unitary executive by vesting “the executive power” in a President;<sup>17</sup> assigning the President the responsibility to “take Care that the Laws be faithfully executed;”<sup>18</sup> directing the President to appoint all principal officers of the United States;<sup>19</sup> and empowering the President to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”<sup>20</sup>

To most commentators, arguments for greater centralized control based on the unitary executive ideal have coalesced around two virtues: accountability and effective leadership.<sup>21</sup> The constitutional structure stresses accountability in order to secure individual liberty. Articles I, II, and III delineate the powers each branch is to exercise so as to clarify the lines of constitutional authority. The President stands responsible for all discharge of policy and is judged by his or her performance on election day. To be sure, voters cannot always call the President to account for one particular issue given that they vote based upon that candidate’s entire record. Nor may the President be eligible to stand for reelection. Nonetheless, the political process remains open to air misgivings about presidential leadership, and as those concerns mount in importance, they may become determinative at election time – if not for the President, then for his party.

This is not to suggest that that the President must personally craft all foreign and domestic policy initiatives. Congress can create new offices pursuant to its Article I powers and can delegate particular responsibility to government officials.<sup>22</sup> But the President must be able to superintend that policy in order not to fragment and dissipate accountability. As Alexander Hamilton noted in the *Federalist Papers*:

It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure . . . ought really to fall. . . . The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that where there are a number of actors who may have had different degrees and kinds of

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<sup>16</sup> See HAROLD J. KRENT, *PRESIDENTIAL POWERS* 9-16 (2005).

<sup>17</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>18</sup> *Id.* art. II, § 3.

<sup>19</sup> *Id.* art. II, § 2, cl. 2.

<sup>20</sup> *Id.* art. II, § 2, cl. 1.

<sup>21</sup> See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 37-45 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and Administration*, 94 COLUM. L. REV. 1, 85-119 (1994).

<sup>22</sup> See *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

agency, . . . it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.<sup>23</sup>

Liberty is gained when one electorally accountable official stands responsible for implementing the law. With a plural executive, responsibility may be shrouded, and the costs of determining where responsibility lies increase.<sup>24</sup>

Most adherents to the unitary executive ideal posit that the President can maintain control of law administration principally through the power to appoint and remove executive officials.<sup>25</sup> The power to remove officers represents the only formal means by which Presidents can control their subordinates' ongoing exercise of power and ensure unified execution of the law. The power to remove an official is emblematic of a continuing relationship between the President and subordinate officials and, in the public eye, links those officials' conduct to the Presidency itself.

Although presidential justifications for preserving the unitary executive ideal differ, the dominant rationale has been to safeguard the ability of Presidents to superintend execution of the law.<sup>26</sup> In setting policy for the nation, both domestically and in foreign affairs, Congress has chosen to delegate widely to the President and executive branch officials. In light of such delegations, the unitary executive principle under President Bush II's<sup>27</sup> predecessors demanded that the President be able to influence all such exercise of delegated authority even when Congress delegated the authority to a subordinate executive branch official. Although Congress enjoyed the discretion to choose which executive branch official should exercise the relevant authority, Presidents retained the power to superintend such authority constitutionally through the power to appoint such officials<sup>28</sup> and to remove them for any reason if they are so-termed "executive officials,"<sup>29</sup> and for "cause" if they are instead "independent" officials within the executive

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<sup>23</sup> THE FEDERALIST NO. 70, at 428 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>24</sup> Professors Manheim and Ides write that "[t]he unitary executive theory embraces and promotes a notion of consolidated presidential power that essentially isolates the executive branch from any type of congressional or judicial oversight." Karl Manheim & Allan Ides, *National Security and the Law: Special Issue: The Unitary Executive*, L.A. LAW., Sept. 2006, at 24, 26. As I discuss, their criticism may be appropriate when evaluating President Bush's conduct, but for reasons different from what they propose. They err by concluding that concerns for a unitary executive necessarily preclude congressional or judicial oversight. Conflict over appointments clause issues or over the removal power, for instance, only modestly insulate the presidency from oversight from the other branches.

<sup>25</sup> See, e.g., Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 607 (2005).

<sup>26</sup> *Id.* at 730.

<sup>27</sup> To avoid confusion, I occasionally refer to President George H.W. Bush as "Bush I" and President George W. Bush as "Bush II."

<sup>28</sup> U.S. CONST. art. II, § 2, cl.2.

<sup>29</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626-32 (1934).

branch.<sup>30</sup> The executive officials can exercise whatever judgment they choose in administering the delegated authority, but run the risk of dismissal should they implement the policy in a way disfavored by the President. Thus, although officials are likely to follow the preferences set by the White House for a host of reasons, they retain the formal authority to implement the law in the manner they choose until dismissed by the President.

To that end, President Bush and others have zealously guarded both the powers to appoint and to remove executive branch officials.<sup>31</sup> Presidents cannot effectively coordinate policy in the absence of close control over their subordinates. President Bush's three predecessors all embraced some form of the unitary executive ideal. All three skirmished with Congress over the scope of presidential powers, and in litigation, all three staked out positions consistent with the ideal of a unitary executive. The following examples, though by no means comprehensive, suggest many points of agreement among the Presidents with respect to the need for robust appointments and removal authority.

Upon assuming office, President Reagan removed a number of agency Inspectors General from office without complying with congressional reporting requirements.<sup>32</sup> He viewed the removal authority as indispensable to the unitary executive. He later pocket vetoed the Whistleblower Protection Act, which would have undermined his control over personnel actions in a variety of ways.<sup>33</sup> In signing the Fisheries Act in 1986, he asserted that Congress could not remove commissioners of the Great Lakes Fishery Commission in order to create staggered terms; only he possessed the power to remove Commissioners.<sup>34</sup> Indeed, it was President Reagan who first determined that signing statements should be widely available in order to promote circulation for executive branch views such as the unitary executive.<sup>35</sup>

As is more widely remembered, President Reagan challenged the Comptroller General's role under Gramm-Rudman-Hollings and other legislation in part because of his lack of plenary removal authority over the Comptroller General.<sup>36</sup> Given that Congress shared the removal authority with the President, President Reagan argued that Congress could not delegate executive-type duties to the Comptroller General. The executive branch's brief in *Bowsher v. Synar* stressed the critical role played by the President's removal authority, appealing to the Court's prior precedent:

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<sup>30</sup> *Morrison v. Olson*, 487 U.S. 654, 685-93 (1988).

<sup>31</sup> Professor Strauss suggests that the current President has extended a unitary conception of the Article II appointments authority too far. *See* Strauss, *supra* note 8, at 721-24.

<sup>32</sup> Yoo, Calabresi & Colangelo, *supra* note 25, at 693.

<sup>33</sup> *See id.* at 693-94.

<sup>34</sup> Statement on Signing the Fisheries Bill, 2 PUB. PAPERS 1552, 1552 (Nov. 14, 1986).

<sup>35</sup> *See* PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 201-03 (2002).

<sup>36</sup> *See* Yoo, Calabresi & Colangelo, *supra* note 25, at 697-99.

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As this Court recently reiterated, the President is “entrusted with the supervisory and policy responsibilities of utmost discretion and sensitivity[,] . . . includ[ing] the enforcement of federal law . . . and management of the Executive Branch – a task for which ‘imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties.’”<sup>37</sup>

More generally, the brief explained,

the Framers believed that an absence of unity in the Executive would create an absence of responsibility and accountability, and thereby “deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power”: “the restraints of public opinion” and “the opportunity of discovering with facility and clearness the misconduct of the persons they trust.”<sup>38</sup>

Furthermore, President Reagan directed subordinates not to enforce provisions in the Competition in Contracting Act permitting the Comptroller General to stay bid protests.<sup>39</sup> In signing the Deficit Reduction Act of 1984, he risked a direct confrontation with Congress to stake out an aggressive claim on behalf of the unitary executive, reasoning that “certain provisions would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the executive branch.”<sup>40</sup>

President Reagan opposed the Ethics in Government Act in court on the ground that Congress’s establishment of the independent counsel outside his direct control infringed upon his removal authority.<sup>41</sup> The executive branch’s brief, which challenged the constitutionality of the independent counsel mechanism, similarly focused on the need for accountability. It argued that “[t]he duties of an independent counsel are purely executive in nature, and they therefore can be performed only by an officer who is *accountable* to the President.”<sup>42</sup> The executive branch, therefore, maintained that the Ethics in Government Act was unconstitutional in preventing the President both from

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<sup>37</sup> Brief of Petitioner at 20, *Bowsher v. Synar*, 478 U.S. 714 (1986) (Nos. 85-1377, 85-1378, 85-1379) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 749-50 (1982)) (alteration in original).

<sup>38</sup> *Id.* at 17 (quoting THE FEDERALIST NO. 70, at 428-29 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

<sup>39</sup> See *Lear Siegler, Inc. v. Lehman*, 843 F.2d 1102, 1119-20 (9th Cir. 1988); *Ameron, Inc. v. U.S. Army Corps of Eng’rs*, 809 F.2d 979, 988 n.6 (3d Cir. 1986).

<sup>40</sup> Statement on Signing the Deficit Reduction Act of 1984, 2 PUB. PAPERS 1053, 1053 (July 18, 1984).

<sup>41</sup> See Yoo, Calabresi & Colangelo, *supra* note 25, at 694-95.

<sup>42</sup> Brief for the United States as Amicus Curiae Supporting Appellees at 29, *Morrison v. Olson*, 487 U.S. 654 (1988) (No. 87-1279) (emphasis added).

appointing the independent counsel and in shielding the officer from plenary removal authority. The Supreme Court ultimately rebuffed that argument in *Morrison v. Olson*.<sup>43</sup>

As with removal, President Reagan zealously guarded his authority to appoint officers without any congressional interference. For instance, President Reagan controversially objected to the manner of Congress's continuation of the U.S. Commission on Civil Rights. In signing the bill, he embraced a Department of Justice statement that:

The new appointment procedure created by the Congress has effectively imposed constitutional limitations on the duties that the Commission may perform. . . . [B]ecause half of the members of the Commission will be appointed by the Congress, the Constitution does not permit the Commission to exercise responsibilities that may be performed only by "Officers of the United States."<sup>44</sup>

Moreover, in reauthorizing the Atlantic Striped Bass Conservation Act, President Reagan objected on constitutional grounds to a provision that would have enabled the Atlantic States Fisheries, a body composed of state officials, to exercise delegated authority from Congress.<sup>45</sup>

Aside from the appointment and removal authority, President Reagan imposed greater supervisory authority over his subordinate officials through Executive Order 12,291.<sup>46</sup> The order permitted the President, through the Office of Management and Budget (OMB), to review the content of major rules prior to publication.<sup>47</sup> Executive Order 12,291 and its successors have played a large role in permitting Presidents greater input into the policy fashioned by the agencies. In particular, commentators have suggested that, with OMB review, agencies have sharpened their own cost-benefit analyses before determining agency policy in the health and safety regulatory arena,<sup>48</sup> and have aligned their own views more closely with those of the President.

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<sup>43</sup> 487 U.S. 654, 685-93 (1988).

<sup>44</sup> Statement on Signing the United States Commission on Civil Rights Act of 1983, 2 PUB. PAPERS 1634, 1635 (Nov. 30, 1983).

<sup>45</sup> Statement on Signing the Bill Reauthorizing the Atlantic Striped Bass Conservation Act of 1984, 2 PUB. PAPERS 1312, 1312 (Oct. 1, 1986) ("Any interpretation of the statute that would vest the Atlantic State Fisheries Commission . . . with the authority to limit the exercise of enforcement discretion under Federal law by executive branch officials would raise a serious constitutional question.").

<sup>46</sup> Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 app. at 431 (1982).

<sup>47</sup> *Id.* § 3, 3 C.F.R. at 128-30, *reprinted in* 5 U.S.C. § 601 app. at 431, 432-33.

<sup>48</sup> See Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 554-57 (1989); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080-82 (1986); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1064-71 (1986). For a more empirical (and nuanced) assessment, see

The first President Bush also supported the unitary executive ideal in several ways. His administration pressured Congress into removing objectionable provisions lingering in the Whistleblower Protection Act and mounted a challenge to another provision in the Competition in Contracting Act on the familiar grounds that the Comptroller General, as an agent of Congress, could not execute the laws.<sup>49</sup> Moreover, toward the end of his administration, he threatened to fire members of the Postal Service Board of Governors for failing to heed an order to withdraw their brief reflecting disagreement with the Postal Rate Commission.<sup>50</sup> In doing so, he challenged Congress's earlier determination to protect the board members from at-will dismissal.<sup>51</sup> In a memorandum dated December 11, 1992, President Bush I wrote that "pursuant to my authority as Chief Executive and my obligation to take care that the laws are faithfully executed, I direct you [the Postmaster General] to cooperate fully with the Attorney General in arranging for the withdrawal of [these] filings,"<sup>52</sup> and later threatened removal if the brief were not withdrawn. Bush left office before following through on the threat.<sup>53</sup>

With respect to his appointment authority, President Bush I objected to a provision in the Omnibus Budget Reconciliation Act of 1989 that required the Secretary of Education to "consult with a representative group of guaranty agencies, eligible lenders, and eligible institutions to develop a mutually agreeable proposal for the establishment of a National Student Loan Data System containing information regarding loans made, insured, or guaranteed."<sup>54</sup> Bush retorted that requiring the Secretary to agree with interest groups not appointed by the President would "circumvent[] the appointment procedures established by the Constitution."<sup>55</sup> Delegating authority to private parties would evade the supervisory controls intrinsic to the President's appointment authority.

President Clinton embraced the ideal of a unitary executive as well, although he rarely relied on the concept explicitly. He objected to the creation

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Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 70-76 (2006).

<sup>49</sup> Yoo, Calabresi & Colangelo, *supra* note 25, at 706.

<sup>50</sup> *Id.* at 708.

<sup>51</sup> The court of appeals rebuffed Bush in *Mail Order Ass'n of America v. United States Postal Service*, 986 F.2d 509, 515 (D.C. Cir. 1993).

<sup>52</sup> Memorandum from President George H.W. Bush to Postmaster Gen. Marvin Runyon (Dec. 11, 1992).

<sup>53</sup> See *Mackie v. Clinton*, 827 F. Supp. 56, 59 (D.D.C. 1993) (holding that the controversy over threatened dismissals had become moot because "of the fact that President Bush is no longer in office").

<sup>54</sup> Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 2008, 103 Stat. 2106, 2121 (codified at 20 U.S.C. § 1092b (2000)).

<sup>55</sup> Statement on Signing the Omnibus Budget Reconciliation Act of 1989, 2 PUB. PAPERS 1718, 1719 (Dec. 19, 1989).

of an independent social security agency to be headed by an officer who was not removable at will. He stated that “the provision that the President can remove the single Commissioner only for neglect of duty or malfeasance in office raises a significant constitutional question.”<sup>56</sup> Moreover, President Clinton’s signing statements, similar to those of his predecessors, attacked *Chadha*-type arrangements,<sup>57</sup> including the continuing influence wrought by Congress’s power to initiate removal of the Comptroller General.<sup>58</sup>

With respect to the appointment power, President Clinton objected to a provision directing the Secretary of Transportation to establish the Commercial Motor Vehicle Safety Regulatory Review Panel.<sup>59</sup> As he explained,

Fourteen of the fifteen members of the panel are to be appointed from lists submitted by two committees of the Congress. The Constitution prohibits the Congress from sharing in the power to appoint officers of the United States other than through the Senate’s confirmation role. As such, no statute may require an appointment to be made from a list submitted by a Member, committee, or other agent of the Congress.<sup>60</sup>

For another example, President Clinton similarly objected to a limitation on the appointment of a U.S. Trade Representative:

[S]ection 21(b) of the Act would forbid the appointment as United States Trade Representative . . . of anyone who had ever “directly represented, aided, or advised a foreign [government or political party] . . . in any trade negotiation, or trade dispute with the United States.” The Congress may not, of course, impose broad restrictions on the President’s constitutional prerogative to nominate persons of his choosing to the highest executive branch positions . . .<sup>61</sup>

President Clinton also expanded executive control by including, for the first time, independent agencies within the ambit of the executive order requiring internal management review prior to promulgation of rules that would have a

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<sup>56</sup> Statement on Signing the Social Security Independence and Program Improvements Act of 1994, 2 PUB. PAPERS 1471, 1472 (Aug. 15, 1994).

<sup>57</sup> In *INS v. Chadha*, 462 U.S. 919, 943-60 (1983), the Supreme Court found the “legislative veto” unconstitutional.

<sup>58</sup> See, e.g., Statement on Signing the Department of the Interior and Related Agencies Appropriation Act, 1995, 2 PUB. PAPERS 1674, 1674 (Sept. 30, 1994) (“There are several provisions in the Act that purport to require congressional approval before executive branch execution of aspects of the bill. The Administration will interpret such provisos to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS v. Chadha*.”).

<sup>59</sup> Act of July 5, 1994, Pub. L. No. 103-272, § 31134, 108 Stat. 745, 1001-03 (repealed 1998).

<sup>60</sup> Statement on Signing Transportation Legislation, 1 PUB. PAPERS 1198, 1198-99 (July 5, 1994).

<sup>61</sup> Statement on Signing the Lobbying Disclosure Act of 1995, 2 PUB. PAPERS 1907, 1907 (Dec. 19, 1995) (third and fourth alterations in original).

major financial impact on the economy.<sup>62</sup> Clinton was not merely content to influence agency rulemaking; he also attempted to take credit personally for the formulation of subsequent rules. In other words, it was no longer the Secretary of the Treasury's or Transportation's rule, it was the rule of the President himself. For instance, in 1995 President Clinton announced publication of a proposed rule to reduce youth smoking:

Today I am announcing broad executive action to protect the young people of the United States from the awful dangers of tobacco.

....

Therefore, by executive authority, I will restrict sharply the advertising, promotion, distribution, and marketing of cigarettes to teenagers. I do this on the basis of the best available scientific evidence . . . .<sup>63</sup>

Although Congress had delegated authority to regulate advertising and marketing of cigarettes to children to the FDA (and FTC), President Clinton asserted in the public eye that the initiative was his personally. Similarly, President Clinton announced in 1999 that he would "use[] [his] executive authority as President" to "direct[] the Secretary of Labor to issue a rule to allow States to offer paid leave to new mothers and fathers."<sup>64</sup> Agency heads, as a formal matter, remained responsible for these rules, but the electorate could voice displeasure more directly to the President. More than prior Presidents, he sought to take credit for policy formulated by his subordinates.<sup>65</sup>

President Bush's predecessors, therefore, all asserted a form of unitary executive, and were not shy about defending presidential prerogative in signing statements as well as in executive orders and litigation. The above examples, even if not fully representative of the administrations' views, suggest that each President believed in a need to supervise his subordinates' exercise of authority to ensure centralized enforcement of the law and to permit citizens to trace governmental actions to the Chief Executive.

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<sup>62</sup> Exec. Order No. 12,866, § 4(c), 3 C.F.R. 638, 642 (1994), *reprinted in* 5 U.S.C. § 601 app. at 638, 639-40 (2000) ("For purposes of this subsection, the term 'agency' or 'agencies' shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. § 3502(10).").

<sup>63</sup> The President's News Conference, 2 PUB. PAPERS 1237, 1237 (Aug. 10, 1995).

<sup>64</sup> Commencement Address at Grambling State University in Grambling, Louisiana, 1 PUB. PAPERS 836, 839 (May 23, 1999). The proposed rule to reduce smoking and the paid leave examples are both discussed in Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2282-84 (2001). President Clinton also defended a view of a unitary executive in litigation surrounding his invocation of executive privilege. KRENT, *supra* note 16, at 184-86.

<sup>65</sup> Kagan, *supra* note 64, at 2249; Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 967 (1997).

## II. PRESIDENT BUSH'S UNILATERAL VERSION OF THE UNITARY EXECUTIVE

President Bush's signing statements and executive orders manifest a different understanding of the unitary executive. President Bush's statements portray a unitary executive that strives not only to attain accountability in the public eye for executive branch actions, but also to funnel as many dealings with Congress through himself as possible. Under this new variant of the unitary executive, Congress is to delegate directly to the President where practicable and to seek proposals for legislative change only from the President himself. Evidently, Congress cannot delegate authority to a subordinate executive branch official without formally permitting the President to substitute his own views for those of the subordinate officer. In President Bush's view, the unitary executive ideal demands not only presidential supervision but immediate presidential involvement. In a sense, the identity of the delegate chosen by Congress is largely irrelevant. Congress might as well choose to delegate to the Secretary of Labor as opposed to the Secretary of Defense: they are just stand-ins for the President himself.<sup>66</sup>

President Bush's signing statements, objecting to numerous congressional provisions, reveal his theory of the unitary executive. Objections to legislative provisions delegating "final" authority to subordinate officials and objections to directives authorizing officials to make recommendations for legislative reform bring President Bush's views to light. Moreover, his executive order altering the status of regulatory policy officers within each agency further bolsters a coherent vision of a super-strong unitary executive that subordinates Congress's interest in determining which officers are best suited to perform particular functions to the President's need to control personally all enforcement of the laws. To be sure, not all of President Bush's actions conform to this expanded view of the unitary executive. Some might even argue that signing statements in particular are poor vehicles for assessing the administration's views. However, there is enough consistency in Bush's statements to warrant serious study.

### A. *Objections to Congressional Delegation of "Final Authority" to Agency Officials*

In his signing statements, President Bush objected to a number of congressional directives delegating "final" authority to a subordinate official. Although President Bush did not expound on his views, he seemingly determined that Congress, consistent with the theory of a unitary executive, can only delegate such final authority to the President.

For instance, in the 2002 Department of Justice Appropriations Authorization Act, Congress delegated "final authority" over certain foreign

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<sup>66</sup> Alternatively, one might view Congress's role as setting a default rule, subject to presidential revision, as to which officer can discharge particular functions.

prosecutorial training grants to a subordinate of the Attorney General.<sup>67</sup> President Bush responded that such delegation had to be construed “in a manner consistent with the President’s constitutional authorities to supervise the unitary executive branch and to conduct the Nation’s foreign affairs.”<sup>68</sup> President Bush believed that vesting final authority in a subordinate officer risked undermining his ability to administer the law.

Arguably, control over the prosecutorial training grants implicates foreign policy, and Presidents plausibly enjoy greater authority in foreign as opposed to domestic affairs.<sup>69</sup> Yet, in the same Act, Congress vested in the United States Attorneys, in the context of particular civil settlements, “the exclusive authority to select an annuity broker from the list of such brokers established by the Attorney General.”<sup>70</sup> President Bush wrote that “[t]he executive branch shall construe this section in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch.”<sup>71</sup> In this most routine or even trivial of administrative settings, President Bush’s statement asserts that Congress cannot vest “exclusive” authority in any executive branch official other than the President.

One can imagine a presidential objection to congressional delegation of final authority to executive branch employees who are not subject to close presidential control. Presidents previously have complained of congressional determinations to vest unreviewable discretion in low-level executive branch officials.<sup>72</sup> If the officials are not senior enough, they may be able to exercise

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<sup>67</sup> 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, §§ 2002, 2004, 116 Stat. 1758, 1789, 1790 (2002) (codified at 42 U.S.C. §§ 3796gg-0, 3796gg-0b (Supp. 2003)).

<sup>68</sup> Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act, 2 PUB. PAPERS 2010, 2011 (Nov. 2, 2002) [hereinafter Signing Statement of Nov. 2, 2002].

<sup>69</sup> As discussed *infra* at text accompanying notes 79-87, textually the President’s power in foreign affairs is no greater than for routine administrative matters. Nonetheless, as a functional matter, there arguably is greater need for coordination, and the Supreme Court has adverted to greater presidential control in the foreign-affairs arena. KRENT, *supra* note 16, at 85-89, 124-32.

<sup>70</sup> § 11015(b), 116 Stat. at 1824.

<sup>71</sup> Signing Statement of Nov. 2, 2002, *supra* note 68, at 2012.

<sup>72</sup> See, e.g., The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 175 (1996) (arguing that congressional directives to agency officials to report directly to Congress may violate the separation of powers because they “clearly weaken the President’s control over the executive branch and by doing so increase congressional leverage on the President”); Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress, 6 Op. Off. Legal Counsel 632, 637 (1982) [hereinafter OLC Constitutionality of Statute Opinion] (arguing that the President or his designee must be able to review reports made by the FAA Administrator before the reports are transmitted to Congress lest “the Administrator would be severed from his superiors in the Executive Branch with respect to these matters”); Inspector

delegated authority largely outside the view of the President and his close advisers. Yet, President Bush also objected to delegations to officers of the United States, such as U.S. Attorneys, who have been appointed by the President and confirmed by the Senate. The logical inference is that President Bush objected to the delegation of “final” authority because it precluded the President’s authority to change the result. In his view, delegations of final authority to officers other than the President do not accord with the unitary executive.

President Bush has also objected to legislation directing him to act through a specific officer, further reinforcing his view of a highly centralized unitary executive. For instance, in crafting an emergency preparedness plan, Congress provided:

If the President, acting through the Secretary of Health and Human Services, determines that 1 or more substances of concern are being, or have been, released in an area declared to be a disaster area . . . the President, acting through the Secretary of Health and Human Services, may carry out a program for the coordination, assessment, monitoring, and study of the health and safety of individuals with high exposure levels . . . .<sup>73</sup>

According to President Bush, the congressional direction requiring the President to act through a specified individual, even a cabinet-level official subject to his plenary removal authority, violated the unitary executive. He stated, “The executive branch shall construe Section 709 of the Act, which purports to direct the President to perform the President’s duties ‘acting through’ a particular officer, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch.”<sup>74</sup>

Moreover, in the Foreign Relations Authorization Act of 2003, President Bush asserted the unconstitutionality of the provision that “[t]he President, acting through the Director General of the United States and Foreign Commercial Service of the Department of Commerce . . . establish Technology American Centers.”<sup>75</sup> Even though President Bush exerted supervisory

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General Legislation, 1 Op. Off. Legal Counsel 16, 17 (1977) (arguing that a proposal requiring the Inspector General to issue reports directly to Congress without presidential review is constitutionally problematic for robbing the President of his Article II power to supervise the work of subordinate officials); President Bill Clinton, Statement of Administration Policy (Mar. 9, 1998) (focusing on the importance of protecting privileged information that might be disclosed by lower level officials reporting to Congress).

<sup>73</sup> Security and Accountability for Every Port Act of 2006, Pub. L. No. 109-347, § 709(b)(1); 120 Stat. 1884, 1948 (2006) (to be codified at 42 U.S.C. § 300hh-14).

<sup>74</sup> Statement on Signing the SAFE Port Act, 42 WEEKLY COMP. PRES. DOC. 1817, 1817 (Oct. 13, 2006).

<sup>75</sup> Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 645(a), 116 Stat. 1350, 1403 (2002) (codified at 22 U.S.C. § 2151p (Supp. 2003)).

authority over the Director General, in President Bush's view, the congressional specification sapped presidential authority.<sup>76</sup>

Perhaps President Bush was making only the formal objection that delegations can be directed at subordinate officials but that delegations to him cannot be accompanied by any restrictions such as working through particular officers. Taken with his objection to devolution of final authority on officers of the United States, however, a vision appears of a super-strong unitary executive in which officers of the United States play a substantially diminished role. Requiring the President to act through particular officers, in other words, suggests that subordinate officers "share" in the executive power under Article II. In President Bush's view, the President must be able to make the ultimate decision.<sup>77</sup>

President Bush's statements depict a centralized executive branch that not merely furthers accountability, but also lodges greater control in the office of the President. A recent Office of Legal Counsel (OLC) Opinion, which addresses the right of senior Health and Human Services administrators to bar lower level officials from communicating with Congress, justifies centralization by reference to "the fundamental principle that the President's relationship with his subordinates must be free from certain types of interference from the coordinate branches of government in order to permit the President effectively to carry out his constitutionally assigned responsibilities."<sup>78</sup> The opinion allows no room for any congressional interest

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<sup>76</sup> See Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1697, 1698 (Sept. 30, 2002) ("The executive branch shall implement [section 645 of the Act] in a manner consistent with the President's authority to supervise the unitary executive branch, including the authority to direct which officers in the executive branch shall assist the President in faithfully executing the law.").

<sup>77</sup> President Bush similarly objected to a string of congressional provisions mandating that he consult with other executive actors before making a final decision. In the context of the Enhanced Border Security and Visa Entry Reform Act of 2002, for example, President Bush challenged a legislative directive that he consult with the Director of the National Institute of Standards and Technology "[i]n the development and implementation of the data system under this subsection." Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, § 202(a)(3), 116 Stat. 543, 549 (2002) (codified at 8 U.S.C. § 1722 (Supp. 2003)). Bush explained that: "The President's constitutional authority to supervise the unitary executive branch and take care that the laws be faithfully executed cannot be made by law subject to requirements to exercise those constitutional authorities . . . in coordination or consultation with specified officers or elements of the Government." Evidently, Congress cannot shape delegations to the executive branch in a way that requires consultation with subordinate officers under the President's thumb or that indicates which officer is to exercise which functions.

<sup>78</sup> Authority of Agency Officials to Prohibit Employees from Providing Information to Congress, Op. Off. Legal Counsel (May 21, 2004) (quoting OLC Constitutionality of Statute Opinion, *supra* note 72, at 638-39), available at <http://www.usdoj.gov/olc/crsmemoresponse.htm>. As noted, the Opinion quotes an earlier OLC Opinion under

in determining the identity of the officeholder who discharges particular functions. The interest in accountability is not mentioned.

In the foreign policy context, President Bush's concerns are more understandable, at least as a functional matter.<sup>79</sup> Permitting Congress to delegate duties to particular members of the military would undercut the President's power as Commander-in-Chief. For instance, when Congress specified the particular military officer to perform duties under the Energy and Water Development Appropriations Act,<sup>80</sup> the President signed the bill but reserved his right under the unitary executive principle to reassign the duties.<sup>81</sup> Some might dispute the relevance of President Bush's reliance on the unitary executive principle in this context given the applicability of the Commander in Chief Clause. Nonetheless, congressional determinations as to where military officials should be deployed certainly would undermine presidential control, whether under the aegis of the Commander in Chief Clause or pursuant to the unitary executive principle. Moreover, President Bush objected to a provision in the "Vision 100 – Century of Aviation Reauthorization Act,"<sup>82</sup> in which Congress vested in the Administrator of the Federal Aviation Administration the power to conduct negotiations concerning aviation safety with counterparts abroad.<sup>83</sup> President Bush asserted that he would accept such provisions as advisory, for otherwise they "would impermissibly interfere with the President's constitutional authority to conduct the Nation's foreign affairs, participate in international negotiations, and supervise the unitary executive branch."<sup>84</sup> The Supreme Court addressed the President's foreign affairs power in *United States v. Curtiss-Wright Export Corp.*:<sup>85</sup>

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President Reagan, but that previous Opinion would have permitted Congress to vest greater authority in executive branch officials, particularly those who are department heads. See OLC Constitutionality of Statute Opinion, *supra* note 72, at 641-42.

<sup>79</sup> As mentioned previously, as a matter of constitutional text, there is no difference between the President's power in the foreign and domestic realm, unless the Commander in Chief Clause is in play. See *supra* note 69.

<sup>80</sup> Energy and Water Development Appropriations Act, 2004, Pub. L. No. 108-137, pmb., 117 Stat. 1827, 1827 (2003) ("The following appropriations shall be expended under the direction of the Secretary of the Army and the supervision of the Chief of Engineers for authorized civil functions of the Department of the Army pertaining to rivers and harbors, flood control, shore protection, aquatic ecosystem restoration, and related purposes.").

<sup>81</sup> Statement on Signing the Energy and Water Development Appropriations Act, 2004, 2 PUB. PAPERS 1659, 1659 (Dec. 1, 2003).

<sup>82</sup> Vision 100 – Century of Aviation Reauthorization Act, Pub. L. No. 108-176, 117 Stat. 2490 (2003) (codified in scattered sections of 49 U.S.C.).

<sup>83</sup> *Id.* § 812(a), 117 Stat. at 2590.

<sup>84</sup> Statement on Signing the Vision 100 – Century of Aviation Reauthorization Act, 2 PUB. PAPERS 1716, 1717 (Dec. 12, 2003).

<sup>85</sup> 299 U.S. 304 (1936).

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“The President is the constitutional representative of the United States with regard to foreign nations.”

. . . [C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.<sup>86</sup>

President Bush’s signing statements in this regard broke no new ground.<sup>87</sup>

In the domestic context, however, congressional directives that particular officers exercise administrative power are routine. The Secretary of Health and Human Services, for instance, issues rules and adjudicates cases that bind the executive branch. In common parlance, these rules, decisions, and orders are “final.” The President can remove the Secretary from office if he disagrees with the rules promulgated or the cases adjudicated. President Bush’s articulation of the unitary executive concept takes the view of his predecessors one step further – not only must Presidents be able to superintend delegated authority, they must have final authority over decision making.

President Bush’s signing statements are noteworthy in another respect. They often group reservations based on the unitary executive principle with those predicated on the Commander-in-Chief power, as in the Energy and Water Development Act example.<sup>88</sup> To President Bush, the need for total control over subordinates in waging war has spilled over into the routine administrative setting. President Bush’s conception of the unitary executive leaves little room for subordinates to exercise independent discretion, even if they are officers of the United States.

#### B. *Proposals for Legislative Change*

The scope of President Bush’s theory of the unitary executive also can be gleaned from his signing statements that assert the unconstitutionality of requiring agency heads to recommend proposals for legislative revisions directly to Congress. In objecting to over one hundred provisions directing agency officials to recommend legislation to Congress,<sup>89</sup> President Bush

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<sup>86</sup> *Id.* at 319-20 (citation omitted).

<sup>87</sup> For a similar example under President Clinton, see Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, 1 PUB. PAPERS 807, 808 (Apr. 30, 1994) (stating that the Constitution gives the Executive special authority in the area of foreign affairs and that his “constitutional authority over foreign affairs . . . necessarily entails discretion over [provisions that direct the President how to negotiate with international organizations]. Accordingly, [he] shall construe these provisions to be precatory.”).

<sup>88</sup> See Statement on Signing the Energy and Water Development Appropriations Act, 2004, *supra* note 81, at 1659; see also *supra* text accompanying notes 80-81.

<sup>89</sup> See Bradley & Posner, *supra* note 11, at 317, 323 tbl.

seemingly has embraced the view that Congress can only solicit, but cannot mandate, proposals for change.

For instance, in signing the Maritime Transportation Security Act of 2002,<sup>90</sup> President Bush objected to a number of provisions which

purport to require an executive branch official to submit recommendations to the Congress. The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch. Moreover, to the extent such provisions of the Act would require submission of legislative recommendations, they would impermissibly impinge upon the President's constitutional authority to submit only those legislative recommendations that he judges to be necessary and expedient.<sup>91</sup>

An examination of those provisions is telling: Section 110(c)(4), for instance, requires the head of the Coast Guard to "make[] a recommendation with respect to whether the program, or any procedure, system, or technology should be incorporated in a nationwide system for preclearance of imports of waterborne goods."<sup>92</sup> Section 112(4) similarly requires a recommendation "for legislative or other actions needed to improve security of United States ports against potential threats posed by flag vessels of [certain] nations."<sup>93</sup> Congress did not bar presidential review of the proposed safety measures. Yet, to President Bush, these legislative provisions undermined the unitary executive, apparently by intruding into the President's constitutional prerogative to be the sole executive branch official to make all recommendations to Congress.

For another example, in the Department of Justice Appropriations Authorization Act discussed previously,<sup>94</sup> Congress directed the Attorney General to "submit a report and recommendation . . . whether there should be established, within the Department of Justice, a separate office of the Inspector General for the Federal Bureau of Investigation."<sup>95</sup> Again, Congress did not bar the Attorney General from conferring with the President before the recommendations were made, yet President Bush objected.<sup>96</sup> Even officers of the United States have no role in making proposals for legislative change under Bush's conception of the unitary executive. In the same Act, Congress required the Office of Personnel Management (OPM) to "submit a report to Congress assessing the effectiveness of the extended assignment incentive

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<sup>90</sup> Maritime Transportation Security Act of 2002, Pub. L. No. 107-295, 116 Stat. 2064.

<sup>91</sup> Statement on Signing the Maritime Transportation Security Act of 2002, 2 PUB. PAPERS 2132, 2132 (Nov. 25, 2002).

<sup>92</sup> § 110(c)(4), 116 Stat. at 2092.

<sup>93</sup> *Id.* § 112(4), 116 Stat. at 2093.

<sup>94</sup> See *supra* text accompanying notes 67-71.

<sup>95</sup> 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 309(c), 116 Stat. 1758, 1785 (2002).

<sup>96</sup> Signing Statement of Nov. 2, 2002, *supra* note 68, at 2011.

authority as a human resources management tool and making recommendations for any changes necessary to improve the effectiveness of the incentive authority.”<sup>97</sup> To President Bush, that directive crossed constitutional lines because it “purport[ed] to require executive branch officials to submit to the Congress plans for internal executive branch activities or recommendations relating to legislation.”<sup>98</sup> The mandatory nature of the provision clashed with his understanding of the unitary executive ideal. Therefore, Bush continued, “[t]he executive branch shall construe such provisions in a manner consistent with the President’s constitutional authorities to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as the President judges necessary and expedient.”<sup>99</sup>

Commentators have missed this aspect of President Bush’s objections to mandated legislative proposals. Professors Bradley and Posner who, by and large, defend the statements, and Professor Strauss who critiques them, suggest that President Bush was claiming only the need to review those reports and recommendations before submission to Congress.<sup>100</sup> Prior Presidents have, at least at times, asserted as much.<sup>101</sup> Significantly, President Bush’s signing statements claim greater power. Bush’s objections are not that he be entitled to review legislative recommendations first, such as he does with proposed agency rules under Executive Order 12,866,<sup>102</sup> but that Congress lacks the power to compel such recommendations. President Bush has stressed that Congress cannot “purport to require executive branch officials to submit to the Congress . . . recommendations relating to legislation.”<sup>103</sup> Supervision by the President prior to submission would not remove the constitutional flaw.

Indeed, that President Bush objected to requiring recommendations but not to reporting requirements, such as the one addressing assignment incentive authority, demonstrates that his constitutional reservation focuses on whether Congress can mandate recommendations by subordinate executive branch

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<sup>97</sup> § 207(d), 116 Stat. at 1780.

<sup>98</sup> Signing Statement of Nov. 2, 2002, *supra* note 68, at 2011.

<sup>99</sup> *Id.*

<sup>100</sup> See Bradley & Posner, *supra* note 11, at 326 (quoting Statement on Signing the Balanced Budget Act of 1997, 2 PUB. PAPERS 1053, 1054 (Aug. 5, 1997)) (arguing that President Bush’s signing statements are no different in kind than President Clinton’s, one of which included the right to “review [subordinates’] proposed communications to the Congress” (emphasis added)); Strauss, *Overseer, or “the Decider,” supra* note 8, at 725 (“[T]he President explicitly claims the right to *approve* reports and recommendations to Congress as a condition upon their being made . . . .” (emphasis added)).

<sup>101</sup> See *infra* notes 117-19 and accompanying text.

<sup>102</sup> Exec. Order No. 12,866 § 7, 3 C.F.R. 638, 648 (1994), *reprinted in* 5 U.S.C. § 601 app. at 638, 642 (2000).

<sup>103</sup> Statement on Signing the Homeland Security Act of 2002, 2 PUB. PAPERS 2128, 2129 (Nov. 25, 2002).

officials. President Bush has not claimed that requiring reports by agency heads or others is in any way problematic. Thus, although Congress arguably must permit review of reports by senior administrative officials, such review is not sufficient when legislative proposals are at stake.

President Bush's theory appears to rest on the exclusivity of the Recommendations Clause in Article II: "He shall from time to time . . . recommend to their Consideration such Measures as he shall judge necessary and expedient . . ." <sup>104</sup> But, although President Bush's argument that Congress cannot compel the President to recommend measures may rest on firm ground, <sup>105</sup> congressional directives to agency heads stand on a different footing. There is nothing in the constitutional text to suggest that the Constitution vests in the President the exclusive power to make recommendations. Presenting such proposals seems intimately connected to officers' duties; officers should recommend proposals for legislative revision where appropriate. After all, part of the reason for congressional delegation is to tap those officers' expertise. <sup>106</sup>

In *INS v. Chadha*, <sup>107</sup> the Supreme Court recognized Congress's legitimate role in requiring reports from agencies and allowing proposed regulation to become law absent intervention by Congress. <sup>108</sup> Congress, in the Immigration and Naturalization Act, directed the Attorney General to report to Congress a "complete and detailed statement of the facts and pertinent provisions of law" with respect to individuals whose deportation should be suspended. <sup>109</sup> The Attorney General's report functioned like a recommendation for legislation – the report would go into effect if Congress did not intervene within the specified waiting period. <sup>110</sup> As the Court stated earlier in *Sibbach v. Wilson &*

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<sup>104</sup> U.S. CONST. art. II, § 3.

<sup>105</sup> President Clinton similarly noted that "[the Recommendations] Clause protects the President's authority to formulate and present his own recommendations, which includes the power to decline to offer any recommendation." Statement on Signing Legislation on Long-Term-Care Insurance for Federal Employees and Retirees and Members of the Armed Forces, 2 PUB. PAPERS 1866, 1867 (Sept. 19, 2000).

<sup>106</sup> Moreover, in the analogous context of judicial/executive relations, the Supreme Court, on a number of occasions, has held that it has less power to compel action from the President than from his subordinates. It has overturned injunctions against the President but routinely issued injunctions against his subordinates, the heads of agencies. *See, e.g.,* *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498-501 (1866). Moreover, the Court has declined to order the President to defend against suits challenging acts in his official capacity while compelling his subordinates to defend against suit arising out of the same events. *See* *Nixon v. Fitzgerald*, 457 U.S. 731, 749-50 (1982).

<sup>107</sup> 462 U.S. 919 (1983).

<sup>108</sup> *Id.* at 935 n.9.

<sup>109</sup> 8 U.S.C. § 1254(c)(1) (1982) (repealed 1996).

<sup>110</sup> *See* *Chadha*, 462 U.S. at 935 n.9 (recognizing the legitimacy of the report and wait provision generally); *see also* *Alaska Airlines v. Brock*, 480 U.S. 678, 690 (1987) ("This interval gives Congress an opportunity to review the regulations and either to attempt to

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*Co., Inc.*,<sup>111</sup> “[t]he value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress.”<sup>112</sup> Congressional directives requiring agency heads to submit reports on the agency’s exercise of authority and to submit recommendations as to future initiatives fall comfortably within the constitutional history and structure.

Moreover, as a functional matter, President Bush’s position is difficult to justify. Distinguishing a report on legislative implementation from a report suggesting future legislative priorities is highly problematic. Congress, in mandating reports on agency implementation, seeks agency views on whether changes should be enacted or budgets altered. For instance, consider that the “report required” from the Special Counsel of the Merit Systems Protection Board under the relevant civil service legislation is to “include whatever recommendations for legislation or other action by Congress the Special Counsel may consider appropriate.”<sup>113</sup> Legislative proposals are often intimately intertwined with the power to report on executive branch implementation.

In addition, the President’s position when asserting the power to review executive branch reports prior to submission to Congress is even stronger than the argument for precluding Congress from mandating proposals for legislative change from agency heads. Requiring reports by statute may infringe upon executive privilege, which the Supreme Court has held is independently rooted in Article II.<sup>114</sup> If agency heads or their subordinates reveal state secrets or deliberative process materials, the privilege is irreparably lost. The President, not executive branch officials, controls the privilege. Thus, only centralized review of reports can preserve the constitutional principle.<sup>115</sup> Executive branch officials’ recommendations concerning future legislation do not jeopardize

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influence the agency’s decision, or to enact legislation preventing the regulations from taking effect.”). Interestingly, in a companion provision under the Act, 8 U.S.C. § 1254(c)(3), the Attorney General’s report would have become effective if “the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation.” In other words, Congress placed the report and wait provision side by side with the request for a legislative recommendation. In both contexts, information and recommendations for legislation from agencies provide grist for possible legislative revisions where needed.

<sup>111</sup> 312 U.S. 1 (1941).

<sup>112</sup> *Id.* at 15.

<sup>113</sup> 5 U.S.C. § 1218 (2000).

<sup>114</sup> Some academics disagree. See RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 51 (1974); Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1151-53 (1999).

<sup>115</sup> The OLC has agreed. See Inspector General Legislation, 1 Op. Off. Legal Counsel 16, 17 (1977) (“The President’s power of control extends to the entire executive branch, and includes the right to coordinate and supervise all replies and comments from the executive branch to Congress.”).

executive privilege. Ex ante presidential review of agency proposals for legislative change, therefore, is not critical to preserve presidential control of privilege.<sup>116</sup>

Furthermore, presidential exclusivity in making legislative proposals does not directly implicate the values undergirding the prior view of the unitary executive. Agency officials' proposals for change would not likely confuse the public. As long as presidents may review any such proposals prior to submission, there is little chance the public would be misled. The public could still trace any legislative proposals to the President.<sup>117</sup>

In other words, the concern for accountability that underlies the traditional variant of the unitary executive is not at stake. Congress should be accountable to the public for legislation, and the President should be accountable for agreeing or disagreeing with legislation, as well as for its subsequent implementation. There is far less need to hold the President accountable for proposals disseminated to Congress, and accountability is amply satisfied if the power to review is preserved. The unitary executive principle does not, therefore, demand that the power to make legislative proposals be exclusive.

Scant precedent supports President Bush's stance that Congress cannot require agency heads and others to make recommendations for legislation. President Clinton, for instance, objected not to Congress's decision to direct subordinate officials to submit proposals *vel non*, but wished rather to reserve the right to supervise the officers in performance of their delegated functions. Referring to the Balanced Budget Act of 1997,<sup>118</sup> he remarked:

Section 4422 of the bill purports to require the Secretary of Health and Human Services to develop a legislative proposal for establishing a case-mix adjusted prospective payment system for payment of long-term care hospitals under the Medicare program. I will construe this provision in light of my constitutional duty and authority to recommend to Congress such legislative measures as I judge necessary and expedient, and to supervise and guide my subordinates, including the *review* of their proposed communications to the Congress.<sup>119</sup>

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<sup>116</sup> A 1982 OLC Opinion recognized the greater threat to privilege when Congress required "production of recommendations and deliberative documents" after the enactment of legislation, as opposed to proposals for legislative change. OLC Constitutionality of Statute Opinion, *supra* note 72, at 640 n.4.

<sup>117</sup> Even without presidential review, members of the public in most contexts would be unaware of such proposals, and the President or his delegate could always clarify that the proposal differed from that favored by his administration. See Strauss, *Overseer, or "the Decider," supra* note 8, at 727-28.

<sup>118</sup> Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4422, 111 Stat. 251, 414.

<sup>119</sup> Statement on Signing the Balanced Budget Act of 1997, 2 PUB. PAPERS 1053, 1054 (Aug. 5, 1997) (emphasis added).

President Clinton's statement above was an exception because, for the most part, he did not comment on provisions requiring executive branch officials to make legislative recommendations. The first President Bush similarly objected to a provision in legislation establishing the Office of Federal Housing Enterprise Oversight, which provided that the Director "submit 'reports, recommendation, testimony, or comments' to the Congress," but only because Congress had not ensured "prior approval or review by 'any officer or agency of the United States.'"<sup>120</sup> Thus, Presidents Clinton and Bush I on occasion objected to congressional measures that prevented them from overseeing subordinates, but not to congressional directives that executive branch officials submit legislative proposals.

Indeed, President Bush's objections to congressionally required legislative proposals differs in kind from the objections lodged by President Reagan as well. A 1982 OLC opinion entitled "Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress," argues, as Presidents from both parties have asserted, that prior review of legislative proposals is required.<sup>121</sup> This position is controversial in itself.<sup>122</sup> However, the opinion also stated that review by an agency superior, i.e., at least a department head, satisfies the presidential interest.<sup>123</sup> In other words, the opinion seemingly argues that review by a department head or other highly-placed executive branch official is required, but that congressionally mandated proposals for legislation are constitutionally appropriate. Furthermore, contrary to President Bush's view, the opinion suggested that the right was not absolute, but could be overridden by "a compelling and specific need asserted by another branch."<sup>124</sup> On this reading, the President's right to submit a proposal is not exclusive, for department heads may be required to submit proposals to

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<sup>120</sup> Statement on Signing the Housing and Community Development Act of 1992, 2 PUB. PAPERS 2060, 2061 (Oct. 28, 1992) (quoting Housing Community and Development Act of 1992, Pub. L. No. 102-550, § 313(e), 106 Stat. 3672, 3946 (codified at 12 U.S.C. § 4513(e) (2000)).

<sup>121</sup> OLC Constitutionality of Statute Opinion, *supra* note 72, at 640.

<sup>122</sup> See, e.g., Strauss, *Overseer, or "the Decider," supra* note 8, at 725-27 (arguing that presidential review of the reports is not constitutionally required).

<sup>123</sup> See OLC Constitutionality of Statute Opinion, *supra* note 72, at 642-43.

<sup>124</sup> *Id.* at 638. The OLC report admittedly was ambivalent. It asserted that "the Executive has explicitly determined that disclosure of unreviewed recommendations by subordinates within the Executive Branch would adversely affect the President's ability to carry out his responsibilities." *Id.* at 640. To that end, executive branch officials should make "recommendations to the President concerning such legislative action so that the President may review them and determine which measures 'he shall judge necessary and expedient.'" *Id.* (quoting U.S. CONST. art. II, § 3). Thus, when Congress "purports to require a subordinate executive official to present legislative recommendations of its own" it "transgresses upon the President's constitutionally designated role." *Id.* Yet, the report never advanced the position followed by President Bush II that the recommendations power was exclusive.

Congress, and lower level officials may be required to submit a proposal if a coordinate branch demonstrates compelling need.

In contrast to Presidents Clinton and Reagan, therefore, President Bush has read the Recommendations Clause to be exclusive, centralizing more authority in the Chief Executive. President Bush's position denies Congress a fundamental link to the agencies Congress created and oversees. If Congress can require agency heads to submit reports, then it can also require proposals for legislative change, leaving aside the question whether the President must be permitted to review the proposals prior to submission.

### C. *Regulatory Policy Officers*

President Bush's recent promulgation of Executive Order No. 13,422 reinforces his striking assertion of a new form of unitary executive. There, in expanding the scope of rules subject to cost-benefit analysis, President Bush altered the role of Regulatory Policy Officers, who now apparently can be presidential appointees outside of Senatorial consent. The order provides that, "[w]ithin 60 days of the date of this Executive order, each agency head shall designate one of the agency's Presidential Appointees to be its Regulatory Policy Officer."<sup>125</sup> The Bush order subtracted the prior order's language that the agency's political officer "shall report to the agency head,"<sup>126</sup> and that the agency's regulatory plan "shall be approved personally by the agency head."<sup>127</sup> The Regulatory Policy Officer is to ensure that the delegation from Congress is carried out in conformance with the President's policy preferences, and apparently reports to the President, not the agency head.<sup>128</sup> Moreover, the order provides that "[u]nless specifically authorized by the head of the agency, no rulemaking shall commence . . . without the approval of the agency's Regulatory Policy Office[r]."<sup>129</sup> Under the order, the senatorially confirmed agency head loses power at the expense of the Regulatory Policy Officer.<sup>130</sup> The tension between the Regulatory Policy Officer's mission to comply with the executive order and the agency head's mission to carry out the terms of the congressional delegation is apparent.<sup>131</sup>

<sup>125</sup> Exec. Order No. 13,422, § 5(b), 72 Fed. Reg. 2763, 2764 (Jan. 18, 2007).

<sup>126</sup> Compare *id.*, with Exec. Order No. 12,866, § 6(a)(2), 3 C.F.R. 638, 645 (1994), reprinted in 5 U.S.C. § 601 app. at 638, 640 (2000).

<sup>127</sup> Compare Exec. Order No. 13,422, § 4(b), 72 Fed. Reg. 2763, 2764 (Jan. 18, 2007), with Exec. Order No. 12,866, § 4(c)(1), 3 C.F.R. 638, 642 (1994), reprinted in 5 U.S.C. § 601 app. at 638, 639 (2000).

<sup>128</sup> See Exec. Order No. 13,422, §§ 4(b), 5(b), 72 Fed. Reg. 2763, 2764 (Jan. 18, 2007).

<sup>129</sup> *Id.* § 4(b).

<sup>130</sup> To date, many of the regulatory policy officers appointed have been general counsels, and some of the appointees have not been subject to Senate confirmation. See Office of Management and Budget, Agency Regulatory Policy Officers (as of Feb. 7, 2008), [http://www.whitehouse.gov/omb/inforeg/regpol/agency\\_reg\\_policy\\_officers.pdf](http://www.whitehouse.gov/omb/inforeg/regpol/agency_reg_policy_officers.pdf).

<sup>131</sup> See Strauss, *Overseer, or "the Decider," supra* note 8, at 732-38.

To be sure, President Clinton also marginalized agency heads, both by applying the cost-benefit orders to independent agencies<sup>132</sup> and by taking credit personally for rules promulgated and initiatives instigated by department heads.<sup>133</sup> Furthermore, Executive Order No. 12,866 established a regulatory policy officer to aid agencies in more rigorous cost-benefit and policy analysis.<sup>134</sup> Yet, Executive Order No. 13,422 goes beyond previous executive orders by formally challenging the authority of the agency head, setting up a rival for power. President Clinton, in contrast, never second-guessed Congress's discretion to vest final decision making in subordinates.

Moreover, under President Reagan, the OLC justified imposing the cost-benefit requirements of Executive Order No. 12,291, the predecessor of Executive Order No. 12,866, on the presidential responsibility "to 'supervise and guide' executive officers in 'their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws.'"<sup>135</sup> There was no intimation of displacing the discretion of the constitutional officers who had been approved by the Senate. In fact, the Opinion stressed that such presidential "supervision is more readily justified when it does not purport wholly to displace, but only to guide and limit, discretion which Congress has allocated to a particular subordinate official."<sup>136</sup> The Opinion then cited the Supreme Court's admonition in *Myers v. United States* that "there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance."<sup>137</sup> The Opinion summarized that "[t]his Office has often taken the position that the President may consult with those having statutory decision making responsibilities, and may require them to consider statutorily relevant matters that he deems appropriate, as long as the President does not divest the officer of ultimate statutory authority."<sup>138</sup> Comparison with President Bush's current executive order highlights the shift from supervision to supplanting.

In sum, President Bush's signing statements and recent executive order reflect a coherent picture of a robust centralized presidency. In President

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<sup>132</sup> Exec. Order No. 12,866, § 4(b)-(c), 3 C.F.R. 638, 642 (1994), *reprinted in* 5 U.S.C. § 601 app. at 638, 639 (2000).

<sup>133</sup> *See supra* text accompanying notes 62-65.

<sup>134</sup> *See* Exec. Order No. 12,866, § 6(a)(2), 3 C.F.R. 638, 645 (1994), *reprinted in* 5 U.S.C. § 601 app. at 638, 640 (2000). For general discussion, see DeMuth & Ginsburg, *supra* note 48, at 1085 (describing OMB's role in one regulatory policy review as the "resolution of a complex and contentious jurisdictional conflict between two agencies"); Kagan, *supra* note 64, at 2290.

<sup>135</sup> Proposed Executive Order Entitled "Federal Regulation," 5 Op. Off. Legal Counsel 59, 60 (1981) (quoting *Myers v. United States*, 272 U.S. 52, 135 (1926)).

<sup>136</sup> *Id.* at 61.

<sup>137</sup> *Id.* at 62 (quoting *Myers*, 272 U.S. at 135).

<sup>138</sup> *Id.*

Bush's view, final authority can only be vested in himself, only he can make recommendations for legislative reform, and only he can ensure that rules enacted by agencies fulfill the congressional mandate. President Bush's signing statements make the case that delegated authority from Congress must not only be subject to his supervision, but to his personal control. Under this rationale, if Presidents can exercise all authority delegated by Congress to subordinate officials, it is far less critical that they possess the removal authority. The supervisory tools of appointment and removal, which had been the focal point of Presidents Reagan's and Bush I's quests for greater unitary authority, would become much less salient.<sup>139</sup> Congress initially can determine where to lodge particular authority, but the President subsequently can alter that framework to make the decision himself or assign the decision making to OMB or others. Congress may as well delegate everything directly to the President for him to parcel out to whomever he pleases.

President Bush's view marks out new territory.<sup>140</sup> For the most part, his predecessors staked a claim for enhanced control through exercise of appointment and removal authority, as well as through internal management orders. They respected Congress's delegation to agency officials, yet wished to influence agency heads' exercise of authority to ensure fidelity to presidential policy preferences and to enhance accountability in the public eye.

To that end, President Bush's predecessors argued for the plenary power to remove all executive branch officials at will. President Reagan most famously urged that theory upon the Supreme Court, first in *Bowsher*<sup>141</sup> and then in *Morrison v. Olson*.<sup>142</sup> President Bush I acted consistently with that theory in

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<sup>139</sup> See *infra* Part III.B.

<sup>140</sup> The super-strong variant of the unitary executive theory finds some roots in prior presidential administrations. Long ago, Attorney General Caleb Cushing asserted that no agency head "can lawfully perform an *official* act against the will of the President." Relation of the President to the Executive Departments, 7 Op. Att'y Gen. 453, 469-70 (1855). Similarly, Attorney General Wirt declared in the midst of the Civil War that "the true theory of departmental administration is, that heads of the Executive Departments shall discharge their administrative duties in such manner as the president may direct; they being, as one of my predecessors terms them 'executors of the will of the President.'" Relation of the President to the Executive Departments, 10 Op. Att'y Gen. 527, 527 (1863) (quoting 7 Op. Att'y Gen., *supra*, at 463). For a discussion of competing views of Attorneys General, see generally Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 717-28 (2005).

Moreover, some academics have championed the super-strong variant. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 568-70 (1994) ("Does Article II's vesting of the President with all of the 'executive power' give him control over all federal governmental powers that are neither legislative nor judicial? The answer is unambiguously yes."); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1242 (1994).

<sup>141</sup> See *supra* notes 37-38 and accompanying text.

<sup>142</sup> See *supra* notes 41-43 and accompanying text.

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threatening to fire members of the Postal Board of Governors in light of their refusal to withdraw a brief filed in court.<sup>143</sup> President Clinton's signing statements reflect his sympathy to this view.<sup>144</sup> Yet, those three Presidents recognized that congressional designation of a particular officer to make rules or legislative recommendations entitled the officer latitude to exercise that authority as a formal matter. Officers could be fired for imprudent steps, but the discretion was theirs. The fact that President Bush's three predecessors advocated closer supervision over agencies should not obscure the fundamentally new direction of President Bush's statements and actions.

### III. IMPLICATIONS OF PRESIDENT BUSH'S UNILATERAL VERSION

To this point, I have argued that President Bush's signing statements and Executive Order No. 13,422 reflect a more extreme view of the unitary executive than that shared by his predecessors. If followed, President Bush's theory of the unitary executive would substantially alter the administrative state. Most notably, officers in the executive branch would lose more independence than under variants of the unitary executive theory followed by his predecessors; as a result, the unitary executive would transform into a unilateral presidency.

To date, President Bush has only pursued the logic of his theory in discrete settings. This Section traces some of the broader ramifications of the new theory in the contexts of agency adjudication and rulemaking, less formal agency actions, and reorganization of the executive branch.

#### A. *Agency Adjudication and Rulemaking*

Congress, in many contexts, has long delegated final authority to subordinate executive officials. The clearest example lies in the field of adjudication. The Administrative Procedure Act prescribes detailed procedures for how agencies are to adjudicate cases falling within their jurisdiction.<sup>145</sup> For the President to intervene in a case on the basis of a supplanting power would extend the unitary executive vision beyond recognizable bounds. Administrative law judges must decide issues based on evidence before them, and reviewing agencies are to rule based on the record. Permitting a President to interfere directly with these adjudications would subvert the integrity of the proceedings, insinuating *ex parte* contacts into deliberations and replacing the multi-member adjudicatory commission with a single decision maker. Intervention by the President might violate not only the APA in a formal adjudication over a license, benefit, or award of spectrum, for instance, but also the Due Process Clause by depriving a claimant of a fair opportunity to defend the property or liberty interest.

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<sup>143</sup> See *supra* notes 50-53 and accompanying text.

<sup>144</sup> All three Presidents also attacked *Chadha*-type arrangements.

<sup>145</sup> Administrative Procedure Act, 5 U.S.C. §§ 551-559 (2000).

The Supreme Court's decision in *United States ex rel. Accardi v. Shaughnessy*<sup>146</sup> reflects this approach in an analogous context. In that case, the Court held that the Attorney General could not substitute his decision for that of individuals whom he had appointed to adjudicate immigration disputes.<sup>147</sup> The Attorney General was bound to abide by the existing procedures for resolving petitions to suspend deportability.<sup>148</sup> *Accardi* strongly rejects the notion of any supplanting authority. At least in the adjudicative setting, superior officers cannot bypass a regulatory scheme to supplant the decision making of subordinates.<sup>149</sup>

Those defending President Bush's view perhaps might carve out an exception to permit "final authority" for agency adjudicators. Yet, the Court is unlikely to approve of supplanting authority in other on-the-record proceedings such as rulemaking. For instance, in *Portland Audubon Society v. Endangered Species Committee*<sup>150</sup> an appellate court considered allegations of presidential meddling into the decision making of a multi-member commission determining whether to grant an exemption to the Endangered Species Act.<sup>151</sup> Even though the President could have removed commissioners at will, the court concluded that presidential intervention would be illegal given that Congress had delegated the decision to the Commission as opposed to the President.<sup>152</sup> Courts in other cases have further noted that agency rules cannot be upheld by reference to political preferences; rather, the agency must justify the rule by the purposes underlying the statute.<sup>153</sup> If the President intervened, he or she could conceivably defend a rule based on those same congressional purposes, but not on politics.<sup>154</sup>

Furthermore, presidential supplanting of officers exercising rulemaking functions would undermine the congressional intent behind determining which

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<sup>146</sup> 347 U.S. 260 (1954).

<sup>147</sup> *Id.* at 266-68.

<sup>148</sup> *Id.* at 267.

<sup>149</sup> For a discussion of *Accardi*, see generally Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569 (2006).

<sup>150</sup> 984 F.2d 1534 (9th Cir. 1993).

<sup>151</sup> *Id.* at 1536-37.

<sup>152</sup> *See id.* at 1547-48.

<sup>153</sup> *See, e.g., Sierra Club v. Costle*, 657 F.2d 298, 404-08 (D.C. Cir. 1981) (stating that the EPA must place conversations with the President on the administrative record if the EPA partly based its ultimate decision on that conversation), *rev'd on other grounds*, 463 U.S. 680 (1983); *see also* Pub. Citizen Health Research Group v. Tyson, 796 F.2d 1479, 1483-84, 1507 (D.C. Cir. 1986) (noting the difficult constitutional question arising from OMB's participation in rulemaking).

<sup>154</sup> As the court stated in *Sierra Club v. Costle*, "it is always possible that undisclosed Presidential prodding may direct an outcome that *is* factually based on the record, but different from the outcome that would have obtained in the absence of Presidential involvement." *Sierra Club*, 657 F.2d at 408.

official is to exercise particular responsibilities.<sup>155</sup> Congress often makes judgments as to whether particular duties are better discharged by the President himself or by a subordinate.<sup>156</sup> President Bush's theory threatens to uproot Congress's ability to make judgments as to the proper delegate to exercise law enforcement functions or to formulate regulatory policy.

Indeed, the very legitimacy of the so-termed independent agencies rests on the premise that Congress may determine that it is advantageous to vest particular responsibilities in agency heads shielded from the President's plenary removal authority. The Supreme Court has defended that conception, most notably in the *Morrison v. Olson* decision.<sup>157</sup> In exercise of that discretion, Congress has determined that particular adjudications, such as those at the Securities and Exchange Commission, and particular policymaking, such as at the Federal Reserve Board, should be independent. A supplanting authority would deny to Congress the authority to determine when independence best serves the public interest.

An Attorney General Opinion in 1823 encapsulated the issue well:

If the laws . . . require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.<sup>158</sup>

At stake was whether a disappointed military officer could appeal to the President the decision of the Treasury Department in a dispute concerning accounts owed. The opinion stated that "it could never have been the intention of the constitution, in assigning this general power to the President to take care that the laws be executed, that he should in person execute the laws himself. . . . The constitution assigns to Congress the power of designating the

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<sup>155</sup> For example, Congress created the FTC largely because it did not trust the DOJ in antitrust matters. See Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 81 (1983); see also Humphrey's Ex'r v. United States, 295 U.S. 602, 625-26 (1935), stating:

Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service – a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.

Congress's decision would be superfluous under the aggressive position advanced by the Bush Administration.

<sup>156</sup> See Kevin M. Stack, *The President's Statutory Powers To Administer the Laws*, 106 COLUM. L. REV. 263, 322-23 (2006) (concluding that Congress has distinguished between delegations to Presidents and other executive branch officials).

<sup>157</sup> See *Morrison v. Olson*, 487 U.S. 654, 685-97 (1988).

<sup>158</sup> *The President and Accounting Officers*, 1 Op. Att'y Gen. 624, 625 (1823).

duties of particular officers . . .”<sup>159</sup> Once the accounts were settled “by the accounting officers appointed by law,” the result was “final and conclusive, so far as the executive department of the government is concerned.”<sup>160</sup>

In limited contexts, courts previously have held that Congress’s determination where to lodge such authority has legal consequence. Consider the Supreme Court’s nineteenth-century decision in *Kendall v. United States*.<sup>161</sup> There, Congress had enacted a statute requiring the Postmaster General to pay parties according to an amount determined by a department solicitor.<sup>162</sup> The Court stated:

There are certain political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the President. But it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.<sup>163</sup>

The Court reasoned that, particularly in light of the “ministerial” nature of the act in question, the President had no power to second-guess the Postmaster’s determination.<sup>164</sup> Recognizing a presidential power to change the determinations of subordinates “would be clothing the President with a power entirely to control the legislation of congress.”<sup>165</sup> President Bush’s adherence to a super-strong version of the unitary executive would undo the understanding in *Kendall*.<sup>166</sup>

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 629.

<sup>161</sup> 37 U.S. (12 Pet.) 524 (1838).

<sup>162</sup> *Id.* at 524.

<sup>163</sup> *Id.* at 610.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 613.

<sup>166</sup> The Supreme Court has variegated review of administrative action based on the identity of the official proffering the interpretation. It matters to the Court which agency interpreted the law. The interpretation of those charged by Congress with the duty to administer the particular statute receives greater deference. In *Martin v. Occupational Safety & Health Review Commission*, 499 U.S. 144 (1991), the Court held that *Chevron* deference would be applied only to an interpretation by the agency that had crafted the regulation at stake. *See id.* at 158. The Court’s decision recognized Congress’s interest in appointing specific agencies as principal architects of particular policies, and it is only those agencies whose interpretations warrant deference. President Bush’s position elides those distinctions among agency heads – all might be entitled to equal deference given that they all reflect presidential policy equally.

The Court’s decision in *Gonzales v. Oregon*, 546 U.S. 243 (2006), is to similar effect. There, the Court refused to pay deference to an Attorney General’s interpretation of the Controlled Substances Act in part because Congress did not intend to give the Attorney

B. *Impinging on Agency Heads' Power over Internal Agency Matters*

A presidential power to supplant on-the-record determinations by agency heads would also open the door for Presidents to involve themselves in internal agency matters. Presidents presumably would be able directly to supplant any planned initiative of a subordinate with which the President disagrees, whether a health care proposal or a hiring decision. Presidents or their designees could command the minutiae of agency activities irrespective of the agency head's wishes. Agency heads could resign in frustration, but Presidents would not need the removal power to ensure conformance with their priorities. Forcing Presidents to exercise the removal authority when warranted, however, ensures some modicum of independence of judgment. Presidents must face the political costs associated with removals.

Throughout our history, Presidents have resorted to the removal authority with caution. President Bush I, for instance, threatened to remove heads of the U.S. Postal Service for failing to withdraw their brief in the dispute with the U.S. Postal Commission,<sup>167</sup> and President Franklin Roosevelt removed William Humphrey from the Federal Trade Commission.<sup>168</sup> Such removals are relatively rare because they have political ramifications. Presidents may face repercussions from the press or within their own party from such removals. There are costs in training a new agency head, which may well result in a loss of productivity during the transition. The removal power is a blunt tool to accomplish policy goals or attain consistency in approach across agencies.

Moreover, an agency head's formal power to formulate policy creates the baseline that a President or OMB must alter in order to change policy preferences. It sets a presumption, in other words, that the agency head's word governs, subject to jawboning or OMB review. The power of inertia rests with the agency, and such inertia accounts for the formidable power exercised by agency heads except in politically salient cases. The agency head risks dismissal for following policy not preferred by OMB or the President, but the agency head knows that dismissal will be reserved for rare occasions.

Some might argue that there is little distinction between recognizing supplanting authority and supervisory authority. A presidential threat to remove an agency head if he or she does not change policy may well do the trick.<sup>169</sup>

Consider, however, the famed Saturday Night Massacre, which witnessed President Nixon ordering Attorney General Elliot Richardson to fire the special counsel, Archibald Cox, who led the investigation into the Watergate break-in

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General, as opposed to the Secretary of Health and Human Services, the power to shape regulation of the health profession. *See id.* at 255-56. The Court therefore has recognized at least one consequence flowing from Congress's power to determine where to lodge particular powers.

<sup>167</sup> *See supra* notes 50-53 and accompanying text.

<sup>168</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602, 619-20 (1935).

<sup>169</sup> For insightful analysis, see generally Percival, *supra* note 8.

and cover-up.<sup>170</sup> Richardson resigned, as did his deputy, William Ruckelshaus, rather than discharge Cox.<sup>171</sup> Reportedly, President Nixon gave Richardson and Ruckelshaus little choice; it was either fire the counsel or lose their jobs. Under the supplanting theory, however, President Nixon could have fired Cox in Richardson's name, no doubt meliorating the subsequent outcry at the forced resignations.

The Watergate dismissals replicated an administrative drama that occurred over one-hundred years earlier. In light of his opposition to the Second Bank of the United States, President Andrew Jackson directed the Secretary of the Treasury, Louis McLane, to remove the federal government's deposits from the Bank and deposit them in state banks instead. Secretary McLane refused because of his conviction that Congress had directed him to keep the funds there. President Jackson thereupon fired McLane for the refusal, and then fired McLane's successor, William Duane, for the same reason.<sup>172</sup> The discharges fueled a showdown with Congress that Jackson narrowly won. Had President Jackson been able to remove the deposits himself in the Secretary's name, the outcry likely would have been more tepid.

To be sure, agency heads can always resign if the President pursues an action in their name that displeases them. However, the impact of a resignation after the fact is far less severe than one *ex ante*. The message, after all, in Richardson's before-the-fact resignation was more poignant than that for Robert Bork's resignation after he discharged Cox. Furthermore, at times, Presidents have balked from removing officials even when they have refused to follow orders.<sup>173</sup> Thus, a presidential power to direct internal agency decision making would further extend the unitary executive principle.

### C. *Reorganizing the Executive Branch*

Under the super-strong view of the unitary executive, Presidents might possess *carte blanche* to reorganize the executive branch. After all, it would make little difference whether Congress delegated a particular function to the FTC or DOJ if ultimate authority remains vested in the President and the President can supplant the authority of either agency. It is a small step to switch responsibilities among executive branch officials. The President may seek recommendations for legislative change, proposed regulations, or even enforcement initiatives from officials other than those designated by Congress.

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<sup>170</sup> *Id.* at 1004.

<sup>171</sup> *Id.*

<sup>172</sup> For a recent retelling of the story, see Strauss, *Overseer, or "the Decider," supra* note 8, at 706.

<sup>173</sup> See Percival, *supra* note 8, at 1004 n.241 (noting that the White House "backed off" of a demand for the EPA to seek a stay of a court order after the EPA Administrator threatened to resign over the issue); Strauss, *Overseer, or "the Decider," supra* note 8, at 707 ("[Political] visibility might lead a President simply to accept his official's contrary-to-advice decision.").

Indeed, Presidents have long asserted the power to delegate to others, such as the OMB, power nominally vested in the office of the President.<sup>174</sup>

Yet, the power to reorganize the executive branch traditionally has been thought to rest in the province of Congress. Congress has passed a number of reorganization acts to establish the framework for when Presidents can reassign functions from one officer or agency to another. In the Overman Act of 1918, for instance, Congress authorized the President “to coordinate or consolidate executive bureaus, agencies, and offices . . . in the interest of economy and the more efficient concentration of the Government.”<sup>175</sup> The Reorganization Act of 1949 forbade the President to propose abolition or consolidation of executive departments.<sup>176</sup> Congress on numerous occasions blocked President Truman’s efforts to reorganize the executive branch, and reorganization efforts of Presidents Kennedy, Nixon, and Carter failed for want of congressional approval.<sup>177</sup> The power to set limits on reorganization preserves Congress’s initial power not only to determine which functions should be exercised by which officers, but which powers belong to the respective administrative agencies.

Through reorganizing, Presidents can bypass the Appointments Clause. If a President shifts all of the Secretary of the Interior’s workload to the Secretary of Agriculture, then the Secretary of Agriculture’s duties have changed significantly enough to warrant senatorial consent for the newly created office. The Supreme Court has not considered the issue, yet in the analogous context of congressional delegations, it held that Congress can only graft new duties upon an existing office if the duties are germane to the original office. Otherwise the addition of new duties can circumvent the President’s power under the Appointments Clause.<sup>178</sup> Conversely, if Presidents assign substantial unrelated duties to a particular officer, the Senate’s power to participate in the appointment of an officer with a particular set of duties would be evaded. Thus, presidential reorganization threatens not only to bypass Congress’s power to determine where to lodge particular powers, but also the Senate’s power to consent to presidential appointments.

Although there have been few judicial tests of Presidents’ power to reorganize the executive branch, consider the Supreme Court’s decision in *Isbrandtsen-Moller Co. v. United States*.<sup>179</sup> There, an ocean liner attempted to set aside a ruling by the Secretary of the Commerce requiring the carrier to make particular filings with the Secretary as mandated under the Shipping Act

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<sup>174</sup> See Percival, *supra* note 8, at 981-86.

<sup>175</sup> Overman Act pmb., ch. 78, 40 Stat. 556, 556 (1918).

<sup>176</sup> Reorganization Act of 1949, § 5(a)(1), ch. 226, 63 Stat. 203, 205.

<sup>177</sup> See generally PERI E. ARNOLD, MAKING THE MANAGERIAL PRESIDENCY (1986).

<sup>178</sup> See *Weiss v. United States*, 510 U.S. 163, 174 (1994); *Shoemaker v. United States*, 147 U.S. 282, 301 (1893).

<sup>179</sup> 300 U.S. 139 (1937).

of 1916.<sup>180</sup> By executive order, President Roosevelt abolished the Shipping Board and transferred its functions to the Department of Commerce.<sup>181</sup> The liner argued that, because Congress had not itself authorized such reorganization, then the executive order was invalid, and the liner could not be penalized for failing to make the filings with the Department of Commerce.

The Supreme Court assumed, without deciding, that the President's reorganization was not valid given that the President did not seek congressional authorization or follow the procedures set out in the Reorganization Act. Nonetheless, the Court held that, because Congress later ratified the executive order in the Merchant Marine Act of 1936,<sup>182</sup> no constitutional problem remained.<sup>183</sup>

Through an executive order, President Bush announced in the wake of September 11th that he was creating a Homeland Security Council within the Office of the White House.<sup>184</sup> Consider whether instead he could have created a new Department without Congress's authority.<sup>185</sup> Consistent with his other actions, President Bush could have claimed the inherent authority to reorganize the executive branch. To him, after all, it was immaterial for the most part whether Congress had specified the CIA or FBI Director for particular duties because the ultimate decision making rests in the office of the President.

Indeed, prior to congressional establishment of the new Department, a Congressional Research Service Report asserted,

[W]ith the submission of the President's FY2003 budget, the Bush Administration appears to be attempting to transfer programs from agencies through funding consolidations. For example, the programs and \$234.5 million budget of the Office of Domestic Preparedness, Department of Justice, would be transferred to the Federal Emergency Management Agency. . . . [T]he propriety of moving program responsibilities and related funds without statutory authority appears to be highly questionable.<sup>186</sup>

President Bush apparently claimed the authority to rearrange both funding and responsibilities between executive branch agencies.

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<sup>180</sup> Shipping Act of 1916, § 21, ch. 451, 39 Stat. 728, 736.

<sup>181</sup> Exec. Order No. 6,166, §12, *reprinted in* 5 U.S.C. § 901 app. at 659, 662 (2000).

<sup>182</sup> Merchant Marine Act, 1936, ch. 858, 49 Stat. 1985.

<sup>183</sup> *Isbrandtsen-Moller*, 300 U.S. at 149.

<sup>184</sup> Exec. Order No. 13,228, § 1, 3 C.F.R. 796, 796 (2001), *reprinted as amended in* 50 U.S.C. § 402 app. at 15, 15 (Supp. 2004).

<sup>185</sup> Ultimately, Congress shifted to the new agency responsibilities formerly exercised by the Department of Justice, the CIA, and the Federal Emergency Management Agency, among others. See Homeland Security Act of 2002, Pub. Law No. 107-296, 116 Stat. 2135 (codified in scattered sections of 6 U.S.C.).

<sup>186</sup> HAROLD C. RELYEA, CONGRESSIONAL RESEARCH SERVICE, EXECUTIVE BRANCH REORGANIZATION AND MANAGEMENT INITIATIVES 8 (2002).

In another example, President Bush announced in early 2008 that he intended to transfer the functions of the Office of Government Information Services from the National Archives to the Department of Justice.<sup>187</sup> A month earlier, Congress created the new office, which was designed to mediate claims involving Freedom of Information Act (FOIA) requests in lieu of litigation. Congress evidently placed it in the National Archives to assure a measure of independence. Nonetheless, President Bush announced the shift in the Fiscal Year 2009 budget proposal sent to Congress.<sup>188</sup> As in the Office of Domestic Preparedness example, President Bush sought to use the budget process to transfer an office from one agency to another.

Precedent, however, would not have treated kindly the President's unilateral reorganization and creation of executive agencies. Consider an OLC decision under President Reagan reporting on whether the President could create a new agency to administer particular foreign aid funds.<sup>189</sup> The OLC concluded that the Appointments Clause prevented establishment of such an agency: "To our knowledge the question has never been definitively adjudicated, but the language of the Appointments Clause and the historic practice of the Executive and Legislative Branches suggests strongly that offices of the United States must be created by Congress."<sup>190</sup> Indeed, the OLC forged the connection to reorganization: "This understanding has also generally been reflected in the Executive Branch's acquiescence in the need for reorganization legislation in order to restructure or consolidate agencies within the Executive Branch."<sup>191</sup> The change between the Reagan and Bush administrations is palpable.

Indeed, the OLC under President Bush, in considering a proposal to centralize border control policy, itself opined:

Congress may prescribe that a particular executive function may be performed only by a designated official within the Executive Branch, and not by the President. The executive power confers upon the President the authority to supervise and control that official in the performance of those duties, but the President is not constitutionally entitled to perform those tasks himself.<sup>192</sup>

The OLC Opinion repudiates the logic of many of President Bush's signing statements.

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<sup>187</sup> See *White House Plan To Put New FOIA Office in Justice Department Draws Lawmakers' Ire*, 76 U.S.L.W. (BNA) 2441, 2441 (Jan. 29, 2008).

<sup>188</sup> See Press Release, Senator Patrick Leahy, FOIA Ombudsman Belongs at Archives, Not DOJ (Feb. 14, 2008), available at <http://leahy.senate.gov/press/200802/021408a.html>.

<sup>189</sup> *Limitations on Presidential Power To Create a New Executive Branch Entity To Receive and Administer Funds Under Foreign Aid Legislation*, 9 Op. Off. Legal Counsel 76, 76 (1985).

<sup>190</sup> *Id.* at 77.

<sup>191</sup> *Id.* at 78.

<sup>192</sup> *Centralizing Border Control Policy Under the Supervision of the Attorney General*, 26 Op. Off. Legal Counsel, slip op. at 2 (2002).

President Bush most likely acted correctly in awaiting congressional authorization before reorganizing the executive branch's capacity to fight terrorism. Yet, if one acknowledges Congress's right to create offices and delegate duties to particular officers, it is difficult to understand President Bush's contemporaneous objections to the delegation of "final" authority to agency officials, the specification that he act in concert with particular officials, and the requirement that agencies propose new legislation to Congress. Furthermore, President Bush's directive that "presidential appointees," as opposed to agency heads, assume much of the responsibility for fashioning major rules flies in the face of the OLC Opinion and prior iterations of the unitary executive.

Ultimately, the question in all the contexts is whether the President's power to superintend the executive branch trumps Congress's power under Article I to vest particular responsibilities in particular officeholders. Although I have not fleshed out a full-fledged analysis in this Essay, as a historical matter, Congress has long made such designations, and both courts and Presidents have concurred in the specifications. Indeed, the Senate's power to consent to appointments reinforces the importance of the position of executive branch officeholders within the constitutional scheme. Combining the power to create offices with the Senate's power to reject presidential nomination of officeholders reflects the Framers' decision to vest Congress with a critical role in determining the identity of the officer exercising delegated authority subject to presidential supervision. Lower courts have held that the President's discretion to issue executive orders cannot override statutes,<sup>193</sup> and the Supreme Court has held that the President's removal authority must be accommodated on a case-by-case basis with Congress's power to determine when an officer's independence of judgment would best serve the public.<sup>194</sup> Such precedents would not likely permit the President to countermand legislative direction to an officer to exercise final authority or make a legislative recommendation. The flaw in President Bush's theory of the super-strong unitary executive is that it brooks no accommodation with the congressional power to determine which officeholder is to exercise which function.<sup>195</sup>

Perhaps we should not construe the Bush Administration's pronouncements about presidential power in the administrative state to reflect a full theory. Maybe they are more like trial balloons to assess how much delegated authority from Congress to the executive branch can be centralized within the

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<sup>193</sup> See *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996) (rejecting President Clinton's order that contracting agencies of the government were not to contract with employers that permanently replace striking employees as inconsistent with the NLRA which guarantees the right to hire permanent replacements).

<sup>194</sup> See *Morrison v. Olson*, 487 U.S. 654, 673-77 (1988).

<sup>195</sup> See Harold J. Krent, *The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash*, 91 CORNELL L. REV. 1383, 1401-02 (2006).

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office of the President. President Bush's statements nonetheless should be taken at face value lest the arguments in defense of regulatory political officers or exclusive presidential authority to recommend legislation spill over to reorganization or rulemaking. Article II in no way prescribes unilateralism within the executive branch.

#### CONCLUSION

The Bush Administration has presented a new theory of the unitary executive. That conception, if realized, threatens to uproot Congress's power to create offices and then provide for officeholders who can exercise discretionary authority apart from immediate presidential control. Put another way, the question is whether we should have a Commander-in-Chief at the apex of our administrative structure.

Such an extension of the unitary executive theory founders on Congress's constitutional authority to create numerous agencies and staff such agencies with officers. Congress cannot appoint those officers, but it can decide which offices to create. It has never been thought that such determinations were merely cosmetic; rather, they reflect Congress's considered determination as to where particular instances of executive authority – whether investigations, law enforcement, or rulemaking – should be lodged.

Prior Presidents have also zealously advocated a strong unitary executive. However, President Bush's predecessors were careful to allow subordinate officials the ultimate discretion to determine which positions to take, whether in adjudication, rulemaking, or dismissals. Presidents can coordinate and influence that discretion but cannot take it over directly.

President Bush's views and actions therefore are as novel as they are unwarranted. No line of authority supports a presidential power to supplant the actions of agency heads. Interest in a strong executive under Article II must be accommodated with congressional power to create offices and to determine where particular authorities should be lodged. President Bush's positions denigrate the respect due such officers and, more importantly, threaten to cut off contacts between Congress and subordinate executive branch officials, a result that dampens the prospect for constructive cooperation between the two branches. In sum, President Bush has confused a unitary ideal for a unilateral one. Presidents must be accountable for executive branch actions, yet they must superintend law administration within the framework set by Congress. Otherwise, unilateralism in the administrative arena may prove as dangerous to the nation as unilateralism in foreign affairs.