

## A POLITICAL PERSPECTIVE ON THE THEORY OF THE UNITARY EXECUTIVE

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This Essay offers a brief and highly speculative political, intellectual, and legal history of the theory of the unitary executive in the late twentieth century.<sup>1</sup> I suggest that that theory developed in three stages, which I label the *weak*, the *strong*, and the *super-strong* versions, and confronted one alternative that superficially resembled the theory of the unitary executive but that actually served quite different political, intellectual, and legal purposes. Further, I suggest that the second stage followed the first, and the third the second; the weak version was articulated on the arrival of the Reagan administration in 1981, the strong version during the late Reagan and Bush I administrations, and the super-strong version during the Bush II administration.<sup>2</sup> And, finally, as those temporal linkages suggest, I will argue that each version of the theory and its alternative fit into the political agendas of these four administrations and were thought to be solutions to specific problems each administration faced.

A preliminary note on what I mean by a “theory” of the unitary executive: my argument is, in part, that such a theory emerged out of the political setting the Reagan administration faced.<sup>3</sup> This is not to say, of course, that arguments for the proposition that the President has important and indivisible powers were not made before then, nor that there were no earlier cases and practices supporting that proposition. Indeed, a theory, in the sense I use the term, would be senseless absent such cases and practices. But, I believe, when claims

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1 The history is speculative because I have not done the necessary archival research to find support for many of my suggestions.

2 The alternative theory was the creature of the Clinton and (perhaps) the Obama administrations.

3 One indication of the timing of the theory’s emergence is that a February 2009 search of the HeinOnline law review data base produced 1,118 hits for “unitary executive,” of which only eight occurred prior to 1981. (Two or three of the latter dealt exclusively with state-level arrangements, but presumably so would some number of the larger number of hits.)

about the President's authority within the national executive structure were made before the Reagan administration, they were not part of a general theory about the unitariness of the executive. A theory of the unitary executive brings together into an integrated, overarching account ideas, cases, and practices that earlier were as a matter of legal "consciousness" understood to deal with discrete topics. Importantly, the theory will be only partly integrated as it develops. In consequence, at some intermediate stage of the theory's development, proponents of the theory will still treat some doctrines about presidential power as independent of the partially integrated theory they have at hand. Only later will those doctrines be themselves integrated into a now broader theory of the unitary executive.<sup>4</sup>

Consider federalism as an analogue. At one point, and to some extent still, courts use one set of doctrinal tools to determine whether the Constitution gives Congress the power to regulate some subject by exercising its power to regulate commerce among the several states, and another set of doctrinal tools to determine whether a condition Congress imposes on states that receive federal funds is constitutionally permissible. At another point, scholars and the courts begin to see both problems as problems of "federalism," and develop a "theory" of federalism into which both sets of doctrines fit comfortably—and, to the extent that specific doctrines do not fit easily into the theory of federalism, those doctrines are criticized by scholars and adjusted by the courts so that they *do* fit.

One can account for the development of theories of this sort in a number of ways. A purely intellectual interest in reducing doctrinal complexity might motivate a scholar to develop a theory, for example. In this Essay, I offer a mainly political account of the development of the theory of the unitary executive. Pure doctrine is not absent from my account, though. Specifically, the solution of the doctrinal problems that are the focus of the theory's development at one stage opens up new doctrinal questions.<sup>5</sup> If the political circumstances are favorable, those questions will be addressed and the answers integrated into a broader theory.<sup>6</sup>

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4 And, of course, on the level of individual commitment, a person can entirely reasonably contend that, although others include many doctrines within their theory of the unitary executive, she does not think that one or more of them should be integrated into such a theory.

5 The typical form of such questions is something like this: Doesn't the position the theory takes on *this* question imply that it needs to offer an answer to *that* one?

6 If the circumstances are not favorable, the open questions will come to be understood as reasonably excluded from the theory's scope.

## I. THE WEAK THEORY OF THE UNITARY EXECUTIVE

According to the weak theory, to which Professors Calabresi and Yoo subscribe, the national executive is unitary in the sense that the President has the power to provide policy direction to officers of the United States,<sup>7</sup> to remove from their positions any such officers who refuse to comply with the President's policy directions, and (perhaps) to implement presidentially determined policy directly by transmitting policy directives to employees who are obliged to carry them out or themselves face dismissal.<sup>8</sup> This theory seems so weak that one would be hard-pressed to understand why it emerged until one took into account its political context.

That context was the arrival of the Reagan administration in 1981. That administration faced several challenges from a bureaucratic or staffing point of view. Its leadership was committed to a substantial change in the national government's programmatic commitments. In political scientist Stephen Skowronek's terms, Ronald Reagan was a "reconstructive" President.<sup>9</sup> Understanding that the New Deal and Great Society constitutional orders were vulnerable, Reagan sought to restructure the national government through a "new Federalism" that devolved power to the states, while maintaining a substantial worldwide military posture. According to Skowronek, reconstructive Presidents must both destroy the remnants of the constitutional order they seek to replace, and construct new institutions that implement the new constitutional order and, importantly, provide it with the political resources to perpetuate itself.

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<sup>7</sup> And through them, to employees of the United States.

<sup>8</sup> *But see* Peter L. Strauss, *Overseer, or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) (arguing that the President lacks power to implement policy directly, at least in the face of legislation allocating policy-making authority to officers of the United States). Perhaps we could give the label "super-weak" to a theory under which the President can discharge executive officers at will but cannot insist that, while they occupy office, they follow the President's directions on specific matters or when Congress has good reasons for delegating decision-making authority to the officer rather than the President. For some indications that the Supreme Court once held such a view, see *Myers v. United States*, 272 U.S. 52, 135 (1926) ("Of course 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. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control."). I would note, though, that such a view would probably not qualify as a theory in the sense I have described in the text above.

<sup>9</sup> STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* 414–29 (1993) (describing Ronald Reagan as a reconstructive leader).

The Reagan administration's difficulty was that it lacked the staff to carry out the negative and positive components of its own program. That program required the dismantling of the bureaucratic structures implementing New Deal and Great Society programs, and substituting new structures. The number of people committed to the Reagan administration's reconstructive efforts was small. The conservative movement had not yet generated enough personnel to place a substantial number of supporters in existing bureaucracies. Put crudely, there were too many positions to fill, and too little time.<sup>10</sup>

Many of those already staffing the bureaucracies had gone into government service because they agreed with the New Deal and Great Society missions, and even those who simply sought government employment because it was relatively secure typically became "mission-committed." Changing their orientation would be difficult, perhaps to the point where the bureaucracies would obstruct the implementation of the administration's programs. Even more, conservatives had not reconstructed the Republican party itself. Some cabinet positions and other important high-level executive offices had to be allocated not according to the position-holders' adherence to the administration's new programmatic commitments, but to traditional interest-group principles.

Further, the constitutional culture within Washington gave those entrenched in the bureaucracies powerful weapons. Decades of New Deal dominance had generated a culture in which it was thought that line bureaucrats and high-level officials often *ought* to be independent of the transient enthusiasms of administrations newly arrived in the city. The well-known "iron triangle" supported bureaucratic independence of direction from the White House.<sup>11</sup> Bureaucrats, members of Congress (and their staffs), and interest-group lobbyists stood in opposition to every administration's efforts to alter specific programs from which the iron triangles benefited. Finally, a widespread (mis)interpretation of *Humphrey's Executor* gave officials a strong sense that the President could not dismiss them if they disagreed with or even resisted his political initiatives.<sup>12</sup>

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<sup>10</sup> Steven M. Teles provides some support for this observation in *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*, 23 *STUD. IN AM. POL. DEV.* 61 (2009).

<sup>11</sup> On the iron triangle, see JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 35–37 (1984).

<sup>12</sup> *Humphrey's Executor v. United States*, 295 U.S. 602, 631–32 (1935), held no more than that statutes could constitutionally require that the President have cause to dismiss a high-level administrative official, but did not address the question of whether disagreement or resistance amounted to cause.

Under these circumstances bureaucrats, both on the line and in high positions, reasonably believed that in practice they could not be dislodged from their positions. And, they might well have thought that they could ride out whatever temporary disruptions the Reagan administration's initiatives might cause. After all—a point to which I return in Part IV—early on no one can know whether a President seeking to reconstruct a constitutional regime will succeed in doing so.

The weak theory of the unitary executive was attractive as a means of countering the bureaucratic resistance the Reagan administration faced.<sup>13</sup> It provided constitutional arguments that could break the link between the bureaucrats and the other legs of the iron triangle. It reminded low-level bureaucrats that the position of quasi-independence they had achieved by the end of the Great Society rested on political and not constitutional foundations.<sup>14</sup> Perhaps most important, the weak theory opened up the possibility of challenging *Humphrey's Executor*, which—had it succeeded—would have shown that high-level officers had to come into line with the President's programmatic commitments and could not rely, at least in constitutional terms, on support from interest groups outside the administration.

Notably, the weak theory of the unitary executive suggested that the mere existence of independent agencies posed constitutional problems, and critics of the Reagan administration's version of that theory regularly pointed that out.<sup>15</sup> The administration did not disclaim those implications.<sup>16</sup> Yet, neither did it actually do anything

13 For a prescient argument by a traditional conservative that conservatives should start to articulate a theory about unitary executive authority, precisely because taking over the government would require disciplining the bureaucracy, see Jeffrey Hart, *The Presidency: Shifting Conservative Perspectives?*, 26 NAT'L REV. 1351 (1974). Hart wrote:

One long term change in the equation of political power involves the steady growth of the federal bureaucracy, which . . . actually operates with considerable autonomy. . . . [T]he only way these agencies can be diverted . . . is through the action of a powerful President. . . . [A]t least until the retirement of the present senior civil servants in the bureaucracy . . . if conservatives wish to get the "executive branch" behind policies they deem desirable, they can do so only by supporting a powerful and activist Presidency.

*Id.* at 1353. I thank Jack Goldsmith for bringing this article to my attention.

14 That is, it reminded them that quasi-independence arose because Great Society politicians agreed with what the bureaucrats were doing and were content to leave them alone.

15 For a nearly contemporaneous overview, see Paul R. Verkuil, *The Status of Independent Agencies After Bowers v. Synar*, 1986 DUKE L.J. 779.

16 See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION 180 (1988) [hereinafter THE CONSTITUTION IN THE YEAR 2000] ("The 'unitary Executive' principle of Article II also provides a basis to question the viability of

about independent agencies, because its deregulatory efforts focused on policies adopted and implemented by executive agencies such as the Environmental Protection Agency, the Department of the Interior, and the Department of Transportation.<sup>17</sup>

Seen in this political perspective, the weak theory was a partial success. It did start the process of bringing the federal bureaucracies into conformity with the Reagan administration's programs. It was less successful at higher levels, largely because reconstructing the Republican party would be more important there. Until conservatives could ensure that cabinet and like positions would be filled by conservatives without constraint from traditional interest groups, high-level officials would be able to act independently of "their" President's programmatic commitments.

## II. THE EMERGENCE OF THE STRONG THEORY OF THE UNITARY EXECUTIVE

By the late 1980s the Reagan administration's reconstructive ambitions were well on the way to success. Some civil service bureaucrats had shifted gears, others had left government employment. The institutions associated with the conservative movement—think tanks such as the Heritage Foundation and organizations such as the Federalist Society—were in a position to supply the administration with

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'independent' agencies in their present form. . . . [B]ecause the Constitution vests *all* executive power in a President, Congress may not give executive power to agencies that are not under the President's control." (citation omitted)). This expression of the position came relatively late in the Reagan administration, but it was articulated earlier. See Stuart Taylor, Jr., *A Question of Power, a Powerful Questioner*, N.Y. TIMES, Nov. 6, 1985, at B8 (noting Attorney General Meese's comments "that the entire system of independent agencies may be unconstitutional"), cited in Verkuil, *supra* note 15, at 779; see also *Special Prosecutor Provisions of Ethics in Government Act of 1978: Hearings Before the Subcomm. on Oversight of Gov't Mgmt of the S. Comm. on Governmental Affairs, 97th Cong., 1st Sess. 122* (1981) (statement of Rudolph Giuliani, Associate Att'y Gen.), cited in Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 61 n.13 (1983). As Tiefer's article also shows, and consistent with my earlier observations about the relation between scattered precedents and a "theory" of the unitary executive, Presidents had lodged constitutional objections to the creation of some independent officers earlier—but not, it seems, to already existing independent agencies.

<sup>17</sup> I do not think it accidental that the two major Supreme Court cases dealing with the power a new administration has to alter policies adopted by its predecessor involved deregulatory efforts by the Reagan Environmental Protection Agency and Department of Transportation. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (upholding a deregulatory initiative undertaken by the Environmental Protection Agency in 1981); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (invalidating a deregulatory initiative undertaken by the Department of Transportation in 1981).

personnel to staff many of the positions below the cabinet level and thereby to exercise some degree of political control over line bureaucrats.<sup>18</sup> The Republican party had come under conservative control, allowing the President to appoint conservatives to high-level positions while satisfying the demands of traditional interest groups—or at least while getting those interest groups to knuckle under. Two problems remained. A minor one was the continued role of truly independent agencies such as the Securities and Exchange Commission and the Federal Trade Commission in national governance. The major one was divided government: Democrats remained in control of Congress, and were in a position to obstruct the administration's reconstructive initiatives.

The solution to both problems lay in the strengthening of the theory of the unitary executive. The weak theory held that the President had the power to control policy-development by choosing the high-level officials who would do so at his behest (or face dismissal) and by directing low-level bureaucrats to implement the President's programs. A stronger theory of the unitary executive addressed the problem of independent agencies by asserting that they were unconstitutional because they exercised executive (or, sometimes, legislative) power and therefore had to be structurally within the executive branch and so subject to the President's control pursuant to the weak theory.<sup>19</sup> The stronger theory necessarily required a constitutional definition of what powers were truly executive (or legislative), a definition that would provide powerful support for the proposition that Congress lacked the power to enact statutes that allocated truly executive power to someone other than the President.

The constitutional challenge to independent agencies moved along two lines, prefigured in earlier cases and theorizing but not to that point integrated into a theory of the unitary executive. The Reagan administration offered some, mostly background, support to

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18 Eventually this method of control metastasized in the hiring processes of the Department of Justice in the administration of George W. Bush. See OFFICE OF THE INSPECTOR GEN. & OFFICER OF PROF'L RESPONSIBILITY, U.S. DEP'T OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING AND OTHER IMPROPER PERSONNEL DECISIONS IN THE CIVIL RIGHTS DIVISION (2008), available at <http://www.usdoj.gov/opr/oig-op-iaph-crd.pdf>. Political supervision of the bureaucracy within legal bounds is neither improper nor unusual, and no one has credibly argued that such control by the late Reagan administration and by the George H.W. Bush administration exceeded legal limits.

19 I suspect, though without evidence, that the only major independent agency that had some potential to disrupt deregulatory initiatives was the Consumer Product Safety Commission.

those who wished to revive the non-delegation doctrine.<sup>20</sup> Formally at least, doing so would not necessarily have advanced the Reagan administration's programmatic agenda. Congress could substitute detailed legislation for delegations to independent agencies. But, as virtually all participants in these discussions understood, reviving the non-delegation doctrine was politically and functionally part of a larger deregulatory agenda. Politically, modern government could not proceed in the absence of delegations, which is why the non-delegation doctrine had withered away. Reviving it would produce paralysis, not more detailed regulations prescribed directly by Congress. And functionally, detailed legislation would be subject to the presidential veto, which would surely be forthcoming were Congress to seek to design detailed regulations.

The second line of attack was on the very idea of independent agencies. This culminated in the conservative position in *Morrison v. Olson*, articulated most forcefully in Justice Antonin Scalia's (sole) dissent.<sup>21</sup> According to that position, prosecution was inherently an executive function, which Congress could not assign to an entity not under the President's ultimate control. Note how the strong theory of the unitary executive differs from the weak one: under the weak theory, Congress cannot impose constraints on the President's ability to control those who all concede to be within the executive branch, whereas the strong theory identifies constitutional limits on the power of Congress to define the contours of that branch.

In *Morrison v. Olson* the Supreme Court rejected one component of the strong theory of the unitary executive, and more than a decade later it rejected another when it upheld a rather vague delegation of rule-making authority in *Whitman v. American Trucking Associations*.<sup>22</sup> Yet, the strong theory of the unitary executive remained available within conservative constitutional discourse. And, indeed, almost necessarily so. Relatively early in the development of the theory of the unitary executive, Edwin Meese had articulated a departmentalist theory of constitutional interpretation, asserting that decisions by the Supreme Court were not conclusive on the President, who had the power—and almost certainly the duty—under the Constitution to articulate and act upon his own interpretations of the Constitution,

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20 See THE CONSTITUTION IN THE YEAR 2000, *supra* note 16, at 180 ("Under a strict Madisonian concept of separation of powers, the Court conceivably could hold that the Congressional delegation of rulemaking functions to the Executive branch or to independent agencies violates the separation of powers.").

21 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

22 531 U.S. 457 (2001).

even if those interpretations were contrary to those proffered by the Supreme Court.<sup>23</sup> The Supreme Court's reasons for rejecting components of the strong theory might have to be taken into account, but the mere fact of the Court's decisions had little importance. So, when in 1988 the Reagan administration's Department of Justice published its study, *The Constitution in the Year 2000*, it listed under the heading "Potential Controversies for the 1990's" the following: "Under what circumstances, if any, does the constitutional principle of separation of powers permit Congress to assign Executive functions, such as the power of prosecution, to officials outside the control of the Executive, whether organized in independent agencies or appointed by an authority other than the Executive?"<sup>24</sup> One could contend—barely—that *Morrison v. Olson* left the Department's question open because the question related to the circumstances under which such assignments could occur and not to whether such assignments were always unconstitutional, but the tenor of the question certainly is that the strong theory of the unitary executive remained an available option.

Importantly, this "such as" formulation brought out an aspect of the strong theory of the unitary executive that would become centrally important during the George W. Bush administration. Perhaps distracted by the controversies of the moment, those who articulated the strong theory during the Reagan administration focused on the executive power to prosecute, but what mattered to the theory was the identification of inherently executive powers. Or, as Justice Scalia put it in his *Morrison* dissent, the power to prosecute was a "quintessential[] executive activity."<sup>25</sup> The full elaboration of the strong theory of the unitary executive required identification of the full set of inherently executive powers that Congress could not assign elsewhere—or otherwise control.

Matters had improved substantially from the vantage point of staffing when a Republican returned to the White House in 2001. Conservatives had come to dominate the party almost completely, allowing them to fill cabinet and sub-cabinet positions with little opposition from traditional interest groups within the party. The pipeline

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<sup>23</sup> Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985–86 (1987) ("The Supreme Court . . . is not the only interpreter of the Constitution. Each of the three coordinate branches of government . . . has a duty to interpret the Constitution in the performance of its official functions. In fact, every official takes an oath precisely to that effect.").

<sup>24</sup> THE CONSTITUTION IN THE YEAR 2000, *supra* note 16, at 183, 184 (emphasis added).

<sup>25</sup> 487 U.S. at 706 (Scalia, J., dissenting).

to lower level positions was reasonably large; Republican control of the presidency in the 1980s and of Congress in much of the 1990s produced staffers comfortable with moving into the bureaucracy at the middle levels, and the institutions supplying personnel to the conservative movement as such—again, the Federalist Society and by the 2000s Regent University Law School serve as examples—had become integrated into the Republican governing project.

From another point of view, though, matters were more difficult. This vantage point was the President's. George W. Bush was what Skowronek calls an "affiliated" President.<sup>26</sup> Such Presidents face a complex set of difficulties. They are affiliated with a prior reconstructive President—for Bush, Ronald Reagan—and seek to complete, perpetuate, and deepen that President's agenda. They also want to place their own mark on the agenda. So, for example, George W. Bush's slogans about an ownership society and his freedom agenda were versions of Reagan's, updated for the 2000s but also transformed somewhat to make them Bush's rather than Reagan's. Yet, affiliated Presidents do not face a prior political regime on whose vulnerabilities their reconstructive predecessors were able to capitalize. And, finally, the simple passage of time reduces the political energy available for the tasks the affiliated President wants to finish. True, those tasks are smaller than the ones facing the reconstructive President, and so might require less political energy. But, affiliated Presidents need to have distinctive programs bearing their own stamp, and enacting *those* programs will call for energy that the affiliated presidency may lack.

There was one additional feature of George W. Bush's situation that affected the development of a super-strong theory of the unitary presidency. The Reagan Revolution had never achieved complete success. Instead, it produced an extended period of divided government, which had its own regime principles.<sup>27</sup> Those principles were vulnerable, not because the American people had become disenchanted with them but because every election presented the opportunity to replace divided with unified government. That possibility guided the George W. Bush presidency's actions.

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26 For a useful discussion of George W. Bush as an affiliated President, see Gerard N. Magliocca, *George W. Bush in Political Time: The Janus Presidency*, 34 *LAW & SOC. INQUIRY* 473 (2009) (reviewing how theories in the recent books of Stephen Skowronek and Keith Whittington can be applied to George W. Bush's presidency).

27 For my analysis of the constitutional implications of divided government, see MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003).

Taking office without the support of a majority of those who had voted in November 2000,<sup>28</sup> Bush could accomplish little legislatively at the outset without substantial support from his political opponents. As President, though, he might be able to push his initiatives through. To do so, the strong theory of the unitary executive had to be strengthened further. The strong theory held that Congress could not “divide” inherently executive authority—or, alternatively, that only the President could exercise executive power. The open questions were, what inherent authority does the President have, and what was the executive power committed exclusively to the President? Narrow answers to those questions would not have been inconsistent with the strong theory of the unitary executive as it had developed by the early 1990s—but, importantly, neither would broad answers.

Indeed, officials of the Bush administration typically continued to use the term “unitary executive” to refer only to the strong theory, even as they defended broad answers to those questions, which they tended to regard as not (yet) integrated into their theory of the unitary presidency.<sup>29</sup> Outsiders—scholars and newspaper commentators—might see the Bush administration as defending a super-strong theory of the unitary executive, but their terminology differed from that used by the administration itself, which distinguished between the strong theory of the unitary executive to which they were committed and a strong but independent theory of broad presidential powers as Commander-in-Chief to which they were also committed.

Broad answers to questions about the President’s inherent powers served George W. Bush’s interests as an affiliated President. In addition, the events of September 11, 2001, had two effects. They presented Bush with the opportunity to become something of a reconstructive President himself. They also provided a direct path to expansive definitions of inherent executive authority. Serious and seemingly permanent threats to national security in a context of obvious military conflicts made it plausible to load a great deal into the President’s status as Commander-in-Chief of the armed forces. The “Take Care” Clause could be given expansive readings as well. It could be read, as many scholars had contended for years, to require that the President take care that *all* the laws, including the Constitution, be faithfully executed. This reading supported departmentalist approaches to constitutional interpretation, and thereby made it pos-

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<sup>28</sup> FEC, 2000 Presidential General Election Results, <http://www.fec.gov/pubrec/2000presgeresults.htm>.

<sup>29</sup> I thank Jack Goldsmith for emphasizing this point to me.

sible for the President to argue, with more than a little plausibility, that he was entitled to disregard legislation that in his view encroached on authority the Constitution gave to the President alone. The “Take Care” Clause could also be read along the lines of President Abraham Lincoln’s question: “Are all the laws *but one* to go unexecuted, and the Government itself go to pieces lest that one be violated?”<sup>30</sup> That is, the President’s *primary* duty is to take care that the nation be preserved, to which the duty to take care that the laws, including the Constitution, be faithfully executed, is subordinate.<sup>31</sup> All this became embedded in the super-strong theory of the unitary presidency with which the Bush administration became identified.<sup>32</sup>

Bush’s reconstructive ambitions foundered in part because of policy errors he made, but probably more important because of a reasonable but, as it turned out, mistaken political strategy. In the face of a closely divided electorate that in 2000 had not seen much difference between the leading candidates for the presidency,<sup>33</sup> Bush and his advisors decided that they were unlikely to build a governing coalition by drawing into the Republican party a large number of centrist voters. Instead of seeking a governing coalition supported by 55% of the voters, they decided to construct such a coalition by consolidating the Republican party as an ideologically conservative one and then seeking just enough votes to get them above 50% in successive elections. For a while that strategy seemed to work, but perceived failures in Iraq and on domestic policy demonstrated how difficult it was to consolidate a reconstructive presidency supported by a mere (and narrow) majority of the electorate.

George W. Bush’s effort to move from being an affiliated President to being a reconstructive one was connected to the super-strong theory of the unitary presidency. That theory emerged from the po-

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<sup>30</sup> Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 20 (1897).

<sup>31</sup> For a version of this argument, see Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257 (2004).

<sup>32</sup> The fact that journalistic accounts of the Bush administration’s theory rarely distinguished the super-strong theory of the unitary presidency from the weaker theories that had been articulated earlier is one datum suggesting that there actually was a new theory in the air, even if not fully acknowledged as such by Bush administration officials.

<sup>33</sup> See D. Sunshine Hillygus & Simon Jackman, *Voter Decision Making in Election 2000: Campaign Effects, Partisan Activation, and the Clinton Legacy*, 47 AM. J. POL. SCI. 583, 594 (2003) (asserting that “the public was not overly enthused about either candidate” in 2000); Arthur H. Miller & Thomas F. Klobucar, *The Role of Issues in the 2000 U.S. Presidential Election*, 33 PRES. STUD. Q. 101, 121 (2003) (concluding that “[i]n the absence of a burning issue, we saw that America was almost evenly divided on the issues, and that is exactly what we saw reflected in the election outcome”).

litical context in which Bush found himself—as an affiliated President in a divided government—and which he sought to transform into a reconstructive presidency, one of whose regime principles would have been the super-strong unitary presidency. There is an obvious gap in the narrative I have provided, though. What happened in the 1990s? The answer to that question will provide some opportunities to speculate about the future of the theory of the unitary executive.

### III. THE DEMOCRATIC PARTY'S ALTERNATIVE: PRESIDENTIAL ADMINISTRATION

In Skowronek's terms, President Bill Clinton was a "preemptive" President. Reagan's reconstruction of U.S. politics remained reasonably vibrant when Clinton took office, and was reinforced by the Republican congressional victories in 1994. Acknowledging that the era of big government was over,<sup>34</sup> Clinton, like any President, wanted to make his mark on public policy. Facing a hostile Congress whose leaders believed that Reagan's policies needed not preempting but extending, Clinton had to assert leadership by exercising the powers only he had. Perhaps drawing upon but certainly transforming the intellectual resources provided by the then-extant theory of the unitary executive, Clinton developed what Elena Kagan insightfully called "presidential administration."<sup>35</sup>

Presidential administration differs importantly from the theory of the unitary executive because it deploys different techniques to accomplish the goal, shared by both approaches, of overcoming bureaucratic and legislative resistance to the President's policy initiatives. The theory of the unitary executive asserts that the White House is to control the bureaucracy. In presidential administration, in contrast, the White House *displaces* the bureaucracy.<sup>36</sup> Rather than

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34 See, e.g., Bill Clinton, Radio Address (Jan. 27, 1996), available at [http://www.cnn.com/US/9601/budget/01-27/clinton\\_radio/](http://www.cnn.com/US/9601/budget/01-27/clinton_radio/) ("We will meet these challenges, not through big government. The era of big government is over . . .").

35 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001). Like all institutional developments, presidential administration had its predecessors, as Kagan points out, *id.* at 2275–76 (describing some early initiatives by Richard Nixon), but as she also insists, changes in scope amounted to a real innovation in form.

36 Kagan's description of presidential administration as used in the Clinton administration emphasizes its use to control the development of regulatory policy outside the White House. See, e.g., *id.* at 2282–83 (describing President Clinton's role in developing anti-smoking policy by the Food and Drug Administration). Such uses might be explained as relatively straight-forward applications of the weak theory of the unitary executive, and indeed Kagan points out that "the Clinton administration 'built on the foundation of President Reagan's regulatory review process.'" *Id.* at 2250. Kagan's deep insight,

controlling the processes of policy-making as they occur outside the White House, presidential administration brings policy-making over exactly the same domains into the White House.<sup>37</sup>

Reconstructive Presidents might be attracted to the theory of the unitary executive, but that theory has its limits. Presidential administration might supplement a strong theory of the unitary executive.<sup>38</sup> One technique Presidents might use is to increase the number of presidential appointees to executive bureaucracies—sub-cabinet officials who do not require Senate confirmation.<sup>39</sup> Such appointees can serve as the President's "eyes and ears" within the bureaucracy in addition to implementing presidential policy. But, I suggest, presidential administration has an important advantage under current conditions for a President who aspires to be reconstructive: it offers a method of breaking the iron triangle that can obstruct reconstructive initiatives. As the sputtering out of the Reagan Revolution showed, the theory of the unitary executive provides the intellectual resources to gain control of the government's bureaucracies, but it cannot help in constructing institutional alternatives to those bureaucracies and indeed to some extent remains committed to their perpetuation, albeit under new leadership. A more complete reconstruction requires working around or outside of the established bureaucracies, specifically by developing institutional forms that provide the President with the resources to construct a new political coalition.

In the remainder of this Essay I speculate on the possibility that presidential administration may provide the Obama administration with the resources to implement what might be its reconstructive ambitions. A preliminary point must be that, as Skowronek points out, each President faces the sedimented layers of what his predecessors have done. Reconstructive Presidents try to burrow through those layers or even destroy them, but the simple passage of time means that this sort of reconstructive destruction becomes increasingly difficult. Further, the sedimentation includes an accumulation of power in the presidency, something a reconstructive President will surely

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though, was that there was something new about the Clinton administration's practices. The novelty was the institutional innovation of presidential administration—in particular, building institutional capacity within the White House to control policy development outside it.

<sup>37</sup> Professor Farina's contribution to this Symposium provides evidence about the growth of the White House staff that, I believe, supports Kagan's account of the rise of presidential administration.

<sup>38</sup> I thank Jacob Gersen for bringing this to my attention.

<sup>39</sup> See DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* (2008) (documenting the rise of such appointments).

find at least initially appealing and worth preserving. Why should President Obama deprive himself of the ability to capitalize on the assets the super-strong theory of the unitary presidency gives him?<sup>40</sup> This question, though, overlooks the possibility that a reconstructive President has goals in using presidential power different from those of affiliated or preemptive Presidents.

As noted earlier, reconstruction requires the creation of new institutional forms. Presidential administration is one of those forms. Devised to deal with Clinton's difficulties as a preemptive President, it can be adapted to serve a reconstructive one.<sup>41</sup> For example, beyond simply expanding the size of the White House staff, presidential administration might encourage, or at least provide an explanation for, the creation of "bureaucracies" within the White House that parallel those outside it; a White House "energy czar" supervises the same policy domain as does the director of the Environmental Protection Agency, for example. These parallel bureaucracies might be explained, at least at their initiation, as a method of institutionalizing the competition in providing policy advice that Richard Neustadt's classic analysis contended was an important component of Franklin Roosevelt's successes.<sup>42</sup> Perhaps not coincidentally, Roosevelt was a reconstructive President, and we might regard the informal methods of producing competition in providing policy advice as his institutional innovation. White House czars with significant access to the President may exemplify a later, more formal institutional mechanism in the same family.

The theory of the unitary presidency attempts to shatter the iron triangle by depriving the bureaucracies of access to their interest group supports on one side and to Congress (and its committees and staff) on the other. Presidential administration can perhaps be un-

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40 In the early months of the Obama presidency, one meme circulating among conservatives and strongly liberal critics of the administration's policies, particularly in the area of national security, was that the administration had not substantially deviated from the Bush administration's claims about the scope of the President's authority even as the Obama administration asserted that it could advance its policy positions without pushing those claims to their limits. *See, e.g.*, Posting of Curtis A. Bradley & Eric A. Posner to Executive Watch: A Weblog of the Duke Program in Public Law, <http://executivewatch.net/> (Mar. 23, 2009, 14:40 EST).

41 It may be worth noting the more general point that innovations in governance developed for one reason may be adapted and transformed to serve other goals.

42 *See generally* RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* (1960).

derstood to seek the same goal in a different manner.<sup>43</sup> We can begin by asking why the interest groups that lobby Congress and the bureaucracies will not simply turn their attention to lobbying the White House and the officials who implement presidential administration. They certainly will try to do so.<sup>44</sup> But, bringing programs within the White House may reduce the lobbying power of these interest groups because their constituents may see smaller payoffs from lobbying than they can see when the iron triangle is operating well. As Kagan noted, one feature of Clinton's use of presidential administration was credit claiming—announcements by the White House of its responsibility for policy initiatives formally taken outside the White House. One goal of such credit claiming is building political support from the constituencies of the external bureaucracies; environmentalists become supporters of the President rather than, or in addition to, enthusiasts of the Environmental Protection Agency and supporters of the Natural Resources Defense Council. In this way presidential administration weakens one leg of the iron triangle.<sup>45</sup>

More generally, the early days of the Obama administration suggest that it has reconstructive ambitions that it seeks to achieve less by working with traditional interest groups than by working around them.<sup>46</sup> The Obama campaign's innovative use of the Web to raise money and generate enthusiasm is one example; so, in my view, is its vaunted bipartisan outreach, which is designed (I believe) to build a permanent Democratic majority at the 55% level rather than the 50% plus one level sought by George W. Bush, by appealing to independents and moderates in the country at large rather than to achieve legislative successes in Washington.<sup>47</sup> Bipartisan outreach of that sort is,

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<sup>43</sup> I note that I may be forcing too much into the category "presidential administration," and that what I describe in the text might simply be reconstructive innovations independent of presidential administration.

<sup>44</sup> One suggestive indication is the response of such groups to a request by President Obama's Office of Management and Budget for comments on how to improve the White House's processes of regulatory review. See Request for Comments, 74 Fed. Reg. 8819 (Feb. 26, 2009). Scores of interest groups submitted comments. See Public Comments on OMB Recommendations for a New Executive Order on Regulatory Review, <http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp>.

<sup>45</sup> I must emphasize once again the speculative nature of my arguments, because the one sketched in this paragraph is perhaps the most speculative.

<sup>46</sup> This is not to say that the Obama administration is insensitive to the continuing importance of such groups, but only that it does not see them as permanently important, as institutional components of its envisioned constitutional order to the same extent that they were institutional components of the New Deal/Great Society constitutional order.

<sup>47</sup> For a similar analysis, cast in somewhat different terms, see Andrew Levison, *Obama the Sociologist*, DEMOCRATIC STRATEGIST, Feb. 3, 2009, [http://www.thedemocraticstrategist.org/\\_memos/tds\\_SM\\_Levison.pdf](http://www.thedemocraticstrategist.org/_memos/tds_SM_Levison.pdf).

again, an effort to break the hold of traditional interest groups on the government's bureaucracies.<sup>48</sup>

#### IV. CONCLUSION

Of course we are early in the Obama administration. What I have taken as indications of an interest in advancing a reconstructive agenda might simply be pragmatic tinkering or almost random innovations. And, equally obviously, events may derail whatever transformative ambitions the Obama administration might have.<sup>49</sup>

I offer this Essay as a suggestion that scholars interested in the constitutional dimensions of presidential power should not be misled by apparent continuities in theories of the unitary executive. Such theories do support the view that modern Presidents style themselves as leaders, but treating all versions of “the” theory of the unitary executive as roughly the same—and, in particular, seeing George W. Bush and Barack Obama as similar in their endorsement of expansive theories of executive authority—may be a mistake. One must ask in addition, “Leadership for what?” George W. Bush began as an affiliated President seeking to use the theory of the unitary executive he inherited for the tasks such a President faces. He then saw the possibility of becoming a reconstructive President, and used a revised version of that theory in the service of a reconstructive project that failed in part because he did not use executive power to build new institutions that would generate permanent political support for his reconstructive policy agenda. Perhaps Barack Obama will be able to use executive power and presidential administration to build such institutions. If so, he and his supporters will surely produce another iteration of the theory of the unitary executive.

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<sup>48</sup> I would not place too much weight on these examples, but the nomination of a Nobel Prize winning scientist to head the Department of Energy and the aborted nomination of a Republican Senator to head the Commerce Department may hint at this outside-the-traditional-interest-groups strategy. (In contrast, the nomination of Representative Hilda Solis to head the Department of Labor shows that the Obama administration has not completely rejected the interest-group model for appointments.)

<sup>49</sup> Just as events—those of September 11, 2001—opened up the possibility that the George W. Bush administration would be reconstructive rather than affiliated.