

# Introduction

*Christopher S. Kelley*

The George W. Bush administration has clearly renewed scholarly interest in the use and abuse of presidential power. Following the close election of 2000, experts widely believed that President Bush would have to govern from the middle if he wanted to get anything accomplished. Bargaining and persuading, we are often told, is at the center of presidential power.

President Bush, however, tested the limits of presidential power from the start. He moved to revoke several controversial executive orders the lame-duck Clinton administration made, he issued an executive order putting into place the White House Office of Faith-Based and Community Initiatives, and in response to the energy crisis in the western United States, he formed an energy task force that worked in near secrecy. This was before the events of September 11, 2001. After September 11, President Bush was given wide latitude to act unilaterally to protect the country from the threat of terrorism. The Department of Justice pushed the controversial USA PATRIOT Act through Congress that gave law enforcement and the executive branch a great deal of power to conduct investigations and make arrests. The president's lawyers made aggressive interpretations to give the president wide discretion to hold U.S. citizens as enemy combatants, therefore holding individuals without benefit of habeas corpus relief. And the president used the authorization he was given in the fall of 2001 to fight terrorism and wage war against one semisovereign state (Afghanistan) and one sovereign state (Iraq).

The war with Iraq has been the focal point of the president's problems, and it has been the starting point from which President Bush has been called the new "Imperial President," a reference to Arthur Schlesinger's work on the state of presidential power at the time of Watergate. In fact, John Dean, who

was President Nixon's White House counsel, has suggested that the Bush presidency "... may be the *most* imperial presidency our history has yet seen.<sup>1</sup>

In the last two years of President Bush's first term in office, he found himself enmeshed in all sorts of controversies involving the overexpansion of presidential authority. To name but a few, a suit was filed in federal courts challenging the secrecy of Vice President Cheney's Energy Task Force, and legal challenges were raised with regard to President Bush's detention of unlawful combatants. In two high-profile instances, President Bush asserted the right as commander in chief to detain U.S. citizens without the right of hearing charges against them or without benefit of counsel. And, as Anthony Lewis has documented, advanced by the attorneys who work in the White House Office of Legal Counsel the aggressive interpretation of constitutional and international law made a mockery of established constitutional and international legal precedent.<sup>2</sup> All of these arguments centered on an expansive, constitutional interpretation of presidential power.

And just like that, pundits and scholars alike began to focus on the meaning of presidential power. The Bush administration, it seemed, had come out of nowhere and in wild-eyed fashion was testing the limits of presidential power. But had it?

## PRESIDENTIAL UNILATERALISM

After Watergate, the U.S. presidency was assaulted by the Congress, the media, and the U.S. public, which all sought to reign in a system they felt had become abusive. Beginning roughly with the Reagan administration, the executive branch was staffed with individuals committed to reasserting presidential power. To do this, the presidency was forced to turn to the U.S. Constitution. The Reagan administration engaged in numerous high-profile clashes with the Congress and the courts over its assertions and interpretations of presidential power. In fact, Attorney General Edwin Meese III caused a major stir when he spoke at Tulane University and defended the president's prerogative to interpret the Constitution independently, despite what the Congress or the courts said.<sup>3</sup>

The administration of George H. W. Bush continued the tract of aggressively asserting presidential power. For instance, the Congress refused to confirm President Bush's nominee to head the Office of Information and Regulatory Affairs (OIRA) until the administration agreed to allow the Congress a role in how the regulatory process worked. Rather than capitulate, the Bush administration simply created a regulatory council (the Council on Competitiveness) within the Executive Office of the President that the vice

president chaired. The “Quayle Council,” as the Council on Competitiveness came to be called, was extraordinarily effective in ensuring that all regulations the executive branch agencies developed were cost effective to business, much to the chagrin of the Congress.

The Bush administration also got creative in how it used the signing statement to win battles lost in the legislative process. The Reagan administration successfully had the signing statement added to the legislative history section of the *United States Code, Congressional and Administrative News* (USCCAN). At the time, Attorney General Edwin Meese argued that it was done “to make sure that the President’s own understanding of what’s in a bill is the same . . . or is given consideration at the time of statutory construction later on by a court. . . .”<sup>4</sup>

In 1989 President Bush vetoed a foreign operations bill that contained an amendment by Rep. David Obey (D-WI) that “prohibited the sales of arms or aid to any foreign government to further U.S. foreign policy objectives if the U.S. would be prohibited from the same kind of influence.”<sup>5</sup> A subsequent bill contained the Obey amendment again, and the president signed it. However, when he issued his signing statement, he pointed to a “colloquy” on the Senate floor as the authoritative legislative history for the bill, and would thus construe the meaning of a section of the amendment narrowly. The “colloquy” that President Bush pointed to in his signing statement was actually an alternative legislative history the Republicans in Congress crafted as a backup for the administration if the Obey amendment became law. The purpose, as Charles Tiefer points out, was to supplant “congressional legislation on a central and hotly contested issue.”<sup>6</sup>

The Office of Legal Counsel in the Clinton administration issued two opinions<sup>7</sup> that underscored Attorney General Meese’s argument that the president had the right to *independently* interpret the constitutionality of law. After the Republicans took control of the Congress in 1995, President Clinton simply turned inward to govern, turning to executive orders, memoranda, and signing statements, leading to the now-famous quote by Paul Begala: “Stroke of the Pen. Law of the land. Kind of cool.”<sup>8</sup>

## CALLING ATTENTION TO CONSTITUTIONALLY ORIENTED POWER

Many presidential scholars have not detected the unilateral actions of those administrations that preceded the George W. Bush administration because the predominant focus on the presidency—the Neustadt paradigm—neglects to study the importance of a public law approach to the presidency. But this

has not meant that many scholars have not used a public law approach or that they have tried to call our attention to its importance.

Most recently, Kenneth Mayer wrote the lead article in the spring 2004 issue of *PRG Report*, the newsletter of the Presidency Research Group, in which he advocated challenging what the Neustadt paradigm has told us about the presidency and renewing our “focus on the explicit legal foundations of presidential action.”<sup>9</sup> As Mayer correctly notes, since taking office, many of the more significant actions the Bush administration took were actions rooted in unilateral assertions of constitutional power.<sup>10</sup> By delegating the importance of the legal foundations of presidential power to the law journals, presidential scholars trained in the social sciences have neglected the importance of a public law approach to understanding presidential power.<sup>11</sup>

Richard Pious, long an advocate of a public law approach to studying presidential power, both countered a Neustadt-only approach and highlighted the value of a public law approach to understanding presidential power in a special 2002 issue of *Presidential Studies Quarterly*.<sup>12</sup> He argues that simply looking through the lens of “public approval ratings, the number of seats the president’s party holds in Congress, and the length of time the president has been in office,” we are often left with no explanations of success or failure.<sup>13</sup> An example to highlight this is President Clinton’s ability to turn around his presidency in 1995 by failing to get a budget passed by the Congress.

Instead, by taking a public law approach, or in Pious’s argument one that emphasizes prerogative power (defined as an expansive reading of constitutional powers), we can understand why a president “imposes tight secrecy, [confines] his deliberations to a small group, . . . [and] issues proclamations, executive orders and national security directives.”<sup>14</sup>

## THE RICH LINEAGE OF THE PUBLIC LAW APPROACH

The Neustadt approach to the presidency, often referred to as the “modern” or “strategic” presidency, has long emphasized the soft aspects of power—bargaining and persuading—and not the aggressive interpretation of constitutional powers.

As influential and important as Professor Neustadt’s work is, the political environment of the 1970s, 1980s, and 1990s have made bargaining and persuading extraordinarily difficult for the president. This prompts some presidential scholars to advocate a return to the constitutional roots of the office—what Pious referred to as the “fundamental and irreducible core of presidential power.”<sup>15</sup> Hence a president, still expected to lead,

found reaching out to the Congress or the public post-Watergate nearly impossible and was forced inward toward the powers the Constitution vested to the presidency.

Thus, in the late 1970s to the present, a disparate but growing number of presidential scholars began investigating unilateral presidential actions such as “administrative clearance,” “executive orders,” “executive privilege,” “presidential proclamations,” and “parallel unilateral policy declarations.” A nonexhaustive list of some early presidential scholars offering a counter to the Neustadt approach includes scholars such as Louis Fisher, who has written numerous influential books and articles examining separation-of-powers issues;<sup>16</sup> Robert Spitzer and his work on the presidential veto;<sup>17</sup> Richard Pious and his continuing efforts to build a cohesive theory around prerogative power; Mark Rozell and his focus on executive privilege; and Ryan Barilleaux and his focus on things such as parallel unilateral policy declarations.

Although some of the other scholars advocating a public law approach to the study of the presidency have invariably been missed, the point remains that it is not something that has sprung forth in the Clinton and Bush presidencies. It has a rich theoretical lineage of which we should all be cognizant.

Recently, the public law approach has enjoyed a greater recognition. For instance, the 2002 Neustadt Book Award went to Kenneth Mayer’s book on executive orders, *With the Stroke of a Pen: Executive Orders and Presidential Power*,<sup>18</sup> and another book examined all types of new unilateral presidential powers referred to as “power tools.”<sup>19</sup> William Howell titled his book *Power without Persuasion* to illustrate the variety of unilateral actions that presidents take because of the highly polarized political environment of the last thirty years or more.<sup>20</sup>

Clearly, contemporary presidential scholars are recognizing the established voices of Pious, Spitzer, Fisher, and others who have been urging presidential scholars to add the public law approach to our methodological repertoire. In fact, Pious, Spitzer, and Fisher draw from the work of Edward Corwin, whose constitutional approach to the study of the presidency in the 1940s and 1950s was the dominant approach.

What this book hopes to achieve is twofold: First is to expose the reader to a burgeoning group of scholars who use the Constitution to explain the development of presidential powers as strategic tools for chief executives from Richard Nixon to George W. Bush. For example, Christopher Kelley discusses how presidents have come to rely on presidential signing statements to protect the prerogatives of the office as well as to advance their own policy preferences. Graham Dodds explains how presidents have used executive orders across successive presidencies to exert presidential control over the

administrative state—influence that extended to the independent regulatory agencies in both the Clinton and the George W. Bush administrations.

Second, all the authors use from Nixon to George W. Bush as their period of analysis. This period saw a fundamental shift in U.S. politics in general and for the presidency in particular. During this period, one president resigned, another was impeached, and still another won the Electoral College but lost the popular vote. Furthermore, the political climate during this period has become especially hostile for the president—the influence of the political party has declined, the relationship with the Congress has been poisoned, and the news media have treated each president during this period in a more negative rather than positive tenor of coverage. Yet our president is still expected to lead. Leadership has required the presidency to become very creative, and this creativity is found in the number of “power tools” forged out of the ambiguities of Article II of the Constitution.

#### PLAN OF THE BOOK

The chapters in this book are organized by theme rather than in chronological order. The first two chapters are more abstract, emphasizing the public law approach to the study of the presidency. The chapters that follow are organized around particular instruments recent presidents have used to gain leverage over the Congress and the courts. The book finishes with an examination of foreign policy and how presidents have continued to exercise greater unilateral control over foreign policy ventures.

In chapter 1, Richard Pious sets the tone of the book, arguing that presidential scholars need to mix their approaches to understanding the presidency rather than simply adhering to one approach. He urges a public law approach integrating one of several methods in understanding the presidency. This not only helps us to understand the executive branch, but also alerts us to instances in which the president may overstep the bounds of Article II power and act unconstitutionally.

The chapters that follow take Professor Pious's challenge and explains ways in which presidents have pushed the boundaries of presidential power to succeed in what occasionally has been a hostile political environment, to the point of abusing executive power in the name of protecting the office of the presidency.

Professor Ryan Barilleaux examines how and why recent presidents have exceeded the limits of presidential power and what effect this has had on the political system, something he refers to as *venture constitutionalism*. He argues that in the past, presidential scholars have been limited in their exam-

ination of presidential power, either by examining discrete instances of unusual presidential actions such as President Jackson's move to take money from the Bank of the United States or by establishing good cop/bad cop scenarios of how some expand power for good whereas others expand it for personal or selfish reasons.

The next three chapters examine the use (or misuse) of particular presidential instruments employed to gain leverage over the legislative process.

Graham Dodds examines the use of executive orders that enable a president to accomplish administratively what cannot be accomplished legislatively. Professor Dodds argues that the use of executive orders is not necessarily new, but the number presidents of both political parties used for strategic purposes is something that has stemmed from the political environment of the last thirty or thirty-five years. What is interesting about Professor Dodds's study is the connection between each administration from Nixon through Clinton to use the executive order to give the president control over the administrative state—something today that reaches not only executive branch agencies such as the Environmental Protection Agency, but also extends to independent regulatory agencies such as the Federal Communications Commission.

Christopher Kelley examines the "understudied" use of the presidential signing statement, which on its own is nothing more than a written and/or verbal statement the president makes after he has signed a bill into law. On its own, the signing statement has not drawn a great deal of interest because most presidential scholars have viewed them as nothing more than a presidential news release. However, beginning with the Reagan administration, the signing statement was used for deliberate political and constitutional reasons, which allowed the president either to advance his policy preferences by interpreting vague or undefined sections of a bill advantageous to the president's position or to nullify sections of a bill that the president independently determines to be unconstitutional.

Mark Rozell turns our attention to the subject of executive privilege, which he argues has always been a part of the presidency, but since the Nixon administration the use of the privilege has become more frequent due to the highly polarized political environment. Professor Rozell first examines how the use of executive privilege has developed over the course of the last thirty-five years, arguing that when a president wanted to withhold something from Congress, more often than not the executive branch would use a term other than executive privilege to do so. Professor Rozell then focuses on the George W. Bush administration and argues that the administration from the beginning sought not only to use executive privilege, but also expand its use into new areas, thus setting an important precedent for future presidents.

Robert Spitzer turns to the concept of the “protective” pocket return veto, which he argues is an “aggrandizement” of presidential power that presidential scholars have largely missed. Professor Spitzer explains that as a matter of custom, presidents and Congress agreed that the pocket veto would be used only at the end of a session of Congress—or after sine die adjournments. The Reagan administration broke this agreement, arguing that a president had the right to execute the pocket veto at any point during the legislative session. Furthermore, the George Herbert Walker Bush administration escalated the situation with the use of the “protective” pocket return veto, which involves returning the bill to Congress and at the same time issuing a pocket veto of the bill. The result was to take the qualified veto that the Founders gave to the president and make it absolute.

Kevan Yenerall puts a twist on the normal study of the rhetorical presidency by placing presidential rhetoric within the confines of presidential power. He looks at how recent presidents—in his chapter, Clinton and Bush—have used rhetoric in support of unilateral executive action. By using case studies, Professor Yenerall shows how Presidents Clinton and Bush rallied the public in support of their executive orders, memorandum, and signing statements to create what he terms the *rhetorical branch* inside the executive office.

The next two chapters examine the president’s relationship with the federal courts. In the first chapter, George Thomas examines the question of whether Ronald Reagan was the sort of transformative president who brings about a fundamental change of a regime—in this instance, the New Deal regime of President Franklin Roosevelt. Professor Thomas argues that Reagan’s use of judicial appointments, the Department of Justice, the Office of Legal Policy, as well as executive orders and signing statements shifted constitutional thinking in legal terms. Professor Thomas finds that the number of Supreme Court cases in the 1990s that challenged congressional interference in the activities of the states was a direct result of the regime President Reagan established in the Court in the 1980s.

In the next chapter, similar to Professor Thomas, Kevin McMahon argues that presidents have attempted to extend presidential influence into the courts by using their appointment powers, the threat of court-curbing legislation, as well as the powers of the Department of Justice. The motivation for doing this varies—it can range from being ideologically driven to seeking to implement the president’s constitutional vision. He concludes that presidential and legal scholars who look only at ideological reasons for appointing individuals to the bench fail to capture the larger reasons for presidential appointment politics.

The final two chapters examine presidential power in the area of foreign policy. In the first chapter, Michael Cairo argues that presidents no longer even hint toward sharing power over war with the Congress, that instead they exercise unilateral control in what he deems to be a “triumph of the imperial presidency.” Cairo looks at the Clinton and George W. Bush administrations and the strategies they have employed to exclude Congress from decisions concerning the use of force. Cairo highlights how both Clinton and Bush have used international agreements as the means to use force without consulting Congress, which is an interesting counter to Richard Rose’s<sup>21</sup> thesis that international commitments have worked to diminish presidential power.

Patrick Haney et al. focus their chapter on how President Clinton sought to undermine Helms-Burton from the moment he signed it into law, arguing that in Clinton’s signing statement, the president worked to retake presidential power that was lost in the legislative battle over the bill. The president was forced to sign the bill after Cuba shot down an airplane that carried Cuban expatriates in international waters. Thus where the president lost influence in the legislative process, he gained it back by the language he used in his signing statement.

In both the Cairo and Haney et al. chapters, the authors argue that presidents have abused their constitutional authority by using unilateral means to undermine authority lost in the constitutional process.

Hopefully this book will jump-start a discussion among presidential scholars around some extremely significant powers recent presidents developed that have gone unstudied in any systematic way. I certainly do not wish to suggest that the public law approach should be *the* approach to study presidential power. Rather, if we remain cognizant of the different approaches to presidential studies, we will better be able to understand for ourselves, our students, and the public why presidents do the things that they do.

## NOTES

1. John Dean, “The U.S. Supreme Court and the Imperial Presidency: How President Bush Is Testing the Limits of His Presidential Powers,” <http://writ.news.findlaw.com/dean/20040116.html>. Dean has also taken his argument to book form. See *Worse than Watergate: The Secret Presidency of George W. Bush* (New York: Little, Brown, 2004). See also Robert Byrd, *Losing America: Confronting a Reckless and Arrogant Presidency* (New York: Norton, 2004).

2. Anthony Lewis, “Making Torture Legal,” *New York Review of Books*, July 15, 2004, <http://www.nybooks.com/articles/17230> (accessed August 2, 2004).

3. Edwin Meese III, “The Law of the Constitution,” *Tulane Law Review* 61 (1987): 979–89.

4. Quoted in Marc N. Garber and Kurt A. Wimmer, "Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power," *Harvard Journal on Legislation* 24 (1987): 367.

5. Charles Tiefer, *The Semi-Sovereign Presidency: The Bush Administration's Strategy for Governing without Congress* (Boulder, Colo.: Westview Press, 1994), p. 38.

6. Tiefer, p. 40.

7. Walter Dellinger, "The Legal Significance of Presidential Signing Statements," Memorandum for Bernard N. Nussbaum, Counsel to the President, November 3, 1993, <http://www.usdoj.gov/olc/signing.htm>; Walter Dellinger, "Presidential Authority to Decline to Execute Unconstitutional Statutes, Memorandum for the Honorable Abner J. Mikva, Counsel to the President, November 2, 1994, <http://www.usdoj.gov/olc/nonexecut.wpd> (both accessed August 15, 2000).

8. James Bennet, "True to Form, Clinton Shifts Energies Back to U.S. Focus," *New York Times*, July 5, 1998, p. 10.

9. Kenneth Mayer, "The Return of the King? Presidential Power and the Law," *PRG Report* 26 (Spring 2004): 1.

10. Mayer, p. 11.

11. For example, the entire October 1993 issue of the *Cardozo Law Review* was devoted to the study of the Unitary Executive, which takes an expansive view of the take care and oath clauses of Article II to push presidential power.

12. Richard Pious, "Why Do Presidents Fail?" *Presidential Studies Quarterly* 32 (December 2004): 724–42. Unfortunately for Pious and his argument, his thesis had to compete with numerous theses, including one by Richard Neustadt, on the appropriate way to study the presidency. Pious's argument may have been lost among the cacophony of competing voices in this special issue of *Presidential Studies Quarterly*.

13. Pious, "Why," p. 731.

14. Pious, "Why," p. 734.

15. Richard Pious, *The American Presidency* (New York: Basic Books, 1979), p. 17.

16. See, for example, Louis Fisher, *President and Congress: Power and Policy* (New York: Free Press, 1972); *The Politics of Shared Power: Congress and the Executive*, 2nd ed. (Washington, D.C.: Congressional Quarterly Press, 1987); and *Constitutional Conflicts between Congress and the President* (Lawrence: University Press of Kansas, 1991).

17. Robert Spitzer, *The Presidential Veto: Touchstone of the American Presidency* (Albany: SUNY Press, 1988); "The Constitutionality of Presidential Line-Item Veto," *Political Science Quarterly* 112 (Summer 1997): 261–83.

18. Kenneth Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton, N.J.: Princeton University Press, 2001).

19. Phillip J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* (Lawrence: University Press of Kansas, 2002).

20. William Howell, *Power without Permission* (Princeton, N.J.: Princeton University Press, 2003). Howell's approach, however, is premised not on a public law approach but rather a rational choice approach. For an excellent review, see Robert Spitzer's review in the June 2004 issue of *Perspectives on Politics*, pp. 374–75.

21. Richard Rose, *The Postmodern President: The White House Meets the World* (Chatham, N.J.: Chatham House, 1988).