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PRESIDENTS AND THE POLITICS OF STRUCTURE

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I

INTRODUCTION

Over the last decade or so, rational choice theory has begun to transform the study of U.S. political institutions. The key to its success is methodological. What it offers, above all else, is a distinctively economic way of exploring a whole range of institutional issues—from government organization to political control to performance and accountability—that political scientists have long approached in less productive ways. As the movement for a new institutionalism has swept political analysis, rational choice has taken the lead in challenging the past and charting new paths for the future.¹

Analytically, this is all to the good. Substantively, however, there is something amiss in what rational choice actually has to say about U.S. political institutions. For while the institutional system has itself been transformed over the past century, evolving from a nineteenth century system of “congressional government”² into a modern, presidentially led bureaucratic state,³ the basic thrust of rational choice theory today fails to explain these developments adequately.

The hallmark of modern U.S. government is presidential leadership. Yet positive theorists have never known quite what to do with presidents. On

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1. See e.g., Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739 (1984). Kenneth A. Shepsle, *Institutional Equilibrium and Equilibrium Institutions*, in *POLITICAL SCIENCE: THE SCIENCE OF POLITICS* 51 (Herbert F. Weisberg ed., 1986).

2. WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* (1885).

3. STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE* (1982).

methodological grounds, they find legislators much easier to deal with. One reason is that legislators vote, which means that the modeling technology of social choice can be relied upon to generate theories of their behavior. Another is that much of what legislators do is motivated by a very simple goal: reelection. Presidents fail both tests. Most aspects of presidential behavior do not involve voting at all, and electoral concerns are only a small part of what motivates them.

Because presidents do not fit very comfortably into rational choice theories, the result is that they typically are left out—a datum so well known among positive theorists that they informally refer to presidents as “the P-word.” Even when presidents are taken into account, they tend to be cast in a legislative mold, portrayed simply as wielders of the veto in legislative decisionmaking⁴ or as undistinguished members of the legislature’s enacting coalition.⁵ The point of these analyses is not to understand the presidency as an institution, but rather to shed more light on the structures and outcomes of legislative choice.

One could argue that this approach is not such a bad thing. Presidents are enormously important to U.S. politics, and one can hardly understand how the system works without taking them fully into account. But theories must start somewhere, and not every relevant factor need be included right from the start. Success calls for simplicity, clarity, and manageability. So it may make sense to start with legislators and thus with Congress in moving toward a theory of political institutions. Presidents can be incorporated into the theory as time goes on, once a solid foundation is laid.

But what sounds fine in principle does not work out so fine in practice. The problem is that these early theories tend to take on lives of their own. They shape scholarly thinking about the political world, even though they are only partial perspectives on what politics and institutions are all about, and they threaten to be misleading if taken alone. In much of positive theory, it is virtually taken for granted that legislators are in fact the critical players, that elections and constituency pressures are in fact the key foundations of governmental decisionmaking, and that Congress is in fact the paramount institution in the U.S. system.⁶

These taken-for-granted are implicit claims about substance. Yet they are curiously inconsistent with the rise of presidential power throughout this century, with the growth and reach of the institutional presidency, with the spectacular

4. See, e.g., John Ferejohn & Charles Shipan, *Congressional Influence on Bureaucracy*, 6 J.L. ECON. & ORG. 1 (1990).

5. See, e.g., Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) [hereinafter McCubbins et al., *Administrative Procedures*]; Mathew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) [hereinafter McCubbins et al., *Structure and Process*].

6. See, e.g., Mathew D. McCubbins et al., *Administrative Procedures*, *supra* note 5; Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); Shepsle, *supra* note 1; Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

increase in the size, responsibilities, and professionalism of the public bureaucracy, and with the decentralization, fragmentation, and irresponsibility of Congress. Moreover, nothing in the logic of rational choice requires anyone to embrace these claims about legislative superiority. That they have gotten tangled up with the methodology of positive theory is essentially a sociological phenomenon, not a scientific one.⁷

We have two purposes here. The first is to bring the presidency more squarely within the terrain of positive theory by presenting it as a well-developed, nuanced, and powerful institution in its own right, rather than as a caricature whose only role in politics is to make life a little more difficult for legislators. The second is to argue that, despite positive theory's admiration of congressional power, presidents actually have substantial advantages over Congress in the institutional struggle to control government, advantages that lead to a creeping presidentialization of the system.

To illustrate how all this applies to the substance of U.S. politics, we follow the theoretical analysis with three brief case studies of political issues that have a direct bearing on the institutional balance of power: the Civil Service Reform Act of 1978, congressional oversight and funding of the institutional presidency, and presidential review of rulemaking by the federal regulatory agencies.⁸

II

STRUCTURE AND POWER

Under the U.S. constitutional system, the president and Congress are different institutions with different interests and powers. It is fashionable to say that these powers are shared rather than separate and to emphasize the need for cooperation across the branches.⁹ But conflict is normal and inevitable. The system generates a constant struggle for power between the two institutions.

This struggle is most observable in the policy arena, where officials from both institutions wrangle endlessly over the goals and details of public policy. These are the conflicts covered daily by the media, and many are of great consequence for the nation. The more fundamental struggles between the president and Congress, however, are not nearly as well publicized. Nor, for most observers

7. Terry M. Moe, *An Assessment of the Positive Theory of "Congressional Dominance"*, 12 LEGIS. STUD. Q. 475 (1987) [hereinafter Moe, *Positive Theory*]; Terry M. Moe, *The Politics of Structural Choice: Toward a Theory of Public Bureaucracy*, in ORGANIZATION THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND 116 (Oliver E. Williamson ed., 1990) [hereinafter Moe, *Politics of Structural Choice*].

8. Portions of the theoretical argument outlined here, especially in the early going, are drawn from Moe, *Politics of Structural Choice*, *supra* note 7, and Terry M. Moe, *Presidents, Institutions, and Theory*, in RESEARCHING THE PRESIDENCY: VITAL QUESTIONS, NEW APPROACHES 337-85 (George C. Edwards III et al. eds., 1993).

9. See, e.g., RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP FROM FDR TO CARTER* 7-8 (1980); MARK A. PETERSON, *LEGISLATING TOGETHER: THE WHITE HOUSE AND CAPITOL HILL FROM EISENHOWER TO REAGAN* 76-99 (1990).

of politics, are they as interesting or comprehensible. These are battles over structure.

Two kinds of structure are of greatest consequence. The first involves the institutions that will interpret, elaborate, and carry out public policy: the bureaucracy. Policies mean little or nothing until they are given concrete expression through bureaucracy. A powerful, well-designed agency can turn policy goals into reality, while a weak, poorly designed one can get nowhere. Because everyone in the policy process knows this, much of the struggle over policy is really a struggle over bureaucratic structure—the design, location, staffing, and empowerment of administrative agencies—as well as a struggle to control them once they are set up. The second kind of structure concerns the presidency and Congress as institutions and, specifically, their capacities for exercising power—over policymaking, over the bureaucracy, over one another. How well each of them succeeds in gaining control of government depends on how its own institution is internally organized, the kinds of resources it can marshal, and the authority it can put to effective use.

The struggle for power between the president and Congress, therefore, while often manifested in well-publicized battles over policy, is largely a structural matter. It is a matter of how well each institution can engineer the structure of public bureaucracy and exercise control over it, as well as a matter of which institution can best structure itself internally to enhance its capacity for power.

A great deal of attention has been lavished on Congress over the years by positive theorists, but the president's role in all this is poorly understood, to say the least. Positive theory needs to inquire more seriously into how presidents, as rational actors, can be expected to approach these basic issues of institutional development and control, and how their approach compares to what we can expect of Congress.

A. Background

With presidents, as with so many other subjects, the best way to get a handle on their behavior is to step back from them, at least at the beginning, and try to gain perspective on the larger context in which their action takes place. In this case it is especially helpful to have some idea of what the politics of structural choice is about, who the contending actors are, and what kinds of structures they would build if they could.

Most people who do not closely study politics are probably under the impression that politics is largely about issues of policy, while issues of structure are decided on more-or-less objective grounds based on the policy goals to be achieved. This impression, of course, is far from the truth. Precisely because structure is a major determinant of policy (as well as power and other important things), people fight over its details, and it is inevitably political.

The politics of structure is like all politics. Its essence is that people with different interests engage in a struggle to control and exercise public authority. The struggle arises because public authority does not belong to anyone, but is simply available to those players that wield enough power under the democratic

rules of the game to gain control over it. Whoever wins this struggle has the right to make authoritative decisions for everyone, and thus the right to set up policies and structures that promote their own interests. The losers have to accept what the winners impose, even if it makes them absolutely worse off. Thus, while much good may ultimately come from all this, public authority is by nature coercive, as is politics. Some people win and some lose.

Bureaucracies and most other political institutions are created through the exercise of public authority. They arise out of a politics of structural choice in which the winners use public authority to design new structures and impose them on the polity as a whole. Because of this, the standard economic ways of thinking about institutions—in terms of voluntary exchange, contracting, mutual benefit, gains from trade, transaction costs, collective action problems—can tell only part of the political story.¹⁰ While these aspects of behavior are surely a big part of the strategies and coalitional processes behind the politics of structural choice, the typical outcome is that one coalition wins and the other loses. Most political institutions are not arrangements of mutual advantage, but vehicles by which winners pursue their own interests.¹¹

Who are the major players in all this? Although presidents and legislators actually make the official decisions about structure, they are not always, or even usually, the prime movers behind the politics of structure, at least in regard to public bureaucracy. As elected officials, they have incentives (particularly the legislators) to be responsive to political pressures arising from their respective constituencies. On issues of structure, virtually all these pressures come from organized interest groups.

The group basis of structural politics should not be surprising. Ordinary citizens may be reasonably well informed and interested on issues of policy, and politicians must pay attention to them. This is not the case, however, for structural issues, which most citizens regard as boring, arcane, impossible to understand, and irrelevant to politics. Organized groups, by contrast, are well aware that policy and structure are but two sides of the same coin, and they know that their success is crucially dependent on precisely those details of structure that most citizens ignore. As a foundation for understanding how presidents and legislators approach the politics of structure, therefore, it makes sense to think first about the kinds of group pressures they are under. What kinds of bureaucratic structures do interest groups want? What kinds of demands do they make on politicians?¹²

A useful baseline is *effective organization*. A winning group would surely like to use its authority to create the most effective agency possible. Were the

10. See, e.g., PAUL MILGROM & JOHN ROBERTS, *ECONOMICS, ORGANIZATION, AND MANAGEMENT* (1992); OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985).

11. See Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213 (1990).

12. For a more detailed treatment of how interest groups approach issues of structural choice, see Moe, *Politics of Structural Choice*, *supra* note 7.

winners unconstrained by political problems, they would favor whatever form of organization, type of staffing, and amounts of discretion seem most conducive to agency performance. Politics, however, does not allow the winners this luxury. Indeed, there are several very basic political forces at work here, all of them anchored in public authority and working against effective organization.

The first is *political uncertainty*. Winning groups that capture authority today can structure agencies in any way they like. They do not own them, however, and tomorrow an opposing coalition may gain the authority to control and undermine what they have created. Recognizing this political uncertainty from the outset, today's winners need not leave their agencies unprotected. They can fashion structures to insulate them from ongoing democratic control, exercising most of their own control *ex ante*, via structural design, rather than *ex post*. The most direct method is to narrow the discretion of bureaucrats and future authorities by specifying in great detail what agencies are to do—through decision criteria, procedures, timetables, personnel requirements, and other restrictive rules.

Obviously, this is not a formula for effective organization. In the interests of political protection, agencies are knowingly burdened with cumbersome, technically inappropriate structures that undermine their capacity to do their jobs well. Nor is this a formula for effective democratic control. Agencies are insulated precisely because those who create them do not want them held accountable by tomorrow's authorities.

A second basic force is *political compromise*. This sounds benign enough, and in private transactions it usually is. As economic actors engage in voluntary exchange, make compromises, and hammer out contracts to create their own structures, all participants expect to benefit (and are free to leave if they do not). In these contexts, organizations are designed by people who want them to succeed.¹³

This is not so in U.S. politics, where public authority not only guarantees that there are losers, but an array of checks and balances guarantees that political victory is difficult in the absence of some compromise with them. The result is that, if the winners want to shift the status quo, they will usually have to let the losers participate in the design of any organization being created. The losers, however, will often press for structures that undermine the organization's performance. Because U.S. politics is unavoidably a process of compromise, public agencies will be designed in part by their enemies, who want them to fail.¹⁴

A third basic force is *fear of the state*, which arises because groups do not exercise public authority directly and cannot perfectly control the politicians who

13. WILLIAMSON, *supra* note 10, ch. 1.

14. For instance, in creating the Occupational Safety and Health Administration ("OSHA"), labor had to compromise with business, which demanded and received bizarre structural arrangements that made it virtually impossible for OSHA to do its job effectively. See Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? 267, 301 (John E. Chubb & Paul E. Peterson eds., 1989).

do. This has a profound effect on their strategies. For while they are afraid of their group opponents, they are separately afraid of public officials, who have their own interests at heart, a measure of autonomy to pursue them, and the right to use the coercive power of public authority in ways that are unwanted and perhaps devastating to the groups. When groups press for new laws and agencies, then, they will try to protect themselves through structure.

As with political uncertainty, the most direct solution is to narrow official discretion through an array of detailed formal restrictions and requirements. And these will make it more difficult for agencies to do their jobs. Because of politics, it is rational for interest groups to fear one another, to fear the state, and to use structure to protect themselves, even though it may hobble the agencies that are supposed to be serving them.

B. Legislators and Bureaucracy

If they could, interest groups would build a bureaucracy that is highly “bureaucratic,” buried in formal rules and requirements that undermine effectiveness and insulate against democratic control. But groups do not exercise authority. Legislators and presidents do. What kind of bureaucracy do they want, and how responsive are they to group pressures?

The connection between groups, legislators, and bureaucratic control is not well understood in the rational choice literature. In the “law and economics” tradition, heavily influenced by the Chicago school,¹⁵ legislators are seen as suppliers of whatever the groups want (which, in our view, is not far from the truth). The implicit assumption of this view seems to be, however, that legislators need to control the bureaucracy in order to do this, or perhaps that groups demand such control—when, as we have shown, groups often have strategic reasons for demanding quite the opposite.

The positive theory of institutions, by contrast, is built on theories of voting, and pays little attention to interest groups as calculating, strategic actors.¹⁶ The spotlight is on legislators, who are seen as deriving great benefit from successfully controlling the bureaucracy—and being enormously successful at it. In the early theoretical work, positive theorists put most of the emphasis on bureaucratic control through ongoing oversight.¹⁷ This, supposedly, was how Congress dominated the bureaucracy. In more recent work, they have recognized that there is inevitably a great deal of slippage in this kind of control. Their claim now is that Congress still dominates the bureaucracy, but in a different way: through the ex ante design of bureaucratic structure.¹⁸

15. See, e.g., George J. Stigler, *The Theory of Economic Regulation*, 2 J. ECON. MGMT. SCI. 3 (1971).

16. Shepsle, *supra* note 1.

17. See, e.g., Weingast & Moran, *supra* note 6.

18. See, e.g., McCubbins et al., *Administrative Procedures*, *supra* note 5; McCubbins et al., *Structure and Process*, *supra* note 5.

Shorn of its congressional-dominance trappings, this more recent line of argument is in the same spirit as our own: bureaucratic structure arises from political attempts to stack the deck. Yet even this recent work, which is specifically about legislative control of the bureaucracy, does not present a clear picture of how or why legislators would want to do this. The rational foundations of control remain murky.

At a minimum, three questions must be answered. First, what kinds of demands about structure are interest groups bringing to bear on legislators? Second, to what extent do legislators respond to these demands, and to what extent can they act autonomously—contrary to what the groups want—in applying public authority toward their own ends? And third, given whatever balance legislators strike between responsiveness and autonomy, what kind of bureaucratic control do they seek?

These issues deserve careful and sustained treatment, and an article about the presidency is obviously not the ideal place to do it. The best we can do is to hit some of the more basic points that help clarify things a bit. We have already done this for interest groups and their demands. We will now turn to legislators and, very briefly, discuss issues of responsiveness, autonomy, and control.

Legislators are driven by an almost paranoid concern for reelection.¹⁹ They are not, most fundamentally, in the business of controlling bureaucracy, whether *ex ante* or *ex post*. They are in the business of making themselves popular and their jobs secure. Because broad constituency influences are largely absent on issues of structure, legislators' political antennae are fully sensitive to the demands of organized interest groups, who do care about structure, pressure for what they want, and know how to use their political resources to shape the popularity and electoral prospects of legislators.

To be reelected, then, legislators must be highly responsive to group demands on issues of structure. And if the groups happen to demand bureaucratic structures that are largely insulated from political control, including legislative control, then legislators will have strong incentives to do what the groups ask. If it enhances their electoral prospects to give up control, they will give up control. For this reason, it is crucial not to think of legislators as the key actors or prime movers in the politics of structural choice. What legislators do only makes sense once it is clear what the groups want and why they want it.

This does not mean that legislators will simply operate as faithful agents of the groups. There is some basis for autonomous action, which the groups regard as shirking. As in any principal-agent relationship, the incentive and monitoring mechanisms available to groups are imperfect, and they cannot exact total compliance. The most obvious occasions for shirking arise when legislators have personal preferences, such as for ideology, that may conflict with their reelection goals,²⁰ and imperfect control allows them to go their own way every once in

19. DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 121-22 (1974).

20. Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (1984).

awhile. Perhaps more importantly, though, legislators may shirk even when they are entirely driven by reelection concerns; there may be certain structural choices that, while opposed by political groups and thus politically costly to embrace, are still in the electoral best interests of legislators. For purely electoral reasons, in other words, they may sometimes make autonomous choices about structure that are unresponsive to group demands.

Two forms of legislator autonomy, which pull legislators in entirely different directions, are most worthy of note. First, when faced with conflicting group pressures, legislators may decide that their own long-term electoral prospects are enhanced not by embracing the demands of one side or the other, but instead by delegating broad discretion to the bureaucracy (and thus, at least implicitly, to the president). This is a strategy by which legislators use structure to protect themselves rather than groups.

They cannot expect to fool anyone, however, when they do this. The groups will know they are being stonewalled, and they can mete out punishment as they see fit. But the advantage for legislators is that they avoid the potentially large, short-term costs of angering one side and, at the same time, they set up a structure that helps funnel future conflicts into the bureaucracy and away from the legislature. Sometimes, especially when passions run high, these benefits of "shifting the responsibility"²¹ may be worth their political price.

Second, when winning groups demand structures that insulate their agencies from political control, legislators may sometimes insist on reserving a greater measure of control for themselves than the groups would like. The legislative veto (prior to *INS v. Chadha*)²² and sunset laws are possible means of doing this. Costs aside, there are clear benefits to such a strategy, especially for committee and subcommittee chairs. The greater their control over policy, the better able they are to supply groups with what they want, and the better positioned they are to demand votes, money, and other emoluments in exchange. The idea is to make groups dependent on them, rather than vice-versa.

But this is less attractive than it might appear, at least as an act of autonomy. The winning groups, which in the current period are the more powerful groups, may impose heavy political costs when their insulationist demands are ignored. So getting control may be costly. And once control is obtained, legislators may become targets for conflicting pressures that they would typically want to avoid for fear of angering one side or both. In the final analysis, moreover, all this does not purchase much real control over policy. Oversight for purposes of serious policy control is time-consuming, expensive, and difficult to do well.

21. Morris P. Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982).

22. 462 U.S. 919 (1983) (holding legislative veto of agency decisions violative of Article I of the U.S. Constitution).

Legislators typically have much more productive ways to spend their scarce resources.²³

As a result, legislators do not typically have strong incentives to buck group demands and invest in general policy control for themselves. To the extent that they value control for their own reasons, they value particularized control.²⁴ They want to be able to intervene quickly, inexpensively, and in ad hoc ways to protect or advance the interests of particular clients or groups in particular matters. This sort of control can be managed by an individual legislator without collective action; it has direct payoffs for which he or she can claim credit; it is generally carried out behind the scenes; and it does not involve or provoke conflict. The bottom line is that particularized control generates political benefits for individual legislators with few political costs.

Overall, it would be a mistake to say that legislators do not have any autonomy and that structural decisions they make on their own account, and not in response to groups, are of no consequence. The whole issue is a fascinating and important one that has so far received much less attention from positive theorists than it deserves. Nonetheless, there is every reason to believe that truly autonomous action is characteristic of legislative behavior only at the margins. The electoral connection, combined with the notoriously short time horizons of most legislators, ensures that they will be highly responsive to group pressures and, in particular, to the costs groups can impose on them for going their own way.

Ironically, behaviors that seem to reflect legislator autonomy, such as shifting the responsibility and asserting legislative control, may often be stimulated and thus explained by the power of the losing groups. Unlike the winners, they are in favor of agency discretion if it increases the opportunities for subverting what the agency does, while they are in favor of greater legislative control if it means opening the agency and its decisions up to further attack. The legislative veto is a perfect example. It tends to be the losers, not the winners, who insist on attaching legislative vetoes to agency mandates.²⁵ Thus, what might appear to be an act of legislative autonomy may well be just another reflection of the underlying balance of group pressures.

The legislative story of structural politics, in any event, is largely a story about groups, and Congress is rightly regarded as an extremely receptive place for the kind of bureaucracy the groups want to create. Legislators are concerned about their own electoral popularity and are not frequently given to flights of autonomy or statesmanship. Most certainly, they are not bound by any overarching notion of what the bureaucracy as a whole ought to look like, nor

23. LAWRENCE DODD & RICHARD SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 127-28 (1986).

24. MAYHEW, *supra* note 19, at 121-22; McCubbins & Schwartz, *supra* note 6, at 165-69.

25. A good example can be found in the political conflicts surrounding the Consumer Product Safety Commission, in which the agency's business opponents pressured heavily for a legislative veto, and its consumerist supporters fought against it. This pattern is common. See Moe, *supra* note 14, at 290-91.

are they driven by efficiency, coordination, management, or any other design criteria that might limit the kind of bureaucracy they can accept. They do not even insist on retaining true policy control for themselves. Instead, they willingly build, piece by piece, whatever sort of bureaucratic monstrosity makes the groups happy. The whole is an accident of aggregation. Only the pieces are important. That is the way the groups want it.

C. Presidents and Bureaucracy

Presidents do not want the kind of bureaucracy that the other players are busily trying to create, and they have the power to do something about it. Because of presidents, the game of structural politics is very different than it otherwise would be and its outcomes are very different as well.

Presidents pursue interests that are often incompatible with, and indeed threatening to, the interests of most of the other major players. Their heterogeneous national constituency leads them to think in grander terms about social problems and the public interest, and to resist specialized appeals. Reelection, moreover, does not loom as large in their calculations (and in the second term, of course, it is not a factor at all). They are more fundamentally concerned with governance.

Unlike legislators, presidents are held responsible by the public for virtually every aspect of national performance. When the economy declines, an agency falters, or a social problem goes unaddressed, it is the president who gets the blame, and whose popularity and historical legacy are on the line.²⁶ All presidents are aware of this, and they respond by trying to build an institutional capacity for effective governance. As a result, they are the only players in the politics of structural choice who are motivated to seek a unified, coordinated, centrally directed bureaucratic system. They want a bureaucracy they can control from the top.²⁷

This quest for control is especially troublesome to the other players, because presidents act with a great deal of autonomy. This is true in two basic respects. The first is that their large, heterogeneous constituency, along with the lower priority they attach to reelection, give them substantial freedom to fashion their own agenda and to pursue their own brand of control. The second is more deeply rooted. If there is a single driving force that motivates all presidents, it is not popularity with the constituency nor even governance per se. It is leadership. Above all else, the public wants presidents to be strong leaders, and presidents know that their success in office, along with their place in history,

26. THEODORE J. LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED* 19-20 (1985); Fred I. Greenstein, *Change and Continuity in the Modern Presidency*, in *THE NEW AMERICAN POLITICAL SYSTEM* 45, 46 (Anthony King ed., 1978).

27. Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235 (John E. Chubb & Paul E. Peterson eds., 1985).

hinges on the extent to which citizens, political elites, academics, and journalists see them as fulfilling this lofty expectation.²⁸

In order to be regarded as strong leaders, presidents must often do what is popular, and they must govern effectively; these aspects of presidential motivation are, in large measure, simply derivative components of strong leadership. But presidents also have to "show the way" by charting new paths for U.S. society, even when these paths happen to be *unpopular* at the time. Strong leaders have the capacity for rising above politics when necessary, for pursuing their own vision in the face of political odds, and for doing what is right rather than what is politically safe and expedient. Strong leaders have to demonstrate their true mettle by being selectively *unresponsive* and showing their autonomy.

Here again, presidents are dramatically different from legislators. For legislators, autonomy is a form of shirking for which they expect to be electorally punished if caught. Their incentive structure strongly discourages whatever inclinations they may have to go their own way. Almost the opposite is true for presidents. They are expected to take autonomous action boldly and openly, and their leadership suffers when they fail to do so. Autonomy is an integral part of their institutional incentive structure, part of what it means to be a good president.

The great emphasis presidents place on autonomy is a major threat to most of the organized groups that animate the legislative politics of structural choice. As far as they are concerned, presidents are unresponsive and out of control. Worse, presidents not only want structures of a different kind, but they also want structures that *give them control* of public bureaucracy—when, of course, what the groups want is to control the various, uncoordinated pieces of the bureaucracy themselves.

Thus, while winning groups have rational grounds for fearing the state, they do not fear all state actors equally. They fear legislators a little. They fear presidents a lot. So as these groups go about building agencies to do their bidding, they will favor protective structures that are disproportionately aimed at limiting presidential control. There are various ways of achieving this goal. They may favor independent forms of organization, insulation of personnel through civil service and professionalism, and reduced roles for political appointees, for example. They can also seek protection from the president by pushing for all the usual formal restrictions on procedure, criteria, and timing that, by reducing the scope for agency discretion, insulate "their" components of the bureaucracy from anyone's *ex post* control.

Not all groups will be dedicated to limiting presidential control. The losing groups, most notably, may often press for structures that increase presidential access and influence, because this opens up new channels into an offending agency and boosts the prospects for opposition and obstruction. Given the managerial concerns of presidents and their responsibility for the national

28. JAMES MCGREGOR BURNS, *LEADERSHIP* (1978).

economy, increased presidential control can also lead to constraints on agency activities that reduce the costs and burdens the losers expect to bear. These advantages of presidential control are especially attractive to business groups. For when bureaucracies are created in the modern age, business is often on the losing side.

While presidents are not without their supporters, then, it is the stronger side—consisting of the dominant group forces behind the creation of bureaucracy, together with their legislative allies—that opposes them on matters of structure. The net result is that the legislative politics of structural choice tends to reflect an antipresidential bias. It routinely promotes the development of an executive branch that is difficult for presidents to control and ill-suited for effective performance.

D. Presidents as Creators of Structure

Presidents are driven to do something about this. There is not much they can do to change the basic features of separation of powers. By weighing into the politics of structural choice, however, they can alter the dynamics of institutional change and fashion a system more to their liking. In some measure, they can create their own structural context, and either prevent others from doing so or counteract what others have done.

This challenge has never been central to the way scholars have understood the presidency. Positive theorists, of course, have largely ignored presidents. Within the broader literature, however, the mainstream view has long been that presidents must operate within a basic structural framework, anchored in separation of powers, granting them far less formal power than they need for strong leadership, and that their key to success is the resourceful pursuit of bargaining and cooperation within this framework. The classic work in this tradition, Richard Neustadt's *Presidential Power*, neatly conveys the basic idea in a phrase so widely accepted that all students of U.S. government have committed it to memory: "Presidential power is the power to persuade."²⁹

More recent work has argued that power in the modern presidency increasingly has less to do with elite persuasion and more to do with the presidential strategy of "going public," appealing over the heads of established powerholders to mobilize the support of the electorate.³⁰ This strategy, too, has presidents taking the system as given and maneuvering within it to bring about desirable outcomes.

Persuasion and bargaining are surely essential to presidential leadership, as is going public. Yet, presidents do not have to take the system as given. They can act to change it, and they clearly have strong incentives to do just that. Those who design and control structure tend to have more than their share of

29. NEUSTADT, *supra* note 9, at 10.

30. SAMUEL KERNELL, *GOING PUBLIC* (2d ed. 1993).

advantages when the political game is ultimately played out. The president's most fundamental job in politics is to take charge of the game: to structure it, not simply to play it.

How can they do this? The simple fact that presidents are the nation's chief executives, endowed by Constitution and statute with certain formal powers, is of enormous consequence for their ability to shape the U.S. institutional system along presidential lines. These formal powers, combined with certain basic realities of political life, enable them to make many important structural choices *on their own*, without going through the legislative process.³¹

Although we do not want to be too literal about it, presidents have something like what economists refer to as "residual decision rights."³² In the private sector, these are rights an actor may possess under a contract or governing arrangement that allow him to take unilateral action at his own discretion when the formal agreement is ambiguous or silent about precisely what behaviors are required. Residual rights are characteristic of ownership. Owners are bound to follow the specific requirements of laws and contracts, but are free to make decisions about whatever is not specified: the residual.³³

Presidents, of course, do not own the structures of government. In many spheres of public organization and policy, however, the absence of specific legal directives about how to proceed means that presidents are able to make authoritative decisions on these matters, acting unilaterally and at their own discretion—as though they have residual decision rights. They can organize and direct the presidency as they see fit, reorganize, coordinate, impose rules, review decisions, put their own people in top positions, and otherwise place their structural stamps on government institutions. Like private owners, they do not have a completely free hand. There are constraints on what they can do and rules they must follow. Within these bounds, though, the residual is often substantial, and they have room to maneuver in making discretionary decisions about the structures of government.³⁴

We discuss the reasons for this at greater length in the next section. For now we simply observe that it gives the president a trump card of great consequence in his struggle against Congress to gain control of government. He can act unilaterally in many matters of structure, while Congress, whether in trying to take actions of its own or in reacting to what the president has done, must go through a difficult process of legislation—a process in which the president gets to participate and, if he disagrees, to veto. Moreover, when Congress does succeed in designing administrative arrangements much to its own liking, the president can unilaterally respond by *adding on* new structures, that, in qualifying

31. RICHARD PIOUS, *THE AMERICAN PRESIDENCY* (1979).

32. Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691-95 (1986).

33. See MILGROM & ROBERTS, *supra* note 10, at 289-90.

34. JOHN HART, *THE PRESIDENTIAL BRANCH* (1987); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 544-46 (1989); Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

the way these arrangements work, are more conducive to his own interests. Regulatory review is a prominent example.

As presidents pursue strong leadership, then, their best strategy is not simply to take structure as given and plunge into the informal politics of bargaining. Nor is it to concentrate their institution-building energies solely on the legislative politics of bureaucratic design. In both, especially the former, presidents are playing on someone else's turf, are being held prisoners of the prevailing structure, and are acquiescing to an institutional system that is incompatible with their leadership. Their best strategy is to use their comparative advantage, their residual decision rights as chief executive, by taking aggressive action within their own sphere of authority to shift the structure of politics for themselves and everyone else. Doing so allows them to become, as much as they ever will, masters of their own destinies, shaping the institutional system along presidential lines.

III

THE INSTITUTIONAL PRESIDENCY

This is the rational basis for the institutional presidency. Throughout this century, presidents have struggled to provide themselves with a structural capacity for leadership by building institutions of their own. For many reasons—political opposition, the pressure of events, the scarcity of resources, and imperfect knowledge about what works—this has not been a simple, linear process of development. But the trajectory is clear, and the motivating force behind it is the president's drive for leadership in a system largely beyond his control.³⁵

At a very general level, the internal organization of the presidency can be understood in much the same way as the internal organization of Congress. Both take forms that facilitate the realization of member interests. Congress, however, is made up of hundreds of coequal individuals, each concerned with bringing home the bacon to his or her own constituents; as a group, they face serious collective action problems in arriving at structures that are stable and mutually beneficial. In large measure, the committees, procedures, and party leaderships that organize congressional behavior emerged over time as solutions, albeit imperfect ones, to these collective action problems. They enable members to have disproportionate influence over issues of relevance to their own districts, to make credible commitments in legislative bargaining, to arrive at durable political deals, and thus to realize gains from trade with their colleagues—all in the interest of reelection.³⁶

35. See Moe, *supra* note 27.

36. GARY COX & MATHEW MCCUBBINS, *LEGISLATIVE LEVIATHAN* (1993); Barry K. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132 (1988). The internal structure of the legislature has also been shaped by the power politics of winning and losing, and not simply by considerations of mutual gains. Rational choice theory clearly has much to say about both, but, for convenience, only the latter,

Similarly, the internal organization of the presidency reflects the interests of the president. The crucial difference is that the presidency is a unified institution, in the sense that it has one supreme authority: the president. In determining his own preferences and making his own decisions, the president does not suffer from the collective action problems that plague Congress, and he need not resort to complex structural arrangements for mitigating them. The task of institution building is much more straightforward here. Presidents are in charge, and they try to create structures to enhance their own capacity for effective leadership.

All sorts of functions are essential to effective leadership in modern times, but most of these the president cannot possibly handle alone. He cannot carry out his own lobbying with Congress. He cannot recruit, screen, and hire all his own personnel. He cannot manage his relations with the press. He cannot plan and schedule all the details of his day-to-day activities. He cannot know enough, technically or politically, to formulate coherent programs and make wise policy choices. He cannot personally control the bureaucracy. In the familiar words of the Brownlow Committee, "[t]he president needs help."³⁷

In more modern terms, he needs to rely on agents. Because he does, he faces the classic "principal's problem" in building his institution: how to choose agents, and how to structure his relationship to them, in such a way that they are most likely to take actions that enhance his own capacity for leadership.³⁸

Figuring out how to organize people productively is a complicated business. It is crucial to recognize, however, that presidents' unchallenged authority within their own realm gives them a great advantage in minimizing the "agency losses" that plague most control relationships in politics. They can choose people who not only have the right kind of training and skills to do their jobs well, but who also, by virtue of ideology, partisanship, and loyalty, can be expected to promote the president's interests as they go about their tasks. The presidency is not just a hierarchy of employees but, more than perhaps any other major political institution, *a team*.³⁹

This simplifies the president's job as well as his organization. In most agency relationships, structures proliferate in order to minimize the agency losses associated with opportunism, conflict of interest, and asymmetric information. Rules, incentive schemes, monitoring, and other devices are necessary to control agents who cannot be counted upon to do the right thing. To the extent that personnel choices produce a genuine team, however, opportunism and conflict

which happens to be the standard line these days among positive theorists, is stressed here. See Moe, *supra* note 11.

37. PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES 5 (1937).

38. JOHN W. PRATT & RICHARD J. ZECKHAUSER, PRINCIPALS AND AGENTS 2-4 (1985).

39. See, e.g., RICHARD NATHAN, THE ADMINISTRATIVE PRESIDENCY (1983). This should not be interpreted in absolute terms. There are obviously different interests and ideologies at work among the various members of each presidency, and power struggles are not uncommon. The president, however, is the focal point that unites all players. They may struggle to gain his attention and influence his decisions, but they are all expected, at the risk of their jobs, to be good, responsible team members.

of interest are greatly reduced, and much of the bureaucratic apparatus designed to reduce agent shirking can be dispensed with. Still, the often politically sensitive decisions these agents make are important to the president, and mistakes can be very costly. So some bureaucracy is still necessary. But its purpose is to mitigate the problems faced by teams—by promoting coordination, information-sharing, and applications of suitable expertise among individuals who share the same mission of furthering the president's interests, but may not know how to achieve it or how to function productively as a group.

All this applies with most force to what we might think of as the “purely presidential” part of the institutional presidency. This part provides support services for the president and includes his closest advisers, the personnel office, the media office, the congressional liaison office, and units for outreach to interest groups. These are clearly internal to the presidential hierarchy and subject to his complete authority. But the boundaries of the institutional presidency are unclear at the margins, more so than those of Congress, because the president has rationally extended his own institution to try to control the far-flung federal bureaucracy—which is *not* solely under his authority. This extension of the presidency reaches beyond the president's own special realm. The problems he faces there, as well as the structures needed to deal with them, are different.⁴⁰

Presidential control of the bureaucracy involves a two-step agency relationship. The first step is purely presidential: the president delegates the task to his own agents, whom he must try to control. Although he cannot do so perfectly, this is the easy part. It is the second step, in which the president's agents try to control the bureaucracy, that produces real trouble. Opportunism, conflict of interest, and asymmetric information—the bases of willful noncompliance—are rampant at this lower level. The surface reason is that each agency has its own mission, expertise, clientele, linkages with congressional committees, and methods of operation. They do not want to be controlled by the president. The deeper reason is that much of this is built in, because legislators and groups design it to be that way.

The president can employ his residual decision rights as chief executive to mitigate these problems and gain more control for himself. Two institutional strategies stand out: he can “politicize” and he can “centralize.”⁴¹ Although dealing with agencies designed and overseen by Congress, he is fully capable of

40. PERI E. ARNOLD, *MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING 1905-1980* (1986); HART, *supra* note 34; Moe, *supra* note 27.

41. Moe, *supra* note 27, at 244-45. These labels are used because they are commonly used in the presidency literature, knowing that they may be less than optimal. The term “politicize,” in particular, is something of a misnomer. Agencies arise out of the politics of structural choice and are thoroughly political from the moment of their conception. Their insulation from presidential control, whether through rules, civil service, professionalism, or the like, is itself a political act with widespread political consequences. Presidents do not make the agencies “more political” by trying to do something about it, as the term “politicize” seems to suggest.

implementing these two strategies on his own authority to target the foundations of agency noncompliance.

Presidents politicize by using their appointment authority to place loyal, ideologically compatible people in pivotal positions in the bureaus, the departments, and, of course, the OMB and other presidential agencies whose job it is to exercise control. This is a strategy of imperialism, extending the reach of the presidential team by infiltrating alien territory. The idea is to ensure that important bureaucratic decisions are made, or at least overseen and monitored, by presidential agents.

The aggressive use of presidential appointment power—nicely augmented by the Civil Service Reform Act of 1978, which allows the president to choose his own team of high-level civil servants in the Senior Executive Service (“SES”)—goes a long way toward mitigating the most severe problems of opportunism and conflict of interest that prompt agencies willfully to resist presidential control. In addition, the appointment power attacks the problem of asymmetric information by providing the presidential team with a pipeline into the private information that agencies might otherwise use to evade control, especially if appointees bring expertise or experience to their jobs (which is virtually guaranteed for team members within the Senior Executive Service). Thus, appointment mitigates not only the will to resist but also the means, for expertise and other types of private information are perhaps the most crucial sources of agency power.⁴²

The appointment power does part of the job, but serious problems remain. Political appointees can never know what career bureaucrats know; they will always be at a disadvantage. Moreover, precisely because they are working in the agencies and need the support of agency personnel to do their jobs well, appointees are under pressure to become advocates for the parochial interests of their agencies. As long as effective decisionmaking authority rests with the agencies themselves, then, presidents will have a difficult time gaining control through an appointments strategy alone. And because the parceling out of authority in this manner means that decisions will be decentralized and fragmented, presidents cannot simply rely on appointments to create the kind of coherent, coordinated policy control they need.

This is where the centralization strategy comes in. Instead of infiltrating the agencies to ensure they make the right kinds of decisions out on the periphery, presidents can use structure to shift the locus of effective decisionmaking authority to the center. One basic way they can do this, as chief executives, is by imposing managerial rules that constrain agency behavior, and by building presidential organizations, such as the Office of Management and Budget, to help make and enforce these rules. The rules may vary from the most mundane procedures for budget submissions and legislative clearance to the bolder, more

42. WILLIAM NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971); FRANCIS E. ROURKE, *BUREAUCRACY, POLITICS, AND PUBLIC POLICY* (2d ed. 1984).

controversial requirements for regulatory review. All such rules have the effects of limiting agency discretion and shifting decisionmaking power to the president.

More generally, presidents can move toward coherent central control by setting up their own policymaking structures inside the White House, incorporating people of their own choosing from the departments, the agencies, and the Executive Office, and pulling salient issues of public policy into the presidency for debate and resolution. In foreign policy the major centralizing institution is the National Security Council ("NSC"). The president clearly has strong reasons for not wanting the State Department, the Defense Department, and other agencies to make their own foreign policy decisions. Incorporating them into a central structure run by his own people, he can attempt to make foreign policy truly presidential by hearing their views, enlisting their expertise, coordinating their contributions, and directing policy toward presidential ends.⁴³

In domestic policy, much the same applies. Although there is no statutory agency like the NSC to put a formal stamp on their efforts, all modern presidents have rightly feared becoming captives of the bureaus and departments, and, they have incrementally moved toward the development of White House structures that presidentialize major policy issues.⁴⁴ Nixon's Domestic Council and Reagan's cabinet councils are two examples. As structures of presidential control, these are the functional equivalents of the NSC.

Even in combination, of course, politicization and centralization cannot give the president the control he needs for effective leadership. The bureaucracy does not want to be controlled, is structured to prevent it, and has ample resources to resist. Moreover, even if he could, the president would not want to push these strategies to an extreme. His leadership obviously benefits from the expertise, experience, and continued operation of public agencies, and he cannot totally circumvent them, infiltrate them, or deny them discretion without undermining their essential role in governance—and his own capacity for leadership.⁴⁵

The continuing problem for presidents, though, is that they have too little control, not too much, and they need to build an institution that helps them do a better job of overcoming the tremendous obstacles to leadership the system places in their way. This is what the presidential team, the various presidential organizations, and the strategies of politicization and centralization are all about, and it is what the institutional presidency as a whole is all about. This is how presidents fight back: with structures that enhance their power.

43. See, e.g., JOHN P. BURKE, *THE INSTITUTIONAL PRESIDENCY* (1992); I.M. DESTLER, *PRESIDENTS, BUREAUCRATS, AND FOREIGN POLICY* (1972); Bert A. Rockman, *America's Department of State: Irregular and Regular Syndromes of Policy Making*, 75 AM. POL. SCI. REV. 911 (1981).

44. BURKE, *supra* note 43; NATHAN, *supra* note 39; Moe, *supra* note 27.

45. Hugh Heclo, *The OMB and the Presidency—The Problem of "Neutral Competence,"* PUB. INTEREST, Winter 1975, at 80.

A. The Presidential Advantage: Discretion and Unilateral Power

At the heart of the U.S. system is a basic institutional tension between the president and Congress. Legislators and groups, motivated by parochial concerns, routinely go about the piecemeal construction of a bureaucracy buried in formalism, insulated from effective control, and ill-designed for its tasks. Presidents, motivated to lead, find this unacceptable. They take aggressive action to presidentialize the system's institutional makeup by modifying the "congressional bureaucracy," developing their own institutions, and putting them to use. The other players resist, the president counters, and the cycle continues. The central dynamic of the U.S. institutional system comes from this tension between presidents who seek control and the legislative and group players who want to carve out their own small pieces of turf.

The U.S. system has always been fragmented and decentralized. The kind of institutions favored by legislators and groups fit nicely with the traditional character of the system. What is new and different in the modern period is the presidency and, in particular, the public expectations that drive all modern presidents to seek leadership and control. Presidents are the ones who are out of step, pushing for new institutional arrangements that fly in the face of traditional practice and parochialism. They are the ones, as a consequence, who represent the real driving force for change in the U.S. institutional system. Legislators and groups are essentially protectors of the institutional status quo.

Inevitably, given separation of powers, the protectors of the status quo are well equipped to block most attempts at change. Even so, presidents hold pivotal advantages that allow them to propel the system, however haltingly and episodically, along a presidential trajectory.

The president is greatly advantaged by his position as chief executive, which gives him the right to make unilateral decisions about structure and policy. If he wants to develop his own institution, review or reverse agency decisions, coordinate agency actions, make changes in agency leadership, or otherwise impose his views on government, he can simply proceed—and it is up to Congress (and the courts) to react. For reasons discussed below, Congress often finds this difficult or impossible to do. And the president wins by default. The ability to win by default is a cornerstone of the presidential advantage.

Why does the president have these powers of unilateral action? Part of the answer is constitutional. Rather than spelling out his authority as chief executive in great detail—a strategy favored by those among the Founders, such as Madison, who were most concerned with limiting the executive—the Constitution remains largely silent on the nature and extent of presidential authority, especially in domestic affairs. It broadly endows the president with "the executive power" and gives him responsibility to "take care that the laws be faithfully executed," but says little else.⁴⁶ This ambiguity, as Richard Pious

46. U.S. CONST. art. II.

notes, "provided the opportunity for the exercise of a residuum of unenumerated power."⁴⁷ Proponents of a strong executive, who won out on the ambiguous language, were well aware of that.

The question of what the president's formal powers really are, or ought to be, will always be a subject of controversy among legal scholars. But two observations seem reasonably clear. First, if presidents are to perform their duties effectively under the Constitution, they must be (and in practice are) regarded as having certain legal prerogatives that allow them to do what executives do: manage, coordinate, staff, collect information, plan, and reconcile conflicting values. This is what it means, in practice, to have the "executive power."⁴⁸ Second, although the content of these prerogative powers is itself unclear, presidents have been aggressive in pushing an expansive interpretation: rushing into grey areas of the law, asserting their rights, and exercising them—whether or not other actors, particularly those in Congress, happen to agree.⁴⁹

The courts have the authority to resolve ambiguities about the president's proper constitutional role, but they have not chosen to exercise it. Certain contours of presidential power have been clarified by major court decisions—on the removal power, for instance, and executive privilege—and justices have sometimes offered their views on the president's implied or inherent powers as chief executive.⁵⁰ The political reality, however, is that presidents have largely defined their own constitutional role thus far by pushing out the boundaries of their prerogatives.

There is nothing that Congress can do to eliminate the president's executive power. He is not Congress's agent. He has his own constitutional role to play and his own constitutional powers to exercise, powers that are not delegated to him by Congress and cannot be taken away. Any notion that Congress makes the laws and that the president's job is simply to execute them—to follow orders, in effect—overlooks the essence of separation of powers. The president is an authority in his own right, coequal to Congress and not subordinate to it.

Precisely because the president is chief executive, however, what he can and cannot do is also shaped by the goals and requirements of the statutory laws he is charged with executing. And Congress has the right to be as specific as it wants in designing these laws, as well as the agencies that administer them. If it so likes, it can specify policy and structure in enough detail to narrow agency discretion considerably, and thereby the scope for presidential control. It can also impose requirements that explicitly qualify and limit how presidents may use their prerogative powers, as it has done, for instance, in protecting members of

47. PIOUS, *supra* note 31, at 38.

48. Bruff, *supra* note 34; Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979); Lloyd N. Cutler, *The Case for Presidential Intervention in Regulatory Rulemaking by the Executive Branch*, 56 TUL. L. REV. 830 (1982); Strauss, *supra* note 34.

49. PIOUS, *supra* note 31.

50. Strauss, *supra* note 34, at 609-16.

independent commissions from removal and in mandating civil service protections.⁵¹

Yet these sorts of restrictions cannot ultimately contain presidential power. Presidents are powerful players in the legislative process, and they will fight for statutes that give them as much discretion as possible. In addition to this, however, the legislative authors of statutes cannot eliminate all discretion in their delegations to bureaucracies and presidents anyway, and they would not want to even if they could. Their concern, politics aside, is still the effective provision of benefits to constituents. For problems of even moderate complexity, especially in an ever-changing world, this concern requires placing most aspects of policy and organization in the hands of professionals and allowing them to use their own expert judgment in fleshing out the details.

The best legislators can do is to write statutory analogues to "incomplete contracts"—arrangements that, however detailed, do not specify the decisions that must be made under all present and future contingencies—and then embed them in "governing structures" that specify who gets to participate in discretionary decisions, what procedures must be followed in making them, and how these decisions can be reviewed or appealed.⁵² But these governing structures are designed subject to presidential veto, and thus with sensitivity to presidential concerns. And once they are set up, it is the president and the agencies who do the governing, not the Congress. Short of new legislation, Congress can only resort to oversight from the outside. The president is chief executive, and the ball is in his court.

Thus, while legislators and groups may try to protect their agencies by burying them in rules and regulations, a good deal of discretion must remain, and presidents cannot readily be stopped from turning it to their own advantage. They are centrally and supremely positioned in the executive, they have great flexibility to act, they have a vast array of powers and mechanisms at their disposal—not to mention informal means of persuasion and influence—and they, not Congress, are the ones who are ultimately responsible for day-to-day governance. Even when Congress directly limits presidential prerogatives (such as the removal power), presidents have the flexibility to simply shift over to other means of control.

In part, the problem Congress faces is analogous to the classic problem a board of directors faces in trying to control management in a private firm.⁵³ The board, representing owners, tries to impose a governing structure to ensure that management will behave in the owners' best interests. But managers have their own interests at heart, and expertise and day-to-day control of operations allows them to engage in a measure of shirking behavior. Much the same is true

51. LOUIS FISHER, *THE POLITICS OF SHARED POWER* (3d ed. 1993); Strauss, *supra* note 34.

52. See generally MILGROM & ROBERTS, *supra* note 10; Oliver Hart & Bengt Holmstrom, *The Theory of Contracts*, in *ADVANCES IN ECONOMIC THEORY: FIFTH WORLD CONGRESS* (Truman F. Bewley ed., 1987).

53. Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J. LAW & ECON. 301 (1983).

for Congress and the president. However much Congress tries to structure things, the president can use his own institution's—and through it, the agencies'—informational and operational advantages to engineer outcomes that promote presidential, rather than congressional, objectives. Although charged with “faithfully” executing the laws, the president has a very substantial capacity to shirk.

But the corporate analogy is not quite on target. The problem owners face is that they cannot control their agents, who are managers that they hire and have authority over. Owners have control problems even though their authority is supreme. Congress's problem is far more severe. The president possesses all the resources for shirking that the corporate manager does, but his position is far stronger, because he is not Congress's agent in the scheme of government. He is an authority in his own right. Congress does not hire him, it cannot fire him, and it cannot structure his powers and incentives in any way it might like. Yet it is forced to entrust the execution of the laws to his hands. From a control standpoint, this is a nightmare come true. And it is not a shirking problem. It is an authority problem in which, when the president goes his own way, he is not really shirking at all.

It is also important to recognize that, although Congress can try to limit presidential prerogatives through statute, the president is greatly *empowered* through statutory law whether Congress intends it or not. Some grants of power to the president are explicit, as, for example, in the negotiation of tariffs and the oversight of mergers in the foreign trade field. But the most far-reaching additions to presidential power are implicit. When new statutes are passed, almost whatever they are, they increase the president's total responsibilities and give him a formal basis for extending his authoritative reach into new realms. At the same time, they add to the total discretion available for presidential control, as well as to the resources contained within the executive.

While it may seem that the proliferation of statutes over time would tie the president up in knots as he pursues the execution of each one, the aggregate impact is liberating. For the president, as chief executive, is responsible for *all* the laws, and inevitably the laws turn out to be interdependent and conflicting in ways that the individual statutes themselves do not recognize. As would be true of any executive, the president's proper role is to rise above a myopic focus on each statute in isolation, to coordinate policies by taking account of their interdependence, and to resolve statutory conflicts by balancing their competing requirements. All of this affords the president substantial discretion to impose his own priorities on government.⁵⁴

Regulatory review is but one instance of this. Since the Nixon years, all presidents have insisted on reviewing the proposed rules of various regulatory agencies, and their add-on structures and criteria have caused a number of

54. See generally PIOUS, *supra* note 36; Bruff, *supra* note 39, at 540-46; Bruff, *supra* note 48, at 461-62; Cutler, *supra* note 48, at 835-39.

important rules to be delayed, modified, or shelved.⁵⁵ Agencies and their legislative and group supporters have complained loudly that this review process prevents the agencies from single-mindedly pursuing their mandates. And they are right. Yet presidents are responsible not just for these particular statutes, but for all statutes, including those directing them to lower inflation and unemployment, promote economic growth, conserve energy, and otherwise enhance the economic well-being of the nation. Thus, presidents have a statutory (as well as a constitutional) basis for asserting their coordinating-and-balancing prerogatives in bringing these other values to bear on the regulatory agencies. And in political practice, of course, this means that they have a legal argument for imposing presidential priorities and expanding the scope of their own discretionary action. The greater the proliferation of congressional legislation over the years, the greater the president's opportunities to find just this sort of conflict and interdependence—and to assert control.

B. The Presidential Advantage: Congress's Collective Action Problems

Another major source of presidential advantage deserves equal emphasis. The president is a unitary actor who sits alone atop his own institution. What he says goes. Congress is a collective institution that can make decisions only through the laborious aggregation of member preferences. As such, it suffers from serious collective action problems that the president not only avoids, but can exploit.

This crucial fact of political life is too often overlooked. There is a tendency among scholars and journalists to reify the Congress, to treat it as though it is an institutional actor like the president, and to analyze their institutional conflicts accordingly. The president and Congress are portrayed as fighting it out, head to head, over matters of institutional power and prerogative. Each is seen as defending and promoting its own institutional interests. The president wants power, Congress wants power, and they struggle for advantage.

This misconstrues things. Congress is made up of hundreds of members, each a political entrepreneur in her own right, each dedicated to her own reelection, and thus to serving her own district or state. While all have a common stake in the institutional power of Congress, this is a collective good that, for well-known reasons, can only weakly motivate their behavior.⁵⁶ They are trapped in a prisoner's dilemma: while all might benefit if they could cooperate in defending or advancing Congress's power, there are strong incentives for each to free-ride if support for the collective good is politically costly to them as individuals. Just as individual citizens, absent taxation, would not voluntarily pay their respective shares of national defense costs, so individual legislators will not flout the interests of their constituencies if that is the price of protecting congressional power. Were a legislator offered a dam, a Veteran's Administration hospital, or

55. See, e.g., Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127, 128-55 (Autumn 1991).

56. MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (1971).

a new highway to vote for a bill that, among other things, happens to reduce Congress's power somewhat relative to the president's, there would be little mystery as to where the stronger incentives lie.

The internal organization of Congress, especially its party leadership, imposes a modicum of order and authority on member behavior and gives the institution a certain capacity to guard its power. But disabling problems still run rampant, and they are built-in. Party leaders are notoriously weak, and they are weak because their "followers" want them to be. Good leadership means promoting the reelection prospects of members by decentralizing authority, expanding their opportunities to serve special interests, and giving them the freedom to vote their constituencies.⁵⁷

Presidents are not hobbled by these collective action problems and, supreme within their institution, can simply make authoritative decisions about what is best. While their interests as individuals may sometimes conflict with those of the presidency as an institution—for instance, if their needs for responsiveness and loyalty undercut the presidency's long-term capacity for expertise and competence⁵⁸—their drive for leadership almost always motivates them to promote the power of their institution. Thus, not only is the presidency a unitary institution, but there is also substantial congruence between the president's individual interests and the interests of the institution.

This sets up a basic imbalance. Presidents have both the will and the capacity to promote the power of their own institution, whereas individual legislators have neither, and cannot be expected to promote the power of Congress as a whole in any coherent or forceful way. This means that presidents will behave imperialistically and opportunistically, but that Congress will not do the same in formulating an offensive of its own, and indeed will not even be able to mount a consistently effective defense against presidential encroachment.

Congress's situation is all the worse because its collective action problems do more than disable its will and capacity for action. They also allow presidents to manipulate legislative behavior to their own advantage, getting members to support or at least acquiesce to the growth of presidential power. One basis for this has already been well established by political scientists:⁵⁹ in any majority-rule institution with diverse members, so many different majority coalitions are possible that, given the right manipulation of the agenda, outcomes can be engineered to allow virtually any alternative to win against any other. Put more simply, an agenda-setter can take advantage of the collective action problems inherent in majority-rule to get her own way. She can find a majority for her own most preferred outcome.

Presidents have at least two important kinds of agenda power. First, precisely because Congress is so fragmented, presidentially initiated legislation

57. MAYHEW, *supra* note 19.

58. Helco, *supra* note 45.

59. See generally Richard D. McKelvey, *Intransitivities in Multidimensional Voting: Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472 (1976).

is the single most coherent political force in setting the legislative agenda. The issues Congress deals with are fundamentally shaped each year by the issues presidents decide will be salient.⁶⁰ Second, presidents set Congress's agenda when they or their appointees in the bureaucracy take unilateral action to shift the status quo—for instance, by changing the direction of an agency's policy. This happens all the time, and Congress is simply forced to react or acquiesce. In either case, presidents can choose their positions strategically, with an eye to the various majorities in Congress, and engineer outcomes more beneficial to the presidency than they could if dealing with a unified opponent.⁶¹

Their leverage is greatly enhanced by the maze of obstacles that stand in the way of congressional decisionmaking. Bills must pass through subcommittees, committees, and floors in each house; they must be endorsed in identical form by both; and they are threatened along the way by rules committees, filibusters, holds, and other roadblocks. All are veto points, all have to be overcome if Congress is to act, and presidents need success with only one to ensure the status quo.

Positive theorists tend to understate the capacity of presidents (and others) to prevent congressional action. Their models of legislative voting invariably leave out many of the veto points. They fail to treat committees and subcommittees as distinct decision arenas, for instance, and they ignore the opportunities for filibusters and holds on legislation in the Senate. Simplifying these factors away may be helpful for modeling purposes, but it glosses over the staggering number of obstacles that must be overcome for any legislation to emerge, suggesting it is much easier to get action than in fact it is.⁶²

More generally, these models assume that legislative voting is costless, and thus entirely determined by the various players' ideal points. In a literature that prides itself on recognizing the pervasive consequences of transaction costs, this is a great oddity. The transaction costs of moving a bill through the entire legislative process are enormous. Not only must coalitions be formed among hundreds of legislators across two houses and a variety of committees and subcommittees, calling for intricate coordination, persuasion, trades, and promises, but, given scarce time and resources, members must also be convinced that any particular issue is more deserving than hundreds or thousands of others that are always competing for a place on the legislative agenda. Party leaders and committee chairs can help reduce some of these costs through their centralizing roles (although what they do in the process, of course, is to eliminate most bills from contention, all of them with eager sponsors). But the whole process of generating congressional outcomes is unavoidably costly anyway. And

60. See, e.g., JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1984); PAUL C. LIGHT, *THE PRESIDENT'S AGENDA: DOMESTIC POLICY CHOICE FROM KENNEDY TO CARTER* (1982); MARK PETERSON, *LEGISLATING TOGETHER* (1992).

61. Thomas H. Hammond et. al., *Presidents, Congress, and the "Congressional Control of Administration" Hypothesis* (Unpublished paper presented at the Annual meeting of the American Political Science Association, Washington D.C. 1986, copy on file with authors).

62. See, e.g., Ferejohn & Shipan, *supra* note 4.

because it is, we cannot predict outcomes based on the ideal points of the players alone. The best prediction is that, for most issues most of the time, there will be no affirmative action on the part of Congress at all. The ideal points may logically support a given outcome, but in reality *nothing will happen*.

When presidents are able to use prerogative powers and discretion to shift the status quo, what they most want from Congress is no formal response at all—which is what they are likely to get. This would be so in any event, given the multiple veto points and high transaction costs that plague congressional choice. But it is especially likely when presidents and their institutional agents weigh into the legislative process on their own behalf: dangling rewards, threatening sanctions, directing the troops, and unsticking legislative deals with side payments.⁶³ Presidents are especially well situated and endowed with political resources to do this. And again, it is fairly easy to block.

Whether presidents are trying to block or to push for legislation, the motivational asymmetry at work adds mightily to their cause. We referred to this above, but it is important enough to need underlining. Presidents are strongly motivated to develop an institutional capacity for controlling government as a whole, and, when structural issues are in question, they tend to take the larger view: how do these structures contribute to the creation of a presidential system of control? Legislators are driven by localism and special interests, and they are little motivated by these sorts of system concerns. This basic motivational asymmetry has a great deal to do with what presidents are able to accomplish in their attempts to block or steer congressional outcomes.

On issues affecting the institutional balance of power, presidents care intensely about securing changes that promote their institutional power, while legislators typically do not. They are unlikely to oppose incremental increases in the relative power of presidents unless the issue in question directly harms the special interests in their clientele; and, if presidents play their cards right, this can often be avoided. On the other hand, legislators are generally unwilling to do what is necessary to develop Congress's own capacity for strong institutional action. For not only does it often require that they put constituency concerns aside for the common good, which they have strong incentives not to do, but it also tends to call for more centralized control for party leaders and less autonomy for individual legislators, which they find distinctly unattractive.

When institutional issues are at stake in legislative voting, then, presidents have a motivational advantage. They care more. This asymmetry means that they will invest more of their political clout in getting what they want. It also means that the situation is ripe for trade. Legislators may fill the air with rhetoric about the dangers of presidential power, but their weak individual stakes allow them to be bought off with the kinds of particularistic benefits and sanctions that they really do care intensely about. This does not imply that

63. See generally GEORGE EDWARDS III, *PRESIDENTIAL INFLUENCE IN CONGRESS* (1980); STEPHEN J. WAYNE, *THE LEGISLATIVE PRESIDENCY* (1978).

presidents can perform magic. If what they want requires affirmative congressional action, they face many obstacles and a low probability of success. But their chances are still much better than they would otherwise be, absent the motivational asymmetry. And if all they want to do is block, which is often all they need, then the asymmetry can work wonders in cementing presidential faits accompli.

The weight of all these factors, taken together, points to a decided presidential advantage in the battle for institutional power. The president is a unitary decisionmaker; he can take unilateral action in imposing his own structures; his individual interests are largely congruent with the institutional interests of the presidency; and he is dedicated to gaining control over government. Congress is hobbled by collective action problems, vulnerable to agenda manipulation by the president, and populated by individuals whose interests diverge substantially from those of the institution. The result is an imbalance in the dynamic of institutional change, yielding an uneven but relentless shift toward a more presidential system.

Inherent in this trajectory is a ratchet effect: when presidents gain new ground, they will not give it back. They want control, and every president will protect not only what he has won, but what all past presidents have won. Sometimes, of course, the tides of politics may move against them. Congress may on rare occasions overcome its congenital incapacities and strike a blow for greater congressional control, as it did, for instance, in the War Powers Act⁶⁴ (which presidents have largely ignored). But these are the exceptions. Congress will usually be incapable of winning back all the ground it has lost.

The presidential advantage does not mean that presidents are destined to take over. Separation of powers creates legal impediments to extreme shifts in the institutional balance. And in the ongoing politics of structural choice, the growth of presidential control represents an increasing threat to parochial interests and gives them stronger incentives to invest in political opposition. The most reasonable expectation is for some sort of equilibrium to be reached in future years, an equilibrium more presidential than we have now, but still a far cry from what presidents might like.

IV

THE PRESIDENTIAL QUEST FOR POWER: THREE CASES

To illustrate this argument about the presidential advantage, we now turn to three important cases in recent institutional politics. Each involves presidential attempts to expand their own powers at the expense of Congress.

The first case explores the politics of the Civil Service Reform Act of 1978,⁶⁵ in which President Carter sought to engineer a significant increase in presidential control over federal employees, and asks how Congress responded. The second

64. Pub. L. No. 93-148, 87 Stat. 555 (1973).

65. Pub. L. No. 95-454, 92 Stat. 1111 (1978).

looks at congressional oversight and funding of the institutional presidency, and asks how effectively Congress has used its own powers to prevent presidents from increasing theirs. The third spotlights regulatory review, in which presidents have imposed their own rules and priorities on agency decisionmaking, and asks what Congress has done to stop it.

A. Civil Service Reform

Civil Service is obviously a major impediment to presidential leadership, but until Jimmy Carter no modern president had invested much in trying to reform the system. Civil service reform had been included in broader reorganization packages, notably under Roosevelt (via the Brownlow Committee) and Eisenhower (via the Second Hoover Commission), but it had never been a high priority on its own.⁶⁶ This is hardly surprising. Genuine reform calls for new legislation of the first magnitude, which is difficult, expensive, and time-consuming to achieve. With so many other ways to enhance their power through unilateral action, presidents had little incentive to pursue it.

Carter's situation was different from that of his predecessors. He oversaw a government that was much bigger, more bureaucratic, and more expensive than theirs. By the mid-1970s, in an atmosphere of stagflation and energy shortages, U.S. citizens were fed up. Strong anti-government, anti-tax sentiments swelled within the electorate, and politicians—Jimmy Carter most prominent among them—responded with pledges of reform.⁶⁷

It was easy to portray civil service reform as part of this broad movement for better, more effective government. But for Carter it was also much more than that. It was a way to make the civil service system an arm of the presidency, and thus to enhance the president's capacity to control the bureaucracy. The kind of reform he had in mind amounted to nothing less than a clear shift in the balance of institutional power.

By the early spring of 1978, barely a year after assuming office, Carter placed a comprehensive proposal for civil service reform before Congress. Together with Alan Campbell, his chair of the existing Civil Service Commission, he turned loose a small army of White House staffers, cabinet members, and OMB officials to mobilize support within Congress.⁶⁸

The proposed legislation involved five major changes in the federal personnel system⁶⁹:

(1) It would divide the Civil Service Commission, long a nonpartisan independent agency, into two parts. One, the Office of Personnel Management

66. ARNOLD, *supra* note 40; RICHARD POLENBERG, REORGANIZING ROOSEVELT'S GOVERNMENT 1936-1939 (1966).

67. Felix A. Nigro, *The Politics of Civil Service Reform*, 20 S. REV. PUB. ADMIN. 196, 203-04 (1979).

68. Patricia Ingraham, *The Civil Service Reform Act of 1978: Its Design and Legislative History*, in LEGISLATING BUREAUCRATIC CHANGE: THE CIVIL SERVICE REFORM ACT OF 1978 13, 15, 21-24 (Patricia W. Ingraham & Carolyn Ban eds., 1984); Harlan Lebo, *The Administration's All-Out Effort on Civil Service Reform*, 10 NAT'L J. 837, 837-38 (1978).

69. Nigro, *supra* note 67, at 212-13.

("OPM"), would be headed by a single presidential appointee and would set personnel policies for federal employees. The other, the Merit Systems Protection Board ("MSPB"), would be an adjudicatory agency for handling appeals and grievances.

(2) It would create a Senior Executive Service, a flexible corps of high-level administrators (about 9,200 in number) who could be moved from job to job and who would qualify for substantial merit pay.

(3) It would get away from automatic pay raises for supervisors and managers, increasing reliance on performance evaluations and merit pay.

(4) It would substantially curtail veterans' preferences, which, since World War I, had given them priority for federal jobs.

(5) It would codify arrangements for unionization and collective bargaining and place responsibility with a new agency, the Federal Labor Relations Authority.

There was nothing here to fool legislators into believing this was just a statesmanlike attempt to achieve good government. The OPM would be an arm of the presidency and would be granted much more discretion than the old Civil Service Commission, discretion that could obviously be turned to presidential advantage. There would be a large corps of senior executives—whose personal views, loyalties, and partisanship are easily identified—that the OPM could allocate at its discretion across key agency jobs. And these executives, as well as other managers within the Civil Service, would be subject to performance evaluations and merit pay, which would inevitably be determined by the discretionary judgment of the president's people within the OPM and the agencies.

Congress responded just as we would expect. Legislators did not care much about the balance of power issue and, with a few exceptions, did not oppose this shift in authority and discretion to the president. Virtually all the political controversy was stimulated by the intense opposition of special interest groups—labor unions and veterans groups—to the provisions of the Act that specifically affected them.⁷⁰ The legislators who led the battle against civil service reform had little or no concern for the larger institutional issues. They were responding to powerful groups, who obviously did not care about these issues either. It was group politics as usual.

The committees with primary jurisdiction were the Senate Government Affairs Committee and the House Post Office and Civil Service Committee. The Senate Committee is not tied to any particular set of interest groups because its mandate is to oversee government organization generally and because it attracts Senators from various constituencies. These Senators, like all politicians during the late 1970s, knew that supporting "reform" would have electoral advantages. And there were few direct impacts on their constituencies to worry about. Meantime, Carter was pushing hard, using the resources at his disposal to win

70. ARNOLD, *supra* note 40, at 334; Ann Cooper, *Carter Plan to Streamline Civil Service Moves Slowly Toward Senate, House Votes*, 36 CONG. Q. WKLY. REP. 1777, 1778, 1782 (1978).

them over. The result was almost total support, among both Democrats and Republicans, for the core of the president's bill.

Not even this committee, however, was immune to group influence. Well aware of the broadly based power of veterans groups within Congress, its members feared a bloody floor fight that could derail the whole bill.⁷¹ In addition, they knew that there were veterans in their own districts who were numerous, organized, and active. The committee ended up reporting a bill that substantially weakened the offensive provision about veterans, but otherwise preserved what the president wanted.⁷²

On the Senate floor, two Republicans, Charles Mathias of Maryland and Ted Stevens of Alaska, who had opposed the bill in committee, argued against the dangers of politicization of the civil service by the president. This was the only serious opposition to the bill that was couched in institutional rather than interest-group terms.⁷³ They were appeased, however, with minor amendments that left the essence of the bill unchanged. The veteran's provision, too, was slightly amended. The amended bill was approved by the entire Senate by a vote of 87 to 1,⁷⁴ hardly an indication that Senators were staying up nights worrying about the balance of institutional power.

In the House, there was more of a political struggle—but not over institutional issues. The House Post Office and Civil Service Committee was a friendly place for interest groups. Because of its jurisdiction, it was a high-priority setting for the federal employees unions and the politicians who sought to serve them. The unions were particularly strong on this committee, and they were not happy with this Act.⁷⁵

Initially, the president had attempted to appease them by including in his bill a provision codifying aspects of labor relations and creating the Federal Labor Relations Administration ("FLRA"). But the unions found this too weak to compensate for the Act's threatening expansions of executive discretion and merit pay, which directly eroded the kinds of rule-based protections unions consistently demand for their members.

The federal employees unions did not have enough support to torpedo the bill, but they were strong enough to cause trouble. Their fallback was to have William Clay, a Democrat from Missouri, attach an amendment that liberalized existing Hatch Act limitations on federal employee political activities. This left the remaining provisions unaffected, but it was something the unions desperately wanted. A similar provision had passed in the House the year before, and presumably would do so again. But it was vehemently opposed by Republicans,

71. Cooper, *supra* note 70, at 1783.

72. *Id.* at 1782-83.

73. Ann Cooper, *Senate Approves Carter Civil Service Reform*, 36 CONG. Q. WKLY. REP. 2239 (1978). It may well be that their rhetoric was really just a vehicle for defending group interests. Mathias, in particular, was from Maryland and thus had every reason to be keenly sensitive to what the federal employees unions wanted, since many of its members lived in his state.

74. Cooper, *supra* note 70.

75. Nigro, *supra* note 67, at 218.

who were generally quite supportive of Carter's civil service reform bill; and they launched a variety of strategic maneuvers of their own, leading to a complicated political battle whose intricacies can only be appreciated by seasoned parliamentarians.⁷⁶

In the end, the Clay Amendment was dropped. Labor did attach an amendment limiting the SES to a small pilot program, but Republicans allowed this, knowing it would die later at the conference committee stage. More concretely, labor also succeeded in strengthening the provision on collective bargaining. Veterans left their mark, too: the House accepted the Senate's wording, and thus retained most veteran's preferences.⁷⁷ The resulting bill passed the House floor on a vote of 385 to 10.⁷⁸ Again, none of this had anything to do with general concerns about the balance of power. Once the groups were satisfied, the legislators were willing to go along.

The bill coming out of the conference committee was almost exactly what President Carter had requested: a bill radically transforming the civil service system and granting him substantial new discretion and power.⁷⁹ With Republican support, the committee restored the full SES program. However, to mollify labor Democrats, it tacked on a two-house legislative veto to the SES provision.⁸⁰ Aside from this, and, of course, the victory by veterans, the bill passed both houses without controversy.⁸¹

While all this was happening, a revealing decision was being made along a separate track. The president had sought most of his changes via new legislation, but he had asked for authority to divide the Civil Service Commission into two parts, the OPM and the MSPB, through a "reorganization plan," which by law would take effect unless vetoed by either the House or the Senate.⁸²

The reaction of legislators to this aspect of the proposal is especially telling evidence of how they approach issues of institutional power, because this Carter reorganization plan was an issue shorn of all special interest provisions. It simply called for an up-or-down vote on whether the president should bring personnel more fully under his control throughout the government. Did members of Congress rise up to stop presidential imperialism? Hardly. The House voted 19 to 381 to defeat a resolution opposed to the president's plan, and the Senate did not bother to vote.⁸³

76. Ann Cooper, *Carter Civil Service Plan: Battered but Alive*, 36 CONG. Q. WKLY. REP. 1839, 1839-41 (1978).

77. Ann Cooper, *Civil Service Reforms Likely This Year*, 36 CONG. Q. WKLY. REP. 2458 (1978).

78. *Id.*

79. Ann Cooper, *Enactment of Civil Service Reforms Nears*, 36 CONG. Q. WKLY. ALMANAC 2735, 2735-36 (1978).

80. *Id.* at 2735. After five years, Congress could overturn the SES provisions if both houses voted (within a prescribed 60-day period) to do so.

81. 5 U.S.C. § 1101 (1978).

82. Ann Cooper, *Civil Service Reorganization Plan Approved*, 36 CONG. Q. WKLY. ALMANAC 2125 (1978). Under the Reorganization Act passed by Congress in 1977 (Pub. L. No. 95-17), the president can submit plans to Congress for reorganizing federal agencies. The plans take effect unless disapproved by the House or Senate within 60 days.

83. Cooper, *supra* note 82.

The bottom line is that the president cared a great deal about these issues of institutional power, but members of Congress did not. If anything, they were mildly supportive, due to the reformist sentiments among the public at the time. The only political fireworks were supplied by the special interest groups directly affected by this legislation: unions and veterans.

B. Congressional Oversight of the Presidency

Under the Constitution, Congress's powers are vague at the margins, just as the president's powers are. While Congress has the right to make the laws, it is unclear how far it might go in making laws that undermine the president's ability to exercise his constitutional rights as chief president. Similarly, while Congress has the power of the purse, it cannot be too draconian in denying funds to the executive without making it impossible for him to carry out his proper duties.

Nonetheless, an aggressive Congress bent on protecting and promoting its own power in the institutional system would do what presidents have done. It would push its prerogatives to the limit and use every ambiguity to its own advantage. If threatened, as it clearly has been, by the growing scope and reach of the institutional presidency, Congress has the formal power to reduce funding, withhold authorization, stifle appointments, and engage in aggressive oversight. Indeed, it could take action to prevent the emergence of a powerful institutional presidency in the first place. Presidents cannot build a powerful institution with no money.

Yet Congress has done nothing of the sort. It has not only failed to act aggressively in asserting its own powers. It has largely stood on the sidelines and allowed presidents to do what they want in building their own institution in their own way. The most comprehensive study of the topic is contained in John Hart's *The Presidential Branch*.⁸⁴ Hart sums it up this way:

Ever since the Executive Office of the President was established in 1939, Congress has shown a marked reluctance to enforce, let alone strengthen, its oversight of the presidential branch. Even the events of Watergate, which helped to crystallize a great deal of criticism of the White House staff, did little to increase enthusiasm for improving congressional oversight in this area. Those efforts that were made came from a handful of legislators who were never able to convince the majority of their colleagues on Capitol Hill to share their concerns with the same intensity, and, today, the presidential branch remains relatively immune from congressional scrutiny of any kind.⁸⁵

Hart explains congressional inaction by pointing to the norm of comity, an understanding among legislators that, in the interests of harmony between the branches, presidents should be given latitude to develop their institution as they see fit. Even if there is such a norm, however, deeper questions remain. Why would legislators find comity compatible with their own interests? Why would

84. HART, *supra* note 34.

85. *Id.* at 168.

they choose to leave the president alone when they have the power to go after him?

The answer is rooted in Congress's collective action problems. Legislators do not care much about incremental changes in the institutional presidency unless their constituencies are directly affected. There are no group "fire alarms" to prod them into action, and no clear electoral benefit to be gained by opposing the president. In comparison, presidents always care intensely, and they dedicate their resources to getting what they want.

The creation of the modern OMB, the workhorse and power center of the institutional presidency, illustrates what Congress faces when presidents take the offensive on purely institutional issues. The vehicle to create the OMB was Richard Nixon's Reorganization Plan No. 2, which sought to transform the Bureau of the Budget ("BOB") into a more powerful presidential agency. Political appointees would replace career officials as heads of its operating divisions; its functions in program management, coordination, and information would be expanded; and all functions officially vested in the Bureau of the Budget would be transferred to the president. The purpose of this plan was to give the OMB greater managerial control over the government and to make the OMB more responsive to the president.⁸⁶ Legislators saw the plan for what it was, but the institutional issues were insufficient to galvanize opposition. The Senate never voted on a resolution of disapproval. The House did vote, but the Nixon forces put together a coalition of Republicans and Southern Democrats to win.⁸⁷

Until the early 1970s, Congress had little success in constraining the institutional presidency and showed little serious interest in doing so. It did try to influence the kind of advice presidents received—by creating the Council of Economic Advisors and the NSC, for instance, within the Executive Office. This was futile as a control mechanism, however, because presidents can refuse to take any advice they do not want. These units, like all others in the Executive Office of the President ("EOP") over the years, quickly became creatures of the sitting president. Each president was given a free hand within his own bailiwick to organize, employ staff, assign jobs, and allocate resources.⁸⁸ Congress was largely in the dark, moreover, about exactly what presidents were doing. It did not even know how many people were employed within the White House Office, where they came from, which units paid their salaries, or what their jobs were. It was funding all this, routinely and without question, but it literally did not know what it was funding.⁸⁹

86. ARNOLD, *supra* note 40, at 282-86; Hecl, *supra* note 45, at 80; Moe, *supra* note 27, at 256-57.

87. *Congress Accepts Four Executive Reorganization Plans*, 26 CONG. Q. ALMANAC 426, 463-65 (1970).

88. EDWARD S. FLASH, JR., *ECONOMIC ADVICE AND PRESIDENTIAL LEADERSHIP: THE COUNCIL OF ECONOMIC ADVISERS* 292-307 (1965); DESTLER, *supra* note 43, at chapter 5; Bert A. Rockman, *America's Departments of State: Irregular and Regular Syndromes of Policy Making*, 75 AM. POL. SCI. REV. 911, 913-14 (1981).

89. Dean L. Yarwood, *Oversight of Presidential Funds by the Appropriations Committees: Learning from the Watergate Crisis*, 13 ADMIN. & SOC'Y 299 (1981).

This changed in the early 1970s. By then, Richard Nixon had transformed the BOB, dramatically increased the size and power of the White House staff, and, in a variety of ways, antagonized the Democrats and their group supporters in Congress; and a small number of legislators had begun to press for more restrictive congressional oversight. Such isolated challenges would normally not be much of a threat. But then Watergate hit with full force, generating a public backlash against the "imperial presidency" and turning up the political heat. More and more legislators found that attacking the presidency was a popular thing to do.

The most notable struggles to come out of all this had their roots in a 1972 study by the House Post Office and Civil Service Committee, which, for the first time, collected simple data documenting the growth of the institutional presidency and its centralization of power in the White House. It decried these developments and called for more intensive congressional efforts to amass information on the presidency and restrict its development.⁹⁰

The next year, John Dingel, a Democrat from Michigan, tried to unhinge the presidential budget by revealing an amazing discovery: while Congress was regularly appropriating money for some five hundred White House employees, a 1948 statute still in effect only authorized six presidential assistants and eight secretaries! The president mobilized enough support to gain authority and funding for his troops in the short term, but a permanent solution in the law obviously had to be found. His opponents, in the meantime, had been accidentally empowered beyond their wildest dreams.⁹¹

Over the next several years, various legislators tried to engineer a bill that would authorize White House staff and at the same time provide Congress with better information and control. After a series of failed attempts, the House Post Office Committee came up with a bill that, with much modification, passed into law as the White House Personnel Authorization-Employment Act of 1978.⁹² The committee's original proposal was highly threatening to the president. It imposed strict ceilings on total White House staff as well as on the number of senior aides and executives; it also required presidents to submit an annual report with detailed information on who works in the White House, what they do, and who pays their salaries. As we would expect, however, these were top-priority issues for President Carter, and he maneuvered legislators into supporting a friendly, largely symbolic final bill: one that authorized a large White House staff and gutted the ceiling and reporting requirements.

Specifically, Carter got the House committee to remove its limit on total staff and to accept an unconstraining ceiling on senior staff (which would allow a fully staffed Carter White House to double its senior staff). Carter also got the Senate, whose members cared even less about the issue, to gut the reporting

90. STAFF OF HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, 92ND CONG., 2D SESS., REPORT ON THE GROWTH OF THE EXECUTIVE OFFICE OF THE PRESIDENT 1955-1973 (Comm. Print 1972).

91. *Executive Office, Treasury Funds*, 31 CONG. Q. WKLY. REP. 2155 (1973).

92. 3 U.S.C. § 101 (1988).

requirements. Instead of detailed records on individual employees, the White House would need to report only overall amounts spent on different types of staff. As before, genuinely revealing information would remain hidden. In the conference committee, the Senate won, and the fully gutted bill became law. The president got his authorization. The Congress got next to nothing.⁹³

To date this has been Congress's most coherent attempt to get a grip on the institutional presidency, and the only major piece of legislation that has yet emerged. But legislation is not Congress's only avenue of attack. There is always its annually exercised power of the purse, which is clearly capable of eviscerating the institutional presidency if used strategically.

Yet Congress has barely put the power of the purse to use. Prior to the 1970s, presidential budgets were barely scrutinized, and they typically passed through both houses of Congress without any change. Presidents provided Congress with virtually no information about the White House and its operations, nor even about the details of EOP agencies. Congress simply appropriated whatever funding presidents said was necessary. During the 1970s, relations became more contentious, peaking during the Watergate period but never entirely subsiding thereafter.⁹⁴

Presidents must work a little harder for their money now. The Appropriations Committees demand more information, scrutinize it more carefully, and are more critical than they used to be. But there is much less here than meets the eye. Presidents continue to get virtually everything they request, legislative rhetoric aside.⁹⁵ And the information they do provide Congress is next to useless for genuine control purposes. For the most part, their requests take the form of lump sum amounts pertaining to whole EOP units, or broad categories of employees or activities, with no information about the details of presidential organization, programs, or staffing. Even these days, then, the presidency is still treated with kid gloves, and Congress remains largely in the dark about what happens inside it.

There are other aspects of legislative activity we might explore here—Senatorial confirmation of appointments, for example—but we do not have the space in this article to dwell on them. The story, however, would be the same. Congress is only weakly capable of overseeing the institutional presidency and preventing its development as a foundation of presidential power. Congress clearly has the power, as an institution, to stop the presidency in its tracks. But its members typically have little incentive to exercise it, and even when they do, they are unlikely as a collective body to do it effectively, especially in the face of a president dedicated to victory.

93. *White House Staff*, 34 CONG. Q. ALMANAC 796, 796-98 (1978); HART, *supra* note 34, at 159-60.

94. See generally Yarwood, *supra* note 89.

95. For data on presidential budgets, see the accounts of Treasury, Post Office, and Civil Service appropriations in Congressional Quarterly Almanac, 1970-present.

V

REGULATORY REVIEW

Regulatory review is often spotlighted as an issue that captures the essence of the institutional battle between the president and Congress. Presidents have imposed new procedures on regulatory agencies in a sustained attempt, stretching over twenty years, to gain control over agency rulemaking and assert presidential priorities. During the same time, agencies and their legislative supporters have vigorously protested, claiming the bureaucracy is being denied the autonomy and discretion it needs to fulfill its legislative mandates. What could better reflect the struggle for institutional power and advantage than this?

Yet regulatory review is quite different from most institutional issues in one crucial respect: in practice, it has been carried out in the form of direct presidential attacks on special interest groups, particularly environmental groups. Thus, unlike the broad and general effects of civil service reform and congressional oversight of the institutional presidency, regulatory review's effects have been concentrated on a few powerful targets. Not surprisingly, these targets have fought back. As a result, legislators' normally weak incentives to protect Congress's institutional interests against presidential onslaught have been bolstered by the mobilization of powerful groups demanding legislative action. Regulatory review is therefore an unusual—and, for Congress, quite fortunate—case in which interest groups actually pressure Congress to defend itself.⁹⁶

The roots of the conflict go back to the early 1970s, when President Nixon instituted the Quality of Life review program under the direction of the OMB. The real target was the Environmental Protection Agency ("EPA"), newly created in 1970, which was devising anti-pollution rules that stood to cost industry billions of dollars annually at a time when the national economy was headed for trouble. Procedures were adopted requiring the EPA to submit its rules for prepublication review so that other agencies could offer comments, economic costs could be analyzed, conflicting views could be reconciled, justifications could be required, and pressure could be applied to bring EPA rules more in line with the President's programs.

During this period, however, new legislation deepened the President's regulatory problems. "Seven new regulatory agencies had been created, including the EPA, OSHA, and the Consumer Product Safety Commission. Between 1970 and 1974, twenty-nine major regulatory statutes had been enacted and the number of pages in the *Federal Register* had more than doubled from 20,036 to 42,422 per year."⁹⁷ When Gerald Ford assumed office, he faced a

96. The basic history of regulatory review is probably familiar to many readers. The following account relies generally upon THOMAS MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* (1974); Elizabeth Sanders, *The Presidency and the Bureaucratic State*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM* (Michael Nelson ed. 1990); Percival, *supra* note 55.

97. Percival, *supra* note 55, at 139.

rising tide of costly regulations, along with serious inflation and energy problems that demanded action.

Ford responded with a more extensive system of regulatory review. The Quality of Life program was continued. In addition, with the consent of an inflation-concerned Congress, he set up the Council on Wage-Price Stability ("COWPS") in the EOP and ordered regulatory agencies to submit their proposed rules, along with "inflation-impact statements," to COWPS for review. The aim, again, was to use procedure, analysis, and informal pressure to force agencies to consider economic costs and modify their rules accordingly.

When Democrat Jimmy Carter took office, environmental and labor groups looked forward to a relaxation that would give their agencies a freer hand to pursue their parochial mandates. Carter faced virtually the same problems that Nixon and Ford had, and his response was distinctively presidential: he took even more aggressive action along the same general path. Through Executive Order 12,044, agencies were required to prepare "regulatory analyses" for all regulations having major economic impacts by rigorously evaluating their cost effectiveness and comparing them to alternatives.⁹⁸ Proposed rules would then be subject to review by the new Regulatory Analysis Review Group ("RARG"), made up of representatives from seventeen executive agencies, led by the OMB, COWPS, and the Council of Economic Advisors ("CEA"), and staffed by economists committed to cost-benefit analysis.

It is clear from insider accounts that agencies—led, of course, by presidential appointees—were indeed moderating some of their rules, sometimes against their own best judgment.⁹⁹ The most affected groups and agencies, particularly the environmentalists and the EPA, complained loudly about it from the start, and members of Congress, led by Senator Edmund Muskie, obliged with sympathetic hearings but little else. Near the end of the Carter regime, however, their insistent pressure through Congress finally bore fruit. Carter pledged to go easier on the EPA, and RARG backed off considerably.¹⁰⁰

This was the calm before the storm. In little more than a year, Ronald Reagan took office and pushed regulatory review well beyond the bounds of his predecessors. He began quickly, appointing a Task Force on Regulatory Relief (chaired by Vice-President Bush), which promptly suspended almost two-hundred pending regulations and prepared a list of current regulations to be targeted for review.¹⁰¹ Reagan followed up with Executive Order 12,291, which brought agencies under presidential control as never before.¹⁰²

Under this most recent order, agencies were required to submit all proposed rules to the OMB's Office of Information and Regulatory Affairs ("OIRA") for pre-publication review, accompanied by rigorous cost-benefit analysis and

98. Exec. Order No. 12,044, 3 C.F.R. 152, 154 (1979).

99. See, e.g., JOHN QUARLES, *CLEANING UP AMERICA* (1976).

100. Christopher DeMuth, *Constraining Regulatory Costs—Part I: The White House Review Program*, REGULATION, Jan./Feb. 1980, at 13, 20-21.

101. Percival, *supra* note 55, at 148.

102. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted as a note in 5 U.S.C. § 601 (1982).

evaluations of alternatives. Unlike the past, the OMB allowed agencies to issue rules only when the benefits could be shown to exceed the costs, and required them to choose among alternatives in such a way as to maximize the net benefits to society. Moreover, the OMB now asserted the right to delay proposed rules indefinitely during review.¹⁰³

There is little doubt that, in terms of both the substance and timing of rules, the Reagan scheme of regulatory review imposed substantial constraints on the EPA, OSHA, and other regulatory agencies.¹⁰⁴ Environmental groups, especially, were furious and launched all-out attempts in Congress to break the hold of regulatory review. Pressure had been building for over ten years, as frustration with past presidents prompted demands for a congressional counter attack. But now, with the Reagan agenda so bold, the groups were pulling out the stops.

How did Congress respond? It did not take on the President directly in an all-out assault—say, through major legislation declaring Executive Order 12,291 null and void. Its approach was piecemeal and fragmented, and it generated just what we would expect from a group-dominated institution: special-interest legislation—for example, the 1982 amendments to the Endangered Species Act,¹⁰⁵ the 1984 amendments to the Hazardous and Solid Waste Act,¹⁰⁶ and the 1986 Superfund amendments¹⁰⁷—that, through countless new restrictions, further narrowed the discretion of the EPA, hobbled it with even more cumbersome and unworkable administrative burdens and, on very specific items, directed the president and OMB not to interfere. In effect, the legislators and interest groups attacked the president by burying the EPA in more bureaucracy. As Percival describes it,

Congress has expressed its dissatisfaction with the consequences of regulatory review by adding more specific statutory controls on agencies' discretion every time it has reauthorized the environmental laws.

The result has been a distinct trend toward reduced flexibility for agencies charged with implementing the federal environmental statutes.¹⁰⁸

At the same time, another fascinating drama was unfolding. OIRA, as it happens, was not really a Reagan creation. It had been created at the end of the Carter period as part of the Paperwork Reduction Act of 1980, and it was only later that Reagan, via his famous executive order, put regulatory review in its

103. To this already stringent set of procedures, Reagan later added Executive Order 12,498, 3 C.F.R. 323 (1985), which required agencies to submit an annual program outlining all significant regulatory actions planned for the coming year, so that the OMB would have plenty of time to review them without constraint by statutory deadlines.

104. See, e.g., Peter M. Benda & Charles H. Levine, *Reagan and the Bureaucracy: The Bequest, the Promise, and the Legacy*, in *THE REAGAN LEGACY: PROMISE AND PERFORMANCE* 102, 114-201 (Charles O. Jones ed., 1988).

105. 16 U.S.C. § 1544 (1988).

106. 42 U.S.C. § 6901 (1988).

107. *Id.* § 9601 (1988).

108. Percival, *supra* note 55, at 175.

hands.¹⁰⁹ As a statutory agency, however, OIRA's authorization was set to run out in 1983, and it had to weather the budgetary process every year to get funding. So, in principle, it was vulnerable to congressional attack.

What happened? OIRA's opponents had a golden opportunity to shoot the agency down, because reauthorization called for an affirmative act of Congress and they needed only to block. In fact, the Act was not reauthorized. The House went along, but the Senate did not. Reagan countered by instructing OIRA to do what it had always done. But it was now acting without legislative authorization; and this meant that, on a point of order, legislators could move to deny the agency funding. No authorization, no funding. Yet opponents were not able to make this work. During 1984 and 1985, OIRA was funded. In 1986, the redoubtable John Dingell credibly threatened the point-of-order strategy, and a bargain was struck with the White House: the Act would be reauthorized and OIRA would get funding, but future agency heads would require Senate confirmation and OIRA would have to increase public disclosures about its review process.¹¹⁰ These were only minor concessions by Reagan. Were legislators and groups really able to exercise power, they could have put OIRA out of business. The President clearly had the upper hand. The regulatory review system churned on, shaping and delaying regulations, and infuriating groups and agencies.

The Bush years witnessed more of the same. Although Bush was not as committed to regulatory review as Reagan, the basic structure of Executive Order 12,291 remained in place. A less zealous OIRA continued to do its presidential job, and interest groups continued to nibble away at their nemesis through fragmented congressional action. Environmental groups scored an indirect success (with Bush's assistance) through the Clean Air Act of 1990, which buried the EPA in more bureaucratic constraints, directives, and timetables. This bill, as Jonathan Rauch puts it, "is one of the most expensive and complicated regulatory measures of the postwar years. It runs to almost 800 pages"¹¹¹

They also took direct shots at OIRA, aided once again by its status as a statutory agency with temporary authority. Its authority had been renewed in 1986, but it ran out again in three years, and this gave its opponents yet another golden opportunity to put it out of business. In 1990, legislators agreed to reauthorize the Paperwork Reduction Act if Bush would accept certain restrictions on OIRA powers, among them a sixty-day deadline for reviewing rules and a requirement that it provide detailed explanations for any substantive changes in rules.¹¹² These were not major concessions, since they would leave the entire regulatory review apparatus in place. Although Bush was willing to go along, key Republican Senators opposed the bill for reasons of their own, and

109. See Benda & Levine, *supra* note 104, at 114-20.

110. *OMB Regulatory Review*, CONG. Q. ALMANAC 325 (1986).

111. Jonathan Rauch, *The Regulatory President*, 23 NAT'L J. 2902, 2903 (1991).

112. Kitty Dumas, *Administration Deal Pushes Paperwork Reduction Act*, 48 CONG. Q. WKLY. REP. 3602 (1990).

it was defeated.¹¹³ The result left OIRA without authorization and thus vulnerable to extinction. Yet the Administration continued to secure funding for the agency throughout Bush's tenure in office.

In short, OIRA's legislative opponents had everything going for them, and were still unable to stop regulatory review. They did, however, make trouble: they defeated Bush's first nominee to head OIRA. The President then relied on his executive flexibility, choosing not to submit another candidate, and instead asking a careerist within OIRA to serve as acting head. He also took a look at all the problems surrounding OIRA as a statutory agency and decided to change strategy, shifting major responsibilities for regulatory review to the Competitiveness Council, a purely presidential unit headed by Vice President Dan Quayle.¹¹⁴

This unit had been established for other reasons and given a broad presidential mandate to look into issues ranging from legal reform to job training. But it quickly delved deeply into regulatory review and, with staff assistance from OIRA, became an influential and controversial force. For the remainder of the Bush presidency, legislative opponents shifted their ire to the Competitiveness Council and went after it in the usual ways.¹¹⁵ But they were never able to deny it funding;¹¹⁶ they had no basis for affecting personnel or appointments; and they never passed legislation challenging the Council's right to do what it did.

When the Democrats finally took back the White House in 1993, one of the first things Bill Clinton did was to get rid of the Competitiveness Council. This met with a joyous response from many legislators and groups, but it was a largely symbolic act—for he most assuredly did not get rid of regulatory review. Indeed, he saw regulatory review as essential to presidential leadership, and he soon issued Executive Order 12,866, which, while repealing Reagan's Executive Order 12,291, reimposed a very similar structure of presidential review.¹¹⁷

At this writing, the Clinton style is still evolving. Review functions have been returned to OIRA, and procedures are being revamped to reflect the new President's agenda—by ensuring access, for example, to environmentalists, labor, and other Clinton supporters. While it remains to be seen what will come of this, the best guess is for “a fine-tuning of what has evolved over the past couple of decades,”¹¹⁸ not a radical change.

113. Janet Hook, *Inside Congress: 101st Congress Leaves Behind Plenty of Laws, Criticism*, 48 CONG. Q. WKLY. REP. 3683, 3699 (1990).

114. Rauch, *supra* note 111, at 2903.

115. See Kirk Victor, *Quayle's Quiet Coup*, 23 NAT'L J. 1676 (1991).

116. For an account of the failed attempt to deny the Council funding, see Susan Kellam, *Conferees Cut 200 Million, Pave Way to Approval*, 50 CONG. Q. WKLY. REP. 2936 (1992); Susan Kellam, *Social Security Riders Thrown from Senate Treasury Bill*, 50 CONG. Q. WKLY. REP. 2712-13 (1992).

117. Exec. Order 12,866, 58 Fed. Reg. 51735 (1993). This also repealed Reagan's Executive Order 12,498.

118. Viveca Novak, *The New Regulators*, NAT'L J. 1801, 1802 (1993).

Overall, the story of regulatory review is more riddled with outright political conflict than the others we have told. Attempts by presidents to expand their institutional power have taken the form of attacks on specific interest groups, and these groups have launched counterattacks against presidents. It is Congress's good fortune to have been caught in the middle. For the groups have been pressuring legislators to take actions that defend the interests of Congress as an institution. This is why Congress has been more active and successful in regulatory review than in the other areas we have looked at.

Nonetheless, their success has been quite limited. Regulatory review is now a routine part of the executive process. Presidents began it, built it up, and regularly exercised its powers in the face of group and legislative hostility. Congress did not rise up and pass major legislation to stop them, although it had the power to do so. It did not refuse to fund the review agencies, although it also had the power to do that. Instead, it succeeded only in causing presidents assorted hassles, imposing minor restrictions on regulatory review—and burying the EPA still further in bureaucracy.

VI

CONCLUSION

We began this article by pointing out that rational choice theory is almost entirely concerned with Congress and voting, and that it has little to say about presidents. It should be noted, however, that the presidency has been highly resistant over the years to genuinely productive theories of *any* kind. The reason for this difficulty is that scholars have long insisted on seeing the presidency in highly personal terms, as an institution built around a single person whose personality, skills, experiences, ideology, and decisionmaking style are the prime determinants of presidential behavior.

The perennial theme throughout the scholarly literature, accordingly, is that presidents are unique individuals whose presidencies are largely reflections of their personal characteristics.¹¹⁹ Given this view, and given the Pandora's box that the "personal presidency" opens for scholars interested in explanation, it is hardly surprising that the academic literature is heavily weighted with description, anecdote, and low-level generalizations. In Anthony King's wonderfully appropriate phrase, "it's a theory-free zone."¹²⁰

The way to escape from this trap is to stop thinking of presidents as people, and to start thinking of them *generically* as institutional actors. Something is inevitably lost in the translation, but what is gained enables us to build genuine theories of presidential behavior and to incorporate presidents into larger theories of institutional politics. Rational choice is ideally suited for doing just that.

119. See, e.g., NEUSTADT, *supra* note 9; STEPHEN HESS, *ORGANIZING THE PRESIDENCY* (1988).

120. Remarks of Anthony King (spoken at the Conference on the Presidency at the University of Pittsburgh, Nov. 1990).

The tremendous success of rational choice theory with legislators attests to its utility. It is evident that legislators are people too, and that their personalities, ideologies, conceptions of the job, and so forth, contribute to their behavior. But positive theorists have built highly productive—and, over the years, enormously influential—theories by stripping away all this and treating legislators as generic institutional actors motivated by reelection.

Nothing prevents this from being done for the presidency. But as yet it simply has not.¹²¹ Rational choice theorists, backed by a rich social choice tradition, have found legislators more interesting and easier to deal with than presidents, and virtually all their energies have been poured into building a theoretical base in legislatures and moving outward from there—to presidents who can veto legislation, to bureaucrats whom legislators must try to control, to judges who can shift the legislative status quo.

While it is nice to think that someday this outward creep will result in a well-balanced view of political institutions, the short-term result is not balanced at all. The present world of rational choice is a legislative world in which everyone is playing a legislative game. The president is not really the president. He is just an actor who can veto legislation. And similarly for bureaucrats and judges. They are not understood or treated as full-fledged actors in their own right, with powers and motivational structures that are fully explored, modeled, and integrated into a larger theory of which Congress is but a part. The notion that this is truly a *system* of interconnected and roughly coequal parts gets lost in the shuffle. For reasons that have little to do with substance, Congress emerges from the literature as the driving force behind U.S. politics and institutions.

In this article, we have had two aims. First, we have tried to show that presidents can be understood on their own terms, not as people that have to be characterized in all their complexity and uniqueness, but as institutional actors that have a distinctive analytic and substantive core. Whether we are talking about Richard Nixon, Jimmy Carter, or Ronald Reagan, the fundamental thing to understand is that these individuals are all occupying the same institutional role; and as such, they share certain distinctive goals, their incentives are structured in the same basic ways, and their approaches to governing and institution-building are much the same. Whatever their personalities and ideologies, they are *presidents* and they behave *presidentially*. Because they do, we can know reasonably well what to expect from them.

Second, we have tried to argue that, once a theory of U.S. institutions takes presidents seriously, there is little basis for crowing about the formidable powers of Congress, as positive theorists have been prone to do. This is not to say that Congress is not powerful, but rather that the powers of presidents have gone entirely unappreciated in this literature, and those powers are considerable. Indeed, we think that, when rational choice turns its attention to the institutional

121. For an exception, see Gary J. Miller, *Formal Theory and the Presidency*, in *RESEARCHING THE PRESIDENCY* 289-331 (George C. Edwards III et. al. eds, 1993).

struggle for power between the two, its logic suggests that presidents ought to have important advantages over Congress in the politics of structure, due especially to their capacity for unilateral action and Congress's debilitating collective action problems. As institutions are created and modified over the years, it is the president, not Congress, who is better equipped to enhance his own institutional bases for power and, incrementally, to bring the various parts of government under some semblance of coherent control.

The case studies suggest as much. Whether we talk about civil service reform, regulatory review, or congressional oversight of the institutional presidency, presidents have clearly been aggressive in seeking to expand the scope of their powers by structural means. And Congress has typically been disorganized, ineffective, and even passive in its response. As we saw, presidents did not always get their way, and Congress did not always fail to act. Indeed, there are so many obstacles to genuine action in the U.S. separation of powers system that it is sometimes a wonder that anything happens at all. But when it does, and when it is geared to alter the balance of power, it is almost invariably because the president is pushing and shoving to occupy new institutional terrain, and because Congress does not have what it takes to stop him. This is no accident. It is built-in.

Doubtless, most positive theorists will object to our savaging of Congress and argue that it actually has major advantages over the president. There may be some. Our focus has been on the president, and we have been unable to devote attention to Congress's own attempts at institution-building. A more extensive analysis would take a look, for instance, at the Congressional Budget Office, the War Powers Act, the tremendous growth in congressional staff, and other recent developments that might counterbalance the institutional presidency. But there should be no surprises here. The new congressional budgetary process is a disaster of fragmentation and irresponsibility. The War Powers Act has largely been ignored by presidents. And legislative staff spend most of their time pursuing the parochialism and special interests that so animate their bosses. Were the picture fully drawn, we still believe that Congress would not prove nearly as well equipped to defend or promote its own interests as the president is.

In the end, we may or may not be entirely correct in this. Either way, we look forward to the time when rational choice can speak confidently to the issue, offering a theory that has as much to say about presidents—and bureaucrats and judges—as it has to say about legislators.