THE EXECUTIVE PRIVILEGE DILEMMA

by

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This paper will examine President George W. Bush and Vice President Dick Cheney’s views of executive power and privilege, with a focus on the role that September 11, 2001 played in their emergence. With this will come an examination of the concept of punctuated equilibrium theory and whether or not this theory aptly explains the Bush administration’s rhetoric and actions. Through a discussion of the definitions, origins, historical usages of, and claims to the privilege during the Bush administration, the questions surrounding punctuated equilibrium theory, September 11, and the scope of presidential power can be more fully examined.

INTRODUCTION

On March 30, 1796, President George Washington sent a message to the United States House of Representatives, declining to turn over, as had been requested, documents related to the Jay Treaty. “Success must often depend on secrecy,” wrote Washington, adding that “a just regard to the Constitution and to the duty of my Office, under all the circumstances of this case, forbids a compliance [sic] with your request” (Washington, 1796). Just over two hundred years after Washington delivered this message, his forty-second successor, President George W. Bush issued yet another memorandum relating to Congressional access to documents. On December 12, 2001 Bush wrote to the Attorney General that “because I believe that congressional access to these documents would be contrary to the national interest, I have decided to assert executive privilege with respect to the documents and to instruct you not to release them or otherwise make them available to the Committee” (Bush, 2001). When President Washington acted in defiance of Congress, he was doing so to prevent the breakdown of the Jay Treaty’s terms and a subsequent conflict with Great Britain (U.S. Department of State, 2007). Similarly, at the time of George W. Bush’s memorandum, the president was concerned over the affect congressional inquiries would have in the aftermath September 11 and the subsequent “war on terror” (Bush,
In between these two Presidential bookends, there have been many attempts, particularly in the 20th century, by presidents to exert executive privilege and secrecy in the name of the separation of powers and national security. President Bush and his Vice President Cheney, however, established themselves as pacesetters in claiming or threatening to assert executive privilege, also in the name of national security or “national interest.”

This paper is fundamentally about the Bush-Cheney administration’s aims at and actions to expand Presidential power. In order to form a lens through which to study such a broad topic, this particular examination focuses on the administration’s use of executive privilege to expand its power. Central to this study is the role of September 11, 2001 in the widened use of executive privilege claims by the Bush-Cheney administration even in arenas outside the bounds of national security. Two separate, but related questions arise from this focus: Did the Bush-Cheney administration expand their claims to executive privilege and executive prerogative in order to accomplish pre-9/11 goals of expanding presidential power? Secondly, did the events of September 11, 2001 legitimize or arguably mandate an expansion in Presidential power, and thus the interpretation and usage of executive privilege even in areas unrelated to national security? The theory of punctuated equilibrium, holding that specific crises redefine previously static relationships and policies stands at the center of this discussion and this study will examine the extent to which this theory aptly explains the Bush administration’s rhetoric and actions. This paper, however, looks not at the specific policy shifts emerging from this question of punctuated equilibrium but rather at whether 9/11 can be interpreted as an event legitimizing actions taken by the executive branch that confront the power of the legislature while expanding its own power. Through a discussion of these issues and particular historical and contemporary claims to executive privilege, this paper will ultimately argue that the events of September 11 should not
be considered an equilibrium-shifting crisis in terms of presidential power, preeminence, and privilege because an active fear of terrorism, arguably justifying the expansion of presidential power, failed to remain a part of the public agenda. Moreover, certain mistakes made by the Bush administration in the conduct of their “war on terror,” further eroded the legitimacy of his executive privilege in the eyes and minds of the public and Congress. This paper will conclude with relevant policy advice for President Barack Obama as he begins his own separation of powers battles.

EXECUTIVE PRIVILEGE, DEFINED AND CONTEXTUALIZED

In Federalist 51, James Madison famously wrote that “ambition must be made to counteract ambition” (Madison, 1788). Madison’s desire for intragovernmental competition in the name of national interest has been answered fervently in the battles over executive privilege. For all of the controversies surrounding executive privilege, however, its definition is rather simple: that the nature of the office of the President gives him the right to withhold certain information under certain conditions from the other branches of government and from the people, if he deems it necessary. The aforementioned example of President Washington’s refusal to turn over secretive documents to the House of Representatives indicates the practice of executive privilege has existed from the nation’s founding. Using Washington’s precedent, succeeding presidents have sought, through claims of privilege, to assert presidential preeminence when resisting an encroaching legislative branch.

It was not until the presidency of Dwight Eisenhower, however, that the term “executive privilege” came into existence to explain such actions taken by presidents. Eisenhower’s attorney general, William P. Rogers, is credited with coining the term “executive privilege,” in his refusal on behalf of President Eisenhower to release particular documents to Congress during the
McCarthy investigations (Rudalevige, 2005). Perhaps even more important, especially in the context of the current executive privilege debate, was Eisenhower’s own statement that his close aides were “really a part of me” (Eisenhower in Rozell, 2008), for this statement extended the realm of executive privilege to encompass not only the presidential officeholder but also the people surrounding the President.

At the center of much of the controversy surrounding executive privilege is the ‘separation of powers’ doctrine in the Constitution. Proponents of the executive’s right to privilege oneself from congressional inquiry often cite John Locke and the Baron de Montesquieu, whose theories were instrumental in the founding of the Constitution; they argue that the Founding Fathers intended the “take care” clause of Article II in the Constitution to inhere secrecy privileges upon the president (Rozell, 2002).

In the 20th century in particular, many scholars have written about the nature, constitutionality, and implications of executive privilege in American politics. Writing in the wake of the Watergate scandal, legal scholar Raoul Berger claimed executive privilege was “a constitutional myth.” (Berger, 1974) Arguing that it is the legislature’s right to ensure that the executive has appropriately and faithfully executed the laws, Berger confronts the notion of separation of powers in his rebuff of executive privilege, and argues that the president must comply with the legitimate demands of Congress for information. Berger also highlights the damaging consequences of unbridled presidential secrecy, noting for example, the ramifications stemming from the Gulf of Tonkin resolution (Berger, 1974). There are, however, two sides to the debate; standing in opposition to Berger is executive privilege expert Mark Rozell.¹

¹ Rozell is widely regarded as the current authority on executive privilege and testified before Congress in November 2001 regarding the issue of executive privilege and power as it related to presidential records (Pallitto and Weaver, 2007).
In his book *Executive Privilege: Presidential Power, Secrecy, and Accountability*, Rozell explicitly rejects Berger’s argument, writing instead that “executive privilege has clear constitutional, political, and historical underpinnings” (Rozell, 2002), based largely in the separation of powers doctrine. Echoing the claims made by presidents throughout history, Rozell argues that a President must have access to unfiltered information from their aides and advisors. Moreover, some level of secrecy must be maintained within the executive branch to protect the separation of powers doctrine and ensure national security (Rozell, 2002). Rozell tempers his argument, however, writing that executive privilege is subject to limitations and must be exercised “under the appropriate circumstances” (Rozell, 2002). Scholars Robert Pallitto and William Weaver further clarify such appropriate circumstances, cautioning against unmitigated congressional, judicial, and public acquiescence to presidential claims of executive privilege even when related directly to national security issues. In their book *Presidential Secrecy and the Law*, Pallitto and Weaver write that “the reintroduction of national security into executive privilege analysis creates a doctrinal dilemma: we risk losing the distinction between state secrets and executive privilege, expanding the scope of presidential privilege beyond meaningful limitation, or both” (Pallitto and Weaver, 2007). Finally, law professor Heidi Kitrosser, in a 2007 article discussing the constitutionality of executive privilege for the *Iowa Law Review*, actually uses the separation of powers doctrine to argue against unbridled executive secrecy. Kitrosser writes, “the Constitution reflects a compromise between openness and secrecy by suggesting support only for political secrecy that is... politically checkable” (Kitrosser, 2007).

While Rozell and Kitrosser seem to find a middle ground in analyzing the existence and reach of executive privilege, John Yoo takes the opposite approach to Berger, arguing that at present, the President has significant force in asserting executive privilege. Perhaps the best-
known supporter of the Bush administration’s prerogatives and expansion of power, particularly after September 11, 2001, Yoo was a member of President Bush’s Office of Legal Counsel from 2001 to 2003 and author of the infamous “torture memos.” Yoo’s memos and other writings since September 11 have argued that the terrorist attacks and subsequent “war on terror” give the President great leverage in war-making (Yoo, 2001). Yoo also argued in a 2006 editorial in the New York Times, “How the Presidency Regained its Balance,” that these powers also extend to the President in the domestic sphere, writing that “the President has broader goals than even fighting terrorism- he has long intended to make reinvigorating the presidency a priority” (Yoo, 2006). Yoo cites the framers’ intent for a healthy separation of powers between branches of the government and celebrates the Bush administration’s domestic actions related to secrecy and declarations that “the Constitution allows the President to sidestep laws that invade his executive authority” (Yoo, 2006).

Beyond the arguments made by scholars, many court rulings in the 20th century have served as further commentary on the legality and limits of executive privilege. One such case, U.S. v. Reynolds (1953) affirmed the privilege of the executive branch against the people and the courts in its decision to allow the Secretary of the Air Force to refuse attempted inquiries of its programs by the widows of pilots. Writing that the claim was justified by national security interests, Chief Justice Fred Vinson argues, “the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers” (U.S. v. Reynolds, 1953). In essence, the Supreme Court recognized a distinct privilege held by the government and the executive branch to conduct its national security affairs in secrecy.
Perhaps the seminal Supreme Court case regarding executive privilege, however, is *U.S. v. Nixon* (1974). In a March 12, 1973 statement about executive privilege, President Richard Nixon wrote that the doctrine of executive privilege “is rooted in the Constitution, which vests ‘the executive power’ solely in the President, and... is designed to protect communications within the executive branch in a variety of circumstances in time of both war and peace” (Nixon, 1973). Nixon also reiterated Eisenhower’s stance on the vulnerability of staff members to questioning by Congress, stating that if the President, as he had claimed under the separation of powers doctrine, “is not subject to such questioning, it is equally appropriate that members of his staff not be so questioned, for their roles are in effect an extension of the Presidency” (Nixon, 1973).

The controversy ultimately landed in the hands of the Supreme Court during the Watergate scandal where Nixon’s lawyers argued that the president’s inherent rights prevent judicial review of his claims to executive privilege and, in the case that the court rejected the notion of the president’s absolute privilege, it should nonetheless recognize executive privilege as superior, and thus not subject to, subpoenas (*U.S. v. Nixon*, 1974). While the court did recognize the existence of an executive privilege, particularly in matters related to national security, it denied Nixon’s claim that such a privilege is absolute, writing, “when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises” (*U.S. v Nixon*, 1974). Nixon was forced to submit the tapes in question and resigned from office less than a month after the decision of the court was handed down. Rozell argues that Nixon’s claims far exceeded the legitimate boundaries of executive privilege because they were intended less for the public good than for personal protection. Prior to the *U.S. v. Nixon* case, Rozell writes, Congress and the public largely acquiesced to presidential claims of secrecy regarding matters of national security.
(Rozell, 2002). The ramifications of Nixon’s attempts to stretch the bounds of the privilege, have affected future Congresses, presidents, and courts to view executive privilege with a more discerning and critical eye.

The final court case considered took place during the presidency of Bill Clinton. After a relative decline in claims of executive privilege during the administrations of Presidents Gerald Ford, Jimmy Carter, Ronald Reagan, and George H.W. Bush, the Clinton administration, writes Rozell, “exercised executive privilege more aggressively than any president since Nixon, and used executive privilege more often than any president since Eisenhower” (Rozell, 2002). One particular instance of Clinton’s attempt to assert the privilege is particularly important as it resulted in a judicial reexamination of the terms of the privilege itself. Stemming from the investigation of former Secretary of Agriculture, Mike Espy, for receiving gifts while in office, the decision in *In re Sealed Case* (1998) articulated the existence of two forms of executive privilege: the presidential communications privilege and the deliberative process privilege. The communications privilege, the court determined, is extremely powerful and can extend to members of the president’s staff when their actions and communications directly affect the president, but must be related only to actions taken by the executive branch in direct exercise of their Article II powers. The deliberative process privilege, however, covers any form of communication related to an executive action and may or may not explicitly or directly include the President. Thus, the deliberative process privilege is far broader and extends more easily to executive branch staff, but is also easily overridden by even a suspicion that the government may have participated in malfeasance (Rozell, 2002). Ultimately, the key difference between these two forms of executive privilege is that the communications privilege is constitutional in nature, whereas the deliberative process privilege is merely a common law privilege (Huq, 2007).
Rozell concludes of the Espy case, “the court thus upheld the principle of executive privilege while striking down this particular use as improper” (Rozell, 2002).

EXECUTIVE PRIVILEGE IN THE GEORGE W. BUSH ADMINISTRATION

While Clinton undeniably attempted, without much success, to expand the use and legitimacy of executive privilege, President Bush went much further during his eight years in office to protect the secrecy and promote the power of the presidency. Pallitto and Weaver emphasize this notion in their book, writing that “the Bush administration has sought to expand dramatically the scope and depth of executive privilege as a cornerstone of the secret presidency” (Pallitto and Weaver, 2007). As has been the cases of former presidents, Bush and Vice-President Cheney utilized national interest and the doctrine of separation of powers to justify such claims. To evaluate fully executive privilege in the Bush White House, it is necessary to discuss specific examples of assertions by Bush, Cheney, and their staff to this particular presidential power. These cases were selected because they offer a view of the Bush administration’s broad use of executive privilege both before and after September 11. Only one of these cases is directly related to September 11 and national security threats and secrets, while the others illustrate the administration’s willingness to couch their claims of executive privilege even in areas such as energy policy, investigations of isolated and internal wrongdoings by the FBI domestically, archival post-Presidential records, and domestic judicial politics in national interest or security-related terms.

Just weeks after Bush became the 43rd President, he developed an energy task force to develop a new energy policy for a country facing increasing energy needs and shortages. This task force was chaired by Cheney and made up of the Secretaries of State, Treasury, Interior, Commerce, Agriculture, Transportation, and Energy, and the Director of the Federal Emergency
Management Agency, the Administrator of the Environmental Protection Agency, the Director of the Office of Management and Budget, the Assistant to the President and Deputy Chief of Staff for Policy, the Assistant to the President for Economic Policy, and the Deputy Assistant to the President for Intergovernmental Affairs (United States General Accounting Office, 2003).

While the proceedings and plans of Cheney’s committee were largely kept secret, a U.S. General Accounting Office report filed in 2003 states that the committee “met with, solicited input from, or received information and advice from nonfederal energy stakeholders, principally petroleum, coal, nuclear, natural gas, and electricity industry representatives and lobbyists” (U.S. General Accounting Office, 2003). The GAO report, a result of the Congressional actions described below, continues, stating that

“the extent to which submissions from any of these stakeholders were solicited, influenced policy deliberations, or were incorporated into the final report cannot be determined based on the limited information made available to GAO... The Office of the Vice President’s (OVP) unwillingness to provide the NEPDG records or other related information precluded GAO from fully achieving its objectives and substantially limited GAO's ability to comprehensively analyze the NEPDG process” (U.S. General Accounting Office, 2003).

In April 2001, Democratic Representatives Henry Waxman (D-CA) and John Dingell (D-MI) requested that the Government Accountability Office (GAO) ask Cheney to report information to Congress about the members and plans of the task force (Rozell, 2002 (2)). David Addington, Cheney’s Chief of Staff and legal counsel, responded to the request in May, declaring that in light of the separation of powers doctrine, the Vice President was not required to acquiesce to the GAO or Congress. Though Cheney did not explicitly claim executive privilege, Comptroller General David Walker wrote in a letter to then-House Speaker Dennis Hastert in August 2001 that the response still utilized “‘the same language and reasoning as assertions of Executive Privilege’” (Rozell, 2002 (2)). In an article for the Duke Law Journal, Mark Rozell writes that the events of September 11, 2001 halted the steadily escalating conflict between Cheney and the GAO (Rozell, 2002 (2)). By January 2002, however, tensions regarding the task force had risen
again, and ultimately prompted two court cases, Walker v. Cheney (2002), and Cheney v. U.S. District Court (2004). In each of these cases, the Supreme Court refused to address directly the validity of the executive privileges allusions, but never direct proclamations, made by Cheney, ruling narrowly in each case in favor of Cheney, but without executive privilege part of its legal reasoning.

All allusions were finally put to rest on December 12, 2001 when George Bush explicitly asserted executive privilege for the first time in office. He did so in response to a Congressional subpoena for executive branch documents that the House of Representatives Committee on Government Reform intended to use in an investigation of a particular FBI branch (Rosenberg, 2008, Bush, 2001). On receiving the subpoena, Bush declared in a memorandum to the Attorney General “because I believe that Congressional access to these documents would be contrary to national interest, I have decided to assert executive privilege with respect to the documents...” (Bush, 2001). This assertion came just one month after Bush had issued Executive Order 13233, restricting the release of Presidential records. In the text of EO 13233, Bush states that the order was intended to protect the American people, mentioning in his justification that the executive order would necessarily protect “Presidential records reflecting military, diplomatic, or national security secrets, Presidential communications, legal advice, legal work, or the deliberative processes of the President and the President’s advisors” (Bush, 2001 (2)). University of Wisconsin Law Professor and author of Abuse of Power: The New Nixon Tapes Stanley I. Kutler wrote critically of Bush’s executive order and of his recent swath of proclamations intended to protect the secrecy of the executive branch and its offices in a January 2002 Chicago Tribune editorial. Kutler criticized Bush especially for mentioning national security so explicitly in his executive order in a clear appeal to September 11; Kutler writes that while EO 13233 “began to
take shape as soon as the Bush II Administration took power,” it was “strange indeed that the executive order should emerge when the nation was on a war footing, readily justifying the familiar and ever-dubious blanket of ‘national security’” (Kutler, 2002). While the issue regarding the FBI investigation was ultimately resolved in 2004 when the administration was eventually coerced into handing over the documents after congressional oversight hearings took place (Rosenberg, 2008), the question of presidential documents is still controversial and debated at present.

Another major instance of the use of executive privilege in the Bush administration came out of the November 2002 founding of the National Commission on Terrorist Acts, commonly referred to as the “9/11 Commission.” Though the 9/11 commission was given significant power to hold hearings and require the presence of witnesses, the Commission met resistance from the White House when it attempted to seek a public hearing with then-National Security Advisor Condoleezza Rice in 2004. Refusing to allow Rice to testify publicly, the administration cited both separation of powers justifications and concerns regarding the national security implications of public testimony (Kitrosser, 2007). Rice, in a series of public interviews surrounding the controversy also cited these issues, saying during a March 24, 2004 interview with Tom Brokaw that she “would like nothing better than to be able to testify before the commission…[but] it is a matter of whether the President can count on good confidential advice from his staff (Rice, 2004). Ultimately, the administration allowed Rice to testify before the commission, after receiving a promise from the commission that Rice’s agreement to testify would not have the force of precedent. University of California law professor Vikram David Amar wrote in April 2004, soon after the controversy was resolved, that the national security and separation of power arguments made by the Bush administration were ultimately unpersuasive and unsuccessful
because "executive privilege immunizes conversations—not persons" (Amar, 2004). Thus, according to Amar, Presidential staff members should be required to testify before Congress, but may be free to abstain from answering specific questions by citing the claim of secrecy for the public good or safety (Amar, 2004).

The most recent controversy regarding executive privilege in the Bush Administration emerged in 2007 over the Congressional inquiries into the potentially politically motivated firings of U.S. attorneys. On March 10, 2007, President Bush issued a statement regarding the controversy, saying that while he hoped for collaboration in the inquiry process, "if the staff of a President operated in constant fear of being hauled before various committees to discuss internal deliberations, the President would not receive candid advice and the American people would be ill-served" (Bush, 2007). In a June 28, 2007 press briefing, an unnamed senior Bush administration official responded to questions regarding subpoenas issued by the House and Senate Judiciary Committees for documents and testimony by Harriet Myers and Sara Taylor in regards to an investigation into the potentially politically-motivated firings of U.S. attorneys. "In response to those subpoenas," the official stated, "the President has asserted executive privilege" (Senior Administration Official, 2007). Bush later asserted executive privilege again to prevent Karl Rove from testifying before Congress (Rozell and Sollenberger, 2008). As the controversy continued throughout 2007, Attorney General Alberto Gonzales, largely criticized for his central role in the affair, ultimately resigned, along with a handful of executive staff members. On July 15, 2008, Attorney General Michael Mukasey wrote a letter to President Bush requesting that he "assert executive privilege" with respect to Department of Justice documents subpoenaed by the Committee on Oversight & Government Reform of the House of Representatives (Mukasey, 2008). Mukasey cited "heightened confidentiality interests" and argued that the Congressional
committee did not sufficiently articulate the "demonstrably critical particularized need required to overcome an executive privilege claim" (Mukasey, 2008) and likewise, the conflict regarding separation of powers. Mark Rozell and Mitchel Sollenberger, in an article for the Presidential Studies Quarterly argue that while Congress has been unable to do little more than issue threats related to the issue, President Bush's intense desire to use this particular domestic issue to further expand presidential powers may ultimately result in a backlash against executive privilege and the overall powers of the President. This reaction would not be unlike that which was seen post-Nixon (Rozell and Sollenberger, 2008), and is particularly ironic in light of Bush's statement during the March 2007 address, in which he declared that his goal in this matter was "to make sure that I safeguard the ability for Presidents to get good decisions" (Bush, 2007).

**THE ROLE OF 9/11: A JUSTIFICATION, TOOL, OR BOTH?**

"Yesterday, evil and despicable acts of terror were perpetrated against our fellow citizens. Our way of life, indeed our very freedom, came under attack"

- September 12, 2001 Letter from President George W. Bush to Speaker of the House Dennis Hastert.

"Does it have anything to do with the fact that the [Justice Department] has sought many of these authorities on numerous other occasions, has been unsuccessful in obtaining them and now seeks to take advantage of what is obviously an emergency situation to obtain authorities that it has been unable to obtain previously?"

- U.S. Representative Bob Barr, in reference to post-9/11 executive branch program proposals (Wolfensberger, 2005)

Building from a theory first propagated by physical scientists and zoologists (Gould, 1993), Frank Baumgartner and Bryan Jones have devoted much of their research and work to addressing the political and social explanations and implications of the theory of punctuated equilibrium. "Political processes are generally characterized by stability and incrementalism, but occasionally they produce large-scale departures from the past" (Baumgartner, Jones, and True, 2006), write Baumgartner, Jones, and fellow scholar James True. From this perceived trend of policy "stasis" punctuated by occasional "crises" (Baumgartner, Jones, and True, 2006), they have theorized that a new equilibrium develops out of such punctuations and crises that, as
schorlar John Owens explains, “forms the base for future institutional responses to subsequent crises or external shocks” (Owens, 2006). Ultimately the most important element in determining the effect of punctuated equilibrium theory, argue Jones, Baumgartner, and True, is the public agenda (Baumgartner, Jones, and True, 2006). Professors Paul Diehl and Gary Goertz also examine punctuated equilibrium theory in social science inquiry. In their book *War and Peace in International Rivalry*, Goertz and Diehl argue that rivalries between two parties, once established, are stable, and form an unchanging “Basic Rivalry Level (BRL) around which relations fluctuate” (Diehl and Goertz, 2000). These fluctuations, Diehl and Goertz add, account even for isolated crisis events that affect state relationships but are merely part of the long-term stasis exhibited in rivalry situations. Even with “a wide range of system changes,” write Diehl and Goertz, “enduring rivalries prove to be quite robust” (Diehl and Goertz, 2000). Only major political shocks, such as an outbreak of world war, they continue, dislodge the BRL and reset the nature of the relationships between the two states. “The punctuated equilibrium approach,” they write, “suggests that states make relatively long-term policy commitments and then stick with them, until some change in the environment dislodges those preferences and policy choices” (Diehl and Goertz, 2000). While their research focuses on international conflicts and rivalries, this model of punctuated equilibrium theory established by Diehl and Goertz is readily applicable to intrastate and, more specifically, intragovernmental rivalries between Congress and the President.

Three major questions emerge from this theory in regards to presidential behavior and the events of 9/11. First, can 9/11 adequately be described as a punctuation that established a new baseline in the most-important arena of public expectations regarding presidential power in the executive-legislative rivalry? Secondly, had Bush and Cheney been planning prior to 9/11 to
increase such powers and found themselves in the aftermath of an unfortunate event with a convenient tool? Finally, were the events of 9/11 a lasting phenomenon that established a new equilibrium point in terms of presidential power or did Bush and Cheney misinterpret an ultimately limited September 11 mandate?

An important means by which to begin an examination of these questions is public polling data. A Gallup public opinion poll taken during July 2000 asking Americans about what single issue they hoped would maintain the focus of their new President, listed education, social security, and healthcare were at the top of the American people’s agenda. National defense was located much further down the list, capturing only 2% of polled respondents (Newport, 2000). By contrast, an October 10, 2001 Gallup poll emphasized the weight of the attacks upon the American public, as terrorism and defense issues topped the list of American priorities. The poll report noted that the “percentage of Americans saying that military and defense issues and foreign affairs are important has increased... by roughly 30 percentage points when compared to polls taken earlier this year (Jones, 2001).” Americans, frightened by the attacks, granted immediate deference to the President. This was perhaps best seen in a September 25 poll, in which Americans supported a retrenchment of civil liberties in the name of safety; for example, 86% of those polled supported new regulations requiring “every person going into an office building or public place to go through a metal detector” (Jones, 2001 (2)).

These concerns were also reflected in the emergence of what is now dubbed the “Cheney Doctrine” in the days following the attacks. In his book The One Percent Doctrine, Ron Suskind describes the Cheney, or “one percent” Doctrine as “a standard of action that would frame events and responses from the administration for years to come. The Cheney Doctrine. Even if there’s just a one percent chance of the unimaginable coming due, act as if it is a certainty” (Suskind,
2006). Thus it seems that in the initial days and weeks following the attacks, a new equilibrium had been formed in terms of Presidential power. The Bush administration recognized this new leeway in terms of executive privilege claims, highlighting, as was previously seen, the issue of “national security” in assertions of the privilege despite only one of the cases directly relating to information that may be considered a legitimate state secret. Evidence exists, however, that indicates that these and other expansive actions taken by the administration were not simply the results of the surprise of 9/11 but rather were planned by Vice President Cheney even decades earlier. Such evidence serves to address the second question emerging from our examination of punctuated equilibrium theory and the motives of the Bush-Cheney administration.

At the height of the Iran-Contra affair, Cheney was a Republican member of the House of Representatives and was named as Ranking Member of the Select Committee to Investigate Covert Arms Transactions with Iran. Displeased with the final report of the committee that condemned the Reagan administration for its actions, Cheney chose to write his own minority report in which he asserted his belief in the plenary power of the executive. The actions of Reagan and his staff were, wrote Cheney, “constitutionally protected exercises of inherent Presidential powers” (Cheney, 1987). In this document, Cheney also warned of the encroachment of Congress upon the executive branch, ultimately writing that “the power of the purse...is not and was never intended to be a license for Congress to usurp Presidential powers and functions” (Cheney, 1987). In a 2005 interview with members of the press, Cheney reminded them of his 1987 position and long-term goals for the executive branch, stating, “go look at the minority views that were filed with the Iran-Contra Committee... Nobody has ever read them, but we -- part of the argument in Iran Contra was whether or not the President had the
authority to do what was done in the Reagan years...I think are very good in laying out a robust view of the President's prerogatives” (Cheney, 2005).

Cheney’s goals of wielding influence as part of the Bush administration thus were no secret when he became the Vice-Presidential selection and then officeholder. In a December 16, 2000 New York Times article entitled “Cheney to Play a Starring Role on Capitol Hill,” Cheney is described as a “powerful force” (Schmitt, 2000) who, said Senator Kay Bailey Hutchinson in the article, “is going to be looking over everyone’s shoulder” (Schmitt, 2000). In a January 20, 2001 article for the Washington Post, titled “Remaking the Role of Vice President; Cheney Expected to Wield Much Power, Influence,” Edward Walsh also wrote of the widespread expectations among many informed and influential individuals that Cheney intended for his, and the executive branch’s, role to be more powerful than it had been in the past. Walsh writes, for example, that Cheney’s unique position as a mentor to Bush allows him to mold the administration’s policies and actions to a great degree. Richard Moe, president of the National Trust for Historic Preservation, Walsh writes, “predicted that, more than his predecessors, Cheney will be an ‘operational’ Vice President, ‘more deeply engaged, not only in decision-making, but in the execution of decisions’” (Walsh, 2001). William Kristol is also quoted in the article, affirming the notion that Cheney desired great power, and stating, “people may never know how much influence Cheney has” (Walsh, 2001). This power afforded to both Cheney and the entire administration by Cheney’s position as Vice President, writes Walsh, is “exactly what George W. Bush had in mind when he chose the 59-year-old former defense secretary to be his running mate” (Walsh, 2001).

Boston Globe correspondent Charlie Savage has also long studied Cheney’s approach to presidential power and in a 2006 editorial described what he referred to as Cheney’s “mission” to
expand the powers of the presidency. Cheney, Savage writes, has, since his time working as an aide to President Gerald Ford, been frustrated by what he sees as encroachments upon presidential power and is using his tenure as Vice President to restore such powers to the "imperial" levels seen in the late 1960s (Savage, 2006). Savage further describes Cheney's mission in his 2007 book *Takeover*. Savage writes that Cheney was careful to remain silent publicly about his thirty year long agenda to restore presidential power, but acted immediately upon his plans once in office. Savage quotes Bradford Berenson, an original member of Bush and Cheney’s legal counsel team, who said, "well before 9/11 it was a central part of the administration’s overall institutional agenda to strengthen the presidency as a whole" (Savage, 2007). In a January 2002 interview with Cokie Roberts, Cheney referred to this long-held desire directly, stating that “in 34 years, I have repeatedly seen an erosion of the powers and the ability of the president of the United States to do his job” (Cheney, 2002).

President Bush’s statements prior to September 11, 2001 also indicate a desire on his part to restore or increase the powers of the executive branch. In his nomination acceptance speech at the Republican National Convention on August 3, 2000, Bush lamented what he viewed as the misguided and ineffective leadership of the Bill Clinton administration, announcing, “they have not led. We will” (Bush, 2000). Immediately upon entering office, however, Bush affirmed the pardoning actions, and therefore presidential powers, of President Clinton. While he stated that he disagreed with Clinton’s decision to pardon Marc Rich for charges of tax evasion and fraud, he argued that the President’s power to make important decisions, including pardons, should not be the subject of any kind of interference. Bush continued, stating ultimately that he was “mindful not only of preserving executive powers for myself but for my predecessors as well” (Bush, 2001).
Additionally, in a *Washington Post* article written on September 10, 2001, just one day before the terrorist attacks, reporters Ellen Nakashima and Dan Eggen describe a White House "seek[ing] to restore its privileges" (Nakashima and Eggen, 2001). The article describes the efforts already underway in the Bush administration to exert its power over Congress. In what is today a haunting foreshadowing of events, Nakashima and Eggen quote Mark Rozell in saying that perhaps the only way the Bush administration could successfully reclaim legitimate executive privilege powers could be through "'something really big like a national security issue'" (Rozell in Nakashima and Eggen, 2001). Thus the question of whether Bush and Cheney had been planning prior to September 11, 2001 to increase the powers of the President seems determinedly affirmed. While there is no evidence to suggest that Bush and Cheney viewed the events of September 11, 2001 as anything less than a tragedy, it did offer them a tool with which to make further attempts to expand their powers through the use of executive privilege.

The third and perhaps more important question that must be addressed regarding 9/11, punctuated equilibrium theory, and executive privilege is whether the events of September 11 constituted a new equilibrium point in terms of presidential preeminence over congressional inquiry. The threat of terrorism, as demonstrated in public polls, no longer predominates in the minds of Americans. By 2006, terrorism had fallen from its place atop the public’s top priorities, with only 3% of respondents to a Gallup poll listing it as the top issue (Carroll, 2006). With the September 11 mandate steadily decreasing in the eyes of the public, and increased criticism of the administration’s actions, for example, in Iraq, Bush and Cheney experienced increased difficulty in asserting executive privilege. The administration’s eventual 2004 acquiescence to the congressional inquiry into the governmental documents related to the FBI serves as a particularly poignant example of this trend. Additionally, while the current controversy over the
firing of the U.S. attorney generals was not resolved while Bush was in office, a public poll conducted in 2007 indicates very little support for the administration’s claims of executive privilege. When polled, 68% of individuals responded that President Bush and his aides should “answer all questions” rather than “invoke executive privilege” (Saad, 2007). Thus while the events of September 11 were certainly of crisis nature and did produce a swath of new and lasting policy changes, they do not fit into Baumgartner and Jones’s or Diehl and Goertz’s classification of an equilibrium-shifting crisis in terms of resetting the baseline for expectations of presidential power, preeminence over the legislature, and privilege for two primary reasons. First, the threat of terrorism as justification for expansionary presidential power in disappeared as an active fear of terrorism subsided from the public conscience. Secondly, the mistakes made by the Bush administration in the conduct of their war on terror ultimately prevented them from exercising any sense of control over the public or congressional agenda.

These conclusions are not, however, universally accepted. In a June 2007 article for the Wall Street Journal, John Yoo addresses the U.S. attorneys controversy and supports the President’s use of executive privilege, again citing national security justifications. “In the 1974 Watergate tapes cases,” Yoo writes, “the Supreme Court said that the President’s right to protect information is strongest when law enforcement, national security, or his other constitutional powers are involved. Under that rule, Mr. Leahy has no right to see the President’s communications about the firing of federal attorneys” (Yoo, 2007). Ultimately Yoo’s arguments, however, fail to account for the growing lack of public fears of terrorism or support for the Bush administration’s policies and claims of privilege. Yoo’s position also undermines Hamilton’s Federalist 51 vision of the government as he seeks to place the office of President above the
control and reach of the other two branches, inhibiting any counteraction of the executive’s energy and ambition.

CONCLUSION

In what would become an extremely important concurring opinion written for the *Youngstown Sheet & Tube Co. v. Sawyer* (1952) case, Justice Robert H. Jackson outlined the relative powers of the president vis-à-vis Congress. Jackson argues that while the President has the most authority and power when acting “pursuant to an express or implied authorization of Congress” (*Youngstown Sheet & Tube Co. v. Sawyer*, 1952), his power significantly decreases to it “lowest ebb” (*Youngstown Sheet & Tube Co. v. Sawyer*, 1952) when acting against the stated or even implied will of Congress. The *Youngstown* case is considered to be one of the most important cases confronting the separation of powers doctrine that is still so controversial today. While the same Supreme Court did find just one year later in the previously discussed *United States v. Reynolds* (1953) that the executive branch did have a right to privacy in defiance of other branches of government and the people, this right was limited to a particular instance in which national security ramifications were distinct possibilities. “In the instant case,” Vinson wrote for the majority, “we cannot escape judicial notice that this is a time of vigorous preparation for national defense” (*United States v. Reynolds* (1953)).

Bush and, perhaps more specifically, Cheney’s attempts to expand the power of the executive branch beyond the arena of specific national security needs and largely into the domestic sphere have not only been relatively unsuccessful but may have ramifications even now when Bush has stepped down from power. In a November 12, 2008 article for the *New York Times*, Charlie Savage discusses the legacies of the controversies that emerged, but were never resolved, during the Bush presidency. Citing the example of President Truman, who successfully exerted executive privilege after he was out of office to prevent a subpoena
requiring his testimony, Savage writes that President Bush, were Congress to continue its investigations into the attorney general scandal, may also attempt to exert the privilege as a former president (Savage, 2008). Controversies and conflicts over executive privilege, Heidi Kitrosser writes however, “rarely reach the courthouse and are even less likely to result in judicial merits decisions” (Kitrosser, 2007). Instead, she argues, courts tend to issue narrow rulings that open the door for more separation of powers and executive privilege struggles in the future (Kitrosser, 2007). In the article discussing the Bush executive privilege legacies, Savage expresses an element of doubt regarding the chances that Bush will be faced with inquiries because of the natural tendency for all presidents, regardless of partisanship, to protect their office, power, legacy, and predecessors. Thus President Obama may very well ignore calls for an invigorated inquiry into the Bush White House. This is due, he writes, to the fact that “every president eventually leaves office” (Savage, 2008).

More important than Obama’s treatment of Bush however, is to what extent he will assert the power of the executive branch and executive privilege. In his inaugural address, Obama announced that his government will “do our business in the light of day,” (Obama, 2009), indicating, at least publicly, a desire to work openly with both Congress and the nation as a whole. At present, claims of executive privilege have very little legitimacy, due in part to the erosion of national trust ironically caused by Bush and Cheney’s work to expand executive power in the aftermath of 9/11. In a January 10, 2009 Newsweek article entitled “Obama’s Cheney Dilemma,” former Office of Legal Counsel head Jack Goldsmith is quoted as saying that “the presidency has already been diminished in ways that would be hard to reverse” (Taylor and Thomas, 2009). Thus while Obama has entered office with great popularity and a clear mandate, he may soon be faced with the executive power and privilege dilemma.
Obama will ultimately find the most success in remaining a powerful, popular and effective leader by following the advice and examples of three people, the first being Presidential scholar Richard Neustadt. In his book *Presidential Power*, Neustadt writes that the American political system is not, as Bush and Cheney claimed repeatedly, a system of separated powers. Instead, presidents must understand and act upon the fact that that the system is one of shared powers (Neustadt, 1960). In order to achieve success for one’s policies and preferences in this system, Neustadt continues, the president must learn to work with and persuade Congress and the nation as a whole to align its aims with his. Central to this success, Neustadt writes, is the president’s public prestige. If the president can remain popular with the public, he will be awarded great leeway with which to govern. Public prestige cannot be ignored by a Congress that answers to their constituents, and the president must remember this to maintain executive influence. (Neustadt, 1960). Cheney’s overt attempts to expand the power of the president at the expense of Congress and the Bush administration’s misinterpretation of the September 11 mandate resulted in an extremely low public prestige and therefore minimal leeway with the public and Congress. While both the American people and the Congressional representatives may have allowed for a more imperial and secretive presidency in the time directly following the September 11 attacks, the Bush administration’s actions in Iraq relinquished this most important leverage and asset. Building on this lesson, it would be wise for President Obama to remain open with both Congress and the public to bolster his reputation and prestige and rebuild the respect for and power of the executive office.

Secondly, Obama should examine and follow the actions of President Ronald Reagan in the aftermath of the Iran-Contra affair. While Reagan had previously asserted executive privilege during his tenure as president, his prestige was severely risking with the revelation that his office
had secretly committed funds to the Nicaraguan Contras in direct defiance of Congress. Rather than assert executive privilege and secrecy at this point, Reagan instead addressed the nation on March 4, 1987, apologizing, taking responsibility for the incident and pledging to be open with Congress and the public regarding the matter. Almost echoing both Neustadt and Baumgartner and Jones, Reagan stated: “The power of the Presidency is often though to reside within this Oval Office,” Reagan said, “yet it doesn’t rest here; it rests in you, the American people, and in your trust” (Reagan, 1987). Reagan underscored his efforts at renewed openness by appointing David Abshire as a special counselor to fully and completely investigate the incident. Reagan’s efforts were largely successful in regaining the public trust and he left office with 68% approval ratings, forty six percentage points higher than Bush’s final approval rating of 22% (Cosgrove-Mather, 2004 and CBS News, 2009), according to CBS polls.

Finally, President Obama should follow his own advice. His commitment thus far to open and collaborative government exemplifies Neustadt’s model of presidential success and was a key reason behind his election. One day after his inauguration, Obama took a step toward making his campaign and inauguration promises tangible, revoking Bush’s Executive Order 13233 (Obama, 2009). Just two months later, however, the Obama administration found itself facing many of the same media pressures regarding executive privilege and state secrets as its predecessor. In a March 25, 2009 Washington Post article entitled “Obama’s Approach to Handling ‘State Secrets’ at Issue” reporter Carrie Johnson writes the Obama Justice Department has hinted at taking actions that would “failo[w] its predecessors in claiming the state-secrets privilege, which would allow the government to exclude evidence in a civil case on grounds that it jeopardizes national security” (Johnson, 2009). It is thus evident, even from his administration’s inception, that Obama’s inaugural pledge will be tested. Obama, therefore,


http://www3.interscience.wiley.com/cgi-bin/fulltext/119404170/HTMLSTART.


(accessed 3 November 2008).


