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**Special Orders**

***The Administrative Strategies of President George W. Bush***

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As presidents segue from the campaign into governance, they develop various strategies for moving their policy agenda forward. The most common strategy for presidents to secure their policy goals has been to submit their legislative proposals to Congress, building on the tools of public persuasion and party supremacy. When presidents capture public support, as President George W. Bush did with his tax cut proposal, Congress follows with legislative approval.

However, in recent administrations, particularly since the Reagan administration, presidents have often bypassed Congress using administrative actions. They have opted for a strategy through administrative actions that is less time-consuming and clearly less demanding of their political capital. Using an array of both formal and informal executive powers, presidents have effectively directed the executive departments to implement policy without any requisite congressional authorization. In effect, presidents have been able to govern without Congress. The arsenal of administrative actions available to presidents includes the power of appointment, perhaps the most important of the arsenal, executive orders, executive agreements, proclamations, signing statements, and a host of national security directives.<sup>1</sup> More than any past president, George W. Bush has utilized administrative actions as his primary tool for governance.

**Appointment Power**

At the heart of the administrative actions exercised by George W. Bush was the presidential appointment power that was used to pepper the departments with partisan loyalists. By ensuring that all political appointments were in tune with the presidential agenda, there would be no debate within the executive branch on implementing the directives of executive orders and other administrative actions. Clay Johnson, director of the White House Office of Personnel, interviewed and approved every candidate.<sup>2</sup> Cabinet officers, who traditionally had hired their own senior staffs, were handed a choice of three candidates approved by the White House personnel office and its political affairs office.<sup>3</sup>

The appointments process was fueled by political executives who shared an ideological commitment to a narrow conservative agenda. The conservative agenda of past administrations, including George H.W. Bush, which had focused on building a strong national defense structure, cutting taxes, and reducing the programmatic responsibilities of the federal government, was replaced by a new conservative

agenda. That agenda revolved around the traditional Republican values of increasing the defense budget and cutting taxes, but incorporated a new agenda that would use the resources of the federal government to address certain business-related and ideological issues.

Examples of politically conservative appointments included Kay Coles James, former dean of the Robertson School at Pat Robertson's Regent University, as director of the Office of Personnel Management; Theodore Olson, a board member of the conservative *American Spectator* magazine who frequently argued against affirmative action, as United States Solicitor General; Jay Lefkowitz, a former law partner of Kenneth Starr, as chief counsel in the Office of Management and Budget; and Michael Chertoff, who assisted the Republicans in the Senate during the Whitewater investigation, as head of the Department of Justice Criminal Division.<sup>4</sup> Political appointments also included religious conservatives such as Dr. Lester Crawford who, as commissioner of the Federal Drug Administration (FDA), refused to make emergency contraception available over the counter in 2005 due to concerns that the "morning after" pill was in effect an abortion.

Numerous appointments represented the business orientation of the administration. Such appointments included Mark Rey, under secretary of agriculture for natural resources and environment who had been a lobbyist for the timber industry. Rey supported expanded logging on public lands both as a timber lobbyist and as under secretary of agriculture. Michael Parker, assistant secretary of the Army for civil works, had been a lobbyist for the barge industry who had opposed the Corps of Engineers shifting focus to environmental protection from navigation issues. Michael Jackson, deputy secretary of transportation, had been vice president of the American Trucking Association and supported expanding the highway system. Williams Myers, solicitor of the Interior Department, had been director of the National Cattleman's Association who supported ranching interests. Bennett Raley, assistant interior secretary for water and science, was a lobbyist representing mining interests who had been a critic of the Clinton administration's environmental policies. Steven Griles, deputy interior secretary, had been a lobbyist for the American Petroleum Institute who supported oil and gas development on public lands.

But some appointments proved too conservative to muster Senate confirmation. Such was the case with Otto Reich who, while in the Reagan administration actively supported the anti-Sandinista efforts, was nominated to be Assistant Secretary of State for Western Hemisphere Affairs. Similarly, Eugene Scalia, the son of Supreme Court Justice Antonin Scalia, was nominated as the Labor Department's chief counsel. Both were opposed in the Senate and failed to gain confirmation but were given recess appointments at the end of 2001.

Recess appointments, another tool in the arsenal of administrative actions, continued throughout the first term and into the second term as Congress continued to question the conservative credentials of some appointments. John Bolton, nominated in early 2005 as Ambassador to the United Nations, withdrew his name from the confirmation process after strong criticism by Democrats for his neoconservative views of foreign policy. Bolton, deeply involved in the 2000 election for George W. Bush, viewed international treaties as easily ignored and opposed continued funding for the United Nations.<sup>5</sup> Bolton was given a recess appointment. The importance of recess appointments as an administrative action to control the personnel process was particularly evident in the second term when President Bush made 16 recess appointments on one day alone, January 4, 2006.

### **Executive Orders and Proclamations: Implementing the Agenda**

The appointments process had enabled George W. Bush to build an administration of political loyalists, committed to moving the conservative agenda forward. Additional administrative actions, particularly executive directives, available to the president provided the directions for the political appointees.

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Executive directives proved essential to carry out a central theme of the Bush administration: opposing abortions, supporting adoption, and promoting a right-to-life culture through resources available in the federal government. The pro-life policy agenda could be easily moved forward without the assent of Congress using executive directives. On January 22, 2001, only two days after the inauguration, President Bush sent a directive to agency heads to reinstate a ban on funding nongovernmental organizations engaged in abortion-related activities. The so-called “gag rule” forbid U.S. funds from being given to international family-planning groups or foreign governments that offer abortion and abortion counseling. Entitled the “Memorandum on Restoration of the Mexico City Policy,” the directive overturned President Clinton’s executive directive to department heads.

Part of the broader conservative agenda was the opposition to stem cell research and to cloning. For each of these issues, conservatives argued that sanctify-of-life was at risk and must be protected. On August 10, 2001 President Bush addressed the nation from his ranch in Crawford, Texas in a live televised speech to register his opposition to further stem cell research using federal funds. He then issued an executive order implementing this statement and issued soon after another executive order on November 28, 2001 creating a bioethics panel to study the moral implications of stem cell research. The eighteen member panel was dominated by conservatives, most of whom had already publicly stated their opposition to stem cell research. Dr. Leon Kass, a University of Chicago professor who chaired the panel, had campaigned against human cloning.<sup>6</sup>

Nearly one year later, President George W. Bush used another form of executive directive, the proclamation, to proclaim “National Sanctity of Life Day” on January 28, 2002. The proclamation was issued on the twenty-ninth anniversary of *Roe v. Wade* as thousands of marchers gathered at the Washington Monument for the annual rally against abortion.

The administration’s conservative agenda, carried out primarily through executive directives, was also inserted through executive order directly into the White House organizational structure. On January 29, 2001, only nine days after taking office, President Bush created the White House Office of Faith-Based and Community Initiatives to help religious and community “faith-based” groups gain access to federal dollars for social programs such as helping the homeless and drug addicts and for after school programs at religious schools. The executive order stated that the purpose of the new White House office was to “help the Federal Government coordinate a national effort to expand opportunities for faith-based and other community organizations and to strengthen their capacity to better meet social needs in America’s communities. At the same time, the White House announced that two offices within the White House, one related to AIDS and one to race issues, would be abolished. After a concerted lobbying effort by gays and lesbians, the AIDS office was reinstated but the office on race issues was shifted out of the White House.

Not only were executive directives used to carry out themes of the president’s religious-laced agenda, but also to support a pro-business political agenda. The pro-business agenda was moved forward across departments through executive orders, particularly in Interior which controlled such programs as oil and gas drilling, mining, grazing, water issues, and logging. An executive order designating energy as a national priority allowed significant latitude by the political executives.

### **Signing Statements**

Another administrative action in the president’s arsenal has been signing statements, in which presidents send statements to Congress asserting that certain provisions of a law are unconstitutional and will not be enforced by the president. The Constitution requires that all bills vetoed by presidents be sent back *with objections* to Congress. Presidents have built on this constitutional mandate by providing their own written objections to certain parts of bills that they will not enforce. Although there is no mention in

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Article I or Article II of the Constitution which provides presidents the authority to single out certain provisions of a law as unconstitutional, Congress has failed to challenge such presidential signing statements.<sup>7</sup>

Signing statements have been regularly used in recent presidencies, most notably since Reagan, to block implementation of laws which presidents view as, in part or in whole, unconstitutional. An opinion written by Assistant Attorney General Walter Dellinger in the Clinton administration's Department of Justice notes that signing statements inform "Congress and the public that the Executive believes that a particular provision would be unconstitutional in terms of its applications, or that it is unconstitutional on its face, and that the provision will not be given effect by the Executive Branch to the extent that such enforcement would create an unconstitutional condition."<sup>8</sup> The Supreme Court has not ruled on the constitutionality of signing statements although the issue was raised during the confirmation hearings for the Supreme Court nomination of Judge Samuel Alito in early 2006. As deputy assistant attorney general in the Reagan administration, Alito had written a memorandum saying that "our primary objective is to ensure that presidential signing statements assume their rightful place in the interpretation of legislation."<sup>9</sup>

President George W. Bush regularly used signing statements as a tool to govern without congressional approval. In spite of laws directing the president to execute the will of Congress, President Bush determined that sections of certain laws undermined his constitutional authority and did not need to be enforced. Since taking office, George W. Bush has written signing statements into more than 500 laws, far more than the 146 signing statements of his father and more than the 105 of President Clinton.<sup>10</sup>

Of the many signing statements during the George W. Bush administration, the one that gained the most attention involved the ban on torture in 2005. Although the McCain- sponsored bill banned torture for prisoners of war, a bill which was aimed at the war in Iraq and in Afghanistan, the signing statement argued that the president was commander in chief and had authority to conduct the war and the treatment of prisoners as he deemed necessary. The multitudes of signing statements became a constant thorn to Congress but were rarely challenged. Only once, in 2003, did a serious challenge arise to signing statements when Congress passed a Justice Department spending bill that required Congress to be informed if the administration did not execute any provision of a law on constitutional grounds. But Congress failed to follow up on its own provision.<sup>11</sup>

### **Executive Agreements and Foreign Policy**

Within the area of foreign policy, Article II of the Constitution provides significant constitutional authority for presidents to govern without Congress using administrative actions. The most powerful authority for presidents stems from the "protect and defend" clause of the oath of office in Article II. Congress has allowed presidents significant latitude in their actions if they can be justified as protecting the nation's national security under the protect and defend clause.

Such unilateral presidential actions in the name of national security have included the levying of sanctions against nations, the abrogation of treaties, and decisions on the conduct of war. One of the most frequently utilized administrative actions by recent presidents has been the levying of sanctions on nations that fail to pass certain military or human rights standards. Congress does not need to validate these sanctions. President George H.W. Bush placed sanctions against Iraq after the invasion of Kuwait in 1991 and President George W. Bush placed sanctions against both India and Pakistan after each detonated nuclear weapons in early 2001. Sanctions can be lifted as quickly as they are imposed, as President George W. Bush did in late September 2001 when he removed economic (not military) sanctions against India and Pakistan for support of the "war against terrorism."

Another administrative action available to presidents, but not often used, has been the abrogation of a treaty. During the first year of the administration, President George W. Bush moved to abrogate a

number of treaties: the 1972 ABM treaty with Russia banning anti-ballistic missile, the 1997 Kyoto accords establishing requirements for reducing greenhouse gases, the Small Arms Pact, the ban on using land mines, and others. In addition, the president sought to have fast track authority for a number of commercial and military treaties being negotiated, which would require a simple approval or disapproval by the Senate with amendments not allowed.

The abrogation of these treaties implemented two key components of the administration's foreign policy goals. First, most of the treaties limited the United States in carrying out a military defense system. President Bush repeatedly argued that he would not be constrained by a treaty if he felt the nation's defense was jeopardized. The 1972 ABM treaty, for example, prevented the administration from deploying a space based weapons system designed to shoot down offensive weapons directed at the United States which had been deployed. The land mine treaty prevented the United States from deploying land mines, a tool which many in the Department of Defense viewed as necessary to protect U.S. soldiers involved in hostile situations. Again, the land mine treaty was unacceptable to the president's foreign policy agenda which focused on ensuring that all treaties protected the nation's interest. The administration has also chosen to implement executive agreements in order to bypass the treaty process. Rather than subject amendments to the Biological Weapons Convention to the Senate for ratification, the administration pursued executive agreements, which do not require Senate ratification.<sup>12</sup>

Decisions on the conduct of war have rarely been contested by Congress, but the issue of secret tribunals in Iraq and Afghanistan in 2004 and 2005 drew bipartisan concern in Congress. The administration was criticized by the international community and by many within Congress for violating the Geneva Conventions guaranteeing public trials and humane conditions while a prisoner. The Bush administration argued that since the Geneva Conventions had nation-states as signatories, the conventions did not apply to the Al Qaeda network of terrorists since they were not representing a nation-state. Similarly, the Taliban fighters were from a government not recognized by the international community (Afghanistan's government in exile continued to be recognized by the international community). While both arguments carried little weight for most nations and many U.S. citizens, the arguments were an example of the independence with which the Bush administration carried out military and foreign policy.

As commander in chief, President George W. Bush led the nation in a "war on terrorism" following the September 11, 2001 terrorist attacks. The commitment of military hardware and thousands of troops to route out the terrorists in Afghanistan saw few challenges in Congress, in spite of the president's failure to follow the procedures set out in the War Powers Act of 1973. Congress was essentially ignored by the president in the "war on terrorism." The president's reluctance to work with Congress on national security issues had been evident months before the terrorist attacks as questions began to arise in the White House over leaks from several committees on national security issues. The president subsequently ordered Congress to limit those who had access to national security material, specifically to the eight senior committee members with jurisdiction over foreign policy and intelligence issues. No other members of Congress were to see the sensitive material, according to the president's order.

This series of moves to reduce or exclude Congress from foreign policy decision-making was part of an effort by the administration to reduce the role of Congress in foreign policy matters. White House press secretary Ari Fleischer explained these moves, noting that "Every administration resets the balance with Congress as times change."<sup>13</sup> Congress, according to the Bush White House, had overstepped its constitutional boundaries by its oversight of presidential decisions in foreign policy.

## Conclusion

George W. Bush has successfully moved an ideologically and politically conservative agenda forward using an array of administrative actions that rarely have been challenged by Congress. The appointments process, executive orders, proclamations, executive agreements, sanctions, signing statements, and other executive actions have given President Bush the tools to move his agenda forward with little support from or intervention from Congress.

When political appointments were challenged in the confirmation process, the president used his authority to make recess appointments. Executive orders, proclamations, and other directives went almost completely unchallenged by Congress as they directed the executive branch to carry out the administration's policy agenda. Similarly, sanctions, executive agreements, and national security directives went unchallenged. When Congress sought to place limits on presidential authority through legislative action, the president often issued a signing statement voiding implementation of specific sections of the law. The unmistakable conclusion, therefore, is that George W. Bush has been able to direct the resources of the executive branch in both domestic and foreign policy using administrative authority. He has not needed to seek congressional authority for the policy direction of the majority of policies promulgated by his administration.

Perhaps the larger question is whether the extensive use of administrative actions for governance has jeopardized the balance of power between the executive and legislative branches. When the Justice Department argues that the president does not need to adhere to legislative actions that unconstitutionally infringe on his authority,<sup>14</sup> what is the recourse in our political structure? The recourse must emanate from Congress itself, but seems unlikely since both Houses are controlled by Republicans and whose leadership remains dominated by conservatives. The issue is also problematic through the courts. Matters between the executive and legislative branches often fall under the rubric of a "political question" for which the Supreme Court refuses to adjudicate. Thus, unless the public can put substantial pressure on Congress, which is unlikely, the continued use of administrative actions will continue to dominate the policy process. The most likely recourse will be when divided government returns.

## Endnotes

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3. James A. Barnes, "Bush's Insiders," *National Journal*, June 23, 2001.
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8. Walter Dellinger, Assistant Attorney General, "The Legal Significance of Presidential Signing Statements," Memorandum for Bernard N. Nussbaum, Counsel to the President, November 3, 1993. See also Walter Dellinger, Assistant Attorney General, "Presidential Authority to Decline to Execute Unconstitutional Statutes," Memorandum for the Honorable Abner J. Mikva, Counsel to the President, November 2, 1994.

9. Adam Liptak, "Presidential Signing Statements And Alito's Role in Them Are Questioned," *New York Times*, January 14, 2006.

10. Ron Hutcheson and James Kuhnhehn, "Bush Quietly Undercuts Laws with Bill Signing Statement," *Knight Ridder*, January 8, 2006.

11. Liptak, "Presidential Signing Statements And Alito's Role in Them Are Questioned," 2006.

12. Dana Milbank, "In War, It's Power to the President: In aftermath of Attacks, Bush White House Claims Authority Rivaling FDR's," *Washington Post*, November 20, 2001.

13. *Ibid.*

14. Noah Feldman, "Who Can Check the President?" *New York Times*, January 8, 2006.

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**Return to Special Orders**