HELPING IDEAS HAVE CONSEQUENCES: POLITICAL AND INTELLECTUAL INVESTMENT IN THE UNITARY EXECUTIVE THEORY, 1981–2000

AMANDA HOLLIS-BRUSKY†

INTRODUCTION

Exactly two weeks after the attacks of September 11, 2001, the Justice Department's Office of Legal Counsel (OLC) circulated a classified opinion on the "scope of the President's authority to take military action in response to the terrorist attacks."[1] This legal opinion, authored by Deputy Assistant Attorney General John C. Yoo, argued that President George W. Bush had broad constitutional authority, not limited to congressional or statutory authorization, to conduct military operations both foreign and domestic against the terrorists. A critical portion of the legal rationale underlying this conclusion was worded as follows:

> [I]t is clear that the Constitution secures all federal executive power in the President to ensure a *unity* in purpose and energy in action. "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number." The centralization of authority in the President alone is particularly crucial in matters of national defense, war, and foreign policy, where *a unitary executive* can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch. As Hamilton noted, "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks." This is no less true in war.[2]

This was but the first in a series of now-declassified memos issued by the Office of Legal Counsel in the wake of the September 11th attacks that relied on a controversial theory of executive power—the unitary executive theory (UET)—to construct the legal framework for the War on Terror.

The UET, [3] while novel for reasons I will discuss, is but the latest in a long line of political instruments presidents have used to loosen the

† Assistant Professor of Politics, Pomona College. Ph.D. University of California, Berkeley

1. OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, THE PRESIDENT'S CONSTITUTIONAL AUTHORITY TO CONDUCT MILITARY OPERATIONS AGAINST TERRORISTS AND NATIONS SUPPORTING THEM (2001) [hereinafter MILITARY OPERATIONS AGAINST TERRORISTS], *available at* 2001 WL 34726560.

2. *Id.* at 4 (emphasis added) (quoting THE FEDERALIST NO. 70 (Alexander Hamilton)).

3. While at least two observers have linked the phrase "unitary executive" to essays in the *Federalist Papers* that discuss the importance of maintaining "unity" in the Executive branch, *see*

constraints on presidential power. However, as one scholar has observed, prior to the George W. Bush Administration, the ideas and institutions that had been developed in response to the separation-of-powers problem were mostly political innovations, not constitutional ones. The UET is therefore distinct (and distinctly potent) because it finds the justification for expansive presidential power in the text, history, and structure of the Constitution itself.[4] The Constitution's Vesting Clause states that "[t]he executive Power shall be vested in a President of the United States of America."[5] To wit, proponents of the UET interpret this Clause as constituting a broad and exclusive grant of power and responsibility over the entire Executive Branch of government. As Supreme Court Justice Antonin Scalia, a strong and vocal advocate of a unitary executive, argued in his dissent in *Morrison v. Olson*,[6] Article II vests "*all of* the executive power" in the President, not "*some of* the executive power."[7] When this robust interpretation of the Vesting Clause is considered alongside the Commander in Chief Clause, the Take Care Clause, and the Oath of Office, the sphere of presidential power "can be broadened along any number of fronts—for example in interpreting and executing the law, or in conducting foreign relations, or in war-making and the control of military affairs."[8]

The ideas and language attendant to the UET began to appear in scattered law review articles throughout the mid-to-late 1970s.[9] However, it

Figure 1

ROBERT J. SPITZER, SAVING THE CONSTITUTION FROM LAWYERS 93 (2008); Jeffrey Rosen, *Power of One: Bush's Leviathan State*, NEW REPUBLIC (July 24, 2006), http://www.tnr.com/article/bushs-leviathan-state, its more proximate origins can be traced to language from the Supreme Court's opinion in *Myers v. United States*, 272 U.S. 52, 135 (1926) ("The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which article 2 of the constitution evidently contemplated in vesting general executive power in the President alone.").

4. Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2092–93 (2009).

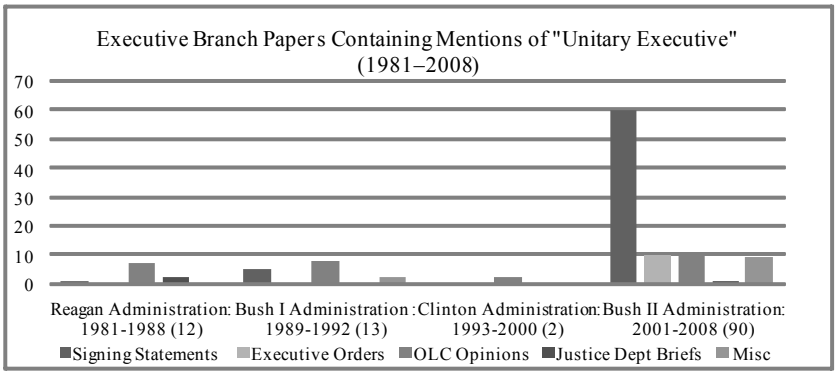
5. U.S. CONST. art. II, § 1, cl. 1.

6. 487 U.S. 654 (1988).

7. *Id.* at 705 (Scalia, J., dissenting).

8. Skowronek, *supra* note 4, at 2076.

9. *See* William Van Alstyne, *A Political and Constitutional Review of* United States v. Nixon, 22 UCLA L. REV. 116, 134 (1974) ("Among the specific executive powers enumerated in article II of the Constitution is that 'he shall take care that the laws be faithfully executed.' . . . The 'he' referred to in article II is the President, a unitary office, deliberately selected to be unitary against alternative proposals advanced in Convention in 1787, and enacted into express language: 'The executive Power shall be vested in a President . . . .'"); *see also* Donald E. King & Arthur B. Leavens, *Curbing the Dog of War: The War Powers Resolution*, 18 HARV. INT'L L.J. 55, 61–62 (1977) ("While the power over foreign affairs is nominally divided between the President and Congress, the institutional advantages of the unitary executive over the legislature produce a recognized ascendency of the President in foreign affairs." (footnotes omitted)).



Sources: The American Presidency Project and HeinOnline.org[10]

was not until the beginning of the Reagan Administration that the UET made its political debut. As Figure 1 illustrates, beginning in 1981 officials in the Reagan Justice Department started using the language "unitary executive" to defend and bolster presidential priorities in signing statements, OLC opinions, and legal briefs. While this effort continued on throughout the George H. W. Bush Administration, it was not until the George W. Bush Administration that the UET became the political and constitutional tool of choice for Executive Branch officials. As we see from Figure 1, in the two decades between the UET's Executive Branch debut and the end of the Clinton Administration, the phrase "unitary executive" was used to explain or support Executive Branch policies in just twenty-seven documents. During the eight years that George W. Bush was in office, on the other hand, that figure nearly quadrupled.

How do we explain this? In discussing the history and development of the UET, Stephen Skowronek has recently argued that "plausibility and timeliness" help account for how the UET became an "effective construction of presidential power."[11] His own work provides valuable insights into the role *timeliness* played in the ascendance of the UET, discussing at great length the historical and institutional developments within the American Presidency that laid the groundwork for the UET while also acknowledging the unique political circumstances—September 11th

10. The tallies for the total number of Signing Statements, Executive Orders, and miscellaneous documents were obtained through a search of the American Presidency Project's (http://www.Presidency.ucsb.edu) archive of Presidential Public Papers for documents containing "unitary" AND "executive" conducted on 7/1/10. Results were then scanned individually and filtered for relevance by the author. The tallies for Office of Legal Counsel (OLC) opinions were obtained through a combination of HeinOnline's online archive of published Office of Legal Counsel opinions (1977–1996) and the Department of Justice, Office of Legal Counsel archive of Memoranda and Opinions (1997–2008). Each archive was searched for documents containing "unitary" AND "executive" on 7/1/10 and, again, results were then scanned individually and filtered for relevance by author. Finally, the tallies for Justice Department briefs containing the language "unitary" AND "executive" were obtained following the same procedures through a search of HeinOnline's archive of legal briefs.

11. Skowronek, *supra* note 4, at 2100.

and the War on Terror—that allowed it to flourish during the George W. Bush Administration.[12] This Article provides a complementary set of insights into the other important attribute of an effective construction of presidential power—*plausibility*.

Specifically, this Article examines the actors inside and outside the Executive Branch who consciously invested in the UET between 1981 and 2000, nurturing, developing, and transforming it into the plausible and powerful construction of presidential power that it had become at the start of the George W. Bush Administration. It draws on previously unexamined evidence from the Reagan and George H.W. Bush Justice Departments, Federalist Society conferences and publications, law reviews, and personal interviews to show how the UET matured over the course of two decades from a rather limited critique of the modern administrative state into a full-blown prescription for presidential power; what Robert J. Spitzer has described as "Article II on Steroids."[13] It finds that the long-term investments in the development of the UET by legal elites between 1981 and 2000 were critical to its political ascendance during the George W. Bush Administration. Accordingly, it argues that without these prior investments in the theory's *plausibility*, the UET would not have become entrenched in Executive Branch policies and culture to the extent that it was during the George W. Bush Administration.

Section I begins the narrative of the political genesis and development of the UET in the Justice Department under President Ronald Reagan. While Skowronek and others have shown how the ideas and premises underlying the theory of the unitary executive had gained traction and been put to political use in prior presidential administrations,[14] this Article is primarily interested in the genesis and evolution of the UET *qua* UET. To that end, all records and searches I performed indicated that the Reagan Justice Department is where the UET first took shape from the primordial soup of loosely formed ideas and premises that had hitherto defined it. Section II proceeds chronologically, showing how the UET was then nurtured, developed, and expanded within the George H. W. Bush Administration and also outside of government with the institutional help and support of the Federalist Society for Law and Public Policy. It finds that while adherents of the UET were in political exile during the Clinton Administration, the Federalist Society and its network of members inside the academy played a central role in the continued theoretical development of the UET.

Section III examines the political returns on this two decade-long investment in the UET. It shows how individuals within the George W. Bush Administration, a significant number of whom had come up

12. *Id.* at 2073.

13. SPITZER, *supra* note 3, at 92.

14. *See* Skowronek, *supra* note 4; *see also* PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009).

through the ranks of the Federalist Society, were able to draw on a mature UET to support and justify some of the Administration's most controversial legal policies. In closing, Section IV offers some lessons learned from this narrative of the ascendance of the UET as contingent upon the conscious, long-term intellectual investment of legal elites. In doing so, it underscores the importance of investing in institutions and personnel that, under the right circumstances, can help "ideas have consequences."[15]

I. THE REAGAN JUSTICE DEPARTMENT: THE UET IN GESTATION

> As head of *a unitary executive*, the President controls all subordinate officers within the executive branch. The Constitution vests in the President of the United States "The executive Power," which means the *whole* executive power. . . . Any attempt by Congress to constrain the President's authority to supervise and direct his subordinates in this respect, violates the Constitution.[16]

> I took administrative law at Yale . . . I think we did the whole thing without discussing the President. It was a little bit like Hamlet without the Prince . . . it was only at the [Reagan] Justice Department that I was exposed to arguments about the President, *a unitary executive*, and the President having control of the entire executive. And I would say the Justice Department experience and especially at [the Office of Legal Counsel]—there were a lot of people there who would later become academics—really allowed me to learn and internalize a theory of things that just wasn't out there.
>
> —Michael Rappaport[17]

The "Reagan Revolution," wrote former Solicitor General Charles Fried, was "fought on two fronts."[18] The first front was the political front. Following the Reagan Era mantra of limited government, aggressive tax cuts would "starve politicians of the resources with which they would regulate the economy" and shift the economic paradigm from Washington-centric steering to a free market, libertarian approach.[19] "The other front," Fried reminds us, "was the legal front."[20] Fried de-

15. Refers to the title of an oft-cited book within conservative and libertarian circles. *See* RICHARD M. WEAVER, IDEAS HAVE CONSEQUENCES (1948).

16. Statute Limiting the President's Authority to Supervise the Director of the Centers for Disease Control in the Distribution of an AIDS Pamphlet, 12 Op. O.L.C. 47, 48 (1988) (first emphasis added).

17. Interview with Michael Rappaport, Professor of Law, Univ. of San Diego (Mar. 17, 2008) (emphasis added) (discussing his tenure in the Reagan Justice Department's Office of Legal Counsel as a Special Assistant from 1986–1988).

18. CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 17 (1991).

19. *Id.*

20. *Id.*

scribes the tenets of this other Reagan Revolution in his memoir, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account*:

> The tenets of the Reagan Revolution were clear: courts should be more disciplined, less adventurous and political in interpreting the law, especially the law of the Constitution; the President must be allowed a strong hand in governing the nation and providing leadership; justice and racial equality could be—and so should be—achieved without twisting legal principles.[21]

On the front lines of this battle were the Attorney General, the Solicitor General, and countless others in the Department of Justice who worked behind the scenes to quietly carry out the tenets of this ambitious Reagan Revolution in the law.[22]

While the legal arm of the Reagan Revolution was implemented with mixed results during the Reagan Administration,[23] Reagan's Justice Department should still be described as *revolutionary* for the legacy it left behind in the form of ideas and, more importantly, personnel who were shaped by those ideas. As Steven M. Teles has explained, the Reagan Justice Department "invested quite considerable resources to transform the broader terrain of constitutional and jurisprudential thought."[24] For example, the Justice Department's Office of Legal Policy was repurposed to serve as a vibrant constitutional think tank focused not only on judicial selection but also on the longer-term projects of bolstering the intellectual foundations of conservative and libertarian constitutional thought.[25] The Justice Department also increased the frequency with which it conducted academic seminars, hosted prominent intellectual and conservative legal thinkers, and held long-range planning retreats, "oriented toward objectives that reached beyond Reagan's term in office."[26] Most importantly, in addition to these institutional investments, there was a conscious focus on staffing the Justice Department with young, ideological conservatives and libertarians committed to the tenets of the Reagan Revolution—individuals who would continue to be committed to these tenets well after the Reagan Administration came to a close.[27]

---

21. *Id.* at 17–18.

22. *Id.* at 17.

23. *See id.* at 170; *see also* LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 69 (1987); DOUGLAS W. KMIEC, THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT, at xi (1992);WILLIAM FRENCH SMITH, LAW AND JUSTICE IN THE REAGAN ADMINISTRATION: THE MEMOIRS OF AN ATTORNEY GENERAL, at xvii (1991).

24. Steven M. Teles, *Transformative Bureaucracy: Reagan's Lawyers and the Dynamics of Political Investment*. 23 STUD. AM. POL. DEV. 61, 63 (2009).

25. *Id.* at 69; *see also* Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 389, 397 (2008).

26. Teles, *supra* note 24, at 67.

27. *Id.* at 20–33; *see also* CORNELL W. CLAYTON, THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY 151 (1992); FRIED, *supra* note 18, at 50–51; Amanda

Former Attorney General Edwin Meese III, the driving force behind many of these innovations, described to me the kind of intellectual culture he sought to cultivate in the Justice Department by way of these institutional and personnel changes:

> One of the things we wanted to do was provide intellectual stimulation and not let the Justice Department sink into a kind of matter of fact civil service mentality organization but rather to have it as a vibrant law firm with an intellectual component . . . particularly have people understand the broader intellectual context in which a system of law—and think of that in the larger sense in our nation—should be carried out and how the Justice Department could contribute to enriching that legal system, both in terms of the day-to-day work we were doing but also in terms of the speaking and the other kinds of things we did, recognizing that the Justice Department should be a leader in the legal profession as a whole.[28]

Special Assistant United States Attorney and co-founder of the Federalist Society Steven Calabresi confirmed that these efforts had a powerful impact on the culture of the department: "[T]he Justice Department at that time had the feel of a faculty. Obviously we didn't have students but it was a bit like a conservative legal think tank. There was a very academic atmosphere to the Department."[29] The intellectual heritage of the Reagan Justice Department has been preserved in the memoranda and opinions of the OLC, the legal briefs the Justice Department submitted in key Supreme Court cases, and various other internal publications that provide evidence of just how deeply actors in the Justice Department were thinking about their day-to-day work in terms of "the broader intellectual context" of the law. It is in these artifacts, the products of the Department's long-term investment in ideas and broad program of intellectual change, that we see evidence of the UET emerging in its nascent form.

A. Unitary Executive Theory: Office of Legal Counsel Memos

One of the most important "tenets" of the Reagan Revolution in the law, to recall Charles Fried's language, was that "the President must be allowed a strong hand in governing the nation and providing leadership."[30] Following this tenet, early on in his first term President Reagan issued an executive order aimed at reigning in and controlling the rulemaking discretion of agencies within the Executive Branch. Executive Order 12,291 required all executive agencies, "[i]n promulgating new

Hollis-Brusky, *The Reagan Administration and the Rehnquist Court's New Federalism*, SELECTEDWORKS, 12 (2008), http://works.bepress.com/amanda_hollis/1.

28. Interview with Edwin Meese III, Ronald Reagan Distinguished Fellow in Pub. Policy and Chairman of the Ctr. for Legal and Judicial Studies, Heritage Found. (Feb. 5, 2008).

29. Interview with Steven Calabresi, Co-Founder, Federalist Soc'y & former Special Assistant to Att'y Gen. Meese (Apr. 3, 2008).

30. FRIED, *supra* note 18, at 17–18.

regulations, reviewing existing regulations, and developing legislative proposals concerning regulation," to submit for approval a Regulatory Impact Analysis to the Presidential Task Force on Regulatory Relief operating within the Office of Management and Budget (OMB).[31] This executive order, as described by scholar Peter M. Shane, "revolutionized the rulemaking process by routinizing White House oversight of proposed agency rules and specifying a general philosophy that agency heads would be required to follow."[32] Shane further characterizes the executive order as "a significant move . . . if only because by mandating a cost–benefit framework, the President effectively tilted the playing field in the direction of . . . [his own] regulatory philosophy."[33]

The Justice Department's OLC, in performing its function as "the Attorney General's lawyer,"[34] was asked to review the executive order for form and legality. In an opinion issued in February of 1981, the OLC defended the order by relying on a crude but distinctly identifiable theory of the unitary executive:

> The President's authority to issue the proposed executive order derives from his constitutional power to "take Care that the Laws be faithfully executed." U.S. CONST., Art. II, § 3. It is well established that this provision authorizes the President, as head of the Executive Branch, to "supervise and guide" executive officers . . . "in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." *Myers v. United States*, 272 U.S. 52, 135 (1926).
>
> [This authority] is based on the distinctive constitutional role of the President. . . . In fulfillment of the President's constitutional responsibility, the proposed order promotes a coordinated system of regulation, ensuring a measure of uniformity in the interpretation and execution of a number of diverse statutes. . . .
>
> . . . .
>
> . . . Any other conclusion would create a possible collision with constitutional principles . . . with respect to the President's authority as head of the Executive Branch.[35]

This opinion would create a legal and constitutional justification for the consolidation of regulatory authority within the OMB—an office staffed by "true believers" such as David Stockman, Michael Horowitz,

31. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).
32. SHANE, *supra* note 14, at 150.
33. *Id.*
34. *See* Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 337 (1993); *see also id.* at 359–65 (discussing OLC's role in reviewing Executive Orders for form and legality).
35. Proposed Exec. Order Entitled 'Fed. Regulation,' 5 Op. O.L.C. 59 (1981).

and others who had been selectively recruited to carry out the Reagan Revolution.[36] This early opinion would also lay the groundwork for others in the OLC to mobilize the fledgling UET to test and expand the limits of presidential power in other ways.

For example, in 1983, the OLC was asked to weigh in on the constitutional question of whether Title VII of the Civil Rights Act of 1964 gave the Equal Employment Opportunity Commission (EEOC) the authority to pursue litigation aims "independent of, and possibly contrary to, those presented by the Attorney General."[37] Restoring control over litigating authority, as scholar Cornell Clayton has documented, was one of the Reagan White House's primary aims.[38] After all, if one of the tenets of the Reagan Revolution in the law was to get courts and government agencies to stop "twisting" the law to achieve racial and social justice, then one way to assure this was carried out was to curtail the litigating authority of agencies like the EEOC, whose primary mission it is to investigate and enforce antidiscrimination laws. In this particular case, the EEOC had petitioned to appear on behalf of a class of black applicants and members of the New Orleans Police Department seeking redress from injuries suffered due to alleged racially discriminatory policies in the selection, training, and promotion of city police officers. The OLC concluded, in no uncertain terms, that "[t]o permit the EEOC, an executive agency subject to the authority of the President, to represent on its own behalf a position in court independent of or contrary to the position of the United States, would be inconsistent with the constitutional principle of the unitary executive."[39]

All told, the Reagan Era OLC relied on an identifiable version of the UET in seven distinct opinions, each of which asserted, in one way or another, the constitutional prerogative of the President to supervise and control the "unitary" Executive Branch.[40] Moreover, in these opinions, which span the entire tenure of the Reagan Administration (1981–1988), one can see evidence of the theory itself becoming better defined, better supported, and more freely deployed. What in 1981 was described in general and rather amorphous terms as the constitutional basis for the President's role in ensuring "uniform and unitary" execution of the laws had, by 1983, evolved into the "principle of the unitary executive" by

36. Interview with Michael Horowitz, former Gen. Counsel, O.M.B. (Jan. 22, 2008).

37. Litig. Auth. of the E.E.O.C. in Title VII Suits Against State & Local Governmental Entities, 7 Op. O.L.C. 57 (1983).

38. *See* CLAYTON, *supra* note 27, at 200–04.

39. 7 Op. O.L.C. at 62.

40. *See* 5 Op. O.L.C. 59, 62; Contacts Between the O.M.B. & Exec. Agencies Under Exec. Order No. 12,291, 5 Op. O.L.C. 107 (1981); Constitutionality of Statute Requiring Exec. Agency to Report Directly to Congress, 6 Op. O.L.C. 632 (1982); 7 Op. O.L.C. 57; Auth. of the Special Counsel of the Merit Systems Protection Board to Litigate & Submit Legislation to Congress, 8 Op. O.L.C. 30 (1984); Federal Equal Emp't Opportunity Reporting Act of 1986, 10 Op. O.L.C. 112 (1986); Statute Limiting the Auth. to Supervise the Dir. of the C.D.C. in the Distribution of an AIDS Pamphlet, 12 Op. O.L.C. 47 (1988).

name.[41] Even more strikingly, as illustrated by an OLC opinion issued in March of 1988, by the close of the Reagan Administration the UET had become a much sharper and more powerful weapon in the battle to consolidate presidential control over the Executive Branch.[42] This opinion, signed by Assistant Attorney General Charles J. Cooper, uses the language "unitary" or "unity" in conjunction with presidential power eleven times.[43] Moreover, the memo contains entire sections on "The Nature of the Unitary Executive" and "Evidence of Original Intent," which provide detailed evidence from *The Federalist,* the Ratification Debates, and the Annals of Congress supporting the UET and its attendant interpretation of presidential power.[44]

These seven OLC opinions, each of which helped President Reagan consolidate power and control over the Executive Branch, tell but one part of the story of the development of the UET within the Reagan Justice Department. Officials within the Reagan Justice Department were also honing the UET to be used in a much bigger and higher profile campaign to consolidate Executive Branch power under the President's control. This part of the Reagan Era battle to rearrange governmental power, as Solicitor General Fried would later describe it, would be waged at the Supreme Court.[45]

B. Unitary Executive Theory: The Campaign in the Courts

A nascent but developing UET also provided the Reagan Justice Department litigators with the impetus and justification they needed to bring their battle for increased presidential power and Executive Branch control to the Supreme Court. Emboldened by a then-recent Supreme Court decision, *INS v. Chadha*,[46] which struck down the one-house legislative veto on separation of powers grounds,[47] litigators in the Justice Department decided to test just how receptive the High Court would be to similar separation of powers challenges. Unlike in *Chadha*, in *Bowsher v. Synar*[48] and *Morrison v. Olson*, the Justice Department framed its separation of powers argument explicitly in terms of the UET.[49] In discussing the decision to ground the Justice Department's separation of powers campaign in terms of the UET, former Solicitor General Fried wrote that it was Attorney General Meese who ultimately convinced him

41. *Compare* 5 Op. O.L.C. 59, *with* 7 Op. O.L.C. 57.
42. *See* 12 Op. O.L.C. 47.
43. *Id.*
44. *Id.*
45. FRIED, *supra* note 18, at 133.
46. 462 U.S. 919 (1983).
47. *Id.* at 959.
48. 478 U.S. 714 (1986).
49. Brief for the United States as Amicus Curiae Supporting Appellees at 6, Morrison v. Olson, 487 U.S. 654, 732 (1988) (No. 87-1279), 1988 WL 1031600; Brief for the United States at 10, Bowsher v. Synar, 478 U.S. 714 (1986) (Nos. 85-1377, 85-1378 and 85-1379), 1986 WL 728082.

on the subject.[50] As Fried explains in his memoir, and other Reagan Justice alumni I interviewed confirmed, during his tenure as Attorney General, Meese arranged several workshops and seminars on the separation of powers in general, and the unitary executive in particular, so that individuals like Fried, who didn't come to the Department "committed to th[e] program" were ultimately "convinced."[51] The Justice Department's briefs in *Bowsher* and *Morrison*, which showcase a much more theoretically developed UET than many of the OLC opinions examined in the previous section, demonstrate that the Solicitor General was not alone in his conversion to the UET.

The first of the two post-*Chadha* separation of powers cases, *Bowsher v. Synar*, implicated the constitutionality of the Gramm–Rudman–Hollings (GRH) Act, which vested in the Comptroller General the authority to initiate automatic, across-the-board cuts in federal spending.[52] This transfer of power to the Comptroller General raised constitutional issues implicating the separation of powers, for even though he was appointed by the President, the Comptroller General was subject to removal by Congress, raising the question of whether an agent of the Executive Branch could be removed by Congress.[53] The UET provided Justice Department litigators with a constitutional argument for why and how this provision threatened the separation of powers and the integrity of the unitary executive:

> The Framers deliberately settled upon a unitary Executive in order to promote a sense of personal responsibility and accountability to the people in the execution of the laws -- and thereby to ensure vigorous administration of the laws and protection of the liberty, property, and welfare of the people. *The Federalist No. 70.* (A. Hamilton) (C. Rossiter ed. 1961). . . . A division between the President and the Comptroller General of authority over the administration of the laws throughout the Executive Branch cannot be reconciled with this considered judgment by the Framers.[54]

All told, in developing its separation of powers argument, the Justice Department used the words "unity" or "unitary" fifteen times.[55] And though the Justices seemed to balk a bit at the "novel doctrine" (i.e., the UET) that Solicitor General Fried was articulating on behalf of the Unit-

50. FRIED, *supra* note 18, at 158.

51. *See id.*

52. The Balanced Budget and Emergency Deficit Control (Gramm–Rudman–Hollings) Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (codified as amended in scattered section of 2, 31 & 42 U.S.C.).

53. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT, 210 (4th ed. 1997).

54. *See* Brief for the United States, Bowsher v. Synar, *supra* note 49, at 25.

55. *Id.* at 25–105.

ed States during oral argument,[56] in the end a majority of the Supreme Court agreed that the Comptroller General provision was unconstitutional.[57] In defending its decision, however, the Supreme Court did not make mention of the unitary executive, relying instead on a general separation of powers argument to strike down the relevant provision of the GRH Act.[58]

After *Bowsher*, the next opportunity Justice Department litigators had to test the Supreme Court's receptiveness to the UET came in *Morrison v. Olson*. This high-profile case challenged the Independent Counsel provisions of the Ethics in Government Act of 1978, which provided for the appointment of independent counsels to investigate and prosecute a sub-set of high-ranking government officials for federal criminal law violations.[59] The litigation in this particular case arose after the Independent Counsel presented evidence to a grand jury that resulted in the issuance of subpoenas to Theodore Olson and two other Justice Department officials for criminally defying Congress and refusing to cooperate with requests for information.[60] Olson and the other officials moved in the United States District Court for the District of Columbia to have the subpoenas quashed on the grounds that the Independent Counsel provisions violated the Appointments Clause, the Separation of Powers Doctrine, and impermissibly interfered with the President's duty to execute the laws under Article II, Section Three of the Constitution.[61] The district court dismissed the motion, but the D.C. Circuit Court of Appeals reversed and declared that the Independent Counsel provisions were unconstitutional.[62]

The opinion for the D.C. Circuit Court of Appeals in *Morrison* has been described by its principal author, Judge Laurence Silberman, as the "high water mark" and the "apogee" of the UET—and with good reason.[63] In a sweeping analysis that spanned nearly forty pages, the majority opinion systematically argued the case for the importance of a unitary executive, specifically mentioning the concept by name ten times, in concluding that the Independent Counsel Act "as a whole jettisons tradi-

56. *See* Transcript of Oral Argument at 47, Bowsher v. Synar, 478 U.S. 714 (1986) (Nos. 85-1377, 85-1378 and 85-1379), 1986 U.S. TRANS LEXIS 55 ("QUESTION: Well, that strikes me as kind of a novel doctrine you're espousing, and I can't quite put a finger on that approach in any of this Court's previous decisions.").

57. Bowsher v. Synar, 478 U.S. 714, 736 (1986)

58. *See id.* at 722–27.

59. *See* Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591–598 (2006).

60. Morrison v. Olson, 487 U.S. 654, 665–69 (1988).

61. *Id.* at 668–70.

62. *Id.*

63. *See* Laurence Silberman, *Panel I: Agency Autonomy and the Unitary Executive*, 68 WASH. U.L.Q. 495, 500 (1990) ("Asking me to speak on the doctrine of the unitary executive is very much like asking General George Pickett to speak on the future of the Confederacy after the Battle of Gettysburg. For just as historians love to point to Pickett's Charge as the high water mark of the South's effort to secede, some legal scholars have labeled my opinion, in which my colleague Steve Williams joined and collaborated, as the brief apogee of a constitutional lost cause.").

tional adherence to constitutional doctrines of separation of powers and a unitary executive, and in so doing, seriously weakens constitutional structures that serve to protect individual liberty."[64] The Supreme Court, however, reversed and held that the Act did not violate the separation of powers.[65] Justice Antonin Scalia was the lone dissenter. In his dissent, Justice Scalia twice mentioned the unitary executive by name,[66] which represented the most direct and clear articulation of the UET *qua* UET in Supreme Court doctrine before or since. Additionally, Justice Scalia built his argument for a unitary executive using many of the same historical sources (e.g., *Federalist* essays 47, 51, 78, 81 and 70) and arguing many of the same points that Reagan Justice Department litigators had outlined in their legal brief.[67] In the end, however, Scalia's manifesto on the importance of the unitary executive failed to persuade a single one of his Supreme Court colleagues.

By the end of President Reagan's second term, though largely ignored by the Supreme Court majority in *Bowsher* and on the losing end of the battle in *Morrison,* the UET had nonetheless become the accepted litigating strategy for Justice Department officials in separation of powers cases. For example, a 1988 report produced by the Justice Department's Office of Legal Policy, while acknowledging the setback in *Morrison*, still advised litigators that in the coming years "the [Supreme] Court increasingly may confront Article II separation of powers issues arising from congressional efforts to expand the powers of independent agencies" and that the "'unitary Executive' principle of Article II" should be used to "question the viability of 'independent' agencies in their present form."[68] Even more importantly, the showcasing of the UET in the judicial opinions of both Judge Silberman and Justice Scalia would lend at least some weight and authority to this position within the legal community and would help make it a topic of salience outside the Reagan Justice Department—a relatively small institution that had been the locus of most UET discussion and theoretical development up to that point. For example, from 1973 to 1988, only thirty-eight American law review articles discussed the unitary executive by name. In the four years following

64. *In re* Sealed Case, 838 F.2d 476, 480–81 (D.C. Cir. 1988).

65. *Morrison*, 487 U.S. at 696.

66. *See id.* at 727, 732 (Scalia, J., dissenting) ("The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom . . . . It is, in other words, an additional advantage of the unitary Executive that it can achieve a more uniform application of the law. Perhaps that is not always achieved, but the mechanism to achieve is there.").

67. *Compare id.* at 698, 711, 720, 729 *with* Brief for the United States, Morrison v. Olson, *supra* note 49, at 10, 17–18, 43, 46, 54.

68. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION 180–81 (1988).

the decision in *Morrison*, however, the words "unitary executive" appeared in seventy-six articles.[69]

While, as discussed in Section II, there are other reasons why dialogue about the UET increased dramatically during the George H.W. Bush Administration, the Reagan Justice Department's litigating campaign was undoubtedly part of the equation. The decision in *Morrison v. Olson* would serve as a call-to-arms for many Reagan alumni and other proponents of presidential power coming up through the ranks of the fledgling Federalist Society—a challenge to more fully develop and theoretically support what the Supreme Court had dismissed during oral argument in *Bowsher* as a "novel doctrine."[70] This post-Reagan Era investment in the UET, and the failed Supreme Court litigation campaign that initially animated it, was a key contributor to the UET's ascendance during the George W. Bush Administration. Without it, the UET might have indeed become, as Judge Laurence Silberman feared in 1989, "a constitutional lost cause."[71]

C. Unitary Executive Theory: The Signing Statement Initiative

The Reagan Justice Department's separation of powers litigation campaign coincided with another, quieter initiative—also grounded in the theory of the unitary executive—which former Special Assistant United States Attorney and Federalist Society co-founder Steven Calabresi would later refer to as "the signing statement initiative."[72] Presidential signing statements, official statements issued by the President upon signing a bill into law, have been used since the nineteenth century for a variety of purposes: to make a rhetorical comment (i.e., to commend or criticize Congress); to communicate a political directive to subordinates in the Executive Branch about how a particular requirement should be carried out; and to flag a constitutional objection to a particular provision of a bill.[73] Under the direction of Attorney General Meese, the Justice Department's OLC would make far more "aggressive use of presidential signing statements" than had its predecessors and would use them in a qualitatively different manner—to vigorously defend the President's constitutional prerogatives and to assert a strong role for the Executive Branch in statutory interpretation.[74]

---

69. *See infra* Figure 2.

70. Transcript of Oral Argument, *supra* note 56, at 47.

71. *See* Silberman, *supra* note 63, at 500.

72. Steven G. Calabresi & Daniel Lev, *The Legal Significance of Presidential Signing Statements*, 4 FORUM, no. 2, 2006 at 2, http://www.bepress.com/forum/vol4/iss2/art8/.

73. *See* Christopher S. Kelley, *The Significance of the Presidential Signing Statement*, *in* EXECUTING THE CONSTITUTION: PUTTING THE PRESIDENT BACK IN THE CONSTITUTION 73, 74–75 (Christopher S. Kelley, ed., 2006). *See generally* T.J. HALSTEAD, CONG. RESEARCH SERV., RL 33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS (2007).

74. Calabresi & Lev, *supra* note 72, at 1.

The "signing statement initiative" included a successful proposal to have West Publishing Company publish the President's signing statements alongside the legislative history of a statute in the *United States Code Congressional and Administrative News*. In announcing this initiative at an address before the National Press Club in February of 1986, Attorney General Meese elaborated on the impetus behind it: "To make sure that the President's own understanding of what's in a bill . . . is given consideration at the time of statutory construction later on by a court, . . . the presidential statement on the signing of a bill will accompany the legislative history from Congress . . . ."[75] Prior to that time, as Calabresi has explained, presidential signing statements were less accessible and therefore rarely relied upon as authoritative pieces of legislative history for courts to use when construing a statute.[76] As scholar Christopher S. Kelley has commented, the Reagan Justice Department hoped that by placing the signing statement beside other pieces of legislative history, it could force judicial decisionmakers to give due weight and consideration to the Executive Branch's interpretation of a bill and help tilt the balance of power toward the President.[77]

While the language "unitary executive" itself appeared in just one presidential signing statement during President Reagan's tenure in office,[78] the UET provided the driving force and the constitutional rationale for expanding the role of the Executive Branch in statutory interpretation. As Calabresi would later explain:

> [P]residential signing statements ought to be treated as having legal significance . . . because of the theory of the unitary executive. This theory holds that the Vesting Clause of Article II is a grant of all of the executive power in the country to the president. . . .
>
> . . . Signing statements allow the President to provide authoritative guidance to his subordinates in the executive branch as to how they should carry out and execute the law. . . . So viewed, signing statements serve a vital function in making the executive branch function in practice the way Article II says it should function in theory.[79]

75. *Id.* at 3 (quoting Edwin Meese III, Attorney General, Address at the Nat'l Press Club, Washington, D.C. (Feb. 25, 1986)).

76. *Id.*

77. *See* Kelley, *supra* note 73, at 80.

78. *See* Statement on Signing the Bill to Increase the Federal Debt Ceiling, 2 PUB. PAPERS 1096 (Sept. 29, 1987) ("First, the Supreme Court's recent decision in *Bowsher v. Synar* . . . makes clear that the Comptroller General cannot be assigned executive authority by the Congress. In light of this decision, section 206(c) of the joint resolution, which purports to reaffirm the power of the Comptroller General to sue the executive branch under the Impoundment Control Act, is unconstitutional. It is only [with this] understanding . . . that I am signing the joint resolution with this constitutional defect . . . . If this provision [of sections 252(a)(1) and (2) of the amended act] were interpreted otherwise . . . it would plainly constitute an unconstitutional infringement of the President's authority as head of a unitary executive branch.").

79. Calabresi & Lev, *supra* note 72, at 16–17.

We see additional evidence of this Reagan Era campaign to have the courts recognize presidential signing statements in another 1988 internal document published by the Office of Legal Policy, called *Guidelines on Constitutional Litigation*. It devotes a two-page section to the "Use of Presidential Signing Statements" and advises Justice Department litigators as follows:

> [G]overnment attorneys should review applicable signing statements as well as congressional debates and reports and should cite those statements in support of appropriate interpretations in briefs filed with the courts . . .
>
> . . . [S]tatements made by the President in fulfilling [his Article II duties] are as relevant to "legislative intent" as are congressional statements.[80]

Even though the publication of presidential signing statements has not produced a flood of judicial deference to Executive Branch interpretation, grounding the constitutionality of the presidential signing statement in the UET set the stage for future President George W. Bush to assert an even stronger role in statutory interpretation—one that has sparked a significant amount of political and constitutional debate on the use and misuse of presidential signing statements.[81]

D. Unitary Executive Theory in Gestation

Even though the phrase "unitary executive" appeared relatively infrequently in Executive Branch papers and policies during the Reagan Administration, as discussed above, actors in the Reagan Justice Department helped to gestate and develop the UET in important ways—through seminars and workshops, through the work and opinions of the Office of Legal Counsel, in their legal briefs, and through the signing statement initiative. That being said, at the end of Reagan's second term, the theory was still very much in embryonic form. As of 1988, the UET was being used primarily as a constitutional tool to bolster the President's role in controlling and overseeing Executive Branch agencies and

80. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 103 (1988), *available at* http://www.ialsnet.org/documents/Patersonmaterials2.pdf.

81. *See, e.g.*, *Task Force Report on Presidential Signing Statements and the Separation of Powers Doctrine*, AM. BAR ASS'N (August 2006), http://www.abanow.org/wordpress/wp-content/files_flutter/1273179616signstatereport.pdf ("Among those unanimous recommendations, the Task Force voted to oppose, as contrary to the rule of law and our constitutional system of separation of powers, a President's issuance of signing statements that claim the authority or state the intention to disregard or decline to enforce all or part of a law he has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress."). *But see*, *e.g.*, Edwin Meese III, John S. Baker, Charles J. Cooper, David B. Rivkin, Jr., Gary Lawson, Lee A. Casey, Steven Calabresi & Robert F. Turner, *Presidential Signing Statements*, THE FEDERALIST SOC'Y FOR LAW & PUB. POL'Y, 3 (2006), http://www.fed-soc.org/doclib/20070321_PresidentialSigningStatements.pdf (prominent conservative legal scholars arguing in favor of presidential signing statements and concluding that the ABA Task Force got it wrong).

to reclaim some power from Congress vis-à-vis the interpretation and execution of the laws. It would take some serious additional theoretical and intellectual work to develop the UET into the full-blown prescription for presidential power that it would become by the start of the George W. Bush Administration.

As stated at the beginning of this section, the Reagan Justice Department should be thought of as *revolutionary* not simply for its attempt to carry out the tenets of the Reagan Revolution in the law (which it did with limited success), but also for the legacy it left behind in ideas and personnel that were shaped by those ideas. While those ideas survived in some of the artifacts examined in this section, they also survived in the personnel who left the Reagan Justice Department and continued on in various other professional capacities. Though a few of these Reagan Justice alumni continued on at the Justice Department into the George H.W. Bush Administration, many more found a home in the Federalist Society for Law and Public Policy, whose meetings and professional support allowed them to refine, nurture and develop many of the same ideas that had been at the center of the Justice Department's intellectual agenda—including the UET—well after they had left the Justice Department.

II. THE UET NURTURED AND DEVELOPED INSIDE AND OUTSIDE OF GOVERNMENT: 1989–2000

> It is abundantly clear that section 102(c)(2), by purporting to require the President to include "individuals representing the Commission [on Security and Cooperation in Europe]" as part of a delegation charged with conducting internal negations, is unconstitutional.
>
> The President possesses broad authority over the Nation's diplomatic affairs. That authority flows from his position as head of *the unitary Executive* and as Commander in Chief . . . .
>
> —Opinion of the Office of Legal Counsel, "Issues Raised by Foreign Relations Authorization Bill"[82]

> The [Federalist] Society has always been consistently interested in promoting . . . *protection of Presidential power* from incursions by Congress and things of that kind and those issues are ones that we have continued to host conferences about and events about for the last twenty-five years. They were also issues that a lot of people working in the [Reagan] Justice Department were interested in.
>
> —Federalist Society Co-Founder Steven Calabresi[83]

82. 14 Op. O.L.C. 37, 38 (1990) (emphasis added).

83. Interview with Steven Calabresi, Co-Founder, Federalist Soc'y & former Special Assistant to Att'y Gen. Meese (Apr. 2, 2008) (emphasis added).

When the Reagan Administration came to a close, some Justice Department alumni elected to stay on and serve in the George H.W. Bush Administration.[84] Many more, however, continued on into positions in the legal academy, think tanks, private litigation, or judgeships. As former Attorney General Meese commented in our interview, the Reagan Justice Department was responsible for training and credentialing a number of now high-profile conservatives and libertarians who would go on to become "key leaders in the legal profession":

> [W]hat's happened since that time is those [Reagan Justice alumni] have gone out and we have a lot of people in legal education. We have somewhere between six and twelve professors at major law schools around the country . . . . Then, in addition to that we have a lot of leaders of the profession [and] a lot of judges. So between the law schools, the legal profession and the Judiciary, after our second term was over, we provided a lot of the key leaders in those various parts of the legal profession.[85]

Whether inside or outside of government, these Reagan Justice alumni were able to stay connected and to continue work on their ambitious intellectual agenda with the institutional support and encouragement of the fledgling Federalist Society for Law and Public Policy.

As Steven Teles has explained, actors in the Reagan Justice Department consciously invested not only in ideas and the intellectual development of conservative and libertarian legal thought but also in personnel—young idealistic lawyers who would be the future leaders of the legal profession.[86] A key part of that investment was in the Federalist Society for Law and Public Policy. By bringing the Society's leaders into the Justice Department as Special Assistant United States Attorneys and recruiting the leadership of the Reagan Administration (including President Reagan himself) to participate in Federalist Society conferences and luncheons, Attorney General Meese and other high-ranking officials provided a mantle of institutional legitimacy to the nascent organization. Consequently, as former head of the Office of Legal Counsel Charles J. Cooper commented in our interview, an "ideological affinity" arose between the Reagan Justice Department and the Federalist Society:

> There was just a philosophical, ideological affinity between the Federalist Society and the Reagan Administration. The two entities or organizations shared a common set of beliefs about law, the nature of law, the nature of the judicial function. That more than anything else is what bound the Federalist Society and the Reagan Administration .

84. *See* Interview with Douglas Kmiec, former Assistant Att'y Gen., O.L.C. (Mar. 14, 2008)
85. Interview with Meese, *supra* note 28.
86. Teles, *supra* note 24, at 63.

> . . a shared set of beliefs about, in the broader sense, the nature of government . . . .[87]

This "affinity" is also reflected in the speaker lists from Federalist Society meetings hosted during the Reagan Era. Of the seventy-six speakers listed on the published agendas of Federalist Society national meetings from 1981 to 1988, nineteen (25%) of those speakers would serve at some point in the Reagan Administration.[88]

As several interviewees discussed with me, Federalist Society meetings created opportunities for Reagan Justice alumni to continue the work of the "Reagan Revolution."[89] Through the sheer act of pulling them together as former colleagues and facilitating the continued discussion of important ideas, the Federalist Society reduced the transaction costs of intellectual collaboration and encouraged the development and implementation of ideas that had been conceived and gestated in the Reagan Justice Department—ideas like the ones underlying the UET. The next section confirms that most of the post-Reagan theoretical expansion of the UET did in fact happen outside of government. While it was deployed in several Office of Legal Counsel memos and a handful of signing statements during the George H.W. Bush Administration, with a few small exceptions, the UET was mobilized in the same context as it had been during the Reagan Administration. It was instead those Reagan Justice alumni and others working outside of government, individuals connected with and through the Federalist Society network, who would contribute most to the theoretical development and expansion of the UET between the end of the Reagan Administration and the beginning of the George W. Bush Administration.

A. The Unitary Executive Theory in the George H.W. Bush Justice Department

One of the Reagan Justice alumni who continued on to serve in the George H.W. Bush Administration was Douglas Kmiec. He did not, however, stay long into the next administration. The reason being, as he explained to me in an interview, was that it was "an entirely different experience. The movement from a time of being inspired by 'ideas having consequences' . . . to a time of management was almost like [flipping] a switch."[90] For example, the Office of Legal Policy, which under Reagan and Meese had functioned as a vibrant legal and constitutional think tank, dropped its long-term intellectual focus and was largely stripped of its role in screening and selecting potential judicial candi-

87. Interview with Charles J. Cooper, former Assistant Att'y Gen., Office of Legal Counsel (June 2, 2008).

88. Hollis-Brusky, *supra* note 27, at 16 (citing to HARV. J.L. & PUB. POL'Y (1982–1989)).

89. Interview with Meese, *supra* note 28; *see also* Interview with Kmiec, *supra* note 84; Interview with Rappaport, *supra* note 17.

90. Interview with Kmiec, *supra* note 84.

dates.[91] Further, because his successors were not the academics-at-heart that Attorney General Meese had been, morning meetings, seminars, and retreats took on a distinctly less academic focus and tone.[92] As another observer noted, unlike the higher-ups in the Reagan Administration, those in the George H.W. Bush Administration "never understood the importance of ideas."[93]

The lack of intellectual ferment at the Justice Department under George H.W. Bush likely explains the lack of theoretical change and development in the UET during those years. That being said, a review of the work products from the George H.W. Bush Justice Department confirms that the UET did survive the administration change intact, and in fact, evidence from two OLC memos suggests that actors in this Administration were at least thinking about the UET in a slightly broader context than their predecessors had in the Reagan Justice Department. The first evidence of this is found in an opinion issued by the OLC in 1990 concerning *Issues Raised by the Foreign Relations Authorization Bill.*[94] The Bill contained a provision requiring the President to include individuals from the Commission on Security and Cooperation in Europe—an entity controlled by the Legislative Branch—as part of a delegation charged with conducting internal negotiations.[95] In making the argument that this provision of the Bill "unconstitutionally infringes on the President's exclusive authority to conduct negotiations on behalf of the United States[,]" the OLC asserted that "[t]he President possesses broad authority over the Nation's diplomatic affairs. That authority flows from his position as head of the unitary executive and as Commander in Chief."[96]

This is the first time since its debut in the Reagan Justice Department that we see evidence of Justice Department actors thinking about the UET in tandem with the President's Commander in Chief power. However, the proposition is more or less left to stand on its own with very little elaboration or further support. In fact, the author(s) acknowledge that the evidence mobilized "by no means exhaust[s] the list of what could be cited in support of our conclusion."[97] Building on this opinion, the OLC later articulated the same rationale—in nearly the same exact language—for defending the President's discretion in the issuance of diplomatic passports against congressional efforts to limit this power:

91. *See* CLAYTON, *supra* note 27, at 229.
92. Interview with Kmiec, *supra* note 84.
93. Interview with Horowitz, *supra* note 36.
94. 14 Op. O.L.C. 37 (1990).
95. *See* Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. No. 101-246, 104 Stat. 15 (1990).
96. 14 Op. O.L.C. at, 37–38.
97. *Id.* at 41.

> The necessary background for our analysis of the particular issues presented here is the well-settled recognition of the President's broad authority over the Nation's foreign affairs. That authority flows from his position as head of the unitary Executive and as Commander-in-Chief . . . . *See Issues Raised by Foreign Relations Authorization Bill,* 14 Op. O.L.C. 37 (1990).[98]

Again, the author(s) do not go to great lengths to elaborate on the evidence or authorities that support the President's "well-settled" and "broad authority" in foreign affairs or explain how this power is derived from his position as head of the unitary executive. Nonetheless, the idea of expanding the UET into the realm of the President's foreign affairs and war powers was clearly floating around the George H.W. Bush Justice Department. The only thing missing was the attendant theoretical support for this move.

The UET provided the OLC with a constitutional rationale for protecting or expanding presidential power in eight distinct opinions.[99] Further, the language "unitary executive" appeared in another five presidential signing statements, demonstrating that the Reagan Era signing statement initiative had also survived the administration change intact.[100] For the purposes of understanding the theoretical development of the UET, however, the situations in which the UET was *not* deployed during the George H.W. Bush Administration are perhaps more interesting than those in which it was. Specifically, there were two controversial opinions issued by the OLC in 1989.[101] These opinions, both signed by William P. Barr, provided the legal and constitutional justifications for the Bush I Administration to undertake aggressive covert and military actions abroad. The first of these opinions, *Authority of the Federal Bureau of*

98. Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 20, 21 (1992).

99. *See* Whether the Office of Special Counsel for Immigration Related Unfair Emp't Practices Is Empowered to Challenge the Constitutionality of State Statutes, 13 Op. O.L.C. 72, 75 n.5 (1989); Constitutionality of Nuclear Regulatory Comm'ns Imposition of Civil Penalties on the Air Force, 13 Op. O.L.C. 131, 136 (1989); Common Legislative Encroachments on Exec Branch Auth., 13 Op. O.L.C. 248, 252–53, 255 (1989); Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37, 38 (1990); Constitutional Limits on "Contracting Out" Dep't of Justice Functions Under OMB Circular A-76, 14 Op. O.L.C. 94, 96 (1990); Sec'y of Educ. Review of Admin. Law Judge Decisions, 15 Op. O.L.C. 8, 14–15 & n.13 (1991); Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18, 21 (1992); Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Emp't Practices, 6 Op. O.L.C. 121 (1992).

100. *See, e.g.*, Statement on Signing the Federal Deposit Insurance Corporation Improvement Act of 1991, 2 PUB. PAPERS 1649, 1650 (Dec. 19, 1991); Statement on Signing Legislation on Trade and Unemployment Benefits, 2 PUB. PAPERS 1543, 1544 (Dec. 4, 1991); Statement on Signing the National Earthquake Hazards Reduction Program Reauthorization Act, 2 PUB. PAPERS 1614, 1615 (Nov. 16, 1990); Statement on Signing the Energy and Water Development Appropriations Act, 1991, 2 PUB. PAPERS 1561, 1562 (Nov. 5, 1990); Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, 1 PUB. PAPERS 239, 241 (Feb. 16, 1990).

101. *See, e.g.*, Sharon LaFraniere, *For Nominee Barr, an Unusual Path to Attorney General's Office*, WASH. POST, Nov. 12, 1991, at A6 (discussing William P. Barr's work on Office of Legal Counsel Memos authorizing covert CIA actions against Manuel Noriega and FBI campaigns to capture terrorists on foreign soil without the permission of the foreign nation).

Investigation to Override International Law in Extraterritorial Law Enforcement Activities, superseded a prior 1980 opinion in which the OLC had advised the President that the FBI did not have the legal authority to carry out extraterritorial law enforcement activities that would contravene or violate "customary international law."[102] In defending its about-face on the issue less than a decade later, the H.W. Bush OLC stated the following:

> We believe that the 1980 Opinion also erred because it failed to consider the President's inherent constitutional power to authorize law enforcement activities. Pursuant to the constitutional command to "take Care that the laws be faithfully executed," the President has the power to authorize agents of the executive branch to engage in law enforcement activities in addition to those provided by statute.
>
> . . . .
>
> . . . [T]his constitutional authority carries with it the power to override customary international law. Thus, Executive agents, when appropriately directed pursuant to the President's constitutional law enforcement authority, may lawfully carry on investigations and make arrests that contravene customary international law.[103]

While the opinion certainly articulates a much more robust understanding of the President's constitutional authority under the "Take Care Clause," nowhere does it deploy the UET in defense of this expanded view of presidential power.

The OLC relied on a similarly expansive view of the President's authority in foreign affairs to support the conclusion that it was well within the President's constitutional prerogative to refuse to report to Congress on certain planned covert operations undertaken by the CIA abroad (such as the 1989 capture and detention of Panamanian military dictator Manuel Noriega).[104] While the author(s) articulate a constitutional conception of presidential power that sounds very similar in effect to what the UET would later provide Justice Department officials with in the George W. Bush Administration, the lack of theoretical support for this conclusion within these memos highlights the intellectual vacuum at the core of the constitutional case for presidential power.[105] This vacuum would

102. 13 Op. O.L.C. 163, 163 (1989).

103. *Id.* at 176, 178 (footnotes omitted).

104. *See* Constitutionality of Proposed Statutory Provision Requiring Prior Cong. Notification for Certain CIA Covert Actions, 13 Op. O.L.C. 258 (1989).

105. *See, e.g.*, *id.* at 261 ("These examples could be expanded upon, but all buttress the conclusion that the President's authority with respect to foreign affairs is very broad . . . ."); *see also* Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37, 41 (1990) ("These examples and authorities by no means exhaust the list of what could be cited in support of our conclusion. Nonetheless, they are clearly sufficient to demonstrate that the President has the constitutional responsibility to represent the United States abroad . . . ."); Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18, 21 (1992) ("The necessary background for our

eventually be filled, as we will see in the next subsection, by a more expansive version of the UET.

B. The Unitary Executive Theory at Federalist Society Conferences, etc.

The intellectual ferment that Reagan Justice alumnus Douglas Kmiec lamented was not happening within the George H.W. Bush Justice Department was in fact happening within the fledgling Federalist Society for Law and Public Policy. For evidence of this, we need look no further than the transcript from the very first Federalist Society held after the end of the Reagan Administration, *The Presidency and Congress: Constitutionally Separated and Shared Powers*.[106] This conference, featuring six Reagan alumni as invited speakers,[107] was particularly UET-centric in its subject matter and discussion. The opening panel at the conference was called "Agency Autonomy and the Unitary Executive" and the first speaker on the panel was Judge Laurence Silberman, who had written the overturned circuit court opinion in *Morrison v. Olson*. [108] Among several others, Reagan alumnus Frank Easterbrook spoke about the President's authority to interpret statutes and endorsed the presidential signing statement as a way to preserve the unitary executive.[109] Also, notably, future Vice President Richard Cheney was invited to speak on the importance of preserving the unitary executive in foreign affairs and national security.[110] Interlocutors used the words "unitary" or "unity" in connection with the "executive" or the "Presidency" a total of fifty-four times throughout the conference.

The UET headlined or played a strong supporting role at three additional Federalist Society National Conferences between the end of the Reagan Administration and the beginning of the George W. Bush Administration. At the Federalist Society Lawyers Convention Symposium in 1992, *The Congress: Representation, Accountability, and the Rule of Law*, the Society hosted a panel discussion on the question of "Who Con-

analysis of the particular issues presented here is the well-settled recognition of the President's broad authority over the Nation's foreign affairs.").

106. *See* Symposium, *The Presidency and Congress: Constitutionally Separated and Shared Powers*, 68 WASH. U. L. Q. 485 (1990).

107. *See id.* at vii-viii (listing as invited speakers Reagan Administration alumni Dick Thornburgh, Terry Eastland, T. Kenneth Cribb, Jr., Frank Easterbrook, Theodore Olson, and Edwin Meese III).

108. *See* Silberman, *supra* note 63, at 500.

109. *See* Frank Easterbrook, *Panel II: Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, and Delegations of Rulemaking Authority*, 68 WASH. U.L.Q. 533, 539 (1990) (reasoning presidential signing statements would produce more consistency and accountability in statutory interpretation than would judicial interpretation: "Indeed, consistency and accountability were principal arguments for a unitary executive in 1787.").

110. Richard Cheney, *Address: The Impact of Separation of Powers on National Security*, 68 WASH. U.L.Q. 525, 526–27 (1990) ("The Presidency . . . was designed as a one-person office to ensure that it would be ready for action. Its major characteristics, in the language of the *Federalist Number 70*, were to be 'decision, activity, secrecy, and dispatch.'" (quoting THE FEDERALIST NO. 70, at 356 (Alexander Hamilton) (J. Cooke ed., 1961))).

trols the Administrative State?"[111] Invited panelists, including Reagan alumnus Theodore Olson, mentioned the unitary executive a total of eighteen times in their respective discussions of presidential power and the administrative state. The UET was also discussed with considerable frequency at the 1998 National Student Federalist Society Symposium on Law and Public Policy, *Reviving the Structural Constitution.*[112] Eight different speakers across various panels mentioned the unitary executive in their talks.[113] Additionally, at the 1999 Federalist Society National Lawyers Conference, *The Rule of Law, Modern Culture, and the Courts at Century's End,* future George W. Bush Justice Department official John C. Yoo moderated a panel debate over the merits of the UET as it relates to the separation of powers, presidential power, and foreign policy.[114] This panel discussion is particularly noteworthy because it represents the first full treatment of the UET in the realm of war powers and foreign affairs at a Federalist Society National Conference and provides evidence of participants discussing the UET in this context prior to the start of the George W. Bush Administration.

While the universe of speakers endorsing the unitary executive view of the presidency at Federalist Society National Conferences between 1989 and 2000 includes some familiar Reagan Justice alumni (Steven Calabresi, John Harrison, Charles J. Cooper, and Frank Easterbrook), it also includes other conservative and libertarian legal scholars who, even more notably, had not been students of the Reagan-Meese Justice Department: John C. Yoo, Burt Neuborne, Cynthia Farina, Roderick M. Hills, Jr., and Jeremy Rabkin, for example. This evidence suggests that while Reagan Justice alumni might still have been the most vocal advocates of the UET, between the end of the Reagan Administration and the beginning of the George W. Bush Administration these ideas had been successfully diffused to other individuals active within the Federalist Society. Apart from its meetings and conferences, the Federalist Society has also facilitated the diffusion of the UET to its membership through its web-published *Conservative and Libertarian Legal Scholarship: An Annotated Bibliography*.[115] Co-author and Reagan Justice Department alumni Roger Clegg explained to me in our interview the idea behind the *Bibliography*: "If you are interested in an area of the law it's very useful to have someplace, some article that you can read that gives you an over-

111. *Panel IV: Who Controls the Administrative State? A Debate on the Relationship Between Congress and Government Agencies*, 23 CUMB. L. REV. 125 (1992).

112. *See* Symposium, *Reviving the Structural Constitution*, 22 HARV. J.L. & PUB. POL'Y 1 (1998).

113. *Id.* at 4, 7 n.15, 19, 52, 176 n.16, 185 n.15, 191, 224, 227–31, 262 & n.14.

114. Conference agenda on file with author, obtained through personal communication with the Federalist Society National Office.

115. *See* Roger Clegg, Michael E. DeBow & John McGinnis, *Conservative and Libertarian Legal Scholarship: An Annotated Bibliography*, THE FEDERALIST SOC'Y FOR LAW & PUB. POL'Y (2011), http://www.fed-soc.org/resources/page/conservative-libertarian-legal-scholarship-annotated-bibliography.

view of that area of the law by somebody who shares your premises on what the law means and how to interpret it."[116] In the areas of law that implicate executive power, every article and book listed in the *Bibliography* (totaling fourteen pieces of scholarship)[117] with the exception of one[118] advocates the unitary executive view. Moreover, eleven of the thirteen pieces of scholarship advocating the UET view of presidential power in the *Bibliography* were authored or co-authored by a documented participant in Federalist Society National Conferences.

One additional way in which the Federalist Society has encouraged the development of the UET has been through the simple act of networking conservative and libertarian legal academics. Evidence from transcripts reveals that legal academics account for the largest percentage (37%) of all presenters at Federalist Society National Conferences. [119] As Federalist Society member, UET advocate, and Reagan Justice alumnus Michael Rappaport confirmed, the Federalist Society is thus "extremely important" in the academy:

> If I have an article that I'm writing [I will consult with] Randy Barnett and Gary Lawson and those are people I would've met in some way through the Federalist Society . . . . [So] it has the effect of a facilitator, an indirect effect. It's not controlling anything, it's changing a climate. You want to change the world, you have to be patient.[120]

Perhaps in part due to the institutional efforts of the Federalist Society to encourage discussion of the unitary executive in the post-Reagan years and in part because of the informal role the Society played as a "facilitator" by connecting and networking like-minded scholars, discussion about the UET in the legal academy increased dramatically during

---

116. Interview with Roger Clegg, Co-Author of the Federalist Soc'y's Bibliography of Conservative and Libertarian Legal Scholarship (Jan. 29, 2008).

117. *See* Clegg, DeBow & McGinnis, *supra* note 115, at 28–29, 35–36 (recommending Am. Enter. Inst. for Pub. Policy Research, THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH (L. Gordon Crovitz & Jeremy A. Rabkin, eds., 1989); Curtis Bradley & Jack Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000); Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Law*, 104 YALE L.J. 541 (1994); Steven Calabresi, *Some Normative Arguments for a Unitary Executive*, 48 ARK. L. REV. 23 (1995); Steven Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Joel K. Goldstein, *The Presidency and the Rule of Law: Some Preliminary Explorations*, 43 ST. LOUIS. U. L.J. 791 (1999); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, (1994); Lee Liberman, Morrison v. Olson*: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313 (1989); Geoffrey P. Miller, *Independent Agencies*, 1986. SUP. CT. REV 41 (1986); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002); Eugene V. Rostow, *Once More Unto the Breach: The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1 (1986)).

118. *Id.* at 35 (listing LOUIS FISHER, PRESIDENTIAL WAR POWER (2d ed. 2004)).

119. Percentage based on coding 1,957 presenters at Federalist Society National Student Conferences and Lawyers Conferences from 1982-2008 for occupation at time of presentation.

120. Interview with Rappaport, *supra* note 17.

the decade between the end of the Reagan Administration and the beginning of the George W. Bush Administration. Focusing specifically on U.S. law review articles mentioning the unitary executive as a measure of the saliency of this theory in the academy, the next sub-section also looks at the quality of that dialogue—the contexts in which the unitary executive is discussed and who those discussants are. It finds that although articles discussing the UET in a broader context—expanding it into the realm of the President's Commander in Chief, War Powers, and Treaty Powers—still constituted a very small majority of the total inventory of theoretical writing on the UET throughout the pre-George W. Bush Era, the articles that did address the UET in a more expansive manner provided more than enough intellectual capital for future Justice Department officials to spend as they worked to construct and defend some of the most controversial legal policies of the George W. Bush Administration.

C. The Unitary Executive Theory in the Legal Academy

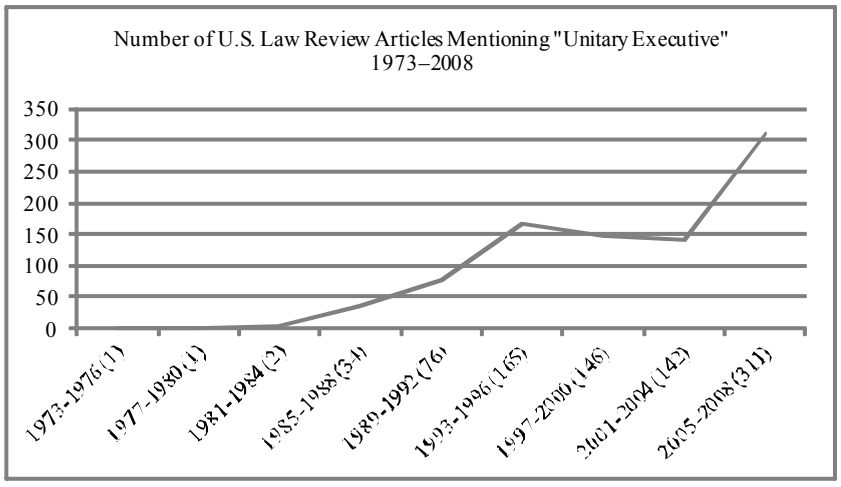
In the previous sub-section, I excerpted a quotation from Reagan alumnus and UET advocate Michael Rappaport's response to the question of how to understand the impact of the Federalist Society. Here is a slightly lengthier excerpt from the same interview, which speaks to the important role the Federalist Society has played in encouraging discussion and debate of ideas and theories that are undervalued or underrepresented in the legal academy's marketplace of ideas:

> I think [the Federalist Society has] had just enormous effects, not by pulling any strings but just in the very ordinary way of being a vehicle—allowing people to debate issues, every year having several conferences which get ideas out which would not otherwise be considered. So, for example on originalism, there's a good deal of stuff outside the Federalist Society being done on originalism. But, for a long time, there wouldn't have been. So it allows there to be intellectual interest in the ideas [and] it allows people to know about one another.[121]

As with the conservative-libertarian theory of originalism, which Rappaport mentions in the excerpt above, there is now a great deal of dialogue and discussion about the unitary executive happening outside of Federalist Society meetings and conferences. But, as Figure 2 illustrates, this was not always the case. A Heinonline search for the term "unitary executive" in all U.S. law reviews in April 2010 confirmed that, while the theory appears to have been in circulation since the 1970s, mentions of the unitary executive in law review articles prior to the 1990s were in fact few and far between.

121. *Id.*

Figure 2



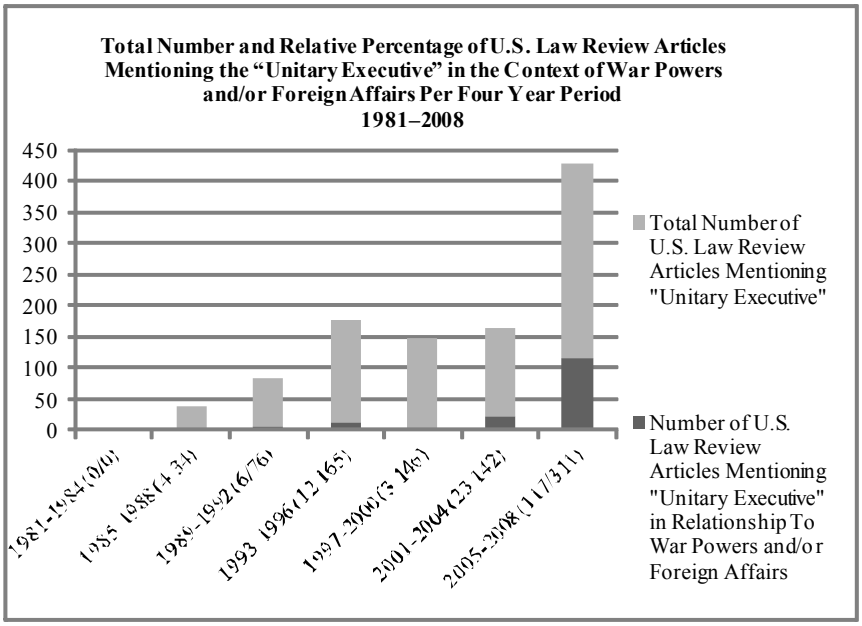
Source: Heinonline.org

As we can see from Figure 2, the first notable spike in discussion of the unitary executive in U.S. law reviews occurs during the Reagan Administration, coinciding with Attorney General Meese's tenure at the Justice Department (1985–1988). Over the next four years, during the George H.W. Bush administration (1989–1992), the number of articles mentioning the unitary executive more than doubled. As I alluded to in Section II, this increase is likely attributable in part to Justice Antonin Scalia's passionate and sharply worded dissent in *Morrison v. Olson*, which mentioned the unitary executive by name several times. However, as the evidence from this section confirms, Reagan Justice alumni and others within the Federalist Society also nurtured and encouraged this dialogue during this time period. And thanks in part to that consistent intellectual investment and promotion, we see another sizeable spike in law review mentions of the unitary executive during the first half of the Clinton Administration (1993–1996). Mentions of the unitary executive in U.S. law reviews would more or less level off over the next eight years (1997–2004). The discovery and release of the now infamous Torture Memo, which I discuss in Section III, and the increased visibility of the UET in presidential signing statements and executive orders are likely responsible for the dramatic spike in academic discussion about the unitary executive during the second half of the George W. Bush Administration (2005–2008).

As important as the quantity of law review articles mentioning the unitary executive— which shows the timing and momentum of the diffusion of ideas related to the UET from the relatively tight-knit circles of the Reagan and Bush I Justice Departments and the fledgling Federalist

Society into the broader marketplace of legal ideas—is the quality of that discussion. To that end, a qualitative examination of the context in which the UET was discussed in each of these articles revealed that, prior to the second half of the George W. Bush Administration, only a very small fraction of U.S. law review articles mentioned the unitary executive in the context of the President's war powers or his role in foreign affairs. Figure 3 aggregates the results of this qualitative exercise, illustrating both the total number of articles using the UET in this broader context and the relative percentage of the total volume of UET articles this constitutes per each four year period. As we see, the overall number of articles discussing the UET in this context prior to the George W. Bush Administration and the relative percentage of the total UET dialogue they constitute are both very low. In fact, only twenty-five articles published between 1981 and 2000 mentioned the unitary executive in conjunction with the President's broader Article II responsibilities. While this total constitutes a very small percentage (6%) of the overall UET discussion in U.S. law reviews during this time, as I discuss below, this small group of articles would end up being extremely important for the UET's theoretical expansion and development.

Figure 3



Source: Heinonline.org

Like the handful of OLC memos I examined from the George H.W. Bush Justice Department, the earliest U.S. law review articles mentioning the UET in the context of the President's Commander in Chief power and role in foreign affairs hint at but do not develop the relationship be-

tween the unitary executive and the robust understanding of executive power they advocate in these areas. For example, in promoting an expanded role for the Executive in intelligence gathering (and, conversely, a protracted role for Congress) in a 1989 article for the *Houston Journal of International Law*, Reagan alumnus and Federalist Society participant Bruce Fein cited the Founders' selection of a unitary executive as evidence of an intent to limit Congress's oversight in this area.[122] Similarly, in an article published the same year in the *University of Miami Law Review,* several scholars, including Reagan alumnus and Federalist Society member William Bradford Reynolds, mentioned the Unitary Executive Clause of the Constitution as support for the President's "inherent authority" to commit troops to hostilities absent Congressional authorization.[123] Likewise, in a *Duke Law Journal* article published in 1992, Federalist Society participant and scholar Gregory J. Sidak argued that a robust interpretation of Congress's constitutional role in declaring and funding war incorrectly "subordinates the unitary executive to the appropriations power" and therefore disrupts the entire scheme of the separation of powers.[124]

Of the ten law review articles that mention the unitary executive in the context of the President's Commander in Chief and foreign affairs powers prior to the beginning of the Clinton Administration, six mention the phrase just once and do so in the service of critiquing or providing nominal support for other, more fully developed theories of executive power.[125] Of the four remaining articles, three mention the unitary executive twice[126] and one three times.[127] Taken together, this first generation

122. *See* Bruce Fein, *The Constitution and Covert Action*, 11 HOUS. J. INT'L L. 53, 60 (1988) ("John Jay likewise lamented the lack of secrecy in foreign affairs that plagued the nation before the Constitution was ratified with its unitary executive responsible for international negotiations.").

123. *See* Charles Bennett, Arthur B. Culvahouse, Geoffrey P. Miller & William Bradford Reynolds, *The President's Power as Commander-in-Chief Versus Congress' War Power and Appropriations Power*, 43 U. MIAMI L. REV. 17, 32 (1988) ("[T]he President has inherent authority, even in the absence of implementing or authorizing legislation, to commit troops in hostilities that fall short of war. . . . Committing troops to hostilities is a classic function of the Executive that finds textual support in the Commander in Chief and unitary Executive clauses . . . .").

124. J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 105–06 (1991) ("The Iran-Contra Affair demonstrated the debilitating effect that squabbling between the President and Congress has over an important component of American foreign policy. That controversy ultimately involved the separation of powers and the wisdom of retaining a unitary executive. . . . The fallacy of [a constitutional theory that gives Congress an expansive role in declaring and conducting war] is that it subordinates the unitary executive to the appropriations power and causes the entire scheme of the separation of powers to be trumped by a single clause in Article I that most probably was intended to serve the modest goal of ensuring fiscal accountability.").

125. *See* Bennett, *supra* note 123, at 32; Lawrence J. Block & David B. Rivkin, *The Battle to Control the Conduct of Foreign Intelligence and Covert Operations: The Ultra-Whig Counterrevolution Revisited*, 12 HARV. J.L. & PUB. POL'Y 303, 348 (1989); William E. Connor, *Reforming Oversight of Convert Actions After the Iran Contra Affair: A Legislative History of the Intelligence Authorization Act for FY 1991*, 32 VA. J. INT'L L. 871, 914–15 (1992); Fein, *supra* note 122, at 60; Kenneth C. Randall, *The Treaty Power*, 51 OHIO ST. L.J. 1089, 1114 (1990); Bretton G. Sciaroni, *The Theory and Practice of Intelligence Oversight*, 12 HARV. J.L. & PUB. POL'Y 397, 425 (1989).

126. *See* Charles J. Cooper & Leonard A. Leo, *Executive Power Over Foreign and Military Policy: Some Remarks on the Founders' Perspective*, 16 OKLA. CITY U. L. REV. 265, 270–71

of law review articles provides evidence of the desire of proponents of presidential power to expand the UET into the realm of war powers and foreign affairs. It also brings into sharp relief the relative dearth of intellectual support that existed for this theoretical move as of the close of the George H.W. Bush Administration. This intellectual vacuum would be filled with a second generation of law review articles, all published while the political right was in exile from the mid- to late-1990s (see Figure 3). Collectively, these fifteen articles address with impressive breadth and depth the gaps in the theory of the unitary executive, developing its intellectual foundations with extensive support from an array of legal and historical sources. For example, a 1994 *Yale Law Journal* article co-authored by Reagan alumnus and Federalist Society co-founder Steven Calabresi and fellow Federalist Society member Saikrishna Prakash methodically develops the historical and theoretical foundations of the UET over the course of 100 law review pages (mentioning the unitary executive over sixty times) and mounts an open challenge against academic and constitutional theories of presidential power that call for a more protracted presidential role in matters of both executive administration and foreign affairs.[128]

Building directly on this work, a 1996 *California Law Review* article published by fellow Federalist Society member John C. Yoo discusses the UET with explicit reference to the President's war powers, concluding in no uncertain terms that "the Framers . . . proceeded to marry an independent, unitary President to the substantive war powers exercised by King, colonial governor, and state executive."[129] And in a follow-up to his earlier opus on the UET, Steven Calabresi collaborated with another Federalist Society member, Christopher Yoo, to develop and defend the theory of the unitary executive from a traditionalist or common law perspective.[130] In this 1996 *Case Western Law Review* article, which again spans over 100 pages and mentions the unitary executive by name over 100 times, the scholars "consider the unitary executive debate from a Burkean, common law constitutionalist's perspective" and contend that the UET, far from being a novel theory of executive power, is strongly supported by the traditions and historical practice of the American Presidency: "we would go further and argue that over the past

(1991); Charles J. Cooper, Orrin Hatch, Eugene Rostow & Michael Tigar, *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 171, 177 (1988); Abram N. Shulsky, *The Iran-Contra Affair and the Intelligence Oversight Process*, 11 HOUS. J. INT'L L. 245, 250 (1988).

127. *See* Sidak, *supra* note 124, at 62, 105–06.

128. *See generally* Calabresi & Prakash, *supra* note 117.

129. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 230 (1996).

130. *See generally* Steven Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997).

208 years a powerful tradition has grown up whereby [p]residents have consistently defended the prerogatives [of the unitary executive]."[131]

This second generation of law review articles, while small in number, provided the requisite normative, historical, and constitutional support needed to expand the UET from what it had been during the Reagan and George H.W. Bush Administrations—a relatively limited tool to critique the administration and execution of the laws in the Executive Branch—to what it would become during the George W. Bush Administration—"Article II on Steroids."[132] In this way, conservative and libertarian legal academics—especially those affiliated with the Federalist Society for Law and Public Policy—played an important role in nurturing and developing the ideas associated with the UET while the right was in political exile under President Clinton. And while the UET would not move into the mainstream of legal academic discourse until around the mid-point of the George W. Bush Administration, the intellectual foundations of the theory had been constructed, bit by bit, by a small but invested group of UET patrons well in advance of this time.

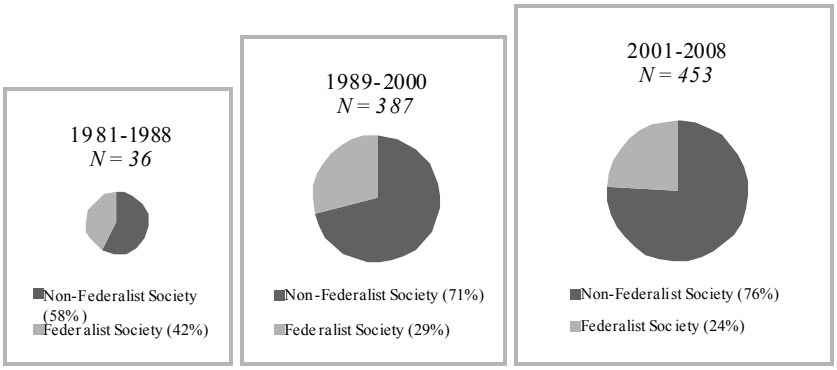
D. The Unitary Executive Theory Nurtured and Developed

From the end of the Reagan Administration until the beginning of the George W. Bush Administration, the UET was nurtured and developed both inside and outside of government. Actors in the George H. W. Bush Justice Department continued to draw on the UET in OLC opinions and signing statements to assert presidential prerogatives in the face of perceived legislative encroachments on executive power. However, the major theoretical developments in the UET would happen outside the government, at Federalist Society conferences and within the legal academy. Reagan Justice alumni carried their ideas and understandings about executive power and the unitary executive into some of the earliest Federalist Society conferences. Here, these actors, who would form the core of the Federalist Society leadership, exposed other members of this burgeoning conservative and libertarian legal network to the UET.

131. *Id.* at 1457.
132. SPITZER, *supra* note 3, at 92.

Figure 4

Relative Percentage of Total U.S. Law Review Articles Mentioning "Unitary Executive" Authored or Co-Authored by Federalist Society Conference Participants 1981–2008



Source: Heinonline.org

Figure 4 provides a graphic illustration of the extent to which Federalist Society network participants were working to develop and disseminate the ideas associated with the UET within the legal academy and the greater legal culture. The three pie charts show the total number of U.S. law review articles that discussed the UET from 1981–2008 and the relative percentage of those that were written by Federalist Society participants. As we can see, both the total number of articles discussing the UET and the diversity of interlocutors has increased over time. These data points speak to the success with which the UET has moved from the much smaller networks of the Reagan Justice Department and the Federalist Society into the broader legal academic dialogue. That being said, from 2001 to 2008, individuals involved with the Federalist Society network still accounted for nearly one out of every four (24%) published law review articles that mentioned the unitary executive.

The end product of all this post-Reagan Era intellectual investment in the unitary executive was a UET transformed. This transformation of the UET was neither necessary nor inevitable. Instead, as the evidence presented in this section demonstrates, it was contingent upon the efforts of a small group of invested patrons. As Section III establishes, these individuals and their intellectual investments are critical to explaining how and why the UET was able to take such a swift and dramatic hold within the Executive Branch from 2001 to 2008.

III. THE UET "ALL GROWN UP": THE GEORGE W. BUSH JUSTICE DEPARTMENT

> Today I have signed into law H.R. 3199, the "USA PATRIOT Improvement and Reauthorization Act of 2005 . . . ."
>
> The executive branch shall construe the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch, such as sections 106A and 199, in a manner consistent with the President's constitutional authority to supervise the *unitary executive* branch and to withhold information the disclosure of which could impair . . . the performance of the Executive's constitutional duties.
>
> —President George W. Bush's Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, Mar. 9, 2006.[133]
>
> One of the things about the Federalist Society is, because it's a small network of conservative lawyers, people help each other get jobs, people recommend each other . . . the interesting thing is to look at who's been in [the George W. Bush] administration. *Because, now we're all grown-ups*, right, and everybody, everybody who got a job who was a lawyer was involved in the Federalist Society . . . . [T]he people who were in the Justice Department . . . all those people were Federalist Society types. I mean all of them.
>
> —Daniel Troy, Reagan Justice alumnus and Federalist Society member.[134]

Just as the theory of the unitary executive matured during the twelve years between the Reagan Administration and the election of George W. Bush, so had the Federalist Society network. It had "grown-up" from a student-oriented group claiming 4,000 members in 1988 to a full-blown professional network totaling 30,000 members in 2000.[135] Through its programming and its networking events, the Federalist Society had helped to create a deep bench of conservative legal talent—a farm team of government appointees in-waiting who were eager to put their shared principles into practice within a sympathetic administration.[136] The George W. Bush Administration turned out to be very sympathetic to these principles, indeed. During the eight years of the George W. Bush Administration, there were at least twelve Federalist Society participants

133. Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 1 PUB. PAPERS. 430 (Mar. 9, 2006) (emphasis added).

134. Interview with Daniel Troy, Former Special Assistant, O.L.C., Reagan Admin. & Federalist Soc'y member (Jan. 30, 2008) (emphasis added).

135. *See* STEVEN TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT 150 (2008).

136. See generally *id.*, and also ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008), for more on the Federalist Society's role in job placement and networking within the conservative legal movement.

working at the OLC.[137] These twelve individuals all drafted and signed at least one published opinion between 2001 and 2008[138]. Based on an inventory of all publicly available opinions from that timeframe, these twelve Federalist Society network actors represented almost half (44%) of all signatories on OLC opinions published during the George W. Bush Administration.[139] This evidence corroborates what Reagan alumnus and Federalist Society member Daniel Troy alluded to in the excerpt at the beginning of this section: there was a strong Federalist Society network presence within the George W. Bush Justice Department. As this section will show, having these network affiliated "boots on the ground"[140]—individuals in policymaking positions who would be sympathetic to the ideas undergirding the UET—helps explain the extent to which the UET took hold during the George W. Bush Administration.

However, it does not do all the explanatory work. As Sections I and II demonstrated, there were also a large number of UET advocates working in the Reagan Justice Department, some of whom stayed on through the next administration. And, as we have seen, the UET did not take hold in these administrations to the extent that it did in the George W. Bush Administration. That is because, to return to a formulation I used in the Introduction to this Article, these decisionmakers also needed access to the proper arsenal of ideas (a fully developed and *plausible* theory of executive power) and the right occasion to deploy them (*timeliness*).[141] As the previous section demonstrated, a small group of UET patrons had been hard at work over the course of the previous decade building the intellectual capital that would help develop, expand and support the UET as a powerful and plausible construction of presidential power. The unique circumstances presented by the events of September 11, 2001, made this intellectual capital extremely valuable to Justice Department officials who were forced to work quickly and under great constraint to construct the legal and constitutional framework for the Executive Branch's response to these devastating terrorist attacks. As former Bush Administration official Jack Goldsmith observed in his memoir *The Terror Presidency*, the clear and present danger to American lives combined with the peculiar nature of the terrorist threats created "countervailing pressures" that made it difficult for Justice Department officials to pro-

137. *See Office of Legal Counsel: Opinions*, U.S. DEP'T OF JUSTICE (last updated Aug. 2011), http://www.justice.gov/olc/opinions.htm. I cross referenced all signatories on published memos from 2001-2008 with my list of Federalist Society participants at National Meetings from 1982-2008.

138. *See id.*

139. *See id.* The total number of signatories on Office of Legal Counsel "Memoranda and Opinions" archived online from 2001–2008 was 27, of which 12 were documented Federalist Society participants (44%).

140. Interview with Michael Greve, Resident, Am. Enter. Inst. & Federalist Soc'y member (Feb. 12, 2008) (describing how the Federalist Society has impacted the "elite institutions of American Society").

141. *See* Skowronek, *supra* note 4, at 2074, 2100–01.

vide neutral, non-political, and thorough analyses of the legal and constitutional questions surrounding the War on Terror:

> For all these reasons, I found myself at OLC managing what Jimmy Carter's Attorney General Griffin Bell described as the tension between the "duty to define the legal limits of executive action in a neutral manner *and* the President's desire to receive legal advice that helps him do what he wants." This ever-present tension was unusually taut after 9/11, when what the President wanted to do was save thousands of American lives. There is no magic formula for how to combine legitimate political factors with the demands of the rule of law.[142]

And while, as Goldsmith writes, there was "no magic formula" for combining the unique political demands of the War on Terror with the sometimes countervailing demands of the rule of law, the recently renovated and expanded UET provided Bush Administration Justice Department officials with an accessible and potent means to apparently satisfy both sets of demands.

This section will underscore how having the right personnel in policymaking positions combined with these other factors—*plausibility* and *timeliness*—to facilitate the diffusion of the UET into the legal opinions defending some of the most controversial policies of the War on Terror. OLC opinions, however, accounted for just 11 % of the total inventory of Executive Branch documents that mentioned the unitary executive during the George W. Bush Administration[143]. As Figure 1 illustrated, this language was most often used during the Bush Administration in presidential signing statements. Thus, the following section will also look at how Justice Department officials deployed this "grown up" version of the UET in signing statements to bolster and support Executive Branch prerogatives under George W. Bush.

A. The Unitary Executive Theory and the Post-9/11 Office of Legal Counsel Opinions

Initial evidence of how deeply the theory of the unitary executive had penetrated the very new George W. Bush Administration can be found in a series of legal opinions produced by the OLC in the aftermath of the September 11th attacks. Six opinions, issued between September of 2001 and March of 2003,[144] provided the legal and constitutional ra-

142. JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 34, 38 (2007).

143. *See supra* Figure 1.

144. MILITARY OPERATIONS AGAINST TERRORISTS, *supra* note 1; OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, CONSTITUTIONALITY OF AMENDING FOREIGN INTELLIGENCE SURVEILLANCE ACT TO CHANGE THE "PURPOSE" STANDARD FOR SEARCHES (2001) [hereinafter AMENDING FOREIGN INTELLIGENCE SURVEILLANCE ACT], *available at* 2001 WL 36191050; OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, THE PRESIDENT'S POWER AS COMMANDER IN CHIEF TO

tionale for two controversial policies guiding the conduct of the War on Terror: the justification for conducting war domestically, which included the use of warrantless surveillance programs, and the policies on torture and interrogation based on legal judgments concerning the applicability of congressional statutes and international treaties.[145] These six OLC documents, five of which were authored or co-authored by Federalist Society participants John C. Yoo and Jay Bybee,[146] provide striking evidence of a theoretically mature UET at work in the George W. Bush Administration.

Two OLC memos, circulated exactly two weeks after the attacks of September 11, 2001, rely explicitly on the theory of the unitary executive to establish broad authority for the President to take military action both at home and abroad in response to the terrorist attacks on the United States.[147] Both of these opinions were authored by then-Deputy Assistant Attorney General John C. Yoo—a frequent Federalist Society conference participant.[148] Drawing from Yoo's own prior scholarship on the UET and that of fellow Federalist Society network members Steven Calabresi, Christopher S. Yoo, and Saikrishna Prakash, these opinions cite multiple authorities from the founding generation[149] to support and defend the President's constitutional authority to engage in aggressive military action. For example, in the OLC opinion entitled *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them*, Yoo cites *The Federalist* 70 as evidence of the Framers' expansive view of the President's war powers:

TRANSFER CAPTURED TERRORISTS TO THE CONTROL AND CUSTODY OF FOREIGN NATIONS (2002) [hereinafter TRANSFER CAPTURED TERRORISTS], *available at* 2002 WL 34482991; OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, SWIFT JUSTICE AUTHORIZATION ACT (2002) [hereinafter SWIFT JUSTICE AUTHORIZATION ACT] *available at* 2002 WL 34482989; OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, INTERROGATION OF AL QAEDA OPERATION (2002) [hereinafter INTERROGATION OF AL QAEDA OPERATION] *available at* 2002 WL 34501675; OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, MILITARY INTERROGATION OF ALIEN UNLAWFUL COMBATANTS HELD OUTSIDE THE UNITED STATES (2003) [hereinafter INTERROGATION OF ALIEN UNLAWFUL COMBATANTS], *available at* http://www.justice.gov/olc/docs/memo-combatantsoutsideunitedstates.pdf.

145. *See* MILITARY OPERATIONS AGAINST TERRORISTS, *supra* note 1, at 19; TRANSFER CAPTURED TERRORISTS, *supra* note 144, at 20–28; AMENDING FOREIGN INTELLIGENCE SURVEILLANCE ACT, *supra* note 144, at 15. *See generally* SWIFT JUSTICE AUTHORIZATION ACT, *supra* note 144; INTERROGATION OF AL QAEDA OPERATION, *supra* note 144;INTERROGATION OF ALIEN UNLAWFUL COMBATANTS, *supra* note 144.

146. MILITARY OPERATIONS AGAINST TERRORISTS, *supra* note 1, at 20 (authored by Yoo); AMENDING FOREIGN INTELLIGENCE SURVEILLANCE ACT, *supra* note 144, at 12 (authored by Yoo); TRANSFER CAPTURED TERRORISTS, *supra* note 144, at12 (authored by Bybee); INTERROGATION OF AL QAEDA OPERATION, *supra* note 144.

147. MILITARY OPERATIONS AGAINST TERRORISTS, *supra* note 1, at 4–5; AMENDING FOREIGN INTELLIGENCE SURVEILLANCE ACT, *supra* note 144, at 3–6.

148. As of 2008, the close of President George W. Bush's term, John Yoo had been a documented participant at fourteen Federalist Society National Conferences.

149. MILITARY OPERATIONS AGAINST TERRORISTS, *supra* note 1, at 3–5 (citing THE FEDERALIST NOS. 23, 25, 34, 70, 74 (Alexander Hamilton); WILLIAM BLACKSTONE, COMMENTARIES; JONATHON ELLIOT, THE DEBATES IN THE SEVERAL STATES; and THE RECORDS OF THE FEDERAL CONVENTION OF 1787); AMENDING FOREIGN INTELLIGENCE SURVEILLANCE ACT, *supra* note 144, at 4–5 (citing THE FEDERALIST NOS. 23, 34, 74 (Alexander Hamilton), NO. 41 (James Madison) and JONATHON ELLIOT, THE DEBATES IN THE SEVERAL STATES).

> The centralization of authority in the President alone is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch. As Hamilton noted, "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks." This is no less true in war.[150]

This OLC opinion also deploys an argument frequently mobilized in the UET scholarship examined in the previous section of this Article; namely, that Article II's Vesting Clause confers all war powers not specifically assigned to Congress in the constitution to the President: "[T]o the extent that the constitutional text does not explicitly allocate the power to initiate military hostilities to a particular branch, the Vesting Clause provides that it remain among the President's unenumerated powers."[151] Following this logic, the Yoo-authored opinion concludes that while congressional approval of military action can be politically useful, it is not constitutionally required.[152] This means that neither the War Powers Resolution nor the Joint Resolution can, as the opinion reads, "place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make."[153]

Citing many of the same authorities, a second opinion issued simultaneously, entitled *The Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the 'Purpose' Standard for Searches*, relied on the same arguments, grounded in the theory of the unitary executive, to defend a strong role for the President in intelligence gathering operations:

> The Constitution, for example, vests in the President the power to deploy military force in the defense of the United States by the Vesting Clause and by the Commander in Chief Clause. Intelligence operations, such as electronic surveillance, may well be necessary and proper for the effective deployment and execution of military force against terrorists.[154]

And while the opinion, also authored by John Yoo, worked to establish the constitutional grounds for amending the Foreign Intelligence Surveillance Act (FISA) to cover domestic surveillance and warrantless

150. MILITARY OPERATIONS AGAINST TERRORISTS, *supra* note 144, at 4 (quoting THE FEDERALIST No. 70 (Alexander Hamilton)).

151. *Id.* at 5.

152. *Id.* at 19.

153. *Id.*

154. AMENDING FOREIGN INTELLIGENCE SURVEILLANCE ACT, *supra* note 144, at 5 (footnote and citations omitted).

search programs, it was careful to point out that "FISA itself is not required by the Constitution" and that intelligence gathering activities conducted for purposes of national security "need not comport with the same Fourth Amendment requirements that apply to domestic criminal investigations."[155] In other words, the memo concluded, once the President's constitutional war powers are triggered, the "calculus" that protects citizens against unreasonable searches and seizures under the Fourth Amendment "shift[s]" and gives the President the authority to dilute these individual liberties in the name of national security.[156]

Additional opinions issued by the OLC between 2002 and 2003 built on the legal reasoning established in these two John Yoo-authored opinions and explained how the broad war powers vested in the President under Article II of the Constitution applied to the capture, transfer and interrogation of suspected terrorists.[157] Central to the arguments of all four opinions—three of which were authored by Federalist Society participants[158]—is the belief, supported by the UET, that the President's inherent authority to conduct military operations cannot be cabined or constrained by either statutes or treaties.[159] For example, a March 13, 2002 memo[160] signed by Federalist Society participant Jay S. Bybee, argued that in light of the President's constitutional authority in times of war, neither the Geneva Conventions nor the Torture Conventions forbade "the transfer of members of the Taliban militia, al Qaeda, or other terrorist organizations" under the control of the United States military to other countries:

> Those treaties that purport to govern the transfer of detained individuals generally do not apply in the context of the current war against al Qaeda and other terrorist groups. Even if those treaties were applicable to the present conflict, however, they do not impose significant restrictions on the operation of the President's Commander-in-Chief authority. . . .

155. *Id.* at 7.

156. *Id.*

157. *See generally* MILITARY OPERATIONS AGAINST TERRORISTS, *supra* note 1; INTERROGATION OF AL QAEDA OPERATION, *supra* note 144; INTERROGATION OF ALIEN UNLAWFUL COMBATANTS, *supra* note 144.

158. OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, THE PRESIDENT'S POWER AS COMMANDER IN CHIEF TO TRANSFER CAPTURED TERRORISTS TO THE CONTROL AND CUSTODY OF FOREIGN NATIONS (2002) [hereinafter POWER TO TRANSFER CAPTURED TERRORISTS], *available at* http://www.justice.gov/opa/documents/memorandumpresidentpower03132002.pdf; OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, STANDARDS OF CONDUCT FOR INTERROGATION UNDER 18 U.S.C. §§ 2340-2340A, (2002) [hereinafter CONDUCT FOR INTERROGATION], *available at* http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf; OFFICE OF LEGAL COUNSEL, U.S. DEP'T OF JUSTICE, MILITARY INTERROGATION OF ALIEN UNLAWFUL COMBATANTS HELD OUTSIDE THE UNITED STATES, (2003) [hereinafter MILITARY INTERROGATION OF ALIEN UNLAWFUL COMBATANTS], *available at* http://www.justice.gov/olc/docs/memo-combatantsoutsideunitedstates.pdf.

159. *See supra* Figure 1.

160. POWER TO TRANSFER CAPTURED TERRORISTS, *supra* note 158.

> To the extent that these treaties would cabin presidential freedom to transfer detainees, they could not constrain his constitutional authority. . . .
>
> . . . This view of the President's war powers is supported by the Constitution's text and a comprehensive understanding of its structural allocation of powers, but also by an unbroken chain of historical practice dating back to the Founding era. In tandem, these factors conclusively demonstrate that the Commander-in-Chief Clause constitutes an independent grant of substantive authority to engage in the detention and transfer of prisoners captured in armed conflicts.[161]

Another OLC opinion issued on August 1, 2002, and also signed by Jay (popularly referred to as the "Torture Memo"), found that provisions of the congressional statute enacted pursuant to the Conventions Against Torture that criminalized torture "may be unconstitutional if applied to interrogations undertaken of enemy combatants pursuant to the President's Commander-in-Chief powers" because "enforcement of the statute would represent an unconstitutional infringement on the President's authority to conduct war."[162]

Along those same lines, an OLC opinion dated April 8, 2002, cited the scholarship of John Yoo to support the proposition that Article II incorporated "the fullest possible range of power available to a military commander."[163] Relying on the evidence presented in Yoo's 1996 *California Law Review* article, the opinion concludes that "Congress cannot constitutionally restrict the President's authority to detain enemy combatants or to establish military commissions to enforce the laws of war."[164] Finally, in a March 14, 2003 memo, author John Yoo relied in part on the UET to defend the sweeping conclusion that "any effort by Congress to regulate the interrogation of enemy combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."[165]

These six opinions, issued in the wake of the September 11th attacks, had a swift and profound impact on the manner in which the Bush Administration conducted the War on Terror. As we've seen, Federalist Society-affiliated officials in the OLC drew on the UET to provide the legal and constitutional rationales for warrantless domestic surveillance programs, the capture and transfer of suspected terrorists to prisons outside the United States, and for the Administration's interrogation programs. While these opinions constitute the most striking examples of the

161. *Id.* at 2 & n.1.
162. CONDUCT FOR INTERROGATION, *supra* note 158, at 2.
163. SWIFT JUSTICE AUTHORIZATION ACT, *supra* note 144, at 3 (citing Yoo, *supra* note 129, at 252–54).
164. *Id.* at 1.
165. MILITARY INTERROGATION OF ALIEN UNLAWFUL COMBATANTS, *supra* note 158, at 19.

acute political impact of the theory of the unitary executive during the George W. Bush Administration, the UET was also deployed by OLC officials to bolster and defend the administration's policy goals through the creative (and controversial) use of presidential signing statements.

B. The Unitary Executive Theory and the Presidential Signing Statement on "Steroids"

On January 31, 2007, John P. Elwood, a Deputy Assistant Attorney General in the OLC, was called in front of the House Committee on the Judiciary to explain and defend President George W. Bush's use of presidential signing statements in light of a damning August 2006 report issued by the American Bar Association (ABA).[166] Citing various scholarly and journalistic studies of the use of presidential signing statements, the ABA Task Force Report concluded that:

> [T]he use, frequency, and nature of [President Bush's] signing statements demonstrates a "radically expansive view" of executive power which "amounts to a claim that he is impervious to the laws that Congress enacts" and represents a serious assault on the constitutional system of checks and balances.[167]

Elwood, speaking on behalf of the OLC—the office responsible for drafting presidential signing statements—stated that he and his colleagues "respectfully disagree with the analysis in [the ABA Task Force] report."[168] Citing legal scholarship supporting a more aggressive use of presidential signing statements (including law review articles authored by Federalist Society affiliated academics),[169] Elwood defended the Administration's use of signing statements as being consistent with the President's constitutional powers and responsibilities.

Notably, Elwood took time to respond to the "critics" who had specifically taken issue with those "signing statements that make reference to the President's authority to supervise the 'unitary executive.'"[170] In a section of his House testimony, entitled "Unitary Executive," Elwood refers to one of the second generation UET law review articles co-

166. *See Task Force Report on Presidential Signing Statements and the Separation of Powers Doctrine*, *supra* note 81.

167. *Id.* at 27 (quoting Neil Kinkopf, *Signing Statements and the President's Authority to Refuse to Enforce the Law*, AMERICAN CONSTITUTION SOCIETY 7 (June 14, 2006), http://www.acslaw.org/publications/issue-briefs/signing-statements-and-the-president's-authority-to-refuse-to-enforce-the-).

168. *Presidential Signing Statements: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 6 (2007) (statement of John P. Elwood, Deputy Assistant Att'y Gen., O.L.C.) [hereinafter *Jan. 31 Hearing*].

169. *See id.* at 4, 12 (citing Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 323 (2006); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era*, 1945–2004, 90 IOWA L. REV. 601, 608, 730 (2005)).

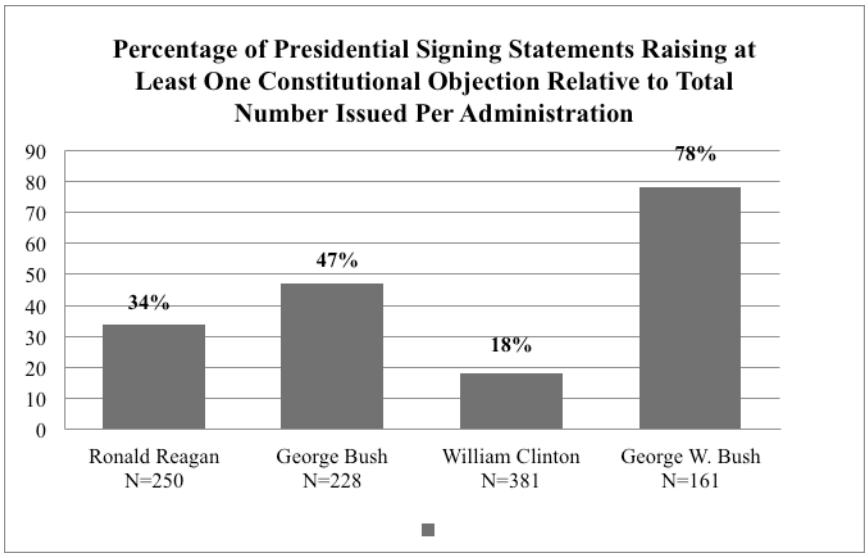
170. *Id.* at 12.

authored by Federalist Society co-founder Steven Calabresi to refute the claim that the theory of the unitary executive was an alarming novelty of the George W. Bush Administration:

> Some critics have focused in particular on signing statements that make reference to the President's authority to supervise the "unitary executive." Although the phrase has been used by critics to mean many things in recent months, at bottom, the core idea of a "unitary executive" is that, because "[t]he executive power shall be vested in [the] President" under the Constitution, U.S. Const. art. II, § 1, the President has broad authority to direct the exercise of discretion by officials within the Executive Branch. As several scholars concluded after an exhaustive survey of historical practice, "each of the first thirty-two presidents—from George Washington up through Franklin D. Roosevelt—believed in a unitary executive" and "every president between 1945 and 2005 defended the unitariness of the executive branch."[171]

As this testimony foreshadows, the investment of those initiators of the Reagan Era signing statement initiative—an initiative grounded in and supported by the theory of the unitary executive—would produce handsome returns during the George W. Bush Administration.

Figure 5



Sources: Congressional Research Service and the American Presidency Project

171. *Id.* (quoting Yoo, Calabresi & Colangelo, *supra* note 169, at 608, 730).

The impact of the UET is not evidenced by the quantity of signing statements issued by President Bush but rather by the quality or nature of those statements. For instance, a Congressional Research Service Report found that even though President Clinton issued more than twice as many signing statements as President George W. Bush (see Figure 5), only 18% of Clinton's statements raised a constitutional objection to the legislation in question as compared with 78% of those issued under Bush.[172] Further, more than a third of Bush II's signing statements (41%) explicitly grounded their constitutional challenges in the President's authority to supervise "the Unitary Executive Branch."[173] While scholars have identified up to seventeen different categories of constitutional objections raised by George W. Bush in his signing statements,[174] this section will focus on one category in particular: statements objecting to provisions of bills that infringe on the President's power over foreign affairs, including his war powers. These signing statements provide evidence of a more mature and theoretically potent UET at work in the OLC under George W. Bush. This category of statements illustrates just how much the UET had "grown up" since the close of the first Bush Administration, where, as I discussed in Section II, it was deployed with far less frequency and within a much narrower scope.

I opened Section III with an excerpt from President George W. Bush's *Statement on Signing the USA PATRIOT Act*, which highlighted the Administration's reliance on the theory of the unitary executive to assert its constitutional authority to withhold certain information about the War on Terror from Congress. Here is a slightly lengthier excerpt from that same statement that provides more context on how the UET was mobilized:

---

172. T.J. HALSTEAD, CONG. RESEARCH SERV., RL33667, REPORT FOR CONGRESS: PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS, 9 (2007).

173. A search of the American Presidency Project's database on April 3, 2010 for all Public Papers containing the phrase "unitary executive" from 2001-2008 returned sixty-six Presidential signing statements, which is 41% of the total number of signing statements issued under George W. Bush. John T. Woolley & Gerhard Peters, *The American Presidency Project*, U.C. SANTA BARBARA, http://www.presidency.ucsb.edu.

174. *See* HALSTEAD, *supra* note 172, at 10 ("Professor Philip J. Cooper has characterized the constitutional objections raised by President Bush as falling across seventeen categories, ranging from generalized assertions of presidential authority to supervise the 'unitary executive branch' to federalism limits imposed by the Supreme Court in *United States v. Printz*. The Bush II Administration has been particularly prolific in issuing signing statements that object to provisions that it claims infringe on the President's power over foreign affairs (oftentimes with regard to requirements that the Administration take a particular position in negotiations with foreign powers); provisions that require the submission of proposals or recommendations to Congress (asserting that they interfere with the President's authority under the Recommendations Clause to 'recommend such Measures as he shall judge necessary and expedient); provisions imposing disclosure or reporting requirements (on the ground that such provisions may interfere with the President's authority to withhold sensitive or privileged information); conditions and qualifications on executive appointments (asserting infringement on the President's authority pursuant to the Appointments Clause); and legislative veto provisions (on the ground that they violate bicameralism and presentment requirements as established in *INS v. Chadha*)." (footnotes omitted)).

> The executive branch shall construe the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch, such as sections 106A and 119, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.
>
> The executive branch shall construe section 756(e)(2) of H.R. 3199, which calls for an executive branch official to submit to the Congress recommendations for legislative action, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as he judges necessary and expedient.[175]

Provisions 106A and 119, two of the three identified as constitutionally problematic, are audit provisions, consistent with FISA that require the Executive Branch to report to the Inspector General on its intelligence gathering activities.[176] Here, as in the John Yoo-authored OLC FISA memo examined earlier in this section,[177] the UET provided a constitutional justification for the Bush Administration to reinterpret legislation in a manner consistent with the President's national security responsibilities.

While this signing statement attracted significant media attention, it is actually quite typical of dozens of other Bush Administration statements issued before and after it. Citing the President's constitutional authority to "supervise the Unitary Executive Branch," the OLC routinely deployed this language in signing statements to push back against what it perceived to be congressional micromanagement of the Executive Branch's constitutional responsibilities.[178] Perhaps the most striking ex-

---

175. Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, *supra* note 133, at 430.

176. *See, e.g.*, H.R. 3199, 109th Cong. § 106A(a) (2006) (enacted) ("Audit.—The Inspector General of the Department of Justice shall perform a comprehensive audit of the effectiveness and use, including any improper or illegal use, of the investigative authority provided to the Federal Bureau of Investigation under title V of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1861 et seq.).").

177. *See* AMENDING FOREIGN INTELLIGENCE SURVEILLANCE ACT, *supra* note 144, at 1.

178. *See, e.g.*, Statement on Signing the National Defense Authorization Act for Fiscal Year 2002, 2 PUB. PAPERS 1553, 1554 (Dec. 28, 2001) ("Several provisions of the Act, including sections 525(c), 546, 705, and 3152 call for executive branch officials to submit to the Congress proposals for legislation. These provisions shall be implemented in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend to the Congress such measures as the President judges necessary and expedient"); *see also* Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, 2 PUB. PAPERS 1697, 1697–98 (Sept. 30, 2002) ("The executive branch shall construe as advisory the provisions of the Act, including sections 408, 616, 621, 633, and 1343(b), that purport to direct or burden the conduct of negotiations by the executive branch with foreign governments, international organizations, or other entities abroad or which purport to direct executive branch officials to use the U.S. voice and vote in international organizations to achieve specified foreign policy objectives. Such provisions, if construed as manda-

ample of statements of this kind was President Bush's *Statement on Signing the Intelligence Reform and Terrorist Prevention Act of 2004*. The phrase "unitary executive" was used four times to raise Executive Branch objections to perceived encroachments on the President's war powers:

> Many provisions of the Act deal with the conduct of United States intelligence activities and the defense of the Nation, which are two of the most important functions of the Presidency. The executive branch shall construe the Act, including amendments made by the Act, in a manner consistent with the constitutional authority of the President to conduct the Nation's foreign relations, as Commander in Chief of the Armed Forces, and to supervise the unitary executive branch, which encompass the authority to conduct intelligence operations.[179]

It should be noted that the use of the term "many" in the excerpt above constitutes something of an understatement. The signing statement drew on the UET to articulate constitutional challenges to more than forty provisions of the law.[180]

Deputy Assistant Attorney General John Elwood noted in his statement before the House Judiciary Committee that all analyses concerning the quantity or quality of President Bush's signing statements "must be viewed in light of current events," pointing out that "the significance of

---

tory rather than advisory, would impermissibly interfere with the President's constitutional authorities to conduct the Nation's foreign affairs, participate in international negotiations, and supervise the unitary executive branch."); Statement on Signing the Intelligence Authorization Act for Fiscal Year 2003, 2 PUB. PAPERS 2140, 2141 (Nov. 27, 2002) ("The executive branch shall implement sections 325, 334, and 826 of the Act, and section 8H(g)(1)(A) of the Inspector General Act of 1978 as enacted by section 825 of the Act, relating to submission of recommendations to the Congress, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch. Many provisions of the Act, including section 342 and title VIII, establish new requirements for the executive branch to disclose sensitive information. As I have noted in signing last year's Intelligence Authorization Act and other similar legislation, the executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties."); Statement on Signing the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, 2 PUB. PAPERS 1476, 1477 (Nov. 6, 2003) ("Title III of the Act creates an Inspector General (IG) of the CPA. Title III shall be construed in a manner consistent with the President's constitutional authorities to conduct the Nation's foreign affairs, to supervise the unitary executive branch, and as Commander in Chief of the Armed Forces."); Statement on Signing the Intelligence Reform and Terrorism Prevention Act of 2004, 3 PUB. PAPERS 3118, 3119 (Dec. 17, 2004) ("The executive branch shall construe provisions in the Act that mandate submission of information to the Congress, entities within or outside the executive branch, or the public, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information that could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties . . . . To the extent that provisions of the Act purport to require or regulate submission by executive branch officials of legislative recommendations to the Congress, the executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to submit for congressional consideration such measures as the President judges necessary and expedient.").

179. Statement on Signing the Intelligence Reform and Terrorism Prevention Act of 2004, *supra* note 178, at 3118–19.

180. *See id.*

legislation affecting national security has increased markedly since the September 11th attacks and Congress's authorization of the use of military force against the terrorists who perpetrated those attacks."[181] This observation brings into sharp relief how *timeliness* contributed to the dramatic spike in the use of the UET in presidential signing statements under George W. Bush. The War on Terror, and the legislation it both implicated and generated, gave the Bush Administration cause and occasion to deploy the UET in signing statements in order to gain some constitutional leverage in the ongoing tug-of-war between the President and Congress. And thanks in part to the small group of intellectual patrons featured in Section II of this Article, Bush Administration officials called to account for this aggressive use of presidential signing statements were able to justify their actions with reference to a *plausible* (if still controversial) and intellectually mature theory of the unitary executive.

C. The Unitary Executive Theory "All Grown Up"

As this section has demonstrated, officials in the George W. Bush Justice Department deployed a "grown up" version of the UET both to construct the legal framework for the War on Terror and, more routinely, to gain constitutional leverage against Congress through the use of presidential signing statements. As this Article has argued, their ability to do so was critically contingent not only upon *timeliness* but also upon the efforts of legal elites who worked to transform the UET from a rather narrow critique of the modern administrative state into a *plausible* constitutional justification for expanding the sphere of presidential power in war and foreign affairs as well.

The ascendance of the UET during the George W. Bush Administration could thus be described as one of the most profitable returns on the Reagan Justice Department's long-term investment in ideas and personnel. Reagan alumni, having failed in their ambitious mission to transmit their vision of a unitary executive into Supreme Court doctrine, nonetheless remained committed to the beliefs and ideas undergirding the UET well after many of them had left the DOJ. The fledgling Federalist Society for Law and Public Policy allowed this small group of committed UET patrons to continue discussing, refining, expanding, and exchanging their ideas. This conscious investment in developing the intellectual and theoretical foundations of the UET resulted, as I describe in Section I, in a UET transformed—a powerful weapon for an administration eager to promote a strong vision of executive power.

But neither *timeliness* nor *plausibility* matter much unless one also has the proper *personnel* in place to put ideas to work. That is what the higher-ups in the Reagan Justice Department and consequently the founders of the Federalist Society understood the best. That is because,

181. *See Jan. 31 Hearing*, *supra* note 168, at 11–12.

as Reagan Justice alumni and Federalist Society member Douglas Kmiec reminded me in our interview, "policy is people":

> [The Federalist Society] has influence on personnel primarily and then through personnel, performance and ideas. That's the other slogan you hear in Washington, "policy is people." "Ideas have consequences" and "policy is people." It's true because if you get appointed or elected, you're not going to have a serious impact unless you can immediately ramp up and hire people who you don't have to educate on basic principles of agreement. You can kind of start in midsentence and proceed from there.[182]

As I noted in the beginning of Section III, while the political right was in exile during the Clinton Administration, the Federalist Society had helped to create a farm team of government appointees in waiting who were eager to put their shared principles into practice within a sympathetic administration. After the 2000 election, several of these individuals—including, most notably, John C. Yoo and Jay Bybee—went to work in the OLC where, as we've seen, their ideas about the UET indeed had both swift and dramatic consequences.

The concluding section of this Article offers some lessons learned from this narrative of the ascendance of the UET as contingent upon the conscious, long-term intellectual investment of legal elites. In doing so, it underscores the importance of investing in support structures for ideas—investments in institutions and personnel that, under the right circumstances, can help "ideas have consequences."[183]

IV. SUPPORT STRUCTURES AND INTELLECTUAL INVESTMENT: HELPING IDEAS HAVE CONSEQUENCES

The individuals who came to work in the Justice Department under President Ronald Reagan shared a belief in the transformative power of ideas; a belief that (to quote the vernacular of the time) "ideas have consequences." As they would come to learn, however, even the most powerful ideas need help to become consequential. In other words (to quote political science jargon), ideas are most politically effective when buttressed by a strong "support structure"[184]—a group of individuals and institutions invested in nurturing, developing, and diffusing them. In the case of the UET, this support structure emerged from the ashes of an ambitious but ultimately unsuccessful Reagan Era litigation campaign to

182. Interview with Kmiec, *supra* note 84.

183. *See generally* WEAVER, *supra* note 15.

184. *See* CHARLES EPP, THE RIGHTS REVOLUTION 3 (1998) (defining a "support structure" in the context of legal mobilization); *see also* TELES, *supra* note 135, at 11–12; SOUTHWORTH, *supra* note 136, at 8 (discussing the importance of the burgeoning "support structure" for conservative legal advocacy). *See generally* Amanda Hollis-Brusky, *Support Structures and Constitutional Change: Teles, Southworth, and the Conservative Legal Movement*, 36 LAW & SOC. INQUIRY 516 (2011).

rearrange governmental power. With the institutional support of the Federalist Society for Law and Public Policy, these Reagan alumni kept the ideas underlying the UET alive—refining, developing, expanding and spreading them to the next generation of scholars, litigators, and government officials in waiting. As this Article detailed, this support structure would help transform the UET from what it was at the close of the Reagan Administration—"a constitutional lost cause"[185]—to what it would become during the George W. Bush Administration—"Article II on Steroids."[186] In explaining the ascendance of the UET as critically contingent upon the political and intellectual investments of a small but well-connected group of legal elites, this Article underscores the important role a support structure can play in helping ideas have consequences.

Of course, the absence or presence of a strong support structure cannot on its own explain or predict the extent to which certain political ideas take hold in a given administration. Recall that in his developmental history of the UET, scholar Stephen Skowronek argued that *plausibility* and *timeliness* were two of the most important attributes of a "politically effective" construction of a presidential power.[187] While the evidence presented in this Article demonstrates how the support structure for the UET positively impacted the theory's *plausibility*, the circumstances that most directly contributed to the *timeliness* of the UET (9/11 and the War on Terror) were entirely exogenous. One could argue, however, that another dimension of *timeliness* is having the right *personnel* in the right place at the right time. In this case, the support structure played a key role in getting UET proponents recognized and employed by a Bush Administration eager to defend a strong vision of presidential power. Were it not for the resulting critical mass of pro-UET personnel working in the OLC at the time of the terrorist attacks of 9/11, the UET arguably would not have had such a swift and dramatic impact on the construction and justification of Bush Administration legal policy.

Evidence presented in this Article thus reinforces the proposition that in order for a construction of presidential power to be "politically effective,"[188] it needs to be both plausible and timely. It also suggests, however, that the extent to which a construction of power takes hold in a given administration (when both these other requirements are satisfied) might well be determined by the number of personnel in policymaking positions who subscribe to it. Of course, of the three administrations under examination in this Article, only the George W. Bush Administration satisfied all three of these requirements. The Reagan Administration had a critical mass of UET adherents in decisionmaking positions but at that

185. *See* Silberman, *supra* note 63, at 500.
186. *See* SPITZER, *supra* note 3, at 92.
187. Skowronek, *supra* note 4, at 2100.
188. *Id.*

time the theory was neither plausible nor timely. The first Bush Administration, as Section I described, presented a few opportunities for the UET to be put to work, but the theory was still too immature. Moreover, the majority of its adherents had left government service after the close of the Reagan administration. Future scholarship might therefore look at whether the ascendance of the UET during the George W. Bush administration should be understood as an exceptional case or whether, under similar conditions, other theories of presidential power have been empowered to have similarly significant consequences. The answer to this question should be of interest to scholars, politicians, activists, and citizens alike as we attempt to comprehend, negotiate, police, and in some cases redraw the boundaries of presidential power in the post-George W. Bush Era.