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Joel K. Goldstein

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Cheney, Vice Presidential Power and the War on Terror

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Joel K. Goldstein
Vincent C. Immel Professor of Law
Saint Louis University School of Law

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Abstract

It is generally conceded that Vice President Cheney has been our most influential vice president. During his two terms, the office assumed a significance which his predecessors, even those who themselves were quite significant, would not have thought possible. Whereas historically the vice presidency had been dismissed as too feeble, the Cheney vice presidency was attacked as too robust.

The unprecedented power of Cheney as vice president had many sources. One of them was the war on terror. It, of course, assumed an unexpected prominence after 9/11, and the war on terror contributed to Cheney's ascendance and provided the political theatre in which his unique vice-presidential role was performed. The war on terror allowed for an expansion of executive power generally in a manner which extended presidential power beyond its normal sphere even while the vice presidency itself occupied a larger space in the executive branch.

This paper will explore the unprecedented nature of the Cheney vice presidency, relating its growth to the war on terror, and suggesting ways in which during Cheney's tenure the office escaped conventional sources of vice-presidential accountability. The Cheney vice presidency avoided many of the constraints which presidential leadership normally imposes as well as those forms of accountability which are rooted in the political system. Moreover, normal patterns of vice-presidential self-restraint often seemed absent, perhaps related to the other two developments.

The patterns of the Cheney tenure are unlikely to become permanent, rooted as they were in a distinctive set of circumstances. It is hard to imagine another president allowing the vice president such latitude, another vice president flexing such muscle, or circumstances occurring which were so conducive to so expansive a vice-presidential role. Nonetheless, the Cheney tenure provides yet another model of vice-presidential conduct and furnishes a case study against which to test certain ideas about the vice presidency in particular and concepts about the institutional design of American government more generally.

Separation of powers and the related doctrine of checks and balances are prominent among the ways the Constitution seeks to prevent the concentration of state power and to promote good governmental decision-making. “If men were angels, no government would be necessary,” James Madison famously observed. Since they are not, Mr. Madison and his colleagues concluded that “auxiliary precautions,” in addition to elections, were needed to impose suitable controls on government. “Ambition must be made to counteract ambition,” Mr. Madison prescribed.¹ The framers created a system of institutions with allocated, but interdependent, governmental power in an attempt to provide a deliberative and accountable government which would preserve individual liberty.

War invariably puts the greatest stress on that system. The events of September 11, 2001 were no exception. They helped relax traditional checks on the power of the executive branch, allowing the president to exercise greater power than under normal circumstances. They also were associated with a second, closely related, institutional development, an enormous and unprecedented rise in the power of the vice presidency or at least of its occupant during the Bush terms, Dick Cheney. During those years, some even took to referring to “the Imperial Vice Presidency.”² Even if some such claims regarding Cheney’s power were inflated, the fact of the assertion was itself suggestive; the oxymoron previously would have been unimaginable.

These two developments were reciprocally related; Vice President Cheney worked to stretch executive power and the growth of executive power expanded his own domain and influence.

Although the war on terror contributed to these two developments in important ways, it was not solely responsible for either the growth of the presidency or of the vice presidency which occurred during the

¹ The Federalist Papers Number 51 at 322 (Clinton Rossiter ed.) (1961)

² See e.g., Editorial, *Cheney: The Imperial Veep*, Philadelphia Inquirer, June 23, 2007, at A08. See also Shirley Anne Warshaw, *The Co-Presidency of Bush and Cheney* 1 (2009) (calling Cheney most influential vice president)

Bush years. On the contrary, both developments would have transpired, no doubt differently and in less robust ways, but occurred nonetheless, independent of the war on terror.

From the outset, the expansion of presidential powers was a fundamental objective of the Bush presidency, its prominent place on the agenda traceable to Cheney's influence. Well before the hijacked planes struck the twin towers of the World Trade Center and the Pentagon, Cheney was in the forefront of an effort to assert presidential powers and to elevate the presidency at the expense of Congress.

Although the war on terror expanded Cheney's influence, his unprecedented role had independent sources which were firmly in place well before September 11, 2001 and which were also critical. This confluence of factors, the war on terror and Cheney's other, unique sources of power, created a situation which raised novel and fundamental questions regarding the political accountability of a vice president. Cheney's power depended in large part on the absence of less formal, but conventional, restraints on vice-presidential conduct which operated in other recent administrations. The Cheney vice presidency avoided many of the constraints which presidential leadership and the political system normally imposed. The Cheney vice presidency reflected a culture of political unaccountability which transcended the separation of powers debates regarding presidential power. Cheney helped engineer the erosion of these restraints with the actual or tacit support of President Bush. These factors, in addition to the Bush-Cheney views on presidential power, influenced the nature and content of policy-making during the Bush administration.

This paper will explore the relationship of the war on terror to the unique Cheney vice presidency. Section I will outline the contours of the vice presidency when Cheney assumed it. Section II will explore ways in which, and reasons why, Cheney was able to stretch those boundaries during the 7 1/2 months before 9/11. Section III will explore Cheney's long-standing commitment to the growth of presidential power and outline steps taken before 9/11 to inflate presidential power. Section IV will

examine the impact on 9/11 on the distribution of governmental power and suggest that it led to concentrating greater systemic power in the presidency with much of that power flowing to the vice president. Section V will show the way in which Cheney's power was enhanced by factors which were unrelated to traditional separation of powers concerns. These included a) Bush's style of presidential leadership which imposed fewer checks than normal on vice-presidential behavior; b) the absence of a regular decision-making process in the Bush White House to ensure a full airing of competing views ; c) Cheney's conduct of his vice presidency in a manner which ignored traditional conventions of vice-presidential self-restraint; d) Cheney's lack of presidential ambitions which gave him greater leeway to pursue independent agendas; e) Cheney's influence over the bureaucracy which was traceable to his role in the transition; f) Cheney's aversion to the media; g) Cheney's rejection of bipartisanship and bilateralism. These factors freed Cheney from conventional modes of accountability and allowed for policy formulation which, in many instances was not deliberative.

I. The Modern Vice Presidency as of 2001

By the time Cheney became vice president, the office had undergone institutional changes which promised significance to any occupant of that office. Vice presidents beginning with Richard M. Nixon had gravitated to the executive branch where they assumed a range of traditional roles. They headed commissions in the executive branch, represented the president as a foreign emissary, served as an administration spokesman, and functioned as a party campaigner and fundraiser. These developments were important transitional steps in the institutional development of the office.³ Nonetheless, they did not bring the office into the inner core of the administration and vice presidents continued to feel excluded and frustrated.

³ See generally Joel K. Goldstein, *The Modern American Vice Presidency: The Transformation of a Political Institution* (1982)

During the presidency of Jimmy Carter, the vice presidency was transformed. Carter's vice president, Walter F. Mondale, was involved in the work of the executive branch on an ongoing basis as a senior adviser and troubleshooter who performed substantive, not make-work, assignments. Carter gave Mondale important new resources—a prominent office on the ground floor of the West Wing, a regular private lunch meeting with Carter each week, the right to attend any meeting Carter had, easy access to the Oval Office, inclusion in the distribution list for documents sent to the president, and integration of the vice-presidential staff in the operation of the White House. It would have been awkward for any new president to retract them and Mondale's successors all retained those privileges. Mondale's tenure created new expectations for the office. Although, for a variety of reasons, neither George H.W. Bush nor Dan Quayle achieved Mondale's significance as vice president, each had access to the President and played important roles in their administrations. And Al Gore expanded on the roles of his predecessors. He was not only Bill Clinton's most significant across the board adviser, he also assumed major substantive responsibilities on an ongoing basis. He was responsible for the reinventing government initiative as well as for environmental and telecommunications policy and he headed important bilateral commissions with his counterparts in Russia, South Africa and Egypt.⁴ Vice Presidents Mondale, Bush, Quayle and Gore were distinct political figures who experienced different levels of influence as vice president. Yet they all benefited from enhanced opportunities to contribute which separated them from the experience of their pre-Mondale predecessors.

II. Cheney and Vice Presidential Power: Pre 9/11

A. The Cheney Vice Presidency

⁴ See generally Joel K. Goldstein, *The Rising Power of the Modern Vice Presidency*, 38 *Presidential Stud. Q.* 374 (2008)

By January, 2001, this new vice presidency had become institutionalized. In many respects, Cheney's decision to accept the vice-presidential nomination recognized this historic development of the office. Cheney was not someone who was drawn to sinecures, having served as Chief of Staff to President Gerald Ford while still in his 30s, Republican House Minority Whip, and Secretary of Defense (not to mention Chief Executive Officer of Halliburton). He thought the second office sufficiently robust to be a desirable job in itself independent of its value as a political springboard. What better confirmation could there be of the significance of the vice presidency?

Yet the experience of Cheney's four immediate predecessors did not predict the Cheney vice presidency. In this instance, the past was not really prologue, or if it was, in a very understated way. From the outset of the Bush administration Cheney played a role which was unprecedented in its range and significance.⁵

Cheney's influence became apparent during the early months of the Bush administration. Cheney had easy access to Bush and he and his staff participated fully in White House discussions and operations. Bush assigned Cheney to supervise the development of administration policy in a number of critical areas and enlisted Cheney's help in working with the Senate and House of Representatives on a range of legislative matters.⁶ In late January, 2001, Bush named Cheney to head a Cabinet level energy task force to develop policy recommendations to address a range of problems relating to the cost and

⁵ Cheney tended to minimize his role in public speeches. On one occasion he recalled his time as a scholar at the American Enterprise Institute as "a time when I had an office, a small staff, and not much in the way of actual responsibility. It turned out to be a lot like the vice presidency." Richard B. Cheney, Vice Presidential Remarks at American Enterprise Institute Annual Dinner, Washington, D.C. (February 10, 2004) <http://georgewbush-whitehouse.archives.gov/news/releases/2004/02/20040212-2.html>

⁶ See generally Scott McClellan, *What Happened: Inside the Bush White House and Washington's Culture of Deception* 85 (2008); Remarks by the Vice President-Elect with Senator Joseph Lieberman, December 21, 2000 American Presidency Project <http://www.presidency.ucsb.edu/ws/index.php?pid=84904&st=cheney&st1=>

supply of energy.⁷ In early May, 2001, he named Cheney to head a task force on domestic preparedness against weapons of mass destruction in the hands of terrorists. Cheney was “to oversee the development of a coordinated national effort so that we may do the very best possible job of protecting our people from catastrophic harm” from the use of weapons of mass destruction by rogue states or non-state terrorist entities.⁸

Cheney also represented the administration in working with Congress on the details of the 2001 tax cut. Congressmen concluded that Cheney had the authority to make a deal which increased their interest in working with him.⁹ Cheney managed to walk Bush away from his campaign promise to require power plants to reduce their toxic emissions to combat global warming.¹⁰ Bush also named Cheney to head a five person¹¹ Budget Review Board to consider appeals from OMB decisions with which departmental heads were unhappy. Other members viewed Cheney’s role as critical. Sometimes he forced modifications. Cabinet members could appeal the Board’s decisions to Bush but they never did, in part a tribute to Cheney’s perceived influence.¹²

⁷ President George W. Bush Remarks Prior to a Meeting With the National Energy Policy Development Group and an Exchange With Reporters (Jan. 29, 2001) American Presidency Project <http://www.presidency.ucsb.edu/ws/index.php?pid=45988&st=cheney&st1=>

⁸ President George W. Bush, Statement by the President, Domestic Preparedness Against Weapons of Mass Destruction (May 8, 2001) <http://georgewbush-whitehouse.archives.gov/news/releases/2001/05/20010508.html>; Barton Gellman, *A Strategy’s Cautious Evolution*, Washington Post, January 20, 2002, at A1

⁹ Barton Gellman, Angler: The Cheney Vice Presidency 73-74 (2008).

¹⁰ *See id.* 82-90

¹¹ The members were the Vice President, Secretary of the Treasury, Director of OMB, Chief of Staff and Director of the National Economic Council

¹² Stephen F. Hayes, Cheney: The Untold Story of America’s Most Powerful and Controversial Vice President 407-408 (2007).

By March, 2001, former chiefs of staff to Vice Presidents Mondale, Bush and Gore all agreed that the Cheney vice presidency marked a new departure.¹³ Craig Fuller, the chief of staff to George H. W. Bush during his second vice-presidential term, observed that Cheney “is definitely serving in a way that's unprecedented.” Cheney was “setting the agenda” and “playing a role that is unique in anything we've seen in history.”¹⁴ Ron Klain, a chief of staff to Vice President Al Gore (and later to Vice President Joe Biden) agreed that Cheney “clearly is functioning in a way broader than any previous vice president has” with “broad, cross-cutting responsibilities for not just ... being part of the agenda but setting the agenda, managing the White House and managing the direction of the Bush administration.”¹⁵ The following month, former Reagan Chief of Staff Kenneth Duberstein observed that for “the first time in our history we’ve had a president and a prime minister.” Presidential and vice-presidential scholar Paul Light thought comparisons of Cheney to other vice presidents understated Cheney’s significance. Light saw Cheney as a combination “chief of staff, the senior cabinet secretary, the chairman of the kitchen cabinet, the president’s best friend and mentor, all rolled into one.”¹⁶

Cheney’s conduct on September 11, 2001 confirmed his unique stature. Bush was on the road that day, meeting with a second grade class in Sarasota, Florida when he learned of the terrorist attack. “We’re at war. Get me the Vice President and get me the Director of the FBI,” Bush reportedly declared

¹³ *The NewsHour with Jim Lehrer: The Cheney Factor* (PBS television broadcast Mar. 12, 2001), available at http://www.pbs.org/newshour/bb/white_house/jan-june01/chenev_3-12.html [hereinafter *Cheney Factor*]. Some anticipated Cheney would be the power behind the throne even before the inauguration. In a Saturday Night Live skit in December, 2000, the character playing Bush said, “Dick Cheney’s going to be one tough boss.” The character playing Gore replied: “Yeah. Actually, George, you’re going to be his boss.” “Don’t I wish,” “Bush” replied. See also Hayes, *supra* note 12, 305.

¹⁴ *Cheney Factor*, *supra* note 13.

¹⁵ *Id.*

¹⁶ Martin Kettle, *Hidden Powerhouse of the US Presidency*, *Guardian* (London) Apr. 28, 2001, at 19 available at www.commondreams.org/headlines01/0428-01.htm.

after leaving the classroom.¹⁷ Cheney was the authority figure in the Presidential Emergency Operations Center after the White House was evacuated and the pivotal operating figure in the government that day. Pictures from the command center depict Cheney's dominance and all accounts confirm that impression. He persuaded Bush not to return to the White House even after Bush had publicly announced that as his destination. When told that an unidentified plane was heading to Washington, D.C., Cheney ordered the military to shoot it down.¹⁸ Cheney's chief of staff, Lewis "Scooter" Libby, later said Cheney responded to that historic request for authority "in about the time it takes for a batter to decide to swing."¹⁹

Bush and Cheney later insisted that Cheney was simply relaying instructions Bush had given him. That seems a dubious claim. The 9/11 Commission placed the initial request for authority and the Cheney directive at between 10:10 and 10:15 a.m.²⁰ so Bush would have had to give Cheney such instructions before that time. Yet not one of a dozen set of records, official and unofficial, reflected a Bush-Cheney conversation during the time period between when the threat became known and the order was given.²¹ Lynne Cheney and Scooter Libby were with Cheney and taking notes, but neither mentioned such a call in which Bush authorized a shoot-down order before Cheney gave it.²² Having not heard any prior discussion between Bush and Cheney, Deputy White House Chief of Staff Joshua Bolten,

¹⁷ Transcript, *The Bush Presidency: Transition and Transformation*, American Enterprise Institute (Dec. 11, 2001).

¹⁸ Hayes, *supra* note 12, at 332-347; Gellman, *supra* note 9 at 114-118;

¹⁹ National Commission on Terrorist Attacks Upon the United States, 9/11 Commission Report 41(2004) [hereinafter 9/11 Commission Report] available at <http://govinfo.library.unt.edu/911/report/index.htm>

²⁰ *Id.*

²¹ Gellman, *supra* note 9 at 120-22; Philip Shenon, *The Commission: The Uncensored History of the 9/11 Investigation* 265-66 (2008). See also *The 9/11 Commission Report*, *supra* note 19 at 41.

²² 9/11 Commission Report, *supra* note 19 at 41; Shenon, *supra* note 21 at 266.

who was with Cheney, asked Cheney to confirm the initial order with Bush.²³ Instead of simply telling Bolten that Bush had already given the instruction, Cheney called Bush at 10:18 a.m.²⁴ Gellman notes that Bush did not tell anyone of having issued such an order until 10:20 a.m. when he hung up after a two minute conversation with Cheney. Yet Cheney had given the shoot down order five to ten minutes earlier.²⁵ The staff of the 9/11 Commission did not believe the account Bush and Cheney gave and that skepticism was apparent in its draft report which the White House reviewed.²⁶ Cheney placed an irate call to Commission chair Tom Kean to demand the section be rewritten to accord with the Bush-Cheney account but apparently no substantive change was made.²⁷

Cheney's shutdown action may have been understandable under the bizarre circumstances of that awful day but neither the Constitution nor any statutory source authorized him to issue such a military order. For present purposes, however, Cheney's issuance of the order confirms the extraordinary power which he felt free to exercise even before the Bush administration began to devise its response to the war on terror. Cheney's standing to exercise such power was necessarily anchored in foundations which preceded the al Qaeda attack.

B. Sources of Cheney's Power

²³ 9/11 Commission Report, *supra* note 19, at 41. Libby's notes from 10:15 a.m. to 10:18 a.m. state: "Aircraft 60 miles out, confirmed as hijack—engage? VP? Yes. JB: Get President and confirm engage order." *Accord* Shenon, *supra* note 21, at 266

²⁴ 9/11 Commission Report, *supra* note 19, at 41.

²⁵ Gellman, *supra* note 9, 122

²⁶ Shenon, *supra* note 21, at 264-66, 412.

²⁷ Shenon, *supra* note 21, at 411-412. See also Evan Thomas, *The Shot Heard Round the World*, Newsweek, February 27, 2006, at A24.

Just as Cheney's stature as of September 11, 2001 was not dependent on the war on terror, it also was not explained simply by the institutionalization of the vice presidency which preceded the Bush administration. Cheney, of course, benefitted from the Mondale resources and the increased expectations of vice-presidential involvement which had developed during the tenures of Vice Presidents Mondale, Bush, Quayle and Gore. Those factors guaranteed him a level of influence and invested him with operational assets such as his proximity and access to Bush and his closest White House advisers and his access to information and expertise. Yet other modern vice presidents had essentially those same assets yet lacked Cheney's pre 9/11 influence. As such, their existence could not account for the unprecedented level of power he achieved, a development which had other causes. Other factors explained Cheney's unique position.

1) Relationship with Bush

First, Cheney's influence stemmed from his relationship with Bush. Other vice presidents had been politically and personally compatible with the Presidents they served but the Bush-Cheney relationship was unique in a critical way. Unlike their recent predecessors, Bush and Cheney had a close relationship which preexisted their inauguration. Cheney had served Bush's father as Secretary of Defense and had consulted with Bush regarding Bush's presidential campaign. He was often present for high level briefings of Bush up to and during the 2000 presidential campaign and Bush came away from those meetings impressed with Cheney's contributions and with the respect he commanded from the other participants.²⁸ Cheney served as a public supporter whose presence lent gravitas and whose voice lent credibility to Bush's effort.²⁹

²⁸ Robert Draper, *Dead Certain: The Presidency of George W. Bush* 89 (2007).

²⁹ James Mann *Rise of the Vulcans: The History of Bush's War Cabinet* 252 (2004).

Bush and Cheney had also had occasion to work closely together, an experience which led Bush to value Cheney's judgment and loyalty. Although Cheney had declined Bush's request that he chair his presidential campaign, a position Cheney thought inconsistent with his obligations as chief executive of Halliburton, Cheney later agreed to direct his vice-presidential search. For present purposes not much turns on whether Cheney opportunistically used that assignment to position himself for selection as some have suggested³⁰ or whether Cheney accepted Bush's repeated solicitations to join the ticket only as he came to see that he really did furnish Bush's best option, as Bush and Cheney later claimed. In any event, Bush and Cheney worked together in that undertaking in a relationship which in some respects foreshadowed their White House interaction. Cheney ran the search process, controlled information about prospective candidates, and reported to Bush from time to time. Bush was drawn to Cheney by the latter's lack of presidential, or even apparent vice-presidential, ambition, a disposition which Bush thought would foster Cheney's loyalty to the president's agenda.³¹

Unlike his predecessors, Cheney did not have to first establish credibility with the president and his inner circle at the beginning of his term. There was no need for him to proceed with diffidence to win the confidence of Bush or his closest advisers. On the contrary, Cheney began his vice presidency with an established relationship with Bush and accordingly was able to assert himself in the early days of the administration when lasting patterns of conduct are often formed. As will be seen below, this advantage had other implications which contributed to Cheney's power.

2) Bush's Leadership Style

³⁰ See e.g. Gellman, *supra* note 9, at 16-19.

³¹ Robert Draper, *supra* note 28, at 89, 90; Jamie Glazov, *Cheney: The Untold Story of America's Most Powerful and Controversial Vice President* FrontpageMagazine, Aug. 13, 2007) <http://www.frontpagemag.com/readArticle.aspx?ARTID=27695> (Interview with Stephen Hayes)

Second, Bush's leadership style created the possibility of a powerful vice presidency in at least three different ways. Bush's leadership style depended upon delegating considerable operational authority to others. Consistent with business models of leadership with which Bush was familiar, he envisioned the president as a chairman of the board who depended upon a chief operating officer. Moreover, Bush was temperamentally disposed to focus on the big picture rather than immersing himself in the detail of issues. As Newsweek columnist Howard Fineman observed during the first months of the Bush administration, "It's not just that the president doesn't know all the details, he has no desire to learn all the details."³² Bush's aversion to detail meant that he needed someone he trusted who could and would master and distill the fine points of policy for him. Finally, Bush focused largely on the political or outside dimensions of the job. He enjoyed the public part of politics. He made frequent public appearances which took him away from the White House. This orientation created opportunity for someone to remain behind to work the internal levers of power at the White House. Bush's leadership style created a need, or space, for a powerful subordinate(s). As will be suggested below, Cheney became the operating person for much of the government and the person who distilled information for Bush and framed options for his decision.

Bush's style contrasted with that of other recent presidents who engaged their vice presidents but exercised some restraint in delegating authority to them. Carter, George H.W. Bush and Clinton were all heavily engaged in policy formulation and implementation on an ongoing basis with, in some cases, a tendency to micromanage aspects of their presidencies. They gave their vice presidents missions, sometimes of great significance, but tended not to delegate general responsibility in central areas. Mondale acted as a troubleshooter but preferred to avoid ongoing portfolios; Bush, Quayle and

³² Howard Fineman, *Political Lives: Cheney as Eminence Grise*, Newsweek, May 9, 2001, <http://www.newsweek.com/id/79199> (Web exclusive). See also Fred I. Greenstein, *The Presidential Difference: Leadership Style From FDR to George W. Bush* (2nd ed. 2004) 209 (Bush's lack of "intellectual curiosity").

Gore accepted, even welcomed, portfolios but those they received varied in importance and tended not to involve the most central issues. Like George W. Bush, Reagan delegated important operational roles, but generally to his closest White House aides or to Cabinet members, not to the vice president, and generally in a manner which limited their autonomy.

3) Cheney's Resources

Third, Cheney brought extraordinary resources to the vice presidency. Cheney had a diversity of high level experience that few, if any, could match. He had served as White House chief of staff, Republican minority whip in the House of Representatives, and Secretary of Defense. This broad based resume gave him occasion to witness and understand how critical aspects of the government functioned. Cheney knew how policy got made in the White House, on Capitol Hill and in the departments and he knew how new initiatives got stopped. He was a master of working the system to achieve any of those outcomes.³³

Cheney's history of past service also gave him enormous credibility. Cheney had a record of success in a series of demanding positions. Others were prepared to defer to Cheney because of his vast experience and their perceptions of his ability.

Finally, Cheney had a range of contacts in Washington, in the business community and overseas which enhanced his influence. He had served in the Ford White House with Alan Greenspan, head of the Federal Reserve Board, and in Congress with Republican leaders like Senate majority leader Trent Lott, Speaker of the House of Representatives Denny Hastert, House minority leader Dick Armey and chairman of the House Committee on Ways and Means Bill Thomas, all of whom he counted as

³³ See generally, Gellman, *supra* note 9.

friends.³⁴ His service at the Pentagon and at Halliburton allowed him to establish relations with international figures. Cheney did not simply have a comprehensive rolodex but a network of relationships with powerful figures.

Cheney's resources were formidable but more importantly, they meshed well with the needs of the Bush administration, thereby fortifying Cheney's position. Bush came to the presidency with less experience in national government or international matters than virtually any other president in the 20th century. As James Mann put it, "[b]ecause Bush's prior experience was so limited, he was obliged to rely to an extraordinary extent on his advisers for ideas and for information."³⁵ Bush recognized this gap in his resume. He had told Cheney: "I don't know what's going to come on my desk, but I'm going to need somebody who's seen things before, who can give me advice to make good decisions."³⁶ To be sure, Bush was close, perhaps closer with some of the Texans who accompanied him to Washington—Karen Hughes, Alberto Gonzalez, Karl Rove. And others, like Colin Powell and Donald Rumsfeld, also had high level experience and credibility. But Cheney had advantages over both sets of people. Unlike Cheney, the Texans were Washington neophytes; they lacked his knowledge of the workings of the national government and the issues it faced and his relationships. And Cheney was far closer to Bush than were Powell or Rumsfeld, both personally and physically, and the vice-presidential resources accentuated his margin.

Cheney also brought a skill set which Bush badly needed. As someone who felt most comfortable dealing in generalities, Bush needed someone to immerse himself in the detail of policy and digest it for him. Cheney filled that void. He was essentially a policy wonk who was perfectly content to

³⁴ *Id.* at 69-70

³⁵ Mann, *supra* note 29, at xviii

³⁶ Draper, *supra* note 28, at 89.

digest huge amounts of briefing papers and distill them for Bush. Cheney, for instance, had a full intelligence briefing early each morning which served as a dry run for the later presidential briefing. Thus prepared, Cheney would later join Bush at the president's session at which Cheney would ask questions to make sure Bush was briefed in areas Cheney thought important.³⁷ Whereas Bush was essentially an outside man who was best suited for the public, political and symbolic aspects of the job, Cheney was an insider, happy to spend his time in policy meetings, shaping and implementing decisions about governing.³⁸

4) Cheney's Role in the 2000-2001 Transition

Fourth, Cheney's unique role in the 2000-2001 presidential transition constituted a unique source of power. The contest regarding Florida's electoral votes extended the presidential campaign for another month, thereby distracting Bush's attention from the transition and truncating the period in which Bush focused on establishing a government. Bush charged Cheney with directing the transition. Whereas vice presidents like Mondale and Gore had been at the table during prior transitions when personnel decisions were made, Cheney assumed overall responsibility for the transition, an unprecedented assignment for a vice president-elect.³⁹

Cheney set up a transition operation in Washington and placed loyalists like David Gribbin, David Addington, and his daughter, Liz, in key positions. Cheney played the leading role in formulating the short lists for high level positions and was one of three persons with Bush when he

³⁷ Hayes, *supra* note 12, at 328.

³⁸ Mann, *supra* note 29, at 370.

³⁹ Transcript, *The Bush Presidency: Transition and Transformation*, American Enterprise Institute, (Dec. 11, 2001) (Comments of Clay Johnson III)

made personnel decisions, the others being Andrew Card and Clay Johnson.⁴⁰ Cheney positioned close associates like Donald Rumsfeld in positions like Secretary of Defense and derailed the prospects of others. Many of those Bush appointed to Cabinet level positions-- in addition to Rumsfeld, Paul O'Neill at Treasury and Spencer Abraham at the Department of Energy-- had long standing relationships with Cheney.⁴¹ Cheney placed many former associates in important positions in the departments and the White House. For instance, Paul Wolfowitz, his former deputy at the Pentagon, got the second job under Rumsfeld. Cheney supported Mitch Daniels to be director of OMB and placed Sean O'Keefe, an alumnus of the Cheney Pentagon, as Daniels' deputy.⁴² Stephen Hadley and Zalmay Khalilzad, both also from the Cheney Pentagon, became deputy National security adviser and oversaw Iraq and Afghanistan policy at the NSC respectively. Cheney's former congressional aide, Paul Hoffman, landed a spot as deputy assistant at the interior department.⁴³ This list is suggestive but by no means exhaustive.

Cheney's central role in the transition gave him three critical assets which greatly enhanced his ability to influence policy. He was able to place allies throughout the government, thereby assuring that the executive branch would be filled with people whose views were similar to his and who were favorably disposed to him. Rumsfeld (and Wolfowitz's) presence at the Pentagon meant that Cheney had a likely ally on most major national security issues. It meant that State and Defense would often be

⁴⁰ Mann, *supra* note 29, at 261.

⁴¹ Gellman, *supra* note 9, at 31-33, 35-40. *See, e.g.*, George W. Bush, The President-Elect's News Conference Announcing the Nomination of Paul O'Neill as Secretary of Treasury, (Dec. 29, 2000) (comments of Paul O'Neill) American Presidency Project <http://www.presidency.ucsb.edu/ws/index.php?pid=84897&st=cheney&st1> ("Secretary Cheney and I go back many years, and so it's also a pleasure to have a prospect of working closely with him again."); and The President-Elect's News Conference Announcing the Nominations of Spencer Abraham as Secretary of Energy, Linda Chavez as Secretary of Labor, and Norman Mineta as Secretary of Transportation (Jan. 2, 2001), American Presidency Project <http://www.presidency.ucsb.edu/ws/index.php?pid=84887&st=cheney&st1>

⁴² Nicholas Thompson, *Dick Cheney's Dick Cheney*, Wash. Monthly, July 1, 2001, at 31.

⁴³ Gellman, *supra* note 9, at 39.

at loggerheads which meant issues had to be resolved at the White House where Cheney could influence Bush.⁴⁴ Moreover, Cheney benefitted from the recognition that many Bush appointees had that they owed their positions in large part to him. Accordingly, they were sympathetic to him and predisposed to respond favorably to his requests. Finally, the transition assignment sent a powerful signal to others, inside and outside of the Bush government, of Cheney's significance. The unprecedented assignment confirmed that Bush trusted Cheney and suggested patterns of operation for the administration.

5) Staffing Arrangements

Fifth, Cheney's staffing arrangements conferred additional advantages. Cheney had a large staff whose personnel was concentrated in critical areas. Whereas prior vice presidents hired fewer than a handful of national security advisers, Cheney appointed a separate team which enhanced his independent capability regarding foreign policy.⁴⁵ Cheney's staff was also fully integrated into White House operations.⁴⁶ Two of Cheney's top aides, his chief of staff and national security adviser, Lewis "Scooter" Libby and political adviser Mary Matalin also were members of Bush's senior staff. As such, they attended the daily meeting of the White House senior staff. Libby, along with Rice's deputy, Stephen Hadley, was the only non-principal who attended NSC and principals meetings and Libby was also included at deputies meetings. Cheney's domestic staffers worked alongside Bush's personnel. Thus, Cheney was kept abreast of, and was able to influence, decisions at multiple levels.

⁴⁴ Mann, *supra* note 29, at 275.

⁴⁵ Mann, *supra* note 29, at 276; Eric Schmitt, *Cheney Assembles Formidable Team*, N.Y. Times, Feb. 3, 2001, at A1, available at <http://www.nytimes.com/2001/02/03/us/cheney-assembles-formidable-team.html?pagewanted=all>

⁴⁶ See e.g., John P. Burke, *Becoming President: The Bush Transition, 2000-2003*, at 97 (2004); Schmitt, *supra* note 45.

Moreover, Cheney's associates had far more experience in Washington and with national politics than did many of Bush's top aides. For instance, David Addington, Cheney's counsel, worked closely with Gonzales. He was invariably involved when the White House considered important legal issues.⁴⁷ Addington's Washington experience, superior knowledge on substantive issues and forceful personality enabled him to influence legal policy in the White House. As one colleague explained: "David Addington is an extremely intelligent, extremely forceful individual who has very firmly held views and very well-grounded views on a lot of issues relating to the presidency, the vice presidency, the executive branch and separation of powers. As events played out through the administration, those views, coupled with David's very forceful and persuasive personality, ended up having a significant impact on the way things played out."⁴⁸ Finally, the influence of Libby, Addington and other Cheney aides was enhanced by Cheney's clout and the perception that they spoke for him.⁴⁹

6) Lack of Presidential Ambitions

Cheney's lack of presidential ambitions has often been described as contributing to his influence within the administration. Whereas Cheney's recent predecessors had all anticipated a subsequent run for the presidency-- indeed part of the allure of the vice presidency to them was its value as a political springboard⁵⁰-- Cheney trumpeted his lack of future presidential ambitions. President Bush and others cited this unusual characteristic as freeing Cheney from divided loyalties and fortifying his

⁴⁷ Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 76 (2007).

⁴⁸ Interview by Jim Gilmore, *Frontline Interview with Bradley Berenson*, (Aug. 9, 2007) *available at* <http://www.pbs.org/wgbh/pages/frontline/cheney/interviews/berenson.html> (Berenson described Addington as "much more the Washington bare-knuckled brawler, the inside man who knows how to fight and get his way by pulling on the levers of government.") See also Goldsmith, *supra* note 47, at 78.

⁴⁹ Goldsmith, *supra* note 47, at 77.

⁵⁰ Indeed, all four later ran for the presidency. Mondale, Bush and Gore received their parties' presidential nomination and Bush was elected. Quayle pursued presidential candidacies in 1996 and 2000 without success.

commitment to the objectives of the Bush administration. During the 2004 vice-presidential debate, Cheney said that “from the perspective of the nation” his relationship had “worked in part because I made it clear that I don’t have any further political aspirations myself. And I think that’s been an advantage. I think it allows the president to know that my only agenda is his agenda. I’m not worried about what some precinct committeemen in Iowa were thinking of me with respect to the next round of caucuses of 2008.”⁵¹ Bush and other White House personnel attached significance to this factor and accordingly it probably merits some weight.

It seems likely, however, that Cheney’s lack of ambition reinforced his power in another way which has received less emphasis. Since Cheney was not interested in seeking a presidential term of his own he had less reason to spend time accepting engagements to curry favor with those who might help in a future campaign. He was free to devote his time to the administration’s current projects rather than to his own future. As such, he was able to be in the White House or in Washington more frequently and to devote his time and energy to shaping present policy, not future leadership.⁵²

7) Compounded Authority

Finally, Cheney’s authority compounded itself. His relationship with Bush made others interested in dealing with him which enhanced his ability to get things done. His ability to work with congressional leaders or figures like Greenspan made him more valuable to others in the administration (which

⁵¹ Transcript, The Cheney-Edwards Vice-Presidential Debate, (Oct. 5, 2004), *available at* <http://www.debates.org/pages/trans2004b.html> See also Hayes, *supra* note 12, at 307 (“It was essential if I was going to be effective working for him, to be able to have his total trust and confidence, and that of the people around him, that I didn’t have my own agenda, that I wasn’t there trying to figure out what a particular proposal or speech was going to do for my image or my standing in the Iowa caucuses in January of ’08, that I was there specifically as part of a team.”); Bob Woodward, *Plan of Attack*, 429 (2004)(Summarizing views of Bush Deputy Chief of Staff Karl Rove:”Cheney did not seem worried about covering his own ass, an amazing phenomenon in politics. His advice was not tainted by any political self-interest that Rove could identify.”)

⁵² See e.g., Woodward, *supra* note 51, at 4 (Quoting President Bush:”[S]ince he is not campaigning for office or his own future, he is around. And so I see him quite a bit.”)

strengthened his hand internally). Bush's operational style created vacuums which Cheney and his staff could fill.

III. Cheney and Executive Power: Pre 9/11

A. The Roots of Cheney's Commitment to Presidentialism

Cheney's conviction that executive power needed to be strengthened predated the war on terror by decades. Its roots traced to his service as a relatively obscure aide in the Nixon executive branch and as deputy chief of staff and chief of staff to President Ford in the mid 1970s, a period during which Congress increasingly sought to assert its powers in response to the perceived excesses of an imperial presidency. In early 2002, Cheney said: "But in 34 years, I have repeatedly seen an erosion of the powers and the ability of the president of the United States to do his job. We saw it in the War Powers Act. We saw it in the Budget Anti-Impoundment Act. We've seen it in cases like this before, where it's demanded that presidents cough up and compromise on important principles."⁵³ Cheney opposed these initiatives of an invigorated Congress. He saw the presidency which emerged in the mid 1970s as a mere shadow of the robust institution the Constitution, as he interpreted it, envisioned.

For decades before September 11, 2001, Cheney had advocated the restoration of executive power. He encouraged friends in the Reagan administration to make that a central theme it would pursue.⁵⁴ Later, as the senior Republican on the House of Representatives Select Committee to investigate the Iran-Contra controversy, he joined the Minority Report which rejected the widespread view that the Reagan executive branch had violated the law during the Iran-Contra affair. The Minority

⁵³ Interview with Vice President Cheney, *This Week With George Stephanopoulos*, (ABC television broadcast Jan. 27, 2002).

⁵⁴ Gellman, *supra* note 9, at 101; "11/19 Cheney" Notes of James A. Baker, http://media.washingtonpost.com/wp-srv/politics/interactives/cheney/docs/baker_notes.pdf

Report included a lengthy discussion of a constitutional theory which assigned broad powers to the presidency. The Report defended many of President Reagan's actions as "constitutionally protected exercises of inherent Presidential powers" and contended that many of the Congressional statutes which were allegedly violated were unconstitutional usurpations of presidential power.⁵⁵ The Minority Report argued that the Constitution gave the president broad powers in foreign affairs independent of Congress, a conclusion it based on the intent of the framers and ongoing practice.⁵⁶ Congressional action to limit the president in foreign policy "should be reviewed with a considerable degree of skepticism" and struck down if they interfered with core presidential functions. Moreover, "doubtful cases should be decided in favor of the President."⁵⁷ The Minority Report stated: "The executive branch's functions are the ones most closely related to the need for secrecy, efficiency, dispatch and the acceptance by one person, the President, of political responsibility for the result. This basic framework must be preserved if the country is to have an effective foreign policy in the future."⁵⁸ Nearly two decades later, in 2005, he directed reporters to that "obscure text" which he said was "very good in

⁵⁵ H. Rep. No. 100-433, at 457 (1987) (Conf. Rep.)

⁵⁶ *Id.* at 460. The Report argued that the "Framers had solid reasons for placing the deployment and use of force (but not declarations of war), together with negotiations, intelligence gathering, and other diplomatic communications (but not treaty ratification) at the center of the President's foreign policy powers. Two reasons favored "an independent, single Executive"--the president needed to be able to act energetically to defend American interests and such a president would be more politically accountable. A body with multiple members and diffused responsibility like Congress was "inherently unable to accept blame or responsibility for mistakes."

⁵⁷ *Id.* at 469.

⁵⁸ *Id.* at 478. The Minority Report minimized the propriety of legislative provisions requiring the president to notify Congress of covert activities. And the number of Congressmen notified of "extremely sensitive matters" should be reduced from 8 to 4, thereby excluding the chair and ranking members of the intelligence committees. Strict penalties should be created for Congressmen or staff who made unauthorized disclosures of classified information. *Id.* at 583-584.

laying out a robust view of the President's prerogatives with respect to the conduct of especially foreign policy and national security matters."⁵⁹

Cheney's endorsement of the Minority Report was not simply an exercise in partisan politics and it certainly did not reflect Cheney's institutional interest as a leader of Congress. Rather, the Minority Report reflected Cheney's deeply held convictions regarding separation of powers, a commitment he acted upon on other occasions during the Reagan years.⁶⁰ Writing in early, 1989, as a member of the House Republican leadership and before he was nominated to be Secretary of Defense, Cheney argued that "in recent years, in a wide range of disagreements with the president, Congress has used policy levers that go well beyond those the Constitution intended for the legislative branch." In assuming powers not intended for it, Congress not only encroached on the President's domain but also effectively made the federal government incapable of exercising some of its power. Cheney argued that the framers expected some nations would seek to undermine American interests; accordingly "the Constitution allowed a much greater scope for executive power in foreign than in domestic policy." If anything, modern conditions suggested allowing greater leeway to the President in security matters. "Technology has shrunk the globe, making the need for quick response and predictability of purpose that much more important."⁶¹

⁵⁹ Richard B. Cheney, Vice President's Remarks to the Traveling Press, Air Force Two en route Muscat, Oman, (Dec. 20, 2005), <http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051220-9.html>.

⁶⁰ See generally, Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* 50-52 (2007).

⁶¹ Richard B. Cheney, *Congressional Overreaching in Foreign Policy*, in *s*) Foreign Policy and the Constitution (Robert A. Goldwin and Robert A. Licht eds. 1990). Cheney complained of three specific practices—Congressional diplomacy (either by legislating instructions or by members engaging in back-channel negotiations with foreign leaders), requirements that the President notify Congress within 48 hours of covert activity, and the War Powers resolution.

As Secretary of Defense during the administration of George H.W. Bush, Cheney acted based upon his expansive views of presidential power. Cheney had long believed that the President could commit troops to war as commander in chief without congressional authorization. He opposed the decision of President George H.W. Bush to seek congressional authorization for the Persian Gulf War,⁶² Cheney would not have been deterred if Congress refused to authorize the use of force. "If we'd lost the vote in Congress, I would certainly have recommended to the President we go forward anyway."⁶³

B. Presidential Power and the Bush Administration: Pre 9/11

Cheney's commitment to asserting executive power became evident early in the Bush administration. At the outset of the Bush Administration, Cheney instructed his legal counsel, David

⁶² *Oral History: Secretary of Defense Richard Cheney*, Frontline, <http://www.pbs.org/wgbh/pages/frontline/gulf/oral/cheney/1.html> ("I was not enthusiastic about going to Congress to ask for an additional grant of authority. I was concerned that they might well vote NO and that would make life more difficult for us, or that even if they voted YES and then we had a disaster on our hands and it didn't work they'd still be against us. The President to his great credit felt very strongly that he wanted the Congress on board and he felt we could get them on board and he was correct. We went to work on them and had that vote and in fact prevailed. I think having had the Congress vote ultimately was a major plus."); Savage, Takeover 61-63

⁶³ *Id.* ("It was my view at the time [that] we were absolutely committed to getting Saddam Hussein out of Kuwait one way or the other, no matter what we had to do. We had to have the Saudis as allies in that venture, but if no-one else had been with us if it had just been the United States and Saudi Arabia, without the United Nations, without the authorisation of the Congress, we were prepared to go ahead. I argued in public session before the Congress that we did not need Congressional authorisation. That in fact we had the Truman precedent from the Korean crisis of 1950 that the Senate and all ratified the United Nations charter. By this time the UN Security Council had authorised the use of force back in November saying that we could do it by January 15th if he wasn't out by then and that legally and from a constitutional stand point we had all the authority we needed.

I was not enthusiastic about going to Congress to ask for an additional grant of authority. I was concerned that they might well vote NO and that would make life more difficult for us, or that even if they voted YES and then we had a disaster on our hands and it didn't work they'd still be against us. The President to his great credit felt very strongly that he wanted the Congress on board and he felt we could get them on board and he was correct. We went to work on them and had that vote and in fact prevailed. I think having had the Congress vote ultimately was a major plus.

If we'd lost the vote in Congress, I would certainly have recommended to the President we go forward anyway. Again, as I say, you don't go back having deployed forces over there and decided it was of strategically vital interest. The worst thing you could do in terms of the situation in that part of the world once you've got 500,000 troops out there in the desert is you can't leave them there indefinitely, you cannot sustain that kind of deployment over time. Then you're in real trouble if you decide you're gonna bring them home...")

Addington, to work to restore presidential power.⁶⁴ For Cheney, the expansion of presidential power was not simply a means but an ultimate objective informed by an ideological commitment. Cheney persuaded Bush to embrace enhancing presidential power as an administration priority. Bush and Cheney “always made clear that a central administration priority was to maintain and expand the President’s formal legal power,” Jack Goldsmith wrote.⁶⁵ Bush’s counsel, Alberto Gonzales, instructed his staff during its initial meeting of Bush’s resolve to strengthen the presidency.⁶⁶ This commitment animated the work of the Bush administration and, accordingly, the argument that an alternative course would erode presidential power was a trump card which would usually prevail.

Cheney operated based on these views during the early months of the Bush administration before 9/11 transformed its focus . In late January, 2001 Bush announced that Cheney would lead a high level task force to make recommendations for a comprehensive energy strategy.⁶⁷ Cheney constructed and conducted his energy task force to escape the accountability requirements of the Federal Advisory Committee Act (FACA) by limiting its membership to governmental officials.⁶⁸ When two ranking Democrats on relevant committees of the House of Representatives, John Dingell and Henry Waxman, and then the General Accounting Office, sought information regarding the composition and operation of

⁶⁴ Dana Milbank, *In Cheney’s Shadow, Counsel Pushes the Conservative Cause*, Wash. Post, Oct. 11, 2004 at A21; Gellman, *supra* note 9 at 82; Hayes, *supra* note 12, at 313; Goldsmith, *supra* note 47, at 85, 88-90.

⁶⁵ Goldsmith, *supra* note 47, at 132

⁶⁶ Gellman, *supra* note 9, at 99-100; Savage, *supra* note 59, at 73-75, Frontline Interview with Bradley Berenson, *supra* note 48.

⁶⁷ Remarks Prior to a Meeting With the National Energy Policy Development Group and an Exchange With Reporters, *supra* note 7.

⁶⁸ Ron Suskind, *The Price of Loyalty: George W. Bush, the White House, and the Education of Paul O’Neill*, 146-47 (2004); Hayes, *supra* note 12, at 314-315.

the Cheney task force,⁶⁹ Addington replied that FACA did not apply since all members and employees of Cheney's task force were officers or employees of the federal government.⁷⁰ Cheney later made broader claims to exempt his office from the scrutiny of the GAO. He told one interviewer that the GAO lacked jurisdiction over him because "I'm the constitutional officer provided for in the Constitution ...[a]nd the General Accounting Office has authority over statutory agencies, but not over constitutional officers" and "it's important here to protect the ability of the President and the Vice President to get unvarnished advice from any source we want."⁷¹ The stakes escalated as Cheney wrote the House of Representatives on August 2, 2001 that the GAO had exceeded its "lawful authority" and that its actions "would unconstitutionally interfere with the functioning of the Executive Branch."⁷² The GAO denied that contention four days later, characterizing its requests as relating to factual and nonprivileged materials and stated that it had unsuccessfully attempted to speak with Cheney to try to resolve the dispute.⁷³ Later that month, Walker submitted a report to Congress, a rare event, Solicitor General

⁶⁹ Letter, U.S. Representatives John Dingell and Henry Waxman to Andrew Lundquist, NEPDG Executive Director, (Apr. 19, 2001) <http://oversight.house.gov/documents/20040831095838-21952.pdf>; Letter, Dingell and Waxman to David Walker, Comptroller General GAO, (Apr. 19, 2001) *available at* <http://oversight.house.gov/documents/20040831095928-35054.pdf>

⁷⁰ Letter from David Addington, Legal Counsel to Vice President Cheney to U.S. Representatives Billy Tauzin, John Dingell, Dan Burton, and Henry Waxman, (May 4, 2001) *available at* <http://oversight.house.gov/documents/20040831095650-29059.pdf>

⁷¹ Interview by Campbell Brown, Weekend Today, with Vice President Richard B. Cheney (NBC television broadcast Jan. 28, 2002) *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=85612&st=cheney&st1=health>

⁷² Letter from Vice President Richard B. Cheney to U.S. House of Representatives (Aug. 2, 2001), *available at* <http://oversight.house.gov/documents/20040830233716-42929.pdf>

⁷³ GAO Statement Concerning NEPDG (Aug. 6, 2001) *available at* <http://oversight.house.gov/documents/20040830233320-50377.pdf>

Theodore Olson signaled the interest of Bush and Cheney in the case by personally attending an argument at the district court, something he rarely did.⁷⁴

Some of Bush's closest aides favored accommodating the congressional requests so as not to irritate members whose support would be needed to advance administration priorities.⁷⁵ They worried about the political costs of Cheney's position which "created an early impression of an administration prone to secrecy and reinforced the image of the Bush White House as in thrall to corporate interests."⁷⁶ Cheney, however, embraced the controversy as an opportunity to establish new constitutional principles regarding more expansive presidential power. When Cheney's energy aide urged the Vice President to disclose records to demonstrate the validity of the Task Force's process, Cheney reportedly replied, "Don't ever suggest that to me again."⁷⁷ After David Gergen, Cheney's former colleague in the Nixon and Ford White House, argued on CNN that Cheney should reveal the names of those with whom his Task Force had met, Cheney called Gergen "and he really wanted to talk about, 'Don't you remember what we went through back in the '70s and how important it is for the executive to have the full power of the Constitution and how hampered we were back then?'" The conversation convinced Gergen that Cheney "really cares about this. It's deep in his being. It's fundamental to who he is and his perception of how the presidency should operate in conjunction with the Congress. He's a very, very strong believer that the presidency has been cut down too far."⁷⁸ Barton Gellman wrote, "[f]or Cheney, this *was* the

⁷⁴ Bruce P. Montgomery, *The Bush-Cheney Administration's Assault on Open Government* 83-84 (2008).

⁷⁵ Gellman, *supra* note 9, at 105.

⁷⁶ McClellan, *supra* note 6, at 96.

⁷⁷ Hayes, *supra* note 12, at 324; Gellman, *supra* note 9, at 93.

⁷⁸ Interview by Jim Gilmore, *Frontline*, with David Gergen, (July 28, 2007), *available at* <http://www.pbs.org/wgbh/pages/frontline/cheney/interviews/gergen.html>; *See also* Interview by Larry King, *Larry King Live*, with Lewis "Scooter" Libby, Vice President Cheney's Chief of Staff (Feb. 16, 2002), *available at* <http://transcripts.cnn.com/TRANSCRIPTS/020216/klw.00.html> ("But he also feels strongly about the White

agenda.”⁷⁹ Cheney believed that presidents had routinely compromised with Congress, “the net result of” which was “to weaken the presidency and the vice presidency.” Cheney said he and Bush felt an obligation “to pass on our offices in better shape than we found them to our successors. We are weaker today as an institution because of the unwise compromises that have been made over the last 30 to 35 years.”⁸⁰ Cheney described his action as having “restored some of the legitimate authority of the Executive Branch, the President and Vice President, to be able to conduct their business.”⁸¹ When a reporter asked Cheney whether the principle was worth the political cost, he replied:⁸²

I took an oath ...when I was sworn in to support and defend the Constitution of the United States. You have an obligation, I believe, in these offices to defend the office against the unlawful or unconstitutional or unreasonable encroachment by the other branches of government.

House and Constitutional rights and obligations and duties of the presidency, and protecting those. And this is a case where he firmly believes -- believes to the point where, when he talks about it, his eyes get a little bluer -- that for the presidency to operate properly, it needs to be able to have confidential communications. And that's part of what our forefathers set up when they set up two co-equal branches of government. The courts have looked at issues like this, and they have decided that there are certain communications and certain roles that are distinct and that should be protected.”)

⁷⁹ Gellman, *supra* note 9, at 105.

⁸⁰ Interview with Vice President Cheney, *This Week With George Stephanopoulos*, (ABC television broadcast Jan. 27, 2002). See also Interview with Vice President Cheney, Fox News Sunday (Fox television broadcast Jan. 27, 2002) as reprinted at <http://archives.cnn.com/2002/US/01/27/enron/> (“Time after time, administrations have traded away the authority of the president to do his job,” Cheney said. “We’re not going to do that in this administration. The president’s bound and determined to defend those principles and to pass on this office, his and mine, to future generations in better shape than we found it.”) See also Montgomery, *supra* note 74, at 66 (“not only did the White House seek to use the case to help restore the powers of the presidency that had been eroded under the Clinton administration, but more important to roll back Congress’s relentless thirty-year encroachment on the executive branch since the Nixon era.”)

⁸¹ Richard B. Cheney, Remarks to the American Society of News Editors, (Apr. 3, 2003), <http://www.asne.org/index/cfm?!D=4544>. See also Interview with Vice President Cheney, *supra* note 80 (““You just cannot accept that proposition without putting a chill over the ability of the president and vice president to receive unvarnished advice...”)

⁸² Interview by Campbell Brown with Vice President Cheney, *supra* note 71.

The way the Constitution is set up specifically provides for separation of powers. And to create a precedent where future vice presidents, for example, would be in a situation where anytime they meet with somebody, they have to call Henry Waxman and tell them who they met with, what the subject was that was discussed, giving him notes of the meetings that were taken -- now, the Congressman does not have the constitutional right to insist that the President or the Vice President provide him with that information, any more than I can demand of the Congressman, look, you've got to tell me everybody you talked to before you cast that vote. That's silly. That's not the way the government works.

Following an Oval Office session, Bush embraced Cheney's approach regarding the operation of Cheney's task force.⁸³ The effort of the General Accounting Office to obtain records of Cheney's energy task force jeopardized the ability of the President and Vice President "to get good, sound opinions." Bush viewed the GAO "like the Vice President does" as "an encroachment on the executive branch's ability to conduct business."⁸⁴ Cheney's Chief of Staff Lewis Scooter Libby said that Cheney "firmly believes -- believes to the point where, when he talks about it, his eyes get a little bluer -- that for the presidency to operate properly, it needs to be able to have confidential communications."⁸⁵

Cheney's effort to avoid disclosure regarding information of the energy task force reflected his and Bush's deep commitment to expanding executive power well before 9/11. The effort brought clear political costs and relatively small short-term gains since much of the information was disclosed in litigation against other governmental agencies. Moreover, as Bruce Montgomery points out, Cheney could have short-circuited the dispute by simply certifying that disclosure would impair the conduct of

⁸³ Gellman, *supra* note 9, at 105. David Gergen later commented: "Gergen said: 'I think this particular vice president has had an enormous amount of persuasion with this president. I think he's listened to him more closely than anybody else, especially in those early years. But still at the end of the day it's the president who's made the calls, and I think this penchant for secrecy and large executive power that Dick Cheney has been pushing, I think it's something the president has bought into. Did Cheney help to persuade him? Absolutely. But is the president now persuaded? Absolutely. I think he's now a devotee of expanded executive power.'" Frontline Interview with David Gergen, *supra* note 78.

⁸⁴ President George W. Bush, Exchange with Reporters (Jan. 28, 2002) American Presidency Project, <http://www.presidency.ucsb.edu/ws/index.php?pid=62986&st=&st1=>

⁸⁵ Larry King Live Interview with Lewis "Scooter" Libby, *supra* note 78

government. Instead, Cheney invited the fight as a means to curtail Congress' oversight of the executive branch.⁸⁶

The dispute regarding the energy task force provided the most visible, but not the exclusive, front in Cheney's battle to expand presidential power prior to September 11, 2001. Cheney also instructed Addington to review all legislation and to prepare signing statements addressing any perceived intrusions into presidential power. Addington largely drove the Bush administration's extensive and unprecedented use of signing statements, an effort which preceded 9/11 and went beyond areas related to national security.⁸⁷

IV. Cheney and Executive Power: The Influence of 9/11

Prior to September 11, 2001, Cheney had established himself as history's most powerful Vice President and as a proponent of an expansive view of presidential power. The events of 9/11 provided the impetus for a significant aggrandizement of the power of the Vice Presidency, or more precisely, of one Vice President, and of the presidency more generally.

The 9/11 attack introduced a new climate which favored broad assertions of presidential powers. Five days later Cheney said on Meet the Press that "things have changed since last Tuesday. The world has shifted in some respects."⁸⁸ The attack on the homeland moved the discussion to an area where historically presidential prerogatives have been viewed most expansively and introduced a

⁸⁶ See generally, Montgomery, *supra* note 74, at 95.

⁸⁷ Savage, *supra* note 60, at 236; see generally James P. Pfiffner, *Power Play: The Bush Presidency and the Constitution*, 194-228 (2008).

⁸⁸ Interview by Tim Russert, Meet the Press, with Vice President Cheney, *Meet the Press*, (NBC television broadcast Sept. 16, 2001) available at <http://www.fromthewilderness.com/timeline/2001/meetthepress091601.html>

context which tempered normal patterns of scrutiny of executive conduct. The nation rallied around Bush; his, and Cheney's, approval ratings reached their highest marks.⁸⁹

The events of September 11, 2001 introduced three dynamics which enhanced Cheney's role. First, crisis invariably draws decision-making into the White House and tends to empower those who, by virtue of personal relationship and physical proximity, are close to the President. Second, the events also brought to the forefront a set of issues in which Cheney's expertise and credibility enhanced his role. Third, the events of 9/11 frightened America and its leaders. New feelings of vulnerability increased the calls for, and the receptivity to, more intrusive security measures. Those, like Cheney, who had or were perceived to have, access to intelligence found that others were less willing to challenge their arguments.

Cheney summoned his counsel, David Addington, to the White House bunker on September 11, 2001 and asked him what additional power the President would need to prosecute the war against terror. Addington, in consultation with Timothy Flanigan, associate White House Counsel, and John Yoo of the Office of Legal Counsel, began to draw up sweeping grants of power. In the aftermath of 9/11, understandably, administration lawyers engaged in an effort "to lay out for the president every single tool in his toolbox" by collecting statutory powers and interpreting constitutional grants.⁹⁰ During his September 16, 2001 Meet the Press interview, Cheney famously said that henceforth America would "also have to work, though, sort of the dark side, if you will. We've got to spend time in the shadows in the intelligence world. A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies, if we're going to

⁸⁹ See Poll data on Cheney *available at* [Polling Report.com/C.htm](http://PollingReport.com/C.htm).

⁹⁰ Transcript, Frontline Interview with Bradley Berenson, *supra* note 48; Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned Into a War on American Ideals* 49-51(2008).

be successful. That's the world these folks operate in, and so it's going to be vital for us to use any means at our disposal, basically, to achieve our objective."⁹¹

In a number of areas in the aftermath of the al Qaeda attack, Cheney's office spearheaded the development of policies based upon expansive views of presidential power. Cheney, Addington and others in his office made broad claims based on the President's Commander-in-Chief power which they viewed as a trump card over legal restraints which statutes or treaties imposed. A few brief case studies put these claims in context and provide some indication of the manner in which Cheney's office operated.

A) Domestic Surveillance

Consistent with the supervisory role which Bush had assigned Cheney regarding intelligence matters during the early days of the administration, Cheney met with CIA director George Tenet and Michael Hayden of the NSA in the aftermath of 9/11 to devise an expanded surveillance program. Working with Libby and Addington, they fashioned a program for surveillance of domestic, as well as international, targets without a showing of probable cause or a judicially authorized warrant. Advocates justified the program, which far exceeded the boundaries which the FISA statute (which Cheney's office thought intruded on the President's constitutional power) and the Search and Seizure Clause of the Constitution imposed, based on expansive readings of the President's constitutional Commander-in-Chief power. The program was Cheney's "brainchild" and he was instrumental in putting it into effect.⁹² Cheney presented the proposal to Bush along with a draft order on October 4, 2001 and the President signed it that day.

⁹¹ Meet the Press interview with Vice President Cheney, *supra* note 88.

⁹² Eric Lichtblau, *Bush's Law: The Remaking of American Justice*, 142-144, 147(2008). See also Savage, *supra* note 59, at 127-132

By design, the program was intended to avoid scrutiny by the other branches of government. Cheney admonished his colleagues to share little about the program with Congress.⁹³ Gellman wrote that “[t]he new legal framework was meant to be invisible, unreviewable—its very existence unknown by legislative or judicial actors who might push back.”⁹⁴ Beginning on October 25, 2001, Cheney, not Bush, typically conducted briefings of a small group of congressional leaders regarding the domestic surveillance program. Yet these briefings provided limited oversight. Few Congressional leaders were briefed and they were sworn to secrecy and accordingly were unable to share the information provided them even with staff, thereby minimizing their ability to access the necessary expertise to analyze it fully.⁹⁵ At least one congressman, Senator Jay Rockefeller, expressed his discomfort with the program and procedure in a handwritten letter to Cheney,⁹⁶ a complaint Cheney dismissed as a “CYA letter.”⁹⁷

The program was formulated and implemented without input from many stakeholders in the executive branch. Cheney and his associates deliberately excluded from knowledge about the program ranking justice department lawyers like Deputy Attorney General Larry Thompson, John Bellinger, the attorney for the NSC and Fran Townsend, Bush’s advisor on counterterrorism. Career lawyers at the Pentagon who specialized in legal issues relating to NSA’s work were also denied information regarding

⁹³ Hayes, *supra* note 12, at 486-488

⁹⁴ Gellman, *supra* note 9, at 138. *See generally id.* 138-151.

⁹⁵ Montgomery, *supra* note 74, at 137; Mayer, *supra* note 90, at 66.

⁹⁶ *See e.g.* Letter, Senator Jay Rockefeller to Vice President Cheney (July 17, 2003); *see also* Lichtblau, *supra* note 92, at 169-170.

⁹⁷ Interview by Bob Schieffer, Face the Nation, with Vice President Cheney, *Face the Nation* (CBS television broadcast Jan. 4, 2009).

the program. Addington, for instance, refused to allow the Inspector General of the National Security Agency to read the Justice department's legal analysis supporting the Terrorist Surveillance Program.⁹⁸

Cheney later defended Bush's domestic surveillance program as being "consistent with the President's constitutional authority as Commander-in-Chief" and "consistent" with the Authorization of Military Force which Congress passed in September, 2001. Moreover, Cheney repeatedly invoked the fact that the program was recertified every 30 to 45 days⁹⁹ and that Congressional leaders had been briefed on the program.¹⁰⁰ Cheney pointed to the attack on September 11 and the "possibility that same organization might try to attack the United States with deadlier weapon threats" as providing additional justification for the surveillance program which he claimed had "saved thousands of lives." "When we were hit on 9/11, [President Bush] was granted the authority by the Congress to use all means necessary to take on the terrorists. And that's what we've done."¹⁰¹

The efforts of Cheney's office to protect the domestic surveillance program perhaps best illustrated the single-minded nature of its commitment to an expansive view of presidential power. When Jack Goldsmith, a highly credentialed conservative academic, was named to head OLC in late 2003¹⁰² he reviewed a number of John Yoo's opinions which had espoused expansive interpretations of executive power, including those regarding the domestic surveillance program. Although Addington had closely

⁹⁸ Gellman, *supra* note 9, at 143-45, 151-53, 297-98; Mayer, *supra* note 90, at 66-71; Lichtblau, *supra* note 92, at 140-142; Goldsmith, *supra* note 47, at 182.

⁹⁹ Interview by Terry Moran, Nightline, with Vice President Cheney, in Al-Asad, Iraq, *Nightline*, (ABC television broadcast Dec. 18, 2005) available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051218-4.html>; Interview by CNN with Vice President Cheney, in Muzaffarabad, Pakistan, (CNN television broadcast Dec. 20, 2005) available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051220-12.html>.

¹⁰⁰ CNN Interview with Vice President Cheney, *supra* note 99.

¹⁰¹ *Id.* For critiques of these arguments, see Pfiffner, *supra* note 87, at 168-193.

¹⁰² Goldsmith, *supra* note 4, at 17-31; Mayer, *supra* note 90, at 261-262; Savage, *supra* note 60, at 183-188.

restricted those with knowledge of the program, Goldsmith, ultimately negotiated permission to brief Deputy Attorney General James Comey regarding it. A bitter debate developed in early 2004 regarding whether the Justice department would continue to certify the domestic surveillance program. Comey persuaded Ashcroft not to recertify the program unless it was changed but, hours later, Ashcroft was stricken with acute pancreatitis, the complications from which were almost fatal. Comey became acting Attorney General as Ashcroft was placed in intensive care in early March, 2004. When Goldsmith told Addington and Gonzales on March 6 that the Department of Justice would not recertify the program, Addington replied that “[i]f you rule that way, the blood of the hundred thousand people who die in the next attack will be on your hands.” Three days later, Gonzales and Goldsmith met but did not resolve their differences.

On March 9, 2004 Cheney met in Card’s office with leaders of the CIA, NSA and FBI. Four hours later that group reconvened to meet with Comey, Goldsmith and Patrick Philbin from OLC. Comey advised that he would not recertify the domestic surveillance program which was otherwise due to expire.¹⁰³ Cheney, supported by the intelligence personnel, argued that the program was critical and that its termination would impair national security. Comey pointed out that Cheney’s defense went to the merit, not the legality of, the program and contended that no good lawyer would advance the legal analysis which Bush and Cheney had relied on, a rebuke to Addington who was among those lawyers who had done so.¹⁰⁴

The following day, March 10, 2004, Cheney convened a meeting of eight congressional leaders, the leaders of the House and Senate and of each body’s Intelligence committee, for a secret briefing regarding the domestic surveillance program. Comey was specifically barred from the meeting. For

¹⁰³ Answers to Written Questions to Former Deputy Attorney General James B. Comey Submitted by Senator Patrick Leahy, May 22, 2007

¹⁰⁴ Gellman, *supra* note 9, at 295-296

some legislators at the meeting, it was the first disclosure regarding the program. Cheney advised them that government lawyers had consistently certified the program but now, in Ashcroft's untimely illness, Comey refused to do so. Gonzales later testified that the administration had raised the possibility of legislation, a claim some legislators denied and one which seems dubious given Cheney's view that the President had constitutional authority and the impracticality of asking for legislation without undermining the secrecy of the program.¹⁰⁵

That night, Bush called Ashcroft (after his wife refused to accept a call from Card or Gonzales) and advised him that Card and Gonzales were en route to his hospital room. They appeared at Ashcroft's room in the intensive care unit to attempt to procure reauthorization from him. Ashcroft told his visitors he was not in condition to make decisions and had relinquished power to Comey. Nonetheless, he reviewed the legal problems with the program and said the White House had denied him the ability to obtain appropriate legal advice regarding the program by refusing to allow him to discuss it with certain advisors.¹⁰⁶

Bush signed a directive reauthorizing the program which Addington prepared with a signature line for White House counsel Gonzales instead of Ashcroft. Card told at least one of the congressional leaders that Gonzales had signed because Comey did not feel comfortable doing so in Ashcroft's absence. The following day, Bush met privately with Comey and then with FBI Director Robert S. Mueller III. By then, White House officials had learned to expect massive resignations from the Justice department. Bush protested that Comey had not raised his misgivings regarding the program until the last minute. Since those doubts had been communicated for months, Bush's claim, if credible, suggested that Cheney, Card and Gonzales had not informed him of a fierce division in the

¹⁰⁵ Gellman, *supra* note 9, at 300-301.

¹⁰⁶ *Id.* at 282-307; Eric Lichtblau and James Risen, *Justice Deputy Resisted Parts of Spy Program*, N. Y. Times, Jan. 1, 2006 at 1; RSM Program Log.

administration regarding the legality of a major program. After meeting with Mueller, Bush agreed to modify the program to conform to guidelines the Justice department established.¹⁰⁷

Ultimately, the spectre of massive resignations by political appointees in the Justice department gave Bush little choice but to accommodate Comey's concerns. Cheney's premise, after all, was that the domestic surveillance program was sacrosanct but could only operate if secret. The resignations would inevitably have exposed the program. Moreover, the crisis arose less than eight months before the 2004 presidential election. Bush simply could not risk the political repercussions of a Justice department exodus which would have made the Saturday night massacre appear like a small wound.

The event, however, may have awakened Bush to a risk of allowing Cheney such autonomy. Cheney's political blinders and his commitment to the importance, and in his view, legality, of the domestic surveillance program led him to bring the administration to the brink of an election year debacle which would likely have made Bush a one term president.

B) Military Commissions

Following 9/11, Gonzales established an interagency process under the chairmanship of Ambassador Pierre Prosper, to consider how to handle those suspected of being foreign terrorists. Representatives of the State, Defense and Justice departments, of the military, NSC and White House counsel's office participated but the vice president's office did not attend those meetings.¹⁰⁸ Some in the White House apparently became impatient with the interagency process and quietly initiated a

¹⁰⁷ Gellman, *supra* note 9, at 311-321.

¹⁰⁸ Gellman, *supra* note 9, at 162-163; Mayer, *supra* note 90, at 80.

separate effort which Addington apparently drove and which excluded some of the interested agencies, like the State department and NSC.¹⁰⁹

Addington played a leading role in drafting a proposed presidential order establishing a system of Military Commissions under the jurisdiction of the Department of Defense to handle detainees.¹¹⁰ The order was predicated on the President's Commander-in-Chief power and the Authorization of the Use of Military Force joint resolution and responded to the national emergency created by al Qaeda's attacks.¹¹¹ Addington's process was hardly transparent; Attorney General Ashcroft learned of the proposed order only because his subordinate, Yoo, had blessed the proposal which excluded America's civil courts and the Justice department from the program. Ashcroft had an unproductive meeting with Cheney to air his dissatisfaction with the arrangement.¹¹²

Cheney presented the order to Bush during a private lunch on November 13, 2001 at which Bush approved it. At the time, Bush was hosting meetings with Russian President Putin at the White House and the following days at his Crawford, Texas ranch. Cheney directed that the order immediately be prepared in final form for Bush's signature. Addington finalized the order and it was presented for Bush's signature that afternoon before he left for Crawford without notice to important stakeholders.¹¹³

¹⁰⁹ Jane Mayer, *The Hidden Power*, New Yorker, July 3, 2006, at 44; Frontline Interview with Bradley Berenson, *supra* note 48; Colleen Murphy and Todd Purdum, *Farewell to All That: An Oral History of the Bush White House*, Vanity Fair, February 1, 2009 (comments of John Bellinger, III); <http://www.vanityfair.com/politics/features/2009/02/bush-oral-history200902>; Savage, *supra* note 60, at 134-139.

¹¹⁰ Gellman, *supra* note 9, at 163.

¹¹¹ President George W. Bush, Military Order - Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001) American Presidency Project <http://www.presidency.ucsb.edu/ws/index.php?pid=63124&st=&st1=>

¹¹² Mayer, *supra* note 90, at 82-83; Gellman, *supra* note 9, at 162-168; Savage, *supra* note 60, at 134-139.

¹¹³ Gellman, *supra* note 9, at 166-168; Mayer, *supra* note 90, at 86; Frontline Interview with Bradley Berenson, *supra* note 48.

Even Cheney's allies were stunned by the speed with which Cheney obtained presidential approval. National security adviser Rice first learned of the order after Bush signed it. Secretary of State Powell learned of it when and how many other Americans did-- when CNN announced it later that day. "What the hell just happened?" Powell asked Prosper, the head of the interagency process considering the issue who was also in the dark.¹¹⁴

In fact, the President's Order presented significant constitutional issues. It empowered the President to determine that a noncitizen should be tried by military commission without affording judicial review by writ of habeas corpus or appeal. As James Pfiffner nicely put it, "the person would be indicted by a subordinate of the president based on evidence provided by subordinates of the president; the defendant would be tried by subordinates of the president; the defendant would be sentenced by subordinates of the president; and the only appeal would be to the president."¹¹⁵

Cheney defended the program before the U.S. Chamber of Commerce on November 14, 2001 . He pointed out that those subject to it were not American citizens and were persons "believed to have engaged in or be participating in terrorist attacks designed to kill Americans, or have provided sanctuary to those who are conducting terrorist operations against Americans." He argued that "somebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans, men, women, and children" does not "deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process." The program Bush had prescribed "guarantees that we'll have the kind of treatment of these individuals that

¹¹⁴ *Frontline*; *Cheney's Law*, (PBS television broadcast Oct. 16, 2007) available at <http://www.pbs.org/wgbh/pages/frontline/cheney/etc/script.html> (comments of Prosper)

¹¹⁵ Pfiffner, *supra* note 87, at 104-105.

we believe they deserve.”¹¹⁶ Even assuming that Cheney was correct about the appropriate treatment for terrorists, the President’s Order, and Cheney’s defense of it, assumed the infallibility of the judgment that the President and his subordinates made regarding the culpability of those charged. Suppose they were wrong?

Cheney and Addington later resisted all suggestions that the administration seek congressional approval for proposed actions. At a meeting to discuss the decision of the Supreme Court to hear Yaser Hamdi’s appeal, Goldsmith suggested asking Congress to approve the detention program. “ ‘Why are you trying to give away the President’s power?’ ” Addington asked. Addington believed that seeking congressional approval would imply that approval was needed and accordingly would diminish presidential power.¹¹⁷ Addington was prepared to risk an adverse Court decision rather than seeking congressional sanction. Although the Supreme Court ruled Bush’s order illegal in important respects in a series of decisions,¹¹⁸ the Bush administration subsequently obtained legislation from Congress reinstating much of what it sought.¹¹⁹

C) Holding Geneva Inapplicable

Cheney’s office, along with Yoo, spearheaded a successful effort to persuade Bush to deny the protections of the Geneva Convention to members of al Qaeda or the Taliban. During Cheney’s November 14, 2001 comments to the Chamber of Commerce, he had said that unlawful combatants

¹¹⁶ Richard B. Cheney, Vice President Addresses U.S. Chamber of Commerce (Nov. 14, 2001) American Presidency Project <http://www.presidency.ucsb.edu/ws/index.php?pid=79224&st=&st1=>

¹¹⁷ Goldsmith, *supra* note 47, at 123-25

¹¹⁸ *See, e.g.,* Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006). *See generally* Louis Fisher, *The Constitution and 9/11: Recurring Threats to American Freedoms* 194-197, 233-234, 237-240 (2008).

¹¹⁹ *See generally* Pfiffner, *supra* note 87, at 105-110; Fisher, *supra* note 118, at 239-244; Savage, *supra* note 60, at 308-323.

“ don't deserve to be treated as a prisoner of war.”¹²⁰ Whether Cheney meant that cryptic statement to signal his view that Geneva’s protections of prisoners of war did not cover this population, his office clearly pushed that view within the administration. Yoo drafted a memorandum denying that the Geneva Convention bound the United States, a position which the State department opposed. Bush apparently accepted Yoo’s position on January 8, 2002 and, consistent with it, Rumsfeld instructed the Joint Chiefs ten days later that the military need not treat al Qaeda or Taliban prisoners in accordance with the Geneva protections. Since Bush had not convened a meeting of his principal advisers to discuss the issue, Powell thereafter obtained an audience with Bush on January 21, 2002 regarding the subject. Working with allies in the Departments of Defense and Justice as well as with Flanigan at the White House, Addington prepared for Gonzales’ signature a memorandum of January 25, 2002 advising that the Geneva convention did not apply. Before the NSC meeting which Bush called for January 28, 2002 , the Gonzales-Addington memorandum was leaked to the Washington Times, a conservative newspaper, which quoted administration sources as saying Powell was caving to left wing pressure.¹²¹ In early February, 2002 Cheney obtained Bush’s signature on an executive order which Addington had prepared denying protections of the Geneva Conventions to al-Qaeda detainees.¹²²

Cheney and his office remained heavily involved in programs for enhanced interrogation.

Cheney participated in the decisions to use enhanced interrogation techniques, including waterboarding. He pressed the Justice department to issue a memorandum approving forms of

¹²⁰ Richard B. Cheney, Vice President Addresses U.S. Chamber of Commerce (Nov. 14, 2001) American Presidency Project <http://www.presidency.ucsb.edu/ws/index.php?pid=79224&st=&st1=>

¹²¹ Gellman, *supra* note 9, at 170-171. Some imply that Addington engineered the leak. See *id*; Mayer, *supra* note 90, at 122-125

¹²² Gellman, *supra* note 9, at 169-171; Murphy and Purdum, *supra* note 109 (Comments of Wilkerson); Joan Didion, *Cheney: The Fatal Touch*, 53 N. Y. Rev. of Books 15, Oct. 5, 2006 available at <http://www.nybooks.com/articles/19376>; James P. Pfiffner, *The Contemporary Presidency: Decision-Making in the Bush White House*, 39 Presidential Stud. Q. 363 371-374 (2009).

torture.¹²³ He briefed selected Congressmen and was viewed on the Hill as “ground zero” on the issue. “It was his office you dealt with at the end of the day,”¹²⁴ Senator Lindsay Graham said Cheney defended those decisions as a “no-brainer”¹²⁵ and Cheney justified them as based on “sound” legal opinions to use “reasonable” techniques to “acquire good intelligence.” The actions were consistent with the constitutional obligation of Bush and Cheney “to protect against all enemies, foreign and domestic”; it would have been “unethical or immoral” not to do “everything we could in order to protect the nation” against a repeat of 9/11.¹²⁶ Cheney lobbied unsuccessfully against the McCain Amendment banning torture during the latter part of 2005. When Bush signed the 2005 Detainee Treatment Act which limited interrogation practices he issued a signing statement which repeatedly invoked the president’s constitutional power to modify the provisions in the act.¹²⁷ The signing statement seemed to reflect Addington’s hand and Cheney’s influence.¹²⁸

D) Conclusion

If anything, the events of 9/11 reinforced Cheney’s belief in a “strong, robust executive authority.” In December, 2005 he acknowledged that “especially in the day and age we live in, the

¹²³ Scott Shane and David Johnston, *U.S. Lawyers Agreed on Legality of Brutal Tactic*, N. Y. Times, June 6, 2009, at A1.

¹²⁴ Paul Kane and Joby Warrick, *Cheney Led Briefings of Lawmakers to Defend Interrogation Techniques*, Wash. Post, June 3, 2009.

¹²⁵ Interview of the Vice President by Scott Hennen, WDAY at Radio Day at the White House, October 24, 2006 <http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061024-7.html>

¹²⁶ Interview of the Vice President by Jon Ward and John Solomon, *The Washington Times*, December 22, 2008; see also Interview of the Vice President by Wolf Blitzer, *Late Edition*, January 11, 2009

¹²⁷ Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (Dec. 30, 2005) American Presidency Project <http://www.presidency.ucsb.edu/ws/index.php?pid=65259&st=&st1=>. See also Savage, *supra* note 59, at 220-227; Pfiffner, *supra* note 87, at 159-160.

¹²⁸ Goldsmith, *supra* note 47, at 85; Savage, *supra* note 60, at 220-227.

nature of the threats we face... the President of the United States needs to have his constitutional powers unimpaired, if you will, in terms of national security policy.”¹²⁹

Cheney’s views a month before leaving office were equally expansive. In wartime, the President’s powers relative to the other branches were “very significant.” Cheney said, the Commander in Chief power entailed not simply command of the military but “collecting intelligence” which means “you’re fully justified in setting up a terror surveillance program to be able to intercept the communications of people who are communicating with terrorists outside the United States.” Moreover, Cheney thought the President had constitutional power to “have a robust interrogation program with respect to high-value detainees.” As a “general proposition,” Cheney thought that presidential action during wartime to protect the country was legal.¹³⁰

V. Cheney and the Escape from Accountability

After 9/11 Cheney pursued policies in the war on terror which were predicated on an expansive theory of presidential power. Programs which Cheney advocated stretched conventional notions of executive power and contracted means of holding the executive accountable for its conduct. Cheney and his office were integrally involved in creating and overseeing programs related to the war on terror and accordingly the expansion of presidential power also increased the Vice President’s power.

¹²⁹ Richard B. Cheney, Vice President’s Remarks to the Traveling Press, Air Force Two en route to Muscat, Oman, (Dec. 20, 2005), <http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051220-9.html>

¹³⁰ Interview by Chris Wallace, FOX News, with Vice President Cheney (Fox television broadcast Dec. 19, 2008). See also Goldsmith, *supra* note 47, at 78-79 (Addington “believed presidential power was coextensive with presidential responsibility. Since the President would be blamed for the next home land attack, he must have the power under the Constitution to do what he deemed necessary to stop it, regardless of what Congress said.”). See also David Ignatius, *Cheney’s Cheney*, Wash. Post, Jan. 6, 2006, at A19.

Yet Cheney's enhanced vice-presidential role was not simply, or even primarily, a product of the war on terror. On the contrary, Cheney used his enhanced vice-presidential role to push that expansive conception of presidential power. Cheney's extraordinary influence traced in substantial part to factors previously identified—his relationship with Bush, the opportunity to fill vacuums created by Bush's leadership style, the resources Cheney brought to office and the value of those resources to the administration, Cheney's role in the transition, Cheney's staff, and his lack of presidential ambitions.

Cheney's exercise of unprecedented vice-presidential power was accompanied by an unprecedented absence of vice-presidential accountability. Conventional forms of vice-presidential accountability, which had constrained Cheney's recent predecessors, eroded during the Bush years and left Cheney, and the Bush administration, less subject to informal administrative and political checks which in the past had contributed to restraining governmental conduct and promoting deliberative decision-making. The absence of these traditional checks during much of Cheney's tenure enabled him to operate free from normal sources of accountability which restrained prior officials of the executive branch.

In considering the demise of vice-presidential accountability during the Bush-Cheney years, it is important to recognize three attributes which give the Vice President a unique character compared to other presidential advisers and administration insiders. First, a Vice President is not simply an adviser but the occupant of a constitutionally prescribed office who can claim a mandate traceable to the electorate. To be sure, most Americans weigh most heavily the choice between competing presidential, not vice-presidential, candidates. Nonetheless, the Vice President's place on the ticket, role in the campaign and receipt of at least 270 electoral votes furnishes him or her with a legitimacy and status

second only to the President. “I’m not a staffer, I’m the vice president, a constitutional officer, elected same as he is,”¹³¹ Cheney told biographer Steven Hayes.

In addition to his constitutional stature, the Vice President’s position is enhanced by the fact that he/she is the first presidential successor who stands the proverbial heartbeat away from the presidency. Unlike others, the Vice President may, at any minute become, as John Adams put it, “everything.”¹³² That contingent significance commands deference.

Finally, and perhaps most importantly, the Vice President cannot be dismissed during his/her four year term. The Constitution gives the Vice President the same four year term it prescribes for the President.¹³³ Bush could and did dismiss Powell, O’Neill, Rumsfeld, Card, Rove, and many others. He could not remove Cheney.

Historically these three attributes—the electoral connection, the successor possibility and tenure—have been both a blessing and a curse for the vice presidency. To be sure, they enhanced the Vice Presidency and gave its officer a status other administration officials could not claim. On the other hand, they also constituted part of the inherent vice-presidential baggage which inhibited Presidents from giving Vice Presidents meaningful responsibilities. Even as President Carter and his successors gave, and their Vice Presidents accepted, significant assignments, they did so in a manner which was sensitive to the need to maintain the office as one which was accountable to the President and subject to other forms of informal constraint.

¹³¹ Hayes, *supra* note 12, at .

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¹³³ U.S. Const., art. II, sec. 1, cl. 1.

Those conventional modes of accountability largely disappeared during much of the Cheney terms. The discussion below outlines the erosion of various factors which had contributed to vice-presidential accountability.

A) Absence of presidential supervision due to Bush's Style of Leadership

Not only did Bush's leadership style afford Cheney the opportunity to play an important operational role but it also helped make Cheney less accountable to presidential oversight than any vice president in history. Two aspects of Bush's leadership style fostered an unaccountable Vice Presidency—his habits and method of delegating power to the Vice President and his lack of intellectual engagement in problems of the Presidency.

Bush was not the first modern president to delegate heavily to subordinates. Ronald Reagan, focused on large concepts while leaving details and operations to others. But Reagan's delegation of power differed in critical respects from Bush's approach. Reagan had relied on a series of strong Chiefs of Staff to operate the executive branch and had imposed various checks on them. Unlike a Vice President, Reagan's Chiefs of Staff served at the President's pleasure, and three of the four (James Baker, Howard Baker, and Ken Duberstein) were enormously sensitive political operators who were scrupulous in their habits of deference to him and served as honest brokers for policy. (The imperious behavior of the fourth, Donald Regan, ultimately cost him that role). James Baker, Reagan's chief of staff during his first term, worked in tandem with long-term Reagan loyalists Ed Meese, Mike Deaver and William Clark. Bush, however, delegated authority to a stronger Vice President who was not subject to effective internal checks until the latter part of Bush's second term when Josh Bolten replaced Card as Chief of Staff.

Moreover, Bush was less equipped than other Presidents to supervise his Vice President due to his lack of intellectual engagement in his work as President. Unlike Carter, George H. W. Bush, Clinton,

and Obama, Bush did not immerse himself in policy. Unlike Reagan, he had not developed and refined views on critical issues by writing and speaking on them for a long period of time.

Some Bush advisers recognized this limitation in his leadership. Scott McClellan wrote: “Bush is plenty smart enough to be president. But as I’ve noted, his leadership style is based more on instinct than deep intellectual debate. His intellectual curiosity tends to be centered on knowing what he needs in order to effectively articulate, advocate, and defend his policies.”¹³⁴ Paul O’Neill thought Bush’s inexperience, especially compared to that of other Presidents under whom he had served, Ford and George H.W. Bush, accentuated the need for a functioning policy process. He argued that the administration could not just move based on instinct or without hearing from those with policy expertise. Nixon and Ford had both insisted that departments provide them with Brandeis Briefs on major issues, O’Neill pointed out, whereas Bush tended to receive input primarily from a small circle of political advisors.

Yet Bush resisted detailed briefings; administration officials soon learned that their briefings, whether written or oral, must be succinct to hold the President’s attention. Bush received relatively little information; that deficit, coupled with his penchant for intuitive decision-making, made him ill-equipped to assess and challenge proposals presented to him.

Bush structured government so that many important disputes never came to his attention. Bush became dependent on Cheney for the operation of, and for information regarding, major governmental portfolios. Cheney, not Bush, met with congressional leaders regarding critical legislation. Cheney, not Bush, often dealt with other principals of the executive branch regarding a host of important matters including intelligence, national security policy, and budgetary matters. Attorney General Ashcroft’s strong disagreement with the proposed order establishing military commissions was

¹³⁴ McClellan, *What Happened*, 145

voiced to Cheney, not to Bush. Appeal of OMB budget decisions went to Cheney, not Bush. Cheney guided Bush through his daily intelligence briefing. Bush gave the order to initiate the war in Iraq by targeting a home where Saddam Hussein was thought to be after excusing everyone from the Oval office except Cheney and receiving Cheney's advice to attack. "Powell noted silently that things didn't really get decided until the president had met with Cheney alone," Woodward wrote.¹³⁵

The episode involving the near mass exodus from the Justice Department in March, 2004 illustrated the extent to which Cheney operated without presidential supervision. Bush was apparently unaware of the strong opposition in the Justice department to the warrantless domestic surveillance program until senior governmental officials were in the process of preparing their letters of resignation. It was largely fortuitous that the mass resignations were narrowly averted at the eleventh hour. Since Bush delegated important areas of responsibility to Cheney and depended on the Vice President for much of his information, Cheney was relatively free to act autonomously within the executive branch.

Near the end of his term, Cheney said that the "most important thing that any vice president needs to know is to understand what it is that the president he works for wants him to do. That really will determine everything in terms of the kind of meetings he attends, the policy issues he gets involved in, the kind of assistance or advice he is asked for by the president and others...But to the degree of influence you have, whether or not it's a consequential vice presidency, if you will, is going to depend almost solely upon the President and what he wants."¹³⁶ To a great extent, Cheney exercised power which Bush gave him and without accountability because Bush allowed it. Bush (and the country) paid a huge price for that deference to the Vice President under the circumstances.

¹³⁵ Woodward, Plan of Attack 392

¹³⁶ Interview of the Vice President by Wolf Blitzer, Late Edition, January 11, 2009; Foon Rhee, Cheney Defends War on Terror, January 9, 2009
http://www.boston.com/news/politics/politicalintelligence/2009/01/cheney_defends.html

B). Absence of Policy-Making Process

Bush failed to establish or adhere to any regular policy-making process and that absence removed an important vehicle for holding Cheney accountable for the quality of his counsel. The scholarly literature on presidential decision-making emphasizes the importance of a policy process which exposes the President to competing perspectives regarding policy alternatives.¹³⁷ Such a process is critical to ensure that competing views are presented and subject to scrutiny. Cheney dominated decision-making in critical areas in the Bush administration¹³⁸ and he resisted the establishment of a policy-making process in the White House which would insure that presidential decisions followed a full airing of competing views. Cheney's positions prevailed often because those likely to articulate competing views were excluded from meetings or not given fair opportunity to present their objections.

Some key administration figures recognized the problem posed by the absence of a policy-making process early in the administration. Beginning during the transition and repeatedly during the first years of the administration, Secretary of Treasury O'Neill spoke to his old friend Cheney frequently regarding the problem. O'Neill expressed his concern that the White House establish a policy process in domestic and economic affairs which included honest brokers and rigorous examination of competing proposals. He encouraged Cheney to act to remedy the situation. On each occasion, Cheney listened, characteristically noncommittal and never disagreeing with O'Neill's points,¹³⁹ and thanked him for his "sharp insights."¹⁴⁰

¹³⁷ See Pfiffner, *supra* note 122, at 363,365-367.

¹³⁸ See e.g., Pfiffner, *supra* note 122 ,at 366 (national security advice)

¹³⁹ Suskind, *supra* note 68, at 43-44, 98.

¹⁴⁰ *Id.* at 167-69.

Belatedly, O'Neill concluded that the absence of such a process was not inadvertent but reflected Cheney's preference and design. O'Neill told Cheney that Bush was "caught in an echo chamber of his own making, cut off from everyone other than a circle around him that's tiny and getting smaller and in concert on everything—a circle that conceals him from public view and keeps him away from the one thing he needs most: honest, disinterested perspectives about what's real and what the hell he might do about it. But then 'I realized why Dick just nodded along when I said all this, over and over, and nothing ever changed...because this is the way Dick likes it."¹⁴¹

The absence or perversion of process became more acute following 9/11. Cheney deliberately excluded key stakeholders from the deliberations which led to the domestic surveillance program and the military commission order. Cheney and his associates sought to insulate programs from review by excluding doubters and denying them access to information. After 9/11 Cheney's office sought to circumvent FISA "in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations."¹⁴² Similarly, Bush decided to hold the Geneva Conventions inapplicable to alleged al Qaeda or Taliban detainees on January 8, 2002 before he heard from the State department.¹⁴³

Cheney not only played an important role in promulgating these and other programs, he and his office were instrumental in protecting them from scrutiny. Rather, than welcoming discussion regarding important programs, Cheney's office acted to chill reexamination of policies it supported. After Goldsmith questioned the legality of CIA interrogation tactics, Addington berated him in harsh language. Addington's proclivity for sarcastic exchanges impeded deliberation.

¹⁴¹ *Id.* at 292-93.

¹⁴² Goldsmith, *supra* note 47, at 181. See also Gellman, *supra* note 9, at 277-281 (Addington's refusal to allow NSA attorneys to review materials re domestic surveillance program)

¹⁴³ Mayer, *supra* note 90, at 121-125. See also Pfiffner, *supra* note 122, at 371-74.

In adopting this approach, Cheney's office deviated by 180 degrees from the philosophy Mondale espoused in suggesting that the Vice President could serve as an important presidential adviser. Mondale thought the "biggest single problem" of recent administrations had been the failure to expose the President "to independent analysis not conditioned by what it is thought he wants to hear or often what others want him to hear." Mondale promised to offer Carter "impartial advice" and to "help assure that you are not shielded from points of view that you should hear." Mondale pledged to "help maintain the free flow of ideas and information which is indispensable to a healthy and productive administration."¹⁴⁴ True to his pledge, Mondale worked to expose Carter to a wider range of advice. He often did not speak at larger meetings Carter attended for fear that his expressions might deter others from expressing competing views.

Cheney's approach was antithetical to that Mondale followed. Cheney's office did not simply avoid meaningful Congressional oversight. It structured decision-making within the executive branch regarding key components of the war against terror in such a manner to avoid debate. The aversion to process allowed Cheney's office to advance dubious proposals without subjecting them to the gauntlet of discussion. Cheney dominated the advising system, and his views carried the day, on important issues relating to the war on terror but the result was flawed decisions.¹⁴⁵

C). Cheney's Lack of Vice-Presidential Self-Restraint

Bush's leadership style and indifference to process created vacuums which afforded Cheney the chance to exert historic influence. Cheney seized, and exploited, those opportunities. Cheney's lack of self-restraint represented a third way in which conventional modes of accountability eroded. Other vice

¹⁴⁴ Memorandum, Mondale to Carter, December 9, 1976, Minnesota Historical Society <http://www.mnhs.org/collections/upclose/Mondale-CarterMemo-Transcription.pdf>

¹⁴⁵ Pfiffner, *supra* note 122, at 371.

presidents had acted with considerable restraint in performing their functions. Mondale, for instance, would not become involved with activities without first getting Carter's permission. When he did engage the bureaucracy, he was careful to pursue Carter's objectives, not his own agenda. By contrast, Cheney assumed an aggressive approach which manifested itself in a variety of settings.

As an advisor, Cheney spent enormous amounts of time alone with Bush. Because Vice Presidents are somewhat constrained from advising in larger meetings,¹⁴⁶ Vice Presidents need private access to the President in order to perform their advising role. When a President is as uninformed and as indifferent to process as was Bush that access can provide the Vice President the ability to influence policy without his views being subject to any meaningful review. The great disparity in knowledge and information between Bush and Cheney gave Cheney opportunity to dominate policy without his views being subject to the scrutiny.

Cheney also was able to use his stature to extract favorable responses from the bureaucracy. Cheney frequently traveled to Langley or other intelligence agencies for briefings or to review data. Some agents claimed they felt pushed to provide analysis tailored to Cheney's policy preferences.¹⁴⁷ When the Inspector General of the CIA issued a report suggesting that the CIA enhanced interrogation program was illegal, Cheney summoned him to his office.¹⁴⁸

Cheney also used his public platform as Vice President to force administration policy. McClellan noted Cheney's "habit of being unable to stay on message." Cheney "simply could not contain

¹⁴⁶ Vice-presidential comment in larger meetings may deter others from speaking since they may assume the Vice President reflects the President's position or may not wish to differ from the Vice President. In addition, vice presidential advice may be leaked which may prove embarrassing to the President and Vice President. Moreover, by not speaking in large meetings, Vice Presidents avoid the possibility of being on record for positions adverse to those the President adopts.

¹⁴⁷ Mayer, *supra* note 90, at 288-289.

¹⁴⁸ *Id.* at 288.

his deep-seated certitude, even arrogance” to Bush’s detriment.¹⁴⁹ Cheney often made statements which went beyond available intelligence or beyond decisions Bush had made. For instance, in December, 2001 he cited a report, subsequently discounted, that the mastermind of the 9/11 attacks, had traveled to Iraq for meetings. He claimed that Iraq had a “robust set of programs” to develop weapons of mass destruction, an assertion which McClellan said pushed “the envelope of credibility.”¹⁵⁰

In August, 2002 Cheney became impatient as Bush seemed inclined to seek a United Nations resolution as a prelude to war and as Republican luminaries, like Henry Kissinger, James Baker and Brent Scowcroft, raised doubts regarding the advisability of unilateral American military action. Cheney told Bush he wanted to speak out on Iraq without telling Bush what he would say. Cheney’s speech, to the Veterans of Foreign War convention, claimed that “there is no doubt that Saddam Hussein now has weapons of mass destruction. There is no doubt he is amassing them to use against our friends, against our allies, and against us.”¹⁵¹ Accordingly, Cheney told the VFW it would be useless or even counterproductive for United Nations inspectors to return to Iraq. “[A] person would be right to question any suggestion that we should just get inspectors back into Iraq, and then our worries will be over, Cheney said.” “Saddam has perfected the game of cheat and retreat, and is very skilled in the art of denial and deception. A return of inspectors would provide no assurance whatsoever of his compliance with

¹⁴⁹ McClellan, *supra* note 6, at 138. See also David Nather, *How Cheney Has Used His Clout*, CQ Wkly, June 11, 2007 (Quoting Lawrence Wilkerson: “I think the vice president still goes off and does things on his own ...but the president has figured that out, and he’s trying to take steps to correct it.”)

¹⁵⁰ McClellan, *supra* note 6, at 136.

¹⁵¹ Richard B. Cheney, Remarks by the Vice President to the Veterans of Foreign Wars 103rd National Convention (Aug. 26, 2002), American Presidency Project <http://www.presidency.ucsb.edu/ws/index.php?pid=79746&st=&st1=>

U.N. resolutions. On the contrary, there is a great danger that it would provide false comfort that Saddam was somehow 'back in his box.'"¹⁵²

The very option Cheney derided was under active consideration. Cheney's remarks, Bob Woodward later wrote, "just short of a declaration of war, were widely interpreted as administration policy."¹⁵³ The New York Times described Cheney's speech as "the administration's most forceful and comprehensive rationale yet for attacking Iraq" and quoted administration officials as saying that Cheney's comments reflected Bush's thinking.¹⁵⁴ Powell was upset at Cheney's effort to hijack policy.¹⁵⁵ In this instance, Cheney's ploy was not entirely successful. Bush later called for a United Nations resolution predicated on sending inspectors back to Iraq. Yet Cheney's willingness to stray publicly from administration policy illustrated one way in which he did not honor traditional notions of vice-presidential restraint.

Cheney's staff did not act with the circumspection characteristic of most vice-presidential staffs. In the aftermath of 9/11, Addington dominated sessions among administration lawyers and conducted himself in a manner which inhibited discussion. When John Bellinger arranged to meet with Gonzales to suggest that a CIA report suggested that the United States was committing war crimes by treating detainees in an inhumane manner at Guantanamo, Addington showed up, dominated the conversation and insisted that there would be no review of Bush's decision that all at Guantanamo were enemy combatants entitled to no process. When Goldsmith advised Gonzales and Addington that the Fourth

¹⁵² Remarks by the Vice President to the Veterans of Foreign Wars 103rd National Convention August 26, 2002, American Presidency Project <http://www.presidency.ucsb.edu/ws/index.php?pid=79746&st=&st1=>

¹⁵³ Woodward, *supra* note 51, at 164.

¹⁵⁴ Elisabeth Bumiller and James Dard, *Eyes on Iraq; Cheney says Peril of Nuclear Attack Justifies Attack*, N. Y. Times, August 27, 2002, at A1 available at <http://www.nytimes.com/2002/08/27/world/eyes-on-iraq-cheney-says-peril-of-a-nuclear-iraq-justifies-attack.html>.

¹⁵⁵ Woodward, *supra* note 51, at 165-166.

Geneva Conventions protected terrorists in Iraq, Addington became angry and “barked,” “The President has already decided that terrorists do not receive Geneva Convention protections....You cannot question his decision.” Bush’s decision related to al Qaeda and Taliban terrorists under the Third Convention, a different question.¹⁵⁶

More than two years later, after Matthew Waxman, a Deputy Assistant Secretary of Defense, convened a Pentagon meeting in which a number of military figures advocated a return to Geneva standards, he was summoned to a White House meeting with Libby and Addington. They berated him for raising the issue (“What you’re doing ...is an abomination!” Addington reportedly bellowed) and told him the issue was forever closed.¹⁵⁷ When Goldsmith advised Gonzales and Addington that the Justice Department could find no legal basis for an important counterterrorism program, Addington replied in “disgust” that “[i]f you rule that way, the blood of the hundred thousand people who die in the next attack will be on *your* hands.”¹⁵⁸ “Why are you trying to give away the president’s power,” he would respond to opposing views.¹⁵⁹ Others were hesitant to differ with Addington; his aggressive and sarcastic replies made disagreeing unpleasant and Cheney’s implicit backing lent weight to Addington’s counsel. Moreover, Cheney’s office, often through Addington, opposed promotions for those with whom they had disagreed.¹⁶⁰

D) Cheney’s Lack of Presidential Ambition

¹⁵⁶ Goldsmith, *supra* note 47, at 41-42.

¹⁵⁷ Gellman, *supra* note 9, at 351-352.

¹⁵⁸ Goldsmith, *supra* note 47, at 71.

¹⁵⁹ *Id.* at 124; Savage, *supra* note 60, at, 336.

¹⁶⁰ Goldsmith, *supra* note 47, at 171; Gellman, *supra* note 9, at 345-346.

Cheney's lack of ambition to succeed Bush as president was, as Bush and Cheney suggested, significant but not primarily because it committed Cheney to follow Bush's agenda as they claimed. On the contrary, Cheney's lack of presidential aspirations made him and/or the administration less accountable in at least three different respects.

From an administrative standpoint, Cheney's lack of political ambition made him freer to deviate from Bush's policies than if he sought to succeed Bush. The political ambition of conventional vice presidents provides them with added reason to advance the agenda of the Chief Executive. They hope their loyalty will be reciprocated when it comes time to make their own run for the White House. That motivation did not constrain Cheney. Cheney's lack of ambition for future political advance freed him to follow his, not Bush's, agenda on occasions and to push policy in directions he preferred.¹⁶¹ In essence, Bush and Cheney had it backwards when they celebrated the virtues of Cheney's lack of ambition as committing him to Bush's agenda. On the contrary, it liberated him from having to follow Bush's lead. Not surprisingly, administration officials seemed to advance that argument less often during the second term than the first.

Cheney's lack of presidential ambition also made him less politically accountable. Cheney had less reason than his predecessors to travel the country and meet with voters, especially during the second term. He did not need to spend time doing the things aspiring presidents do such as meeting with a range of citizens, holding press conferences and media interviews or considering public opinion. Cheney had less reason than other vice presidents to avoid policies which were politically unpopular.

¹⁶¹ See e.g., John Dickerson, *Cheney's Dreadful Lack of Ambition*, Slate, Nov. 21, 2005, <http://www.slate.com/id/2130793/>.

“Maybe you could say that his political antennae aren’t up as high as they would be if he were running for president himself,” Andrew Card said in 2006 in something of an understatement.¹⁶²

Not surprisingly, Cheney’s standing in public opinion polls cratered. A CBS News poll during the first months of 2006 found Cheney’s favorability rating to be 18%, a score which columnist Richard Morin found to be lower than O.J. Simpson’s standing after his trial for allegedly murdering his wife and another man, lower than Josef Stalin’s standing with Russians, and lower than Vice President Spiro Agnew’s ratings in his last days in office.¹⁶³ Other poll results, though not quite so dismal, confirmed Cheney’s lack of popularity outside a small segment of the Republican base.¹⁶⁴

Finally, Cheney’s own lack of political ambitions made the Bush administration less democratically accountable during the second term than other recent administrations. Prior vice presidents had sought to use the vice presidency as a springboard to a presidential race. That continuing reality helped mitigate the antidemocratic impact of the Twenty second Amendment which imposed term limits on the president. Even during the second term, the Vice Presidents’ ambitions for a “third term” gave the administration reason to weigh popular opinion in fashioning policy.

That incentive was missing during Bush’s second term. Cheney said in February, 2007 that “I’m not running for office. I’m not worrying about what the folks in Iowa are going to say in the caucuses in

¹⁶² Todd S. Purdum, *A Face Only a President Could Love*, Vanity Fair, June 1, 2006 available at <http://www.vanityfair.com/politics/features/2006/06/Cheney200606>.

¹⁶³ Richard Morin, *18%; Just How Low Is It*, Wash. Post, March 5, 2006, at B03, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/03/AR2006030302045.html>.

¹⁶⁴ See e.g., Mark Murray, *Bush, GOP Mired in Political Quicksand*, MSNBC.com, Nov. 9, 2005 <http://www.msnbc.msn.com/id/9981177/> (Wall Street Journal/NBC News poll finding 27% with positive views of Cheney, 11% lower than Bush and down from 42-41% favorability rating in January, 2005); *Dick Cheney: Job Ratings as Vice President*, Polling Report.com <http://www.pollingreport.com/C.htm> (showing Cheney with 40% approval rating in Gallup Poll in March, 2006) (showing 30% in Harris Poll then thinking he was doing “excellent / pretty good” job)

January of next year. I'm there to do a job, and that's to call them as I seem, to help the president to the best of my ability be the best president he can to address the issues of the day. We have tough issues. It's a tough job. And his job is tougher than my job. If you worried about the polls, you'd be absolutely traumatized and unable to get anything done."¹⁶⁵ Cheney argued that his "guiding principle" had been to do what he "thought was necessary and essential for the country" not "to achieve the highest level of polls that we could during the course of this administration."¹⁶⁶ A March, 2008 exchange with Martha Raddatz of ABC News reflected Cheney's aversion to public opinion. When Raddatz observed that "[t]wo-thirds of Americans say [the war in Iraq is] not worth fighting, and they're looking at the value gain versus the cost in American lives, certainly, and Iraqi lives," Cheney replied, "So?" "[Y]ou don't care what the American people think?" Raddatz inquired. "No, I think you cannot be blown off course by the fluctuations in the public opinion polls..." Cheney replied.¹⁶⁷

There is, of course, something admirable about leaders who put their country's well-being above their political careers. Yet democracy does not allow leaders the luxury of responding with an indifferent "So?" when confronted with the fact that the public has rejected their central policy objectives. Democracy is predicated in important part on a continuing relationship between leaders and citizens. Policy is only sustainable if it commands public support; without it, other governmental figures are likely to resist it. Moreover, the absence of public support may signal that leaders have failed to adequately defend policy or that the policy is inherently indefensible. Cheney's lack of political

¹⁶⁵ Interview by Jonathan Karl, ABC News, with Vice President Cheney (ABC television broadcast Feb. 23, 2007), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2007/02/20070223-2.html> ("I come back again to the proposition, do we get paid to be popular? Do we get paid to have a nice standing in the polls? Or do we get paid to do what we think is right for the country to make those tough calls")

¹⁶⁶ Interview by Chris Wallace, FOX News, with Vice President Cheney (Fox television broadcast Dec. 19, 2008). Cheney reportedly was critical of Powell for worrying about his public standing. See Woodward, *supra* note 51, at 411

¹⁶⁷ Interview by Martha Raddatz, ABC News, with Vice President Cheney, (ABC television broadcast March 19, 2008) <http://georgewbush-whitehouse.archives.gov/news/releases/2008/03/20080319-5.html>.

ambition, coupled with his indifference to public opinion, excused him from the conventional, yet vital, political activity of engaging in a continuing dialogue with the public.

E) Absence of Media Engagement as a Constraint

Cheney's lack of presidential ambition contributed to his disengagement from media interactions. Although interaction with the media furnishes one means of holding most political leaders accountable, Cheney spent relatively little time with the press. At times, he appeared on the Sunday talk shows or on the MacNeil-Lehrer program to serve as a public advocate for the war on Iraq or other administration programs. But Cheney conducted few press conferences, generally on overseas trips, and his interviews occurred irregularly and were concentrated on Fox News and other conservative outlets.

Initially, Cheney's aversion to engaging the media might have reflected his desire not to overshadow Bush or a concern by Bush's public relations personnel that frequent Cheney interviews would diminish Bush.¹⁶⁸ Cheney's appearance on Meet the Press on September 16, 2001, when Cheney discussed his dominating role on September 11, 2001 had that effect, especially when Cheney's central role at the White House was juxtaposed with Bush's absence from the White House as he moved around the country before returning in the evening. Even if this consideration influenced early strategy, it is hard to believe it continued to be a factor as the country became more accustomed to Bush as President.

Cheney claimed that he reduced his media accessibility to protect his role as presidential advisor. "Cheney decided early in his vice presidency that his job would not include much time with

¹⁶⁸ Hayes, *supra* note 12, at .

journalists,” his authorized biographer, Stephen Hayes wrote.¹⁶⁹ Cheney called that practice “a deliberate decision on my part” which was designed to protect his credibility as an advisor.¹⁷⁰ “But it’s a very conscious decision my part that the job I’ve had as Vice President can best be done if I’m not out publicly commenting on all of these issues,” Cheney told Martha Raddatz. “The question you and your colleagues in the press always ask is, well, what did you advise the President; did you support that policy; did he do what you recommended? Those are questions I won’t answer. My value to him is the fact that we can talk privately, I can tell him what I think. Sometimes he agrees, sometimes he disagrees. He doesn’t always take my advice, by any means. But the contribution I make, and my value to him I think is greater because he knows and everybody else knows I’m not going to be in the front pages of the paper tomorrow talking about what I advised the President on a particular issue.”¹⁷¹

That explanation seems suspect, to say the least. The media does not often ask Vice Presidents to divulge the advice they gave the President and those who have reached the nation’s second job are generally pretty nimble in avoiding or recasting questions they prefer not to answer. Most vice-presidential interviews present occasions to explain presidential initiatives not to promote the Vice President at the expense of the Chief Executive. Cheney could have spoken to the press without discussing the advice he gave the President.

Cheney’s course reflected rather an aversion to the press. This attitude was manifested on many occasions and in different ways. For a while, Cheney barred New York Times reporters from his

¹⁶⁹ Hayes, *supra* note 12, at xi.

¹⁷⁰ Interview by Mark Knoller, CBS Radio, with Vice President Cheney (CBS radio broadcast Jan. 7, 2009). See also Hayes, Cheney, 505 (“It’s not my job to spin the press....It’s my job to give [the president] the best policy advice. And to a large extent I’m very cautious about how much I see the press....”) See also Interview by Martha Raddatz, ABC News with Vice President Cheney (ABC television broadcast Mar. 24, 2008) <http://georgewbush-whitehouse.archives.gov/news/releases/2008/03/20080324-8.html>.

¹⁷¹ See Interview by Martha Raddatz, ABC News with Vice President Cheney (ABC television broadcast Mar. 24, 2008) <http://georgewbush-whitehouse.archives.gov/news/releases/2008/03/20080324-8.html>

plane. His office pushed, unsuccessfully, to impose stricter criminal sanctions for government officials who made unauthorized disclosures.¹⁷² In the aftermath of the incident in which Cheney accidentally shot a fellow hunter Cheney avoided releasing the story for hours; when he did, it was given to a small, local newspaper rather than to a national outlet. Surely Cheney and his associates could not have thought that the first instance in which a Vice President shot another person in more than 200 years was not news. Cheney's lack of presidential ambitions removed a reason to burnish his public image through media availability and freed him to follow his dispositions regarding media inaccessibility. In so doing, he escaped one of the types of activities which have helped make past vice presidents accountable.

F). Absence of Bureaucratic Restraint as a Form of Vice-Presidential Accountability

Cheney was subject to fewer bureaucratic restraints than were other recent vice presidents. On occasion other administration figures did push back against Cheney—Powell on Iran policy, Comey on domestic surveillance—but Cheney appears to have faced less internal resistance than most of his predecessors for much of the life of the Bush administration. A number of the features already identified helped explain this phenomena. Bush's leadership style made many in the administration reluctant to appeal Cheney's decisions to him. Thus, Ashcroft did not take his unhappiness with the military commission order to Bush nor did those who lost in the budget review process before Cheney's committee ask Bush to intervene.¹⁷³ Similarly, Bush's aversion to process limited the opportunities for others to persuade Bush to follow their advice, not Cheney's. Cheney had unlimited access to Bush, others did not, and Bush was simply not interested in exposing himself to a range of sources of information and ideas.

¹⁷² Lichtblau, *supra* note 92, at 132-133.

¹⁷³ Gellman, *supra* note 9, at 164-166, 259-261.

In addition to these other factors, Cheney's control of the transition allowed him to create a government in which he was less accountable than prior vice presidents. His ability to place allies in important positions meant the government was loaded with his friends and those who shared his outlook and there were fewer people who would push back against him. Often when Bush solicited Cheney's views, Cheney was simply blessing recommendations which he or his allies had originated.

As Lawrence Wilkerson put it:¹⁷⁴

His network is positioned almost everywhere in the government that's important. It was marvelous to watch his network work. ... His people attended, and rarely did they ever say anything; [they] just took good notes so that they could take it back and flummox the process wherever the vice president elected to flummox the process. ... Their modus operandi most of the time was to just be quiet, gather information and go back and tell the big guy. Then the big guy weighed in with the even bigger guy -- the president -- and generally speaking, got what he wanted.

When the events of September 11 gave the war on terror paramount importance, Cheney, through Addington, was largely able to dominate legal policy regarding presidential power and the laws of war. The leading figures in Bush's administration were not lawyers and Attorney General Ashcroft increasingly became an outsider as the first term wore on. Bush's first two counsels, Alberto Gonzales and Harriet Miers, were presidential cronies who were totally unversed in the legal areas which became most important.

Addington filled this vacuum. He had encountered constitutional and statutory issues relating to national security throughout his career as a government lawyer as had another Cheney ally, Timothy Flanigan, who Cheney had conveniently installed as Gonzales' deputy. They were reinforced by the

¹⁷⁴ Frontline Interview with Lawrence Wilkerson, (December 13, 2005) *available at* <http://www.pbs.org/wgbh/pages/frontline/darkside/interviews/wilkerson.html>; see also Murphy and Purdum, *supra* note 109 (comments of Wilkerson) ("Cheney brings this accumulation of power and ability to influence the bureaucracy to a fine art. He surpasses Kissinger even. ... But he turns everything on its head and he *becomes* the power. And he does it through his network. This is a guy who's an absolute genius at bureaucracy and an absolute genius at not displaying his genius at bureaucracy. He's always quiet.")

relationship they developed with John Yoo at the Office of Legal Counsel and William Jim Haynes II, General Counsel of the Department of Defense and an alumnus of the Cheney Pentagon.¹⁷⁵

Addington was able to dominate legal policy owing to his unfettered access to Gonzales and Miers and the work of their office. Addington received copies of all documents sent to Gonzales and Miers and was invariably present when they conferred regarding an important legal issue. He saw executive orders before they reached Bush and often substantially revised documents after others had already seen them.¹⁷⁶ When Gonzales became Attorney General during Bush's second term, Cheney's office was again able to influence the work of the Office of Legal Counsel, a relationship which had been interrupted during Goldsmith's brief tenure.

Addington's views had weight because of the common perception that he spoke for Cheney. Others recognized him as Cheney's "eyes, ears, and voice." Those hearing Addington's views in Gonzales' office or elsewhere could reasonably assume they were hearing a preview of what Cheney would later tell Bush.¹⁷⁷ Cheney's clout with Bush gave those who preferred to be on the winning side on legal issues reason to concur in Addington's prescriptions. His power was largely derivative of Cheney's influence.

G) Absence of Constraint of Consensus Politics

Cheney's rejection of any form of consensus politics, both in dealing with Congress and with other nations, removed another important form of accountability. Cheney's rejection of the politics of consensus reduced the extent to which he needed to consider opposing views and either persuade or

¹⁷⁵ Gellman, *supra* note 9, at 132-139; Savage, *supra* note 60, at 76-84.

¹⁷⁶ Goldsmith, *supra* note 47, at 76-77.

¹⁷⁷ *Id.* at 77.

accommodate them. Although President-elect Bush made overtures which suggested that he would seek bipartisan consensus, even before the inauguration Cheney rejected all suggestions that Bush pursue consensus politics. Appearing on Face the Nation on December , 2000, Cheney declared that Bush had run on a platform “and we have no intention at all of backing off of it....The suggestion that somehow, because this was a close election, we should fundamentally change our beliefs I think is just silly.”¹⁷⁸ When Cheney met with a handful of Republican moderate senators from the northeast shortly after the Court decided Bush v. Gore, he quickly rejected their suggestions that the new Bush administration modify its positions to seek bipartisan consensus.¹⁷⁹ Cheney was undeterred when his approach drove Senator Jim Jeffords from the Republican party, thereby costing the Republicans control of the Senate during its first two years. Two years later, Cheney justified resurrecting the idea of reducing the tax on corporate dividends, an idea which Treasury Secretary O’Neill viewed as economically unsound, by asserting ““We won the midterms. This is our due.””¹⁸⁰ When he spoke to the Cabinet following Bush’s reelection, one of the narrowest in history, Cheney applauded Bush’s initial decision not to ““trim the sails”” and suggested that the 2004 election provided a mandate ““to complete the task,””¹⁸¹ a somewhat optimistic interpretation in view of the narrow dimensions of the margin.

Cheney demonstrated similar dispositions in international relations. Cheney tended to have little patience with the notion that America should consult other nations in formulating foreign policy. He

¹⁷⁸ Suskind, *supra* note 68, at 9.

¹⁷⁹ Draper, *supra* note 28, at 90.

¹⁸⁰ Suskind, *supra* note 68, at 291.

¹⁸¹ McClellan, *supra* note 6, at 237.

was the primary opponent of the notion that the United States should seek a United Nations resolution before attacking Iraq.¹⁸²

H) Noncompliance with Record Keeping Requirements

Cheney's aversion to accountability became most conspicuous in his efforts to escape compliance with legal requirements. Cheney resisted complying with federal rules requiring that governmental offices report to the Information Security Oversight Office of the National Archive regarding handling of classified materials. The office of the Vice President had complied through 2002 at which point Cheney's office argued that it was not subject to an executive order establishing a uniform system of protecting classified information by claiming that the Office of the Vice President was not an entity within the executive branch.¹⁸³ Cheney advanced the position to resist an audit of the way in which his office handled classified information. When officials at ISOO asked the Attorney General to rule that the Vice President was subject to the rules, Addington recommended eliminating the office by executive order.¹⁸⁴

Cheney's position evoked widespread condemnation and mockery. Representative Rahm Emanuel, the third ranking Democrat in the House, filed legislation to remove Cheney's funding of \$4.8 million dollars from the executive branch budget.¹⁸⁵ In response, Addington reserved, but backed off of,

¹⁸² Woodward, *supra* note 51, at 157.

¹⁸³ See Letter, U.S. Representative Henry Waxman to Vice President Cheney, (June 21, 2007) available at <http://speaker.house.gov/blog/?p=507>; Peter Baker, *Cheney Defiant on Classified Material*, Wash. Post, June 22, 2007 at A01 available at <http://washingtonpost.com/wp-dyn/content/article/2007/06/21AR2007062102309.html>; Michael Isikoff, *Challenging Cheney*, Newsweek, Dec. 24, 2007 <http://www.newsweek.com/id/81883>; Scott Shane, *Agency is Target in Cheney Fight on Secrecy Data*, N. Y. Times, June 22, 2007, at 1 available at <http://www.nytimes.com/2007/06/22/Washington/22cheney.html>.

¹⁸⁴ Isikoff, *supra* note 183.

¹⁸⁵ Mike Allen, *Dems Force Cheney to Flip-Flop on Secret Docs*, The Politico, June 27, 2007, <http://www.politico.com/news/stories/0607/4670.html>; Michael Abramowitz, *Cheney Aide Explains Stance on Classified Material*, Wash. Post, June 27, 2007 at A05 available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/26/AR2007062602052.html>

that constitutional claim, interposing instead a new justification for exemption based upon a reading of “agencies” in the executive order.¹⁸⁶ Less than two months later, Cheney’s office reasserted the position that it was not part of the executive branch, this time in resisting a subpoena relating to documents regarding warrantless surveillance.¹⁸⁷

Cheney’s position seemed inconsistent with positions previously taken. For instance, in Cheney’s appeal to the Supreme Court in *Cheney v. United States District Court for the District of Columbia*, he essentially characterized himself as an actor in the executive branch. Cheney’s legal filings identified himself as a “close” and “senior” presidential advisor acting within the Executive Branch “to fulfill core Executive Branch functions under Article II of the Constitution.” Cheney suggested he should enjoy the same prerogatives as the President.¹⁸⁸ Cheney should benefit from the presumption of regularity which attaches to conduct of officials of the Executive branch, particularly those of the rank of President and Vice President.¹⁸⁹ In the dispute with ISOO, however, he claimed, in part, that he was not part of the executive branch to escape reporting requirements regarding classified records. His ability to exalt form over substance flowed in part from his lack of political ambition which minimized the consequences to him of adverse political reaction.

¹⁸⁶ Letter from David Addington, Chief of Staff to Vice President Cheney, to Senator John Kerry (June 26, 2007).

¹⁸⁷ Letter, Shannen Coffin, General Counsel to Vice President Cheney, to Senator Patrick Leahy (August 20, 2007).

¹⁸⁸ Petition for Writ of Certiorari, *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004) (No. 03-475) 2003 WL 22669130.

¹⁸⁹ Brief for the Petitioners, *Cheney*, (No. 03-475) 2004 WL 250239.

Some suggested that Cheney was creating his own branch of government.¹⁹⁰ More precisely, Cheney advanced the claim that he straddled the two political branches as a way to escape accountability. When expedient to do so, he claimed the privileges associated with each but denied membership in either to avoid disclosure duties imposed on both.

VI) Conclusion

Cheney began to lose some influence during the second term. Gellman traces Cheney's decline to his mishandling of the reauthorization of the domestic surveillance program in March, 2004 when Bush saw, perhaps for the first time, the potential political consequences of allowing Cheney such latitude in view of the low priority the Vice President gave political considerations.¹⁹¹ Yet Cheney retained formidable power even after that date. When Gonzales replaced Ashcroft as Attorney General and Harriet Miers became the new White House counsel, Cheney's influence over legal policy was restored. His office blocked the appointment of Patrick Philbin to head OLC—he had worked with Goldsmith on revising Yoo's memoranda—and supported that of Stephen Bradbury who wrote an opinion authorizing CIA interrogators to use numerous techniques. When Comey objected to Bradbury's memoranda, Gonzales told him he was under enormous pressure from Cheney to acquiesce.¹⁹² Cheney played a leading role in creating the short list of Supreme Court candidates and in interviewing Judges John Roberts and Samuel Alito.¹⁹³

¹⁹⁰ Posting of Yochi J. Dreazen to WSJ Washington Wire blog, *For Cheney, His Own Branch of Government?* <http://blogs.wsj.com/washwire/2007/07/31/for-cheney-his-own-branch-of-government/> (July 31, 2007, 18:56 EST); Michael Duffy, *The Cheney Branch of Government*, Time, June 22, 2007, available at <http://www.time.com/time/nation/article/0,8599,1636435,00.html>

¹⁹¹ Gellman, *supra* note 9, at 323-326.

¹⁹² Mayer, *supra* note 90, at 308-312, 323-324.

¹⁹³ Gellman, *supra* note 9, at 358-360.

Yet other events eroded Cheney's position. In March, 2006, Bush replaced Card as Chief of Staff with Joshua Bolten who asserted more control over White House decision-making. In November, 2006, Bush fired Cheney's ally, Rumsfeld, over Cheney's objections, replacing him with the more independent minded and pragmatic Robert Gates. Cheney began to lose some internal arguments in a new national security context in which Rumsfeld no longer reinforced his predilections, in which Gates was more independent and in which Rice had greater influence with Bush than had Powell. Rice persuaded Bush to take a less bellicose approach to Iran and North Korea, contrary to Cheney's urgings.¹⁹⁴

Cheney's standing was also hurt by two unique events—the trial and conviction of Libby, Cheney's chief of staff, for perjury with its embarrassing disclosures about Cheney's office, and the incident in which Cheney shot a fellow hunter. Both cast Cheney in a negative light and eroded his public standing. The Iraq war, which Cheney had championed, went poorly as many of the events Cheney had confidently predicted (*e.g.* the discovery of weapons of mass destruction, heroic welcome by the Iraqi people) did not materialize. Cheney's popularity reached record lows. Although Bush commuted Libby's sentence, he refused, despite Cheney's persistent efforts, to pardon him.¹⁹⁵

Notwithstanding these defeats, Cheney exercised a level of power as vice president which would have exceeded the imagination of virtually anyone who has held, or thought about, that office during its 220 year existence. Yet as striking as the power Cheney exercised was Cheney's ability to insulate himself from the sort of informal checks which had held past Vice Presidents, and other presidential subordinates, accountable. Had some of the checks remained in place, Cheney's authority would have been lessened and policy-making in the Bush administration might have taken a different course. A

¹⁹⁴ See Michael Duffy, *Cheney's Fall from Grace*, Time March 8, 2007, available at <http://www.time.com/time/nation/article/0,8599,1597226,00.html>

¹⁹⁵ Massimo Calabresi and Michael Weisskopf, *Inside Bush and Cheney's Final Days*, Time, July 24, 2009 available at <http://www.time.com/time/politics/article/0,8599,1912297,00.html>.

different President would not have granted Cheney such autonomy or been so indifferent to process or failed to recognize the implications of placing the initial transition in the Vice President's hands. A different Vice President would have exercised more self-restraint or would not have been so oblivious to the impact of decisions on his or her political future or so indifferent to bipartisanship or multilateralism or viewed process as something to manipulate rather than as a vehicle to promote deliberative decision-making.

The Cheney vice presidency developed in the unique way it did due to the confluence of a variety of factors which maximized vice-presidential power while minimizing vice-presidential accountability. The war on terror was certainly among those factors. It contributed to the exercise of sweeping presidential, and vice-presidential, powers during the Bush-Cheney years. Yet before and independent of the events of September 11, 2001, the course was set to aggrandize the presidency and to create a largely unaccountable Cheney vice presidency.

It would be a mistake to regard the Cheney service as an indictment of the vice presidency. That institution, like any other political office, is subject to abuse and carries no guarantee of exemplary performance. Yet the trajectory of the office, especially since the Mondale period, is promising and has represented one of the real success stories in American government. The continuing challenge is to construct in each administration a menu of activities which will allow the Vice President to contribute as an advisor and trouble-shooter in a way which makes his or her exercise of power accountable. The failure of Bush and Cheney to do so constitutes one of the failures of their tenure.

