Chapter Five

Coordinated Action and the Limits of Presidential Control over the Bureaucracy: Lessons from the Bush Presidency

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Presidents have considerable formal authority over the executive branch of the government. Article II of the U.S. Constitution enumerates the formal powers of the U.S. chief executive. One salient area where presidential power has manifested itself in recent years is President George W. Bush’s issuance of Executive Order 13422 on 18 January 2007. From the view of presidential authority, the most striking (and controversial) provision of this executive order is the enhanced role the Office of Information and Regulatory Affairs (OIRA) plays in determining the acceptability of agency rulemaking activities. Under EO 13422, Executive Office of the President (EOP) appointees play an increasingly vital role in determining which agency rules will be promulgated from those which are not. Such enhanced executive authority is consistent with a broader dual trend in presidential strategy centering on increased centralization and politicization of the agency policymaking process (see Rudalevige and Lewis 2005).1 The “modern” origin of this trend began with Reagan issuing EO 12291 in February 1981, whereby all executive branch agencies were required to conduct a regulatory impact (cost-benefit) analysis for all proposed regulations exceeding an annual impact of $100 million. These regulatory impact analyses were subject to executive clearance by OIRA. This executive order was augmented by EO 12498, which made all major rules subject to OMB director approval. President Bill Clinton extended this power in September 1993 by issuing EO 12886, which once again altered the rulemaking process via OIRA, and revoked the terms of both 12291 and 12498. As can be seen from this illustration, presidents’ unilateral authority over the federal bureaucracy can be quite
extensive and formidable as they meld executive policymaking to fit their own policy preferences.

It is commonly accepted (and for good reason) that presidents have unilateral authority over the executive branch, and thus possess an institutional advantage for directing bureaucratic agency activities vis-à-vis Congress (Moe 1995). However, presidential influence over the bureaucracy via unilateral action is predicated on both timely and full compliance by public agency officials. Yet, in practice, bureaucratic compliance often does not work in the manner posited by unilateral action accounts of executive influence over the bureaucracy. That is, presidential intent can be thwarted by either bureaucratic delay (Carpenter 2003) or bureaucratic opposition (Halperin 1974). One obvious source of noncompliance to presidential will is attributable to civil servants whose employment position is independent of the president that they serve under (Heclo 1977: 171-173; Seidman and Gilmour 1986). Still a less commonly understood source of bureaucratic noncompliance can be attributable to political executives who serve at the pleasure of the president.

In this chapter, we make two broad theoretical claims concerning the latter form of bureaucratic noncompliance. First, we contend that effective coordination between presidents and political executives is a necessary condition for obtaining presidential control over the bureaucracy. In turn, we claim that effective coordinated presidential action requires policy cohesion between the president and (appointed) political executives charged with the responsibility of overseeing bureaucratic agencies. We highlight these obstacles to presidential control over the bureaucracy by examining the George W. Bush presidency. This presidency provides a conservative empirical test of our logic since it is commonly thought of as being robust in its exercise of executive authority (Rudalevige 2005), and thus is conducive for maintaining bureaucratic compliance consistent with administration policy goals. Specifically, we analyze two cases where political executives either delayed or thwarted presidential will: the Bush administration’s desire to relax emission standards through the reform of New Source Review (NSR) implemented by the Environmental Protection Agency (EPA); and the Department of Justice’s (DOJ) opposition to the National Security Agency’s domestic surveillance program advocated by Bush administration.

The outline of the chapter is as follows. The first section discusses the limits to understanding presidential influence over the bureaucracy by solely focusing on the power of unilateral presidential action. The second section discusses why executive branch policy cohesion is a necessary condition for observing effective presidential coordination action. The third section presents the two empirical illustrations noted in the preceding paragraph to highlight instances where Bush administration policies have been met with a lack of compliance from political executives. Finally, this chapter concludes by discussing the implications of imperfect executive policy cohesion for theoretical models analyzing bureaucratic politics, and how a mixed strategy of “soft” and “hard” power may improve bureaucratic compliance consistent with presidential intent. 

The Limits of Presidential Control over the Bureaucracy

Over the past two decades, scholars have spent considerable time analyzing the means by which presidents can ensure bureaucratic compliance. These means include setting the budgetary agenda for government agencies via OMB budget requests (e.g., Moe and Wilson 1994: 36), the power to appoint political executives to serve as agency leadership (e.g., Wood 1988), and unilateral authority via executive orders, signing statements, proclamations, and the like (Howell 2003; Moe and Howell 1999). While U.S. presidents possess strong formal powers over the bureaucracy, such authority does not ensure bureaucratic compliance.

Obtaining bureaucratic compliance requires that presidents are successful in handling hierarchical (i.e., vertical) coordination dilemmas between their administration and political executives. If such problems cannot be well handled, it is rather unlikely that cooperation among political executives or between them and the permanent bureaucracy will occur. Vertical coordination dilemmas are often the most difficult to resolve since the agent (political executive) has hidden information that they can exploit at the expense of the principal (president) (Miller 1992: 196). Effective presidential coordinated action requires political executives to comply with presidential intent. A presidential strategy of coercion via formal authority is one way to solve this dilemma. Yet, solving this dilemma often requires “soft power” in the form of bargaining and positive inducements to ensure bureaucratic compliance. This is because agent control via fiat is a rare occurrence within organizations (Barnard 1938). If the executive branch is an alliance comprised of a confederation of sovereigns joined together in pursuit of a common goal (Seidman and Gilmour 1986: 79), presidential use of “hard power” via formal authority will be of
limited effectiveness in obtaining bureaucratic compliance. That is, whenever support for a common goal dissipates within the executive branch, presidential control naturally becomes difficult.

Rapid turnover among political executives makes effective coordinated presidential action even more difficult (Heclo 1977). Therefore, presidents do not have sufficient time to develop trust between themselves and their appointed surrogates (Aberbach and Rockman 2000: 170–171). Such trust is crucial for developing effective coordinated presidential action. This is because incentives have limited utility for understanding how a principal (president) can effectively obtain compliance from an agent (political executive). Rather trust is premised on the notion of cooperation, which can imply a norm of reciprocity between the principal and agent (Miller and Whitford 2002: 258). Although selective recruitment based on shared policy goals and loyalty to the administration can facilitate coordination between the president and political executives (Moe 1985b), it is by no means a perfect remedy for solving the president's principal-agent problem (Whitford 2002: 171–172). Thus, effective coordinated presidential action requires cooperation between both the president and political executives.

Next, we discuss the critical variable for understanding effective coordinated presidential action—executive branch policy cohesion. Specifically, we address the centrifugal forces that cause political executives to deviate from presidential will, and why it is not an uncommon occurrence. Later, we show that both timely and complete bureaucratic compliance is a difficult aim for presidents to achieve—even in the case of the George W. Bush presidency, an administration known for its vigorous efforts at politicizing the executive branch bureaucracy.

**Why Executive Policy Cohesion Matters**

Because the president is the singular chief executive, the effective exercise of presidential authority within the U.S. executive branch is often assumed. While it is true that presidents possess certain unilateral advantages for exerting their influence over the bureaucracy (Moe 1995), it remains equally true that presidents face obstacles in obtaining bureaucratic compliance that cannot be gleaned from a strict interpretation of executive power enumerated in the U.S. Constitution. In this study, we highlight one critical obstacle—namely **executive branch policy cohesion**. This concept refers to the extent to which various officials housed within the executive branch of government act in accordance with the president's wishes. For the purposes of our study, we analyze our executive coordination thesis by restricting our focus to the relationship between presidents and their own top-level political appointees. After all, one should expect greater policy agreement between the president and their political appointees than compared to presidents and the permanent bureaucracy.

Our argument is straightforward: effective coordinated presidential action relies on a high level of executive branch policy cohesion. That is, presidents who seek to obtain bureaucratic compliance require political appointees to act in accordance with their policy wishes. Otherwise, there is little chance that agency careerists will follow the president's wishes if the latter's chosen agents go against their boss. A high level of policy cohesion among presidents and their political appointees is thus required in order to obtain bureaucratic compliance. This is because greater cohesiveness within an organization limits policy choices since it restricts intragroup competition by enforcing group demands on any individual actor who wishes to "defect" (March and Simon 1958: 60).

Several pressure points exist that may prevent presidential will from being faithfully executed by political appointees. First, political appointees will often have divided loyalties between the president and the agency that they lead (Heclo 1977: 98). This tension is natural since political executives routinely serve as "policy brokers" between the administration and the permanent bureaucracy (Aberbach and Rockman 2000). Presidents recruit political executives to implement policy on their behalf for a good reason—they possess a shared philosophy on matters of both policy and governance (Moe 1985b). Yet, counterbalancing presidents' desire for control over their political appointees is the fact that political executives often view themselves as representing the agency's long-term mission, thus giving voice to the concerns of agency careerists. Political executives who "go native" by supporting the professional mission of an agency can cause a decline in executive branch policy cohesion by producing disagreement between them and the president (Rourke 1984: 194).

Second, political executives may be insulated from White House influence if they represent agencies possessing strong support external to the executive branch. Under such circumstances, it is often necessary for the administration to make concessions to the agency (Rourke 1984: 74). For example, the USDA's Bureau of Chemistry (led by Harvey Wiley) was vigorous in its enforcement of the 1906 Pure Food and Drug Act on a wide array of issues ranging from caffeine and cocaine in Coca-Cola to blended forms of whiskey, even in the face of opposition by Republican-organized interests controlling both the
executive and legislative branches of government at the turn of the twentieth century (Carpenter 2001: Chapter Eight).

Third, while the American presidency is typically viewed as becoming increasingly centralized over the past half century (e.g., Aberbach and Rockman 1976; Burke 1992; Moe 1985b; Weko 1995; but see Rudalevige 2002), it is widely regarded that this institution has become increasingly complex through time. As Samuel Kernell (1989: 224) notes, “As the White House becomes more complex, so too do these management problems. Presidents who manage their own offices will increasingly risk being overwhelmed with policy work.” Even if presidents place a great premium on loyalty as a selection criterion for hiring political executives, the increasing multiplicity of presidential actors both inside and outside the EOP will engender a decline in executive branch policy cohesion. Thus, the American presidency’s increasing complexity makes effective presidential coordinated action an even more difficult goal to attain.  

Finally, presidents may face incentives to select political appointees for reasons beyond achieving their own policy goals. These alternative selection criteria include technical expertise, rewarding campaign workers, satisfying the demands of organized interests, to name but a few (Wilson 1989: 198–199). Although presidents desire policy responsiveness from their political executives, they also realize that by doing so they may be exchanging greater loyalty for a lower level of bureaucratic competence (Huber and McCarty 2004; Lewis 2008).

Coordination is fundamental to the functioning of all organizations (March 1988; Miller 1992; Wilson 1989: 24). Intrabranch policy coordination within a given political institution is essential for obtaining effective presidential influence over policy administration. In turn, such effective coordinated presidential action requires a high level of policy cohesion between presidents and political executives. Although the presidency’s singular position as the unitary head of the executive branch affords it with special advantages over Congress for eliciting bureaucratic responsiveness (Moe 1995), it will not necessarily translate into both full and timely bureaucratic compliance. As Norton E. Long (1949: 260) has noted, “The personal unity of the Presidency cannot perform the function of Hobbes’ sovereign since his office lacks the authority of Hobbes’ contract. Single headedness in the executive gives no assurance of singleness of purpose. It only insures that the significant pressures in a society will be brought to bear on one office.”

In the next section, we examine two important cases involving the George W. Bush presidency where the administration’s will was not executed in a manner consistent with full and timely bureaucratic compliance by political executives. As a result, these case studies shed much needed light on the importance associated with coordinated presidential action as a means to understanding intra-executive branch relations. In our first case study, we examine the clash between the Bush administration and former EPA chief Christine Todd Whitman regarding NSR. NSR is an administrative rule requiring private firms to modernize their industrial plants if they were built prior to the Clean Air Act of 1970. The EPA’s desire to maintain the bureaucratic discretion afforded by NSR led to bureaucratic delay in response to the Bush administration’s attempts to eliminate this regulatory mechanism from this agency’s policymaking arsenal. This case highlights the fact that while presidents may get their preferred course of action, they may not obtain it in a timely manner.

The second case study examines the coordination problems between the Bush White House and Department of Justice regarding the National Security Agency’s (NSA) domestic wiretapping program. The Justice Department viewed NSA’s program as a breach of the U.S. Constitution’s protection of civil liberties, whereas the Bush administration viewed this program as a key administrative weapon in protecting the United States and its interests from terrorism. Most notably, presidential will in this instance was thwarted by the actions of Justice Department political executives Jack Goldsmith and James B. Comey. Because of the George W. Bush administration’s reputation for placing a high premium on policy loyalty and corresponding efforts to elicit policy responsiveness as noted in several chapters of this volume, we feel that it is an appropriate empirical setting for analyzing the limits of presidential influence over the bureaucracy. Although the Bush presidency has had vigorous influence over administrative behavior in many areas, the point of these case studies is to provide some balance to the empirical debate analyzing the extent to which presidents can control policy administration via executive appointments.

Empirical Illustrations


The battle between the White House and several EPA personnel over the reform of NSR highlights how a lack of effective coordinated
According to Whitman, both Andrew Card, Bush’s chief of staff, and National Security Adviser Condoleezza Rice approved Whitman’s statement about carbon emissions before the G8 conference.3

However, days after Whitman’s reiteration of Bush’s assurance to reduce carbon emissions, Bush reversed his campaign pledge in a letter to four Republican senators: Chuck Hagel (Nebraska); Jesse Helms (North Carolina); Larry Craig (Idaho); and Pat Roberts (Kansas) (Jehl and Revkin 2001; Whitman 2005). Citing a report by the Energy Department, Bush argued that any attempt to regulate carbon dioxide would cause energy companies to shift from coal to natural gas, which would lead to higher energy costs (Pianin and Goldstein 2001). Dick Cheney and Spencer Abraham guided Bush to this decision. Whitman was one of the last top administration officials to find out about the reversal (Ahearn 2001).

Whitman recalls that President Bush broke the news about the reversal in a meeting on 13 March 2001. Immediately after the meeting, she encountered Dick Cheney, who gave her a curt “hello” in the hallway next to the Oval Office. Whitman reports that the vice president appeared rushed, and that he asked one his aides for a letter. As it turned out, that was the letter to the four senators that reversed Bush’s campaign pledge and undercut Whitman’s previous statements (Whitman 2005: 175–176). Whitman was on the outside looking in on the real decisions being made within the Bush administration about the environment. As Whitman stated in an interview in early 2007, it was clear that Bush gave “great deference to [Cheney’s] opinion,” including on environmental issues.6

The environmental policy feud between Whitman and Cheney set the stage for another confrontation—this time involving the NSR program. NSR has been a source of much controversy. Much of the consternation has been over the vague language of the policy that afforded EPA administrators considerable policy discretion. Specifically, NSR does not require power plant operators to install modern pollution control technology when performing “routine repair and maintenance.”7 Prior to the mid-1990s, the EPA only passively enforced NSR because of the confusion over the language (Schlesinger 2002). However, when Clinton’s EPA decided to actively pursue violators of NSR, calls for both NSR reform and the abolition of NSR were ubiquitous among Republicans (Whitman 2005: 184). In May 2001, the Bush administration ordered a review of the NSR program. Striking some as indicative of the White House’s proindustry position, the White House ordered the review to be a joint effort between the EPA, which is responsible for NSR, and the Energy
Department, which was widely seen as favoring energy and manufacturing industry interests (Seeley 2002a).

Whitman's main problem with NSR was the imprecision of the "routine repair and maintenance" rule (Whitman 2005: 183). She stressed the need for either an environmentally conscious reform of NSR or a similar substitute program (184). Whitman's political solution to this dilemma was to agree to abolish NSR in exchange for an environmental program—dubbed the "Clear Skies Initiative"—that would implement caps on emissions via a market-based system. The idea was to get the energy industry to support substantive emission caps by doing away with the controversial NSR rule. However, Clear Skies had been tabled in Congress since 2002. According to Whitman, the Clear Skies Initiative received little support, because the White House had offered to gut NSR without the expectation of serious support for Clear Skies (Becker and Gellman 2007).

According to an internal EPA memo leaked in early 2002, the Energy Department, working in close concert with Cheney's task force, proposed changes that would "viti ate" NSR.8 Whitman said that the task force even pushed to have the Energy Department—not the EPA—responsible for NSR. The regulatory relevance of NSR depends upon the commitment to enforcement shown by the administering agency. The higher level of NSR enforcement exhibited by the Clinton administration demonstrates this point. The regulatory burden to plant operators would likely be less if the Energy Department were in charge of the NSR program, because the Energy Department—especially in the Bush Administration—would probably be more sympathetic to proindustry interests. Whitman fought "tooth and nail" to defeat this proposal, and finally did so after imploring former chief of staff Andrew Card to prohibit the proposed change (Becker and Gellman 2007; Whitman 2005: 185).

In late 2002, the Bush administration announced changes to the NSR program. Although the EPA argued that the reforms would actually provide a net benefit to the environment, many Democrats and environmentalist groups blasted the reforms (Schlesinger 2002). While the reforms did appear to relax some regulations, the new policy was more measured than the plan originally proposed by the Energy Department.9 However, the new reforms did not include a clarification of the ill-defined "routine maintenance and repairs" line (ibid.). The 2002 reforms did not include a clarification on the vague rule, because Whitman and Cheney/Abraham had vastly different ideas on how to deal with NSR. If reform was going to happen, Whitman wanted both a pragmatic and environmentally conscious approach to NSR reform, whereas Cheney's task force, in conjunction with the G. W. Bush White House, wanted to allow power plants to make expensive upgrades to equipment without triggering an emissions review by the EPA (Schlesinger 2002; Whitman 2005: 185).

Whitman's opposition to the Cheney/Abraham NSR reforms was attributable to both her own policy preferences and the influence of several key EPA career executives. On a personal level, she thought the NSR reforms were politically unwise and environmentally harmful, and she appeared to hold this view on emissions prior to her EPA job. As governor of New Jersey, Whitman supported efforts during the Clinton administration to reduce emissions from coal-fired power plants (New York Times Editorial 2001). In addition, Whitman had strong support from her subordinates within EPA. When this support began to deteriorate via key departures from within the agency, the policy tide within the executive branch turned against her. Specifically, against this backdrop of long-standing executive branch policy disagreements, a pair of key EPA career executives began an exodus of key agency personnel that would extend beyond Whitman's tenure as EPA chief.

First, Eric Schaeffer, former director of the Office of Regulatory Enforcement at the EPA, resigned in February 2002. In his resignation letter, he expressed frustration at "fighting a White House that seems determined to weaken the rules we are trying to enforce" (Seeley 2002c). Schaeffer specifically mentioned the White House's proposed NSR rule changes as a key irritant. Although Schaeffer said he was not sure if Whitman was effective, he did say that she was "pushing back" on the White House's proposed policy changes. According to Schaeffer, "This is a watershed issue for her…There's a reason you haven't seen a really bad proposal come out yet—she isn't just sitting there. She's starting to work it and starting to understand the scale of what we're looking at" (ibid.). Next, Sylvia Lowrance, the former deputy assistant administrator for enforcement, retired in August 2002 (Lee 2004). Lowrance expressed annoyance at the perceived lackluster way in which the Bush administration prosecuted Clean Air Act compliance cases.

Ultimately, the White House won the intra-administration battle over defining the terms "routine" and "maintenance" with respect to NSR policy when Whitman resigned in June 2003 (Pianin and Gugliotta 2003). At the time, she said she resigned to spend more time with her family; however, she later admitted that personal reasons were only partly the cause of her resignation. A major reason for her resignation was her realization that the White House was going to
announce major reforms to NSR in just a few weeks. In her book, Whitman said that she simply could not sign the reforms being proposed by the White House (2005: 185). Subsequent to Whitman’s departure, Bruce Buckheit resigned as head of the EPA’s Air Enforcement Division six months later. In an interview on Dateline NBC in April 2004, Buckheit said that he would still be at the EPA if not for the administration’s proindustry stance on the Clear Air Act. Richard Biondi, former associate director of the Air Enforcement Division at the EPA, also made evident his frustration, stating that the “rug was pulled out from under [them]” by the Bush administration (Lee 2004).

In August 2003, the Bush administration enacted the NSR reforms that were the cause of Whitman’s departure. The reforms allowed older power plants to upgrade their facilities without having to install modern pollution controls, as long as the cost did not exceed the equivalent of 20 percent of the cost it would take to replace the plant’s entire essential production equipment. In addition, the reforms stated that the upgraded equipment must be the “functional equivalent” of the replaced equipment (Pianin 2003a).

Marianne Horinko, the interim EPA administrator at the time, vigorously defended the program, contending that the reforms would not affect emission levels (Pianin 2003b). However, critics argued that the rules essentially voided the intent of NSR, which was to phase out plants that did not conform to the Clear Air Act. Under the 2003 reforms, plants could potentially operate indefinitely without installing newer pollution control systems (ibid.). Bush’s reforms never went into effect, however, because of court challenges by several states and environmental groups (Sissell 2007). The D.C. Court of Appeals struck down the NSR reform on 17 March 2006, and the Supreme Court declined to hear an appeal (Becker and Gellman 2007; Sissell 2007).

Before its demise, the August 2003 reforms to NSR continued to receive support from Whitman’s successors. In January 2004, while the administration’s reforms were in limbo due to legal restrictions, Mike Leavitt, Whitman’s immediate successor, expressed optimism and hope that the Bush administration’s reforms would stand (Pianin 2004). Stephen Johnson, who took over for Leavitt in 2005, also showed support for the administration’s ideas on NSR reform. In 2005, Johnson backed a program that would have further weakened NSR, according to environmental advocates. The proposed plan would have allowed plants to avoid installing modern pollution controls technologies as long as their hourly rate of emissions did not increase. Thus, a plant could legally emit more pollutants in a given week, month, or year by increasing the number of hours the plant operates on a daily basis (Eilperin 2005). To the adulation of environmental advocates everywhere, the Supreme Court rejected this interpretation of NSR in Environmental Defense et al. v. Duke Energy Corp. in April 2007 (Greenhouse 2007).

Whitman, and by extension the EPA, incurred both political and policy losses over NSR reform. It is clear that Cheney’s voice on environmental issues trumped the EPA’s position at the White House. Whitman recalls that when she met with Bush about energy-related issues, Cheney always stayed in the room with President Bush after she departed, thus showing that Cheney had the ear of the president (Becker and Gellman 2007). Furthermore, the White House was not happy with the EPA’s proposed reforms for NSR, because their reforms needed to be “more proindustry” (ibid.). Of course, the administration’s proposed reforms did just that. Furthermore, since Whitman’s resignation, the White House has been able to install two EPA administrators who have supported the White House’s efforts to dull NSR’s regulatory teeth.

However, it is clear that these reforms could have come much earlier. Cheney’s task force wanted to make big changes to NSR as early as 2001. In May 2001, Whitman sent a memo to Cheney warning the White House about its proposed changes that would weaken NSR (Pianin 2003c). In August 2001, while Whitman was vacationing with her family in Colorado, Cheney called her to inquire why the EPA was “dragging its feet” on weakening NSR. Cheney pushed her to make NSR changes quickly, but Whitman protested again that doing so would be environmentally unwise and would only invite court challenges (ibid.). Throughout the course of the next two years, several staff members at the EPA strongly objected to vast reforms to NSR that would damage the environment. The White House was obviously dealing with a potentially explosive situation politically, as Whitman was prepared to resign over reforms with which she did not agree. The White House had to tread lightly on this issue. Without Whitman’s objections, it is very likely that the NSR changes would have come much earlier than August 2003 (Seeley 2002a). Instead, the delay in EPA’s implementation of the NSR reforms in accordance with the Bush administration’s policy wishes was over two years, marked from the May 2001 memo from Whitman to Cheney to the August 2003 reforms promulgated shortly after Whitman’s departure (Pianin 2003c; Symons 2003).

The case of NSR reforms and the EPA provides two lessons about executive politics. First, this case illustrates that political executives can
thwart the president’s agenda by causing bureaucratic delay in policy implementation. Yet, it is worth noting that career executives play a critical role in supporting political executives under such circumstances. When the strength of careerist support wanes, most often through key personnel departures, then political executives become vulnerable to presidential influence without a strong base of support within the agency. Therefore, the existence of robust bureaucratic cohesion is crucial for public agencies seeking to fend off attempts at political influence over policy and administrative matters (Rourke 1984).

Relatedly, conventional wisdom suggests that a president’s unilateral authority over public agencies gives the president reason to expect prompt bureaucratic compliance. The NSR case suggests a more tempered view of presidential control over the bureaucracy is needed. Indeed, the president exerts tremendous power over the executive branch, but high-level political appointees possess the capacity to obstruct and delay the president’s agenda. The broader lesson from this case study is clear. Political executives may not ultimately win policy battles with the White House, but they can make it costly in both time and political capital for the White House to promulgate controversial policy changes when considerable internal agency opposition exists.

The NSA Surveillance Program (2002–2007)

In addition to delaying policies favored by the White House, political executives can occasionally change administration policy. The highly classified—and highly controversial—NSA domestic eavesdropping program illustrates this point. In early 2004, the White House sought the Justice Department’s approval for the renewal of the NSA surveillance program. Top officials at the Justice Department viewed some of the program’s provisions as legally indefensible, and the end result of this policy battle was an outcome that moved the status quo away from the White House’s preferred policy outcome. This case shows that political executives can impede even a White House viewed by many as exercising unfettered unilateral authority (New York Times Editorial 2005). The NSA program represented a vast expansion of executive power, but many observers overlooked the implications of the way the current NSA program was formed. The program was a result of a policy compromise between the White House and the Justice Department, and it serves as a good example of how a lack of bureaucratic compliance can result in policy shifts by the White House. Thus, the NSA program reveals both an expansion of presidential power and that bureaucratic noncompliance can diminish the president’s authority.

Acting on leads from almost a dozen government officials, the New York Times published a story on 16 December 2005 revealing the existence of a secret domestic surveillance program administered by the NSA (Risen and Lichtblau 2005). President Bush confirmed the existence of the program later that day. According to Bush administration officials, the program, which started in 2002, allows the NSA to wiretap any phone conversation between someone in the United States and someone in another country. There must be a “reasonable basis” to conclude that one party to the conversation is somehow affiliated with a terrorist group and Bush administration officials had stated that the NSA—or any other agency—must still obtain warrants to eavesdrop on purely domestic conversations (ibid.). While the Bush administration briefed congressional leaders about the program well in advance of the disclosure of the program in 2005 (ibid.), the public revelation of the program caused a torrent of criticism to be unleashed on the administration by Congress and the media (Johnston 2007a).

Before the implementation of the NSA surveillance program, any government intelligence agency, including the NSA, had to obtain a warrant from the Foreign Intelligence Surveillance Court to engage in domestic eavesdropping. The hearings for these warrants take place within closed sessions at the Justice Department (Risen and Lichtblau 2005). Congress passed the 1978 Foreign Intelligence Surveillance Act (FISA), which mandates this requirement, in response to surveillance abuses by the Nixon White House (ibid.). Many legal scholars, pundits, and policymakers maintain that any domestic surveillance without a warrant is forbidden by the Constitution. The Congressional Research Service, the nonpartisan research arm of Congress, has argued that the Bush administration’s legal grounds for the program are dubious (Lichtblau and Shane 2006).

The disclosure of the NSA program eventually faded from the news headlines. However, a year and a half later, on 15 May 2007, James B. Comey, the former deputy attorney general, delivered a spellbinding testimony on Capitol Hill that thrust the wiretapping program back into the headlines. The Senate Judiciary Committee summoned Comey to question him about the firings of several U.S. attorneys by Alberto Gonzales’ Justice Department. The topic eventually turned to Comey’s riveting account about the debate within the Bush administration over
the NSA surveillance program (Milbank 2007a). For the first time, the public learned firsthand about the strong policy disagreements that this program caused between the White House and the Justice Department.\textsuperscript{13}

Legal decisions within the administration concerning interrogation techniques and surveillance programs after September 11 were kept within a small cadre of administration lawyers (Rosen 2007). In particular, the White House relied heavily on the legal opinions of John Yoo (Stevenson and Liptak 2005). Yoo was a deputy assistant attorney general in the Department of Justice’s Office of Legal Counsel (OLC) and the OLC advises the president on the boundaries of presidential power (Rosen 2007). Because Jay Bybee (OLC Director) had relatively little expertise on security issues, he routinely delegated such policy matters to Yoo, who took an expansive view of executive authority regarding issues such as interrogations and surveillance programs (Stevenson and Liptak 2005). Yoo’s legal opinions served to insulate the White House from subsequent legal problems (including prosecution) (Rosen 2007).

Policy change effectively began once Bybee left as OLC Director in late 2003. White House Legal Counsel Alberto Gonzales suggested that Yoo replace Bybee as OLC director, but Ashcroft, with whom Yoo often clashed, vetoed that suggestion (Rosen 2007). Jack Goldsmith, Yoo’s friend, replaced Jay Bybee as OLC director on Yoo’s recommendation in October 2003. However, Goldsmith immediately clashed with some administration officials over several issues (ibid.). Part of this tension arose from the extraordinary secrecy surrounding the NSA surveillance program. Goldsmith has stated that prior to his arrival as OLC Director, NSA lawyers were not allowed to study any legal analysis of the surveillance program. For example, in 2003, David Addington, longtime advisor to Dick Cheney, denied a request by the NSA’s inspector general to see an OLS legal review of the surveillance program (ibid.).

In late 2003, Goldsmith began a formal legal review of the NSA surveillance program, and in 2004 he determined that certain facets of the program had no firm legal foundation (Eggen 2007c). He briefed James Comey and former attorney general John Ashcroft on his findings, and both Comey and Ashcroft concurred with Goldsmith’s analysis.\textsuperscript{15} Because some White House officials disagreed vehemently with Goldsmith on this issue, this set the stage for the infamous hospital room altercation between White House officials and several Department of Justice officials. On 10 March 2004, as Attorney General John Ashcroft lay recovering from emergency gall bladder surgery at George Washington University Hospital in Washington, DC, the White House notified Ashcroft’s wife that Card and Gonzales were on their way to the hospital to visit Ashcroft.\textsuperscript{15} Ashcroft’s wife, who forbade any visitors to see Ashcroft, immediately contacted David Ayres, Ashcroft’s chief of staff, about the visit (Eggen and Kane 2007). Ayres then alerted Comey (Taylor Jr. 2007), and Comey arrived at the hospital just minutes before Card and Gonzales did (Eggen and Kane 2007). Jack Goldsmith also rushed to the hospital when he heard of Card and Gonzales’ visit.

According to several witnesses, the two White House visitors wanted to discuss more than Ashcroft’s convalescence. Card and Gonzales were there to obtain the Justice Department’s reauthorization of the NSA wiretapping program. Even though Ashcroft and Comey, after an extensive Justice Department review of the legalities of the NSA program, both agreed on 4 March 2005 that the NSA needed to revamp the program in order to put it on a better legal foundation, Card and Gonzales apparently felt they could persuade Ashcroft to approve the renewal (ibid.). After Card and Gonzales asked that Ashcroft sign off on the renewal of the wiretapping program, Ashcroft reiterated the Justice Department’s view that the program lacked a legal basis, and he refused to sign the reauthorization papers brought by Card and Gonzales (ibid.). Ashcroft also reminded Card and Gonzales that Mr. Comey was the acting attorney general, but, according to Comey, Card and Gonzales ignored him and then left promptly after Ashcroft rebuffed them (Milbank 2007a).

Upon returning to the White House, Card and Gonzales phoned Comey to set up a meeting at the White House to discuss the NSA program. Comey expressed his dismay at Card and Gonzales’ seemingly inappropriate visit to Ashcroft. He said that he would not attend a meeting with them without a witness, who ended up being Solicitor General Theodore Olson. Comey, along with Olson, met with Card and Gonzales at 11 p.m. that night at the White House. According to Comey, nothing was resolved at the meeting (Eggen and Kane 2007).

The next day, 11 March 2004, terrorists killed over 200 rail commuters in Madrid, and President Bush reauthorized the program that day without approval from the Justice Department (Eggen and Kane 2007). In response to this apparent disregard for the Justice Department by the White House, Comey drafted a letter of resignation, effective from 12 March 2004. David Ayres, Ashcroft’s chief of staff, persuaded Comey to delay his resignation until Ashcroft was healthy enough to join him in resigning (ibid.). FBI Director Robert Mueller was also prepared to resign, along with other top Justice Department
preferences. Although American presidents possess formidable institutional authority to elicit bureaucratic responsiveness, these powers are of limited value when there is fundamental disagreement between the chief executives and their political appointees. We argue that political executives do more than implement the president’s wishes. When policy disagreements are palpable, political executives may oppose their appointive political principal, and thus not comply with the latter’s wishes.

The Dilemma of Executive Branch Coordination: Implications and Prospects

The current state of scholarship in executive politics suggests that the presidency’s formal powers are formidable, and thus can be effectively used to implement its desired policies through the executive branch bureaucracy (e.g., Howell 2003; Krause and Cohen 2000; Lewis 2005, 2008; Mayer 2001; Moe 1985b, 1995; Moe and Howell 1999; Rudalevige 2005; Wood 1988). While we concur that presidents possess robust formal mechanisms to elicit bureaucratic responsiveness, the effective use of such means often requires policy cohesion between presidents and their political executives. When presidential authority cannot produce executive branch policy cohesion, one cannot infer that presidents will necessarily control the bureaucracy. Absent a high level of executive branch policy cohesion, political executives can significantly delay or impede the implementation of policies advocated by presidents. This chapter has attempted to highlight the limits of presidential control over the bureaucracy when political executives have sharp differences in policy preferences with the presidents whom they serve.

This chapter raises the question how can presidents best obtain bureaucratic compliance? Our answer is that formal executive authority (i.e., “hard power”) has limits for effective presidential control over the bureaucracy. Yet, a presidential strategy relying solely on “soft power”—for example, trust, esprit de corps among executive branch personnel, and persuasion—is also potentially fraught with problems. This is because bureaucratic compliance sometimes requires “sticks” since agencies may have incentives, as well as their own unique set of preferences, which render such “carrots” as being ineffective. Perhaps the optimal administrative strategy undertaken by presidents for obtaining bureaucratic compliance should involve
utilizing a mixture of hard power and soft power. The balance between these two classes of tools would be determined by how strong agency incentives for policy opposition were, and the extent to which presidents could rely on soft power to get their way.

In conclusion, we have attempted to make two broader points about shared internal power within executive branch politics. First, that a president’s unique position as the singular head of the executive branch does not necessarily guarantee presidential control over the bureaucracy. Although Congress suffers from well noted collective action problems, presidents incur internal executive branch coordination problems of their own. Also, political executives will not possess the same policy preferences as the presidents who appointed them to their position. This latter point may seem obvious, but it has direct implications for formal theoretic models of bureaucratic politics that treat the agency’s ideal point as being synonymous with the president’s because political executives are appointed to head agencies by the former (Epstein and O’Halloran 1999; cf. Volden 2002). Specifically, existing separation of powers models that make such simplifying assumptions regarding executive branch preferences not only overstate presidential control, but also understate both bureaucratic autonomy and congressional influence. The overarching lesson from the George W. Bush presidency is simple—even presidents who vigorously utilize their formal authority as a means of exerting their will over the bureaucracy will face executive branch coordination problems. Taking these organizational realities into account will provide students of executive branch politics with a more accurate theoretical understanding of presidential power in the realm of policy administration.

Notes

1. This trend predates the advent of the modern administrative presidency that began during the Nixon presidency (Nathan 1975). Please see Dickinson and Rudalevige (2004) for an excellent historical treatment of efforts at presidential centralization through the Bureau of the Budget during both the Truman and Eisenhower administrations.

2. This line of argument is analogous to one that I have made elsewhere concerning the deleterious impact of the increasing organizational size and scope of the presidency on institutional policy performance (Krause 2004).


4. Several news reports mention the delay caused by the dispute between the EPA and other administration factions. See Kahn (2001); New York Times Editorial (2002); Seelye (2002a).


6. Whitman, PBS Frontline Interview.

7. Ibid.

8. This EPA internal memo was not made available to the public. According to news reports, it was leaked to an unnamed environmental group, which in turn gave it to the Times. See Barcott (2004).

9. The Energy Department originally recommended a 15-year period after a review during which factories and power plants would be exempt from NSR. The final changes to NSR in November 2002 allowed only a 10-year exemption period. See both Seelye (2002a) and Schlesinger (2002).

10. Whitman, PBS Frontline Interview.


13. The New York Times ran a piece on 1 January 2006 that mentioned the incident, but the source of the leak was not named in the piece and many details were excluded. See Lichtblau and Risen (2006).


15. See Milbank (2007a). Comey believes that the call to Ashcroft’s wife could have come from President Bush.

16. However, it is currently impossible to confirm that the reforms made by the Justice Department in March 2004 are still in effect. Ashcroft, Goldsmith, and Comey are no longer part of the administration, and the administration has not revealed the specifics of the reforms. In August 2006, a federal district judge in Detroit ruled the surveillance program illegal, but the sixth Circuit Court of Appeals reversed this ruling in July 2007. The Supreme Court could eventually decide the matter. See Weinstein (2007).