The presidency of George W. Bush was widely noted for its expansion of executive power. More than a few commentators found the Bush presidency disorienting in this respect. In a 2007 editorial looking back over the events since the terrorist attacks of September 11, 2001, the New York Times began, “There are too many moments these days when we cannot recognize our country.”

The Times referred to “lawless behavior” on the part of the administration motivated by panic after the attacks. A long litany of examples followed—they included the Abu Ghraib prison scandal, the National Security Agency (NSA) wiretapping controversy, the justification of torture, unnecessary increased law enforcement power, the Guantanamo detentions, and inhumane interrogations conducted by the Central Intelligence Agency (CIA) in foreign countries.

In the years following 9/11, lawyers and legal scholars had a similar vertiginous sense that their constitutional universe was changing in unfamiliar ways. Theories of constitutional change are in the business of explaining how this could happen. The Bush presidency is only the most recent demonstration of the important role that informal constitutional change plays in our constitutional system.

For the purposes of this article, I am assuming that the critics of the Bush administration were correct to conclude that a number of policies implemented since 9/11 were departures from the status quo in that they were illegal or unconstitutional and the arguments in their favor were unsound. This allows me to get the discussion of how constitutional change occurred in the Bush presidency off the ground without retracing well-worn controversies on topics such as torture and NSA surveillance.

I will argue that the Bush administration’s changes to the constitutional order can be explained in the following way. After the 9/11 attacks, President Bush cleared the ground for significant informal constitutional change by using his Commander in Chief power to aggressively define the reality in which all branches of government would henceforth operate. That reality was a state of war equivalent to World War II, the last total war fought by the U.S. The informal changes were often secret in that the public (and other administration officials) did not know they were taking place. They were further enabled by the Office of the Vice President (OVP) going operational in the manner of a cabinet department. Lawyers in the White House, OVP, and the Department of Justice used their positional advantages to immunize executive officials from legal liability by adopting the theory of “preclusive” Commander in Chief powers. Finally, as a related point, I suggest executive officials were driven primarily by a fear of accountability generated by the internal logic of the constitutional system rather than from the more commonly posited desire to aggrandize their own power.

A useful quality of an institutional approach to constitutional change is that it highlights the latent power contained within roles created by the text. History suggested that after a Pearl Harbor-like attack, vast power to shape the nation’s response would flow to President Bush as Commander in Chief. Arguably the
The single most important constitutional action in the aftermath of the shocking and disorienting events of 9/11 was Bush’s assertion that the United States was at war.

A famous remark can help orient us with regard to President Bush’s ability to define this new constitutional reality. In an article on the anti-analytical qualities of the Bush presidency, reporter Ron Suskind quoted a “senior adviser to Bush.” The adviser characterized Suskind as being “‘in what we call the reality-based community,’ which he defined as people who ‘believe that solutions emerge from your judicious study of discernible reality.’” He continued, “‘That’s not the way the world really works anymore . . . We’re an empire now, and when we act, we create our own reality. And while you’re studying that reality—judiciously as you will—we’ll act again, creating other new realities, which you can study too, and that’s how things will sort out. We’re history’s actors . . . and you, all of you, will be left to just study what we do.’”

No doubt some analyses of the “reality-based community” remark focus on the implicit assumption of the Bush adviser that the administration was immune from the real-world consequences of its actions. However, consider this remark in the light of 9/11. First, it suggests that the exercise of power creates its own reality to which others must respond. It also points to the first-mover status accorded to the president as Commander in Chief after a surprise attack on the United States. Because the war on terror justified preemptive actions, the administration will always stay one step ahead of “judicious study” through the use of surprise to throw our enemies (and, as it happens, the reality-based community at home) off balance.

Any surprise attack on the United States would likely give the sitting president this sort of unique power. The 9/11 attacks gave President Bush an enormous opportunity to shape public deliberation for the conflict to come. The president had the option of encouraging public debate on the nature of the response. Instead, President Bush immediately categorized the attacks as a military operation, akin to an invasion by a foreign state. The President told his advisers “‘we’re at war’” just hours after the attacks occurred and made a global war on terror the official policy of the executive branch.

The potent framing effects of Bush’s statements pose a serious difficulty for theories of constitutional change based on public deliberation. Bush’s definition of reality so thoroughly disabled the public sphere that the press and the public were still having trouble escaping the 9/11 frame as the Iraq War began in early 2003. This suggests that a theory of change that is not dependent on a particular normative path and is more attuned to the disruptive potential of the exercise of textual power is more useful in understanding the presidency after 9/11.

By describing 9/11 as a war, the president short-circuited any meaningful debate over the nature of the attacks and the appropriate response. But his constitutional claim was arguably more significant. While the president participated in the process that led to the September 2001 Authorization to Use Military Force (AUMF), he reserved the argument that he did not need it to prosecute the war. In two subsequent letters to Congress, the president ignored the AUMF and apparently invoked his traditionally recognized power to respond to sudden attacks by stating that he had ordered military action “pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.” This meant that the president was not bound even by the broad terms of the AUMF.

At the same time he bypassed Congress, the President was treating the war as a precedent-shattering world struggle against evil. In a major speech to the nation on November 8, 2001, less than two months after 9/11 and amidst the anthrax attack scare, the President described an existential struggle between the United States and terrorist groups worldwide. He stated:

Our nation faces a threat to our freedoms, and the stakes could not be higher. ... We wage a war to save civilization, itself. We did not seek it, but we must fight it—and we will prevail. This is a different war from any our nation has ever faced,
a war on many fronts, against terrorists who operate in more than 60 different countries.\textsuperscript{23}

Taken cumulatively, these statements described a presidency at the zenith of its constitutional power—a Commander in Chief responding to a surprise attack with the backing of Congress.\textsuperscript{24} This put the war on terror on a legal and normative plane with World War II and suggested President Bush could exercise the same authority possessed by President Roosevelt. Executive branch attorneys lost no time suggesting that because Roosevelt had used military commissions to try Nazi saboteurs as “unlawful combatants,” Bush could do the same thing with respect to captured terrorists.\textsuperscript{26}

Bush’s definition of reality after 9/11 is thus an excellent example of the creative tension between the text and informal change. Bush and his attorneys used his power as Commander in Chief to leverage informal constitutional change that transformed the rules under which detainees inside the United States were held.

Empowered by these presidential claims of authority, the executive branch set into motion all of the questionable policies that would later come to light: indefinite detentions, military commissions, NSA surveillance, and extreme interrogation techniques.\textsuperscript{22} Secrecy was essential to the creation of this new constitutional order.\textsuperscript{28} The war on terror featured secret decisions,\textsuperscript{29} secret executive orders,\textsuperscript{20} and secret programs,\textsuperscript{31} not unusual in wartime. However, these initiatives also had secret constitutional rationales,\textsuperscript{32} something that was crucial to getting them off the ground by shielding them from the normal processes of interagency review.\textsuperscript{33} Jack Goldsmith, head of the Office of Legal Counsel (OLC) during 2003–04, provides an example in his account of the special NSA program. He states that [Vice President Dick] Cheney and his counsel David Addington “had abhorred FISA’s [Foreign Intelligence Surveillance Act] intrusion on presidential power ever since its enactment in 1978. After 9/11 they and other top officials in the administration dealt with FISA the way they dealt with other laws they didn’t like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis for the operations.”\textsuperscript{34}

Among the Bush administration’s most important institutional innovations was the change to the OVP.\textsuperscript{35} Vice President Cheney has been described as “[t]he most powerful vice president in American history.”\textsuperscript{36} The positions advocated by Cheney and Addington were often decisive in the administration’s councils.\textsuperscript{37} As noted previously, Cheney had strong views about restoring presidential power prior to becoming vice president.\textsuperscript{38} He believed that the presidency had sunk into a trough of weakness in the wake of mid-1970s congressional reform efforts (including FISA) and had never recovered.\textsuperscript{39} Cheney “told Bush, who later repeated the line, that if nothing else they must leave the office stronger than they found it.”\textsuperscript{40}

Cheney’s institutional role, unique among vice presidents,\textsuperscript{41} flowed in part from his unusual political status. He had no ambitions for the presidency\textsuperscript{42} and could function as a sort of policy overseer,\textsuperscript{43} his influence flowing both from his position as constitutional officer\textsuperscript{44} and uber-staffer. The practical consequence of Cheney’s lack of a political future was that he was accountble only to Bush.\textsuperscript{45} Indeed, Cheney seemed to loathe the standard forms of political accountability. After the 2006 elections in which Republicans lost control of Congress, Cheney referred to the election results as if they were a lone poll of public opinion.\textsuperscript{46}

Cheney’s role enabled the OVP to go operational in the manner of a cabinet department with line (statutory) authority.\textsuperscript{47} In this respect, what happened in the Bush administration had a noteworthy institutional resemblance to Watergate in the Nixon administration and the Iran-Contra scandal in the Reagan administration. These episodes all involved the White House acting independently of executive branch agencies. Nixon used the “Special Investigative Unit” (the Plumbers) to investigate intelligence leaks outside the FBI and CIA.\textsuperscript{48} The Iran-Contra scandal resulted when the National Security Council under Admiral Poindexter and Lt. Col. Oliver North assumed operational responsibilities for saving American hostages held in Lebanon.\textsuperscript{49} While conducting operations from the White House allows for greater secrecy and flexibility, it can obviously lead to grave constitutional difficulties.

Giving OVP operational responsibility had decisive implications for how the executive branch functioned during the Bush presidency. It meant OVP could intervene with respect to any policy without being subject to normal statutory and interagency checks.\textsuperscript{50} The power OVP wielded intimidated even the highest cabinet officials.\textsuperscript{51} Officials probably assumed that the positions advocated by OVP staff had presidential approval, whether or not this was actually the case.

The consequences of OVP going
The 2001 and 2002 OLC opinions were critical to the creation of an lax interrogation policy in which abuses were all but inevitable. After an extensive investigation, the Senate Armed Services Committee recently concluded:

Legal opinions subsequently issued by the Department of Justice’s Office of Legal Counsel (OLC) interpreted legal obligations under U.S. anti-torture laws and determined the legality of CIA interrogation techniques. Those OLC opinions distorted the meaning and intent of anti-torture laws, rationalized the abuse of detainees in U.S. custody and influenced Department of Defense determinations as to what interrogation techniques were legal for use during interrogations conducted by U.S. military personnel.56

Here we can see clearly the practical import not only of questionable constitutional interpretation, but the key role of positional advantage within the executive branch. With OLC opinions behind them, those pushing for an aggressive approach to interrogations within the Department of Defense now occupied the institution-al high ground.57

2 Id.
3 Id.
4 Id.
9 Id.
10 Id.
13 See id. at 330-38.
14 For a careful study of these framing effects, see W. Lance Christensen, Regina G. Lawrence & Steven Livingston, When the Press Fails: Political Power and the News Media from Iraq to Katrina (2007).
16 In signing the AUMF, the President stated: “In signing this resolution, I maintain the longstanding position of the executive branch regarding the President’s constitutional authority to use force, including the Armed Forces of the United States and regarding the constitutionality of the War Powers Resolution.” See “President Signs Authorization for Use of Military Force bill,” September 18, 2001, at http://22.whitehouse.gov/news/releases/2001/09/20010918-10.html.
23 Id.
24 This was a point made in John Yoo’s OLC memo in the immediate aftermath of the 9/11 attacks. See John C. Yoo, “The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them,” Office in Legal Counsel, in The Torture Papers, at 3, 5, 21.
25 See Ex parte Quirin, 317 U.S. 1 (1942).
26 For the story of this suggestion from former Attorney General William Barr, see Stephen Brill, After: How America Confronted the September 12 Era 125-26 (2003).
27 Mayer at 33.
28 Id. at 268-69.
31 On the use of the CIA to conduct a secret war, see Mayer at 39-43.
33 Goldsmith at 166-67, Mayer at 268-69.
34 Goldsmith at 106.
35 See Gillman at 31-60, 132-33.
36 Savage at 7.
37 Mayer at 51-54, 63-64, 265, 308-11, 321-24.
38 See Savage at 9, 43.
39 See Gillman at 99-102.
40 Mayer at 7.
41 See Gillman at 51.
42 See Gillman at 16, 49.
43 See Draper at 89-90.
44 Gillman at 87.
45 See id. at 50.
47 This is a central theme of Gillman’s book on Cheney. See Gillman at 50-55, 127-28, 131-54.
50 See Gillman at 50-55, 127-28, 131-54.
51 See id. at 168, 173.
53 Id. at 162-68.
54 See Gillman at 139-54, 277-93.
55 See Gillman at 299-326.
57 See id. at xxvii.