

I. “FREEDOM FRIES” & PRESIDENTIAL POWER

As the cherry trees budded around Washington, D.C., in the spring of 2003, war was already in full bloom. The brutal regime of Saddam Hussein, in control of Iraq since 1979, had resisted the efforts of United Nations (UN) weapons inspectors to catalog its violations of that body’s past resolutions and the cease-fire that ended the 1991 Gulf War. Every day new headlines blared, telling of (mainly unsuccessful) negotiations seeking support for the war from nations large and small, of American and British troop buildups in Kuwait and Qatar, of covert operations searching for Iraqi arms caches, of demonstrations for and against the war, of preparations for terrorist retaliation against the American homeland.¹

President George W. Bush appeared in practically every one of those articles, a commander in chief very much in command. General Tommy Franks, Secretary of Defense Donald Rumsfeld, Secretary of State Colin Powell, their aides, and other military and intelligence staffers also played key roles as the drama unfolded. Congress, however, did not. Indeed, a careful reader of the *Congressional Record* would have been hard-pressed to glean from its pages a sense of the frenetic nature of events. The Senate spent most of mid-March debating the emotionally polarizing but substantively limited question of partial-birth abortion procedures. The House of Representatives had its official photograph taken, named a room after former majority leader Richard Armey, and expressed its unanimous sense that fires in nonresidential buildings and executions conducted by stoning were bad things. Of the thirty-five March roll call votes in the House before the war started, just one, a broad statement of

support for American military personnel, had any relationship to the impending hostilities. As Sen. Robert C. Byrd (D-WV) lamented, the legislative branch was “ominously, dreadfully silent. You can hear a pin drop. . . . We stand passively mute, paralyzed.” What would the Constitution’s framers say? Byrd asked plaintively. “What would these signers of the Constitution have to say about this Senate which they created when they note the silence, that is deafening, that emanates from that Chamber on the great issue of war and peace?”²

Congressman Paul Ryan (R-WI), speaking for most of his colleagues, replied that silence was golden. After all, “there’s nothing for us to do. . . . We don’t have any role on Iraq.” Majority Whip Roy Blunt (R-MO) added: “the truth is that in time of war . . . there is not a whole lot for Members of Congress to do.”³ In a legal brief, the Bush administration enthusiastically agreed.

Irrespective of any Congressional assent, the President has broad powers as Commander in Chief of the Armed Forces under the Constitution that would justify the use of force in Iraq. . . . The Constitution vests the President with full “executive Power,” and designates him “Commander in Chief” of the Armed Forces. Together, these provisions are a substantive grant of broad war power that authorizes the President to unilaterally use military force in defense of the United States’s national security.⁴

In truth, the Constitution *is* uncharacteristically unequivocal on the subject of warfare—but in the other direction. The president is, of course, assigned the role of commander in chief. However, there is meant to be little to command without congressional approbation. In Article I, Section 8, Congress is given the power “to declare war, grant letters of marque or reprisal, and make rules concerning captures on land and water,” along with other responsibilities for governing and supporting the armed forces. The framers of the Constitution, most scholars agree, clearly saw the initiation of war as a congressional function. As James Wilson put it at Pennsylvania’s ratification convention, “this system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress.”⁵

But in 2002 and 2003, members of Congress seemed happy to accept

the administration's argument for presidential preeminence. As Rep. Scott McInnis (R-CO) put it, "We elected our President, and President after President we put confidence in our administration and our leadership. They know a lot more than we know." Indeed, after the bombs began falling on Baghdad, deference to President Bush's conduct of the war extended even to tax policy. On March 21, 2003, arguing that one couldn't undercut the president in wartime, House leaders rammed through the president's proposed \$726 billion in tax cuts by three votes, suggesting that moderates perturbed by the recurrence of massive budget deficits were unpatriotic.⁶

Upset by the failure of the French government to support the war, however, the chairman of the House Administration Committee announced on March 11 that he had ordered "French toast" and "French fries" stricken from the menu of the House cafeteria. In their place would be "freedom toast" and "freedom fries."⁷ Congress had taken a stand.

RETURN TO TONKIN?

It was true that, from most members' perspective, Congress had already taken its only relevant stand: some five months prior, the House and Senate had voted by wide margins to pass a resolution concerning Iraq.⁸ Rather than tackling the decision by voting war up or down, however, the legislators voted to delegate that problematic choice to President Bush—leaving him both to know and to do. The president was granted authority to "use the Armed Forces of the United States as he determines to be necessary and appropriate . . . against the continuing threat posed by Iraq." Congress found, in the words of the resolution, that Iraq continued "to possess and develop a significant chemical and biological weapons capability"; that it was "actively seeking a nuclear weapons capability"; and that it was "supporting and harboring terrorist organizations," including "members of al Qaida." This pairing of malicious intent and destructive capacity, the resolution went on, "combine[s] to justify action by the United States to defend itself." Some legislators, especially on the Democratic side of the aisle, expressed their opposition to actually taking such action, at the time of the vote and when it came;

but since many of them voted “yes” nonetheless, it was natural to ask if they had read what they had just voted for. Others had no hesitancy: Democratic House leader Dick Gephardt, for example, joined the president in a showy Rose Garden ceremony trumpeting unity and marginalizing dissenters.⁹

While they slightly amended the president’s preferred draft—which would have given him authority to act militarily anywhere in the Middle East to “restore international peace and security” in the region—legislators were eager to strengthen the president’s hand as he entered into negotiations with the UN and just as eager to rid themselves of the pesky issue of war and peace before the midterm elections in November. While the National Intelligence Estimate summarizing American knowledge about the threat posed by Iraq was available to all members of Congress, no more than a dozen ever read it. (Had they done so, the preamble of the resolution might have been less certain regarding Iraq’s weapons capacity and recent ties to terrorism.) Within three days of debate in each chamber—by contrast, the full Senate debated the 2001 education bill for twenty-one days and an energy bill for twenty-three—the president had been granted the authority to do as he wished in Iraq. Bombs started falling on Baghdad on March 19, 2003.¹⁰

War with Iraq may have been the right choice. But Congress chose to delegate that choice rather than to make it. Sen. Patrick Leahy (D-VT) was among a number of legislators to make a direct comparison to an earlier debate: “the key words in the resolution we are considering today,” Leahy noted, “are remarkably similar to the infamous resolution of thirty-eight years ago which so many Senators and so many millions of Americans came to regret. Let us not make that mistake again. Let us not pass a Tonkin Gulf resolution.”¹¹

The analogy was carefully chosen. The 1964 resolution that took its name from the Gulf of Tonkin—granting President Lyndon Baines Johnson a similar blank check concerning the conflict in Vietnam—was symbolic of an earlier era of congressional deference to the executive in a time of crisis. Johnson’s actions and, even more so, those of his successor, Richard M. Nixon, were famously assailed by the historian Arthur M. Schlesinger Jr. as exemplifying an “imperial Presidency,” an institution “created by wars abroad” and “making a bold bid for power at home.” Schlesinger charged that Nixon “had produced an unprecedented concentration of power in the White House and an unprece-

dented attempt to transform the Presidency of the Constitution into a plebiscitary Presidency." Under such a system chief executives could do what they wanted, regardless of checks and balances, so long as the voters approved at quadrennial intervals.¹² The Vietnam War, Schlesinger and others felt, represented "the presidency rampant," with the president acting unilaterally and often in secret, unconstrained by Congress or Constitution, misrepresenting to the public both American interests and their own actions. "When the President does it, that means that it is not illegal," Nixon would later say; and this arrogation of power was evident throughout his presidency, whether in the bombing and invasion of Cambodia, the wiretapping at the Watergate (and elsewhere), the huge slush fund payments during and after the 1972 campaign, or the impoundments that subverted Congress's "power of the purse." Vietnam and Watergate were tightly linked; the latter, at least in its broadest sense, could not have happened without the former.¹³

The Vietnam/Watergate era has shaped our current era in numerous tangible ways, both in reaction and counterreaction. As discussed later, the framework of presidential-congressional relations established in the wake of Watergate is critically important for understanding a wide range of current issues, from war powers to budgeting to government ethics to executive secrecy. World War II, the cold war (including its hot interludes), and the various "wars of Watergate"¹⁴ led presidents to secrecy, to deceit, and to the unilateral and sometimes careless exercise of power. These were justified as they happened, and often in retrospect, by the challenges that these crises posed to the national interest. And obviously the new mandates of the "global war on terror" and its expansion into Iraq gave new resonance to many of these topics. The terrorist mass murders of September 11, 2001, spurred a reassessment of the questions posed in the 1970s and forced a new appreciation for strong presidential leadership. But Leahy's analogy suggested a specter lurking behind that development: Had the imperial presidency returned?

THE NEW IMPERIAL PRESIDENCY?

That is the basic question of this book. It is a question that might have seemed silly just a few years ago. After all, one did not need to go back to the revolutionary period, as Senator Byrd urged, to find evidence of

strong legislative initiative in the face of aggressive executive action. One had to return only to the first “imperial” era. On March 31, 1968, Lyndon Johnson, his political capital and credibility fatally wounded on the battlefields of Vietnam, announced that he would not seek reelection as president. Six years later, on August 9, 1974, Richard M. Nixon resigned his office, the first and only American president to do so.

Nixon’s decision, especially, was barely voluntary. It came some two weeks after the House of Representatives’ Judiciary Committee approved in bipartisan fashion three articles of impeachment, alleging presidential abuse of power and obstruction of justice. The votes followed a unanimous ruling by the Supreme Court forcing Nixon to surrender tapes of conversations relevant to criminal trials arising from the June 1972 burglary of the Democratic National Committee (DNC) headquarters in Washington’s Watergate complex. Most critical was the release of Nixon’s conversation with Chief of Staff H. R. Haldeman a week after the break-in, when Nixon told his aide to have the CIA short-circuit the FBI’s criminal investigation: “[T]hey should call the FBI in and say that ‘we wish for the country, don’t go any further into this case, period!’” That discussion became known as the “smoking gun,” placing the metaphorical murder weapon in the president’s hands, and as its details were made public, Nixon’s remaining political support melted away. The prospects of impeachment by the full House and removal by the Senate became a near certainty. Instead, Nixon chose to resign.¹⁵

In the aftermath, new president Gerald R. Ford declared that “our Constitution works.” And such was the lesson of Watergate, as presented by the punditocracy: that the system worked, that constitutional malfeasance had been ferreted out and punished by constitutional process. Certainly, the actions of Congress and the Court seemed to fulfill the desire of the framers of the Constitution for interinstitutional policing through the aggressive use of checks and balances. In 1788 James Madison had argued that “the great security against a gradual concentration of the several powers in the same department consists in giving to [each branch] . . . the necessary constitutional means and personal motives to resist encroachments. . . . Ambition must be made to counteract ambition.”¹⁶ With Watergate—considered here not just as the burglary itself but as a blanket term covering a wide range of executive

abuses—presidential ambition was checked, and checked hard. The political actors who impelled Nixon to resign were self-interested, to be sure; but as Madison and his colleagues hoped, self-interest was channeled into constitutional duty and into the public interest.

As Nixon's hold on the Oval Office weakened, and for several years thereafter, Congress, the courts, and even the bureaucracy reined in unilateral presidential authority on a variety of fronts. The War Powers Resolution (WPR) of 1973 sought to enhance legislators' ability to control presidents' use of force. The Hughes-Ryan Amendment of 1974, the Domestic Intelligence Guidelines of 1976, the Foreign Intelligence Surveillance Act (FISA) of 1978, and the Intelligence Oversight Act of 1980 aimed to likewise limit the autonomy of executive branch law enforcement and intelligence activities at home and abroad. The Federal Election Campaign Act (FECA) of 1974 and the Ethics in Government Act (EGA) of 1978 (creating, among other things, the office of the independent counsel) were to diminish the role of money in the political process and thus to reduce corruption—and to provide a neutral mechanism for investigating high-level corruption that might occur nonetheless. *U.S. v. Nixon* set bounds on the ability of presidents to claim confidentiality over executive branch procedures; the Presidential Materials and Preservation Act (PMPA), the Freedom of Information Act (FOIA) amendments of 1974, and the Presidential Records Act (PRA) of 1978 opened public access to the workings of the executive branch, including the White House; and the Privacy Act of 1974 protected individuals from the misuse of information they had provided the government. The Congressional Budget Act (CBA) and Impoundment Control Act of 1974 reinvented the legislative budget process while prohibiting presidents from unilaterally manipulating how, and whether, budgetary appropriations were actually spent.

One after another, then, the assumptions and processes that had extended the president's power, his ability to shape governmental behavior and outcomes, were reformed or removed. In the wake of congressional resurgence, it seemed the "imperial presidency" was an outdated period piece.¹⁷ Indeed, as the Ford and Carter presidencies wound on, many scholars feared these limiting changes might have crippled the office. President Ford himself claimed that the presidency, far from imperial, had become "imperiled."¹⁸ While the strong leadership

of Ronald Reagan banished this fear for a time, especially after his first-year budget triumphs, even the Great Communicator ran ashore on the shoals of the Iran-contra scandal. Further limits on covert operations and intelligence resulted. By 1995, after his massive health-care plan was defeated and the first fully Republican Congress in forty years elected and in active opposition, President Bill Clinton was forced to insist that “the Constitution gives me relevance. . . . The president is relevant here.”¹⁹ Three years later, of course, Clinton would be impeached by the House of Representatives, though not removed from office, over charges arising from his efforts to keep secret an extramarital affair. Longtime political reporter R. W. Apple summed up the presidency, and the president, circa 1998: “his ability to function effectively, already eroded, would be further curtailed [if impeached]. Even now, he is neither trusted on Capitol Hill nor feared by Saddam Hussein and other enemies of the United States.”²⁰

The contrast with the spring of 2003 seems rather stark.

In between, of course, came September 11. Yet the events and claims of the post-9/11 political world are in many ways merely an acceleration of recent history. The current wars came as the strictures of the aftermath of Vietnam and Watergate no longer held much sway and a new set of rules was already being negotiated: had September 11 never happened, this book would be shorter by one chapter but no less pertinent. Over time, the legal institutions that marked what I will call Congress’s “resurgence regime” proved to be built on sand—and, like sand, they eroded away, leaving a new landscape. Some parts crumbled more quickly than others; and to be sure, Congress maintains much latent power. But developments to date point the compass of presidential-congressional relations in a direction much more favorable to presidential authority.

This progression will be mapped in some detail over the course of the narrative that follows. But the broad outlines—the reasons why the Tonkin Gulf analogy, broadly conceived, hit home—are worth considering here. Even in the decade following Nixon’s resignation, the office of the presidency retained a solid base of authority grounded in its ability to grab the public spotlight and to set the agenda, in the commander-in-chief power, in its potential control over regulations and policy implementation, in its role in appointments, and in its veto leverage. A

wide range of recent scholarship, indeed, has stressed—with varying degrees of normative concern—the inherent ability of the president to take unilateral action in the absence of legislative authority.²¹ As Clinton himself suggested after the Democrats lost Congress, “I think now we have a better balance of both using the Presidency as a bully pulpit and the President’s power of the Presidency to *do* things, actually accomplish things, and . . . not permitting the presidency to be defined only by relations with the Congress.” Clinton took unilateral military action around the globe, ordering cruise missile strikes even as the House pondered impeachment. And on Capitol Hill itself, the pre- and postimpeachment Clinton could claim a fair measure of success in pursuing his policy priorities through budget bargaining with the Republican majority.²²

Presidents since Watergate have resisted probes for information and have asserted “executive privilege” over a wide range of records while protecting even historical material from public release. The Clinton administration went to court several times to protect conversations and documents, with mixed success; the George W. Bush administration has been perhaps even more aggressive in this area, holding fast against congressional requests for documentation in a variety of areas, even where the confidential advice protected by the privilege was not given directly to the president. Vice President Richard Cheney, for instance, refused to provide the General Accounting Office (GAO)²³ with even the barest records of his stewardship of the process that produced the administration’s energy proposals in 2001. The GAO’s subsequent lawsuit against the vice president was unsuccessful and was not appealed; the Supreme Court declined in a parallel suit to force the administration to release the information. Bush also delayed the release of records from the Ronald Reagan Library scheduled under the PRA and then issued an executive order rewriting the act to limit access to material in presidential libraries more broadly.

The Independent Counsel Act was allowed to expire at the end of June 1999. In 2000 presidential candidates spent more than \$800 million in their quest for election—compared to the then shocking \$90 million spent by both parties in 1972—and in 2002 FECA was seriously modified by the McCain-Feingold amendments, which hoped to root out the role of “soft money” in the system and whose very passage implied that FECA had failed. Both major presidential candidates opted

out of the FECA system in 2004, and as soft money made its way back into campaigns through organizations ostensibly unconnected to the parties or candidates, spending skyrocketed toward \$1 billion.

The CBA, likewise, failed to discipline federal spending, which continued in deficit into the early twenty-first century, with a brief blip into surplus in the late 1990s. By 2004 the federal government's annual budget was over \$400 billion in the red, with additional spending in Afghanistan and Iraq still on tap and the first-term Bush tax cuts yet to fully kick in. Further, the deliberative process laid out in 1974 was often honored in the breach: in fiscal 2002, for example, not a single budget bill (of the thirteen required) was approved before the start of the new fiscal year beginning October 1. In 2003 just two were approved, in 2004 just three, in 2005 just one. The result each year was one or more massive omnibus spending bills cobbled together as late as February of the next year. Given that the single thing Congress *has* to do each year is to pass a budget, its failure to do so spoke volumes. So did the legalization of impoundment by the Line-Item Veto Act of 1996, a delegation of power too extreme for the Supreme Court, which overturned it in 1998. Looking at these developments, the departing head of the Congressional Budget Office said in late 2002 that the process should be pronounced "dead."

The situation was even more dramatic in the realm of foreign policy. Covert operations remained frequently covert even from their legislative overseers, and members of Congress seeking to make decisions about questions of war and peace often received carefully selected intelligence information. While the WPR remains on the books, its effect is uncertain in the face of presidential use of troops in places ranging from Grenada to Kosovo without express congressional approval.

Many of these trends were cast in sharp relief in the aftermath of September 11. Almost immediately, President George W. Bush and his administration took decisive action at home and abroad. Much of the power unleashed was also unchecked, either by congressional consent or its silent assent. On September 14 Congress passed a resolution arguing that "the president has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States" and granting the president the ability to use all "necessary and appropriate force" against those he determined had committed, planned,

authorized, or aided the attacks or helped those who had.²⁴ The first target was the repressive Taliban regime in Afghanistan, starting in early October. The next was Iraq: starting in the summer of 2002 the administration argued for deposing Saddam Hussein and claimed the inherent constitutional right to make war, even preventively; it finally settled for the broad congressional delegation of authority discussed at the start of this chapter and promptly utilized it. As of Election Day 2004, over 1,100 American soldiers had been killed either during the invasion or during the subsequent occupation of Iraq, along with thousands of non-combatant Iraqis. Some 140,000 troops remained there, at a cost of over \$1 billion per week, itself spent with little legislative oversight.

Meanwhile, hundreds, perhaps thousands, of prisoners captured around the world, all with suspected ties to the al Qaeda terrorist network, were being held in military custody. More than six hundred were imprisoned at the custom-built "Camp X-Ray" at the U.S. naval base in Guantánamo Bay, Cuba. They were designated not as prisoners of war but rather as "unlawful enemy combatants," without the rights that prisoner-of-war status confers and without formal charges being brought against them. Secretary of Defense Donald Rumsfeld noted in February 2004 that the prisoners at Guantánamo, some held for more than two years at that point, would be detained "as long as necessary." Charges that detainees' human rights had been violated in Cuba, Afghanistan, and especially Iraq made headlines in the spring of 2004 and beyond as photographs of prisoner abuse and administration memos seeming to justify the use of torture came to light. According to the president's top lawyers, the executive powers flowing from the September 11 attacks and the September 14 resolution were practically unlimited. "Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield," the Justice Department declared. In this view, laws banning torture were themselves unconstitutional to the extent that they constrained presidential discretion during wartime.²⁵

On the domestic front, the USA PATRIOT Act²⁶ was designed to enhance the executive branch's prosecutorial tools and power to conduct criminal investigations by relaxing limits on surveillance. The Bush administration closed immigration hearings and held most aliens appealing violations of visa charges without bond. The president claimed the

authority to create military tribunals outside the normal judicial system for terrorism suspects and issued an executive order doing just that. Most dramatically, the administration claimed that some defendants—even American citizens, arrested within the United States—could be held indefinitely without charge or lawyer if they too were labeled as enemy combatants. The determination of who qualified as an enemy combatant was, according to the president, entirely up to him, not the courts or legislature, and was not even reviewable by those branches of government. “The capture and detention of enemy combatants during wartime falls within the President’s core constitutional powers as Commander in Chief,” argued the Justice Department. “The Court owes the executive branch great deference.”²⁷

As 2002 closed, observers suggested that Bush had “created one of the most powerful White Houses in at least a generation”²⁸ as part of a specific strategy aimed at recovering executive powers ceded to—or seized by—Congress during the Watergate era. In the 2002 elections, Bush’s frantic campaigning was credited with providing an unusual midterm boost to the president’s party in Congress, strengthening the GOP’s House majority and winning back the Senate outright. The iron discipline of legislative Republicans meant that through his entire term President Bush did not find it necessary to use the veto pen. Indeed, a string of successes made it appear that he could get Congress to do most anything he wanted. Lyndon Johnson, it was said late in his presidency, was so unpopular that he would have failed to get a resolution favoring Mother’s Day passed by Congress. George W. Bush, one suspects, could have had Mother’s Day repealed. And on November 2, 2004, he was reelected to a second term. He soon made clear that there would be no retreat. “I earned capital in the campaign, political capital,” he said—“and now I intend to spend it.”²⁹

Was the imperial presidency back? Many have concluded so. Even Schlesinger returned to the fray with a brief essay entitled “The Imperial Presidency Redux.”³⁰ It should already be clear, however, that the question is not as simple as institutional partisans of all sides might prefer. For one thing, it is hard to affix a label to a work in progress. In fact, the intertwining of presidential power and congressional prerogative goes back to the framing of the Constitution. Congress is the first branch

of government and remains the actor with the most potential authority over the workings of the public sphere. Against this backdrop it should come as no surprise that the Bush administration—that *any* administration—would try to expand its power. Though temperament certainly matters for presidential behavior, the question here is not one of personality but one of positionality. Presidents since the beginning of the republic have sought to better their status in the constitutional order. The powers used and abused by Nixon were not plucked from thin air; as Nixon constantly complained, the Watergate charges were “chicken-shit. I mean, it’s nothing”—“Kennedy did it all the time.” Nixon apologist Victor Lasky likewise proclaimed, “It didn’t start with Watergate,” and he had a point: executive authority had grown dramatically over the course of American history and especially since the energetic response of Franklin D. Roosevelt to the dark days of the Depression and war in the 1930s and 1940s.³¹ From the vantage of the Oval Office, Congress is sluggish, cacophonous, and fragmented. As an aide to President Kennedy once put it, “Everybody believes in democracy—until he gets to the White House.”³²

Further, despite the pejorative slant of the very term *imperial*, such unbelief is not always unwarranted. The presidency is a natural focal point for leadership, and its structural unity gives the president both great opportunity and great responsibility for exercising that leadership in perilous times. There is a threat to liberty from an overweening executive; but there is a threat, too, from those who target liberty with bullet and bomb, and that reality must inform our debate.

But the word *debate* remains the right one. Much as he might prefer it, the president is not alone in his responsibilities. Nor, even if he will not admit to mistakes, is the president always right. One of his mandates is therefore to exercise his leadership through coalition, not command, justifying his choices in a way that persuades a range of constituencies and their representatives to follow his lead. The genius of American government flows from the interaction of the branches, from the contending self-interests and ambitions Madison foresaw. Justice Robert Jackson of the Supreme Court, writing as the United States fought in Korea in a war Congress never voted on, put it best: “While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable govern-

ment. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress.”³³ If power in government is defined as effective influence over governmental outcomes, then the relative power of the legislative, judicial, and executive branches has always ebbed and flowed over time. Across the sweep of American history, each branch continually pushes the boundaries of its power and is met, or not, by resistance from the others. The players change, but the dance goes on, with different steps and divergent grace.

It is critical that Congress not act the wallflower here. If the framers expected ambition in the American executive—and that quality unifies the otherwise very different men who have served as president—they expected counterbalancing ambition elsewhere. “The history of human conduct,” warned Alexander Hamilton in *Federalist* No. 75, “does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.” The tragedies of September 11 made it clear that strong presidential leadership is essential to the nation. But they made it equally clear that Congress has a critical role to play in determining national policy in times of crisis. As Justice Jackson put it a half century ago:

The claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy. . . . By his prestige as head of state and his influence upon public opinion, he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness. . . .

[But] a crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that “The tools belong to the man who can use them.” We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers. With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive

be under the law, and that the law be made by parliamentary deliberations.

If so, the idea of *inherent* “imperialism” must be rejected: there is no “imperial presidency” in the structure of American government. Any such creature is conditional, fragile, and revocable. The presidency, in other words, is contingently imperial.

The flip side of the “imperial presidency,” then, is the invisible Congress. Congress itself has not been run over so much as it has lain supine; it has allowed or even encouraged presidents to reassert power in the world after Watergate. We should ask why it has been such a willing party to its own victimization.

It may be, of course, too early to draw such a conclusion. Short-term assessment carries with it the distinct risk of being outrun by events (though, on the other hand, Keynes’s famous assessment of the long run places its own premium on timely analysis). In 2004 the Supreme Court heard appeals from the inmates at Guantánamo Bay and the American-born “enemy combatants,” ruling that executive prerogative could not override a suspect’s access to the courts and due process. Though President Bush called for the permanent extension (and expansion) of the Patriot Act in his 2004 State of the Union address, a number of legislative voices rose in resistance. They were emboldened, perhaps, by rising concerns about the occupation in Iraq and the justification for the war in the face of mounting evidence that Saddam Hussein did not, in fact, possess weapons of mass destruction or anything close to them by the time of the U.S. invasion. The approaching 2004 election also served to spur mounting criticism of the administration’s stewardship of the post–September 11 world. As noted previously, Congress retained the tools to counteract the assertions of presidential prerogatives—if it could muster the will to do so.

Still, when George W. Bush took the oath of office for the second time in January 2005, he presided over a presidency much stronger in absolute and relative terms than the framers had conceived it. Increased partisan polarization and the structural divide between executive and legislature enhanced the incentives for the president, whoever the incumbent, to claim unilateral authority and to try to make it stick. Thus, however it is resolved in the war on terror, the basic balance of

power between the branches will remain at the very heart of our democracy. It is not entirely correct to see their interaction as a zero-sum game: what benefits one branch does not always harm another in equal and opposite measure. But making that relationship a positive one depends both on our political actors and, perhaps most crucially, on we the people. How we choose to balance the advantages and dangers of presidential power has great ramifications for American self-government and its ability to handle the crises that already define the twenty-first century.

THE PLAN OF THE BOOK

The remainder of this book delves into these issues. In so doing it veers across three possible approaches. The first is historical: how has presidential power developed over time? The second is institutional: how have other branches of government reacted to that development? A third, far briefer, is normative: how much presidential power does American governance require?

Chapter 2 will discuss the constitutional framework undergirding American government. In 1787, when the framers met in Philadelphia, they wanted to produce a president strong enough to resist legislative tyranny—the situation, as they saw it, in many of the thirteen states—but himself clearly held in check. There was, after all, little desire to substitute one king for another. The president's enumerated powers in the Constitution are fairly limited; his authority lies in the vague grant of prerogative inherent in “the executive Power” assigned at the start of Article II, in his ability to insert himself in the legislative process through the veto, and in his role as chief executive.

Still, presidents pushed to define the vague terms of their charter in practice. Sometimes Congress pushed back; sometimes it did not. The result was an accretion of precedent, of prerogative—of presidential power—over time. Further, as the government grew enormously in size and scope, presidents' administrative authority grew with it. By the 1940s the “modern presidency” was born.

Chapter 3 will center the discussion on the first “imperial presidency,” detailing the events of Vietnam and Watergate as they expressed presidential power. The centralization of authority in the executive

branch by Presidents Johnson and especially Nixon will be analyzed. This review is surprisingly necessary: a poll taken on the thirtieth anniversary of the break-in, in 2002, found that only 35 percent of Americans—and just 16 percent of those under thirty-five years of age—claimed to know enough about the events of Watergate to explain their gist to someone else. Yet those events have played out across the political and civic landscapes of three decades. As Suzanne Garment has noted, “The post-Watergate laws, like fossils, present a lasting record of the cast of the Watergate-era mind.”³⁴

Chapters 4 through 6 examine the responses of other institutions to the “imperial presidency” and how those responses held up over time. The chapters are organized in parallel, covering four broad areas: unilateral executive authority and “executive privilege”; budget politics (given that politics is, after all, about the distribution of resources); war powers and intelligence oversight; and governmental ethics more generally, including the role of money in politics. These chapters trace what happened in the 1970s in these areas and then what happened to the reforms beginning in the 1980s. As traced previously and detailed subsequently, Congress sought to “fix” Vietnam and Watergate by reshaping the institutional balance of power through a series of major statutory changes. They limited presidential initiative in a wide variety of areas. They assumed, in many ways, that the relationship between the branches of government could be legislated rather than negotiated.

But by and large, this assumption failed. The processes created in the 1970s proved unworkable or unsatisfactory in important ways—sometimes because they were evaded by presidents, sometimes because Congress failed to follow through on the burden it assigned itself, and sometimes because they fed an adversarial culture where civility leaked away and the ordinary pursuit of politics was deemed dirty or corrupt. As suggested previously, the events of September 11, 2001, and their own aftermath have only accelerated that process; bringing that story through the presidential election of 2004 is the subject of chapter 7.

The concluding chapter revisits the broader question of the balance of power in American government. In a system as large and fragmented as ours, there is a clear need for clear leadership. Did the erosion of the 1970s resurgence regime simply reflect the need for a strong executive in a government infinitely more complex than the framers could have

imagined? If so, the relative aggrandizement of the executive office is simply a natural development and a rather efficient one, helping to solve the enormous governance issues facing the United States—from globalization and terrorism to skyrocketing health-care costs and an aging population and infrastructure. American government favors the status quo; empowering the president allows decisive action.

Or, as suggested earlier, is the issue less an imperial president (even if for good) and more an intentionally invisible Congress eager to shirk hard choices? The latter possibility is less benevolent. The goal of legislative deliberation is not to foster trust in government for its own sake; indeed, a healthy distrust of government is part of American history and a valuable tool of accountability. But both reflexive distrust and reflexive trust carry the seeds of disengagement, of apathy. Our government is built to respond—if we know what we want to ask it to do.

As the Watergate-era reform regime has crumbled, little systematic has arisen to replace it. Crafting a new balance of power within our government—and between polity and public—means making difficult decisions and trade-offs about the powers and goals of American government, about its very scope and direction; thus, doing so is our highest national priority. But it will require the active involvement of *all* our ambitions. “We must recognize,” said a young John F. Kennedy, campaigning in his first election in 1946, “that if we do not take an interest in our political life, we can easily lose at home what so many young men so bloodily won abroad.”³⁵