

IV. THE WORLD AFTER WATERGATE

The Resurgence Regime Takes Shape

Richard Nixon's resignation took effect at noon on August 9, 1974. There was one last walk across the White House lawn, a last clenched grin and V-for-victory wave. Marine One whirred to life, lifted off, and faded from sight.

With that, as new president Gerald Ford remarked upon taking the oath of office that afternoon, "our long national nightmare" was over. "Our Constitution works," Ford exulted. "Our great Republic is a government of laws and not of men. Here the people rule."

Congress was soon circling warily around the body of the imperial presidency, seeking to forestall its resurrection. Throughout the 1970s legislators erected a latticework of statutes that aimed to imprison the president and to strengthen the legislative hand in interbranch relations. From war powers to public records to executive ethics, from intelligence oversight to impoundment, this wide-ranging array of new laws reshaped executive-legislative relationships in the substantive areas where congressional prerogative had been slighted. The congressional show of strength, at times abetted and sometimes altered by the judiciary, would profoundly affect American politics for the next thirty years.

Indeed, it is not going too far to call this new, overarching institutional framework a "regime," as scholars of international relations have used the term: as a comprehensive "set of implicit or explicit principles, norms, rules, and decision making procedures around which the expectations of actors converge for a given issue area."¹ The intent and extent of the 1970s legislative regime were as complex and far-reaching in some

ways as the network of multinational agreements and organizations that formed the postwar world. The post-Watergate enactments were very much intended to shape politics, and policy, by laying out the formal and informal mechanisms through which the players in the great game of governance were supposed to interact and come to decisions.

It is not surprising that the framers of the regime foresaw a much greater role for congressional input—for both advice and consent—than recent presidents had desired or allowed. “The President has overstepped the authority of his office in the actions he has taken,” warned Rep. Gillis Long (D-LA) in April 1973. “Congress will not stand by idly as the President reaches for more and more power. . . . Our message to the President is that he is risking retaliation for his power grabs, that support for the counter-offensive is found in the whole range of congressional membership—old members and new, liberal and conservative, Democratic and Republican.”² Congress intended to reclaim control over the nation’s bottom line and to forbid presidential impoundments; to have a key role in authorizing and overseeing America’s military deployments and covert adventures; and to keep a close eye on executive corruption. James L. Sundquist notes that, after a “Congress at nadir,” by 1973 or so legislators had achieved “a collective resolve—a firmness and unity of purpose extraordinarily difficult to attain in a body as diffuse as the Congress—to restore the balance between the executive and legislative branches. . . . A period of resurgence had begun.”³

This chapter details the construction of the resurgence regime. The narrative that follows tracks the four broad categories already introduced: executive authority and secrecy; war powers and intelligence; budgetary politics; and ethics. The enactments and developments in each of these areas add up to an impressive whole—so much so that by the late 1970s many argued that the wave of legislation had flooded the Oval Office. That conclusion, as we shall see later, was incomplete and premature. But at the time it seemed far from unfounded.

EXECUTIVE AUTHORITY & GOVERNMENTAL SECRECY: NO “PALACE GUARD”

One prominent symbol of the Nixon White House was the “Berlin Wall” of top staffers Haldeman, Ehrlichman, and Kissinger, who were

blamed for sealing Nixon off from both wider sources of advice and the consequences of his decisions. Gerald Ford took office vowing to tear down that wall. "We will have an open, we will have a candid administration," the new president told reporters an hour after taking office. Ford said he would have no chief of staff; he intended to set up a collegial White House personnel system in which he would be the hub of a wheel, with a number of spokes leading directly to him. The cabinet was not to work through the Domestic Council staff or holdover Nixon chief of staff Al Haig but through Ford directly. As Ford wrote in his memoirs, "A Watergate was made possible by a strong chief of staff and ambitious White House aides who were more powerful than members of the Cabinet. . . . I decided to give my Cabinet a lot more control." He was generally given credit for fulfilling that promise, though at some cost to the coherence of his policy-making. Indeed, far from being rigidly hierarchical, Ford's staff melded Nixon veterans with Ford's own congressional and vice presidential staffs, as well as those loyal to new vice president Nelson Rockefeller. It had a "staff coordinator"—but no full-blown chief of staff. (The staff coordinators were Donald Rumsfeld and then Dick Cheney, who both clearly drew some lessons about presidential management from the experience.) In December 1974, trying to establish his own dramatic mark on the White House, Ford pledged to cut his staff an additional 10 percent.⁴

Carter repeated and expanded Ford's pledges during his 1976 campaign, which suggests there was still political capital to be gained by attacking the Nixon White House two years after the fact. In an interview before the election, he said he would require "much heavier dependence on the Cabinet members to run their departments than we've had in the past. I would not establish a 'palace guard' in the White House." His aide, Hamilton Jordan, made the comparison even more explicit. "I don't think you'll have a Haldeman or Ehrlichman in the Carter Administration," he said soon after the election. "The concept of a chief of staff is alien to Governor Carter and those of us around him." Jordan was first among equals, but Carter was to be his own chief of staff.⁵

Upon taking office, Carter dismantled a variety of advisory groups centered in the EOP and supported by presidential staff, from the Economic Opportunity Council to the Energy Resources Council. The Domestic Council staff remained in place, renamed the Domestic Policy

Staff (DPS), but shrank from seventy to twenty-odd members. In all the White House staff was reduced by close to 25 percent, from the nearly 500 that Carter criticized during the campaign to about 360 in 1978. "Although still in the embryonic stage, the organizational and procedural modifications could reverse the trend toward centralization of authority within the White House, dating back to the Administration of Franklin D. Roosevelt," the *National Journal* reported in February 1977.⁶

Carter's staff organization evolved sharply over time, most dramatically in 1979, as will be detailed in chapter 6. Some of the reduction in staff size was arguably an accounting trick, such as Carter's transfer of the Office of Administration from the White House Office to the also centralized, but less visible, EOP. All in all, the stated differences among Nixon, Ford, and Carter may have been more for public consumption than anything else: the Nixon staff organization, after all, actually worked quite efficiently to serve the president's needs in many instances.⁷

Nonetheless, that Ford and Carter decided they had to make such pledges—Carter went so far as to give a televised address on the topic within two weeks of taking office—speaks volumes to the general attitude of the public and Congress toward the way the institutional presidency had developed.

EXECUTIVE PRIVILEGE

That attitude carried over to other areas, for instance to the governmental secrecy that was a hallmark of the Vietnam/Watergate era. David Halberstam, in *The Best and the Brightest*, claimed that Lyndon Johnson had an "almost neurotic desire for secrecy." This especially pervaded military decision making, tightly held in order to maintain confidentiality; but even in other areas, Johnson demanded that he control access to information and the administration's outgoing message. He went so far as to change substantive policy decisions after they had been leaked to the press in order to undermine the leaker and embarrass the leakee.⁸ The Nixon White House, as we have seen in some detail, was even less forthcoming.

One aspect of the secrecy "neurosis" was the assertion of executive privilege. As discussed in chapter 3, Nixon claimed that executive privilege extended to past and former aides, to all executive branch employ-

ees, and to deliberations on virtually any topic. Eventually his efforts to withhold from the special prosecutor taped conversations with his aides facing criminal charges stemming from the Watergate cover-up brought these claims before the Supreme Court. Special prosecutor Leon Jaworski argued that the tapes were evidence necessary for the prosecution (and defense, for that matter) of Haldeman, Ehrlichman, John Mitchell, and the rest. Nixon, in turn, argued that he was the sole judge of what the executive branch needed to disclose: “In the exercise of his discretion to claim executive privilege the president is answerable to the Nation, but not to the courts.” The question, as Jaworski then put it, was, “shall the evidence from the White House be confined to what a single person, highly interested in the outcome, is willing to make available?” In 1974’s *U.S. v. Nixon*, a unanimous Supreme Court said the answer was no.

The Court’s opinion first affirmed its own relevance, overturning Nixon’s claim of absolute separation of powers. Next, the justices held that Nixon’s claim in this case could not be upheld: “neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances,” since to allow executive privilege to circumscribe a criminal trial would “cut deeply into the guarantee of due process of law and gravely impair the function of the courts” and their own constitutional duties. After all, “in designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.”⁹

The judiciary had thus expressed its own “ambition” (in *The Federalist’s* sense of the word), counteracting that of the presidency. And the presidency was forced to yield. Though Nixon had pondered resisting the Court’s opinion, its unanimous nature made that untenable. The tapes were released; and what was thereon did the rest, galvanizing impeachment proceedings on Capitol Hill. In the circumstances it seemed for the moment less important that the Court had gone further than it needed to by holding for the first time that executive privilege, when legitimately exercised, was in fact constitutionally grounded.

Certainly that ruling was little comfort to Nixon's immediate successors. The doctrine of executive privilege had been painted as a mechanism of cover-up, "a ploy to deceive or to conceal wrongdoing," and reclaiming it seemed a losing cause. Ford never even issued guidelines on the topic, as his predecessors had generally done, seeking, it seems, to avoid even mentioning the term. A White House memo pointed out the obvious: executive privilege, bound up as it was with Watergate, had "unfavorable connotations" that, when combined with "the present mood of Congress, dictated "a sharp break from traditional practice." As a result, the few times that the Ford administration declined to provide sensitive information to legislative overseers, the doctrine was never formally invoked and compromise was usually reached. In general, Ford felt he had little choice but to provide Congress with virtually all it requested, even on the very sensitive topic of FBI and CIA abuses.

Nor did things change much under Jimmy Carter. Like Ford, Carter never endorsed a formal policy on executive privilege and almost never invoked it. The hopeful declaration of one 1977 memo—"We hope to find a sound legal basis to answer the subpoena without using the term 'executive privilege'"—was the post-Watergate formula of choice. But as proponents of the "open" presidency, Ford and Carter had little leeway to withhold secrets, by whatever name for secrecy their lawyers devised. Carter even toned down the rules for classifying documents as secret, ordering a balancing test so that "the public's interest in access to government information" would be considered against the need to keep certain items confidential.¹⁰

OPEN GOVERNMENT: PRIVACY AND FREEDOM OF INFORMATION

Congress also stepped into the question of secrecy more directly. In one area, legislators actually encouraged more government discretion, namely, where personal records were concerned. The 1974 Privacy Act restricted disclosure of personally identifiable information about individuals to people not authorized to get that information (e.g., White House staffers hoping to see tax returns) and gave the affected individual the right to sue if private information was revealed. At the same time the law expanded disclosure by giving individuals the right to see what information the government had collected pertaining to them (outside of crim-

inal investigations or the like) and to amend those records if they were inaccurate.¹¹

The latter provisions dovetailed with a sweeping reworking of the Freedom of Information Act, passed originally in 1966. Before then, under the Administrative Procedure Act, agencies had wide discretion to keep records closed. FOIA, on the other hand, declared that openness was in the public interest. President Johnson was unenthusiastic, reaffirming his right to exercise executive privilege and noting contingently that “a democracy works best when the people have all the information that the security of the nation permits.” The implication was that it did not permit much. Johnson’s concern was written into the act itself, which provided for nine expansive categories of documents to be exempted. Most notably, it allowed presidents, by executive order, to keep information “secret in the interest of the national defense or foreign policy.”

This last phrase contributed to a 1973 decision in which the Supreme Court upheld the Nixon administration’s decision to keep secret a series of classified reports concerning the environmental impact of nuclear testing in the Pacific. The Court reasoned that FOIA as drafted did not allow the judiciary to determine whether something had been rightly classified, merely that it had been classified at all. Once the president decided that a document contained sensitive information, judges could go no further.¹²

In 1974 Congress responded to this decision and to agency recalcitrance under the law by substantially broadening FOIA, over President Ford’s veto. Judicial review of executive determinations that something needed to be kept secret was now authorized, even for national security materials: information could be withheld only if it was “in fact properly classified.” The original law had allowed law enforcement agencies to withhold investigative files; the new version changed “files” to particular “records,” broadening the possible release and allowing withholding only when releasing given records would harm an active investigation or jeopardize an investigator.

Access was eased in other ways as well. Applicants’ requests for documents, for example, could now be less specifically targeted, solving the chicken-or-the-egg problem posed when agencies had required details about a file an applicant would rarely have without the file already in

hand. Fees could now be charged only for the direct costs of search and duplication (not for time spent reading and redacting relevant documents) and were to be waived if the information released could be considered in the public interest. Agencies had strict time limits—normally just ten working days—to make a decision about the provision of documents, and requesters were immediately granted court standing to sue if the agency missed its deadlines. The costs of any litigation would be paid by the government if a court determined that documents had been improperly withheld. Indeed, personnel who wrongfully withheld records could be subject to disciplinary action. In 1975 the number of requests made under FOIA quadrupled.¹³

In the 1970s presidential records themselves were, for the first time, deemed public records. Until the Nixon years, White House papers and memos had been considered the personal property of the individuals involved. Presidents had set up libraries, to be sure, but they donated their materials to the government through a deed of gift, which could restrict access for a certain period of time or to certain researchers. (For a long while they also received a hefty tax deduction for this, which brought Nixon more grief when the deduction he claimed for the donation of his vice presidential papers made his later tax burden embarrassingly low.)

Immediately after Nixon resigned, he arranged for his papers to be shipped to his home in California. President Ford signed off on the agreement. But since it was still possible that Nixon would be criminally charged, the special prosecutor's office objected, worried that Nixon's staff would remove crucial evidence documenting the administration's abuses of power. Congress quickly passed the Presidential Materials and Preservation Act, effectively setting aside Nixon's claims, and the papers made another cross-country flight, eastward to the National Archives. The Supreme Court upheld the act in 1977's *Nixon v. Administrator of General Services*.¹⁴

The PMPA procedure was made prospective instead of retroactive with the passage of the Presidential Records Act in 1978. The PRA decreed that documents created during a presidency were government property and that, like other executive branch records, they should be made public in a reasonable time. The law set this marker at twelve years after a president left office: thus, for example, Ronald Reagan's papers were to

become public in January 2001, twelve years after his term's conclusion in January 1989. Some restrictions, including the relevant FOIA exemptions, still obtained, so as to protect personal privacy and national security. But the principle that records would be released on a timely basis without undue obstruction by past or current presidents was absolutely clear.

The same principle carried over to ongoing government decision-making processes. Congress passed the Government in the Sunshine Act in 1976 to require that most decision making by the fifty or so independent agencies run by boards or commissions be conducted in open meetings. The Federal Communications Commission, the Securities and Exchange Commission, and the Occupational Safety and Health Administration were among those included.¹⁵ Another effort at greater disclosure was aimed at presidential task forces, which are often created by executive order without congressional input. Congress feared that such advisory groups—which grew in number and importance in the 1960s—were increasingly powerful and unrepresentative; prior legislative efforts to control them had tried to limit their funding, a constraint presidents evaded by shifting money from other EOP accounts. The Federal Advisory Committee Act (FACA), passed in 1972, took a different tack. Nongovernmental groups (that is, those including at least one person who was not a full-time federal employee) advising the executive branch, whether newly created or preexisting and merely “utilized” by the president, were now required to hold open meetings and to issue public reports of their findings. The president in turn was required to compile a detailed annual report describing, among other things, the activities and reports of each of the advisory committees, the names and occupations of their members, their termination date, and their cost.¹⁶

Privacy and Due Process. Another aspect of the move toward open government concerned civil liberties: what due process protections against government intrusiveness were required? How would the needs of law enforcement balance against individuals' right to privacy?

As noted in chapter 3, the Nixon administration had wiretapped aggressively, even staking a claim to an inherent presidential power to conduct surveillance without a warrant when gathering intelligence about threats to the national security. Lower courts had tended to be deferential on this point, generally agreeing to presidential discretion so

long as it was linked directly to such threats.¹⁷ As we have seen, the Nixon administration was wont to use the national security umbrella to shield its own domestic political espionage; but this was not yet known when the wiretapping question finally reached the Supreme Court in the *Keith* case of 1972. The claim there concerned whether the president could set aside Fourth Amendment warrant requirements for suspects of crimes that he felt had national security ramifications. The *Keith* defendants were accused of bombing a Michigan CIA office, and the attorney general argued to the Court that the surveillance was “deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of Government.” There was, however, no indication of any foreign involvement.

The Court unanimously held that even this category of domestic case required a warrant. As Justice Lewis Powell wrote, “Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch.” The president’s argument may have “pragmatic force,” Powell conceded, but he added pointedly that executive branch officials are vested in any given case as investigators and prosecutors, not “neutral and disinterested magistrates. . . . We cannot accept the Government’s argument that internal security matters are too subtle and complex for judicial evaluation.” More broadly, and most crucially,

Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech. Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent. . . . The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. . . . Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent.¹⁸

The Court did not address the question of the president’s ability to order wiretaps where the activities in question *did* involve foreign powers or their agents. But it suggested that Congress pass more specific statutory guidance for prosecution of such cases. And as more of Water-

gate was revealed, from the NSC intra-White House wiretapping to the Plumbers to Operations CHAOS and MINARET, addressing both domestic and foreign intelligence gathering became a salient legislative priority. Even Henry Kissinger, largely untouched by Watergate fallout to this point, was buffeted by criticism during and after his confirmation as secretary of state over his role in the NSC wiretaps.¹⁹ Rep. William Cohen (R-ME) put legislative options in rather dire terms later in 1974: “When the chief executive of the country starts to investigate private citizens who criticize his policies or authorizes his subordinates to do such things, then I think the rattle of the chains that would bind up our constitutional freedoms can be heard, and it is against this rattle that we should awake and say ‘no.’”²⁰

In 1976 the executive woke first, when Attorney General Edward Levi instituted a series of strong regulatory restrictions on FBI “domestic security” surveillance. Under the Levi guidelines, the bureau could open a preliminary investigation only when it had information that an individual or group was, first, violating federal law and, second, engaged in force or violence. The preliminary investigation had to turn up additional factual evidence before a full investigation was launched, and it had to do so without using methods such as electronic surveillance, infiltration, or mail intercepts. A full investigation could “only be authorized on the basis of specific and articulable facts giving reason to believe that an individual or a group is or may be engaged in activities which involve the use of force or violence and which involve or will involve the violation of federal law.”²¹ No investigations were to take place where the offense was simply to advocate controversial or offensive stands, without threat of violence. The Justice Department was to review all full investigations annually to make sure they met these standards and to decide whether the FBI should continue a given investigation.

Jimmy Carter followed up with a 1978 executive order regulating both domestic and foreign intelligence gathering. A long section entitled “Restrictions on Intelligence Activities” required that all domestic investigations move through a procedure approved by the attorney general to “protect constitutional rights and privacy, ensure that information is gathered by the least intrusive means possible, and limit use of such information to lawful governmental purposes.” The CIA was explicitly barred from “internal security,” electronic surveillance or physical

searches within the United States; any domestic counterintelligence had to be approved by the attorney general. Further, intelligence agencies were not allowed to subcontract such work to others for the purposes of plausible deniability. In March 1976 the FBI had 4,868 domestic security investigations under way. By the end of 1981 that number had plummeted to 26.²²

Cases involving foreign counterintelligence were subject to less rigorous standards under the Levi and Carter guidelines but even here could only be pursued upon “reasonable suspicion” that the suspect was a “conscious member of a hostile foreign intelligence network.” Electronic surveillance could only be approved upon showing probable cause that the suspect was involved in the “clandestine transmission of information to a hostile intelligence service.”²³

Despite these executive initiatives, though, Congress did step in as the Court had suggested in *Keith*, goaded by the Nixon administration’s use of warrantless wiretaps on war and civil rights dissidents. The Foreign Intelligence Surveillance Act (FISA) of 1978 sought to provide oversight of what presidents had claimed as inherent authority for four decades. FISA limited “foreign intelligence information” to information related to clandestine intelligence activities, sabotage, terrorism, or other hostile actions carried out by a foreign power or its agent. It then created a special court—the Foreign Intelligence Surveillance Court (FISC)—to review applications for surveillance linked to such investigations and required that the attorney general personally sign off on each application. The standard for issuing FISA “warrants” was relatively low, especially where Americans were not the targets: the Justice Department merely had to establish that the target of surveillance was a foreign power or an agent thereof. For “U.S. persons,” on the other hand, there had to be evidence that the suspect was working on behalf of a foreign power in ways that might violate criminal statutes, not merely advocating in ways protected by the First Amendment. Further, a “wall” was erected between FISA investigations and regular criminal investigations of the same suspect. Foreign intelligence, not criminal prosecution, had to be the primary purpose of the surveillance. The idea was to make it hard, though not impossible, to use information obtained through a FISA warrant in a criminal prosecution—at the least, to minimize the temptation to use counterintelligence as an easy end run around Fourth

Amendment constraints. To this end, the attorney general had to submit an annual report on FISA activities. In 1980 a federal appeals court ruling further limited Justice's ability to influence intelligence surveillance, forbidding it to make FISA-related recommendations to intelligence officials. "The FBI and the Criminal Division [of the Justice Department] shall ensure that law enforcement officials do not direct or control the use of the FISA procedures to enhance criminal prosecution," the court held. To enforce this the decision also created what the FBI came to call a "chaperone requirement," mandating that the Justice Department's Office of Intelligence Policy and Review sit in on meetings between the FBI and the Criminal Division seeking to coordinate investigation or prevention of "foreign attack or other grave hostile acts, sabotage, international terrorism, or clandestine intelligence activities by foreign powers."

That "wall," or at least the way it was interpreted by subsequent administrations, would engender great controversy after the September 2001 terrorist attacks as a structural constraint burdening life-or-death investigations. But at the time, it was hailed—by legislators at least—as "a landmark in the development of effective legal safeguards for constitutional rights . . . a triumph for our Constitutional system of checks and balances."²⁴

EXECUTIVE POWER & CONGRESSIONAL OVERSIGHT

In 1974 the United States had been in a continuous state of emergency since 1933. During that time, Congress had delegated a wide array of powers to the president to meet various exigencies. Thus the forty years of "emergency," beyond diluting the meaning of the term, meant that presidents had accumulated nearly five hundred discretionary powers ready at hand as "standby" authority. Those powers had been activated in 1933, 1950, 1970 (to deal with a postal strike), and 1971 (to deal with the balance of payments crisis) but never rescinded. A Senate committee examining the question found that "this vast range of powers, taken together, confer[s] enough authority to rule the country without reference to normal constitutional procedures." Indeed, presidents could seize property, limit travel or communications, declare martial law, and nationalize various industries; they could suspend publication of their

own orders in the Federal Register (as Nixon did during the bombing of Cambodia) or (as in World War II) order the detention of suspect groups.²⁵

In response, the Emergency Detention Act—which had allowed the president, in case of an “internal security emergency,” to detain anyone suspected on “reasonable” grounds of spying or sabotage—was repealed. The new statute declared that no citizen “shall be imprisoned or otherwise detained in the United States except pursuant to an Act of Congress.” More broadly, the National Emergencies Act of 1974 terminated standing emergencies as of 1976. It then set a two-year limit on future states of emergency, providing further that they could be terminated earlier by passage of a concurrent resolution. Another refinement came with the International Emergency Economic Powers Act (IEEPA) of 1977, designed to constrain executive emergency powers over the regulation of international and domestic financial transactions and to limit the latter to periods of declared war.²⁶

With the emergencies housekeeping perhaps in mind, Congress sought to commit itself more generally to conducting rigorous, ongoing oversight of the executive branch. Oversight had long taken a backseat to other legislative duties—despite its importance to checking executive excess, it is rarely a political lucrative endeavor. One 1970s innovation was the creation of a cadre of statutorily grounded, Senate-confirmed inspectors general (IG) within most executive departments and agencies. The IG were to probe into agency operations, conducting audits to detect waste, fraud, and corruption and reviewing pending statutes and regulations with an eye toward agency efficiency.

Inspectors general had existed on an ad hoc basis before this time but were subject to presidential manipulation or punishment, as the abolition of the Agriculture Department’s IG in 1974 made abundantly clear. The Inspector General Act of 1978 reacted by systematizing the office and prohibiting agency heads from interfering in a given audit or investigation. Both chambers of Congress had to be notified whenever an IG was removed by the president. And each IG’s findings would be communicated not just to the agency head but directly to Congress and the public. This last provision was strongly opposed by the attorney general at the time; indeed, all twelve agencies covered by the 1978 act testified against it. Nonetheless, as Sundquist notes, “In signing the bill, President

Carter did not protest this additional limitation on executive privacy and concealment.”²⁷

But oversight was not to be contained within the executive branch. Congress sought to bind itself to the task as well by requiring that new authorizations be time limited (thus closing down nonrenewed programs) and shortening existing multiyear authorizations. The State and Justice Departments and the CIA were authorized for only a single budget cycle by 1976; by 1980 this was true of nearly 15 percent of all federal spending.²⁸ Congress also amended the GAO’s authorizing legislation in 1980 to allow that office, as Congress’s auditing arm, to bring civil suits against agencies that failed to provide records it requested during its audits and investigations.

At the same time, Congress began to write more and more “legislative vetoes” into law. These were to provide “a more timely and authoritative means of intervention in the administrative process” than after-the-fact oversight could exert. While they varied in form and stringency, legislative vetoes enabled all or part of Congress to review the executive branch’s use of a given power statutorily delegated to it, before the executive decision took final effect. Sometimes this just meant that an agency would “report and wait,” giving Congress time to review and to take affirmative action if so desired. More often the action could be vetoed—sometimes merely by a committee, sometimes by one chamber, sometimes by both. From 1932 to 1972, one study shows, fifty-one laws containing some form of legislative veto were passed. But from 1972 to 1979 another sixty-two were added. A study defining the veto more broadly (for example, to include Congress’s use of concurrent resolutions to terminate programs) found there were 132 provisions passed from 1932 to 1969—sometimes more than one per law—but 423 between 1970 and 1980. More than half of these were passed after 1975.²⁹

A few examples make the scope of the new requirements clear. One new provision gave Congress the power to veto arms sales valued at over \$25 million. Another allowed one chamber the power to revoke budget deferrals, as discussed in the next section. Others provided for potential veto of all regulations issued by the Federal Election Commission and Federal Trade Commission and of the guidelines issued by the Department of Health, Education, and Welfare to local school districts. A 1976 House measure that would have made all regulations promulgated by all

administrative agencies subject to legislative veto eventually attracted two hundred cosponsors. While it did not pass, individual provisions continued to be written into law, “the most forceful continuing expression of the congressional resurgence.”³⁰

“By the end of the decade,” Sundquist concludes, “the Congress appeared to have won its point. There could be no more secret wars, no more secret covert operations, not even secret scandals.”³¹

Even in the wake of Watergate, of course, presidents could still utilize their constitutional powers. Ford frequently exercised the veto, for example, in a largely successful effort to block the policy priorities of the Democratic legislative majority. His pardon of former president Nixon in September 1974, massively unpopular at the time, was not subject to congressional check.

But where Congress could act, it did. And in many other areas, the law of anticipated reactions helped govern presidential behavior. After Ford pardoned Nixon, he felt compelled to appear in person before a congressional committee to justify his actions. It is hard to imagine a more resonant tribute to the state of executive power in the resurgence regime.

WAR POWERS, INTELLIGENCE OVERSIGHT, & FOREIGN POLICY

“The Constitution assumed that democratic control of foreign policy was a possibility,” Schlesinger wrote in *The Imperial Presidency*. “The Indochina War proved it to be a necessity.”³² During the 1970s, Congress tried to write that control into law.

RESOLVING WAR POWERS

The Tonkin Gulf Resolution was not the first blank check, but subsequent doubts about the way its authority was used and misused made it the last—for a while, at least.

Doubts about the veracity of the events in the Tonkin Gulf, and thus the solvency of the account on which the resolution’s check drew, had been raised in Congress as early as 1966 and renewed with force in a

series of hearings in 1968. In 1969 the Senate held hearings on the issue of “national commitments,” which produced nothing in the way of binding legislation but did prompt some interesting debate. “Crisis has been chronic” since the start of World War II, the Senate Foreign Relations Committee opined, and choices had often been made “in an atmosphere of real or contrived urgency,” leading to a premium on speed and decisiveness—parameters favoring executive authority. Congress’s failure to challenge executive claims to the war powers, the committee’s report warned, was “probably the single fact most accounting for the speed and virtual completeness of the transfer” of authority and initiative. But in doing so it “is giving away that which is not its to give, notably the war power, which the framers of the Constitution vested not in the executive but, deliberately and almost exclusively, in the Congress.”³³

It took more time for Congress to act on these sentiments. As noted in chapter 3, the Cambodia incursions of April 1970 prompted a wave of angry debate but no unified legislative action: here, as elsewhere, those who agreed with Nixon’s tactical objectives felt unable to criticize their constitutional underpinnings. The Tonkin Gulf Resolution was finally repealed in 1971, but, like Johnson, Nixon had never felt the resolution was as necessary as it was convenient.

The 1972 “Christmas bombings” finally stirred Congress to seriously debate proposals aimed at reining in presidents’ abilities to wage unilateral warfare. Various versions of such legislation had been floated since 1970 or so, along with attempts to cut off funding for military operations in Southeast Asia. The two debates overlapped; the continuing bombing of Cambodia in the spring of 1973, after legislative disapproval, prompted a vehement reaction from those who, like Sen. William Fulbright (D-AR), raged that “the Nixon administration has shown that it will not be gotten the better of by anything so trivial as a law.” When Nixon vetoed a ban on further funding for the bombing, a new version was subsequently attached to a critical debt limit measure. This forced Nixon to cut a deal: military operations in the region would end by August 15.³⁴ Still, the power of the purse was a blunt instrument for influencing military action. And it was politically unwieldy. After all, it would be difficult to pass a funding cutoff during an ongoing operation, when a lack of resources might endanger troops under fire.

The two chambers had different ideas of how to check the president’s

ability to send those troops into battle in the first place. Both wanted to make sure that Congress would be consulted before military action ever began. But the House allowed some wiggle room, requiring that the president consult in “every possible instance” before sending forces into imminent or ongoing hostilities; if unable to do so, he had to give a detailed report within seventy-two hours. The Senate version required legislative approval in advance, except in very specific circumstances: namely, if troops were deployed to repel an attack on the United States or its armed forces (wherever stationed), to forestall the imminent threat of such an attack, or to rescue endangered Americans abroad or at sea. Even under these circumstances military engagement would have to end after a month unless Congress voted to authorize it—again different from the House requirement, which gave the president 120 days. In either case, if Congress did not act within the stated time frame, the military engagement was terminated; it could also be terminated earlier if Congress so directed by concurrent resolution (a procedure that meant presidents could not veto the order).

The different drafts went to conference committee. The House had doubts about exactly specifying presidential powers, given the difficulty in interpreting terms such as *imminent threat*. The Senate in turn feared giving the president power to commit troops even for four months without a tighter leash than the House provided. In the end, the resolution merged the two approaches, and the War Powers Resolution (WPR) was finally passed in November 1973, over President Nixon’s veto. Nixon claimed it would limit flexibility in foreign policy; members of Congress responded that “flexibility has become a euphemism for presidential domination.” The *nation’s* ability to make decisive choices, they stressed, was not equivalent to the *president’s* ability to do so.³⁵

As finally approved, the resolution started with a statement of purpose and policy that included a version of the Senate’s list of conditions. It held that presidents’ “constitutional powers . . . as Commander-in-Chief” applied only after a declaration of war or some other formal authorization by Congress or if the United States or its armed forces were attacked. The next section included the House requirement that presidents “shall consult with Congress” before the use of force “in every possible instance” and shall continue consultations until troops are

out of harm's way. Consultation with Congress was not intended to be optional; the president, explained Senate sponsor Jacob Javits (R-NY), would now be "obliged by law to consult before the introduction of forces into hostilities and to continue consultations so long as the troops are engaged."³⁶

Unless war had been declared, presidents were further required to report on each troop deployment within forty-eight hours of that deployment, justifying the circumstances of the decision and "the constitutional and legislative authority under which such introduction took place," along with the likely duration of the hostilities. Choices triggering disclosure included the introduction of new troops into hostilities or into the "territory, airspace or waters of a foreign nation, while equipped for combat" and also any deployments that would "substantially enlarge" existing force levels. Periodic reports were to follow at least once every six months.

With this information in hand, Congress retained the right to require at any time by concurrent resolution that the engagement cease. And without affirmative congressional authorization in the meantime, troops were in any case to be removed from hostilities within sixty days (up from the thirty-day window the Senate had passed). This period could be extended either by congressional action or by the president, if he certified in writing that the additional time was a matter of "unavoidable military necessity" to ensure their safe withdrawal. But in the latter case the extension could last no more than an additional thirty days. Treaties and alliances were explicitly ruled out as a justification for military action unless implementing legislation specifically authorized that action.

As will be discussed in the next chapter, the wording of the resolution as it combined the House and Senate versions led to complications for interpretation and enforcement. But if the WPR was partly symbolic, even the symbol was substantial: it epitomized the idea that Congress was an indispensable actor in all areas of policy-making. "It is the purpose of this joint resolution," the text began, "to fulfill the intent of the framers of the Constitution and the United States and insure that the collective judgment of the Congress and the President will apply to the introduction of United States Armed Forces into hostilities." Even Henry Kissinger was moved to assert that "Congress is a coequal branch of government . . . [and] foreign policy must be a shared enterprise."

Javits went further. There would be no more “Presidential war,” he asserted, for Congress had at last moved to “codif[y] the implementation of the most awesome power in the possession of every sovereignty.”³⁷

INTELLIGENCE OVERSIGHT

With the massive CIA efforts in Laos and Thailand and the Operation 34-A adventures in Vietnam in mind, some lawmakers hoped to include covert operations within the consultation and reporting functions of the WPR. These efforts were unsuccessful. However, the CIA began to come under further scrutiny as early as 1973, when the agency’s support of various White House Plumbers’ efforts (providing false identities, electronic equipment, and the like, as well as the Ellsberg psychological profile) came to light through the Watergate investigations. Further, it was noted, there had been no objection to the excesses of the Huston Plan from Langley’s side of the table.

Soon thereafter U.S. involvement in the dismantling of Chile’s Allende government came under suspicion. A House Armed Services subcommittee held oversight hearings that by 1974 led to an effort to ban altogether covert actions undertaken for “the purpose of undermining or destabilizing” any foreign government. While this failed, in December 1974 the Hughes-Ryan Amendment was added to a foreign aid bill. Hughes-Ryan put into statute important new reporting requirements: the CIA would have to brief six (later eight) separate committees on what specific actions were under way outside of “activities intended solely for obtaining necessary intelligence.” To get even that far, the president would have to make a finding, in writing, that each operation was “important to the national security of the United States.” Otherwise, no funds could be expended for the operation. Congress thus reinserted itself into the intelligence oversight process; and the president, further, was stripped of the “plausible deniability” behind which so many prior operations had been shielded. Interestingly, President Ford did not fight the amendment very hard: administration officials, one Republican negotiator noted, were demoralized, “shell-shocked from the Chilean exposé.” What the scholar Kathryn Olmsted has called “a historic erosion of [executive] foreign policy powers” thus took place without much publicity or resistance.³⁸

It should be noted that Hughes-Ryan only required notification, not permission. But worse was to come for the agency. Just before Christmas in 1974, Seymour Hersh's blockbuster reporting on the CIA's Operation CHAOS—its program of domestic surveillance and harassment—alerted Washington to a new scandal quickly dubbed “son of Watergate.”³⁹ In 1973 new CIA director James Schlesinger, wanting to know his liabilities in light of the revelations of CIA-Plumber relations, had directed that all potentially embarrassing agency actions be compiled into a single report. The result—693 pages of the CIA's “family jewels”—detailed some nine hundred major covert projects and several thousand lesser ones since 1961. Those projects included plots to assassinate foreign leaders and overthrow governments; programs examining the effects of illicit drugs by testing them on unsuspecting American citizens; and the wiretaps, mail opening, and black bag jobs of Operation CHAOS.

Not all of this was in Hersh's story. But enough was there that a firestorm of legislative recrimination (some self-directed) ensued, fueled by ongoing media reports about the CIA and, soon, the FBI's COINTELPRO. By mid-January the CIA's Bill Colby had been called to testify before the Senate Armed Services Committee and President Ford had been pressured into appointing a blue-ribbon commission on domestic abuses by the CIA. Led by Vice President Nelson Rockefeller, members included the AFL-CIO's Lane Kirkland, Eisenhower and Kennedy cabinet member Douglas Dillon, and former California governor Ronald Reagan. While finding that the “great majority of the CIA's domestic activities comply with its statutory authority,” the commission concluded that “some were plainly unlawful.” However, it claimed, “the Agency's own recent actions . . . have gone far to terminate the activities upon which this investigation has focused.”⁴⁰

Congress wasn't so sure and began conducting its own hearings. After February 1975, when Daniel Schorr of CBS broke the news of CIA-sponsored assassination attempts, public interest in the investigations exploded. The Rockefeller Commission began looking into the assassination allegations, but the Ford administration shelved those efforts, prompting renewed accusations of cover-up. The field was open for the Senate's new Church Committee and its House counterpart, led by Rep. Otis Pike (D-NY).⁴¹

Looking into the controversy proved a tad problematic for the Democratic majority, since, as noted earlier, a number of the abuses had taken place under Democratic administrations. Conservatives on the committee who felt that presidents should have wide unilateral power in foreign affairs were less conflicted. Sen. Barry Goldwater (R-AZ) defended JFK and LBJ and suggested that, had he won the 1964 election, he too would have ordered assassinations: in a war, even a cold one, ruthless methods were required. One comforting Democratic response was to charge the CIA with “rogue” status, acting outside the bounds of presidential knowledge and approval; but as Sen. Walter Mondale (D-MN) concluded, the problem was, rather, “presidential unaccountability to the law,” given that “the grant of power to the CIA and these other agencies is, above all, a grant of power to the President.” Since the president could exercise that power in secret, the question of reform was a difficult one.⁴²

In April 1976 the final Church Committee report was released, six hefty volumes comprising several thousand pages of detailed information on foreign and military intelligence, domestic operations, the organization and historical evolution of American intelligence agencies, and (as a sop to conspiracy theorists) the performance of those agencies in investigating JFK’s assassination. Its conclusions condemned the FBI much more strongly than the CIA, which was odd, since even the conservative Rockefeller Commission had called much of Operation CHAOS illegal and all of it “improper.”⁴³ Still, Presidents Ford and Carter were pressured to do their own housecleaning of the agency. Anticipating the Church Committee report, Ford issued a February 1976 executive order that banned political assassination, created an Intelligence Oversight Board, channeled the CIA out of the domestic arena, and prevented human subjects research—policies continued under the Carter administration, when former Church Committee stalwart Mondale became vice president. Further, in 1977 new director of central intelligence Stansfield Turner purged the agency by demoting or dismissing some eight hundred espionage officers, even renaming the Directorate of Intelligence the National Foreign Assessment Center. Covert operations were limited by executive order to activities “designed to further official [i.e., overt] United States programs and policies abroad.” Such operations continued, to be sure, especially after the Soviet invasion of Afghanistan

in 1979, but the CIA's capability for carrying them out had been significantly weakened by the agency's trials since 1973.⁴⁴

The Church Committee's final report reflected the ambivalence many members of Congress had about the necessity for covert actions and the likely efficacy of their own body in directing such actions when necessary. Keeping secrets comes hard to a legislative body, as the repeated inquiries into leaks during the Church and Pike investigations attested.

This debate was resolved in two related ways. First, if Congress was conflicted about the need for secret operations, it did at least want to be kept informed. "If CIA had been acting as the President's agent in many of its improper actions," longtime agency hand (and later director) Robert M. Gates later wrote, "then the way to control CIA was to dilute the President's heretofore nearly absolute control over the Agency. And that would be done by a much more aggressive congressional oversight mechanism." The eventual result, in 1976 and 1977, was the creation of permanent Select Committees on Intelligence in each chamber, with membership rotating after six to eight years. The idea was to reduce the number of committees with jurisdiction over covert action, thus making information less prone to leaks and forging a more effective oversight relationship with the administration. The Intelligence Oversight Act, passed in 1980, added punch to that process, making sure required disclosure was limited to the intelligence committees and expanding the Hughes-Ryan mandates by requiring that those committees be "fully and currently informed" of *all* intelligence activities run out of the CIA or elsewhere in the government. This included intelligence collection and counterintelligence operations as well as covert action. Further, the committees were to receive information on "any significant anticipated intelligence activity," that is, they were to be notified in advance. If the president did not give advance notice, briefings still had to occur quickly thereafter ("in a timely fashion," as under Hughes-Ryan) and fully explain the lapse. And the president still had to make specific findings that covert activities were required by national security.

There were some concessions to demands of speed and secrecy. Under "extraordinary circumstances affecting vital interests of the United States," for example, notice could be restricted to eight members

of Congress: the chair and ranking minority members of the intelligence committees, the Speaker and minority leader of the House, and the majority and minority leaders of the Senate. Nevertheless, as Loch Johnson wrote in 1984, the Intelligence Oversight Act was a “benchmark in congressional efforts to enhance the participation of elected representatives in the making of international agreements. It achieves—in law—equal access to information, and makes that information available to legislators before it is too late for them to use it.”⁴⁵ Whether it achieved that goal in fact as well as law was, of course, a matter to be decided in practice. In the short run, at least, the Senate and House Intelligence Committees did prove to be aggressive interlocutors.⁴⁶

A second avenue for legislative assertiveness was via the power of the purse. Hughes-Ryan had already banned funding for covert activities that went unreported to Congress, and Ford administration efforts to take sides in the Angolan civil war prompted further such efforts. The CIA had been shipping millions of dollars’ worth of arms, communications gear, and cash to a faction fighting another backed by Cuba and the Soviet Union. The administration’s efforts to hide this aid prompted statutory language in 1976 limiting CIA activities in Angola to intelligence gathering. The Clark Amendment passed later that year prohibited any assistance to any side in the Angolan war “unless and until the Congress expressly authorizes such assistance by law”; in separate action, Congress refused to provide any funding. In other areas, though, presidents were able to gain support for what Louis Fisher calls “covert action in the open”; enormous funding was provided, for example, to the Mujahedeen resistance to the Soviet Union after the latter’s invasion of Afghanistan in 1979.⁴⁷

EXECUTIVE AGREEMENTS

During the 1970s Congress also tried to gain information about another area of executive-directed foreign policy: agreements with other countries that do not conclude in treaties. Treaties, of course, must be ratified by a two-thirds vote of the Senate. “Executive agreements,” however, need no such sanction, and, indeed, the commitments they make have not always even been disclosed to Congress. By the mid-1920s the number of executive agreements began consistently to outpace the number

of treaties, a trend accelerated by World War II; President Truman concluded more than 1,300 agreements while submitting just 145 treaties for ratification. One calculation suggests that between 75 and 80 percent of significant military commitments abroad were conducted via executive agreement rather than by treaty between 1953 and 1972.⁴⁸ These included, in the mid-1960s, major commitments to the defense of such nations as Ethiopia, Thailand, and Spain. In the last case the United States pledged to protect Spain (which did not join NATO until 1982) against attack in exchange for the right to use Spanish soil for military bases.

Such a relationship linked directly to war powers and to the issue of national commitments debated as early as 1969. Legislators' concerns were exacerbated by the "obsessive secrecy," in Sen. Henry Jackson's (D-WA) phrase, of Nixon-Kissinger back-channel diplomacy in the Middle East, Southeast Asia, China, and the USSR. What commitments were being made, what understandings reached? Hearings in 1972 led to the Case-Zablocki Act, which required that "the text of any international agreement, other than a treaty," be submitted to Congress "as soon as is practicable" but in any case within sixty days after the agreement took effect. If an agreement was deemed too sensitive for release to the full Congress, it could be sent to the foreign relations committees under seal.

Oral agreements were soon added to the mix, along with a requirement that presidents explain in writing any delays in reporting agreements to Congress.⁴⁹ Later proposals were even stronger, recommending that all executive agreements have a waiting period before going into effect, so that they could be legislatively reviewed. Some required both House and Senate participation in that process, others just the Senate; arguments over this question ultimately stalled various versions of the language in mid-1970s conference committees. Sen. Dick Clark (D-IA) tried to limit presidential discretion further with the Treaty Powers Resolution, which would prohibit presidents from reaching "significant" agreements without seeking their ratification. If presidents evaded this, in the judgment of the Senate, the Senate rules would henceforth make it out of order to consider any funding to implement the agreement. Definitional problems soon arose: what triggered "significance," after all? However, the cumulative debate had an effect on executive behav-

ior: when the Spanish base agreement came up for renewal in 1975, the Ford administration submitted it as a treaty.⁵⁰

In general, then, Congress throughout the 1970s took dramatic new stands affirming the legislative role in matters of war and peace. Even so, the previous account is truncated: Congress also used foreign aid and trade as instruments for asserting a proactive place in the making of foreign policy more generally. A new office in the State Department was created and charged with preparing annual reports on the human rights observances of all nations seeking military assistance, and Chile, Uruguay, and South Korea saw their U.S. aid cut over similar concerns. The Jackson-Vanik Amendment, seeking the right of Jews to emigrate freely from the Soviet Union in exchange for granting Russia favorable trade status, became law in 1974. Congress withdrew the United States from the International Labor Organization; cut its contribution to the United Nations Educational, Scientific, and Cultural Organization (UNESCO) over UNESCO's exclusion of Israel; and then cut funding to the United Nations itself. Congress placed conditions on arms sales and attempted to place a total ceiling on overall weapons sales. All this, President Ford warned in 1976, placed "impermissible shackles on the President's ability to . . . conduct the foreign relations of the United States."⁵¹ For many in Congress, though, that was their job too—and for them the president's shackles had been very belatedly fastened.

THE BATTLES OF THE BUDGET RESUME

The budget battles of the early 1970s were less amenable to dramatic television than were many of the other fronts of the Watergate wars. Yet they were arguably the most critical from the point of view of legislative prerogative, given how fundamental the power of the purse is to congressional authority.

IMPOUNDMENT CONTROL

Because of this, perhaps, the congressional reaction to Nixon's assertions of power came earlier in this area than in others. As early as March 1971, Sen. Sam Ervin (D-NC) blasted impoundments by declaring that Nixon

had “no authority under the Constitution to decide which laws will be executed or to what extent they will be enforced.” The selective nature of impoundment, he argued, did just that. A half dozen bills were filed requiring the president to at least notify Congress when he planned to withhold funds.⁵²

In the interim, a number of court actions were brought that challenged the president’s impoundment authority. It was not obvious that the courts would step in: Was this a “political question” between the branches? Were the suits “ripe” for judicial determination? While some cases were set aside on these grounds, most were heard. Where they were heard, the president nearly always lost.⁵³ By mid-1973 a memo from budget director Roy Ash to Nixon referenced some forty-five ongoing lawsuits resulting from impoundment. “The volume and variety of these legal challenges were clearly unanticipated at the time the budgetary decisions were made,” Ash admitted. He continued, with some understatement: “Defending them continues to be a difficult proposition, and some setbacks in the courts have occurred.”⁵⁴

By the end of that year, two cases had reached the circuit courts of appeal, and these were consolidated for appeal to the Supreme Court in April 1974 as *Train v. City of New York*.⁵⁵ The cases involved \$23 billion passed over Nixon’s veto in 1972 to ameliorate water pollution but withheld; only 55 percent of the specified funds were allotted. The circuit court had held that “the executive trespassed beyond the range of its legal discretion” in so doing, since such a strategy would “make impossible the attainment of the legislative goals” explicit in the statute. The Supreme Court’s unanimous ruling was more narrowly drawn, but still a clear defeat for the administration: “The legislation was intended to provide a firm commitment of substantial sums within a relatively limited period of time in an effort to achieve an early solution of what was deemed an urgent problem,” wrote Justice Byron White for the Court. “We cannot believe that Congress at the last minute scuttled the entire effort by providing the Executive with the seemingly limitless power to withhold funds from allotment and obligation.” Such a holding rejects, at least by implication, the Nixon claim to an inherent power of impoundment—since if such a power were constitutional, statutory language could not have set it aside.⁵⁶

The *Train* decision was not handed down until February 1975, and in the meantime Congress took action of its own. After the 1972 campaign

and Nixon's escalation of impoundments in 1973, the debate over anti-impoundment legislation had rekindled. Senator Ervin again was at the center of the argument and put the case starkly: unless Congress responded, he claimed, "the current trend toward the executive use of legislative power is to continue unabated until we have arrived at a presidential form of government." Congress itself would cease to be a "viable institution."⁵⁷

The Impoundment Control Act, which ultimately passed in 1974, put Congress back in charge of spending. The act divided impoundments into two main categories, deferrals and rescissions. A rescission reflected a president's intent to rescind, or cancel, the appropriation in question. By contrast, deferrals were monies held aside temporarily for use later in the fiscal year. The comptroller general, who heads Congress's GAO, was put in charge of ensuring that requests were properly classified.

Under the Impoundment Control Act, both deferrals and rescissions had to be sent to Congress for evaluation. Deferrals could be vetoed by the majority disapproval of one chamber of Congress but became effective if neither House nor Senate disapproved. However, rescission requests would only take effect, and thus actually cancel spending, if they were affirmatively adopted by both chambers within forty-five days of continuous session. There was no requirement that the president's proposals receive a vote or even debate. Thus, while presidents could delay spending somewhat, Congress could readily ensure that its fiscal wishes were carried out on a case-by-case basis.

Nixon left office before the Impoundment Control Act became effective. President Ford briefly pressed the point by repeatedly seeking to withhold all appropriations that came in higher than his own recommendations. However, Congress just as regularly overturned his decisions (just 12 percent of Ford's \$3.3 billion in rescission requests were approved), and the administration eventually gave up. There were fifty rescissions proposed in 1976, twenty-one in 1977, and just eight in 1978.⁵⁸

THE CONGRESSIONAL BUDGET ACT

The impoundment debate kick-started another one over the larger process followed by Congress in formulating a budget. The administration argued that impoundments were necessary in part because of leg-

islative irresponsibility. Members wanted expenditures cut—but while they did not want the president to choose where those cuts would come, they did not want to act themselves either. The basic problem was the so-called tragedy of the commons, where the aggregate of individually rational acts is problematic for the whole community. It is not surprising that each member of Congress seeks gains for his or her own district and seeks to lower the costs imposed on his or her own constituents. And while those goals make individual sense, when pursued by 535 legislators, they add up to fiscal disaster. The body needed centralized discipline to ensure that the body could see the forest for the trees, that overall goals and balance were not nibbled away by particularistic self-interest. Thus in late 1972 a Joint Study Committee was created to suggest ways to address these institutional shortcomings.

The Congressional Budget Act was the result. Signed into law in July 1974 in conjunction with the Impoundment Control Act, it represented a complete reshaping of the legislative budget process.

Three provisions in particular are worth exposition. First, the CBA created new Budget Committees in each legislative chamber whose job it was to formulate an overall budget ceiling—revenues and expenditures both—and broad funding allocations by governmental function, within which the existing Appropriations Committees would be constrained to work.

Second, a series of deadlines were set up for completion of various stages of the process. These came complete with rules protecting the process from various strategies of delay, privileging the budget for debate and guarding it from Senate filibuster.

A resolution agreeing to the overall Budget Committee determinations was to be passed by May 15, giving the Appropriations subcommittees the summer to determine spending on particular items within each allocation. A second resolution reconciling the first with any legislative changes made during the year would follow by September 15. This was to match spending levels with statutory requirements: to cut spending on entitlements, for example, Congress might need to change the conditions for eligibility in various entitlement programs. By October 1, which now marked the start of the fiscal year, the thirteen different appropriations bills funding the entire federal government were to be passed and signed into law.

Third, the CBA created the Congressional Budget Office (CBO) to

provide Congress as a whole with its own source of budget expertise. CBO was to “score” the fiscal impact of legislative initiatives and to vet the assumptions of the president’s budget as a check against the Office of Management and Budget (OMB).

Relatedly, Congress sought to dilute presidential partisanship at OMB itself. One tack was to undercut executive unity in the budget formulation process. Legislators required that certain agencies send their desired funding levels to Congress at the same time they submitted them to OMB and even mandated that the president include the unedited requests of select other agencies in his own budget, next to his own recommendations.⁵⁹

Congress also required that OMB’s top two appointees, who had served since 1921 as purely presidential staff, receive Senate confirmation. The original draft of the bill sought to make this requirement retroactive—in order to get at controversial Nixon appointees Roy Ash and Fred Malek. However, Nixon’s veto of this power play was sustained by the House. A proactive version of the bill became law in February 1974.⁶⁰

All told, by the mid-1970s the budget battle had come to temporary truce on congressional terms. In 1975 Senate Budget Committee chair Brock Adams (D-WA) could declare that “for the first time in its history the Congress . . . had developed and operated a comprehensive national budget”; had formulated “an economic policy that is distinctly that of the Congress, not the President”; and had thus “recaptured from the executive its constitutional role in controlling the power of the purse.” Even OMB’s deputy director, Paul O’Neill, gave the act credit for moderating congressional spending inclinations. By 1980 the president and Congress were working together on a balanced budget resolution, so closely that House Speaker Tip O’Neill (D-MA) declared, “consultation of this type I’ve never seen in all my years in Congress.” Using the discipline of the new process, the standing committees quickly produced changes in law to make the needed cuts. While declining economic conditions put balance out of reach, Sundquist concludes that, “in the sixth year of the budget process, the great potential of that process was beginning to be realized.”⁶¹

If Congress wanted to exercise detailed oversight and coordination of

fiscal policy, it was now equipped to do so without reliance on the president. The question was no longer capacity but determination. And during the remainder of the 1970s, at least, Congress seemed committed to making the process work.

ETHICS: BUILDING THE “ETHICS EDIFICE”

Given the breathtaking scope of the ethical lapses uncovered by the Watergate investigations, by 1974 few members of the public admitted to having much faith in any segment of government. Efforts to restore public trust led Congress to act in a number of areas designed to deter official corruption and to systematically prosecute it when it occurred. In 1976 the Public Integrity Section was established in the Criminal Division of the Justice Department to consolidate efforts to investigate “criminal abuses of the public trust.” The Federal Election Campaign Act of 1974 and the Ethics in Government Act of 1978 sought to institutionalize guardianship of governmental integrity. As G. Calvin Mackenzie has concluded, “the effort to protect the public from its own leaders became one of the fastest-growing sectors of government in the years after Vietnam and Watergate.”⁶²

CAMPAIGN FINANCE REFORM

As noted earlier, the Federal Election Campaign Act (FECA) of 1971 was violated in every particular by the subsequent campaigns of 1972. Nixon campaign money flowed from corporate coffers into slush funds and thence into the accounts of burgling ex-Plumbers. For large donors, *quid* seemed to lead quickly to *quo*. The 1971 act seemed quickly and wholly inadequate. “Watergate is not primarily a story of political espionage, nor even of White House intrigue,” argued John Gardner, head of the good-government group Common Cause. “It is a particularly malodorous chapter in the annals of campaign financing.”⁶³

In response, Congress passed extensive amendments to FECA in 1974. The new law required that each candidate be limited to one campaign committee: this was to eliminate the various coordinated “volunteer” committees commonly used to evade spending limits and to pro-

vide off-budget aid to campaigns. Contributions would be capped: for each election, individuals could give just \$1,000 to candidates, \$5,000 to political action committees (PACs) or state parties, and \$20,000 to national party committees, with the total across all recipients limited to \$25,000. Even if running for office themselves, individuals were constrained: presidential candidates could give just \$50,000 to their own campaigns and congressional candidates even less. PACs and, in most cases, parties could themselves contribute \$5,000 to any given candidate. In-kind donations uncoordinated with a campaign, but *de facto* on its behalf, were limited to \$1,000 per candidate.

Spending was limited too. House campaigns were capped at \$70,000 in expenditures, Senate races at \$100,000, except for the largest states, though even there spending could not exceed eight cents per potential voter. Party committees could spend another \$10,000 on behalf of their House candidates, \$26,500 in the Senate.

On the presidential side, the excesses of 1972 were to be stemmed by making elections publicly funded. If a candidate became eligible by raising a threshold amount of money in small contributions (\$250 or less) across twenty different states, those donations would become eligible for federal matching funds until the candidate faltered and received less than 10 percent of the vote in consecutive primaries. Primary season spending limits were set in each state based on population, starting at just \$10,000. Overall expenditures on primary elections were also capped. To avoid the temptation of corporate underwriting of the national conventions (*à la* ITT in 1972), \$4 million in federal funding was provided for each party's grand party. And full public funding was instituted for the general election season after the conventions, with \$20 million for each major party candidate. The Senate version of FECA had included federal financing of congressional races as well; but even without that, FECA's mechanisms for election funding were "heralded as the most significant reform of the campaign finance system in American history."⁶⁴ Capping them off was a permanent enforcement mechanism in the form of the new Federal Election Commission (FEC). The FEC was to develop electoral regulations and to enforce them, as well as to serve as the public clearinghouse for the periodic reports on contributions and expenses each campaign now had to compile and file.⁶⁵

The intent of the new FECA was, like so many of the post-Watergate

enactments, to restore the public's faith in the electoral process. The idea was to strike back at big money's influence in politics, real and perceived, clearing the field for small and presumably more virtuous donors. FECA, Sen. Edward Kennedy (D-MA) argued, would "guarantee that the political influence of any citizen is measured only by his voice and vote, not by the thickness of his pocketbook." Even PACs, quickly seen as perfidious, were viewed positively at the time as mechanisms that allowed the pooling of small contributions for big impact and that required those contributions to be disclosed instead of slipped under the table.

Soon enough, of course, the Supreme Court would strike the first blow at this new framework; purveyors of "soft money" would inflict the fatal wounds. But in 1974 Sen. Howard Cannon (D-NV) could claim that the "new law will constitute the most significant step ever taken in the area of election reform." Kennedy went further: the bill's passage was "one of the finest hours of the Senate in this or any other Congress." Even President Ford, no fan of public financing, could not resist the pressure to sign FECA into law. The fact was, he conceded, "The times demand this legislation."⁶⁶

THE ETHICS IN GOVERNMENT ACT & THE INDEPENDENT COUNSEL

The Ethics in Government Act (EGA) of 1978, as President Carter noted in his signing statement, likewise "respond[ed] to problems that developed at the highest level of Government in the 1970's." The president added, probably sincerely, that he was "very pleased" with "this milestone in the history of safeguards against abuse of the public trust by Government officials."⁶⁷

The EGA, under various labels, had been in the works long before it became law. Early versions dating back to 1974 and 1975 included requirements for financial disclosure by the president and vice president, enhanced limitations on political activity by government employees, and the creation of a "congressional legal service" able to advise legislators on the legality of executive practices and to initiate civil actions on Congress's behalf.

By the time the EGA became law, the bill had changed substantially. It contained a variety of requirements designed to stem malfeasance and

to deter conflicts of interest, largely by making them more transparent: all elected federal officials, senior staff, Senate-confirmed appointees (including judges), and presidential candidates would be required to file public financial disclosure forms laying out income and investment information. Any gifts valued over thirty-five dollars—or cumulating to more than one hundred dollars in a given year—also had to be disclosed. To jam the “revolving door” between government and the regulated private sector, formal and informal lobbying contacts between ex-federal employees and their former agencies were forbidden for two years. An Office of Government Ethics was created to monitor executive branch compliance with these requirements; GAO was to enforce legislative compliance.⁶⁸

But by far the best-known provision of the EGA was Title VI, the special prosecutor provisions, which would later be known as the Independent Counsel Act (ICA).⁶⁹ Title VI hearkened to the aftermath of the 1973 “Saturday Night Massacre,” when Nixon removed Archibald Cox from office. Within days, legislation to create a permanent, independent special prosecutor’s office had been introduced and attracted wide support in both chambers.

In the short run, the White House undercut the bills’ momentum by quickly naming a successor to Cox, Leon Jaworski and granting him a large degree of independence from the executive branch proper. The Justice Department went so far as to publish new regulations specifying that “the Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities.” Indeed,

In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President’s first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action.⁷⁰

Congress nonetheless pushed to institutionalize the independence that Jaworski had negotiated. While some members persistently argued that the ultimate result of Watergate indicated that no new procedures were required—that, after all, the “system worked”—many more thought an impartial mechanism needed to be put in place as a concession to an era of burgeoning polarization. Senate Judiciary Committee hearings were entitled “Removing Politics From the Administration of Justice.”⁷¹ After all, even if one trusted Congress to do the right thing instead of the partisan thing, the executive branch could not be trusted to police itself. Over time, attorneys general had tended to be appointed on the basis of their loyalty to the president rather than on their legal expertise;⁷² and in any case, the president, as chief executive, is likewise the nation’s chief prosecutor. Cox’s firing (later combined with the revelation of the smoking gun evidence that the president had sought to quash the FBI investigation) suggested that a president determined to protect himself would use that authority ruthlessly. In a 1987 debate over amending the act to provide for presidential appointment of the independent counsel, Sen. Carl Levin (D-MI) accused the administration of amnesia: “What you want to do is say let’s just forget about what has happened in the 1970s with that Saturday Night Massacre. . . . I think you are going to find the Congress resisting that advice.”⁷³

Substantive conflicts over the structure of the special prosecutor’s office (How should a prosecutor be chosen? Should it be a permanent appointment?) delayed enactment of the law until Ford was defeated by Jimmy Carter in the 1976 elections. As finally passed, with Carter’s support, the independent counsel law provided a three-stage process for setting an investigation in motion after the attorney general received information alleging that a high-level federal official had committed a violation of federal law. First, the attorney general was to conduct a preliminary investigation. Second, unless the attorney general found that “no reasonable grounds exist to warrant further investigation,” she was to apply to a Special Division of the United States Court of Appeals, a panel of three judges serving two-year terms on the panel.⁷⁴ The panel would then name and appoint the independent counsel and define his jurisdiction. The counsel was then to have “full power and independent authority to exercise all investigative and prosecutorial functions and powers of

the Department of Justice.” There was no time limit or spending limit binding the investigation.⁷⁵ At the outset, the counsel could only be removed for “extraordinary impropriety,” though this standard was changed to the still daunting requirement of “good cause” in 1982.

The ICA had widespread support among Washingtonians. Indeed, Katy Harriger’s authoritative book on the topic suggests that “the strength of elite support for the institution of the special prosecutor is perhaps the arrangement’s greatest contribution to American politics. . . . The confidence of elites in the impartiality of independent counsel investigations helped to defuse the animosities and limit the conflict among the branches and between the parties.”⁷⁶ The use of independent counsels quickly became a routine part of Washington life—the first was appointed almost immediately, in 1979, followed by another in 1980 and a third in 1981. Before the act’s expiration in 1999, twenty cases were brought, employing twenty-five independent counsels at a cost of over \$175 million. Charges ranged from allegations of drug use by White House aides to perjury, bribery, fraud, and influence peddling by cabinet secretaries.⁷⁷ Some fifty convictions resulted. Many investigations did not lead to the filing of any criminal charges, a fact that the statute’s defenders argued showed its basic impartiality; on the other end of the scale were the immense Iran-contra investigation of 1986–93 and the wide-ranging 1994–2000 probe that began with the Whitewater land deal. These are described in more detail in the next chapter, but both had far-reaching impact. The Iran-contra investigation led to eleven convictions and two pretrial pardons; the Whitewater probe, through the tortuous expansion of the independent counsel’s authority into areas ranging from suicide to sex, led to some fifteen convictions and the impeachment of the president of the United States.

In 1988 the Supreme Court decisively upheld the ICA’s constitutionality, despite its odd amalgamation of a judicial appointee into the executive branch. In general, the Court accepted the contention made by the Senate in its 1978 committee report on the act: that a court’s appointment of the prosecutor was required “in order to have the maximum degree of independence and public confidence in the investigation conducted by that special prosecutor.” The Court agreed that Congress had not tried to usurp executive functions but simply sought a workable mechanism for dealing with allegations of executive corruption.⁷⁸

Not everyone bought that argument. While only Justice Antonin Scalia demurred from the Court's opinion, his vigorous dissent pointed out that the ICA went past simple workability to mark yet another institutional resurgence against the executive branch. The act, Scalia claimed, "deeply wounds the President, by substantially reducing the President's ability to protect himself and his staff. That is the whole object of the law, of course, and I cannot imagine why the Court believes it does not succeed."

In this view, both the courts and Congress grabbed power. On the one hand, Scalia took the position that executive power could not be qualified: Article II did not give the president "some of the executive power, but all of the executive power." Thus the Court's judgment that it had the power to determine when infringement on executive authority was "substantial" was itself pretentious, since the Court had no right to overlay shades of gray on black-and-white boundaries.

On the other hand, Congress also gained at the president's expense. The trigger mechanism of the law was so low that attorneys general had little standing to resist the appointment of independent counsels; presidential accusers were thereby empowered to bring criminal charges with little evidence but much potential for damaging the White House. In Scalia's opinion,

The institution of the independent counsel enfeebles him more directly in his constant confrontations with Congress, by eroding his public support. Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrong-headed, naive, ineffective, but, in all probability, "crooks." And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution. The present statute provides ample means for that sort of attack.⁷⁹

Whether or not they were as weakened as much as Scalia argued, presidents could not welcome the *Morrison* decision. The ICA was in place, and, at least on constitutional grounds, the issue seemed settled. For Congress, the institution of the independent counsel was "the grandest monument to its victory over Richard Nixon and the Imperial Presidency."⁸⁰ It was the cornerstone of a new "ethics edifice" erected to gild the resurgence regime.⁸¹

CONCLUSIONS

The resurgence regime was undergirded by what the legal scholar Gerhard Casper has called “framework statutes”: laws designed not to solve a particular policy problem but “to support the organizational skeleton of the Constitution by developing a more detailed framework for governmental decisionmaking . . . and attempt[ing] to stabilize expectations about the ways in which governmental power is exercised.”⁸² Statutes ranging from the Congressional Budget and Impoundment Control Acts to the National Emergencies Act to the War Powers Resolution were aimed at channeling information—and authority—through new procedures and veto points. Court decisions added their own constraints.

A critical motive was to enhance public trust and confidence in government. Proponents of resurgence argued that trust could only be built through more open, less secret government.

Still, it was no coincidence that public confidence was also deemed to require increased legislative assertiveness. The frameworks enacted in the 1970s were hardly neutral in their approach to the constitutional balance of power. Both court and, especially, Congress pushed back against the presidency’s two-century-long expansion of prerogative authority. Throughout the 1970s the efforts by Congress to regain the powers of the purse and the sword, along with its general institutional standing, were extensive and ambitious. Already by 1976 journalists were keeping track of “the score since Watergate” in a running battle of “the President versus Congress”; and Congress was ahead.⁸³

By the 1980s some argued that the truly imperial branch was not the presidency but Congress. The resurgence regime, they felt, set too many limits, thus undercutting national security, effective administration, and even the constitutional order. “America faces a constitutional crisis,” wrote Gordon S. Jones and John A. Marini, settling on two causes: “the congressional failure to observe traditional limits on its power, and the acquiescence of the other two branches of government in the resulting arrogation of power.” They urged a restoration of presidential power.⁸⁴ But that, as we will see, was already under way.