

VI. THE RESURGENCE RECEDES, PART II

Peace & War

Developments in the areas of budgeting and executive ethics were parallel to those in the other areas under study. Indeed, as the resurgence regime receded, presidential power over matters both of peace (in unilateral expressions of executive authority) and war (in military and intelligence operations) was enhanced. The result, by the start of the twenty-first century, was inter-branch terrain altered from the Watergate era, but still recognizable, after Congress's intervening surge and decline.

EXECUTIVE AUTHORITY & GOVERNMENTAL SECRECY

President Ronald Reagan's White House counselor and attorney general Edwin Meese recalled in his memoirs that one "major threat to constitutional government" faced by the Reagan administration "was the legislative opportunism that arose out of the Watergate controversies during the early 1970s. Congress had used this episode to expand its power in various ways vis-a-vis the executive branch."¹ Reagan intended to turn this around.

By his second term, many academic observers believed he had succeeded. "More than any other modern president," one wrote, "Ronald Reagan has moved with dedication and comprehensiveness to take hold of the administrative machinery of government." Another concluded that Reagan's presidency was "postmodern" in that it had accelerated and consolidated trends of the post-FDR "modern" presidency discussed in chapter 2 in ways that added up to a newly empowered office.

The development was praised by some as a realistic approach to the varied constraints on presidential power; others decried it as an arrogation of power.²

BUILDING EXECUTIVE CAPACITY

Responsiveness & Centralization

Presidents starting with Reagan paid renewed attention to controlling appointments throughout the executive branch. With an eye toward what former OMB staffer Richard Nathan called the “ideological purity of the cabinet and subcabinet,” Reagan and his staff put significant effort into placing hundreds of well-vetted loyalists across the bureaucracy. New appointees in 1980–81 were oriented to their departments not by the departmental staff but by conservative think tanks. Civil service reform passed in 1978 had given presidents more leeway over high-level appointments to what was now called the Senior Executive Service: Reagan used this tool to remove numerous career officials from key positions and to replace them with his own partisans, while using staffing cuts to eliminate entire offices of civil servants. Reagan also aggressively used his power to make recess appointments to evade Senate confirmation of nominees—doing so nearly 250 times in eight years. After failing to abolish the Legal Services Corporation, for example, he appointed its entire board in this manner.³ Judicial appointments followed a like path. The merit-based judicial screening process established in the Carter administration was replaced in 1981 by a President’s Committee on Federal Judicial Selection, which institutionalized close ideological review of candidates for the bench.⁴

Future presidents took note. They stressed “responsive competence” over the old public administration ideal of “neutral competence”—and responsiveness over competence generally. The Iran-contra projects of the NSC staff, discussed in the last chapter, serve as a case in point; but this level of loyalty was hardly considered a fatal flaw on a White House résumé. As Clinton staffer George Stephanopoulos put it, “doing the president’s bidding was my reason for being; his favor was my fuel.” George W. Bush cabinet secretary Paul O’Neill, with his long background in policy analysis, chafed under the White House’s demands for “personal loyalty” and that staffers “stick together, *no matter what*,” even

if empirical analysis dictated a different policy path. True presidential control of the bureaucracy remained elusive, but presidents kept trying, as the 1994 reorganization of the OMB and the 2001 “President’s Management Agenda” made clear. Under the latter, President Bush sought to privatize as many as 850,000 jobs in the federal bureaucracy while utilizing a new Program Assessment Rating Tool to link funding levels to agency performance.⁵

As ever, managerial efficiency was usually perceived to flow from increased attention to the priorities of the current administration. And thus appointment strategies remained a critical tool. By the mid-1990s, what Paul Light has termed “thickening government” gave presidents some 2,400 high-ranking positions to fill—up by a third even from 1980—reaching down into the middle management ranks of most federal agencies. In 2001 incoming president George W. Bush controlled nearly 500 slots from the deputy assistant secretary level up, as well as 185 ambassadors, 200 U.S. attorneys and marshals, more than 700+ non-career senior executive service managers, and 1,400 lower-level political appointees scattered around the bureaucracy. Presidents built up the White House Personnel Office so as to maintain strict control over the responsiveness of their appointees, often drawing them from lobbies or industries sympathetic to the administration and deeply interested in a given substantive area. The Bush personnel office worked in close conjunction with political adviser Karl Rove and the Office of Political Affairs. While the slow pace of the confirmation process for those nominees requiring Senate approbation was decried, in the end few nominees were denied.⁶

Sometimes presidents don’t want to fill a vacancy—George W. Bush indicated his feelings about the Environmental Protection Agency’s (EPA) Office of Regulatory Enforcement by leaving it vacant for more than a year and a half.⁷ But where presidents did grow tired of waiting, acting and recess appointments were common. Clinton, while more reluctant to use recess appointments than Reagan (or George H. W. Bush), did so in several high-profile cases that angered senators, including the appointment of the openly gay ambassador James Hormel in 1999. Clinton also made a recess appointment to the federal judiciary in late 2000, only the second time since the 1950s that strategy had been utilized; he resubmitted the judge’s name, successfully, for regular

confirmation in 2001. George W. Bush pushed the recess strategy much further in early 2004 by using it to appoint two contested circuit court nominees whose pending nominations had been filibustered on the Senate floor. Democratic senators complained that the move was “questionably legal and politically shabby,” but they had little recourse. Later Bush was able to trade a promise not to make further recess appointments in 2004 in exchange for the quick confirmation of twenty-five less controversial nominees.⁸

Another fundamental piece of this strategy was the use of centralization, as described earlier: the shift of policy-making capacity out of the wider executive bureaucracy into the White House itself. One indicator of this trend was that the size of the White House staff largely bounced back from its early pruning by Carter. As noted in chapter 4, some of that decline had reflected accounting shifts rather than changes in the actual personnel available to the president; in 1980, for example, the number of authorized personnel was held constant, but under the pressures of the reelection campaign a large number of staff were detailed from other agencies to the White House. Carter’s commitment to cabinet government, so fervent in 1976, waned throughout his term. As early as 1977—and most visibly after 1979, when he fired five members of his cabinet—he began to give White House aides more say in the policy-making process. That same summer, Carter also abandoned the idea of operating without a chief of staff, naming Hamilton Jordan to that post; all subsequent presidents have utilized one. The Nixon White House has, in a real sense, become the “normal” model for presidential staff organization.⁹

This development both meant and reflected a larger and more hierarchical White House. As important as the “general secretariat”¹⁰ centered in the chief of staff’s office was the increasing functional specialization and layering within its various staff units. The EOP housed aides—and aides to aides—devoted to policy-making (domestic, economic, and national security), communications (with the public, the bureaucracy, Congress, and interest groups), and internal coordination and administration. One study found that an index combining the number of titles, levels of hierarchy, and topics of specialization within the White House staff more than doubled between the 1970s and 1990s.¹¹ New staff units sprang up to reflect salient presidential or simply societal concerns, from

the drug czar to an AIDS outreach office to one exploring faith-based initiatives. The Domestic Policy Council was restored; like other cabinet-level councils it has been important largely for its White House staff secretariat. The importance of the National Security Council (NSC) staff, especially its head, is well known. Less prominently, the National Economic Council was created in 1993 to integrate foreign and domestic policies with economic implications; its workings were likewise dominated by its directors, Democrats Robert Rubin and Gene Sperling and Republicans Larry Lindsey and Stephen Friedman. The various pledges during the 1992 campaign to cut the size of the White House staff—by a quarter, Clinton promised—suggest the continuing resonance of the issue, but it proved a promise not worth keeping and only briefly kept.¹² While questions remained as to whether centralization always provided presidents with the resources they needed for effective policy deliberation, as a source of resources and capacity for exercising authority the White House at the dawn of the twenty-first century seemed undiminished by Watergate.

Another facet of centralization was the use of direct executive action—executive orders, presidential decision memoranda, and the like—as a means of implementing policy preferences by directing bureaucratic action without explicit legislative authorization. With Congress at least partly in opposition hands for most post-Watergate presidents, this strategy became increasingly tempting. As Clinton aide Rahm Emanuel put it in 1998, “sometimes we use [an executive order] in reaction to legislative delay or setbacks. Obviously, you’d rather pass legislation that can do X, but you’re willing to make whatever progress you can on an agenda item.” Orders could be used to issue binding directives to members of the executive branch; to shape regulatory action; to reorganize agencies or decision-making processes; to control the military; or even to make new policy, especially in areas where Congress had not acted or where presidential initiative was generally accepted. Whether or not divided government was the cause, and scholars disagree on this point, the number of significant executive orders issued by presidents has risen dramatically over time. One exhaustive survey of the executive orders issued between 1936 and 1999 found that, after a World War II–induced surge in their use in the 1940s, the proportion of substantively significant orders tripled from the 1950s to the

1990s. Another study similarly concluded that the number and scope of substantive orders have risen impressively since the Reagan administration, aimed at “efficient, effective, prompt, and controlled action within the executive branch.”¹³ Recent examples include the Clinton set-aside, by proclamation, of nearly 2 million acres of land in Utah as a national monument and George W. Bush’s faith-based social services initiative.

In 1994 the Supreme Court held that presidential executive orders were not subject to the Administrative Procedures Act—thus no public comment or balanced research process is required in their development. Such orders are, however, supposed to be grounded in statutory authority. Where so—and at times they rely instead on the happily vague “executive power” of the Constitution—they often show the unintended consequences of congressional delegation. Clinton’s Utah proclamation, for example, rested on a 1906 statute long forgotten by Congress but not by presidents. Further, as noted earlier, congressional efforts to constrain executive authority sometimes legitimate it. A good example is the International Emergency Economic Powers Act. The IEEPA was passed in 1977 to rein in the use of its titular powers by carefully specifying when they might be used. But by providing a process for declaring emergencies as a means of preventing economic transactions with disfavored regimes, Congress formalized a previously shadowy claim to power. Presidents took advantage: between 1979 and 2000 nearly thirty “national emergencies” were invoked to seize the assets of and prohibit trade with countries ranging from Iran (1979) to Libya (1986) to Afghanistan (1999). Sometimes these “emergencies” simply provided a means for unilateral implementation of policy preferences, as when President Reagan applied IEEPA sanctions against Nicaragua in 1985 as a substitute for those Congress had refused to enact.¹⁴

Executive orders are hardly unfettered. For one thing, they can be overturned by court or Congress. But outright negation is relatively rare. And in the interim they can give the president power to shape or reshape the policy landscape, often under the political radar screen.¹⁵

For example, take the rise of “central clearance” within the OMB in the 1940s (discussed in chapter 2). OMB had grown to be a powerful tool of presidential control over the executive branch; as we have seen, Congress eventually responded by requiring Senate confirmation of its top two positions and creating the CBO as a legislative analogue. But in

the 1980s, using executive orders, President Reagan expanded OMB's functions in another direction. Now the agency was to review department-issued regulations.

This sounds dull. But agency rule making is extraordinarily powerful, turning vague statutes into specific mandates on individuals and businesses. The substance of any law is in many ways determined by the regulations issued in its name.¹⁶ Thus as Reagan sought to expand presidential power over the bureaucracy, as a way of enforcing bureaucratic responsiveness, the implications were far-reaching. If nothing else, it was hoped the exercise would limit the number of new regulations published, itself a Reagan policy goal.

President Nixon, perhaps not surprisingly, had been the first to assert a regulatory approval power within OMB; Ford and Carter had directed agencies to consider the inflationary impact and cost-benefit ratio of new regulations. But Nixon's stratagem never took hold, and the Ford and Carter directives applied no sanctions. Reagan, on the other hand, aimed to stop regulations that imposed any net cost at all, to anyone. In February 1981 he issued an order grounded rather vaguely in "the authority vested in me as President by the Constitution and laws of the United States," stating flatly that "regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society." OMB had the power to recommend that regulations be withdrawn if they could not "be reformulated to meet its objections."

The process as it developed was largely off the record—over the phone or via confidential comments—which served to shield it from legislative or judicial review. Further, since (under the Paperwork Reduction Act of 1979) all the forms bureaus wanted to use for research had to be cleared through OMB, that agency's staff announced it would not approve departmental efforts to collect the information needed to justify the costs of new regulations. By 1985 a more direct route—simply denying bureaus the funds for regulatory research—had been chosen; that year also marked the issuance of a new executive order requiring agencies to create an annual list of "anticipated regulatory actions" for OMB review. One legal analysis concluded that this meant OMB had "virtually unbridled power to supervise or veto almost any agency's activity without public scrutiny." Despite congressional grumbling,

there was little legislative reaction; and regulatory review remained in place through the Bush, Clinton, and Bush presidencies. Upon taking office, President Clinton placed a moratorium on George H. W. Bush's pending regulations; George W. Bush, in turn, did the same to Clinton's.¹⁷ The latter Bush's desire for regulatory responsiveness in environmental policy attracted perhaps the most attention, as scientists charged that scholarly, technical review was being shunted aside in favor of political considerations, usually favoring development over preservation.¹⁸ Nonetheless, regulatory review had become a fixture, if not one with any statutory approbation.

Executive orders were not the only presidential tool used to centralize authority over policy: the use of presidential memoranda also increased dramatically. Memoranda direct departments to act in a certain way. They are similar to executive orders and may supplement them, but they do not, unlike those orders, need to be published in the *Federal Register*. President Reagan signed a memorandum freezing federal hiring on his Inauguration Day, even before he had left the Capitol. George H. W. Bush used memoranda to extend the Reagan regime by imposing a moratorium on all rule making and by shifting regulatory oversight to an aggressively deregulatory Council on Competitiveness headed by Vice President Dan Quayle, whose authority was to extend even to independent regulatory commissions (and which, as an executive creation, could claim executive privilege when asked for records of its deliberations). President Clinton used a memorandum to overturn the Reagan/Bush "Mexico City" policy banning funds for foreign organizations advising family planning, a decision itself reversed by George W. Bush immediately upon his own accession to the presidency in 2001. Indeed, according to one scholar Clinton "transformed" the use of memoranda, issuing more than 530 of them during his eight years in office; other controversial examples from the 1990s include decisions to direct the Food and Drug Administration to reconsider imports of the abortion-related drug RU-486, to order the secretary of defense to draft language "ending discrimination on the basis of sexual orientation" within the armed forces, and to declare a patients' "bill of rights" within federal health-care programs. By their nature, memoranda are hard to challenge—harder than executive orders, though they may have almost identical effects.¹⁹

Another variant of memoranda deals with national security issues and

is normally drafted through the NSC staffing process. National security directives—given different names by different administrations²⁰—are normally classified, and thus no good overall count can be made. But in the mid-1980s such directives underlay the policies in Iran and Nicaragua that ran afoul of the statutory bans on arms sales to terrorists and aid to the contras. They provided negotiation instructions to diplomats working on nuclear arms control and shaped the Strategic Defense Initiative. They even implemented the “Plan for Economic Warfare Against the USSR,” which laid out aggressive plans for hindering Soviet commerce. Needless to say, this plan did not receive congressional review or approval. Legislative efforts in the late 1980s to obtain a list of national security directives failed, even after the Iran-contra investigation had presumably weakened the president’s hand. Rep. Lee Hamilton (D-IN) complained in 1988 that such directives “are revealed to Congress only under irregular, arbitrary, or even accidental circumstances, if at all.”²¹

Signing Statements

Chapter 3 noted several examples of President Nixon’s use of signing statements, designed to make clear that the president had no intention of implementing part of a bill he was signing into law. But President Reagan far surpassed the Nixon record in this regard. The goal was to direct executive agencies in their interpretation of the law as they drafted rules or made other decisions about implementation—including whether to do so in the first place. Secondly, presidents hoped to influence judicial readings of a given statute by putting executive office views into its legislative history. Either way, Reagan and his successors made frequent use of the tactic.

One Reagan-era example harkened back to the questions of secrecy raised earlier (and renewed later). Reagan had issued a national security directive with strict enforcement provisions governing the disclosure of information deemed sensitive. When Congress passed a bill forbidding the administration from enforcing those provisions, Reagan signed it—but wrote that “this provision raises profound constitutional concerns,” since it “impermissibly interfered with my ability to prevent unauthorized disclosures of our most sensitive diplomatic, military, and intelli-

gence activities.” Thus, “in accordance with my sworn obligation to preserve, protect, and defend the Constitution, [this section] will be considered of no force or effect.” Reagan likewise refused to enforce language requiring that reports by the CIA inspector general be submitted to the legislative intelligence committees.

Presidents throughout this period routinely included language in signing statements that would in their view “unconstitutionally constrain my authority regarding the conduct of diplomacy and my authority as Commander-in-Chief.” And, when signing authorizations of force, they uniformly asserted their refusal to concede the constitutionality of the War Powers Resolution (WPR).²²

These claims to constitutional interpretation have gone beyond national security issues. George H. W. Bush, for instance, used a signing statement to direct the Energy Department to administer language requiring affirmative action contracting “in a constitutional manner”—that is, so as not to include affirmative action contracting. Reagan and both Bushes argued that Congress cannot interfere with any processes leading to the potential proposal of measures that presidents might deem “necessary and expedient,” as Article II puts it, for legislators to enact; for instance, in spring 2001 George W. Bush asserted that a section directing the administration to submit legislation concerning mad-cow and foot-and-mouth diseases would be interpreted instead as a suggestion. Clinton added the appointment power to the list. In October 1999 he filled a newly created National Nuclear Security Administration with extant Energy Department staff in defiance of congressional dictates. George W. Bush in 2001 followed his example, rejecting legislative specification of the pool of potential appointees for a Defense Department post.²³

Such signing statements, claiming the right to selective execution of the laws, are a form of line-item veto dressed up as constitutional commentary. They have not gone entirely uncontested—a circuit court once scolded the Reagan administration’s effort to avoid parts of a contracting act by saying that “this claim of right for the President to declare statutes unconstitutional and to declare his refusal to execute them . . . is dubious at best.” But in other cases the Supreme Court has at least implicitly endorsed the practice; at the least, such presidential assertions

have proven hard to overturn, and more often than not Congress has not tried. Presidents, in turn, have tended to act in accord with the Justice Department's Office of Legal Counsel (OLC) guidance drafted in 1994: "where the President believes that an enactment unconstitutionally limits his powers, he has the authority to defend his office and decline to abide by it, unless he is convinced that the Court would disagree with his assessment."²⁴ On that last score, they have proven hard to convince.

Overlooked Oversight

Meanwhile, the Supreme Court's landmark 1983 decision in *INS v. Chadha* made it harder for Congress to conduct oversight over other aspects of the administrative presidency. Recall that the use of the legislative veto, checking the executive's use of delegated powers, had exploded in the 1970s as a pragmatic means of dealing with the explosion of the regulatory state. It had become, as Justice Byron White put it, "a central means by which Congress secure[d] the accountability of executive and independent agencies."

The *Chadha* case came about when Mr. Jagdish Chadha sued the government after the attorney general's suspension of his deportation was vetoed by the House. Though the circuit court had found narrower grounds for ruling in Chadha's favor, the Supreme Court declared that the legislative veto mechanism was itself unconstitutional. In so doing, it set aside some two hundred statutory provisions. The core rationale was that the legislative veto violated the presentment clause of the Constitution, that is, the portion of Article I laying out how a bill becomes a law. That "step-by-step, deliberate and deliberative" process requires both chambers of Congress to pass the same measure and to present it to the president for his signature. Thus, extending the process to require that the measure return to Congress in some manner for reconsideration and action "essentially legislative in purpose and effect" was not acceptable. That the act allowed for a one-chamber veto only made things worse, since this violated the principle of bicameralism as well.

In a lengthy, peeved dissent, Justice White argued that there was a good case for the legislative veto's basic constitutionality, since its exercise did not write new law but merely fulfilled the terms of the original

statute. Overturning all such vetoes, he thought, went much too far and did damage to Congress's practical ability to rein in "the modern administrative state." The result was to empower presidents—who had no such presentment limitations placed on their use of executive orders and proclamations and the new law those tools created.²⁵

Some have argued that the overturning of the legislative veto mattered little substantively, because Congress didn't really want the responsibility that came with its aggressive use. This has the ring of truth to it. Either way, there is little doubt that congressional oversight has decreased dramatically from the mid-1970s. Vigorous hearings on matters of policy, as opposed to allegations of wrongdoing, have dropped off sharply: one political scientist found that congressional committees met, in aggregate, only half as many days in 1997 as in 1975 and that fewer of those days were devoted to oversight activities. Instead of agency-by-agency review during authorization hearings, governmental functions were increasingly reauthorized in huge omnibus legislation (or quite frequently not at all, relying on recurring waivers of authorization authority through the annual budget appropriation). "Lately," one 2004 analysis concluded, "the watchdog is getting a reputation for sleeping on the job."²⁶

Proxy overseers, such as the inspectors general, have also been criticized. Some complain that Congress no longer used the inspector general process effectively; others were more concerned that inspectors general, like their 1978 counterparts the independent counsels, had too many incentives to find abuse and wasteful spending even where little objectively existed. Still others accused presidents of politicizing the inspector general corps. For example, George W. Bush, upon taking office, dismissed a number of agency inspectors general and also appointed the daughter of Supreme Court Chief Justice William Rehnquist as inspector general at Health and Human Services. An ex-White-water investigator later became chief of staff of the Defense Department's inspector general staff. Former congressional counsel Stephen Ryan argued in 2003 that inspectors general were "pushing their conception of what's good public policy" instead of auditing the efficient implementation of established policy.²⁷ But from the presidential vantage, this may not be a bad thing.

Responsiveness & Law Enforcement

Despite its kinship to the Nixon Responsiveness Program—indeed, it has been judged by most to be more successful—the reborn “administrative presidency” was not extended to law enforcement agencies as vigorously as its predecessor. No credible analogue to Operation CHAOS, or COINTELPRO, or the Huston Plan emerged in the 1980s or 1990s. Still, even here the resurgence against executive discretion in law enforcement came under fire. The Carter Justice Department had prosecuted and convicted two top Nixon-era FBI officials for their role in authorizing COINTELPRO break-ins; Reagan pardoned them. A 1981 executive order superseded Carter’s more stringent constraints on the FBI’s use of infiltration techniques. And in 1983 Attorney General William French Smith issued domestic security guidelines that significantly amended the Levi guidelines of 1976.

Smith eliminated Levi’s earlier requirement for a preliminary investigation to prove the need for a full-blown investigation. Further, where a full investigation could previously be justified only if “specific and articulable facts” showed that an individual or group was breaking the law, and in a violent way, the Smith guidelines allowed domestic security investigations if “facts or circumstances reasonably indicate that two or more persons are engaged in an enterprise for the purpose of furthering political or social goals wholly or in part through activities that involve force or violence.” Beyond weakening the evidentiary requirement (from “articulable fact” to “reasonable indication”), the language allowed the FBI to investigate groups that “knowingly support” another group that is violent, even if they did not themselves commit criminal acts. And, where the resurgence regime guidelines had considered activities to be conducted under the First Amendment unless shown otherwise, the new rules stress that an organization’s rhetoric inciting violence or criminal activity is fair game for investigation “unless it is apparent . . . that there is no prospect of harm.” While such inquiries could not be based solely on activities reflecting free speech, infiltration of organizations could be authorized even if it occurred “in a manner that may influence the exercise of rights protected by the First Amendment.” An appeal court ruled in 1984 that this was good enough: the FBI “need not

wait till the bombs begin to go off, or even till the bomb factory is found.”²⁸

As protest grew over Reagan’s foreign policies, especially in Central America, the bureau was used to monitor and infiltrate groups that opposed those policies. The Committee in Solidarity with the People of El Salvador (CISPES), the Central America Solidarity Association, the Inter-Religious Task Force, and other groups were the target of lengthy investigations, which accelerated after a small bomb exploded in the U.S. Capitol in 1983. As with earlier antiwar groups, the FBI hoped to show that CISPES and the rest were both violent and directed from abroad, thus undercutting the legitimacy of their protests against administration policy. Yet there was little evidence for either accusation.²⁹ On the foreign intelligence side, the 1987 case of the Palestinian “L.A. Eight” highlighted the possibility, at least, of abusing FISA authority, even of non-“U.S. persons,” by focusing on a group’s political activities and associations rather than on its support for violence or terrorism.³⁰

The CIA also got back into the act. “Reagan’s men in early 1981 believed deeply that CIA was dominated by political liberals very much out of touch with the real world and the worldview of the president,” recalled future agency director Robert Gates. For the first time in memory, an outside transition team was commissioned to evaluate the CIA, and Reagan’s campaign manager, William Casey, became director of central intelligence.³¹ Tellingly, Reagan’s intelligence activities directive of December 1981 (Executive Order 12333) reworked the section previously entitled “Restrictions on Intelligence Activities” into one called simply “Conduct of Intelligence Activities.” While some of Carter’s language was retained, the tone of the document reflected the retitling: constraints were no longer the rule but the exception to a broad authorization of authority. Where the Carter order stressed legal boundaries, Reagan’s focused on the ability to do anything not strictly prohibited. The ban on assassinations remained in effect, for example, but the ban on using or even encouraging third parties to conduct operations ruled out in the order did not. In the Carter order, the Intelligence Oversight Board was to probe not just illegality but “impropriety”; this instruction was deleted in 1981. The agency was, further, given additional freedom from White House oversight (and accountability), shifting review responsibility from the national security advisor to the director of central intelligence himself.³²

There seemed to be some willingness too to have the CIA reenter the domestic sphere. The agency was specifically authorized to “conduct counterintelligence activities within the United States in coordination with the FBI,” so long as they did not perform any “internal security functions.” The CIA passed on to the FBI information on Salvadoran leftists in the United States, much of it provided by the National Guard of El Salvador, to aid in its investigations; in return, by some accounts, the FBI provided the National Guard information about refugees who had fled to the United States illegally and had been deported back to El Salvador. On neither side was their welcome a warm one.³³

Further, the new definition of “special activities,” aka covert operations, was expanded. First, the Carter requirement that such actions be consistent with overt operations, “designed to further official United States programs and policies abroad,” was deleted. And until the 1991 amendments to the Intelligence Oversight Act in the wake of the Iran-contra affair, the Justice Department held that the written findings used by the president to authorize covert action were “merely procedures instituted for the ‘internal use’ of the president and his intelligence advisers and could not legally bind him”; after all, the assistant attorney general wrote, “activities authorized by the President cannot ‘violate’ an executive order in any legally meaningful sense.”³⁴ Given the broadening importance, as discussed previously, of executive action, such a claim suggested a distinct absence of boundaries for executive power.

The rise of terrorism both as a rising global concern and as a domestic phenomenon—made painfully clear by the 1993 World Trade Center and 1995 Oklahoma City bombings and the 1996 attacks on U.S. bases in Saudi Arabia—enhanced those claims. In 1995 FBI director Louis Freeh announced that the 1983 Smith guidelines would be “reinterpreted” to allow expanded investigations into terror cases, arguing that investigations previously requiring “imminent” commission of a crime could now be conducted against groups that had the potential for carrying out violence, advocated it, and acted in a way that “might violate” federal law. From 1995 to 1997 the number of open security investigations shot up from about one hundred to as many as eight hundred.³⁵

These unilateral expansions of surveillance and investigation reflected in part the Republican-led Congress’s temporary unwillingness to enhance the president’s legal tool kit, even though President Clinton had proposed doing just that as early as February 1995—before the

Oklahoma City bombing that April. Much of the delay owed to conservative outrage at the 1992 Ruby Ridge, Idaho, and 1993 Waco, Texas, incidents where standoffs with well-armed suspects turned into deadly shootouts with federal law enforcement personnel. But legislative recalcitrance changed in 1996 with the Antiterrorism and Effective Death Penalty Act, which awkwardly tied new barriers to appealing capital sentences to new presidential powers. At the time, as much attention was paid to what was not included in the bill—roving wiretap authority, for example (which would be partially granted in 1998 and fully in the 2001 Patriot Act), and chemical “taggants” in gunpowder (to allow it to be traced)—as to what was. But its contents were quite extensive. The secretary of state, in conjunction with Treasury and Justice, was given authority to designate given groups as terrorist organizations; individuals associated with such groups could be denied visas and more readily deported (whether or not they had themselves participated in any terrorist activities). Treasury received new power to block designated groups’ fund-raising, to freeze their assets, and to ban transactions between countries supporting them and U.S. citizens. Terrorism became a federal crime, as did the use of biological and chemical weapons. The FBI received new authority to obtain financial records from consumer reporting agencies. And \$1 billion was provided (about half of it to the FBI) for improving counterterrorism tools; that fall, with the election looming, Clinton demanded and received another \$1.1 billion for securing overseas military and intelligence operations.³⁶

GOVERNMENTAL SECRECY: EXECUTIVE PRIVILEGE & BEYOND

Executive Privilege

Starting in the 1980s executive privilege received new life, if not immediately in name then in deed. President Reagan was the first president since Nixon to issue administration-wide guidance on executive privilege, arguing that it had “legitimate and appropriate” uses, though only if specifically invoked by the president himself. And early in the administration Attorney General Smith produced a memo strongly supporting invocation of the doctrine against a pending congressional subpoena. Smith pointed out that *U.S. v. Nixon* placed executive privilege squarely within the Constitution. “A President and those who assist him must be

free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately,” Chief Justice Burger had written, adding that some sort of communications “privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.” The privilege was not absolute, and in the Nixon case it was trumped by the Court’s duty to safeguard the judicial process. But in other areas, especially when “military, diplomatic, or sensitive national security secrets” were at stake, the Court owed the president “great deference.” Smith recommended that the president use this decision to withhold Interior Department documents pertaining to foreign ownership of mineral leases that contained information from Canadian officials. Besides the documents’ diplomatic and deliberative protections, he argued, Congress did not have a presumptive right to executive branch information during its investigations. Smith wrote:

The interest of Congress in obtaining information for oversight purposes is, I believe, considerably weaker than its interest when specific legislative proposals are in question. . . . [T]he congressional oversight interest will support a demand for predecisional, deliberative documents . . . only in the most unusual circumstances.³⁷

In the end, Reagan did not hold fast to the doctrine in this conflict or several others; during the Iran-contra investigation, he even consented to turning over portions of his personal diary. Ironically, George H. W. Bush, the consummate Washington insider (and close observer of the effects of Watergate as the chair of the RNC), ultimately was more successful than Reagan at keeping information from Congress. One scholar concluded that “Bush’s strategy was to further the cause of withholding information by *not* invoking executive privilege” and thus not calling attention to the doctrine. This approach was similar to Ford’s and Carter’s—but different in that Bush contended that executive privilege by any other name did, indeed, smell as sweet. Under the rubric of “deliberative process privilege,” “attorney work product” and “attorney-client privilege,” “internal departmental deliberations,” “secret opinions policy,” “deliberations of another agency,” and the like, the Bush administration was frequently able to win the point while not

engaging the larger argument. One House Judiciary Committee staffer complained in 1992 that the president “knew how to work the system. . . . In reality, executive privilege was in full force and effect during the Bush years.”³⁸

But it was Bill Clinton who brought the term itself back to life, prompted by his battles with independent counsel Kenneth Starr and Congress. Clinton took a broad view of the doctrine; the administration renewed the Reagan-era distinction between oversight and legislation, arguing that Congress’s rights to access information concerning the former were weak. The presumption was that White House communications were privileged and that nothing would be released that was “subject to a claim” of privilege, even if that claim was not actually made.

The doctrine was accordingly used aggressively—it was officially asserted fourteen times, in the end, compared to once by George H. W. Bush and three times by Ronald Reagan—to the point that journalists began drawing parallels to the 1970s. “What’s the difference,” Clinton was asked, “between your case and Richard Nixon’s effort to stop the Watergate investigation?”³⁹ The proximate cause was the aggressive legislative investigations into administration actions and ethics, especially after 1994. For example, the president claimed executive privilege in an effort to withhold documents relating to the firing of White House Travel Office staff from a House committee; if successful this would have extended privilege to the First Lady’s discussions with White House staffers. In 1994 the White House was forced by a circuit court to release documents relating to the independent counsel investigation of Agriculture Secretary Mike Espy. And Clinton’s extended efforts to exert executive privilege over materials relating to the Whitewater investigation and its extended progeny, the Lewinsky affair, were also unsuccessful; the Lewinsky case, the courts held, had little to do with official government business.

But the administration also successfully invoked executive privilege in a number of instances as well, even where it made broad claims. For example, refusing a congressional request for documents concerning the administration’s policies in Haiti, Attorney General Janet Reno made the startling claim that Congress had no power to conduct oversight of foreign affairs, due in part to the “sole organ” doctrine of the 1936 *Curtiss-Wright* case. The investigating committee backed down.

Further, in the *Espy* case, the presidency achieved some broadening of judicial doctrine regarding executive privilege even as President Clinton suffered a tactical defeat. The court's careful opinion divided executive privilege into "deliberative process privilege" and "presidential communications privilege." The former, while valid, could be "overcome by a sufficient showing of need" and denied "where there is reason to believe the documents sought may shed light on government misconduct." But the latter, following *U.S. v. Nixon*, was grounded in the separation of powers—thus "congressional or judicial negation of the presidential communications privilege is subject to greater scrutiny than denial of the deliberative privilege"—and, when invoked, "the documents become presumptively privileged." That presumption was qualified by the needs of the court system to be able to guarantee full access to evidence (like the *Nixon* court, the *Espy* decision focused on judicial needs, and it specifically avoided most questions peculiar to the balance between the president's need for confidentiality and legislators' need for information). And in this case, the court held that the independent counsel's need for the evidence outweighed presidential prerogative, especially since the evidence was not available elsewhere.

Where this was not so, though, the court noted that "the critical role that confidentiality plays in ensuring an adequate exploration of alternatives cannot be gainsaid." Thus the presidential communications privilege applied to "final and post-decisional materials as well as pre-deliberative ones"; and it applied to "communications made by presidential advisers in the course of preparing advice for the President . . . even when these communications are not made directly to the President," so long as they were "in the course of performing their function of advising the President on official government matters" on issues arising from the president's constitutional duties.⁴⁰ Documents concerning the president's controversial decision in 1999 to grant clemency to members of a Puerto Rican terrorist group fell into this category, given the absolute nature of the pardon power.

Clinton's extensive use of executive privilege, associated in the public mind with the Lewinsky scandal, did little to bring the doctrine back into good repute. But George W. Bush was, if anything, even more aggressive in shielding information from the legislative gaze, even before the tragedies of September 11, 2001, vaulted national security to the

forefront of the policy process. The rationale, argued Bush press secretary Ari Fleischer, was that “these are vital matters dealing with constitutional prerogatives vested in the presidency. They should not be whittled down over time as a result of the actions of the previous administration.”⁴¹

Bush rarely made formal claims of privilege, preferring like most of his post-Watergate predecessors the pragmatic practice of utilizing its substance while avoiding its nomenclature. One exception came in response to a subpoena seeking information on FBI investigations of Boston mobsters; releasing such documents would, Bush wrote to the attorney general, “inhibit the candor necessary” for executive deliberation. Indeed, “Congressional pressure on executive branch prosecutorial decisionmaking,” he continued, “is inconsistent with separation of powers and threatens individual liberty.”⁴² The administration never did release all of the requested documents, despite angry rhetoric from legislators of both parties. Nor did it hand over records relating to alleged campaign finance violations from the 1996 campaign. This last, obviously, shielded the records of former president Clinton still held by the Justice Department.

More systematically, Bush sought to extend privilege to all former presidents even after their records moved into the National Archives system. After delaying the planned release of records from the Ronald Reagan Library in early 2001 for more than eight months, Bush issued an executive order restricting access to historical documents subject to the Presidential Records Act (PRA).

In 1989 Reagan’s own executive order had identified three areas (national security, law enforcement, and a much broader “deliberative process” category) in which a former president could claim executive privilege over his records due for release by presidential libraries. However, the National Archives were not bound by that claim after a thirty-day review period expired; unless the incumbent president made a formal assertion of his own executive privilege, the records would be automatically released after the thirty days.⁴³

The 2001 order added new categories to Reagan’s list (including the “presidential communications privilege” and one for legal work) and granted both former and incumbent presidents joint claims of privilege

over documents in those categories. That is, a current president could assert privilege even if the former president objected—and vice versa. Vice presidents, and presidents' and vice presidents' estates, were also given the ability to make binding claims of privilege, an unprecedented grant of power making executive privilege something to be bequeathed to one's heirs, presumably in perpetuity. Further, in contrast to the PRA, the burden of proof for the records' release was ratcheted up and placed squarely on the researcher, who was required to have a "demonstrated, specific need" for a given record. (This was in addition to the requirements already in the PRA safeguarding the release of national security information.) Thus, while the order was entitled "Further Implementation of the Presidential Records Act," the result was actually to amend that act quite dramatically.⁴⁴

In the brief furor that followed the order's issuance, the White House did agree to release, more than a year late, most of the first batch of Reagan documents cleared by the National Archives. This gesture was sufficient to forestall a half-hearted effort in Congress to overturn the order. And in 2004 a court case over the breadth of the executive order was dismissed, despite the order's inconsistency with the Supreme Court's 1977 decision in the Nixon papers case. Because the researcher bringing the suit had died during its long gestation, he could no longer be said to have been harmed by his failure to get access to the papers.

Government in the Sunshine?

If the Reagan administration had limited success in its formal claims to executive privilege, it nevertheless showed little compunction in trying to evade public oversight more generally. The *Los Angeles Times* went so far as to complain that Reagan "set a policy and tone for secrecy in government that exceeds anything since Watergate. In fact, not even during the Nixon years were so many steps taken to establish secrecy as government policy."⁴⁵

This conclusion was partly driven by administration efforts to manage the press. During the invasion of Grenada, for example, journalists were kept more than 150 miles from the fighting. Reagan tried aggressively to curb leaks of sensitive information to the press, authorizing the use of lie

detector tests on employees handling such information and seeking to impose White House advance approval for any contact with reporters if classified materials might be discussed.

Further, starting in 1981 Reagan proposed rolling back parts of the Freedom of Information Act (FOIA); as Attorney General Meese argued the administration brief, Congress had “overcorrected” in 1974 and “seriously impaired . . . the effective functioning of law enforcement agencies” by limiting their ability to withhold “FOIA-ed” information. In 1982 Reagan issued an executive order modifying Carter’s requirement that only information causing “identifiable damage” to national security could be withheld; automatic declassification of documents was suspended and the standard duration of classification extended. Restrictions on access to additional information (e.g., at the Energy Department) were also expanded, by departmental regulation. All this mattered for FOIA since one of the exemptions in the law provides that information otherwise legally secret—no matter how it gets that way—cannot be released.

In 1984 a new exemption allowing the CIA director to withhold “operational files” from release was approved. In 1986, as part of legislation designed to fight the war on drugs, Congress acquiesced to other changes. Reasonably enough, the new amendments protected undercover informants and confidential sources and prevented pending investigations from being revealed to potential targets. But the revised language went beyond this to substantially broaden existing FOIA exemptions for law enforcement records and to create a new one. Among other things, instead of protecting just “investigatory records,” FOIA now covered any “records or information compiled for law enforcement purposes.” (Meese’s memoranda interpreting the amendments for federal agencies broadened this still further, telling them to “carefully consider the extent to which any of their records, even though not compiled for a specific investigation, are so directly related to the enforcement of civil or criminal laws that they might reasonably meet [the] revised threshold standard.”) The new exemption allowed the FBI not just to withhold, but to deny the existence of, certain restricted records, most notably those “pertaining to foreign intelligence or counterintelligence, or international terrorism.”⁴⁶

Another change in FOIA was enacted in 1996, when the Electronic FOIA Act doubled, and in some cases tripled, agencies’ original ten-day

window for their original responses to requests for information.⁴⁷ By then, the number of classified documents immune from FOIA had also risen exponentially. Still, President Clinton had ordered agencies generally to release documents under FOIA unless banned from doing so by statute. He also issued an executive order streamlining declassification of older material and reversing extant policy by providing that in unclear cases the government's basic stance should be against classification.

The George W. Bush administration, however, reversed the burden of proof in both instances. In 2001 Attorney General John Ashcroft announced a new policy directing federal agencies to withhold responses to FOIA requests if any legal basis existed to do so. And an executive order amending Clinton's policy, in the works since mid-2001, was issued in March 2003. The new order removed the default stance of declassification and gave the CIA new power to resist declassification decisions; other information, such as that pertaining to weapons of mass destruction or "current vulnerabilities" in security, was exempted from the automatic declassification process. Another section made it possible to reclassify previously declassified information. Even before this, notably, the number of documents marked as classified rose by more than 40 percent during the first (and predominantly pre-September 11) fiscal year of the Bush administration. Future classification was abetted by complementary low-profile administrative orders that gave three new cabinet officers—at Agriculture, at Health and Human Services, and at the EPA—the right to designate documents as "secret."⁴⁸

These developments were consistent with the Bush administration's overall attitude toward the release of information: "a matter of theology . . . that we the people have made the White House too open and too accountable," as one close observer put it.⁴⁹ That faith was exemplified, perhaps, by the administration's actions and claims in the energy task force saga.

In early 2001 Vice President Richard Cheney was asked by the president to develop energy policy for the administration. The task force subsequently appointed did not count among its formal membership any nongovernmental actors but rather consisted of fifteen or so cabinet secretaries, agency heads, and White House aides. It was therefore presumably not subject to the Federal Advisory Committee Act (FACA), described in chapter 4.

However, two Democratic congressmen, intrigued by press reports suggesting that Cheney's most meaningful consultations were with representatives of various groups and companies pushing for increased extraction of fossil fuels, asked the GAO to find out more. The request was joined by others, including two Senate chairmen. The GAO attempted to comply and requested extensive information about who attended the task force meetings and what was said. Their request was refused, on the grounds that the GAO had no authority to investigate program development. While this was news to most agencies in the executive branch, the GAO subsequently limited its request so as to seek only meeting dates and the names of attendees. The vice president's office refused again. The GAO decided to bring suit.

However, a district court judge upheld the vice president's refusal to turn over the names of his task force members. The decision rested largely on the fact that Congress as a whole, or even as a full committee, had not directed the GAO to gather this information or issued a subpoena requiring Cheney to comply. Thus the merits of the case could not be decided. Further, since the head of GAO had suffered no harm from Cheney's refusal, he thus had no standing (despite the 1980 statute directly authorizing him to sue) to get the court involved in "a clear constitutional confrontation between the political branches." The agency, while protesting that its governing statute required it to respond to committee requests (and that the Senate chairs involved were speaking for their entire committee), nevertheless decided not to appeal the decision. By this time, the Senate had returned to Republican control, and the legislative leadership now strongly opposed pursuing the suit further. Indeed, at least one Capitol Hill news agency reported that GAO was warned its budget would be jeopardized if it appealed the district court decision.⁵⁰

Meanwhile, a parallel case had been pursued by a pair of interest groups on different grounds. Their argument was that the industry sources consulted by the vice president were so important to the task force's deliberations as to make them *de facto* members of the group: if so, FACA—and its requirements to hold public meetings, to release minutes, and so forth—should apply. The plaintiffs asked that the courts require the Bush administration to produce documents that would establish the role that industry contacts had played. The administration,

in turn, argued that to do so—even if the court wound up agreeing that FACA should not apply—would disclose the information the plaintiffs wanted in the first place.

For Bush, though, the core question was not this limited excursion into court procedure, or even the definition of statutory terms; rather, it was grounded in the separation of powers. The Constitution, the solicitor general told the Supreme Court, grants the president “a zone of autonomy in obtaining advice, including with respect to formulating proposals for legislation.” Congress can do what it will with those proposals; but “Congress does not have the power to inhibit, confine, or control the process through which the President formulates the legislative measures he proposes or the administrative actions he orders.” If FACA did permit this sort of intrusive inquiry, it interfered with the president’s constitutional rights and duties and was “plainly unconstitutional.”⁵¹

The plaintiffs in turn argued that this set of claims represented a “startling bid for effective immunity from judicial process.” At the least, the administration should have to make a specific claim of executive privilege to protect a given document from release. But the Supreme Court, which considered this impasse in the spring of 2004, ruled instead that those seeking information bore the burden of specificity, so as to protect the president from “unbounded” requests. It was a “mistaken assumption” that the *Nixon* decision required presidents to explicitly invoke executive privilege, the Court held, for doing so set “coequal branches of Government . . . on a collision course” that “should be avoided whenever possible.” Since the civil matter presented by the Cheney task force did not have the same constitutional “urgency or significance” presented by the criminal case wrapped up in *Nixon*, the lower courts would have to revisit the matter with a more deferential eye toward protecting executive prerogatives. The Court did not address the broader point of FACA’s constitutionality.⁵²

The result, at the start of the twenty-first century, was a transformation of Congress’s admittedly self-serving presumption, post-Watergate, that executive processes and deliberations would be transparent. If Congress has been frustrated by the shift, it has rarely acted on this frustration. Executive privilege can be overcome by sufficient political pressure, as the Bush administration would find out with the 9/11 Commission (more formally, the National Commission on Terrorist

Attacks Upon the United States), but legislators have found it difficult to mount that pressure. Nor will the courts usually come to Congress's defense: over time they have been very reluctant to use their authority under the 1974 FOIA amendments to overrule executive decisions about classification. The principle, as one opinion put it, is one of "utmost deference" to administration determinations.⁵³

This combination of legislative lassitude and judicial deference undercut Congress's ability to breach the "zone of autonomy" and conduct effective oversight in the face of aggressive administrative policy implementation. In this sense the secrecy debates serve as useful summary for arguments over executive authority more broadly conceived.

WAR POWERS, INTELLIGENCE OVERSIGHT, & FOREIGN POLICY

WAR POWERS, UNRESOLVED

On the twenty-fifth anniversary of the War Power Resolution (WPR), in 1998, the legal scholars Louis Fisher and David Gray Adler suggested that the statute had overstayed its welcome. Rather than the lauded "high-water mark of congressional reassertion in national security affairs," the WPR was instead "ill conceived and badly compromised from the start, replete with tortured ambiguity and self-contradiction." It was, they wrote, "time to say good-bye."⁵⁴

Note that it was not the administration of George W. Bush that had raised so much scholarly ire but that of Bill Clinton. Elsewhere, indeed, Adler accused Clinton of "one of the most flagrant acts of usurpation of the war power in the history of the republic," namely, the NATO air war against Serbia on behalf of ethnic Albanians in Kosovo.⁵⁵

Kosovo is just one entry on a long list of presidential uses of force since passage of the WPR that occurred without benefit of congressional authorization. Even an abbreviated litany would have to include Lebanon, Iran, Grenada, the Persian Gulf (in 1987–88), Libya, Panama, Somalia, Iraq (in 1993 and throughout the "no-fly zone" period), Haiti, Bosnia, Sudan, and Afghanistan (in 1998).⁵⁶ Only once has the formal notification process required under the resolution been invoked, by

President Gerald Ford after he ordered American forces to rescue the crew of the *Mayaguez*, a ship seized by Khmer Rouge guerrillas off the Cambodian coast. And even he reported only after the operation was over. Every president since Nixon has resisted the WPR's constitutionality (without quite daring to challenge it in court) and has refused explicit adherence to its provisions.

None of this is surprising, perhaps, given the language of the resolution. There are at least five problematic aspects to the drafting—which itself, it will be remembered, was a product of the amalgamation of divergent House and Senate approaches to the issue. Presidents have exploited each of these ambiguities.

The first comes with the resolution's effort to define when the commander-in-chief powers to introduce troops into imminent or actual hostilities may be exercised. Two cases are intended: in the event of sudden attack on U.S. troops or territory or when Congress gives specific statutory authorization, as in a declaration of war. As written, these conditions are rather narrow, not including, for example, the protection of American embassies abroad or even the suppression of civil insurrection at home. Presidents have felt free to define "self-defense" more generously. The 1983 invasion of Grenada or the extensive naval operations in the Persian Gulf later in the 1980s, for example, were not cases where U.S. territory or servicemen had been attacked.

Presidential autonomy on this score is enhanced by the structure of the WPR. The conditions are not contained in the operational parts of the resolution but rather in Section 2(c), the "purpose and policy" section. This placement effectively makes them advisory rather than binding, a fact that sponsor Senate Jacob Javits played down at the time of passage but later conceded.⁵⁷

Second, though consultation with Congress was meant to come when a "decision is pending," according to the 1973 House report accompanying the resolution, the WPR leaves the president a clear out: he must consult in advance only in "every possible instance." Though politics is the art of the possible, presidents have proven adept at finding such instances to be impossible. What "consultation" itself requires is left hazy. It has been defined in practice by presidents as "notification"—not asking what to do, but saying what was about to be done, or, more often, what already had been done. President Carter decided to tell law-

makers about his attempted rescue of the hostages held in Iran only after it was too late to turn back; likewise, President Reagan called congressional leaders to the White House in 1986 only as U.S. bombers approached Tripoli. President Bush did not consult Congress regarding the long buildup to the Gulf War in 1991. Nor did President Clinton consult before ordering air strikes on Baghdad in June 1993, which he justified under the right of the United States to self-defense under the UN charter.⁵⁸

In any event, who, specifically, should be consulted? The whole membership of Congress? Party leaders? At the time of the *Mayaguez* incident, Congress was in recess; Ford complained that legislators were scattered around the nation and the globe and that he could not find anyone with whom to consult. Proposals designating “consultation groups” or even some congressional body parallel to the NSC have been suggested but not adopted.

Third, the resolution itself seems to override the Section 2(c) “purpose and policy” limits mentioned previously by requiring the president to report on a variety of circumstances where armed forces might be introduced—but assuming that he has the unilateral right to do such introducing in the first place. The section in question (Section 4) is in the passive voice: “in any case in which United States Armed Forces are introduced . . . the president shall submit” such a report.

Further, troops are to be withdrawn after sixty days—or ninety if the president certifies that more time is needed to ensure their safety—unless Congress has authorized them to stay longer. But this means the president is given a clear opportunity to commit U.S. forces at his discretion within the sixty- to ninety-day window. As Sen. Thomas Eagleton (D-MO) argued—in support of sustaining President Nixon’s veto of the WPR—suddenly the president had “unilateral authority to commit American troops anywhere in the world, under any conditions he decides, for sixty to ninety days. He gets a free sixty days and a self-executing option.”⁵⁹ As this suggests, presidents have certainly not sought prior authorization for troop deployments. Assistant Attorney General (and later Solicitor General) Walter Dellinger claimed in 1994 that the resolution’s structure “makes sense only if the President may introduce troops into hostilities or potential hostilities without prior authorization by Congress.” This logic was used by the Clinton administration in

Haiti and the former Yugoslavia, operations that received not congressional approval but antipathy. In Haiti the Senate voted 100–0 to stress that the UN Security Council resolution sanctioning force did not give the president any power to deploy troops. But the president said he could invade anyway: “Like my predecessors in both parties, I have not agreed I was Constitutionally mandated to get [approval from Congress].”⁶⁰

One of those predecessors had taken the argument to an extreme, at least temporarily, just a few years before. After Iraq invaded Kuwait in August 1990, President George H. W. Bush claimed he could fight the Gulf War without legislative sanction. At first, the American troop buildup was defensive, to prevent further Iraqi aggression. As the size of the deployment grew past four hundred thousand in late 1990, though, and the Bush administration spent much effort obtaining support from the UN Security Council for the use of offensive force, members of Congress demanded that no military action begin without their approval. Still the administration resisted. Dick Cheney, then secretary of defense, testified in December 1990 that the president did not need “any additional authorization from the Congress,” while the Justice Department held that “war making” and “offensive actions” should be distinguished, with power over the latter vested solely in the president.⁶¹ Even when he asked for congressional authorization in January 1991, Bush said, “I don’t think I need it.” After the war, he explained, “I felt after studying the question that I had the inherent power to commit our forces to battle after the U.N. resolution.” Put another way: “I didn’t have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait.”⁶²

Further, and fourth, the sixty- to ninety-day “clock” only starts ticking when the president reports under Section 4(a)(1) of the resolution. Presidents have therefore avoided mentioning Section 4(a)(1) when communicating with Congress. Instead, they report “consistent with” the requirements of the WPR rather than “subject to” it, without citing any particular provision.⁶³ As noted, George H. W. Bush did ultimately ask for authorization in 1991 and received it, thus obviating the need to start the clock. Yet his request asked only that Congress “express its support” for him, and he never filed a report specifically linked to the WPR. Even when President Reagan sent marines to Lebanon in 1982,

a place where “imminent hostilities” could not have been more clearly presented, he declined to trigger WPR provisions. Instead, he said the troops had been deployed under his “constitutional authority with respect to the conduct of foreign relations and as Commander-in-Chief.” Later, he argued that “the initiation of isolated or infrequent acts of violence against the United States Armed Forces does not necessarily constitute actual or imminent involvement in hostilities, even if casualties to those forces result.” (Shortly thereafter, 241 marines were killed by a massive car bomb at their barracks near Beirut.) The NATO war in Kosovo utilized some eight hundred U.S. aircraft; two months into the war, more than twenty thousand air sorties had been flown over nearly two thousand targets throughout Yugoslavia. Again, President Clinton did not deem that troops had, in the language of the WPR, been “introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”⁶⁴

The notion of a ticking clock is also undercut by the mechanics of shorter engagements. Many of the uses of force after 1973 have been so short as to make a sixty-day limit a nullity. Sixty hours, indeed, would be a huge window for swift attacks via cruise missiles or bombing runs. Cruise missile launches, further, are certainly “hostilities,” but they may not place U.S. troops in harm’s way.

The fifth potential problem is relevant to the clock too. Section 5(c) of the WPR provides that Congress can pass a concurrent resolution to remove troops at any time, even before the sixty days are up. But even before the 1983 decision in *INS v. Chadha* traced previously, many scholars (and all presidents) argued that such a resolution would not be constitutionally valid since it would not be presented to the president for signature and thus would not become law in the sense of Article I, Section 7, of the Constitution. *Chadha* strengthened this argument by striking down the legislative veto. Still, though this aspect of the WPR has never been tested in court, some analysts have provided thoughtful arguments for the concurrent resolution’s constitutionality. For example, Louis Fisher notes that *Chadha* centers on the ways Congress tried to delegate legislative authority, but the WPR was not meant to delegate; its last section specifies that it does not confer new power on the president. Further, using a mechanism that allows a veto means that presidents’ unilateral war making could be stopped only if two-thirds of both

chambers disagreed with him. “It does violence to the Constitution to place that burden on Congress.”⁶⁵

While presidents have thus taken advantage of every inch of slack in the WPR’s text, the key questions are actually less legal than political, for both presidents and legislators. After all, even if the WPR is badly written, does that sufficiently explain Congress’s failure to get involved in most deployments of American force after 1973? One way to see if a concurrent resolution would work is to actually pass one. Or to take another example, if presidents seek to avoid reporting via Section 4(a)(1), Congress could start the clock itself. (Indeed, since the language of the section says the clock starts on the date military action is reported or is “required to be [reported],” Congress could presumably do this simply by stating on what date the president *should* have reported.) Presidents have tried to use UN Security Council resolutions as a substitute for U.S. constitutional procedure. But the WPR specifically prohibits the use of treaty obligations as authorization for war and requires additional implementing legislation referencing the WPR itself.⁶⁶ Again, Congress has not pressed this point.

It is worth noting that presidents do seem to have felt constrained at times by the resolution. Through 2000 they submitted eighty-six reports “consistent with” its requirements. And when they contemplated major, long-term applications of force, they largely sought authorization—even if they claimed not to have to do so. In 1983 President Reagan eventually asked for support for the Lebanon peacekeeping mission; in 1991 President George H. W. Bush reluctantly sought approval for the Gulf War. It is hard to know whether the Kosovo war in 1999 was the exception that proves the rule—or the template for a new rule. Notably, in that conflict U.S. ground troops were not used, and active combat ended within ninety days; there were no American casualties during this period.⁶⁷

Still, technical compliance might not equal practical utility. Even in the cases just specified, legislative assertiveness varied with political context. In October 1983, most notably, legislators did start the WPR clock. But they did so as of late August 1983, though marines had arrived in Lebanon in the fall of 1982; and they set it not at sixty days but at eighteen months—safely past the 1984 elections. After the barracks bombing, even this stand may have seemed too strong, as members worried that

their very debate over the issue gave them unwelcome accountability for a disastrous intervention.⁶⁸

In late 1990 and 1991 lawmakers also pressured the president to seek approval for offensive action in Iraq. Here, even though the WPR did not function as its framers intended—to the point it was deemed by some observers to be an “archaic joke”—the resolution does seem to have provided antiwar legislators with useful leverage. It was a way, as various members of Congress put it, to “get in the game,” serving as a “framework for the debate that took place”; “we couldn’t ignore it with any good conscience.”⁶⁹ Congress didn’t fully implement the resolution—it never started the clock ticking, for example, even while passing unsolicited resolutions in the early fall approving the troop buildup. But in January 1991 the House voted overwhelmingly to affirm that “the Constitution of the United States vests all power to declare war in the Congress. . . . Any offensive action taken against Iraq must be approved by the Congress of the United States before such action may be initiated.” Legislative debate was extensive and serious about the merits of the war, and the final vote was quite close, especially in the Senate. Of course, having done the work in this case, the House could not resist a bit of self-congratulation after the fact. In a March 1991 resolution, it voted to commend the performance of the troops, the president, and, well, itself: “Whereas the House of Representatives, by means of its historic debate and courageous passage of H.J. Res 77 . . . authorized the President to use United States Armed Forces.”⁷⁰

In 1993, lawmakers (and public opinion) pressured President Clinton to withdraw the peacekeeping troops sent to Somalia by his predecessor. In 1999, on the other hand, Congress was wildly divided over Clinton’s Kosovo actions and could come to no coherent conclusion. Legislation that would have authorized the war was defeated when a Senate-passed measure failed in the House on a tie vote. But the House also defeated, by a lopsided 139–290 vote, a concurrent resolution requiring termination of the Kosovo effort. Congress did not start the WPR clock. Further, it appropriated money specifically for ongoing Kosovo operations—twice as much, in fact, as the president had requested—while rejecting an attempt to limit presidential use of ground troops there. And in 2000 the Senate voted down another effort to terminate the peacekeeping deployment by then under way.⁷¹

Despite periodic suits brought by those in Congress who have opposed specific military actions, the courts have stayed out of this arena of legislative-executive relations. When Rep. Tom Campbell (R-CO) and twenty-five colleagues filed suit at the sixty-day mark of the Kosovo engagement, the case was dismissed; among other reasons, the district court held that Congress had not exercised its WPR authority and thus the president had not acted to nullify a clear legislative imperative. In short, as Justice Powell had written in 1979, "If the Congress chooses not to confront the President, it is not our task to do so."⁷²

The massive gains by the GOP in the 1994 election may have made that sort of confrontation less likely. By 1995 prominent members of the new Republican majority had come to the same conclusion as Fisher and Adler, but from the opposite direction. The academic view was one of horror at the failure of the WPR to rein in presidential uses of force; but in some quarters of Capitol Hill, the horror was at the constricting nature of the resolution on presidential authority. Republican House Speaker Newt Gingrich himself supported efforts to repeal the resolution in 1995 even if, "at least on paper," that increased Democratic president Bill Clinton's power. Gingrich suggested that "the President of the United States on a bipartisan basis deserves to be strengthened in foreign affairs and strengthened in national security." As Clinton ordered troops to Bosnia in 1995, Senate majority leader Bob Dole—who opposed the action—nonetheless claimed he had a constitutional duty to acquiesce and to seek approval of authorizing legislation. Later, Rep. Benjamin Gilman (R-NY), chair of the House International Relations Committee, would argue that utilizing the WPR over the peacekeeping troops dispatched to Bosnia would "undermine . . . the morale of our young men and women who served" there.⁷³

Even in 1998, as Clinton's adultery scandal dominated the news—his widely panned "apology" speech to the nation was just three days behind him—the president fired off missile strikes at suspected terrorist sites in Afghanistan and the Sudan. While some members of Congress accused Clinton of distracting attention from his personal problems, more suggested that "we have to support the President as commander-in-chief," as Rep. Peter King (R-NY) put it. Sen. Fred Thompson (R-TN), who had served as minority counsel to the Ervin Committee during Watergate, said that Clinton's attacks were "exactly the right response."⁷⁴

Indeed, even during the impeachment debate itself in December 1998, Clinton ordered the firing of more than four hundred cruise missiles and six thousand air sorties aimed at Iraq after the UN reported that Saddam Hussein was not complying with inspection requirements. The result was what *New York Times* reporter R. W. Apple called a “surreal split-screen frenzy” in the Capitol. While a number of Republicans questioned the motives and timing of the action, few doubted the president’s right to take action. Rep. Gerald Solomon (R-NY) griped that Clinton “deliberately ignored the Congress,” but the House quickly passed a resolution supporting the troops in the Persian Gulf.⁷⁵ The nasty rhetoric, in some ways, only underscored legislative passivity in the face of the aggressive presidential claim to the war powers.

The election of George W. Bush seemed likely, then, to make the Congress, still narrowly controlled by the GOP, more supportive of presidential initiative. After September 11, as chapter 7 details, Congress reverted to blank check resolutions reminiscent of the Gulf of Tonkin. Had the story come full circle?

INTELLIGENCE OVERSIGHT

The arc was not quite so smooth in intelligence oversight, but here too Congress tended to cede back ground to the executive. As early as 1979 the so-called Canadian caper gave grist to those who felt notifying Congress about covert action could be counterproductive. In that case, President Carter authorized the CIA to extract from Tehran six Americans who had taken refuge in the Canadian embassy when the U.S. embassy there was seized. Any leak would have made the operation impossible, pro-presidential forces argued. The 1986–87 Iran-contra scandal, which spawned a congressional inquiry and an independent counsel investigation, did spotlight one corner of the covert intelligence world (showing too how it could be directed straight from the White House) and lead to new amendments to the Intelligence Oversight Act. In another sense, though, Iran-contra showed both the vast scope of such activities and how little of it members of Congress find out, or choose to know, about.

The Intelligence Oversight Act of 1980 had streamlined congressional oversight and mandated that the president notify the intelligence com-

mittees about covert operations. But despite the “strong sword” the act provided, scholarly observers worried by the mid-1980s that the intelligence committees had “lately chosen to return to the pre-1974 ‘know-nothing’ era.”⁷⁶ In 1986 Leslie Gelb concluded that the new regime had produced a “decade of support” for the CIA in Congress. Sen. Daniel Patrick Moynihan (D-NY) conceded, “Like other legislative committees, ours came to be an advocate for the agency it was overseeing.” Congress gave the president nearly everything he asked for in intelligence budget requests and accepted that the administration would make the key choices as to how to allocate that spending. The committees, largely staffed by former CIA officers, forged a cooperative partnership with the agency; as Sen. David Durenberger (R-MN), chair of the Senate Intelligence Committee during the Iran-contra investigation, put it, “The purpose [of oversight] is to help intelligence, not to have an audit team sitting on the back of the [CIA].” His predecessor as chair, Barry Goldwater, was even franker. “I don’t even like to have an intelligence oversight committee,” he said. “I don’t think it’s any of our business.”⁷⁷

Congressional cooperation with the intelligence community does not in itself indicate less legislative power. Oversight could help grant legitimacy to covert policy by requiring that Congress assert accountability for it. But intelligence committees needed to be willing to search for knowledge beyond what they were told by the executive branch. When faced with a president committed to an aggressive campaign against communism, by both overt and covert means, and an equally aggressive CIA chief in William Casey, the oversight structure was not up to the challenge. Casey was determined to free the CIA from its Church Committee constraints; Reagan, for his part, stressed that “covert actions have been a part of government, and a part of government’s responsibilities, for as long as there’s been a government.” Any number of administration actors held that the president had unilateral—even universal—authority in foreign policy, many of them citing the 1936 *Curtiss-Wright* case discussed in chapter 2.⁷⁸

The tangible results of this philosophy came to a head in Central America. During the 1980s U.S. military advisers were used to support the government of El Salvador and were often involved on that nation’s many battlefields; congressional efforts to cut aid to El Salvador because of its human rights record (sixty thousand civilians died during the

bloody civil war) were evaded by presidential use of a military emergency fund that kept the cash flowing. In Honduras, the administration used a Pentagon “operations and maintenance” fund to train and equip Honduran forces and maintained a deployment of several thousand U.S. military personnel in Honduras and offshore in a series of exercises and maneuvers that soon proved permanent.⁷⁹

The key battleground was Nicaragua, where the Somoza dictatorial dynasty had been deposed in 1979. As the new Sandinista government grew increasingly close to the Soviet Union and began funneling arms to rebels fighting against the El Salvadoran government, the United States grew hostile, and the CIA presented a plan for covert action to President Reagan in March 1981. Soon rebel armies known as the *contras* began to grow, first trained by Argentina and then by the CIA itself. The cover of *Newsweek* blared “America’s Secret War” in November 1982, ensuring that the “secret” part was no longer accurate.

Newsweek did more than the CIA to identify the issue for Congress. But that said, Congress acted aggressively—it thought—to end the CIA’s proxy war. Rep. Edward Boland (D-MA), House Intelligence Committee chair, proposed a budget amendment for fiscal 1983 to prohibit the CIA or Defense Department from using any funds to overthrow the government of Nicaragua. This passed the House by a vote of 411–0. In response, CIA funding was directed to activities that could be claimed were not aimed at direct overthrow, such as the sabotage of ports and oil supplies; and the agency sought to build up a stockpile of arms to be given to the *contras* in case Congress continued to be recalcitrant.

The prohibition expired in October 1983. In January and February 1984, with presidential approval, the CIA mined three Nicaraguan harbors. When this became public in April, Senate Intelligence Committee chair Goldwater changed his mind about his committee’s relevance. “Dear Bill,” he wrote to CIA head Casey, “. . . I am pissed off! . . . The President has asked us to back his foreign policy. Bill, how can we back his foreign policy when we don’t know what the hell he is doing?” Ultimately Casey had to promise that the CIA would give the committee presidential findings in advance of covert action and to keep legislators updated on the progress of each operation. And in mid-1984 Congress passed a second Boland Amendment, flatly prohibiting the use of any

funds by any government agency “which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua.”⁸⁰

The administration, however, was committed to just that support. One result was to seek funding for the contras from other governments and even private citizens. Saudi Arabia and Taiwan, among others, thus helped to create a small force of mercenaries and pilots helping to resupply the contras (including, ironically, at least one Cuban veteran of the Bay of Pigs invasion). When one of their planes was shot down over Nicaragua in 1986 the entire operation began to unravel.⁸¹

Another result was to shift control of contra operations away from the CIA and into the White House itself, to the NSC staff. This way, when the intelligence committees asked the CIA for information, they could be told the agency had none; this went on for almost two years.⁸² But since the NSC staff was considered by the president to be his personal staff and thus shielded from congressional oversight, other information was hard to come by. Nor was it aggressively sought. NSC staff, when they did speak with the committees, were at best evasive; in one 1986 briefing, Lt. Col. Oliver North flatly lied about his involvement with the contras. But he was not pushed to give more information or to clarify a number of loose ends already evident. One account concludes, “Oversight was the right designation for the committee in more than one sense.”⁸³

At the same time, another series of covert actions run by North and the NSC staff was under way in Iran. Here the idea was to free American hostages held in the Middle East by selling weaponry, directly and via Israel, to the Iranian government—which had of course only recently released its own large group of American hostages after 444 days in captivity. This operation was authorized by a retroactive presidential finding in January 1986, a decision also withheld from the intelligence committees.

The denouement of these operations, and how they became intertwined as “Iran-contra,” has already been discussed. But it seems clear that, at best, congressional oversight was incomplete and overly dependent on presidential good faith.⁸⁴ In 1986, even as the scandal broke, Assistant Attorney General Charles Cooper claimed that the “timely notice” phrase in the Intelligence Oversight Act “should be read to leave

the president with virtually unfettered discretion” as to when to notify. In 1987 President Reagan issued a National Security Decision Directive prohibiting the NSC from conducting covert action but continuing to allow the president to avoid notifying Congress in advance of such operations.

Congress began drafting legislation as early as 1987 to tighten these requirements—aiming to require notification, at worst, within forty-eight hours of the commencement of an operation. For four years, however, legislators could come to no agreement. The president continued to insist that Congress could not be trusted to keep secrets; the House and Senate continued to argue about whether notification had to be time limited. Meanwhile, in 1989 President Bush vetoed a bill prohibiting the president from soliciting funds to get around a congressional ban on a particular policy; his veto was not overridden. And in 1990 he pocket vetoed a version of the Intelligence Oversight Act that omitted a specific notification requirement but added a broad definition of “covert action” itself that would have included the use of foreign governments as proxies for U.S. action.

The Intelligence Oversight Act of 1991 was finally signed into law the next August. The president was required to put his findings of a need for covert action in writing, and they could not be retroactive; they had to specify all parties involved, and the action contemplated could not violate American law or influence domestic affairs. But once again, notification would only be “in a timely fashion.” Thus the likelihood of Congress getting in on the takeoff still depended on presidential discretion. As the Republican staff director of the Senate Intelligence Committee put it, “protecting the prerogatives of the Presidency overrode everything.”⁸⁵

In 2004, the 9/11 Commission investigation would conclude that Congress had done little after 1991 to contribute to the intelligence debate. It found that “the legislative branch adjusted little and did not restructure itself to meet changing threats.” Military intelligence (and its large budget) remained the purview of the Armed Services Committees throughout this period, hampering the ability of the intelligence committees to serve as a central forum for coordination. Nor did legislators do much to focus sustained governmental attention on the rising issue of global terrorism. Indeed, as a subject for oversight, terrorism came under

the jurisdiction of at least fourteen House committees, dropping it straight between the cracks.

In short, legislators asked few hard questions about what American intelligence did and didn't do—or about what it knew and didn't know. They did little to shape executive policy or reshape executive organization and appropriated some 98 percent of presidential intelligence budget requests from 1995 to 2000. Since intelligence spending was classified and channeled through various “black” accounts in different spending bills, even most members of Congress did not know how much was being spent on what.

At best, legislators outsourced the issue. Several outside commissions (three in 1998 alone) were created to explore issues of counterintelligence and homeland security. But in September 2001, those commissions' recommendations were sitting largely unread on office bookshelves all over Capitol Hill.⁸⁶

TREATIES & EXECUTIVE AGREEMENTS

A last set of issues in foreign policy concerns treaties—both their making and their breaking—and executive agreements. Recall that executive agreements are reached with foreign leaders and have the force of law. But they do not require Senate ratification, and they are frequently not made public. The Case-Zablocki Act of 1972 had required that, at the least, presidents should submit all such agreements to Congress. But nearly immediately presidents began to toy with semantics: even the Ford administration, terming some “agreements” to be only “accords,” refused to comply fully. In 1978 new amendments to the Case-Zablocki Act allowed the secretary of state to determine whether an agreement counted, though also requiring presidential explanation for all agreements reported late. Certainly the making of executive agreements continued apace. President Reagan concluded three thousand such agreements between 1981 and 1988, compared to only 125 treaties. Agreements likewise outnumbered treaties by more than nine to one under Presidents Bush and Clinton.

The 1981 Supreme Court decision in *Danes & Moore v. Regan* upheld the complex executive agreement that ended the Iran hostage ordeal, allowing the president to restore to Iran assets in the United States that

had been frozen during the crisis and subsequently awarded by courts to American citizens. Congress, the Court suggested, had given the president broad discretionary powers in related areas. The president had thus been “invited” to act, even if his action resulted in the cancellation of court procedures and the transfer of assets without explicit legislative authorization.

Scholars agreed that Congress had not, in the Court’s phrase, “resisted the exercise of presidential authority.” As early as 1984 Loch Johnson concluded that presidents consistently reported their agreements late (when at all) but that Congress had settled for “submissive acceptance . . . of ex post facto notifications.” Another study covering developments through 1996 reached largely the same conclusion. It noted that while statutory authority was most often the basis for presidential negotiations over executive agreements, thus implying legislative involvement, the statutes cited were nearly always decades old—popular choices included the 1961 Foreign Assistance Act and the 1954 Atomic Energy Act. As a result legislators were not in a position to take a partnership role in overseeing American commitments abroad. But neither did they act to put themselves in such a position.⁸⁷

If making agreements remained a presidential prerogative, two very different presidents also came to the same conclusion about breaking them. While the Senate has to ratify treaties, it is less clear whether Senate (or wider congressional) involvement is necessary for their cancellation. Presidents, naturally, argue it is not. Thus, in late 1978 Jimmy Carter gave notice that the United States was going to withdraw from the 1954 Mutual Defense Treaty with Taiwan. This would enable the United States to establish formal diplomatic relations with the People’s Republic of China, which still claimed sovereignty over Taiwan. And in December 2001, after a year of broad hints that he would do so, Bush informed Russian president Vladimir Putin that the United States would withdraw from the 1972 Anti-Ballistic Missile (ABM) Treaty with the Soviet Union. The prompt this time came from internal policy debates: the administration wanted to implement a missile defense program prohibited by the ABM Treaty (which defined such defenses as an impediment to the deterrence imposed by mutually assured nuclear destruction). In neither case did Congress as a whole act to block the presidential action, though the Senate voted to protest Carter’s move.

Back in the early 1800s, however, Thomas Jefferson had written, “Treaties being declared equally with the laws of the United States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded.” Using this logic, members of Congress filed suit against the president in 1979 and again in 2001. In the Taiwan case, Barry Goldwater led the charge for Senate participation, claiming that presidential unilateralism marked “a dangerous precedent for executive usurpation of Congress’s historically and constitutionally based powers.” While a district court judge agreed, the D.C. Circuit Court reversed that ruling, holding that since a president could decide whether or not to move forward with a treaty even after ratification, he had “the constitutional initiative in the treaty-making field.” Upon appeal, the Supreme Court refused to comment on the merits. Instead, it dismissed the suit as a political question not subject to resolution by the judiciary. The 2001 suit brought by more than thirty House members was dismissed on like grounds: if Congress did not act to challenge the president, the court saw no reason to get involved and do work that was properly the legislature’s.⁸⁸ In any case congressional ire seemed to be driven more by policy preference than by constitutional consistency. In 1979 Goldwater’s suit was opposed by liberal senator Ted Kennedy and joined by conservative senators Strom Thurmond (R-SC), Jesse Helms (R-NC), and Orrin Hatch (R-UT). In 2001 Kennedy supported continued compliance with the ABM Treaty, while Hatch prevented a Senate resolution asserting that body’s role in treaty termination from coming to a vote.

By 2001, then, presidents found themselves in a comfortably familiar spot: if not the “sole organ” of foreign policy, then certainly the maestro of a powerfully amplified orchestra. To be sure, this narrative should not lead one to conclude that Congress is inactive or overwhelmed in all areas of foreign affairs. Legislators were particularly active in trade policy and foreign aid, for example, during the Clinton years (though while Clinton was denied renewed “fast track” tariff negotiation authority, George W. Bush was soon granted it). Nor does it imply that congressional dominance in the exercise of the war powers represents an ideal balance of responsibilities. Many legislators, as noted, opposed the WPR, and even some supporters of the resolution came to feel over

time that Congress should or even could not lead in foreign policy. As a House foreign affairs aide noted in 1981, “The general feeling is that the president is justified in asking for more flexibility”; and one academic review of the Clinton years suggests that, when congressional intervention into foreign policy occurred, it was largely irresponsible. Javits himself, distressed over the Senate’s failure to extend the SALT I accords in 1977, noted, “I have been in the Senate 21 years, and I have spent all that time trying to bring Congress into a real partnership with the President on foreign policy. . . . Why have we not been successful? Precisely for this kind of performance.”⁸⁹

Still, flexibility is not the same thing as “unfettered discretion.” And activation on constituencies’ trade issues is different from institutional involvement in matters of war and peace. On the latter front, longtime senator Robert Byrd (D-WV) may be given the last word (at least for now). Asked to comment on the withdrawal from the ABM Treaty in December 2001, he replied that he thought the president’s act was legal. But he added, even so, “I am sorry that the Senate apparently is willing to just lie down, be quiet, and not ask any questions.”⁹⁰ It is an appropriate epitaph to the era.

CONCLUSIONS

As the next chapter describes, George W. Bush took office with an eye toward restoring presidential power and prerogative. Already, though, the ground lost by the presidency after Watergate seemed largely to have been retaken: as the twenty-first century dawned, the institutional landscape no longer reflected the vision of those who had sought to rein in presidential unilateralism. Consider the presidency as of 2001:

- It had a wide array of unilateral administrative tools, from executive orders to regulatory review, at its disposal.
- It had extensively exercised executive privilege, if not always by name, to withhold information from the public, Congress, and (less successfully) the courts.
- It had expanded its law enforcement authority to overcome many of the post-Vietnam limits on surveillance of suspicious groups and activities.

- It had never been formally limited by the WPR and resisted most effective oversight over intelligence activities.
- It had been granted, if temporarily, unprecedented item veto authority over spending, and Congress had proven unable or unwilling to abide by the deadlines and discipline of the CBA.
- The Independent Counsel Act had expired, leaving no independent mechanism for investigating criminal behavior within the executive branch (and executive office).

If the 1970s seemed a delayed affirmation of Bob Dylan's famous observation that "the times, they are a-changin'," the state of the presidency now was better described by the satirical observation of the fictional folk singer Bob Roberts in the 1992 film of the same name: "The times they are a-changin'—back."

To be sure, this period of presidential-congressional relations culminated in the impeachment and Senate trial of William Jefferson Clinton, the first elected president ever to have been impeached. The irony is that presidents regained their initiative even so. Old precedents were cemented and new ones established even as Clinton's critics bemoaned "the death of outrage." The 2003 edition of a leading compilation of essays on the president for classroom use mentioned impeachment only in passing. Two political scientists observed that, despite dire predictions, "one year later, the legacy of Clinton's impeachment is scarcely debatable"; its "main consequence," they noted, only partly tongue-in-cheek, was that two Republican House Speakers were deposed.⁹¹ In any case, the impeachment debate never seemed to reach the structural level or to grapple with issues of separation of powers. One never got the sense that, because Congress had been unable to fight back on other fronts, it channeled its institutional pride into one grand extra-legislative battle. Instead, impeachment was directed at Clinton the individual, not at the office of the presidency. The articles of impeachment from 1974 and 1998 are instructive in this regard. Nixon's were about the abuse of presidential powers, while Clinton's were personal. Both were accused of obstructing justice, but Nixon's mechanism was to use one federal investigating agency to block another, while Clinton's was to try to get a former lover to lie about their affair.

Claiming as a result that Clinton was "imperial" went too far. Presidents had not been humbled; and certainly the office had rebounded

since Watergate and Vietnam. But that process had further to go, as the events after September 11, 2001, would clearly show. Discussing those developments is the task of the next chapter.

Further, it is worth prospectively raising a question that is largely deferred to the final chapter: Was this increase in presidential power a bad thing? Was it, instead, necessary? After all, the 1980s were marked by nuclear uncertainty and the cementing of terrorism as an “-ism” in its own right, a strategy as well as a tactic. Both politicians and academics argued that presidents hampered by FISA, the Church Committee reforms, and the like would be hamstrung in dealing with issues quite literally of life and death. September 11 would bring that question to the forefront of American political discourse.