

## VII. TIDAL WAVE

*The World after September 11*

During the 2000 election campaign, then governor George W. Bush spoke frequently of the diminution of presidential authority. He meant, it seemed, moral authority: his administration, he argued, would “restore honor and dignity to the White House.” But it soon became clear he had in mind a broader conception of presidential power. “I have an obligation to make sure that the Presidency remains robust,” Bush noted. “I’m not going to let Congress erode the power of the executive branch. I have a duty to protect the executive branch from legislative encroachment.” Chief of Staff Andrew Card later said this meant Bush “wanted to restore . . . the executive authority that presidents had traditionally been able to exercise.” And Vice President Dick Cheney—who got started in political life as a staffer in the Nixon White House—put the aim more bluntly: “For the 35 years that I’ve been in this town, there’s been a constant, steady erosion of the prerogatives and the powers of the president of the United States, and I don’t want to be a part of that.” He cited the War Powers Resolution (WPR) and Congressional Budget Act (CBA) as examples.<sup>1</sup> Thus even before the terrorist attacks of September 11, 2001, the Bush administration asserted a wide range of unilateral claims with the stated goal of rolling back the resurgence regime.

By late 2002, after the surprising Republican victories in that year’s midterm elections, Bush seemed to have succeeded. A front-page headline in the *New York Times* trumpeted, “Shift of Power to White House Reshapes Political Landscape,” with longtime Democratic power broker Robert Strauss quoted as saying, “George Bush . . . [has] made the

White House a power center in ways that I haven't seen in a long, long time—all the way back to Lyndon Johnson.” The flip side, as a *National Journal* cover story proclaimed it, was a “Congress in Eclipse.” Sen. Chuck Hagel (R-NE) concluded that “[this] administration. . . . treats Congress as an appendage, a Constitutional nuisance.” House Democrat David Obey went further. “This administration,” he grouched, “thinks that Article I of the Constitution was a fundamental mistake.”<sup>22</sup>

As chapters 5 and 6 suggest, the steady erosion noted by Cheney and Card was perhaps in the other direction—that the shifting sands of inter-branch interaction built up the presidency rather than wearing it down. Still, September 11 and its aftermath was a tidal wave accelerating this process, bringing enhanced visibility and leverage to the presidential office. And by suddenly placing the United States on a war footing, at least in some respects, the attacks prompted a range of executive claims that otherwise would not have been credible. Critics of the president were quick to charge that he used the “war on terror” as cover for things the administration wanted to do anyway. This is at best exaggerated and often simply malicious: in the absence of the attacks, for instance, it is hard to imagine the designation of “enemy combatants” or the creation of military tribunals. It is true, however, that the president’s strategies for fighting the newly joined battle were consistent with his broader view of presidential-congressional relations. Two things seem clear: that the aftermath of the attacks gave the administration the opportunity to greatly expand presidential power; and that the other branches of government largely failed to check its exercise.

This chapter endeavors to trace those developments through the fall of 2004, leaving off with the presidential election that narrowly returned President Bush to office. To remain consistent the discussion here utilizes the subject-matter categories used in previous chapters, though given the common roots of the actions under review there is more spillover between categories than in the earlier narrative.

However, before turning to the additional powers claimed by, and granted to, the Bush administration in the wake of September 11, the chapter starts with a reminder of the events of that day. After all, neither the Bush administration nor Congress was acting in a vacuum. Rather, from the fall of 2001, events unfolded in an environment of constant uncertainty and often, quite legitimately, of fear. The context does not

necessarily justify the choices that were made; but those choices cannot be untethered from that context.

## SEPTEMBER 11 & THE AUTUMN OF 2001

At 8:00 a.m. on September 11, 2001, American Airlines flight 11 left Boston for Los Angeles. Somewhere over the Adirondacks it was hijacked, reversed course, and headed toward New York City. At 8:48 a.m. it was flown directly into the north tower of the World Trade Center in Lower Manhattan. Fifteen minutes later, United Airlines flight 175, also originally bound from Boston to Los Angeles, impaled the south tower.

At 9:41 a.m. American flight 77 slammed into the west side of the Pentagon shortly after taking off from Virginia's Dulles Airport. At 10:03 United flight 93, headed toward another target in Washington—the Capitol Dome? the White House?—crashed in a field in western Pennsylvania after its passengers attempted to regain control of the plane from the hijackers.

The bad news came fast and furious. A little before 10:00 a.m., the south Trade Center tower collapsed, its 110 stories falling onto one another like a rapidly shuffled deck of cards as the structural steel within melted from the white-hot burning jet fuel. A half hour later the north tower did the same. All that was left of the twin towers were massive piles of rubble at what was immediately dubbed "Ground Zero." Under the mockingly beautiful blue skies, over 2,700 people from eighty nations lay dead—the single bloodiest day on American soil since the Civil War battle of Antietam. Nearly 200 more were dead in Washington and another 40 in Pennsylvania. In total, 2,976 people were killed and at least 6,000 more injured.<sup>3</sup>

Rumors flew as people stayed glued to their television sets and their cell phones, watching endless replays of the crumbling towers—of the desperate people on the upper floors leaping to their deaths—of doomed firefighters marching into the doomed buildings—of the crowds swarming out of Manhattan across the Brooklyn Bridge as soot and debris continued to rain down. Shocked news anchors knew little more than the general public, and speculation was reported as widely as fact. Were

there more targets? Was Washington burning? Media reports suggested car bombs at the State Department and fires on the Mall, with tens of thousands dead in New York—a reasonable guess, given the daytime population of the World Trade Center. Government buildings, museums, and businesses were evacuated; the armed services went to DEFCON Delta, the highest state of military alert. The entire passenger airline network was grounded for the first time in history, stranding frightened travelers around the globe. World reaction was immediate and immense: “Nous sommes tous américains,” proclaimed Paris’s *Le Monde*; and the “Star Spangled Banner” played at Buckingham Palace.

As days went on, and rescuers continued to probe the Ground Zero destruction, more details of the attacks were revealed. There had been nineteen hijackers, all originally from the Arab world, many of them trained at U.S. flight schools. Their allegiance was to the al Qaeda terrorist movement headed by Osama bin Laden and linked to a number of prior killings around the world, including the 1998 bombing of U.S. embassies in East Africa and the 2000 attack on the USS *Cole*. Bin Laden was a Saudi national believed to be resident in Afghanistan, sheltered there by the repressive Taliban regime.

Another threat soon emerged to keep Americans on edge. In October and November letters filled with a powdery form of the deadly bacterium anthrax were discovered in newsrooms and on Capitol Hill; one contained enough of the poison to kill one hundred thousand people. Congressional office buildings were shut down so that they could be sterilized; the Hart Senate Office Building did not reopen until late January 2002. Post offices in New Jersey and Washington that had handled the letters were also contaminated, and two postal workers from the D.C. branch later died. Government buildings cracked down on mail and visitors. The Capitol was suddenly off-limits to the American people.

On September 14 President Bush proclaimed a state of national emergency. On September 20 he addressed a joint session of Congress and the American people. The president urged the public to “be calm and resolute, even in the face of a continuing threat.” He announced the creation of a new Office of Homeland Security (OHS), to be headed by Pennsylvania governor Tom Ridge. He asked for tolerance for those of Arab descent or the Muslim faith targeted by ignorant hate crimes. He asked “every nation to join us” in the battle against terror: “this is the

world's fight. This is . . . the fight of all who believe in progress and pluralism." And he delivered an ultimatum to the Taliban regime: "They will hand over the terrorists, or they will share in their fate."

"I will not forget the wound to our country and those who inflicted it," Bush declared. "I will not yield, I will not rest, I will not relent in waging this struggle for freedom and security for the American people."

From a 50–50 split just the week before, the president's approval ratings quickly brushed 90 percent. The speech was a "home run, a ten," said Rep. Maxine Waters (D-CA), one of the most liberal members of the House. "Right now," she added, "the president of the United States has support for almost anything he wants to do."<sup>4</sup>

## PRESIDENTIAL POWER AFTER SEPTEMBER 11

### WAR POWERS & INTELLIGENCE OVERSIGHT

Even before the president spoke, Congress had given him immense discretionary authority to act. Three days after the attacks, with just one dissenting vote in the House and with none in the Senate—most Senate discussion of the bill took place *after* the vote—Congress passed a joint resolution authorizing President Bush to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."

Given the unprecedented events that were unfolding, such a resolution was hardly unwarranted. The language was toned down somewhat from the draft prepared by the White House, which would have given the president power to "deter and pre-empt any future acts of terrorism or aggression against the United States." Further, the language specifically invoked the WPR, stating that it was to serve as congressional authorization for military action subject to the WPR's provisions.

Nevertheless, the language of the resolution remained notably broad. Sen. Carl Levin (D-MI), even in urging unanimous support for its passage, noted that "this joint resolution would authorize the use of force

even before the President or the Congress knows with certainty which nations, organizations, or persons were involved in the September 11 terrorist acts.” But no language was added requiring the president to certify that targets of the use of force authorized by the resolution were actually connected to the September 11 attacks. War was declared but without a specified enemy; that choice was left to the president. As Levin conceded, “This is a truly noteworthy action and a demonstration of our faith in the ability of our Government to determine the facts and in the President to act upon them.”

Further, the resolution found that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.” The source of this authority was not stated, but presumably it referred to the Madisonian argument that the president could “repel sudden attacks.” Where deterrence or proactive prevention fit into this was not obvious. But congressional action was designed to be supportive rather than permissive in any case: many legislators claimed that Bush could act without an authorizing vote. Sen. Russell Feingold (D-WI) stressed that “Congress owns the war power”—but also argued that “there is no reason to suggest that the action we take here today is required in advance of any immediate military response by the President.”

Nor was the WPR of abiding concern, given the circumstances. Responding to a tentative effort in the House to add specific reporting requirements to the resolution, Rep. Henry Hyde (R-IL) retorted:

[T]he whole point of the joint resolution we are considering this evening is to clear away legal underbrush that might otherwise interfere with the ability of our President to respond to the treacherous attack on our Nation that took place three days ago. Most importantly, we are stripping away the restrictions of the War Powers Resolution. It hardly makes sense to reimpose and, in one case, tighten the restrictions of the War Powers Resolution, if our larger purpose is to make it easier for the President to respond to terrorism.

“In any other case,” Hyde continued, “I might understand and sympathize with the interest of the gentleman in keeping the President on a short leash as he goes about exercising the authority we give him

tonight. But this is not any other case. This is a situation in which our Nation has been attacked by a sinister enemy, and thousands of our fellow citizens have been killed. I, for one, do not want to restrain our President as he goes about responding to this heinous attack.”<sup>5</sup>

That response, in the sense of exerting presidential power, had already begun: the air force rules of engagement had been revised by the president to allow the military to shoot down hijacked planes that posed a direct threat to targets on the ground.<sup>6</sup> The response abroad began almost immediately, too, as Army Special Forces troops were introduced to the remoter regions of Afghanistan to begin preparations for a war against the Taliban regime. The UN Security Council demanded on September 18 that Osama bin Laden be remanded to the United States or a third country; the Taliban refused. On October 7 an American and British air assault commenced, focusing on Kabul, Kandahar, and suspected terrorist training camps. The anti-Taliban warlords of the “Northern Alliance” gathered their troops and, in conjunction with American troops and airpower, advanced on Taliban lines. The Northern Alliance marched into Mazar-i-Sharif on November 9 and took Kabul on November 12. By the end of the year, the Taliban had been driven from power.

Neither Taliban leader Mullah Omar nor Osama bin Laden was captured during the offensive. But by early 2002 President Bush declared in his State of the Union address that “we are winning the war on terror. . . . The American flag flies again over our embassy in Kabul. Terrorists who once occupied Afghanistan now occupy cells at Guantánamo Bay.” However, he went on, “What we have found in Afghanistan confirms that, far from ending there, our war against terror is only beginning.”

Bush’s speech would become most famous for his predictions of that war’s future fronts. Naming Iran, Iraq, and North Korea, he warned,

States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States. In any of these cases, the price of indifference would be catastrophic.

Bush concluded by promising, “I will not wait on events, while dangers gather. I will not stand by, as peril draws closer and closer.” In June 2002, in a commencement address to West Point cadets, he expanded on this theme. The war on terror, he argued, could “not be won on the defensive.” Deterrence and containment, the mainstays of cold war security doctrine, were no longer adequate. Instead, as detailed in the administration’s September policy paper, *The National Security Strategy of the United States*, proactive action might be necessary. The United States, it argued, could no longer be “reactive,” given the undeterrable nature of potential attackers and the magnitude of harm that could result from their nuclear, chemical, or biological strikes. “We cannot let our enemies strike first. . . . To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.”<sup>7</sup> As that language suggests, the notion of preemption in the document was very broad, moving beyond a surprise strike against an enemy clearly planning to attack nearly immediately—against an army massed on the borders, say—to “forestalling” well in advance developments that potentially pointed to future, and possibly more serious, attacks.

Quite clearly, the enemy the administration had first in mind was Iraq. Saddam Hussein remained in control of that country despite the Gulf War of 1991 and a decade of sanctions and sporadic American air strikes. Indeed, the oil-for-food program run by the UN had enriched him and his family (and various contractors) while doing little to bring his subjects food or medicine. He had failed to cooperate with UN weapons inspectors, causing inspection teams to be pulled from Iraq in 1998. The Iraq Liberation Act, passed that year, declared that it was American policy “to support efforts to remove the regime” there from power.<sup>8</sup> Most U.S. policymakers believed that Iraq retained weapons of mass destruction of some sort or at the very least the capacity to quickly reconstitute earlier programs.

Building on this history—and on a fervent belief that a free Iraq would help jump-start a positive chain reaction toward stability and liberal democracy across the Middle East—the Bush administration had started talking privately about the prospects for abetting (or creating) Iraqi regime change soon after the president took office. Immediately after September 11, planning expanded dramatically as the president ordered the preperation of invasion options. In early 2002 he signed a

secret order giving the CIA authority to assassinate Saddam Hussein. It seems that the president had decided as early as that April that Saddam could not be allowed to remain in power. In late August Vice President Cheney put the case bluntly: "There is no doubt that Saddam Hussein now has weapons of mass destruction," he told the Veterans of Foreign Wars convention. "There is no doubt that he is amassing them to use against our friends, against our allies, and against us." Even if he didn't attack directly, as the "sworn enemy" of the United States Saddam might well pass along weapons or technology to terrorist groups.<sup>9</sup>

War was coming. Would it require legislative approval? The White House counsel's office advised the president that the answer was "no." The claim was threefold: that the president's commander-in-chief powers were themselves sufficient; that the September 14 resolution encompassed such action; and that the congressional resolution from the *first* Gulf War had already granted any necessary authority in any case, since Iraq had not lived up to the terms of the UN resolution ending—or, in this view, suspending—it. "We don't want to be in the legal position of asking Congress to authorize the use of force when the president already has that full authority," one senior official said. "We don't want, in getting a resolution, to have conceded that one was constitutionally necessary."<sup>10</sup>

Yet despite repeated high-level administration assertions—Secretary of Defense Donald Rumsfeld told an interviewer in September, for example, that, "as we sit here, there are senior al Qaeda in Iraq; they are there"—there was little evidence tying the Iraqi regime to al Qaeda and still less to September 11. This made using the 2001 resolution problematic. Using the 1991 resolution seemed even more dubious. The original resolution authorized the president to use force to implement UN demands that Iraq withdraw from Kuwait and restore the status quo ex ante. Using it to justify invasion and regime change was a stretch. Granted, U.S. and British air power continued to enforce the no-fly zones over northern and southern Iraq. But the legitimacy of the no-fly raids themselves was grounded in self-defense. (To the extent they were offensive operations, they probably should have had legislative authorization of their own.) Expanding those strikes to an invasion a decade later without renewed authorization would, as one scholar of international law put it, "completely contravene the spirit of the resolution and

the constitutional values at stake.”<sup>11</sup> After all, this was not a question of repelling a sudden attack on the United States or an ally; nor could it be argued that there was no time for congressional deliberation.

In any case, recalcitrance in going to Congress hardly seemed necessary, given the near certainty of legislative approval of the president’s request. “The question we face today is not whether to go to war, for war was thrust upon us,” House majority whip Tom DeLay (R-TX) declared. “Our only choice is between victory and defeat.” Democrats were quick to stress that “we want to be helpful,” as Senate Majority Leader Tom Daschle (D-SD) put it. “We do want to be supportive.”<sup>12</sup>

Thus after an effective speech to the UN challenging that body to make its past resolutions relevant, the president turned to Congress and requested a resolution authorizing the use of force. The original administration draft was, once more, quite sweeping; “I don’t want a resolution that ties my hands,” President Bush cautioned.<sup>13</sup> His version authorized the president “to use all means that he determines to be appropriate” in order to “restore international peace and security in the region.” Given the paucity of both those attributes in the Middle East, it represented a broad grant of power indeed.

Congressional negotiators did remove that phrase and added language making clear that the resolution was meant to serve as the approval required by the WPR. Reporting requirements parallel to the WPR were also imposed. But the bottom line changed little. President Bush had told members of Congress: “I want your vote. I’m not going to debate it with you,” and he barely had to. The final language read: “the President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to defend the national security of the United States against the continuing threat posed by Iraq; and enforce all relevant UN Security Council resolutions regarding Iraq.”<sup>14</sup>

Despite sometimes frantic efforts to build a “coalition of the willing,” the only resolution ultimately passed by the UN Security Council was one declaring Iraq to be in breach of its obligations to disarm and demanding that weapons inspections restart. It noted that the Security Council had “repeatedly warned” Iraq of “serious consequences” but did not spell out any new ones; in any case, Iraq allowed UN and International Atomic Energy Agency (IAEA) inspectors to return.

The inspections, however, found little. Was this because there was nothing to find? The administration thought not. Secretary of State Colin Powell told the Security Council in early February that, “instead of cooperating actively with the inspectors to ensure the success of their mission, Saddam Hussein and his regime are busy doing all they possibly can to ensure that inspectors succeed in finding absolutely nothing.” While not necessarily disagreeing with this assessment, the members of the Security Council largely supported waiting for more evidence from continued inspections. President Bush did not. “The Iraqi regime has used diplomacy as a ploy to gain time and advantage,” he told the nation on March 17, giving Saddam and his family forty-eight hours to step down. The UN itself, he argued, “has not lived up to its responsibilities, so we will rise to ours. . . . The security of the world requires disarming Saddam Hussein now.” Two nights later, the war began.<sup>15</sup>

Some members of Congress who were unhappy with the president’s planning for and conduct of the war would later claim that their votes were meant to internationalize the war through the UN. But the resolution plainly made the president’s discretion independent of UN deliberations: if he felt that diplomacy would no longer “adequately protect the national security of the United States” against Iraq, he was simply to tell Congress so within forty-eight hours of the start of hostilities. The decision was up to him. Indeed, as with the September 14 resolution, some lawmakers seemed to suggest that it always had been—that the administration had been right in the first place to claim it didn’t need congressional approval. Sen. John Kerry (D-MA), running for the Democratic Party’s presidential nomination, fended off criticism of his “yes” vote by claiming it was irrelevant. “We did not give the president any authority that the president of the United States didn’t have,” he said in February 2004.<sup>16</sup> Certainly by the time war came in March, Congress was irrelevant, by its own choice. Its October debate was five months past.

As noted in chapter 1, some members did express concern that the October resolution was a blank check reminiscent of the 1964 Gulf of Tonkin grant of authority in Vietnam. It was later, though, that additional parallels to the Tonkin debate came into clearer focus. Developments since the fall of Baghdad in April 2003 suggested that—as forty years before—the case for immediate action was far fuzzier than in the

picture painted by the administration. This threatened to open a new “credibility gap.”

As it was, the case for war was presented in bold, certain strokes. The administration expressed no doubt that Iraq possessed forbidden arms. In the fall of 2002 the president and his staff gave a series of addresses about what Vice President Cheney called “irrefutable evidence” of an Iraqi nuclear program. That October the president told the public that “we do [know]” that Iraq “has dangerous weapons today.”<sup>17</sup> British information about the impending strength of Iraq’s nuclear program was repeated as fact by the president in his 2003 State of the Union address.<sup>18</sup> A new Pentagon intelligence analysis unit, the Policy Counterterrorism Evaluation Group, told White House staffers that there was (in the vice president’s words) “overwhelming evidence” of ties between Iraq and al Qaeda. Powell’s presentation to the UN in February 2003 stated, “When we confront a regime that harbors ambitions for regional domination, hides weapons of mass destruction and provides haven and active support for terrorists, we are not confronting the past, we are confronting the present.” The president’s assistant for national security, Condoleezza Rice, entitled a January 2003 op-ed piece “Why We Know Iraq Is Lying,” and most observers generally accepted her view. For many in the public, those “known” Iraqi lies mattered a great deal: more than half of Americans surveyed in the spring of 2003 believed that Saddam Hussein had been “personally involved” in September 11. Six in ten believed that Iraq was a threat that required quick action and that could not be contained.<sup>19</sup>

CIA director George Tenet reportedly told the president that the case against Iraq was a “slam dunk.” The preamble to the Iraqi force resolution had been accordingly certain about the threat Hussein posed, and hostile scrutiny of the administration’s claims accordingly sparse. Iraq “remains in material and unacceptable breach of its international obligations,” Congress declared, by “continuing to possess and develop a significant chemical and biological weapons capability, actively seeking a nuclear weapons capability, and supporting and harboring terrorist organizations.” Three other clauses linked the use of force against Iraq to the war on terrorism and, at least by implication, to some Iraqi role in the September 11 attacks, expressing among other things legislative determination to “continue to take all appropriate actions against international

terrorists and terrorist organizations, including those” responsible for September 11.

Of course, as noted earlier, the vast majority of members of Congress didn’t bother to read the National Intelligence Estimate (NIE), the executive summary of which elided away much of the nuance contained in the full document. However, had they done so, they might have been only marginally more informed. In July 2004 the Senate Intelligence Committee concluded that the “major key judgments” of the full NIE were “either overstated, or were not supported by, the underlying intelligence reporting. . . . The Intelligence Community did not accurately or adequately explain to policymakers the uncertainties behind the judgments in the [NIE].” The analysis was hampered by a lack of timely hard evidence from reliable informants. Worse, CIA’s surety ignored the fact that its conclusions were projected from past estimates that were themselves speculative. “Analysts interpreted ambiguous data as indicative of the active and expanded WMD [weapons of mass destruction] effort they expected to see,” the committee complained. “Mechanisms . . . of alternative or competitive analysis were not utilized.” The upshot was “a hypothesis in search of evidence.”<sup>20</sup>

As a result Tenet’s “slam dunk” would clang loudly off the rim. The British claim regarding Iraq’s search for uranium had been debunked by a CIA analyst in advance of the president’s speech. Many others within the administration knew that the aluminum tubes touted as “irrefutable evidence” that Iraq was implementing its atomic ambitions were most likely unusable for that purpose. The Defense Department’s intelligence unit, it seemed, had been specially constructed to go around the CIA (Tenet knew nothing of its White House briefing) and to provide information that was more favorable to the administration’s case for war; Powell’s speech was girded by similarly unreliable sources, some of whom had evidently fabricated data.

In October 2003 U.S. inspector David Kay reported that his survey teams had found no evidence to date that Iraq had possessed weapons of mass destruction before the war and in January 2004 chastised the intelligence community for promulgating what he now saw as a false belief in those weapons’ existence: “we were almost all wrong, and I certainly include myself.” The inspectors’ final report released in September 2004 repeated this conclusion: Saddam wanted weapons, but he didn’t have

them. The administration itself would later repudiate the notion that there were direct links between Iraq and September 11; as the 9/11 Commission reported, NSC staff analysis as early as the week after the attacks found no compelling signs of Iraq–al Qaeda cooperation. The commission’s more exhaustive work could also find “no credible evidence” of such ties. Instead, Iraq became home to a significant number of al Qaeda–linked terrorists only after the American occupation created both a governing vacuum and an excuse for those seeking to vent their hatred.<sup>21</sup>

Before the “slam dunk,” the CIA had been a clear organizational winner, post–September 11. While unhappy with the failure to detect the plots, officials mainly expressed frustration that the post–Church Committee checks on the CIA’s behavior had made the agency risk-averse and less willing to do the hard (and sometimes sordid) work needed to obtain accurate intelligence. “Post-Church,” summed up Harvard’s Michael Ignatieff, “we may have betrayed a fatal preference for clean hands in a dark world of terror in which only dirty hands can get the job done.” Recruiting human sources had taken a backseat to using remote surveillance, to the point where the CIA had only one thousand overseas operatives—fewer officers than the FBI has in New York City alone. Before the Iraq war, it had a grand total of four sources reporting from within that country.<sup>22</sup>

Money poured into the CIA as it quickly expanded recruitment and brought retired officers back to work. Agency operatives played a heroic role in the Afghan campaign and as early as February 2002 had set up operations in northern Iraq.

However, the failure to find weapons of mass destruction in Iraq, along with the lengthy investigations into the September 11 attacks, put the CIA on the organizational defensive. George Tenet resigned in July 2004, and Florida congressman Porter Goss took his place. The 9/11 Commission went further, calling for the creation of a National Counterterrorism Center (NCTC) and a powerful national intelligence director to manage and coordinate the sprawling sweep of foreign, defense, and homeland intelligence efforts. In August, seeking to forestall legislative efforts to implement those recommendations, President Bush issued executive orders creating an NCTC under the CIA director’s purview and broadening the director’s power over the portion of the foreign

intelligence budget not linked to tactical military operations. The orders did not give the director complete budgetary authority or control over hiring and firing across all the intelligence agencies, as the commission report urged. Just prior to the 2004 election, the House and Senate passed very different versions of intelligence reorganization (in the Senate's case, based closely on the commission's recommendations) but were unable to hash out a bill until the public outcry of the 9/11 victims' families pressured the president to urge a compromise. The final statute codified the extant NCTC and created a new director of national intelligence (DNI) separate from CIA. How the DNI's powers would work in practice was not immediately clear. The position was tasked with drawing up government-wide intelligence budgets but had limited authority to transfer funds between programs and lacked day-to-day control over how monies were spent. Intelligence budgets would remain classified, scuttling Senate plans to create a new Appropriations subcommittee to review intelligence funding.

More generally, Congress failed to fundamentally restructure its intelligence oversight capacity, though the Senate did remove term limits on Intelligence Committee service. At the same time, the administration successfully pressed to preserve the Pentagon's autonomy in the new setup. Reports suggested that the Defense Department was using that freedom to greatly expand its own intelligence operations, which it claimed were subject to fewer legal restraints and less congressional oversight than the CIA's covert missions. Pentagon lawyers argued that "traditional . . . military activities" and their "routine support," exempt from the operations requiring timely legislative notification, might include a vast range of clandestine ventures, given an indefinite, global war on terror.<sup>23</sup>

#### EXECUTIVE POWER & HUMAN RIGHTS

Meanwhile, the intelligence community's already-renewed freedom of covert action brought renewed charges of excess. In Iraq, for example, the goal of identifying and eliminating the anti-American insurgency's leadership raised the specter of the Vietnam-era "Phoenix Program." The CIA pushed to rehabilitate cooperative allies of Saddam Hussein, briefly installing as the new intelligence head a man who had com-

manded units involved in the slaughter of Kurd and Shiite civilians under Saddam.<sup>24</sup> A permissive set of rules governing interrogation was approved by the president, allowing the CIA to set up secret detention centers abroad; for high-level terror suspects, reportedly, the order allowed treatment on the edge (or over the edge) of torture—for example, techniques like “water boarding,” where a bound prisoner is held underwater to the brink of drowning. Other detainees were sent to third countries with few constraints on outright torture or kept as unofficial “ghosts” in army facilities. A series of memos from the CIA’s general counsel and from the Justice Department’s Office of Legal Counsel (OLC) claimed for the agency wide custodial and interrogation powers that in some cases overrode the Geneva Conventions governing the treatment of prisoners and civilians during wartime and occupation. OLC argued that, “to facilitate interrogation,” formal charges should not be brought against potential suspects, as this would trigger Geneva protections preventing detainees from being moved to other countries. The need to obtain reliable information on terrorist plans was clear. But allowing secret, unconstrained behavior had obvious risks: in the spring of 2004, investigations found at least five cases where detainees died in CIA custody.<sup>25</sup> However, these issues were hardly the agency’s exclusive province. Indeed, at the same time the army was pursuing more than thirty criminal investigations linked to the deaths of prisoners.<sup>26</sup>

It is worth taking a step backward, for these issues arose from a broader prior dilemma for the intelligence community and the armed services as a whole. Namely, how should the United States classify, treat, and physically house suspected terrorist operatives captured abroad? Were those detained in Afghanistan, for example, prisoners of war, as under the traditional rules of military engagement? If so, detainees would have certain rights to humane treatment under the 1949 Geneva Conventions, to which the United States is a signatory. Among them would be the right to communicate with the outside world and the right not to talk to their captors. That clearly posed a dilemma. If a given prisoner had information about fellow members of worldwide terror cells and the plots they had in motion, how could authorities not try to obtain it? And how could that prisoner then be allowed to alert those confederates to change their plans?

It would have been possible, presumably, to hold formal hearings to

determine whether individual detainees should, in fact, be classified as prisoners of war or not. Indeed, U.S. military regulations prescribed just that, as did later court decisions. Non-Iraqis seized in that country during the U.S. occupation and believed to be members of terrorist organizations were also evaluated on a case-by-case basis.

However, the administration did not originally choose this course. In Afghanistan, the White House rejected the hearings process as unwieldy and unnecessary, arriving instead at a blanket definition of prisoners captured there as “unlawful enemy combatants.” Since such combatants were not fighting on behalf of an established state or in uniform, the administration reasoned, they were not covered by the laws of war. Precedents to this effect went back to the Revolutionary War capture and hanging of the British spy Major John André but focused largely on the 1942 Supreme Court decision in *Ex parte Quirin*, which classified German saboteurs who entered the country in civilian dress as “unlawful combatants” or “enemy belligerents.” Some of those captured were retained in Afghanistan; some 650 others were housed at a newly built facility at the naval base at Guantánamo Bay, Cuba.<sup>27</sup>

A January 2002 memo from White House counsel Alberto Gonzales reminded the president that, “as you have said, the war against terrorism is a new kind of war. . . . In my judgment, this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its [other] provisions.” Gonzales’s analysis built on extensive research within OLC, the office charged with (in Gonzales’s term) “definitive” interpretation of such questions. OLC held that a “transnational terrorist organization,” since not a nation-state, was not party to the Geneva Convention and that exempting al Qaeda prisoners from Geneva protections would, in turn, exempt U.S. soldiers from prosecution under the War Crimes Act.

On February 7 the president declared that “pursuant to my authority as Commander in Chief and Chief Executive of the United States . . . I . . . determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world.” He added that “our values as a Nation . . . call for us to treat detainees humanely” and “consistent with the principles of Geneva.” In practice, in Secretary of Defense Rumsfeld’s translation, those detained in Afghanistan would be treated in “a manner that is *reasonably* consis-

tent” with the conventions—“for the most part.” What the other parts might mandate was not then disclosed. However, with Rumsfeld’s approval, previous army regulations constraining interrogation methods were superseded; at Guantánamo Bay the use of tactics such as sleep deprivation and lengthy placement of prisoners in “stress positions” or in hoods was sanctioned. Further, according to the reporter Seymour Hersh, Rumsfeld had already approved a highly secret program aimed at carrying out “instant interrogations—using force if necessary” around the world. As one intelligence official told Hersh, the rules were to “grab whom you must, do what you want.” That might include sexual humiliation, thought to be particularly effective in shaming Arab subjects to cooperate, and the use of attack dogs.<sup>28</sup> These techniques were widely transferred to other military facilities in Afghanistan and Iraq, beyond the program’s original intent and often in tragically embellished form. The most notorious example was at the Abu Ghraib prison outside Baghdad, where photographs and even videotape showed the repellant juxtaposition of graphic, often sexual, torture and grinning U.S. soldiers. General Antonio Taguba’s investigation of Abu Ghraib found “numerous incidents of sadistic, blatant, and wanton criminal abuses” inflicted on detainees—and this in a place where the Geneva Conventions *were* generally supposed to apply.<sup>29</sup>

The link between executive power and human rights was made explicit in internal administration deliberations. Most notable was the Justice Department’s ruling in August 2002 on the applicability of the Convention against Torture, as implemented by American law, to ongoing interrogations. In a memo to the White House, OLC head Jay S. Bybee concluded that the term *torture* could be applied only to acts sufficient to cause, for example, “organ failure . . . or even death,” and then only if inflicting such pain (and not, say, gaining information) was the “precise objective” of the interrogator.<sup>30</sup> However—even in such a case—the law did not apply to questioning stemming from “the President’s constitutional power to conduct a military campaign.” Since, “as Commander in Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information”—since, indeed, this is a “core function of the Commander in Chief”—Congress could not make laws that encroached on the exercise of that authority. A later memo constructed by a working group of

Defense Department attorneys came to the same conclusion: “in order to respect the President’s inherent constitutional authority to manage a military campaign, 18 U.S.C. § 2340A (the prohibition against torture) as well as any other potentially applicable statute must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority.” In this sense, at least, the president was above the law. While administration officials later argued this analysis was unnecessary or even irrelevant—since the president did not intend to order torture—they did not, tellingly, argue it was wrong.<sup>31</sup>

#### TRIBUNALS & TRIBULATIONS

“Unlawful enemy combatants” were to be brought to trial, if at all, not through the regular court system but through a system of military tribunals established through a military order issued by President Bush on November 13, 2001. The order stated that individuals bound over for the tribunals had no right to “seek any remedy” in state or federal court. Though American citizens would later be designated as “enemy combatants,” as discussed later, the tribunal system was targeted at noncitizens who were determined by the president to (a) be a present or former member of al Qaeda, (b) be “engaged in, aided or abetted, or conspired to commit acts of international terrorism or acts in preparation thereof” that would have “adverse effects” on the “United States, its citizens, national security, foreign policy, or economy,” or (c) have “knowingly harbored” someone who had.

While individuals detained under this order were to be “treated humanely,” the interrogation rules noted previously were deemed by administration lawyers to meet that condition. Rules for the tribunals were to be set via Defense Department regulation, providing for a “full and fair trial,” though the order added that “it is not practicable to apply . . . the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States.” White House counsel Gonzales argued that “everyone tried before a military commission will know the charges against him, be represented by qualified counsel and be allowed to present a defense.” After sharp criticism, the regulations issued by the Pentagon in March 2002 required that trials be presumed open rather than closed and that capital punishment be imposed only

upon unanimous, secret ballot vote of the tribunal members. Notably, though, the original order provided that the record of any trial—including “any conviction or sentence”—was to be sent on to the president “for review and final decision.” The regulations provided for intermediary review, but the president could still presumably overturn a tribunal decision not to impose the death penalty or even its decision to acquit a given suspect. There was no appeal outside the military chain of command, and the top of that chain seemingly had little doubt of the proper outcome, at least early on. The president called the detainees “killers,” and Rumsfeld elaborated: they were, he said, “the most dangerous, best-trained, vicious killers on the face of the earth.” The military lawyers assigned to serve as defense counsel were sharply critical as the process moved forward; one commented, in light of the evidentiary standards and review process involved, that the system “is not set up to provide even the appearance of a fair trial.” The truth of this critique could not be immediately evaluated. The first “combatants” were not designated for trial by a tribunal until February 2004, more than two years after their capture. Others, the Defense Department said, could be held indefinitely—even if acquitted at trial or after serving a sentence meted out by a tribunal. By the fall of that year, some 150 detainees had been released or transferred to custody in their home countries, but only 4 had moved through even preliminary trial proceedings. In November a district court judge muddied the waters further by holding that proceedings under the military order were illegal unless preceded by “a competent tribunal’s” determination that detainees were not, in fact, prisoners of war.<sup>32</sup>

The preventive detention of those seeking to do the United States harm, especially of those fanatically devoted to that cause, has obvious appeal. Still, even if good or necessary policy, the power of the president to issue such an order without delegated authority from Congress was far from self-evident. The wording of the 2001 order, including direct presidential review, tracked Franklin Roosevelt’s similar proclamation in 1942 concerning the *Quirin* saboteurs. Yet Roosevelt’s order, though issued during a declared war, was itself criticized at the time for stacking the deck against the defendants and was subsequently altered when a second set of Nazi saboteurs was captured in late 1944. Further, the 1942 order was drafted retrospectively to apply to a specific case, not prospec-

tively to the entire population of people not American citizens—comprising more than 20 million persons within the United States itself.<sup>33</sup>

As justification, the Bush administration drew on the commander-in-chief power, on the president's own declaration of a national emergency, on the September 14 resolution authorizing military force, and on the Uniform Code of Military Justice (UCMJ). Since the order applied to noncitizens on American soil as well as those captured abroad, it had implications for the right of habeas corpus: was the president unilaterally suspending it, as Lincoln had done during the Civil War? The order also brushed up against the Sixth Amendment's guarantee of a jury trial (which applies on the face of it to "all criminal prosecutions") by redefining actions previously handled by criminal courts as violations of the "laws of war." This is most clear in the order's invocation of the UCMJ, which authorizes military tribunals only in the "laws of war" context—as opposed to under the "law of nations," which the September 11 attacks did clearly violate.<sup>34</sup>

Certainly Congress could have suspended habeas corpus, as it did during the Civil War and Reconstruction. It could have declared war—since not doing so might be read (in this case probably incorrectly) as an intentional limitation on the president's authority. And certainly it had authority to authorize tribunals—after all, Article I, Section 8, of the Constitution vests the power to "define and punish . . . offenses against the Law of Nations" directly in Congress. However, legislators did none of these things. Congress was not asked to act, except to appropriate funds, which it did; nor did it bestir itself to act, which must itself be considered a deliberate choice, especially since lawmakers did not even voice much complaint about the president's own chosen actions. To the contrary, most lawmakers felt that criticism would, in the words of Sen. Jeff Sessions (R-AL), "have the tendency to erode unity in the country and undermine respect for our leadership in a time of war" and that "aggressive oversight," in the words of Sen. Orrin Hatch (R-UT), would be "counterproductive." The risk that tribunal powers would be inappropriately expanded, most felt, was not consonant with the risk of additional terrorist attacks.<sup>35</sup>

The judicial response was more complicated, though in any case far from swift. The tribunal order's attempt to rule out the opportunity for judicial review was soon challenged: even in the *Quirin* case, the

Supreme Court had rejected Roosevelt's effort to dismiss the German saboteurs' ability to ask the court to at least review their case. Attorneys representing Guantánamo Bay prisoners soon asked federal courts to do the same.

In so doing another question arose: were those prisoners subject to the jurisdiction of American courts in the first place, since they could be said to be held on foreign soil? In its briefs to the Supreme Court, the administration said no: since Cuba retained "ultimate sovereignty" over the base, Guantánamo Bay was "outside the sovereign territory of the United States" and thus, as one of the lawyers later put it, "the legal equivalent of outer space."<sup>36</sup> The prisoners' counsel noted that the Guantánamo Bay naval base could hardly be said to be under Cuban control. Indeed, they pointed out, the U.S. Endangered Species Act specifically referenced the base as American territory, so as to protect the Cuban iguana. The iguanas thus had rights superior to the detainees.

Lower courts sided with the administration. The D.C. Circuit Court of Appeals, for example, held that "no court in this country has jurisdiction" since the detainees "are now abroad" and thus did not fall under constitutional protections. Justice Kennedy's concurring opinion for the Supreme Court's June 2004 reversal of the D.C. circuit court decision, however, pointed out that "this lease is no ordinary lease." The Court majority noted that an American citizen charged with an offense at Guantánamo Bay would certainly have habeas corpus rights, and "there is little reason to think Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship." The decision did not go to the merits of the case but only established judicial jurisdiction over detainees' challenges to custody (indeed, dissenters claimed it established such wide jurisdiction over cases abroad as to be untenable). However, the Court's warning that the "case of military necessity" was made "weaker" by the base population's "indefinite detention without trial or other proceeding" did prompt the Defense Department to begin moving ahead with the long-stalled tribunal process. Such procedures, it was hoped, would serve as sufficient due process to satisfy the courts in future cases, though subsequent lower court decisions like the one noted previously clouded that hope, at least temporarily.<sup>37</sup>

Further, in response to the related *Hamdi* case, discussed later in this

chapter, the Pentagon also ordered the creation of a Combatant Status Review Tribunal. This board was to hold hearings for each of the 594 detainees at Guantánamo Bay, so as to determine their status as legitimate prisoners of war, enemy combatants, or innocent bystanders. Of the first 104 decisions, 103 detainees were affirmed as enemy combatants and one was released.<sup>38</sup>

## BUDGETING FOR WAR: THE OVERSIGHT DEFICIT

In April 2003 the head of the U.S. Agency for International Development assured taxpayers in a televised interview that the costs of occupying and rebuilding Iraq would be relatively minimal. “The American part of this will be \$1.7 billion,” he said. “We have no plans for any further-on funding for this.” After all, as Deputy Defense Secretary Paul Wolfowitz told Congress around the same time, Iraq “can really finance its own reconstruction, and relatively soon.” In earlier testimony, Wolfowitz had denounced estimates that suggested reconstruction would cost over \$60 billion. But by early September 2003 the administration had requested \$20 billion in reconstruction aid as part of an \$87 billion request supporting operations in Iraq and Afghanistan. A January 2004 CBO report suggested that anywhere from \$55 to \$100 billion was a plausible estimate in the near term.<sup>39</sup>

The projected costs of the war itself were likewise opaque. White House policy was to refuse to make an estimate—“fundamentally, we have no idea what is needed,” Wolfowitz told the House Budget Committee. He added, just three weeks before the war, “I am reluctant to try to predict anything about what the cost of a possible conflict in Iraq would be. . . . But some of the higher-end predictions that we have been hearing recently . . . are wildly off the mark.” That dig was aimed at General Eric Shinseki, the U.S. Army chief of staff, who had told Congress that “several hundred thousand soldiers” would be needed to win the war and to administer the occupation. Shinseki was soon retired; White House economic adviser Larry Lindsey had already been fired for his prediction that the war would cost between \$100 and \$200 billion (a figure in line with other outside estimates, such as that of economist and former Reagan aide William Nordhaus). Part of the problem was that

the Office of the Secretary of Defense, albeit not the whole of the Defense Department, felt that resistance in Iraq would be minimal since Iraqis would greet American troops as “liberators.” A large occupation force would not be required if, as presumed, Iraqis would be throwing flowers rather than rocket-propelled grenades at U.S. servicemen.<sup>40</sup>

The Lindsey estimate proved prescient: by late 2004 more than \$125 billion had been spent and a new \$80 billion appropriations request was being readied for 2005.<sup>41</sup> Still, Congress did not push much past the administration’s original assumptions. Its dilemma was real: having allowed the president wide discretion in conducting the war, it had little leeway to rein in those choices. The administration, through occupation administrator L. Paul Bremer, insisted that none of the first supplemental appropriations request for \$87 billion was optional. It was, he said, “a carefully considered, integrated request” and “urgent” for “the safety of our troops.” The president threatened to veto the package if any of the bill was turned into a loan. House leader DeLay, having earlier framed March 2003 tax votes as a matter of presidential patriotism, called the October 2003 vote on the supplemental budget a “second war resolution.” It passed 303–125 and 87–12 in the House and Senate, respectively.

Likewise, as the regular budget that year rolled around, Sen. John Warner (R–VA), chair of the Armed Services Committee, would state matter-of-factly, “We have an obligation to live up to the president’s budget request.” If the war in Iraq was part of the war on terror—and after a year of occupation, even if it was not—losing was not an option. Further, holding up appropriations might deny American soldiers the tools they needed. (Indeed, stories relating that military families were sending privately obtained body armor, boots, global positioning system units, and the like—and that the army was short of armored vehicles and other basics for troop safety—made lawmakers eager to spend more, not less.)<sup>42</sup>

With funding in hand, the administration used it without much reference to legislative intent or oversight, a pattern that went back to the \$40 billion Emergency Response Fund created immediately after September 11. The president had been given much of that amount to spend on assisting victims of the attacks and to strengthen the American security position. Few strings were attached; as the Office of Management and

Budget (OMB) put it, “the president asked and Congress provided unprecedented flexibility for funds to wage the war on terrorism.” However, the administration was supposed to provide a plan for how the funds were to be used and to provide quarterly reports on their disposition. Those reports were fitful and ended in May 2003. Further, in the summer of 2002 some of this antiterror funding—and other older appropriations as well—was utilized in the Persian Gulf, apparently as preparation for the war with Iraq, long before that war was publicly decided upon. The *Washington Post*’s Bob Woodward put the prewar spending figure at \$700 million (the Pentagon countered with an estimate of \$178 million). According to Woodward, a top White House official defended the diversion of funds from Afghanistan to Iraq by saying that the White House didn’t want “to disturb the karma of Congress.” Woodward’s conclusion: “Congress got had.”<sup>43</sup>

As the \$87 billion supplemental moved through the legislative process, Congress and its karma sought to avoid a repeat performance by attaching reporting requirements to those funds. An inspector general’s post was added to the Coalition Provisional Authority (CPA) administering the occupation; the inspector general was to issue regular public reports on spending and (as discussed later) contracting. However, the president was given special authority to quash portions of those reports, even those to Congress. No information could be disclosed if it was “specifically required by Executive order to be protected from disclosure, in the interest of national defense . . . or in the conduct of foreign affairs”; and the president could waive, “for national security reasons,” the inclusion of “any element” in the quarterly reports the law demanded. In a signing statement, President Bush additionally made clear that he intended the inspector general to “refrain” from audits into intelligence or counterintelligence, ongoing criminal investigations, or “sensitive operation plans.” Those topics were left undefined but could in principle wall off much of the CPA’s work.<sup>44</sup>

Complicating accounting, and accountability, was the trend toward using civilian contracting for tasks that were once purely military. Contractors made up some 10 percent of American personnel in Iraq by the spring of 2004, performing functions ranging from construction to translation to food service to tank repair. Contractors even served as security details for CPA officials and as prison interrogators. As this suggests, the

gathering and analysis of intelligence data were in many cases effectively privatized. This was not always inappropriate, given the shortage of military linguists and the availability of private sector expertise. But neither was it always clear who was responsible for what, as military and civilian personnel carried out the same tasks (if at radically different rates of pay).<sup>45</sup>

Nor were clear procedures for competitive contracting announced. Even before the war started, the firm of Kellogg Brown & Root (KBR) received a no-bid contract worth as much as \$7 billion over five years. Originally this was announced as a way to efficiently repair Iraqi oil fields likely to be damaged in the war; later, however, it was made public that the contract also included future operation of, and distribution to market from, those oil fields. This raised eyebrows, both for the size of the contract and because of Vice President Cheney's close ties to KBR's parent company, Halliburton.<sup>46</sup> In October the top contracting official for the Army Corps of Engineers charged that Halliburton officials had been allowed to join internal Defense Department discussions of the KBR contract before its terms were settled.

Pentagon audits of bills for gasoline and food services later led to charges from House Budget Committee Democrats that "Halliburton has routinely and systematically overcharged the U.S. government." As bad publicity mounted, the \$7 billion KBR contract was shortened to one year and then opened to competition. As or more troubling were charges of more overt corruption; in January 2004, for instance, the *Wall Street Journal* reported that two Halliburton employees had received \$6 million in kickbacks from a Kuwaiti company in exchange for extending it a lucrative subcontract. There was no way to know whether it was the event itself or the reporting of it that was aberrant, since the administration was hesitant to release what Rep. Henry Waxman (D-CA) called "basic information" on the "scope and status" of contractors and bidding. Still, various bills filed to require competitive bidding languished in committee. When the administration's \$87 billion supplemental budget request came before Congress, Rep. Jim Kolbe (R-AZ) and others insisted on including such a provision, along with the inspector general's office noted previously. But as passed, the open bidding requirement could still be waived if the head of the CPA and the execu-

utive agency awarding the contract both agreed, though the reasons for the waiver had to be published.<sup>47</sup>

The fuzzy status of the CPA itself made oversight yet more difficult. The CPA, which vanished from government upon the reassumption of nominal sovereignty by the Iraqi government in June 2004, had come into being sometime in the spring of 2003, replacing an earlier Office of Reconstruction and Humanitarian Assistance. Bremer, CPA's head, reported to the Defense Department. Yet the CPA had no basis in statute or even executive order; the Congressional Research Service (CRS) was left to guess it had been created by a secret National Security Presidential Directive. Another possibility was that it was "an amorphous international organization" established pursuant to a UN Security Council resolution. As a result, CRS fretted, "it is unclear whether CPA is a federal agency" and thus to what rules it might be subject: "the lack of an authoritative and unambiguous statement about how this organization was established, by whom, and under what authority leaves open many questions, particularly in the areas of oversight and accountability." Indeed, in 2003 the army denied that the Congress's General Accounting Office (GAO) had the right to audit CPA spending or contracting decisions, since the "CPA is a multinational coalition" and the "GAO does not have jurisdiction over this process." CPA issued regulations, but not subject to the Administrative Procedure Act (thus not published in the *Federal Register* or open to public comment). No clear chain of command could be identified.<sup>48</sup> All that seemed clear was that the president was meant to be in charge.

## UNILATERAL AUTHORITY & EXECUTIVE PRIVILEGE

War and spending powers, then, were expanded both by presidential fiat and by congressional delegation. Prosecution of the war on terrorism on the domestic front followed a similar pattern. The president used his extant powers aggressively. Most publicized were his broad claims of inherent authority to designate even American citizens as enemy combatants and thus not subject to the regular legal process. He also used tools like the International Emergency Economic Powers Act (IEEPA),

seizing private assets his administration designated as linked to terrorism.

However, the president's administrative arsenal also received additional reinforcement via legislative action. In the wake of lax airport security on September 11, for example, that function was federalized in a new Transportation Security Administration. As noted earlier, by the fall of 2004 serious discussions were under way aimed at creating a director of national intelligence in order to consolidate some fifteen extant agencies that had failed to cooperate or to share intelligence information with each other.

That proposal built on another large-scale effort at coordination. In September 2001 President Bush had used an executive order to create the OHS, seeking to superintend hundreds of scattered executive branch functions applicable to the purpose. Later, acknowledging that the OHS had insufficient clout over the offices it ostensibly channeled, the president proposed the creation of an enormous new Department of Homeland Security (DHS). Congress agreed (indeed, the proposal had originally been congressional), and the reorganization was signed into law in late November 2002. DHS combined 170,000 employees from twenty-two agencies into a \$37 billion organization. The president demanded, and received, sweeping new powers over this new bureaucracy, including flexibility over pay levels and work assignments and the authority to revamp hiring and firing procedures. The legislation also included language mandating that the department keep the information it received from private industry secret, even from state and local government; leakers could be criminally prosecuted. The broad exemption was meant to protect from public view any vulnerabilities in "critical infrastructure." However, by providing that such communications could not be released without the permission of the entity submitting them, the provision opened the door for industry to use DHS as a hiding place for damning reports on, say, the dumping of hazardous wastes. To prevent this, Congress and the GAO were specifically granted access to such information. However, in a detailed signing statement, President Bush effectively revoked that exemption. "The executive branch does not construe this provision," Bush wrote,

to impose any independent or affirmative requirement to share such information with the Congress or the Comptroller General and shall

construe it in any event in a manner consistent with the constitutional authorities of the President to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.

Parallel limiting language was repeated in other sections dealing with potential oversight of the president's use of his new civil service authority, in the requirement that DHS send budget information directly to Congress, and in some twenty other sections of the law.<sup>49</sup>

Executive privilege was not invoked formally with regards to matters linked to September 11. But the doctrine hit the headlines in the spring of 2004 when the 9/11 Commission requested that national security adviser Rice testify under oath on the intelligence available to the president before the attacks. Originally the president resisted, arguing that Rice's appearance would harm presidents' ability to receive candid advice about sensitive issues. This rationale gained little traction with the public, in part because Rice had already spoken widely to the media on similar topics while seeking to rebut charges that Bush had been inattentive to terrorism for the first eight months of his term. Ultimately, Bush allowed Rice to testify. He argued that only the "truly unique and extraordinary circumstances" of September 11 justified his decision, going so far as to extract assurances from the House and Senate Republican leadership that her appearance "does not set, and should not be cited as, a precedent for future requests" for any White House official to testify before a legislative body.<sup>50</sup>

The administration had more success with less salient measures heightening government secrecy. For instance, Chief of Staff Card directed in March 2002 that agencies restrict access to what he called "sensitive but unclassified" information that might provide information on weapons of mass destruction or, more generally, "related to America's homeland security." According to the conservative Heritage Foundation, agencies responded by removing thousands of previously public documents from the possibility of FOIA disclosure. In other cases the administration charged huge sums for document searches conducted under FOIA, presenting a bill for nearly \$375,000 to a public interest

group seeking information on immigrants detained by the Justice Department after September 11.<sup>51</sup>

#### LAW ENFORCEMENT AFTER SEPTEMBER 11

Not surprisingly, law enforcement powers received a major boost after the September 11 attacks. The FBI was told that its first job was now terrorism prevention, and the Justice Department worked aggressively to give the bureau and other entities additional resources. One front was administrative. In October 2001, for example, the department published rules crimping attorney-client privilege—to be implemented immediately, without public comment. The new regulations allowed prison authorities to monitor phone conversations and mail between prisoners and their lawyers if the attorney general had any suspicion that those communications might “further or facilitate” acts of terrorism. Originally, the prisoner had to be told that the government was listening in. Later, however, a statutory change rescinded the need for such notice.

Shortly after September 11, Attorney General John Ashcroft announced that he would allow the Justice Department’s guidelines governing investigative behavior to be waived in “extraordinary cases” where this would “prevent and investigate terrorism.” In May 2002, expressing “disappoint[ment]” that authority had not been used more frequently, he announced a broad revision of the guidelines. The new language gave FBI field offices more discretion to open counterterrorism investigations and rescinded some of the remaining Ford-era restrictions on domestic surveillance by the bureau. In some cases, this merely allowed agents to enter areas, real and virtual, open to the public. But it also meant agents were now allowed to monitor religious or political groups at will, independent of a formal investigation or probable cause that individuals in the group had committed or were plotting a crime.<sup>52</sup>

A number of administrative actions were aimed at noncitizens. The Justice Department used its power over immigration matters to locate and hold over five thousand resident aliens in preventive detention. Some were held as “material witnesses,” meaning that they were deemed to have information pertinent to a crime and might flee unless detained, though no charges were filed against them; others were

charged with violating the terms of their visas or other laws (from speeding to assault). Deportation hearings were accelerated, and the department ordered that more than six hundred hearings deemed of “special interest” be completely closed to the public, including to family members of the accused. The hearings themselves were not to appear on the public docket, and even the names of those detained were kept secret, leading to angry accusations drawing parallels to the Argentinian *desaparecidos* of the 1970s. Lower court orders to open the hearings were largely overturned, and in May 2003 the Supreme Court let stand a ruling by the Third Circuit Court of Appeals, which had upheld the government’s ability to close the hearings.<sup>53</sup>

Governmental efforts to collect information about the behavior of noncitizens and citizens alike expanded dramatically. The creation and “mining” of vast, centralized databases of financial, communications, travel, and medical records were at the heart of the ominously named Total [later, “Terrorism”] Information Awareness program (TIA) housed within a research branch of the Pentagon. A parallel project hoped to develop biometric identification technology that could pick out individuals from a distance or within large crowds. The characterization of these projects as “computer dragnets” inimical to privacy rights forced their curtailment in late 2003.

#### THE PATRIOT ACT

Related projects continued, however, diffused across various agencies involved in foreign intelligence.<sup>54</sup> The administration also asked for legislative approval for a wide-ranging relaxation of limitations on Justice’s surveillance and detention powers. The bluntly named Patriot Act created a host of new federal crimes and enhanced penalties for others, defining “domestic terrorism” and outlawing terrorist attacks on mass transportation facilities, harboring terrorists, or providing them with “material support” (including “expert advice”). It provided new charges associated with crimes ranging from the use of biological weapons to fraudulent charitable fund-raising. Terrorism was defined as a racketeering activity under the Racketeer Influenced and Corrupt Organizations (RICO) statutes, expanding prosecutorial tools. New money-laundering provisions made it easier for the treasury secretary to get access to bank

records and to seize the assets of any person or entity taking part, or planning to take part, in terrorist activities; portions of the World War I-era Trading with the Enemy Act allowing the president to confiscate (not just freeze) foreign property in response to foreign aggression were resurrected.

A number of provisions dealt with immigration and resident aliens. Building on the 1996 antiterror law discussed in chapter 6, the Patriot Act expanded the definition of “engaging in terrorist activity” so that any alien soliciting money or membership for a certified terrorist organization or “espousing” terrorist activity could be deemed inadmissible to—and thus deportable from—the United States. Spouses or children of an inadmissible alien were likewise deemed inadmissible. More broadly, aliens suspected on “reasonable grounds” of terrorism could now be detained by the Justice Department for up to seven days without charge. (The administration’s original request was for unlimited detention, without judicial review. The military order discussed previously may have served as another way to achieve that goal.)

The Patriot Act extended government surveillance powers as well. Some of the changes simply caught statutes up to the digital age—for example, by more readily permitting “roving” taps on suspects using multiple or portable phone lines and by allowing voice-mail messages to be seized pursuant to a warrant. Others added terrorist activities to the list of offenses where federal law specifically allows domestic wiretapping after obtaining a warrant. Federal power to trace the identities of incoming and outgoing calls (a sort of hidden, two-way caller ID) was expanded and extended to e-mail and to the addresses of Web sites that a computer user had visited. The government’s ability to delay notifying the target of a warrant of that warrant’s execution was also broadened to so-called sneak and peek searches, where officers are authorized to conduct a search but not to remove tangible evidence (though they can take pictures or download computer files) without leaving notice of their presence. Such notification could be delayed if a prosecutor could claim that notice was “jeopardizing an investigation or unduly delaying a trial.”

Additional sections broadened the information available to the FBI through National Security Letters (NSLs), which themselves could now be issued by bureau field offices instead of Washington. The enhanced NSLs required telephone or e-mail logs, bank records, credit reports,

and a wide array of financial records (including those from casinos, pawn shops, and used-car dealerships) to be turned over to the FBI if the bureau felt they were “relevant” to an ongoing intelligence investigation. In late September 2004 a district court judge held that the language was too broad and that NSLs amounted to a warrant by other means, without judicial review. The government appealed the ruling.<sup>55</sup>

NSLs could not be used in criminal investigations in any case. However, other portions of the Patriot Act aimed to breach the Foreign Intelligence Surveillance Act (FISA) “wall” between counterintelligence and criminal cases. In later testimony, Attorney General Ashcroft would blame “the wall”—and specifically its purported reinforcement by the Clinton administration—for much of the FBI’s difficulty in uncovering the September 11 plot. However, Ashcroft’s own office had endorsed the Clinton-era interpretation of FISA in August 2001. A more telling critique was of bureaucratic culture: neither FBI nor CIA had much interest in sharing information. A report issued by Sen. Richard Shelby (R-AL) suggested, indeed, that invocation of the “wall” as a legal question was often simply a tool “for maintaining the independence that the FBI views as its birthright.”<sup>56</sup>

That said, the statutory wall *had* at times been used as a barrier to legitimate investigations. There was good reason for this, given past abuses. But there were also potential trade-offs, made clear by the pre-9/11 investigative failures (for example, domestic law enforcement’s failure to realize that several of the hijackers being tracked by the CIA had entered the United States). FISA had been amended in 1994 to allow physical searches as well as electronic surveillance and in 1998 to expand the FBI’s ability to tap lines in terrorism investigations. But the Patriot Act went much further. The duration of FISA orders was extended, in the case of physical searches doubled to ninety days. Most critically, it allowed FISA surveillance if foreign intelligence information gathering was a “significant purpose,” as opposed to the only, or primary, purpose, of the investigation; thus under the new law criminal investigation itself, and not foreign intelligence, could be the main reason for the surveillance.<sup>57</sup> It made FISA warrants easier to obtain—the FBI now had to show only that the request was part of an investigation relevant to a foreign intelligence operation rather than show it was linked to any particular individual’s actions—and empowered the FBI to require produc-

tion of “tangible things,” such as business records and even library lending receipts. Further, domestic law enforcement officials were empowered to share information discovered through grand jury investigations with other federal authorities, from immigration to intelligence.

After the first-ever ruling from the FISA Court of Review upheld the new rules in late 2002, the number of applications for FISA warrants rose above seventeen hundred in 2003 (from about twelve hundred in 2002). Only three were rejected.<sup>58</sup>

The Patriot Act attracted much obloquy, ranging from the thoughtful to the hysterical. Some worried about FISA procedures being used to evade Fourth Amendment protections against unreasonable searches. Others were concerned about the treatment of aliens and immigrants. Others feared that the label of “domestic terrorist” could be used to prosecute anyone from abortion clinic picketers to antiglobalization protesters.<sup>59</sup>

One common criticism was the lack of deliberation accorded the act in Congress. The administration demanded immediate action: “we’re at war,” the president reminded lawmakers. “And in order to win the war, we must make sure that the law enforcement men and women have got the tools necessary, within the Constitution, to defeat the enemy.”<sup>60</sup> The Patriot Act draft received no hearings or committee consideration in the Senate, going directly to the floor—where it was slotted for consideration under a unanimous consent order in the Senate that prohibited amendments or even discussion. Sen. Russ Feingold (D-WI) objected; nonetheless, after just four hours of debate, the bill passed unamended by a vote of 96 to 1. On the House side, the normally polarized Judiciary Committee (whose members ranged from Bob Barr [R-GA] on the far right to Barney Frank [D-MA] on the far left) rewrote the administration’s draft to provide increased protections for civil liberties. However, at the behest of the White House, the new version passed unanimously in committee vanished from consideration: the rule adopted for the bill’s consideration on the House floor provided that the Judiciary Committee’s bill be replaced with language much closer to the administration’s own proposal. The rule closed off all other amendments and allowed just one hour for debate. No advance analysis was provided of the 187 pages of new text. While this maneuver prompted recrimination—the rule prevailed only on a near perfect party-line vote,

214–208—many members feared the political impact of a “no” vote on the bill itself, and it passed overwhelmingly.<sup>61</sup>

It should be noted that in conference committee the bill regained some of the checks that civil libertarians had urged. One shift, for instance, curtailed Justice’s proposal to detain immigrants indefinitely. Others raised the bar somewhat for various warrants and searches. Most significant was a sunset provision for many (though not all) of the changes in the surveillance regime; they were to expire on January 1, 2006, unless extended.

After the conference report was passed by huge majorities, President Bush signed the act into law on October 26, 2001. In doing so, the president emphasized that “This government will enforce this law with all the urgency of a nation at war.”<sup>62</sup> Little oversight was expected—or accepted—in this process. Attorney General Ashcroft told critics of the law that raising “phantoms of lost liberty” was “giv[ing] ammunition to America’s enemies and pause to America’s friends.” His message, he said, was “this: your tactics only aid terrorists.” The Senate Judiciary Committee sent twenty-seven letters to the Justice Department on the implementation of the Patriot Act and other laws—all went unanswered. When its House counterpart asked for information on how often various Patriot Act provisions had been used, the Justice Department refused to give any details for months. Only a threatened subpoena from House Judiciary Committee chair F. James Sensenbrenner (R-WI) elicited answers. When conservative senator Larry Craig (R-ID) urged mild revisions to the Patriot Act in 2003, Ashcroft attacked the bill before it even reached committee, arguing there was no point to discussing something that would “undermine our ongoing campaign” against terrorism. Senate Judiciary Committee chair Hatch evidently agreed; no hearings were held until September 2004, in conjunction with efforts to repeal the bill’s sunset provisions.<sup>63</sup> At that time, Deputy Attorney General James Comey defended the law that, he argued, “has changed our world and has made us immeasurably safer,” especially by breaking down the FISA wall.<sup>64</sup>

There were, nonetheless, signs that law enforcement had not always used its new discretion appropriately. In 2003, the Justice Department’s inspector general reported that authorities had made scant effort to discriminate between valid terror suspects and other individuals. More than

seven hundred aliens were arrested in the months after September 11. Many were jailed for months, often without access to attorneys or formal charges against them. And some—notably in the Metropolitan Detention Center in Brooklyn, New York—were physically abused, verbally harassed, and repeatedly strip searched, mistreatment all caught on videotape. None were ever charged as terrorists. In 2004, after the Madrid train bombings, the FBI secretly surveilled and very publicly detained an Oregon lawyer whose fingerprint was claimed to be a “100 percent” match to one found in Spain. But the print had been wrongly identified. That summer the FBI was accused of harassing antiwar activists planning to demonstrate at the Democratic National Convention in Boston. Others charged that the bureau had abused its ability to detain material witnesses without filing charges. More generally, Patriot Act powers surfaced in mundane cases ranging from drug enforcement to political corruption, even as the administration at once emphasized the act’s utility in fighting terrorists but downplayed the frequency with which its most controversial provisions were used.<sup>65</sup>

To be sure, the pressures on law enforcement immediately after September 11 were immense. But the lingering effects on civil liberties demanded debate that did not occur. In any case, said the attorney general, “We make no apologies.” In his 2004 State of the Union address, President Bush asked Congress to make the existing provisions of the Patriot Act permanent and to add new ones. He elaborated in a speech on April 19 (Patriots’ Day): the act, he said, was “essential law. . . . We can’t return to the days of false hope.” This meant giving the Justice Department the power to issue administrative subpoenas to obtain time-sensitive records without judicial review, banning bail for terror suspects, and making additional terror-related crimes eligible for capital punishment. Other proposed changes, not mentioned by the president in his speech, would make it easier to keep classified information from criminal defendants and would expand FBI’s FISA surveillance over “lone-wolf” noncitizens suspected of terrorist activities but without affiliation with an international group. In the fall of 2004 the House leadership included key provisions of the president’s proposal in their version of the intelligence community restructuring bill and added tough language allowing DHS to detain indefinitely foreigners charged with terrorist ties and expanding the government’s capacity to deport

aliens without judicial review. The final version included the “lone wolf” provision and new restrictions on bail for terror suspects, while increasing the penalties for harboring illegal aliens and making it illegal to attend terrorist-run training camps. It also refined—and expanded—the criteria that defined “material support” to terrorist operatives, in response to a court ruling that had found those criteria overly vague.

While contentious—the Patriot Act provisions of the House bill helped stall the broader intelligence restructuring in conference committee—the 2004 enactments were tame compared to other portions of the proposed Domestic Security Enhancement Act of 2003, immediately dubbed “Patriot II.” Prepared secretly in the Justice Department until leaked in February (on the eve of the Iraq war), Patriot II would have provided for greatly expanded wiretapping in criminal—not intelligence—investigations of U.S. citizens as well as of aliens. Access to consumer credit reports was also to be eased by allowing federal investigators merely to certify that the information therein would be used “in connection with their duties to enforce federal law”—not to investigate any particular crime.

FISA was to be amended again too. The attorney general’s power to bar or remove aliens would be expanded anew; and FOIA would be amended to exempt information about aliens detained during terror investigations. FISA surveillance could be in place for seventy-two hours before a warrant was obtained—or in some situations, under new “presidential authorization exceptions,” for up to a year. Even the attorney general, currently permitted to authorize FISA orders without court permission for fifteen days during periods of declared war, would receive enhanced power to do so any time Congress authorized the use of military force or during times of national emergency.

Most dramatic, perhaps, especially given the actions and claims concerning aliens, was the provision providing that an American could “voluntarily” lose citizenship by “serving in a hostile terrorist organization” as designated by the administration. Providing material support—attending a rally? buying a raffle ticket?—to such a group, even without knowledge of their status, could result in the president’s stripping one’s citizenship.<sup>66</sup> It was a breathtaking proposal, and it was not enacted.

Nonetheless, the Patriot Act’s sunset clause guaranteed that the debate over Patriot II, and more broadly the proper balance between security

and civil liberties, would be renewed in 2005. There seemed little likelihood that the act would be allowed to expire.

#### CITIZEN COMBATANTS?

Those debates would be shaped by the president's unprecedented claim to unilateral power over the rights not just of aliens but of American citizens. Specifically, President Bush claimed the authority to remove defendants from the judicial process by designating them as terrorist "enemy combatants" parallel to the aliens discussed previously in the war powers section. Such people, he said, did not have to be charged with a specific crime or represented by an attorney. And they could be held indefinitely without trial. In this view of presidential power, judicial review of a given suspect's case was not necessary—nor indeed permissible.

Bush's claims were challenged by two individuals presenting different sets of facts. One, Yaser Hamdi, was a Saudi national born in Louisiana. He was captured on the Afghan battlefield and originally detained at Guantánamo Bay. When identified as a U.S. citizen, he was transferred to a military brig for interrogation and remained there for two and a half years without being criminally charged. This was legal, the administration argued, under the president's powers as commander in chief, which were "at their height" in this case: Hamdi was "a classic battlefield detainee," and "the Executive's determination that an individual is an enemy combatant is a quintessentially military judgment." Further, recall the September 14 resolution: had not Congress allowed the president the use of "all necessary and appropriate force against those . . . persons" the president determined to be connected with the September 11 attacks? And had not legislators asserted, in the same statute, that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States"? As a result, any judicial review was unwarranted. "The court may not second-guess the military's enemy combatant determination, and therefore no evidentiary proceedings concerning such determination are necessary," the administration told the Fourth Circuit Court of Appeals. "Going beyond that determination would require the courts to enter an area in which they have no competence, much less institutional exper-

tise, and intrude upon the Constitutional prerogative of the Commander in Chief.” At most, the administration later said, judges could decide whether there was any factual basis for the determination that Hamdi was an enemy combatant. But judges could not question the merits of that determination. Thus so long as something like the one-and-a-half-page “Mobbs Declaration” provided by Pentagon aide Michael Mobbs existed, judges would have to accept the president’s decision.

A district court rejected this argument, saying the Mobbs Declaration was “insufficient” and that it “leads to more questions than it answers.” After all (quoting now from the declaration itself), it merely affirmed that Hamdi had been “determined by the U.S. military . . . to meet the criteria for enemy combatants.” But the Fourth Circuit Court overturned that judgment, averring that while judicial deference was “not unlimited” judges should nonetheless be “highly deferential”: since it was undisputed that Hamdi was “captured in a zone of active combat operations abroad, further judicial inquiry is unwarranted when the government has responded to the petition by setting forth factual assertions which would establish a legally valid basis for the detention.” Actually testing those assertions went beyond the court’s jurisdiction: Hamdi was “not entitled to challenge” them.<sup>67</sup>

Clearly the circumstances of Hamdi’s capture featured prominently in the administration’s argument and the circuit court’s decision. But the president’s claim was not limited to the foreign battlefield. New York native José Padilla was arrested in Chicago on May 8, 2002, as he arrived at O’Hare International Airport from Pakistan. He was detained as a material witness to a conspiracy to use a radiological (i.e., “dirty”) bomb against American targets. It later emerged that the dirty bomb plot had probably been discarded and that Padilla hoped instead to blow up apartments by exploding gas ovens. Presumably he could have been criminally charged in connection with either set of plans. However, when a court required that he be either charged or released, Padilla was instead designated an enemy combatant by order of the president and transferred to military custody. “The authority of the commander-in-chief to engage and defeat the enemy encompasses the capture and detention of enemy combatants wherever found, including within the nation’s borders,” the administration argued. There need not be any rules for deter-

mining who was an enemy combatant and who would be a regular criminal, Solicitor General Theodore Olson noted; instead, “there will be judgments and instincts and evaluations and implementations that have to be made by the executive that are probably going to be different from day to day, depending on the circumstances.”<sup>68</sup>

A legal standard that changed “from day to day” clearly had ramifications for the Fifth and Fourteenth Amendments’ notions of due process and equal protection of law. Padilla argued that any crimes he had committed could be adequately managed by civilian courts. After all, in *Ex parte Milligan* after the Civil War, the Supreme Court had held that even wartime did not justify evasion of a functioning court system (see chapter 2). Further, he argued, the administration’s actions violated the 1971 Non-Detention Act’s provision that no person may be detained “except pursuant to an act of Congress” (see chapter 4).

The administration responded that, as “a belligerent associated with the enemy” who had returned to the country in order to harm it, Padilla was properly subject not to U.S. law but to the laws of war: the appropriate case was not *Milligan* but *Quirin*, the Nazi saboteur case discussed earlier. Thus the president’s inherent authorities more than sufficed: “The President’s exercise of that core Article II power [i.e., the commander-in-chief power] is not conditioned on any action by Congress.” As for the 1971 statute, the administration argued that it did not apply to wartime—and that even if it did, the September 14 Authorization for Use of Military Force (AUMF) was sufficient warrant for the president’s orders. “Nothing in the terms of Congress’s Authorization suggests a limitation to a foreign battlefield,” the Justice Department noted, pointing out that the resolution had after all been passed in response to acts on domestic soil. “Is Padilla just the same as somebody you catch in Afghanistan?” Deputy Solicitor General Paul Clement was asked in oral argument; “he is just the same,” Clement replied. As with *Hamdi*, the courts were to stay out of the way. “The fact that executive discretion in a war situation can be abused,” Clement noted, “is not a good and sufficient reason for judicial micromanagement and overseeing of that authority.”

In late 2002 a district court ruled in favor of the administration on all points but one—American enemy combatants were possible, and any judicial review did indeed owe the executive great deference, but a

detainee was to be allowed to consult an attorney to help him challenge the evidence presented by the government.

The administration balked and appealed, arguing that Padilla's lawyer might be used, even unwittingly, to carry messages to other terrorists. However, the Second Circuit Court of Appeals rejected not just this claim but the president's more basic assertion. It ruled in December 2003 that "the President lacks inherent constitutional authority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat." Going back to the 1952 *Youngstown* case, the court decided that the Non-Detention Act explicitly denied presidents the power to detain American citizens on American soil; to overcome this, the detention power would have had to be "clearly and unmistakably indicated," and the September 14 authorization failed this test. The president could simply not act alone on his own say-so. The court concluded,

we are as keenly aware as anyone of the threat al Qaeda poses to our country and of the responsibilities the President and law enforcement officials bear for protecting the nation. But presidential authority does not exist in a vacuum, and this case involves not whether those responsibilities should be aggressively pursued, but whether the President is obligated, in the circumstances presented here, to share them with Congress.

The short answer was "yes."<sup>69</sup>

The Supreme Court heard the *Padilla* and *Hamdi* cases on the same day in April 2004. By a 5-4 vote, the justices set Padilla's case aside on technical grounds since he had not filed his petition in the correct federal court: it should have been done in South Carolina rather than in New York. The dissenters fiercely protested that the "exceptional" nature of the case overrode the legal fine print: "at stake in this case is nothing less than the essence of a free society," argued Justice John Paul Stevens. "Even more important than the methods of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law."<sup>70</sup>

The court chose instead to use Hamdi's case to flesh out Stevens's claim. It largely agreed with him. All told, some eight justices agreed that

the administration had overstepped its constitutional bounds. As Justice Antonin Scalia wrote (joined by Stevens), “the very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.” The president, Scalia felt, had suspended habeas corpus, which was a power reserved to the Congress. Since Congress had not done so, Hamdi needed to be either charged or released.

The sound bite commonly drawn from the plurality opinion written by Justice Sandra Day O’Connor was along similar lines. “A state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens,” the Court declared. “Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”

As a result, the president’s claims that judges had no role in examining the combatant cases, and that the presence of *any* evidence in the record painting a suspect as an enemy combatant must be deferred to as *sufficient* evidence, were set aside. Such suspects were owed due process—at the least, the accused needed to be told of the evidence against him and a fair hearing to rebut it.

Nonetheless, Scalia’s opinion was not a concurrence but a dissent. The lead opinion held that, while Congress had not suspended the habeas writ, the September 14 Authorization for Use of Military Force (AUMF) did constitute legislative delegation to the president sufficient to name enemy combatants: “Congress has in fact authorized Hamdi’s detention, through the AUMF.” The 1971 Non-Detention Act did not apply (a contention that sparked a different dissenting opinion), because taking prisoners was deemed so central to armed conflict that “it is of no moment that the AUMF does not use specific language of detention.” The Court therefore did not need to discuss whether the president’s commander-in-chief power extended to detaining Hamdi and others: so long as they were among those covered by the AUMF, Congress had done the extending. The issue was whether they *were* covered, and the Court held that the president had not bothered to prove that point.<sup>71</sup>

Nor did the administration try to do so, in this case at least. Hamdi—having been declared so dangerous to national security that he could not be allowed access to counsel—was released from prison without charge

in October 2004 and returned to his family in Saudi Arabia. The decision, then, was a win for him (and perhaps for Padilla, whose habeas petition was refiled in the appropriate district, while the government pondered bringing criminal charges against him). But whether it was a long-term loss for the president was less certain. “Our opinion only finds legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, in fact, an enemy combatant,” wrote the four justices led by O’Connor, but the Court left the definition of sufficient clarity itself rather hazy. The justices declined to state whether citizens detained beyond the Afghan battlefield might apply; nor was adequate due process specified beyond the “core elements” noted previously. A full-blown judicial proceeding was not, it seemed, required: “enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.” The status review hearings noted earlier in this chapter were the military’s first effort to “tailor” such proceedings without involving the courts. The process did not provide the detainees with lawyers or with the chance to review the evidence against them. And in subsequent cases, despite the Court ruling, the administration continued to strenuously resist detainees’ efforts to obtain counsel and hearings before federal judges.<sup>72</sup>

The unsettled situation recollected a section of Justice Souter’s opinion in the *Hamdi* case appealing to legislators for judgment. “In a government of separated powers,” he wrote, “deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch.” After all, the president has a job to do: “the [executive’s] responsibility for security will naturally amplify the claim that security legitimately raises.” There was therefore the “need for an assessment by Congress before citizens are subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims.”

No resolution, however, was forthcoming.

## ETHICS: THE POLITICS OF TRUST

The September 11 attacks made Americans reevaluate, for a time, their attitudes toward government. In July 2001 a little more than a quarter of

respondents said they trusted the federal government to do the right thing most or all of the time. But in October 2001, 57 percent said so. In July, 50 percent of those polled said their feelings toward the government were at least “somewhat” favorable—in October that figure brushed 80 percent.

But by May 2002 both figures had dropped back down—to 40 and 60 percent, respectively, and by late 2003 just 27 percent answered “most of the time” to the question of how often they trusted government to do the right thing.<sup>73</sup> The quick return of these figures to “normal” post-Watergate levels reflected many things, of course, but among them was surely the fact that even in the wake of tragedy government itself acted distressingly “normal” in many ways. To be sure, the most pressing ethical questions of the immediate post-September 11 period were less of outright criminality than of credibility. The United States, political leaders frequently declared, was on a “war footing.” As detailed earlier, in a variety of areas the Bush administration utilized that footing to extend executive claims to secrecy and control over information. And it made broad statements—about the costs and rationales for the Iraq war, about broader budget outcomes, about the nature of foreign detainees—without allowing independent verification of the evidence used to support them.

Indeed, it was largely efforts to prevent the spread of information that most rebounded against the administration and even resulted in illegality. One such case, ironically, involved a statute protecting secrecy—violated when the identity of a CIA agent was revealed to the press, despite federal law protecting undercover intelligence operatives from disclosure. The agent’s husband, former ambassador Joseph Wilson, had revealed a 2002 report discrediting the president’s 2003 State of the Union claim concerning supposed Iraqi efforts to import uranium from Africa. With the expiration of the Independent Counsel Act in 1999, the Justice Department regained control of investigations into allegations of executive misbehavior. But Attorney General Ashcroft’s close ties to the White House staff most likely responsible for the leak led to familiar accusations of conflicting interests. Ashcroft ultimately recused himself from the case, though resisting calls to name an outside counsel; his deputy appointed a U.S. attorney from Chicago to direct the investigation.<sup>74</sup>

A second case was not about defense but drugs—namely, a new Medicare prescription drug program. As noted in chapter 5, extraordi-

nary arm-twisting had led to GOP approval of a \$400 billion entitlement expansion. But lawmakers soon discovered that the program, when implemented, would cost at least a third more than that, a fact that might have doomed passage among conservatives already uneasy at the hefty price tag. The higher figure had been circulating within the administration for some time—a June 2003 memo by Medicare’s chief actuary put the cost at \$550 billion or more. However, this information was not shared with Congress until after the bill was safely in law. The actuary claimed his job had been threatened if he released cost data. If true, that sort of disciplinary action violated statutes protecting the rights of federal employees to communicate with Congress, for just such reasons of oversight.<sup>75</sup>

The abuses later revealed by the Abu Ghraib photos and an array of subsequent investigations were down the chain of executive command (though not always far down). They were hardly instituted by White House fiat. But they highlighted what can arise when doors are closed. And the administration tried in myriad ways to keep them tightly shut. Some of those efforts were symbolic, if poignant, such as the ban on photographs of the flag-draped coffins returning from Iraq. Others were substantive. Even the blue-ribbon 9/11 Commission was created over the president’s objections and received only grudging, delayed cooperation from the White House, whether the issue was access to preattack intelligence briefs, the extension of the commission’s reporting deadline, or testimony from national security adviser Rice.<sup>76</sup>

All this dented the president’s reputation for candor. The administration’s “fetish for secrecy,” as columnist Robert Novak termed it, did not welcome the checks that prevent abuse of trust. Another, earlier assessment concluded by saying Bush had not learned “the lessons of Watergate” and that “secrecy is the way of dictatorships, not democracies.” This could perhaps have been dismissed as a partisan screed—except that the author was Nixon counsel John W. Dean.<sup>77</sup>

## CONCLUSIONS: AMBITION RISING?

The horror of the September 11 attacks accelerated the demise of the resurgence regime. The attacks made executive authority seem both

more necessary and more legitimate. President Bush's standing to lead soared, and he seized the role—and the reins. Congress followed along, endorsing administration initiatives in war, spending, and law enforcement with few legislative questions asked and little executive information volunteered.

The impressive Republican gains in the 2002 midterm elections—solidifying control of the House and returning the Senate to GOP hands, after extensive personal campaigning by the president in key races—seemed to confirm the wisdom of this strategy. Members noted with some trepidation the fate of Sen. Max Cleland (D-GA), defeated for reelection at least in part because of his opposition to the administration's homeland security reorganization proposal. It is worth noting in this context that such deference was actively encouraged. And if the patriotism of a quadriplegic Vietnam War veteran could be questioned successfully, who might be next? House Majority Leader DeLay called opponents of Bush's policy "hand-wringers and appeasers"; Speaker Dennis Hastert (R-IL) suggested that critics of the Iraq war "may not undermine the president as he leads us into war, and they may not give comfort to our adversaries—but they come mighty close." In his successful challenge to Senate Minority Leader Tom Daschle in 2004, former representative John Thune (R-SD) said Daschle's critiques of the president "embolden the enemy." Advertisements in battleground states sought to paint candidates opposing the president's post-9/11 policy as endorsing the Taliban's attacks on human rights.<sup>78</sup>

But this sort of loyalty test was largely gratuitous. Even under divided government in 2002, President Bush was successful on nearly 90 percent of the roll call votes on which he took a position—a figure higher than President Clinton's success rate under unified Democratic government in 1993 and 1994. Democratic senators supported Bush at rates of 71 percent in 2001 and 67 percent in 2002; Republican senators' support for Clinton was never above 46 percent during the period 1998–2000, and even that was up from 1995–96. "On major legislation, Congress has so reliably bowed to Bush's demands that he has yet to veto a bill in his three years in the White House," one summary of the 2003 legislative session pointed out (nor did he veto one in 2004, when his fourth year success on roll call votes was the highest in a generation). Despite the billions of dollars at stake in Iraq contracting, in the end Senate Minor-

ity Leader Daschle correctly noted “the lack of any expressed concern in the Congress. There has been virtually no oversight in either the House or the Senate.” As late as March 2004, the House of Representatives adopted by a vote of 327–93 a post hoc resolution stressing the need for the Iraq war. Even at home, Congress showed little inclination to keep tabs on crucial aspects of policy implementation; in late 2004 a task force headed by retired senator Warren Rudman (R–NH) scolded Rudman’s former colleagues for having “done almost nothing” to ensure that homeland security programs were given effective oversight.<sup>79</sup>

Overshadowing the president’s legislative agenda, of course, were his unilateral claims of power—which also received general deference from Congress and the courts. Still, as the 2004 campaign heated up, the frozen ambition of the other branches of government seemed to have thawed as well. Bush’s opponent, Sen. John Kerry, fiercely criticized many of the administration’s claims and policies, touting his own military service and challenging President Bush’s leadership even on national security issues. The Supreme Court’s *Hamdi* decision served notice of judicial concern regarding executive overreach and of judges’ willingness to step into the fray.

Congress also began to grow more restive. Legislative enthusiasm for early renewal or expansion of the Patriot Act seemed decidedly muted, especially in the Senate, and legislators pondered legal protections for federal whistle-blowers facing administration retaliation. The graphic photographs of humiliation and torture inflicted by American servicemen on imprisoned Iraqis shocked Congress and the nation, as did the kidnappings and grotesque beheadings of foreign civilians by terror cells. As insurgent attacks were mounted by the thousands, U.S. troops continued to die not only in Iraq but in an Afghanistan still rife with warlords and patriarchs. And the list of post–September 11 attacks continued to grow with deadly al Qaeda train bombings in Madrid that drove Spanish troops out of the allied coalition in Iraq.<sup>80</sup>

None of this pointed to a “mission accomplished,” as the president had declared in May 2003. Public trust, as already noted, showed signs of ebbing. The president’s approval ratings plunged below 50 percent for the first time in his term and hovered there through Election Day. From early in the Iraq conflict, references to Vietnam had been freely extended, if not always appropriately drawn. As the administration con-

tinued to describe the situation in Iraq as “a remarkable success story,” and as weapons of mass destruction failed to appear, the credibility gap, at least, of the Johnson-Nixon years returned to the fore. The return of covert operations and the abuses they can hide merely elaborated the Vietnam metaphor, complete with revelations of wrongdoing exposed by Seymour Hersh. High-ranking Defense Department officials “created the conditions that allowed transgressions to take place,” one Pentagon consultant observed. “And now we’re going to end up with another Church Commission. . . . Congress is going to get to the bottom of this.”<sup>81</sup>

In these circumstances the administration’s ongoing budget requests served as intermittent outlets for legislative frustration. Defense Department personnel testifying on behalf of an additional \$25 billion for Iraq were assailed for the request’s lack of specificity, for the imprecision of prior spending estimates, and for the ongoing interrogation scandal. “This is a blank check,” said Sen. John McCain (R-AZ), and it seemed that blank checks were less fashionable than before. News that some \$3.4 billion originally appropriated for reconstruction needed to be spent on shoring up Iraqi security attracted further criticism: Senator Hagel called the request “an acknowledgment that we are in deep trouble.” Sen. Richard Lugar (R-IN), chair of the Senate Foreign Relations Committee, scored the administration’s prewar claims, saying that “the nonsense of that is apparent. The lack of planning is apparent.”<sup>82</sup>

In some ways the galvanizing effect of elections, court decisions, and legislative hearings came as no surprise. Political contexts had changed; the world had changed; but the Constitution, and the hold it gave each branch on each of the others, had not changed.

Yet how deep the overall impact of this reaction would be was far from obvious. Even as some senators began to voice their doubts, others suggested that “collective hand-wringing” over such issues was merely “a distraction from fighting and winning the war.”<sup>83</sup> President Bush was narrowly reelected in November. The result was quickly interpreted as an endorsement of the president’s vision of a forceful and unapologetic chief executive. Indeed, even had Kerry won the presidency, fundamental change in its workings seemed unlikely, given his campaign commitments to an aggressive foreign policy and the bitterly divided government he would have faced.

Thus, what did seem clear by Election Day 2004 was that the resurgence regime no longer bound, or even consistently guided, legislative-executive interaction. The question was, What would replace it? This is the grist for the concluding chapter, which assesses the path of power traced in this volume, moving from “what” to “why.” There are reasons to expect presidents to remain aggressive in their claims to power and Congress to remain more deferential than not to presidential claims. In the American system of government, strong executive leadership is at once unacceptable and unavoidable: it is to this fundamental tension we now turn.