

VIII. “PRACTICAL ADVANTAGES & GRAVE DANGERS”

Imperial Presidency or Invisible Congress?

HAVING traced the broad sweep of presidential power across American history, with particular attention to its vicissitudes after Vietnam and Watergate, it is time to evaluate it. In so doing we revisit the motivating question of this book. Is there a “new imperial presidency”? That is, has the governmental balance of power shifted back to the president to an extent comparable to the Vietnam/Watergate era?

The short answer is “yes.” As previous chapters have detailed, the 1970s resurgence regime has eroded and presidential power has expanded. These developments have come in concert but are not completely reciprocal. That is, not everything that weakens Congress strengthens the president; other actors, or none, may gain instead, for American governance is not a zero-sum game. Still, presidents have regained freedom of unilateral action in a variety of areas, from executive privilege to war powers to covert operations to campaign spending. There are meaningful parallels between the justificatory language of the Nixon administration and that of our most recent presidents: each stressed the notion of “inherent” presidential power, the broad sweep of the constitutional “rights” of the office. This development would have endured even had President Bush failed of reelection in 2004. The default position between presidents and Congress has moved toward the presidential end of the interbranch spectrum—and irreversibly so.

As with most interesting questions, though, the short answer is rarely the full story. The best response might instead be “it depends.” Read as simple sequence, the events detailed in this book present a set of linear trends: the rise of presidential power to the 1960s, the overstretch of the

presidency past “Savior” to “Satan,” the resurgence of other political actors through the 1970s, and the countersurge of presidential initiative starting in the 1980s and accelerating into overdrive after September 11, 2001. That is certainly accurate, as generalizations go. Nonetheless, this concluding chapter is the appropriate place to introduce complicating variations on this theme. In part, we must ask whether it overstates the case: has the presidency as an office become so inherently powerful? Precedents matter—and accrete—and future presidents will rely upon what is established now as the “normal” balance of presidential-congressional power. But despite the consistent and often successful efforts of presidents over more than two centuries to expand their institutional resources past the sparse grants of Article II, they ultimately remain subject to its constraints and part of a set of potential checks and counter-balances. The modern presidency has many potent tools and a global reach, surely unforeseen by the architects of the Constitution. Yet the framework they designed remains. Presidential power, in a real sense, is the residual left over after subtracting out the power of other actors in the system.¹

As such, the power of the president, however great, remains conditional. President Carter’s speechwriters, planning for his trip to Atlantic City, prepared jokes on the theme that all Washington gamblers know the “odds are with the House.” Less jocularly, before the full sweep of Watergate was known, Kennedy aide Ted Sorensen commented that “Congress already has enormous power, if it only had the guts to use it.”² This observation remains decidedly relevant to the current revival of presidential unilateralism.

If so, the presidency is contingently, not inherently, imperial. Such was suggested at the start of the book and strongly confirmed by the events traced in the text. Indeed, as frequently noted in this volume, Congress was and is the first branch of government: the constitutional structure gives Congress the whip hand. This means that when the presidency expands, it is because Congress has chosen to stay that hand. And this allows us to frame the crucial question a different way: When does Congress choose not to push back against presidential prerogative? When does legislative ambition fail to counteract presidential ambition? Is it a question of “guts,” as Sorensen charged, or something else? And should we worry about it?

These are hard questions. The answer even to the last is not as obvious as it seems. For while the very word *imperial* in this context has a sharply negative connotation, if this is a simple matter of vocabulary we need to rethink our lexicon, lest we avoid the real issue at hand: the demands that motivate the history of the presidency in the modern era and the tension framed by those demands. On the one hand, after all, how can one provide direction to an enormous nation, with an enormous national executive establishment, with enormous public expectations—and still hope to limit the authority necessary to meet those needs? A nation cannot meet crises, or even the day-to-day needs of governing, with 535 chief executives or commanders in chief. The problems of administration that arose during the Articles of Confederation period in a much smaller country, with a much smaller Congress, in what seemed a much larger world, were sufficient to drive the framers to submerge their fear of monarchy and to empower a single person as president. These days the flutter of a butterfly's wing in Wellington shifts the climate of Washington; a globalized, polarized world seems to call out for endowing leadership sufficient to match its powers to the tasks at hand.

On the other hand, presidential "leadership" is not by definition virtuous, if it does violence to constitutional tenets. To accede to presidential hagiography—and thus executive dominance—is extraordinarily problematic for a republican form of government. The words of Patrick Henry noted earlier echo over the years: "If your American chief be a man of ambition, and abilities, how easy is it for him to render himself absolute? . . ." We want men, and women, of ambition and abilities to serve as our presidents. But to pledge that their preferences should without need of persuasion become policy, that they should as a matter of course substitute command for coalition building, is to cede something of the soul of self-governance.

The ultimate aim must therefore be, as Schlesinger himself remarked in *The Imperial Presidency*, to "devise means of reconciling a strong and purposeful Presidency with equally strong and purposeful forms of democratic control." We need a strong president, he argued, but a strong president "*within the Constitution.*"³ Supreme Court Justice Robert Jackson perhaps put the dilemma best: "comprehensive and undefined presidential powers," he wrote in 1952, "hold both practical

advantages and grave dangers for the country.”⁴ The remainder of this chapter will consider aspects of each in turn before turning to a final evaluation of presidential power in a separated system.

PRACTICAL ADVANTAGES

More than 4 million civilian and military employees work in the federal executive branch, across fifteen cabinet-level departments and more than one hundred agencies. The federal budget is more than \$2 trillion annually (as much as the 1960 through 1974 budgets combined). American interests, both corporate and strategic, reach into every corner of the globe: there are McDonald’s restaurants from Brasilia to Beijing and over two hundred thousand American troops stationed in twelve dozen countries—a figure that does not include the additional deployments of the Iraq war.

Thus the United States, since the New Deal at least, has had a heavy-laden ship of state, unlikely to steer in any direction at all without a single hand at the tiller. Times of crisis, as at present, make delegation of power to the president even more tempting for good reasons of efficiency and effectiveness. As Richard Nixon would argue long after leaving the White House, “the alternative to strong Presidential government is government by Congress, which is no government at all.”⁵

His basic reasoning is suggested by the framers’ first debates: that, as Hamilton foresaw in *Federalist* No. 70, the structural advantages of the executive—unity, decision, dispatch—are well suited to overcoming fragmentation in other parts of the government. Where fast, unified action is necessary, the president is the only actor in our political system who can provide it.

That fragmentation is most obvious at the other end of Pennsylvania Avenue. Despite common grammatical usage, including in this book, Congress is not an “it” but a “they.” That is, Congress is not singular but plural and a fractious plural at that. The geographic basis of House representation—the “territorial imperative”—means that no two House members share identical interests.⁶ The distinctive constituencies and terms of the House and Senate generate few overlapping sympathies across the chambers. Sequential majorities and supermajorities are

required for action, but only a small minority for inaction. This became even more true after the application of reforms in the 1970s designed to apply the openness and decentralization aimed at the executive branch to Congress itself. The reforms enhanced the power of subcommittees and gave party rank-and-file more power to override seniority in selecting committee chairs. What nineteenth-century observers like Woodrow Wilson condemned as “committee government” often atomized further into “subcommittee government” instead. As a result, one scholar noted, members of Congress can make laws “only with sweat patience, and a remarkable skill in the handling of creaking machinery.” But stopping laws is a feat “they perform daily, with ease and infinite variety.”⁷

Thus even an alert and aggressive Congress has endemic weaknesses.⁸ Its large size and relative lack of hierarchy hamper quick decision making. The specialized jurisdictions inherent in the committee system, so necessary for dividing labor, also divide issues and make their comprehensive consideration across functional lines nearly impossible. (Nor do House members’ two-year terms give much incentive for long-term planning.) For similar reasons Congress has difficulty in planning and agenda setting. The ready acceptance of the idea of a presidential legislative program after World War II was partly a question of legislative convenience, a way to weed through innumerable proposals and provide a focus for limited floor time. Finally, with so many members, each seeking press attention, Congress also finds it hard to keep a secret. As President George H. W. Bush’s counsel, Boyden Gray, put it, “any time you notify Congress, it’s like putting an ad in the *Washington Post*. Notification is tantamount to declaration.”⁹

In short, Congress has the problems inherent to any body of individuals that must take collective action. The decisions that are rational for a single member—especially those aimed at gaining particular benefits for his or her district—are not always good decisions for the body as a whole.¹⁰ James Madison wrote as early as 1791 that whenever a question of “general. . . advantage to the Union was before the House . . . [members] commonly resorted to local views.” Then, as now, coalition building had to overcome decentralized inertia, with the result that governing often comes down to, in the words of LBJ budget official Charles Schultze, “a lot of boodle being handed out in large numbers of small boodle.”¹¹

Worse, fragmentation is not limited to the legislative branch. After all, Congress created most of the executive branch as well—and in its own image. The “politics of bureaucratic structure” result in a bureaucracy far different than what organization theorists would draw up on a blank page, one rarely aligned along functional lines or with clear lines of executive authority. Legislative majorities hope to institutionalize their own interests in government agencies and to structurally insulate those preferences against future majorities seeking to meddle. They hope to gain access to the bureaucratic decision-making process and to influence it whenever desirable. They hope to gain points with constituents for fixing the errors agencies make, perhaps to the point of structuring agencies that cannot help but make errors. If nothing else, the historical pattern of executive branch development has spurred a particular array of legislative committees—and organized special interests linked to both.¹²

As the size and scope of the national government grew, its organizational inefficiencies became more obvious and more meaningful. This in turn focused increased attention on the need for direction and coordination—for a chief executive who could actually manage the executive branch. The areas of homeland security and intelligence analysis are only the most recent cases where failures of communication or analysis within the bureaucracy have magnified the need for those qualities.

Globalization in some ways highlights the continuing limits of the presidency’s authority: its incumbent is not, after all, president of the world. Yet the practical advantages of presidential leadership vis-à-vis the legislature, at least, are further magnified in an era where rapid transportation, instantaneous communication, and huge flows of trade have changed the context of governance in ways that play to presidential strengths. Both opportunities and threats arise quickly and demand immediate response. Their resolution requires a broad national view, not territorialism; resident expertise, not the give-and-take of log-rolling compromise. Further, if, as Richard Neustadt suggested, the cold war’s omnipresent fear of nuclear war made the president for a time the “final arbiter” in the balance of power, the rise of rogue states and nonstate actors with access to similar weaponry ups the ante again. In this one sense at least the “modern presidency” described earlier may have given way to a “postmodern” one.¹³ As the Bush administration argued to the

Supreme Court on behalf of the president's power to designate enemy combatants,

The court of appeals' attempt to cabin the Commander-in-Chief authority to the conduct of combat operations on a traditional battlefield is particularly ill-considered in the context of the current conflict. . . . The September 11 attacks not only struck targets on United States soil; they also were launched from inside the Nation's borders. The "full power to repel and defeat the enemy" thus necessarily embraces determining what measures to take against enemy combatants found within the United States. As the September 11 attacks make manifestly clear, moreover, al Qaeda eschews conventional battlefield combat, yet inflicts damage that, if anything, is more devastating.¹⁴

The line between arguing that the president is constitutionally weak and arguing that he therefore *ought* to be institutionally feeble is a thin one. We may fear a strong presidency, but other, external dangers pose their own real threat to liberty as well.

GRAVE DANGERS

Yet neither should that latter fact lead us to entirely discount the former fear. The temptation is to shift the burden of action from the Congress to the president: Dick Cheney, while still a member of Congress in the 1980s, wrote that "if Congress does not have the will to support or oppose the president definitively, the nation should not be paralyzed by Congress's indecision." Certainly, as noted earlier, Congress is much better at stopping things than at running them. Still, compare Cheney's formulation with that of George Washington. "The Constitution vests the power of declaring war in Congress," Washington wrote in 1793; "therefore, no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure."¹⁵

Should congressional "indecision"—a state that itself likely reflects a lack of national consensus around the president's proposal—be enough

to hand unilateral authority to the executive? Where does the burden of proof lie? True, the world has changed dramatically since Washington's time. But a quick review of the perils the first president faced—with foreign empires all about, no armed forces to speak of, an enormous debt burden, and an untried system of government—makes one wonder whether that is sufficient rationale for setting aside his position.

Indeed, the need for checks on power is timeless. The dangers of unilateral authority are immense, because once those claims are accepted they logically admit no limits. Abraham Lincoln, as a member of Congress, took a rather different view from Representative Cheney. Representative Lincoln felt that President James Polk's argument for beginning the Mexican War was deceptive and worried that presidential power, once freed from constraint, could not be reined in:

Let me first state what I understand to be your position. It is, that if it shall become *necessary, to repel invasion*, the President may, without violation of the Constitution, cross the line, and *invade* the territory of another country; and that whether such *necessity* exists in any given case, the President is to be the *sole* judge. . . .

Allow the president to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion, and you allow him to do so, whenever he may choose to say he deems it necessary for such purpose—and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect, after you have given him so much as you propose. If, today, he should choose to say he thinks it necessary to invade Canada, to prevent the British from invading us, how could you stop him? . . . Your view destroys the whole matter [of constitutional restraint on presidents] and places our president where kings have always stood.¹⁶

Nor has the progression of power to which Lincoln alluded been wholly theoretical—not least, perhaps, in Lincoln's own tenure as president. Recall (from chapter 2) the arguments he made during the Civil War, in suspending individuals' rights to habeas corpus, spending unappropriated funds, or expanding the army. Well, one might reply, but that was a national crisis if ever there was one. But consider then the case

made in district court by the Truman administration defending the seizure of the steel mills in 1952. “So,” asked a district court judge,

you contend the Executive has unlimited power in time of an emergency?

Mr. Baldrige (assistant Attorney General): He has the power to take such action as is necessary to meet the emergency.

Judge Pine: If the emergency is great, it is unlimited, is it?

Baldrige: I suppose if you carry it to its logical conclusion, that is true.

. . .

Pine: And the Executive determines the emergencies and the Courts cannot even review whether it is an emergency.

Baldrige: That is correct.

The judge pressed: did the Constitution really limit the powers of Congress and limit the powers of the judiciary, “but it did not limit the powers of the executive”? Baldrige replied, “That is the way we read Article II of the Constitution.” However, he pointed out, there were two limits on presidential power: “one is the ballot box, and the other is impeachment.”¹⁷

A parallel argument reemerged in 1974 when the Supreme Court heard the *U.S. v. Nixon* case. As recounted in chapter 3, Attorney General Richard Kleindienst had already asserted a very broad definition of executive privilege: the judgment as to what information could be released, he told Congress, “is made by the President of the United States and only by the President of the United States.” Sen. Lawton Chiles (D-FL) asked, “You think the Founding Fathers designed this document just to put absolute judgment in one man . . . to determine whether he thought something was in the public interest or not?”

Kleindienst replied:

Unlike the President, the Congress has a remedy because if the Congress feels the President is exercising this power as a monarch or tyrant you have an impeachment proceeding. . . . Leaving aside the normal remedy of impeachment, which I do not think will be used but once

every three hundred years, it is our political process which determines the ultimate result. . . . If [political actors] abuse their powers they lose elections, and they do not come back.

Later, the president's attorneys argued that Nixon's claims were "based squarely on the Constitution," since executive privilege was wholly a matter of presidential discretion, "inherent in the executive power." If a president misused that discretion, he could be punished—but only by the political process. Since Nixon was in his second term and could not run for reelection, only one option remained. "The President is not above the law," Nixon attorney James St. Clair told the Court during oral arguments. But, "as the president, the law can be applied to him in only one way, and that is impeachment."¹⁸

In both cases, presidents claimed that inherent power vested in them by the Constitution allowed them to act in important ways without check by Congress or court. The relevance to more recent claims, especially in the enemy combatant cases discussed in chapter 7, is clear. The cases are not entirely equivalent, of course. After September 11 Congress gave the president a potential claim to authority not present in 1952 or 1974, with its large, vague, grant of power authorizing presidential action against anyone he decided was responsible for the September 11 attacks. Nor do the enemy combatant arguments explicitly mention impeachment or even reelection. However, by inference those are the only responses not ruled out, since neither courts nor Congress is deemed necessary or welcome actors in the process. Even if one somehow reads the September 14 resolution as granting permission to suspend civilian courts, the administration claimed it didn't need such a legislative authorization to pursue its detention policies.

For example, recall the administration's argument in the *Rumsfeld v. Padilla* case. The president claimed that he could, on the basis of "some evidence," remove someone from the court system and hold them without charge or trial. Deputy Solicitor General Paul Clement was subsequently asked during oral arguments before the Supreme Court to state the limits of this argument. For example, if the circuit court had correctly held that the September 14 resolution was insufficient authorization for such power, did the president still have the authority to detain and deny trials to American citizens? Yes, Clement replied. Given the

emergency created on September 11, “I think he would certainly today, which is to say September 12th [2001] or April 28th [2003].” And, in fact, “I would say the President had that authority on September 10th.” In that case, he was asked, could you shoot an enemy combatant, or torture him? Well, no, said Clement, “that violates our own conception of what’s a war crime.” Still, a justice pressed, what if it were an executive command, what if torture were necessary to garner intelligence? “Some systems do that to get information.”

“Well,” replied Clement, “our executive doesn’t.”

“What’s constraining? That’s the point. Is it just up to the good will of the executive?”

“You have to recognize that in situations where there is a war—where the Government is on a war footing—that you have to trust the executive to make the kind of quintessential military judgments that are involved in things like that.”¹⁹

The result comes back to what Schlesinger decried in the 1970s as a “plebiscitary presidency,” where presidents claim broad discretion to act, constrained only by quadrennial referendum on their decisions—a problematic model in the world of term-limited incumbents and four presidential elections running where the winner has received less than 51 percent of the popular vote. In the meantime, voters must trust that the president was acting in their interests. “Our executive doesn’t,” the administration claimed, but at the same time the Justice Department had ruled a ban on torture was unconstitutional if it interfered with the president’s running of a war. “Our executive doesn’t,” the administration claimed; but Abu Ghraib suggested our executive branch, at least, could.²⁰

The point is too important to be a punch line. The broader argument must accept that executive discretion is, in fact, increasingly important. The amount of information pouring into government is immense, and the public and even legislators will normally be privy to only a small fraction of it. Preemptive or preventive warfare, by its nature, enhances the executive. Its successful prosecution requires extensive intelligence gathering, the discretionary ability to adjust troops and resources, and, for preemption, the element of surprise.²¹ Not so long ago, such an approach was virtually ruled out: the early government template for the cold war, NSC-68, stated in 1950, “It goes without saying that the idea

of ‘preventive’ war—in the sense of a military attack not provoked by a military attack upon us or our allies—is generally unacceptable to Americans.” The idea of a first strike to wipe out the Soviet missiles being assembled on Cuba in 1962 was rejected by President Kennedy in part because of arguments (most vehemently from his brother Robert) that the United States was not that kind of country: “it’s a Pearl Harbor thing.”²² But in late 2002, preventive action was affirmatively ruled in. There seemed little movement in Congress to question that doctrine or the expansion of executive authority it implied.

Yet these developments make the “grave dangers” of which Justice Jackson warned even more salient. A “war footing” against an obvious enemy on a defined battlefield is one thing; even there, as Justice William O. Douglas once pointed out (in an affirming, not cautionary, manner), “the war power does not necessarily end with the cessation of hostilities.” But what about when, as now, there is no clear point when hostilities cease, no clear boundary to the battlefield, no clear set of combatants? Justice Jackson concurred with Douglas’s ruling but added that the “war power” was too often “undefined and undefinable,” prone to be claimed by governments urging “hasty decision to forestall some emergency.” He urged that, “particularly when the war power is invoked to do things to the liberties of people . . . that only indirectly affect conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinized with care.”²³

Even if Congress must overcome structural handicaps, then, it has little excuse not to “scrutinize with care” the workings of the executive branch. Presidential authority is not the flip side of congressional authority: the relationship is not a zero-sum game. There is a clear normative difference between a presidential assertion of power that stands because of congressional inertia and a power delegated to the president after full and free debate. Edward Corwin pointed out long ago that “the principle of departmental autonomy does not necessarily spell departmental conflict. . . . mutual consultation and collaboration are quite as logical deductions from it.” Justice Antonin Scalia’s dissent in *Hamdi* reminds us that “The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it.” And Chief Justice William Rehnquist put the question in a manner relevant to today’s debates: “it may fairly be asked by those whose civil liberty is curtailed,” he wrote,

“whether they are any better off because Congress as well as the Executive has approved the measure. As a practical matter, the answer may be no, but from the point of view of governmental authority under the Constitution, it is clear that the President may do many things in carrying out a congressional directive that he may not be able to do on his own.”²⁴ The individual might not be better off, in practical terms, but both practically and morally the nation is better off.

One could envision a powerful president and a powerful Congress both, where the empowerment of the president was thoughtful rather than reflexive. The framers anticipated that civil liberties might have to be limited from time to time—that the right of habeas corpus, for example, might be suspended. Some means of preventive detention might have to be enacted. The balance between liberty and security remains in constant play, each side weighted by events and (as Justice Jackson put it) “a little practical wisdom”; as was oft-remarked after September 11, “the Constitution . . . is not a suicide pact.”²⁵

But the calibration of the scales was always meant to be conducted through deliberation, not by dictate. Rather than simply agreeing to “trust the executive,” as repeated administrations urged, lawmakers were expected to involve themselves with determining the rule of law. To be sure, in an era of rapidly developing threats and technologies, presidents might need to be granted discretion over the utility and use of force. But Harry Truman’s comments after Congress passed the Formosa Resolution, handing President Eisenhower authority to do what he would to defend Taiwan, are instructive. He didn’t necessarily want to criticize the policy, “but, he said, he did want to criticize one aspect of the situation: that the Senate had not adequately debated the subject. Had there been such a debate he would have felt no anxiety at all over the ultimate decision, whatever it might have been.” He added, “I have got tired a long time ago of some mealy-mouthed Senators who kiss Ike on both cheeks.”²⁶

The irascible former president could not resist this last shot (mainly aimed at then Senate majority leader Lyndon Johnson), but he was right that the American system contemplated little in the way of interbranch affection. Cooperation, surely—but not deference without debate. “Exercise of [Congress’s] own power is the constitutional answer to the imperial presidency,” Anthony Lewis observed in 1976. And while this

is certainly less efficient than allowing presidents to do what they will, the branches are separated not to oil the wheels of governance but to allow for a little sand in the joints. “The purpose was not to avoid friction,” Justice Louis Brandeis wrote, “but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.” Speaker of the House Newt Gingrich later put the point more succinctly: “the price of freedom,” he said, “is frustration.”²⁷

The first branch’s job is not to manage policy implementation on a day-to-day basis. Nor is it always to pass a new law: the resurgence regime bears witness to the inadequacy of creating a statutory framework in the absence of political will reinforcing its component parts. But Congress has a critical task nonetheless. Its job is to use debate and deliberation to distill priorities and to set clear standards; to oversee and judge the decisions and actions of others by those standards; to expose both the bad and good efforts of government to public scrutiny; and to revisit its earlier debate in the light of later events. All this is Congress’s job; and debate, judgment, and oversight are delegated to other actors in the system at our potential peril. How can it be induced to do that job?

GETTING CONGRESS TO DO ITS JOB

As noted at the outset, it is no surprise that the Bush administration—or in fact any administration—has tried to push the boundaries of its authority. The framers of the Constitution expected as much. It is not a question of personality but position: one need assign no bad motive to a president to predict that he will prefer to have more power—and for Congress to have less. Sen. Evan Bayh (D-IN), noting presidential efforts to avoid the “irritant” of legislative oversight, asked rhetorically, “Do you think they want more oversight? I don’t ascribe sinister motives. This administration has shown that they like to act unilaterally wherever possible.”²⁸ The comments were about George W. Bush, but they would not be out of place describing his predecessors—or successors. There is no reason to think that a President Kerry taking the oath of office on January 20, 2005, would have renounced presidential power. Indeed, Kerry, in voting to give the administration the authority

to use force in Iraq, maintained during the 2004 campaign that he would have cast the same vote even after knowing the facts on the ground in Iraq: after all, he said, “I believe it’s the right authority for a president to have.” In casting the vote itself, Kerry noted that Congress was “affirming the President’s right and responsibility to keep the American people safe.”²⁹ And when divided government returns to the scene, as it would have under a Kerry presidency, the assertion of unilateral authority will be more tempting still. Future presidents facing legislative stalemate will devise strategies to evade congressional checks, their administrative claims bolstered both by the precedents of the war on terror and the wide-ranging internal legal holdings of the Bush administration counsel determining what presidents can and can’t do.

The critical question, then, is straightforward: why has Congress been so acquiescent? The fact is that we have had an invisible Congress as much as an imperial president. Much of the expansion in presidential power has not been taken but given; as James Sundquist points out, “one of the striking facts of the modern presidency is the extent to which it was built through congressional initiative.”³⁰ In short, while the framers expected that “ambition would counteract ambition,” that other actors would rise to the occasion when presidential power overflowed its bounds, frequently in recent years this expectation has not been met. Why not?

I suggest that the answer is simply that the costs of such ambition have outweighed the benefits. Despite endless jokes at their expense, politicians are not stupid. To the contrary, they are quick to adjust to the institutional constraints, the rules of the game, within which they must operate. In recent times the game has changed in ways that dampen the incentives for legislative assertiveness vis-à-vis the president’s claims to authority.

One dimension of the change surely stems from previous discussion: during periods of uncertainty or danger a strong presidency is genuinely seen as a positive good. Recent congressional debate is laced with references to the need for forceful, unified leadership in troubled times. “Success in time of war requires cohesion and unity,” noted Rep. Tom Lantos (D-CA). “If you study the sweep of history in the United States and the history of the Presidency,” Sen. Richard Durbin (D-IL) orated, “you understand that at times of crisis the President has an opportunity

to rally the American people, to summon them to a higher calling and a greater commitment than they might otherwise reach. Time and again, each President faced with a national challenge has tried his best to do just that.”³¹

But another and less laudable aspect of legislative lassitude is the siren call of blame avoidance. For the interbranch relationship to work, as Schlesinger wrote three decades ago, Congress “must *want* to know—and accept the risk that knowledge means an acceptance of responsibility.”³² But Congress has not always wanted knowledge and still less risk. Capitol Hill often claims to want a substantive part in key decisions; Sen. Arthur Vandenberg’s famous assertion that “[we want to be] on the policy takeoffs, instead of merely on the crash landings” has become a mantra for legislators shut out of the action. But in practice legislators suspect they will get little electoral credit for the hard work required for deliberation and oversight and plenty of blame if they miscalculate—which will happen often enough, the real world being what it is. In the 1970s members of Congress assumed that acting assertively to stem presidential power and the erosion of public trust would have electoral benefits. In an age of terrorism, where one failure has high costs, it is an easy call to do too much delegation rather than too little. If things go well, members can take credit for having empowered the president; if things go badly, they can blame him. As Rep. Ron Paul (R-TX) suggested, “Congress would rather give up its most important authorized power to the President and the UN than risk losing an election if the war goes badly.” Lyndon Johnson’s rejoinder to Vandenberg’s sentiment, then, is worth remembering. “I said early in my Presidency that if I wanted Congress with me on the landing of Vietnam, I’d have to have them with me on the take off,” Johnson recalled. “And I did just that. But I failed to reckon with one thing: the parachute. I got them on the takeoff, but a lot of them bailed out before the end of the flight.”³³

As discussed earlier, grounding legislative representation in geographic dispersion guarantees that legislators will look to their district interests before they consider the national interest.³⁴ Collective action problems are inherent in any group but are especially virulent when individual incentives are bound to conflict (given district differences) and have no clear mechanism for reconciliation. Over time, Congress

has tried various methods to coordinate itself, from strong party leadership to the oligarchical rule of committee barons and back again.

But if the problem is long-standing, it has been exacerbated by more recent political changes. The Watergate era coincided with major shifts in the electoral landscape, most notably the party reforms that followed the disastrous 1968 Democratic National Convention in Chicago. The subsequent rise of direct primaries as the main mechanism for selecting presidential nominees eviscerated the role of party elites in the campaign process and empowered the media in their stead. Candidate-centered, instead of party-centered, elections created organizations loyal not to a single platform but to individual political entrepreneurs.³⁵ This development had an impact on assumptions about presidential behavior: “the more popular the mode of selection,” the political scientist James Ceaser has commented, “the more likely it becomes that a president will invoke the informal title of representative of the people’s will along with—or perhaps in place of—the Constitutional powers of the office.”³⁶ For candidates rising to the presidency through the primary, the traditional claim to be a “steward of the people” has become more tempting—and more convincing, even to members of Congress. It is interesting to note that, as the parties within Congress itself have polarized, one result has been to make real the long-chimerical dream of liberal political scientists for responsible party government. That is, the parties are, at last, unified around a substantive platform, enhancing the power of the president as party leader and agenda setter. Woodrow Wilson would presumably be pleased.

This is exacerbated by another effect of candidate-centered elections on the legislature, which has been to further undercut the sense of collective responsibility necessary for institutional maintenance. Richard Fenno put it most famously, perhaps, when he wrote that members often “run *for* Congress by running *against* Congress,” attacking the institution as a way of bolstering their own indispensability. But the result is that “the institution bleeds from 435 separate cuts.”³⁷ The collective institutional incentives—as simple as pride—that the framers thought would govern behavior have been replaced in some measure by personal incentives. Rapid turnover in the 1970s, exemplified by the large class of “Watergate babies” elected in 1974, brought to Congress a

new cohort of members good at self-promotion in the new media game and reliant largely on their own campaign skills rather than party organizations. With less owed to party leaders, and with the Vietnam War and Watergate as their formative political experiences, they had the incentives and ability to challenge legislative leaders as well as the president.³⁸ Yet having pushed through internal reforms giving individual legislators more power to be effective policy entrepreneurs, this cohort also walled off their electoral fates from those policy decisions. They used new staff resources to build up district offices that focused on constituent correspondence and assistance, more than doubling the percentage and at least tripling the raw numbers of staff members stationed in the home district. The number of days spent in session in Washington dropped dramatically from the 1970s to the 1990s and early 2000s.³⁹

After all, issues were divisive, but constituent service was not: “they can get reelected on their newsletter,” complained House Speaker Tip O’Neill (D-MA). Members mastered the “permanent campaign,” constantly attentive to local concerns and at once solicitous and wary of the exploding number of single-issue interest groups. Voters and groups remember costs imposed longer and with more venom than the gratitude with which they remember benefits accrued—thus, so did their legislators. Staying “one step ahead of the blame” was a crucial strategy for members of Congress who sought to avoid association with tough national choices (such as deficit reduction, entitlement reform, and defense procurement) that necessarily had winners and losers. Insulation was a better electoral bet than assertion. In any case divided government, a rarity in American politics before the 1950s but a near fixture from 1969 into the start of the twenty-first century, made it hard for voters to sort out where responsibility should really be assigned. A constant blare of advertising, abetted by the collapsing campaign finance regime, aimed to shift that task from hard to impossible.⁴⁰

It worked. By the early 1990s, all else being equal, incumbents received an additional twelve percentage points of the vote simply by virtue of their status—up from a mere two points in the first half of the twentieth century. Meanwhile the number of marginal districts, where either party could win depending on national electoral trends, declined precipitously. As the 2004 elections approached, analysts predicted there would be fewer than 40 competitive House races out of 435. In the end

only 8 seats were decided by a difference of five percentage points or less.⁴¹

The trend away from competition was reinforced by repeated redistrictings that served to further dampen the choices offered voters. Partisan gerrymandering—that is, the drawing of legislative districts to make them safe for one party or another—accelerated after 1990 and 2000 as new technology brought new knowledge of census block demographics and new ease in manipulating them. In 2004 the Supreme Court upheld Pennsylvania’s district map, even though a statewide Democratic majority of four hundred thousand registered voters had been effectively compressed into just six of nineteen districts. After the 2000 census the Texas legislature (with prodding from the U.S. House GOP leadership) decided to redistrict not once but twice, so as to take advantage of a new Republican majority in the State House and wipe out Democratic incumbents. Justices ordered a review of the case by lower courts but declined to become immediately involved.⁴²

Such strategies generally have known no party label, and the Court may have done well to steer clear, but the implications for representation were ominous: even though a clear plurality of the public (42 percent) described themselves as moderate on election eve 2004, a finding basically unchanged for three decades, ideological polarization in Congress reached its highest postwar level by 2002. While in earlier eras, northeastern Republicans and southern Democrats overlapped in the middle of the ideological spectrum, by the 1990s these species of partisans were largely extinct. Members clustered instead to the far left and far right.⁴³

What Richard Neustadt presciently termed a “snarly sort of politics” ensued. There was, for legislators, no incentive to find a middle ground, to debate the merits of issues at all—since ideology had dictated the proper answer. Such behavior was rational, if one’s district was homogeneous and the most likely challenge was from a primary opponent. Voters who might argue the point had been defined out of the district. The small governing majorities of the post-Watergate era only hardened the divisions. As already discussed, assertive presidents leading unified government improved their standing as a result—“an indolent majority,” John Stuart Mill observed long ago, “like an indolent individual, belongs to the person who takes most pains with it.” Likewise in divided government: since a majority of Congress was unlikely to be able to coalesce

against their exertions, presidents were simultaneously empowered to be more aggressive in pursuing unilateral action.⁴⁴

Congressional deference to presidential power thus made increasing sense as the post-Watergate era advanced into the twenty-first century. It was not merely a question of the body's own inherent limits. Rather, its members' own efforts and wider developments in political time changed the costs and benefits of legislative action. The good news for the interinstitutional balance of power returns to the point made at the outset of this chapter: that Congress retains the ability to act, and react, to presidential claims of authority and to check presidential ambition. Legislators have the power of the purse; the power of lawmaking initiative and statutory specificity; the power to oversee and expose; and even the power, if need be, to remove executive officials from office. The bad news is that there is little reason to think that, on their own, those legislators will have much incentive to replicate their past resurgence.

THE IMPERIAL ELECTORATE

Still, Congress is not always on its own. Any legislative resurgence will likely herald another one, long overdue: the resurgence of the imperial electorate. This is the silver lining on the flip side of the insulating curtain described earlier: Congress is extraordinarily responsive to public demands. Public pressures recalibrate congressional incentives. Thus, Congress will want to act when the American people tell it to do so. When the general interest becomes salient to constituents, it overwhelms special interests.⁴⁵

It is true that the realm of legislative-executive relations has rarely attained this status. As Sen. Orrin Hatch asked in late 2001, "do any members of this committee really believe that in this time of crisis, the American people, those who live outside the capital beltway, really care whether the president, the secretary of defense, or the attorney general took the time to pick up the telephone and call us, prior to implementing these emergency measures?"⁴⁶ Turnout in the 2002 congressional elections barely topped one-third of the voting age population; in 2004, even as record numbers went to the polls, more than four in ten voters

did not bother to bestir themselves. Congress is as responsive to ambivalent apathy as it is to directed calls for action.

But that does not change the burden on the public to provide the latter. There is a temptation to rely on extrapolitical mechanisms to save us from ourselves—perhaps, for example, to rely on the judicial system to play the primary checking role. To be sure, the courts, in pursuing their own empowerment, have resisted some of the more pronounced claims of presidential authority over the years. They take their role—to say what the law is—seriously enough. Still, court constraints can only be reactive. Judges do not, or should not, set policy priorities looking forward. They may reflect political consensus, but they rarely build it. Indeed, folk wisdom suggests that they do little more than “follow th’ illiction returns.”⁴⁷ As we have seen, the courts over time have repeatedly allowed Congress’s precedential deference to become presidential power.

Thus, as Justice Potter Stewart observed in the Pentagon Papers case, “The only effective restraint upon executive policy and power . . . may lie in an enlightened citizenry—in an informed and critical public opinion which alone can protect the values of a democratic government.”⁴⁸ Much rests on the hope that the American people *will* care, that they will seek out the information they need to hold elected officials in all branches of government responsible for the results of their leadership. Trust in the *legitimacy* of government—that it is “a government of laws, not men”—is critical. But blind trust in any particular government leads to complacency. Accountability depends as much on the electorate’s healthy skepticism as it does on healthy discourse between its branches of government. Ronald Reagan’s arms control aphorism—“trust, but verify”—is thus not bad advice for American voters. To verify, though, voters must take charge of their own government; they must inquire, probe, care—and vote.

Such a development would be a stiff challenge in the best of circumstances, given the American belief in nonparticipation as a God-given right. The difficulty is exacerbated, though, by the very explosion of data resources that should make government more accountable. President Bill Clinton liked to say that, “if there’s enough time and enough information, the American people nearly always get it right.”⁴⁹ But the

Internet and the rise of cable and satellite television have both compressed time and expanded information in ways that make “getting it right” ever more onerous. The twenty-four-hour news cycle makes reflection a luxury. Further, the broadcast news of the past is now “narrowcast.”⁵⁰ Viewers can readily avoid public affairs entirely through devotion to channels filled twenty-four hours by golf or romance; the civic-minded may seek validation of their extant political preconceptions from a source geared toward reinforcing them. Studies during the 2004 election showed that voters choosing divergent media outlets—say, Fox News versus National Public Radio—came away with very different views of the world, even “separate realities” as regarded the war in Iraq and al Qaeda involvement in the September 11 attacks.⁵¹ Abraham Lincoln reputedly said, “If given the truth, [the people] can be depended on to meet any national crisis. The great point is to bring them the real facts.” But sorting out “real” facts from false ones has become a full-time job. Rumor flies over the Internet at the same rate as truth, and often faster.

Clouding the picture further is the submergence of honest debate in the “snarl” noted previously. Special interest politics demands constant mobilization—which requires in turn the constant stoking of outrage, the equating, at top volume, of policy disagreement with personal perfidy. Both ends play against the middle. However substantively important the “moral issues” of recent election seasons might be, as amplified by scaremongers on the left or right they distract from the very real issues of power and governance that require public attention.

More ominously still, presidents and their allies have been quick to doubt the motives, honor, and patriotism of anyone doubting the wisdom of presidential leadership. Such charges arose during the 1998–99 impeachment imbroglio, when those who opposed the president were lumped into a “vast right-wing conspiracy” out to bring him down. The president’s defenders painted his critics as vitriolic partisans on a vendetta, sowing personal destruction in order to reap political gain.⁵² But such rhetoric took a more chilling tone after September 11. President Bush’s own caution to the world community that “you are either with us or you are against us” was taken by his domestic advocates as license to draw up an enemies list of sorts: Attorney General John Ashcroft’s comment that to question administration decisions was to

“aid terrorists” has already been noted. House Majority Leader Tom DeLay, raising the rhetorical bar still higher, suggested, after the capture of Saddam Hussein, not that several Democrats’ comments were inaccurate or unfair, which they were, but instead that they were “hateful, moronic,” and, ironically, “beyond the pale.” Later, he attacked a Democratic congressman who had criticized postwar planning in Iraq: “in a calculated and craven political stunt, the national Democrat Party declared its surrender in the war on terror,” DeLay declared. The president himself pushed the point home during the relentlessly negative 2004 campaign. At a New Hampshire campaign stop in September, for example, President Bush responded to acerbic attacks on his Iraq policies by telling his audience about

some of the lessons that I have learned and the country must learn about the world we live in today. Our world changed, obviously, on September the 11th 2001. We were confronted with an enemy that has no conscience, period. . . . They stand for exactly the opposite we stand for. . . . We believe in freedom of speech. They say, if you speak wrong, you’re in trouble.

But having said this, the president suggested that actually utilizing such freedoms was dangerously disloyal. Any criticism of his administration, after all, sent “mixed signals” that demoralized the Iraqi people, coalition allies, and U.S. troops and encouraged terrorists to doubt American resolve.⁵³

The unfortunate implication of such rhetoric is that policy decisions, and the public trust, won’t withstand the give-and-take of criticism. When debating the House resolution of March 2004 reaffirming the Iraq war (albeit now in terms of human rights rather than weapons of mass destruction), Rep. Henry Hyde (R-IL) told Democrats to “put your bruised feelings aside and support it. If we want to go into bruised feelings . . . [t]hose kinds of ideas are not conducive to getting together and embracing each other in the unity that must prevail if we are to win.” In some ways the argument hearkens back to the era of “scientific administration,” when scholars urged that politicians find the single correct, rational policy to achieve public ends and then keep out of the way of its administration. But even in that model goals were to be set by the messy processes of democracy.⁵⁴ And democracy, as a wise political scientist

once noted, “is a political system for people who are not too sure that they are right.”⁵⁵ Presidents, however much they might disclaim the possibility of error, are not infallible.

To encourage open debate is to acknowledge that it will sometimes be caustic, obnoxious, and “beyond the pale.” Unfair criticism ought to be rebutted, with eloquence—and with evidence. But if the accusations that various actors are “politicizing” issues of state, and that they are thus somehow unpatriotic, are successful in silencing criticism, the polity has lost much more than it has gained. It is a sad day for a nation built on argument when the public gets the message that it should be intolerant of politics, afraid of honest discussion and the negotiated outcome of a marketplace of ideas. The American system of checks and balances depends on politics and politicizing, on the robust debate—and, critically, its role in consensus building—stressed previously. Persuading the public that they need not get excited about politics is hardly a remedy; people need to be energized, not turned away. Thus urging top-down government in the name of calm and unity, in the end, may well undermine its stated purpose. If there have been vehemently unjust attacks on presidents—and there have been many⁵⁶—that is a risk worth running. For to do otherwise runs a much greater risk: that presidents, already necessarily possessed of more concentrated power than the framers ever imagined, utilize that power in an atmosphere of subdued deference. In this sense, accusations that opposing views constitute treason are the embodiment of their own charge.

Sen. Robert Taft (R-OH), known as “Mr. Republican,” was asked in 1951 whether arguing about foreign policy gave aid and comfort to enemy. Well, Taft said, “I think that the value of such aid and comfort is grossly exaggerated. The only thing that can give real aid and comfort to the enemy is the adoption of a policy which plays into their hands.” As Taft himself knew, the best way to prevent adoption of such policy is to give it a full airing. Readers picking up a newspaper on the sixtieth anniversary of Pearl Harbor could read the Ashcroft comments that free speech aided America’s enemies; but Taft, within two weeks of the actual event in 1941, staked a strong claim to open debate: “As a matter of general principle,” he stated, “I believe there can be no doubt that criticism in time of war is essential to the maintenance of any kind of democratic government.”⁵⁷ An invisible Congress would lead to an

imperial presidency. An invisible electorate is the best bet for empowering both.

Taft's principle, in war or peace, becomes all the more important given the actual and potential scope of presidential authority. Their perennial complaints about legislative interference and activist judges notwithstanding, presidents have done a good job of counteracting their constitutional weaknesses. They have strategically utilized their formal powers; they have constructed a supportive staff apparatus; they have used their "bully pulpit" to preach their preferences; they have pushed unilaterally into the interstices of the Constitution, aided by the expansion of the American state and its role in the world. As one eminent political scientist put it, "an office the Framers left largely unfinished was completed by those who held it."⁵⁸

Yet this is not quite right. Though the office has received a lot of renovation, both by those who have held it and those who have beheld it, it cannot be said to be complete. It is a project, a story, that continues. And with that in mind, the American people must overcome the obstacles discussed here to make their case for America's ideals. For to write a happy ending—to ensure that presidential power does not become presidential government—is the task of all those concerned with the American experiment in democracy.