NOTES

PREFACE


CHAPTER 1

1. See, e.g., Karen DeYoung and Colum Lynch, “Bush Lobbies for Deal on Iraq,” *Washington Post* (March 12, 2003), A1; on that date alone the *Post* ran twenty-four stories with the word *Iraq* in the lead paragraph.

8. The votes were 296–133 in the House and 77–23 in the Senate. For more discussion of the resolution, see chapter 7.


11. *Congressional Record* (October 9, 2003), S10154.


18. In an interview with *Time* magazine (November 10, 1980), Ford warned, “We have not an imperial presidency but an imperiled presidency. Under today’s rules . . . the presidency does not operate effectively. . . . That is harmful to our overall national interests” (30).


21. On executive orders see Phillip J. Cooper, *By Order of the President* (Lawrence: University Press of Kansas, 2002), and the discussion in chapters 4 and 5.


23. The General Accounting Office was renamed the Government Accountability Office in July 2004.


26. This title is in capital letters because it is formed by a rather strained acronym: “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.” I will refer to the law simply as the Patriot Act.

27. See Public Law 107–56 (October 26, 2001); President’s Military Order of November 13, 2001; Government’s Brief and Motion, August 27, 2002, Jose Padilla v. George Bush, Donald Rumsfeld, et al., U.S. Dist. Court, Southern Dist. of New York—Case No. 02–4445. Again, see chapter 7 for elaboration of this argument.


29. Lyndon Johnson Library oral history (AC 82–19) of Kenneth O’Donnell, who was a staffer to both Kennedy and Johnson; transcript of presidential press conference, Office of the White House Press Secretary, November 4, 2004.


33. This Jackson quotation and the subsequent statement are from his concurring opinion to Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).


CHAPTER 2

1. Whether the president should be a “she” was not, of course, discussed at the time; in talking about the presidency I will defer to historical fact and use the masculine pronoun to describe the office’s occupants. But “he” should be read as “he, someday she.”


7. North Carolina and Rhode Island ratified the Constitution in November 1789 and May 1790, respectively.


9. The Twenty-second Amendment creates presidents who are “lame ducks” for the whole of their second terms. The Twentieth Amendment moved the presidential inauguration from March to January 20 and provides that Congress shall normally come into session on January 3. This means that Congress is already lying in wait when the president takes office at the start of his term; previously, Congress usually returned to session in the fall, giving new presidents useful breathing room. Other amendments affecting the president are the Twelfth Amendment, providing for separate ballots for president and vice president as a response to the Electoral College tie of 1800, and the Twenty-fifth Amendment, providing for an acting president in the event of presidential disability short of death and for filling vice presidential vacancies. Thus nearly 220 years after its writing, the text of Article II remains largely the same.


16. Cleveland called the “take care” clause an “impressive and conclusive additional requirement. . . . This I conceive to be equivalent to a grant of all the power necessary to the performance of his duty in the faithful execution of the laws.” See his *The Independence of the Executive* (Princeton: Princeton University Press, 1913), 14–15.


25. Binkley, *President and Congress*, chaps. 8–9; Cleveland message to the Senate, quoted in Cleveland, *Independence of the Executive*, 69.


36. Note that Washington did veto one bill he thought was bad policy; it would have reduced the size of the army. See Milkis and Nelson, *American Presidency,* 93n34.


41. Sometimes, controversially, the authority to issue one is claimed to derive simply from the executive power.


52. Sorensen quoted in Kernell, *Going Public*, 86.


56. Schlesinger, *Imperial Presidency*, 156–59; Mark J. Rozell, “The Clinton Legacy: An Old (or New) Understanding of Executive Privilege?” in Adler and Genovese, eds., *Presidency and the Law*, 63. While the phrase “executive privilege” was new, presidents dating back to George Washington had grappled with the issue of sharing information with Congress and the judiciary; see chapter 3 for more detail.


59. House committee chair’s admonishment to Eisenhower and Kennedy’s statement quoted in Rudalevige, *Managing the President’s Program*, 45, 2.

60. Rudalevige, *Managing the President’s Program*, chap. 4.

61. Sundquist, *Decline and Resurgence*, 202. Note too that, as the number of laws grew, so did opportunities for the president to act under old statutes (recall that the banks were closed in 1933 under a World War I law).

62. See, e.g., Fisher, *Constitutional Conflicts*.


64. Quoted in Leuchtenburg, “First Modern President,” 36.


68. It is interesting to note that Richard Nixon, then a senator, voted against allowing Truman the authority to move troops without congressional
approval. See Dean Acheson, Present at the Creation: My Years in the State Department (New York: W. W. Norton, 1969), 415; Bernstein, “The Road to Watergate,” 79n105; Schlesinger, Imperial Presidency, 135–40.


70. A chillingly banal 1942 note in the Roosevelt Library, from FDR to his aide Edwin Watson, reads in its entirety (I have suppressed the victim’s name): “Secretly, will you get Edgar Hoover to look into the opinions of W———? I want to know if he is heart and soul with the Government or otherwise.” Memo of December 19, 1942, President’s Secretary’s File, Box 133, Folder Executive Office of the President: Rowe, James H., Franklin D. Roosevelt Library.


74. Paul H. Appleby to D. C. Stone, no title, memo of August 9, 1944. Record Group 51 (Office of Management and Budget), Entry 9B, folder B1–7, Relations with Members of Congress and Congressional Committees, National Archives and Records Administration, College Park, Maryland.


76. Rossiter, American Presidency, 14, 151, and chap. 1 generally; Rossiter, letter to Herald Tribune (New York), May 29, 1953 (quoted in Schlesinger, Imperial Presidency, 152). The contemporary view of Eisenhower has been amended dramatically by the opening of Eisenhower’s papers and especially by Fred Greenstein’s book The Hidden-Hand Presidency: Eisenhower as Leader (New York: Basic Books, 1982); Greenstein’s research is reflected in Neustadt’s 1990 revisions to Presidential Power.


79. Hargrove and Nelson, *Presidents, Politics, and Policy*, 4; Corwin, *President: Office and Powers*, 354. As Pyle and Pious put it, in *President, Congress*, 49, some suggest that “all assertions of presidential power that end well are, ipso facto, legitimate.”


CHAPTER 3


35. Quoted in Lukas, *Nightmare*, 70.


41. George Lardner Jr. and Walter Pincus, “Watergate Burglars Broke into Chilean Embassy as Cover, Tapes Show,” *Washington Post* (February 26, 1999),
A9. The United States helped overthrow Allende in 1973; see the discussion of this in the section on war powers in this chapter.

42. Lukas, Nightmare, 94. On Brookings, see Kutler, Abuse of Power, 3, 6, 8, 10, 13, 17.

43. The rise of secrecy in terms of governmental classification of documents is an important related topic, though it goes beyond the scope of this chapter. In March 1973 Nixon proposed a revision of the federal criminal code to expand official secrecy such that disclosure of anything classified as secret would be a crime, even if the classification was inaccurate; it also would have made it a crime to publish said information and, in fact, to fail to turn it over to the government immediately. See Schlesinger, Imperial Presidency, 340ff; more broadly, see Daniel Patrick Moynihan, Secrecy (New Haven: Yale University Press, 1998).


45. In one 1968 case, the Defense Department refused to give information pertaining to the 1964 Gulf of Tonkin incident to the Senate Foreign Relations Committee; Senate Judiciary Committee requests that various staff testify about the controversial nomination of Abe Fortas to become the Supreme Court’s chief justice were also rejected. Pierson is quoted in Mark J. Rozell, Executive Privilege: Presidential Power, Secrecy, and Accountability, 2d rev. ed. (Lawrence: University Press of Kansas, 2002), 41–42.


48. Dallek, Flawed Giant, 147–51; Herring, America’s Longest War, 119–22. McNamara’s comment, from NSC minutes, is on p. 121.


51. Johnson quoted in Dallek, Flawed Giant, 153; McNamara quoted in Fisher, Presidential War Power, 117; Adair quoted in Herring, Longest War, 122.

52. See Fisher, Presidential War Power, 117; Johnson quoted in Dallek, Flawed Giant, 155. Dallek (155) argues that “the bulk of recent evidence suggests [the attack] did” occur; Fisher is far less sure.


78. “Annual Budget Message to the Congress, Fiscal Year 1967,” January 24, *Public Papers of the Presidents, 1966*, 48, 68. Note that a fiscal year differs from a calendar year. “Fiscal Year 1967,” for example, meant the twelve months ending on June 30, 1967, thus the year beginning on July 1, 1966. In 1975 the start of the fiscal year was shifted to October 1. Thus, fiscal year (or FY) 2006 is the year starting October 1, 2005, and ending September 30, 2006.

79. Pfiffner, *The President, the Budget, and Congress*, 41.


84. Weinberger quoted in Fisher, *Abdication*, 116 (emphasis added). Sneed and Nixon quoted in Schlesinger, *Imperial Presidency*, 239; see also Sundquist, *Decline and Resurgence*, 208. Sneed also argued that “the warrant of historic practice” added a constitutional gloss to Nixon’s actions, parallel to the 1915 *Midwest Oil* case discussed in chapter 2. See Pfiffner, *President, Budget, and Congress*, 66. It is interesting to note that then assistant attorney general William Rehnquist argued strongly in 1969 against the president’s ability to impound, at least in domestic spending.


87. For greater detail on Nixon’s economic policies, see Matusow, *Nixon’s Economy*, chaps. 6–7; and Small, *Presidency of Richard Nixon*, 208–14.

89. Nixon was speaking to interviewer David Frost in 1977. He was honest enough to continue, “And, I guess, if I’d been in their position, I’d have done the same thing.” Quoted in Ambrose, *Nixon: Volume III*, 510.


102. A fourth article regarding the bombing of Cambodia, and a fifth, charging income tax evasion, were defeated.


CHAPTER 4

7. It was, perhaps, Nixon’s needs that were the problem. On Nixon’s staffing, and the similarity of Ford and Carter to the Nixon model, see Hult and Walcott, *Empowering the White House*.
Edmund Muskie’s comments in the *Congressional Record*, October 17, 1974, S36083–84; Foerstel, *Freedom of Information*, chap. 2.


14. See *Nixon v. Administrator of General Services*, 433 US 425 (1977). However, Nixon and then his estate continued to press for compensation, a case that lasted nearly a quarter century and was not settled until 2000, when the government agreed to pay the Nixon estate $18 million. The estate had sought approximately $200 million, including interest.

15. 5 USC 552b. There are ten categories of exception that mainly parallel FOIA, including meetings that discuss classified information, banking reports, litigation or law enforcement investigations, or sensitive personal information.


17. See the review in *U.S. v. Duggan*, 743 F.2d 59 (2d Cir. 1984).


19. In June 1974 Kissinger threatened to resign if he was not cleared of misleading the Senate about his role in the wiretaps during his confirmation hearings; the resulting hearings placed the lion’s share of the blame on President Nixon, who was in no position to resist that conclusion. U.S. Senate, Committee on Foreign Relations, *Dr. Kissinger’s Role in Wiretapping*, hearings of September 1973 through July 1974, 93d Congress, 2d session (Washington, DC: U.S. Government Printing Office, 1974).


28. A bill requiring sunset provisions for all government programs was popular enough to pass the Senate in 1978 with eighty-seven votes, though it failed to win House approval. See Allen Schick, *Congress and Money*, 171–72; Sundquist, *Decline and Resurgence*, 329–30; *CQ Almanac*, 1978, 850.


34. Fulbright quoted in Sundquist, *Decline and Resurgence*, 256.

35. Fisher, *Presidential War Power*, 128–33; Sundquist, *Decline and Resurgence*, 254–60, quoting the joint statement of Reps. Clement Zablocki (D-WI) and Thomas Morgan (D-PA); *Public Papers of the Presidents*, 1973, 893–95. Concurrent resolutions are voted on by both chambers but not presented to the president. Thus they are not “law” in the way that joint resolutions, which are signed by the president, are.


40. The Rockefeller Commission’s official name was the Commission on CIA Activities within the United States. It was created by Executive Order 11828 on January 4, 1975. The quoted sentences are from p. 10 of the full report, which can be found on-line at http://history-matters.com/archive/church/rockcomm/contents.htm (accessed April 28, 2004). See also Olmsted, Challenging the Secret Government, 83–84.

41. The Church Committee was named for Sen. Frank Church (D-ID); its official name was the Select Committee to Study Governmental Operations with Respect to Intelligence Activities. The Pike Committee was formally the House Select Intelligence Committee.

42. Quoted in Olmsted, Challenging the Secret Government, 88, 96.

43. Rockefeller Commission Report, 149.


50. Johnson, Making of International Agreements, 138–44.

51. Public Papers of the Presidents, 1976, 1481–85.

52. Sundquist, Decline and Resurgence, 206.

53. For a detailed discussion of these questions, see James P. Pfiffner, The President, the Budget, and Congress (Boulder, CO: Westview, 1979), chap. 5.

54. But he assured Nixon: “As a matter of principle, however, your con-
continued efforts to use all available options to control spending, and to fight in the courts those which are initially foreclosed, will enable you to retain your firm anti-inflationary posture before the public and Congress.” Roy Ash to Nixon, “Impact on Litigation on Battle of the Budget,” June 27, 1973, White House Central Files: Staff Member and Office Files: Roy Ash, Box 7, Ash Memos to the President, February 1973 to December 1973, Nixon Presidential Materials Staff.

55. Russell Train was the administrator of the EPA.

56. Pfiffner, President, Budget, and Congress, 100ff; Train v. City of New York, 420 U.S. 35 (1975). The Court overturned the EPA’s failure to follow the formula for allotting money to the states on the grounds that any discretion the administration might have would come at a later stage of the process, when actual funds were expended. But the justices suggested that discretion was dubious even then.


58. Sundquist, Decline and Resurgence, 214; rescission data in Schick, Congress and Money, 401ff, esp. table 32.

59. Schick, Congress and Money, 22.

60. Public Law 93–250.

61. Sundquist, Decline and Resurgence, 221, 228–29, 231; Joel Havemann, Congress and the Budget (Bloomington: University of Indiana Press, 1976), 195f.


64. Corrado, Paying for Presidents, 1.

65. For a cogent discussion of the 1974 FECA amendments, see Frank J. Sorauf, Inside Campaign Finance: Myths and Realities (New Haven: Yale University Press, 1992), 7–10; and see the Federal Election Commission publication “Public Financing of Presidential Elections.” Each candidate’s primary spending could not exceed $10 million (in 1974 dollars). The spending caps were linked to inflation—but donation caps were not.

66. See Gillon, “That’s Not What We Meant to Do,” 204–9.


69. The “special prosecutor” became the “independent counsel” in the 1982 revisions (Public Law 97–409).

70. 28 CFR §0.37; Katy J. Harriger, The Special Prosecutor in American Politics, 2d rev. ed. (Lawrence: University Press of Kansas, 2000), 44. Because of these regulations, the Supreme Court later held in U.S. v. Nixon, the office was
sufficiently removed from the president to move the tapes dispute out of the realm of “intrabranch” argument.


72. The Justice Department led by John Mitchell and Richard Kleindienst and the FBI under L. Patrick Gray had certainly not covered themselves in investigative glory. Roosevelt, Truman, Eisenhower, Kennedy, and Nixon all appointed their party’s national chairman or their campaign manager as attorney general; Bobby Kennedy, of course, had the added benefit of consanguinity.

73. Quoted in Harriger, Special Prosecutor, 85. Overall, Harriger concludes, “the executive branch’s influence on this issue was minimal. Its views, as a rule, were suspect because its opposition was predictable” (69).

74. As this suggests, the attorney general was given little leeway in determining whether a charge against an executive official was warranted. The 1982 amendments increased the attorney general’s discretion somewhat (so as to examine the specificity and credibility of the evidence), but the 1987 reauthorization tightened it again (so that the attorney general could weigh only that specificity and credibility).


76. Harriger, Special Prosecutor, 234–35.


78. Senate committee report quoted in Maskell, Independent Counsel Provisions, 7. Writing for the Court, Chief Justice William Rehnquist argued that the ICA did not violate the separation of powers principle. Because the counsel was an “inferior officer,” the Court held, Congress had the power to have the position appointed by someone other than the president and even outside the executive branch. That the president could not control the prosecutorial powers of the counsel or fire her was also upheld, as Rehnquist compared the position to a regulatory commissioner—many of whom are appointed for fixed terms and can only be removed for cause. See Morrison v. Olson, 487 U.S. 654 (1988).


80. Garment, Scandal, 83.


CHAPTER 5


11. Gramm–Rudman–Hollings, which also changed the date of the budget resolution to April 15, was officially the Balanced Budget and Emergency Deficit Control Act of 1985 (Public Law 99–177); Fisher, *Abdication*, 130–34; see also Irene S. Rubin, *Balancing the Federal Budget* (Chatham, NJ: Chatham House, 2003), 37–40.


17. Specter in *Congressional Record*, November 9, 1993, S15382.

18. Presidential deferrals of spending, which had gone into effect until overturned by the action of one chamber of Congress, had been eliminated in 1983 when the *Chadha* decision, discussed in chapter 6, negated this sort of legislative veto. The phrase “bill-ettes” is from Sen. Robert Byrd (D-WV); see, among other places, *Congressional Record*, March 21, 1995, S4227. For more on the various approaches and for extensive detail on the eventual structure of the bill, see Andrew Rudalevige, “In Whose Interest? Deficit Politics and the Item Veto,” paper presented at the 1997 annual meeting of the American Political Science Association, Washington, DC.


33. For a broader description of developments, see Mackenzie, with Hafken, *Scandal Proof*, especially table 4–2.


37. See the materials covered by document 353149CU/LE, a memo from Bush counsel C. Boyden Gray to Phillip D. Brady, the staff secretary, entitled “Enrolled Bill Memo and Veto Message re S. 323” and dated September 23, 1992. The quoted memo is dated September 10, 1992, and written by W. Lee Rawls, assistant attorney general for the Justice Department’s Office of Legislative Affairs. In the end, the Senate did not take up the renewal bill. WHORM Subject File General, Series LE, George H. W. Bush Presidential Library, College Station, Texas.


42. Olson quoted in Hall, Pullen, and Rayos, “Independent Counsel Investigations,” 827; General Accounting Office, Financial Audit: Independent and Special Counsel Expenditures for the Six Months Ended March 31, 2004, GAO–04–1014 (September 30, 2004). This GAO audit shows $871,204 in expenditures on the Cisneros case, on top of more than $800,000 spent in the previous six months ending September 30, 2003 (see GAO–04–525).


49. Victoria Farrar-Myers, “In the Wake of 1996: Clinton’s Legacy for


CHAPTER 6


3. Recess appointments allow presidents to temporarily fill vacancies that occur when the Senate is not in session, an important power when slow travel and a lighter schedule mean long absences of Congress from Washington. These days, given year-round congressional sessions, its exercise is somewhat


9. On Carter, see Warshaw, Powersharing, chap. 5; more generally, see Hult and Walcott, Empowering the White House.


11. See Dickinson, Bitter Harvest, figure 1.2.


15. Cooper (*By Order of the President*, 70) suggests that they “hide in plain sight.” For an extended discussion of the “first mover” advantage orders grant, see Howell, *Power without Persuasion*.


23. Examples are largely from Cooper, *By Order of the President*, chap. 7; for George H. W. Bush, see also Charles Tiefer, *The Semi-Sovereign Presidency* (Boulder, CO: Westview, 1994); for George W. Bush, see *Public Papers of the Presidents, 2001*, May 24, 575, and December 28, 1554. In 1988 Reagan refused to enforce an extension of the requirement that certain departmental budget
requests be included in the White House budget (as noted in chapter 3, these requirements arose to constrain the Nixon administration).


29. Senate Select Committee on Intelligence, Inquiry into the FBI Investigation of the Committee in Solidarity with the People of El Salvador (CISPES), Senate Hearing 100–151, 100th Cong. (1988); William Greider, Who Will Tell the People? The Betrayal of American Democracy (New York: Simon and Schuster, 1992), 366; Ross Gelbspan, Break-ins, Death Threats, and the FBI: The Covert War against the Central America Movement (Boston: South End Press, 1991), esp. chaps. 11, 16. The Capitol bombing, it should be noted, was quickly linked to a small splinter group from the May 19 Communist Organization (138).


34. Executive Orders 12036, 12333; Koh, National Security Constitution, 59, 257n114.

35. “According to the accompanying interpretive memorandum prepared by the Justice Department, the FBI may authorize a full investigation if there are
statements threatening or advocating the use of violence, and an apparent ability to carry out the violence in a way that would violate federal law.” The tools allowed during preliminary investigations were also expanded. Banks and Bowman, “Executive Authority,” 108.


39. “News Conference with Prime Minister Romano Prodi of Italy,” May 6, Public Papers of the Presidents, 1998, 700. Clinton replied that he could not comment on an ongoing proceeding but insisted that “the facts are quite different in this case.”

40. In re Sealed Case, 121 F. 3d 729 (D.C. Cir. 1998). The specific definition of privilege covered “communications authored or solicited and received by those members of an immediate White House adviser’s staff who have broad and significant responsibility for investigating and formulating the advice to be given the President on the particular matter to which the communications relate.”


42. “Memorandum for the Attorney General,” December 12, Public Papers of the Presidents, 2001, 1509–10. While this memo is dated after September 11, it was the result of a lengthy back-and-forth with Congress—the original hearing on the matter had been scheduled for September 13.


45. Quoted in Rozell, Executive Privilege, 98.


47. See Foerstel, Freedom of Information, 59.

48. The Clinton executive order was Executive Order 12958; some 900
Million pages were declassified from FY95 to FY01. This process continued under the main Bush order (Executive Order 13292), though agencies were given three more years to review documents that would otherwise have been declassified in 2003. Classification figures from the government’s Information Security Oversight Office, reported in Jack Nelson, “U.S. Government Secrecy and the Current Crackdown on Leaks,” Working Paper 2003–1, Joan Shorenstein Center on the Press, Politics, and Public Policy, Kennedy School of Government, Harvard University, 10; Executive Order 13292, March 25, 2003. The orders granting HHS, EPA, and the Agriculture Department the right to classify documents were issued on December 10, 2001; May 6, 2002; and September 26, 2002, respectively; they may be found in the Federal Register.


56. Arguably, recent deployments in Colombia and the Philippines providing hundreds of military advisers to those countries’ governments could be...
included, to the extent those troops become involved (even unintentionally) in combat operations there. However, Congress has approved those deployments, though not U.S. participation in direct combat. See, e.g., Juan Forero, “Congress Approves Doubling U.S. Troops in Colombia to 800,” New York Times (October 11, 2004), A9; Glen Martin, “Battling Rebels in Philippines: U.S. Playing Critical Role in Campaign against Muslim Insurgents,” San Francisco Chronicle (July 6, 2003), A1.

57. See Sundquist, Decline and Resurgence, 258–59; Ely, War and Responsibility, 117; Congressional Record, October 10, 1973, 33555ff.

58. See Clinton’s letter of June 29, 1993, to the congressional leadership (three days after the attack).


61. Quoted in Fisher, Abdication, 164; see also Tiefer, Semi-Sovereign Presidency, 125–28; Eileen Burgin, “Rethinking the Role of the War Powers Resolution: Congress and the Persian Gulf War,” Journal of Legislation 21 (1995): 28ff. The Justice Department’s position was echoed by Clinton secretary of state Madeleine Albright in 1998, when she argued that “we are talking about using military force [against Iraq], but we are not talking about war. This is an important distinction.” See Adler, “Clinton Theory,” 162.

62. Cheney’s and Bush’s quotes are in Fisher, Presidential War Power, 149–51; see also Ely, War and Responsibility, 3.

63. Fisher and Adler, “Time to Say Goodbye,” 11. Only Ford, in 1975, has invoked Section 4(a)(1), and his report was moot, since it came after military action was completed.


66. See Richard F. Grimmett, War Powers Resolution: Presidential Compliance, Congressional Research Service report IB81050, March 24, 2003, 13; on treaty obligations, see the WPR, Sec. 8 (a)(2) and 8(b).

67. Hostilities began on March 24 and ended on June 21, 1999. It should be noted, though, that President Clinton did not request or announce a thirty-day extension to the sixty-day window as provided for in the WPR. Further, air war was certainly meant to be included in the WPR, given the example of Cambodia unfolding before its drafters. Note that in 2002 George W. Bush asked for authorization for war with Iraq; this is discussed in chapter 7.

68. See Barry M. Blechman, The Politics of National Security (New York: Oxford University Press, 1990), 186; see also Huchthausen, Splendid Little Wars.
70. The Senate vote was 52–47; the House tally was 250–183. The quoted resolutions are H. Con. Res. 32 and H. Res. 95 of 1991.
76. Johnson, Making of International Agreements, 136.
82. Indeed, even when military aid resumed in 1986 after Nicaraguan president Daniel Ortega’s ill-considered visit to Moscow, and a presidential finding brought the CIA back into the operation, the agency was instructed not to inform the oversight committees. See Treverton, Covert Action, 4.
84. See Koh, National Security Constitution, who argues that the system has not been reformed even in the scandal’s wake. Louis Fisher has commented that
“efforts to understand the full dimensions [of the scandal] . . . were regularly thwarted by the strategy of destroying or withholding information, denying classified documents, and issuing presidential pardons . . . There is hardly a shadow of political accountability.” “Constitutional Violence,” in Adler and Genovese, eds., *Presidency and the Law*, 198.


89. Quoted in Rourke, *Congress and the Presidency*, 289–90; for the Clinton years, see James Lindsay, “Deferece and Defiance: The Shifting Rhythms of Executive-Legislative Relations in Foreign Policy,” *Presidential Studies Quarterly* 33 (September 2003): esp. 534–37.


CHAPTER 7


3. Sources differ as to the exact times of impact, within a minute or two; see, e.g., House Permanent Select Committee on Intelligence and Senate Select Committee on Intelligence, Report of the Joint Inquiry into the Terrorist Attacks of September 11, 2001, Senate Report 107–351/House Report 107–792, December 2002, 141–43, from which the death toll (as of December 2002) is calculated.


In a March 2004 appearance on NBC’s Meet the Press, Defense Secretary Rumsfeld would claim the administration had never referred to the Iraqi threat as immediate or imminent. But this was not so. See James P. Pfiffner’s dispassionate treatment of the matter in “Did President Bush Mislead the Country in His Arguments for War with Iraq?” Presidential Studies Quarterly 34 (March 2004): 25–46.

20. Report on the U.S. Intelligence Community’s Prewar Intelligence Assessments on Iraq (hereafter Senate Intelligence Report), Select Committee on Intelligence, United States Senate, July 7, 2004, 14, 16, 19, 21, 22.


30. More precisely, torture referred to acts that inflicted pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” But inflicting such pain was not illegal unless done with “the specific intent to inflict severe pain”—“even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent.” See Bybee to


33. See Fisher, “Military Tribunals,” 491–95, 503–4. According to the Census Bureau, there were 20.6 million noncitizens among the 286 million U.S. population in 2003.


37. *Rasul v. Bush* was decided June 28, 2004. Justices Scalia, Rehnquist, and Thomas dissented. The tribunal system itself was challenged in federal district court in late October 2004, resulting in the *Hamdan v. Rumsfeld* district court decision noted here and in note 32, this chapter. Later decisions at the district court level favored both the government and detainees in turn; appeals seeking resolution from the circuit court of appeals were pending as of this writing. See Carol D. Leonnig, “Judge Rules Detainee Tribunals Illegal,” *Washington Post* (February 1, 2005), A1.


40. Milbank and Wright, “Off the Mark on Cost of War”; Fallows, “Blind into Baghdad.”


46. Cheney served as Halliburton’s CEO before becoming vice president in 2001.


52. Karen Branch-Brioso, “Ashcroft’s New Powers Anger Civil Libertari-


57. The original Justice Department draft would have required merely that it be “a” purpose.


61. The vote on engrossment was 337–79. See *Congressional Record*, October 12, 2001, H6712–26, 6739–58.


The Non–Detention Act is Public Law 92–128, codified at 18 USC 4001 (a);
as noted in chapter 4, it was passed to repeal the Emergency Detention Act of 1950.


71. The four justices were joined by two others (Breyer and Ginsburg) for the portion of the opinion setting aside the circuit court opinion and requiring due process for suspected combatants. But Breyer and Ginsburg dissented from the notion that the AUMF provided sufficient permission to hold Hamdi in light of the Non-Detention Act, especially given what was known about his involvement in the Afghanistan hostilities. They found it unlikely that the AUMF was intended to allow indefinite detentions given that even the Patriot Act allowed detaining noncitizens for only seven days without charge. As noted, Justices Scalia and Stevens also would have released Hamdi immediately. Thus, only Justice Thomas held both that the AUMF gave the president sufficient power and that the combatant proceedings to date were acceptable. Thomas wrote that “this detention falls squarely with the Federal Government’s war powers, and we lack the expertise and capacity to second-guess that decision.”


75. This issue erupted again in early 2005 when a new administration estimate put the ten-year net cost of the prescription drug program not at $550 billion but at over $720 billion. A spokesman said the discrepancy stemmed from shifting the ten years measured to those when the drug program was actually operating. Sheryl Gay Stolberg and Robert Pear, “Mysterious Fax Adds to Intrigue over the Medicare Bill’s Cost,” *New York Times* (March 18, 2004); Robert Pear, “Agency Sees Withholding of Medicare Data from Congress as


80. A partial list of attacks by al Qaeda or other Islamic terrorist groups includes an April 2002 bombing of a Tunisian synagogue, killing 21; an October 2002 bombing of nightclubs in Bali, killing 202; a November 2002 bombing of a Kenyan resort hotel, killing 13; May 2003 bombings of residential compounds in Saudi Arabia, killing 34, and of Jewish targets in Casablanca, Morocco, killing 20; the August 2003 bombing of UN headquarters in Baghdad, killing 24; the November 2003 bombings of synagogues, a bank, and the British consulate in Instanbul, Turkey, killing nearly 60; the March 2004 bombings of Shiite shrines in Baghdad and Karbala, Iraq, killing 185; the September 2004 seizure of a school in Beslan, Russia, killing some 328, many of them children; and the October 2004 execution-style slayings of 49 Iraqi army recruits. This list excludes killings in Israel, Palestine, and Chechnya, among others. A


CHAPTER 8

1. Thanks to William Howell and Jon Pevehouse for suggesting this formulation.


8. Much of this section is drawn from James Sundquist’s comprehensive discussion of these weaknesses in *The Decline and Resurgence of Congress*, esp. chaps. 7 and 14, and from Kenneth R. Mayer and David T. Canon, *The Dysfunctional Congress? The Individual Roots of an Institutional Dilemma* (Boulder, CO: Westview, 1999).


10. Morris P. Fiorina wrote that “district interests are special interests, whose sum is not the national interest.” See *Congress: Keystone of the Washington Establishment*, 2d ed. (New Haven: Yale University Press, 1989), 127, and, more generally, Mayer and Canon, *Dysfunctional Congress?*


13. Neustadt, *Presidential Power*, 317. For extended treatments of rather dif-
ferent uses of the term postmodern, see Rose, Postmodern President, and Barilleaux, Post-Modern Presidency. As noted in chapter 6, my conclusion is closer to Barilleaux’s, though owing much to Rose’s discussion of global pressures on American policy.


20. Even after the administration backed away from the original OLC August 2002 definition of torture in 2004 in hopes of easing White House Counsel Gonzales’s appointment as attorney general, it did not retreat from its broader claims of presidential prerogative in this area. In June 2004 and again in his confirmation hearings Gonzales argued that the claims were unnecessary, even “irrelevant” because the president did not intend to authorize torture, but not that they were wrong. In any case, he argued that the CIA was not bound by the president’s directive in 2002 to treat detainees at Guantánamo Bay humanely. And the administration successfully fought efforts to include a legislative ban on “extreme interrogation measures” in the intelligence reform act. R. Jeffrey Smith and Dan Eggen, “Justice Department Memo Redefines ‘Torture,’” Washington Post (December 31, 2004), A9; Eric Lichtblau, “Gonzales Says Humane Policy Order on Detainees Doesn’t Bind C.I.A.,” New York Times (January 19, 2005), A17; Douglas Jehl and David Johnston, “White House Fought New Curbs on Interrogations, Officials Say,” New York Times (January 13, 2005), A1; written responses of Alberto Gonzales to questions posed by members of the Senate Judiciary Committee, January 2005.

21. Preemption and prevention are not, of course, the same thing. Preemption supposes imminence: a “direct, immediate, specific threat,” such as an invading force massed on one’s border. As such, it has had far more legitimacy over time. See Schlesinger, War and the American Presidency, 23–24.
22. NSC-68 is discussed in chapter 2. Robert Kennedy, from the transcript of a meeting held on October 22, 1962, in Ernest R. May and Philip D. Zelikow, eds., *The Kennedy Tapes: Inside the White House during the Cuban Missile Crisis* (Cambridge, MA: Harvard University Press, 1997), 234. Kennedy had earlier (October 18) argued, “We’ve fought for fifteen years with Russia to prevent a first strike against us. Now, in the interest of time, we do that to a small country? I think it’s a hell of a burden to carry” (149). See also Schlesinger, *War and the American Presidency*, 22–23.


29. Wilgoren, “Kerry Says His Vote,” A18; *Congressional Record*, October 9, 2002, S10175.


31. *Congressional Record*, March 17, 2004, H1143; *Congressional Record*, October 2, 2003, S12330–31. Durbin went on: “In this situation, after 9/11, President Bush came to us and summoned the American people to be unified. . . . He summoned us to humility. . . . He also summoned us to courage and the courage that America has to display every day in confronting the war on terrorism.”


34. This is largely a matter of choice: the Constitution does not require that states be divided up into districts represented by only one member, only that a certain number of members represent a given state.


38. For a nice discussion of these trends, see Thomas E. Mann, “Making Foreign Policy: President and Congress,” in Mann, ed., *Question of Balance*, 15.


44. Neustadt, *Presidential Power*, 157; see also Hugh Heclo’s masterful vari-


48. N.Y. Times Co. v. United States, 403 U.S. 713 (1971). Or as James Madison put the point back in 1822, “a people who mean to be their own Governors must arm themselves with the power which knowledge gives.” Quoted in Schlesinger, Imperial Presidency, 333.

49. Clinton, July 5 interview, Public Papers of the Presidents, 2000, 2103.


51. For example, 75 percent of Bush voters believed that Iraq was closely linked to al Qaeda; more than 60 percent believed that clear evidence of that link had been found; and one in five believed that Iraq was directly involved in the September 11 attacks. Steven Kull et al., “The Separate Realities of Bush and Kerry Supporters,” report on a survey conducted by the Program on International Policy Attitudes and Knowledge Networks, Inc., October 21, 2004.


54. Hyde in *Congressional Record*, March 17, 2004, H1143. There is an interesting parallel to the Supreme Court’s decision to resolve the 2000 election by accepting the *Bush v. Gore* case, which took even the most political of events, elections, out of political hands. The public, the Court held, had to be saved from the unseemly spectacle of representatives fulfilling their constitutional duty to determine the winner in the presidential race; *Bush v. Gore*, 531 U.S. 98 (2000). Justice Breyer’s dissent (p. 155) is on point: “The decision by both the Constitution’s Framers and the 1886 Congress to minimize this Court’s role in resolving close federal presidential elections is as wise as it is clear. However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people’s will far more accurately than does an unelected Court. And the people’s will is what elections are about.”

55. E. E. Schattschneider, *Two Hundred Million Americans in Search of a Government* (New York: Holt, Rinehart, and Winston, 1969), 53. Justice Learned Hand noted something similar in a 1944 essay: “The Spirit of Liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weights their interests alongside its own without bias.” See *The Spirit of Liberty: Papers and Addresses of Learned Hand*, 3d enlarged ed. (New York: Alfred A. Knopf, 1974), 190.

