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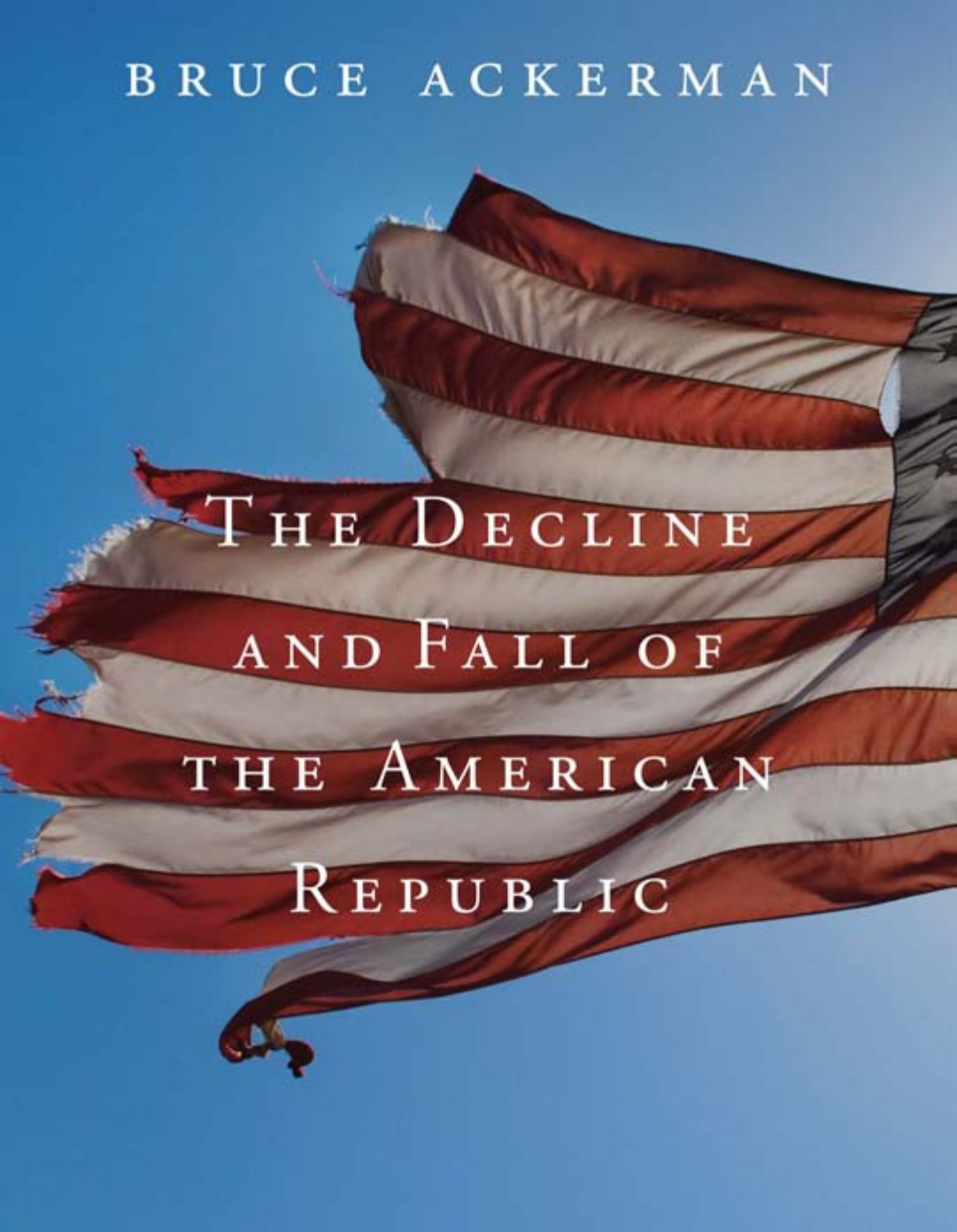

The Decline and Fall of the American Republic

THE DECLINE AND FALL OF THE AMERICAN REPUBLIC

The Tanner Lectures on Human Values

THE DECLINE AND FALL OF THE AMERICAN REPUBLIC

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For Susan
For ever

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THE DECLINE AND FALL OF THE AMERICAN REPUBLIC

INTRODUCTION: TRIUMPHALISM

Constitutional thought is in a triumphalist phase. The American mind is dominated by heroic tales of the Founding Fathers, who built an Enlightenment machine that can tick-tock its way into the twenty-first century, with a little fine-tuning by the Supreme Court. The basic machinery has stood the test of time for two centuries—so why not three?

This premise is broadly shared by America's leading constitutionalists. While many criticize the extreme ancestor worship of Justices Scalia and Thomas, almost everybody is trying to fill the gap with other heroes. Judicial activists celebrate the genius of the Warren Court; judicial minimalists, the prudence of crafty judges; popular constitutionalists, the creativity of mass movements. These are different themes, but they add up to a triumphalist chorus: we must be doing something right; the only question is what?

Law follows life. The participants in the contemporary debate have all lived through the rise and rise of the American state at home and abroad. We have had defeats along the way, but there is no mistaking the general arc of ascendancy: America's victory over the Axis powers and the Communists, its civil rights revolution, and the success of its free market system have propelled the country to the center of the world historical stage—economically, militarily, morally. Little wonder that its lawyers merely disagree about the magic constitutional formula that accounts for this remarkable record of achievement.[1]

It has not always been this way. Over most of our history, constitutional thought exhibited a healthy skepticism about the Philadelphia achievement. During the long run-up to Civil War, there was widespread anxiety about the Founding legacy, and many desperate efforts to redefine its terms before failures in the original design provoked a bloodbath.

The great Reconstruction amendments did little to sustain constitutional enthusiasm. When they failed to fulfill their promise of racial equality, the next generation of thinkers inaugurated a wide-ranging critique. Progressives like Woodrow Wilson and James Bradley Thayer and Oliver Wendell Holmes disagreed about many things, but they agreed on One Big Thing: the Founders made a bad mistake in relying on mechanical checks and balances in designing their constitutional machine. Darwin, not Newton, was the scientific hero of the age, and progressive constitutionalists used Darwin to discredit basic premises. In their view, the Founders' mistakes couldn't be repaired by writing a few constitutional amendments adding new instructions for operating the old Enlightenment machine. Real constitutional change only came through the evolutionary struggle of social forces to survive, prosper, and dominate. The sad fate of the Reconstruction amendments served as an example of this larger truth: evolutionary struggle overwhelms mechanical checks and balances.

The Progressive critique was reinforced by the muckraking of the next generation, led by Charles Beard, who argued that the Founders were not only conceptually confused but materially interested in creating a machine that would crush popular demands for social justice. This series of deflationary diagnoses defined the terms of New Deal constitutionalism and its successful assault on the old laissez-faire regime in the 1930s. As the nation headed into a total war with totalitarianism, it was digging

itself out of the debris left by the court-packing crisis. Only a fool would have confidently predicted that America's constitutional tradition would dominate the world in the decades ahead.[2]

Triumphalism is a Johnny-come-lately to the legal scene. It is the product of the New Deal's success in adapting classical constitutional forms to express a new activist vision of American government; reinforced by the Warren Court's triumph during the civil rights revolution; and consolidated by the new originalism of the Reagan years.

But nothing lasts forever, not even the American Century. And looking forward, I don't think we can afford another generation of triumphalism. The pathologies of the existing system are too dangerous to ignore. We can't limit our critique to details. We must ask whether something is seriously wrong—very seriously wrong—with the tradition of government that we have inherited.

This is an awkward moment for me. Like almost everybody else, I've been a triumphalist ever since I've been writing about the Constitution. My own account has featured a distinctive hero: not the Founding Fathers, not the Warren Court, but the ordinary Americans who have shaped and reshaped the country's fundamental commitments over the centuries—from the Founding to Reconstruction, from the New Deal to the civil rights revolution, and beyond.[3]

My claims have proved controversial—surprise, surprise—but the cloud of debate should not disguise the triumphalist character of my enterprise. While most scholars look upon the very idea of "popular sovereignty" as a political myth, I have tried to establish that We the People have indeed given their government new marching orders at crucial turning points of American history. To make my case, I have provided blow-by-blow accounts of the

constitutional moments at which Americans redefined their constitutional identity during the Founding and Reconstruction, the New Deal and the civil rights revolution.

One recurring theme has been the presidency. My revisionist history emphasizes its central role in expressing and consolidating popular demands for fundamental change. The precise roles played by the presidency have differed during different historical eras. But without the creative interventions by great presidents of the past, popular sovereignty would not have remained a living force in the American tradition over the past two centuries.

Which leads to my current embarrassment. My argument will be taking a tragic turn. The triumphs of the presidency in the past have prepared the way for a grim future. The office that has sustained a living tradition of popular sovereignty threatens to become its principal agent of destruction. Just because we call him the "president," we should not suppose that President Obama is occupying essentially the same office as George Washington, or even Richard Nixon. In the first part of this book, I shall be pointing to a series of developments in politics and communications, bureaucratic and military organization, that have transformed the executive branch into a serious threat to our constitutional tradition.

The second part turns from the evolving dynamics of power to changing notions of legitimacy—and points, once again, to disturbing developments. My discussion takes the form of classic tragedy: it's not as if there is one aspect of the presidency that is a force for good, and another a force for evil. *The very same features* that have made the presidency into the platform for credible tribunes of the People, like Abraham Lincoln or Franklin Roosevelt, are also conspiring, under different conditions, to make it into a vehicle for demagogic populism and lawlessness in the century ahead.

Haven't we heard all this before? Arthur Schlesinger sounded the alarm in his *Imperial Presidency* a generation ago[4]—and yet the Republic has managed to stumble along despite the warnings of countless Cassandras ever since. We have had our share of crises, to be sure, but that's true of any other country at any other time. The presidency has been the site of three serious outbreaks of illegality over the past half-century—Watergate, Iran-Contra, and the War on Terror—as well as a host of lesser ones. But we have managed to recover from them all, to one degree or another. And that's better than lots of other countries have done. Let's not blow our problems out of proportion with idle chatter about our impending decline and fall.

What is more, if we look to the present, President Obama's performance in office has been anything but imperial. He has had a tough time pushing high-priority initiatives through Congress even though his party has had strong majorities in both Houses. And he will have a tougher time after the midterm elections, which almost invariably will lead to a significant decline in congressional support for his party. As a skeptical Congress buries one major presidential initiative after another, a very different diagnosis will come to the fore: surely it is congressional obstructionism that is our number one problem?

At least the president has an incentive to rise above congressional parochialism and speak for the Nation as it confronts the pressing problems of the twenty-first century. The real dangers come from Capitol Hill: its pandering to special-interest groups, its endless ideological posturing, will destroy our collective problem-solving capacity in the decades ahead. If there is any serious prospect of decline and fall, its source is this "crisis of governability"—a crisis generated by self-indulgent congressional barons, not presidential demagogues.

As president and Congress collide, each particular impasse will generate its own point-counterpoint: the president's talk of

crisis will, to his critics, seem a petulant overreaction to Congress's prudent refusal to endorse his extravagant demands. Depending on the politics of the moment, each of us will find ourselves changing sides in the debate—sometimes cheering for the president, sometimes for the Congress. But as White House initiatives are repeatedly blocked on Capitol Hill, the escalating talk of a "crisis of governability" will deepen the suspicion that super-strong presidential leadership provides the only realistic path to decisive action. Crisis talk, in short, prepares the ground for a grudging acceptance of presidential unilateralism as the unfortunate, but necessary, price to pay if the nation is to confront and resolve the challenges of the twenty-first century.

In emphasizing the danger of a runaway presidency, I don't mean to give Congress a free pass. Most obviously, the Senate filibuster is a scandal, and requires reform. (I will be proposing one in the final part of this book.) But the presidency represents the graver threat: while Schlesinger was prophetic in sounding the alarm, it has become a far more dangerous institution during the forty years since he wrote *The Imperial Presidency*—and these threatening trends promise to accelerate over the decades ahead. This is, at any rate, my thesis.

In making out my case, I will be focusing on institutions, not individuals. I will not be asking, for example, whether John Yoo deserves criminal punishment for writing the justly notorious "torture memos." I will be exploring the institutional conditions that made these memos possible. How was an untested young academic, with notoriously extreme views, selected to occupy such an important position in the first place? Was Yoo's job structured in a way that required him to consider both sides of the argument before reaching a conclusion? Or did it create perverse incentives to tell the president precisely what he wanted to hear?

Yoo has responded to the broad-based legal critique of his work by mounting a public relations campaign in his own de-

fense. But it is a mistake to allow these publicity-hound activities dominate serious diagnosis of the problem the torture memos exemplify. Without structural reform, the institutional dynamics of the modern presidency will encourage future Yoos to play the role of legal apologist at moments of crisis.

My institutional approach has four distinctive features. It is systematic, historicist, dynamic, and interactive. Let me devote a few words to each.

Systematic: The modern presidency is an institution, not only a person. To understand its operation, we must dissect the institution into a series of functional elements. For starters, (1) there is the mechanism for selecting presidential nominees. Once the winning candidate gets to the White House, he will (2) continue to communicate to the larger public, and (3) use his very large White House staff to steer an enormous bureaucracy, containing thousands more of his political appointees. As commander in chief, he is also dealing (4) with the Joint Chiefs of Staff and other leading generals, as well as the civilian leadership at the Pentagon. As he is engaging with all these systems, the president is also trying (5) to legitimate his ongoing uses of power through the law and other forms of rhetorical appeal.

Historicist: When we look at each of these functional systems, they pose greater dangers to constitutional fundamentals than they did a mere forty years ago, when Richard Nixon was in the White House. To put my thesis in deeper perspective, I will begin with the Founding and consider how the presidency has evolved through the centuries. This will allow a better appreciation of the remarkable character of the institutional transformations of the last generation.

Dynamic: I am not interested in the past for its own sake. By gaining perspective on recent institutional dynamics, we can appreciate how they may accelerate, if left unchecked, and generate even more serious presidential pathologies in the future.

Reasonable people will disagree about the likelihood of my darker scenarios—and they will doubtless come up with counter-scenarios that I haven't considered.

So much the better. This forward-looking dialogue is absolutely necessary if we are to take control of our constitutional destiny and create new checks and balances responsive to the most likely forms of presidentialist abuse.

Interactive: Nevertheless, future projections are particularly difficult because of a final feature of the problem. It isn't enough to focus on a particular functional system to glimpse the future contours of presidential abuse. We must consider how the systems interact with each other to assess the overall threat posed to the constitutional order.

Perhaps a change in one functional system will neutralize the dangers posed by others, leading to an overall view of executive power that is less pathological than appeared on a function-by-function view of the problem. Or perhaps the sectors reinforce one another, generating a presidency with a threat level that is vastly greater than first appeared on a piecemeal basis.

I have come to this darker view, leading me to challenge the Panglossian premises of legal scholarship. My argument gains greater support from political scientists and historians, who have often presented more critical views of the modern presidency. But they don't usually attempt a systemic approach, contenting themselves with the study of one or two aspects of the problem. For example, since Samuel Huntington wrote his book *The Soldier and the State* in 1957, no major scholar has attempted a sustained exploration of the role of the modern officer corps in the larger constitutional system. As we shall see, there have been important—and troubling—changes in civil-military relations since Huntington's time, and there is a rich specialist literature describing them. But for better or worse, you will be reading the first modern discussion that considers how these

transformations interact with those going on elsewhere in the modern system of presidential government. Similar integrative efforts are required in other specialized areas of presidential studies.

In my concluding chapter, "Living Dangerously," I will reconsider the extent of institutional change since Schlesinger's *Imperial Presidency* and what these transformations portend for the future. By that point, you will be in a much better position to make your own judgment on the value of my grim predictions. But for now, let me simply report the conclusions of my crystal-ball gazing exercise.

I predict that: (1) the evolving system of presidential nominations will lead to the election of an increasing number of charismatic outsider types who gain office by mobilizing activist support for extremist programs of the left or the right; (2) all presidents, whether extremist or mainstream, will rely on media consultants to design streams of sound bites aimed at narrowly segmented micropublics, generating a politics of unreason that will often dominate public debate; (3) they will increasingly govern through their White House staff of superloyalists, issuing executive orders that their staffers will impose on the federal bureaucracy even when they conflict with congressional mandates; (4) they will engage with an increasingly politicized military in ways that may greatly expand their effective power to put their executive orders into force throughout the nation; (5) they will legitimate their unilateral actions through an expansive use of emergency powers, and (6) assert "mandates from the People" to evade or ignore congressional statutes when public opinion polls support decisive action; (7) they will rely on elite lawyers in the executive branch to write up learned opinions that vindicate the constitutionality of their most blatant power grabs. These opinions will publicly rubber-stamp presidential actions months or years before the Supreme Court gets into the

act—and they will generate heated debate amongst the broader legal community. With the profession divided, and the president's media machine generating a groundswell of support for his power grab, the Supreme Court may find it prudent to stage a strategic retreat, allowing the president to displace Congress and use his bureaucracy and military authority to establish a new regime of law and order.

These are the dynamics of decline and fall for the American *Republic*—a term best clarified through a few orienting contrasts. For starters, the fall of the Republic is compatible with the continuation of American *empire*—by which I mean the country's standing as world hegemon. While America may well be declining in relative economic and military power, this is not my subject. I am dealing with the future of the Republic, not the Republic's future as a superpower.

Similarly, my subject is the decline of our political institutions, not the state of our morality. This is no Jeremiad prophesying America's final fall into a godless condition of selfishness, sensuality, sloth. To the contrary, I take a positive view of the great moral movements of the twentieth century. We have managed to transform a white man's country into a more inclusive place. Americans are much less bigoted and much more educated—eager to transform the techno-breakthroughs of the twenty-first century into new frontiers for the enhancement of human freedom. All in all, I don't count myself amongst the doom-and-gloomers: for all our selfishness and self-righteousness, America *has* made moral progress in the twentieth century, and we *can* move forward once again.

But only if we manage to keep our institutions under control. This does not require a great leap forward into a higher morality, but some constitutional reality testing. We must rid ourselves of the comforting notion that our heroic ancestors have done the heavy lifting for us. We must confront the real-world

Constitution and its potential for catastrophic decline—and act before it is too late.

Finally, the death of the Republic does not necessarily mean the end of *democracy.* Even if our constitutional tradition is overwhelmed by presidential power, the presidency may well remain an elective office—though, under some of the scenarios we shall be canvassing, the military will operate as a power behind the throne. My concern is with the preservation of our tradition of *republican* values—most notably, the threat posed by the transformation of the White House into a platform for charismatic extremism and bureaucratic lawlessness.

The republic can decline and fall in many different ways. My broad account points to seven different factors, whose dynamic interaction can generate a host of concrete scenarios that may destroy the system of checks and balances. Each is worth discussing in its own right. But I will be focusing on a few that seem to me most likely. Some critics will find my choices misguided—they will discount some scenarios I emphasize and develop others I have ignored. These critiques will usefully clarify the stakes involved, but they shouldn't divert us from the key issue: is the overall likelihood of all the scenarios, when put together, big enough to warrant a serious reform effort to preempt the looming threat?

I think reform is imperative, but it can't happen without sustained discussion. I hope to kick off the debate by proposing a broad-ranging reform program in the last part of this book. Given the multifaceted dynamics of the problem, we shouldn't be searching for a single miracle cure to deal with all our presidential dis-eases at once.

It would be even sillier to respond with radical surgery—hacking away at presidential power indiscriminately in a desperate effort to reduce the danger. While the White House has become a serious threat to the republic, the president also remains

an indispensable tribune of the American people, expressing its deepest hopes for their collective future. We will have to keep on living with our tragic hero for a very long time to come. I do not aim to cripple the presidency, but to devise a series of damage-control devices that check its worst tendencies.

Easier said than done. To get the debate going, I will confront each of my seven factors and consider measures that might sensibly reduce the risk without unduly undermining the positive aspects of presidential authority. Some suggested reforms respond to the threat of a politics of unreason; others confront outbreaks of executive illegality led by superloyalists on the White House staff; others encourage a new professional code of military ethics that will check the ongoing politicization of the officer corps; and still others try to correct the perverse institutional incentives that can transform White House lawyers into apologists for presidential power grabs.

These proposals come in different sizes—some are small, some are not—but even when taken together, they won't operate as a cure-all. The pathological tendencies of the modern presidency are far too deep for anything resembling a panacea. Nevertheless, a series of partial fixes may make a real difference in the decades ahead.

I shall begin, though, by setting the search for solutions to one side. My first task is to challenge the reigning spirit of constitutional triumphalism and to provoke more general reflection on the grave vulnerabilities of our current system. Before we can even think about serious reform, we must recognize that we have a serious problem on our hands.

Do we?

PART ONE

THE MOST DANGEROUS BRANCH

1

AN EXTREMIST PRESIDENCY

American constitutional law is transfixed by the study of the Supreme Court. But this won't help in diagnosing the most important way the Founding design has been outstripped by contemporary realities. As Hamilton predicted, the Supreme Court has turned out be the "least dangerous" branch, as it must depend upon the president's support "even for the efficacy of its judgments."[1] Where the Framers went wrong was in guessing the identity of our most dangerous branch.

The Founders thought that Congress would be most dangerous, and they took pains to constrain the threats emerging from that direction—most notably, by splitting the legislature into the House and Senate and having them check-and-balance one another.[2] But over the course of two centuries, the most dangerous branch has turned out to be the presidency—requiring a fundamental reworking of our thinking and practice, an overhaul that may come too late if it comes at all.

I don't want to be too tough on the Framers. Their fears about Congress were perfectly plausible in 1787. We're the ones to blame for transforming them into Enlightenment demigods who somehow managed to transcend their place in history. Our job is to view their handiwork with twenty-twenty hindsight and appreciate how Founding structures operate in ways that mock original expectations.

Begin with the presidency and parties. For modern Americans, regular party competition is the defining characteristic of democracy: if the same party stays in power for seventy years, as in the case of Mexico, we know all we need to know about its undemocratic status.

This was not how the Founders thought about things. Like other Enlightenment gentlemen of the eighteenth century, "party" was a synonym for "faction." Factions were bad, and the aim of the Constitution was to create a system in which public-spirited gentlemen might win office by transcending the wheeling and dealing of petty factionalists.

That was the point of the Electoral College. By giving local notables in each state the right to choose the president, the Founders hoped to avoid the Roman Republic's decline into populist demagoguery and imperial dictatorship.[3]

But the Founding vision was shattered by the rise of a proto-modern party system in the 1790s. With Federalists and Republicans battling over the future of American democracy, the presidency became a platform for Thomas Jefferson to claim a mandate from the People for a sweeping program of revolutionary reform. This was just the kind of demagogic enterprise the Framers had sought to prevent.[4]

So much the worse for the Framers. Over the course of the nineteenth century, it was Jefferson's example that shaped constitutional understandings. Each generation used the party system to impress the presidency with new plebiscitarian meanings—with the Democratic Party of Andrew Jackson, the Republican Party of Abraham Lincoln, and the Populist-Democratic Party of William Jennings Bryan each using the presidency as an engine of radical transformation. Jackson and Lincoln succeeded, Bryan failed, but win or lose, the recurring pattern impressed the presidency with a new constitutional significance: Americans

began to take it for granted that their presidents could legitimately claim popular mandates for sweeping changes in the name of We the People.

At the same time, nineteenth-century parties constrained the presidency's plebiscitary thrust. Presidential candidates did not then create their own campaign organizations.[5] They were remote figures, who relied on local party newspapers to deliver the partisan message to a general readership and on local party workers to deliver the vote on Election Day.[6]

Things began to change at the end of the nineteenth century as Hearst and other newspaper barons ousted party leaders from direct control over the dominant means of communication. Woodrow Wilson made the decisive breakthrough. He transformed the State of the Union Address into a media event by delivering it personally to a joint session of Congress—a custom that had been repudiated by Thomas Jefferson as overly reminiscent of the King's Speech to parliament. He also began holding news conferences with the press corps—permitting him to go over the heads of congressional leaders and speak directly to the country.[7] Then FDR's Fireside Chats got the president's voice into the nation's homes.[8]

This set the stage for another great revolution of the party-system—and one that defines the dangers of our present situation. The critical moment came in the aftermath of the disastrous Democratic Convention of 1968, which discredited party professionals and led to the current system in which ordinary voters choose their party's presidential candidates directly in the overwhelming majority of states.[9]

This removed a crucial moderating element from the system. When party chieftains did the picking, they focused on candidates who might win the support of the median voter in their state.[10] Even during moments of ideological fervor and mass

mobilization, the professionals steered the nomination to figures who would maximize their appeal to the political center—the moderate Lincolns, not the extremist Sewards, of their parties.

The new system shifted the balance in the direction of extremism—away from the median voter in the general election, toward the median voter in the primary or caucus. Candidates might move even farther to the left or right to encourage activists to get out the vote in the primary campaign. Given low primary turnouts, mobilizing the base will often be a recipe for victory at the polls. This tendency toward extremism is heightened by the increasingly polarized character of the voting public—with strongly mobilized left- or right-wing activists flanking the relatively passive voters in the middle.[11]

No need to exaggerate. While party chieftains no longer meet in smoke-filled rooms, a more diffuse group of political influentials can play a moderating function. Running a nationwide primary campaign requires vast resources, and this gives lots of power to the elites that provide the money, organization, and volunteer energy required for an effective race. Since the primary season is compressed into a few months (at most), candidates who come to the starting line with the assets they need for effective campaigning have a decisive advantage. As a consequence, aspiring nominees spend the preceding year competing for pledges of financial and organizational support. During this "invisible primary," elites may play a gatekeeping role that may serve the cause of moderation.[12]

Begin with *negative* gatekeeping. Under this scenario, elites try to starve one or another extremist candidate who they think will lead the party to a crushing defeat in November. In contrast, *positive* gatekeeping is more ambitious: elites try to channel their resources to a single favorite, giving their front-runner an overwhelming advantage over opponents before the official primaries begin.

Despite its grand ambitions, positive gatekeeping does occur from time to time. During recent elections, Robert Dole and George W. Bush came out of the invisible primary with commanding leads in 1996 and 2000, as did Al Gore in 2000.[13]

But as a general rule, it will be tough for the new gatekeepers to maintain such a high degree of coordination. They bring very different assets and interests to the table. Some are full-time politicians, others are leaders of activist groups, others come from labor unions and church groups—each can pledge different organizational resources, which have differential value to different candidates, depending on their ideologies and track records. Financial contributors also come in different flavors: some are rich ideologues; others are businessmen who don't care about a candidate's position but want to buy favorable treatment if the candidate comes out on top. To put it mildly, there is no guarantee that this diffuse and diverse set of gatekeepers will lavish their attentions on a single front-runner, or even starve candidates that many oppose.

Recent experience confirms this point: John Kerry and Hillary Clinton were the winners of the "invisible primaries" in 2004 and 2008, but Kerry barely won, and Clinton lost, in the face of insurgent candidates. Republican gatekeepers utterly collapsed in 2008: John McCain won the prize despite a virtual boycott from traditional Republican funders during the invisible primary.

A key to these insurgent breakthroughs is the Internet. Howard Dean was the first to use it as a tool for generating enough money to launch a credible campaign. By the time of the first primary, he had raised more than $41 million, with half coming online.[14] Four years later, Obama raised $28 million online during the single month of January 2008—more than Dean obtained on the Internet during his entire campaign. By the end of February, he had received gifts from more than 1 million

Americans.[15] McCain owed his political survival to similar, if less dramatic, successes.[16]

But money isn't everything, and the Internet weakens the power of traditional elites in other ways.[17] In 2008, 300,000 liberal activists voted nationwide in a "virtual primary" organized by MoveOn.org—more than the combined number of Democrats participating in the first two official polls in New Hampshire and Iowa.[18] When they chose Barack Obama over Hillary Clinton by a 70–30 margin,[19] they erased the frontrunner status she had gained by her victory in the "invisible primary" during the preceding year.

The Internet also levels the playing field when it comes to mobilizing an effective field organization. Candidates need an army of volunteers to reach out to primary voters, and they have traditionally relied on party organizations—as well as labor unions, college clubs, social and religious groups—to fill the gap. This made their leaders into important gatekeepers.

But once again, the MoveOn story suggests that we are entering a new era. The liberal organization announced its poll results as the Democratic candidates were confronting a major test on "Super Tuesday," when twenty-two states held caucuses and primaries.[20] It then formally endorsed Obama, urging its 3.2 million Internet members (1.7 million in Super-Tuesday states) to join the Obama campaign effort. The response was overwhelming, leading Hillary Clinton to blame MoveOn for her poor showing.[21] While left-wing activists have thus far proved more adept in harnessing the Internet to break the grip of the old political establishment, right-wing activists will undoubtedly rise to the occasion in the years ahead.

The emerging system also changes the likely composition of candidates coming forward to claim the big prize. It encourages charismatic outsiders to compete with seasoned and successful

politicians. Sitting governors and senators have responsible day jobs, which make it tough for them to go on the road for months and months in pursuit of the nomination. In contrast, governors and senators who have lost their last election may see a primary campaign as an opportunity to rehabilitate their careers. High-profile media pundits may also take the plunge—while the chance of winning may be low, the notoriety gained from a noble defeat may serve the pundit well in the years ahead.

Worse yet, when successful leaders escape their jobs and fly in to crucial primary states, they must engage in "debates" with their opponents, who denounce corrupt Washington politicians in stirring one-liners. Charisma counts, sound bites count, and experience counts a lot less to the mobilized activists on the right and left of their respective parties. Some candidates may resist temptation and cleave to the center—and primary voters may reward them in the end.

But then again, they may not. When voters go to the polls in general elections, they often use party labels to help sort out the rival candidates, placing Democrats to the left of Republicans on the political spectrum. But this crucial cue is unavailable during primaries, and many voters rely on very scanty information to pick out a favorite from amongst the throng. They may be attracted by a candidate's pleasing manner and a few one-liners, without appreciating his hard-right or -left views. The race may well go to the "stealth extremist"—the campaigner who best combines an appeal to the average Jill Republican, while bombarding political activists with strident messages on the Internet.[22]

Once an insurgent candidate breaks out of the pack, she will generate enormous momentum, with early primary victories generating a flood of campaign contributions, provoking more publicity, and so forth. A good deal will then depend on the

particular states that are up next in the primary schedule. If their voters happen to be especially susceptible to her ideological appeals, her momentum will accelerate.

As lagging competitors begin to drop out of the race, another chance factor enters. The relative position of each frontrunner will depend on the others who remain. In a three-candidate race, an attractive extremist can be greatly advantaged if her two rivals split the moderate vote. Even if she stumbles on the way to the finish line, her rivals will have a powerful incentive to run to the Democratic left or Republican right to pick up the dropout's vote. By the end of the primary season, the winner will be invited to claim a popular mandate for the extreme positions she has taken in the campaign. But a few million mobilized supporters don't amount to much in a country with 130 million voters.[23]

As a consequence, the two winning candidates may swing to the center to compete more effectively in the fall election. But then again, they may remain more or less faithful to the ideology that won them the top spot on the ticket. Or they may revert to strong partisanship once they win the White House.

Broadly speaking, presidents since Roosevelt have followed this last pattern.[24] They have governed as partisans, attempting to persuade centrist voters to move left or right, as the case may be. These efforts at persuasion haven't been very successful, but a more centrist strategy carries even greater risks—the danger of demoralizing the activist base of the president's party. If activists sit on their hands, they will deprive the president of the energy and resources his party needs to win the next election. This polarizing dynamic will only become more powerful with the rise and rise of the Internet, and, as we will see, the presidency will have many more tools to overcome resistance to its extremist initiatives.

When viewed against this background, President Obama's victory contains mixed messages. He was an untested outsider who beat the establishment candidate, Hillary Clinton, by moving to her left on the activist issue of the day—Iraq. He then shifted to the center in his race against John McCain, and it was anybody's guess where he would go next. Obama's cool eloquence and Ivy League background served as a perfect way to reconcile the competing rhetorical demands of the left and the center. On the one hand, his calm demeanor symbolized the triumph of the civil rights revolution, which activists on the left saw as their principal recent achievement; on the other hand, his rationalist Ivy League persona served to reassure centrists of his capacity for balanced judgment.

Future outsider candidates will find it tougher to design symbolic appeals that mobilize activists in the primaries and sustain the broad support of the center. When insurgents look back to Obama's triumphant speech accepting the Democratic nomination, they might be less impressed by what he said than where he said it: Instead of delivering his speech to the convention delegates, he went on television before an adoring throng of 75,000 cheering partisans in a Denver football stadium.[25] This is a kind of ecstatic-charismatic politics that we don't need. Similar stadium scenes will be repeating themselves with increasing frequency over the next century.

Predicting the future is a tricky business. When a strong ideologue captures one party's nomination, the other side may come up with a credible centrist who manages to carry the day. But perhaps both parties will be captured by extremists at the same time.[26] Or perhaps the centrist comes from a party burdened by some economic or military disaster, and the extremist reaps the whirlwind. Only one thing seems clear: if we take a step back from particular scenarios, more presidents will be

governing from the ideological extremes over the next fifty or a hundred years.

Once they make it to the White House, presidents will look to their political consultants to help them guide the course of policy. In contrast to the party bosses of the past, these men and women wouldn't think of running for public office. They may not even be ideologically driven types. Many flit from candidate to candidate—even from party to party—offering their services to the highest bidder. The president's trust in them is a tribute to the rising authority of social science in our national life. He believes, like the rest of us, that these gurus, through the scientific use of polling and focus groups, can frame story lines, sound bites, and dramatic images in ways that will effectively shape the perceptions of ordinary voters, and thereby sustain his popular support.

There is a lot of pseudo-science, and sheer incompetence, mixed into the actual work produced by consultants operating under immense time pressures.[27] But the president isn't going to allow such doubts to afflict him. After all, *his* consultants have used their impressive-looking data and scientistic sloganeering to help catapult him to the White House; if they got him this far, they must be doing something right!

White House interest in polling began with Roosevelt, but it only became a central preoccupation under Richard Nixon.[28] His chief of staff, H. R. Haldeman, was an advertising executive with long experience in marketing, and Nixon asked him to "get in touch" with the "average American" by organizing a polling operation.[29] The reign of media consultants gained further momentum with the triumph of the primary system. Jimmy Carter's pollster, Pat Cadell, played a key role in the candidate's decisive emergence from political obscurity during the Democratic primaries. Once Carter won the White House, Cadell

naturally became part of his inner circle.[30] By the twenty-first century, the polling guru's privileged place in the White House is taken for granted—no president would think of operating without his constant advice.

Different presidents use their pollsters differently. On the one hand, they may use the poll numbers as a mirror of public opinion and try to adapt their own positions to correspond to the shifting numbers. If Bill Clinton's guru, Dick Morris, is to be believed, his boss practiced this *mirroring* strategy:

> For Bill Clinton, positive poll numbers are not just tools—they are vindication, ratification, and approval—whereas negative poll results are a learning process in which the pain of the rebuff to his self-image forces deep introspection. . . . He uses polls to adjust not just his thinking on one issue but his frame of reference so that it is always as close to congruent with that of the country as possible.[31]

When presidents take this mirroring approach, polling operates as a restraint on extremism—constantly pulling them back into the mainstream.

George W. Bush repudiated Clinton's example in his acceptance speech at the Republican National Convention: "[G]reat decisions are made with care, made with conviction, not made with polls."[32] While he "out-Clintoned Clinton" in creating a White House Office of Strategic Initiatives,[33] he did not systematically engage in mirroring. He often used the office to design narratives and sound bites that would shore up support for positions that expressed his own firm convictions.[34] This *manipulative* strategy encourages extremism.

This is true even if media-manipulators don't turn out to be particularly successful in one or another case.[35] At the critical moment of decision, no president can ever know how his manipulative strategies will work out. The question is whether he

has sufficient confidence in his gurus to give it a try. From this vantage, the increasingly loud self-confidence of media manipulators is cause for concern.

Consider the remarkable writings of George Lakoff, an academic giant in the field of linguistics, who has more recently become a leading liberal public intellectual. In his *New York Times* bestseller, *Don't Think of an Elephant!*,[36] he faults his fellow progressives for allowing conservatives to frame the dominant narratives and slogans that currently shape public opinion. The booming science of cognitive linguistics, he assures them, is just what they need to beat the conservatives at their own game.

For present purposes, it's irrelevant whether Lakoff is overselling his new science of unreason.[37] The key point is that the liberal establishment puts its trust in his assurances. The endorsements of Howard Dean, George Soros, and many other leading liberal lights are prominently displayed on his books. Professor Robert Reich offers a particularly instructive recommendation: "It's not enough to have reason on our side. Lakoff offers crucial lessons in how to counter right-wing demagoguery. Essential reading in this neo-Orwellian age of Bush-speak."[38]

Is Professor Reich suggesting that progressives should counter "right-wing demagoguery" with "left-wing demagoguery"?

This is a climate of opinion that encourages future presidents, both left and right, to push forward with their extremist visions, trusting their media gurus to come up with the sound bites and stories needed to sustain mass support.

As demagogy becomes scientific, the great institutional checks on its abuse are disintegrating. During the twentieth century, big city newspapers had the financial resources for large staffs of serious journalists who made it their business to interrogate the administration's story line. The prospect of critical response restrained the White House from indulging in particularly egre-

gious media manipulations and distortions—especially since network newscasts generally took their cue from newspaper story lines. These shows always provided far more superficial coverage: "a big story on television might get two minutes, or about 400 words. The *Los Angeles Times* coverage of the same big story could easily total 2,000 words."[39] Nevertheless, they buttressed the power of professional journalism to serve as a check-and-balance.

But these journalistic gatekeepers have been in decline for a generation. From 1980 to 2000, the proportion of households tuning into the network news declined by half—from about 40 to 20 percent. Both newspapers and television have also reduced their coverage of public issues: in the early 1980s, three-quarters of front-page stories and network newscasts focused on government and politics; by the late 1990s, this proportion had slipped to 60 percent or so.[40] This shift away from public affairs was largely a response to the rise of all-news channels on cable television, which diverted the nation's political junkies to the likes of CNN and Fox. With high-interest viewers abandoning the network news, mainstream broadcasters shifted their coverage to emphasize the "human interest" concerns of their remaining viewers—reducing the flow of political information that many Americans rely upon in making their decisions.[41]

This created a new opening for a presidential end run around the mainstream media. Presidents Reagan, Bush, and Clinton already began to shift away from efforts to address the general public, and toward marketing campaigns that "target[ed] their party bases, . . . [and] splinter[ed] the public into select subsets."[42] These tendencies will accelerate now that the Internet is destroying the economic foundations of professional journalism.

The speed of this transformation is extraordinary—the overall number of newspaper reporters and broadcast news analysts

dropped from 66,000 in 2000 to 52,000 in 2009, with devastating cuts in the Washington press corps.[43] This is only the beginning. The very existence of professional journalism is at stake. We are losing a vibrant corps of serious reporters whose job is to dig for facts and provide both sides of the story in a relatively impartial fashion.

These journalistic ideals didn't exist in the nineteenth century, when the party press dominated political debate. They came to the fore only when changing technologies permitted newspapers, then television, to break free of party control and create a space for independent reporting. Real-world journalism has fallen far short of its professed ideals—but this doesn't mean that we can do without it.

A professional corps of journalists serves as a crucial focal point for the blogosphere.[44] By generating a series of fact-based accounts of public events, it provides millions of bloggers the grist for dynamic democratic debate. But if the economic foundation for serious journalism collapses, blogging will degenerate into a postmodern nightmare—with millions spouting off without any concern for the facts.

Serious reporting on national and international affairs isn't for amateurs. It requires lots of training and lots of contacts and lots of expenses. It also requires reporters to write for a broad audience while maintaining their long-term credibility. The modern newspaper created the right incentives, but without a comparable business model for the new technology, the center will not hold.[45]

So what, say the skeptics: after all, American democracy thrived in the nineteenth century with a partisan press, why can't it survive in the twenty-first century with a postmodern blogosphere?

Because the twenty-first century presidency is a far more dangerous creature than its nineteenth-century predecessor. As

professional journalism disintegrates, the White House can fill the news gap with messages scientifically calibrated to push the hot buttons of different microaudiences.[46] This temptation will be overwhelming during moments of real or imagined crisis, as media gurus turn to YouTube and Twitter to generate a cascade of appeals for support for the Fearless Leader in the White House. Professional journalism has hardly been immune from fear-mongering campaigns, but its role as check-and-balance will be sorely missed.[47]

There is more than a little irony in this dark scenario. Modern Americans are far more highly educated than ever before. In 1940, the average white male went to school for 9.5 years; the average black, 5.7. A half-century later, it was 13.3 for whites, and 12.2 for blacks.[48] Modern Americans move into workplaces that place a much higher premium on their capacity to manipulate symbols in a sensible fashion. And yet their political environment is more irrational than it has been in the past, more reliant on emotional sound bites, and tending always toward a media cult of personality.

These developments engage with basic features of the presidential system in disturbing ways. Most fundamentally, the president remains in office regardless of what his fellow party members in Congress think of him. They cannot threaten to bring him down on a vote of no-confidence if he takes the country in the wrong direction. Until recently, this basic point was tempered by the other bonds that tied the president to the congressional leadership—his need to gain their backing for renomination, their control over local party organizations, their access to public opinion on the ground, and so forth.

But these ties are now greatly attenuated. The most important legacy from the past is the myth of heroic leadership left by the examples of the Lincolns and Roosevelts. Every president hopes to reach and overreach these giants and is tempted to use

his media consultants to propel his charismatic ascent to the Rooseveltian heights.

This heroic tendency is exacerbated by another basic aspect of the system, which is harder to appreciate since it requires noticing a dog that doesn't bark. Consider what happens in a parliamentary system once the dust clears after election day: Not only do voters learn who has won, but they also learn who will be speaking for the losers. When the new parliament opens up for business, the leader of the opposition will be standing opposite the prime minister on the front bench—contesting his claims in a point-counterpoint on the nation's airwaves.

Not in America. Here, the losing presidential candidate is left in the wilderness without any official position, generating a variety of pathologies. Begin with close elections, as in Bush v. Gore. Upon confronting the verdict of the Supreme Court, Gore had two choices. He could either spearhead an extraparliamentary opposition and denounce the new president's claim to legitimacy, or he could quietly depart from the political stage while his opponent flaunted his victory by repudiating the Kyoto Treaty and other leading elements of the Democrat's political program. Gore's restraint in upholding the constitutional system has not been given the credit it deserves.

My point is not to praise Gore but to condemn the system that generated his dilemma. A healthy constitutional order, Madison told us, does not depend on the public virtue of a single man for its survival. Yet our current system *does* depend on the self-restraint of a single person—the losing candidate—whenever the presidential election generates a disputed result. It is only a matter of time before the loser chooses the option of extra-parliamentary opposition, relying on his media consultants to mobilize the millions of activists he has inspired in his primary campaign.

Something like this actually happened in the Mexican rerun of Bush v. Gore in 2006—where Lopez Obrador refused to accept the legitimacy of the Supreme Electoral Tribunal decision awarding the presidency to his rival.[49] This particular adventure in extraconstitutional opposition hasn't worked out too well for Lopez-Obrador or his political party. But this outcome is hardly a guarantee against many dark scenarios in the future, in which the president and counterpresident make escalating charismatic appeals for popular support despite the danger of constitutional disintegration.

The problem isn't as melodramatic in the standard case, where the loser has lost by a substantial margin and the winner's victory is beyond fair challenge—take the Obama election as an example. John McCain conceded defeat in a particularly gracious manner, demoting himself to the position of just-another-senator from Arizona and leaving the opposition party in its normal condition of disarray—with party leaders in Congress and the states competing for attention while President Obama dominated the political stage. As time moves on, the congressional leadership will have to share the spotlight with the leading contenders for the presidential nomination—who will be pandering to their base with extremist appeals.

Worse yet, given the media revolution, pundits like Glenn Beck and Rush Limbaugh will also assert a claim as Republican Party spokesmen, even though they are entirely unconstrained by electoral calculations.

Within this setting, the advantage will sometimes go to the pundits of the world. Their extreme message is attention grabbing, and they are good at delivering it—otherwise, they would never have gotten to the top of the ratings chart. In contrast, the opposition leadership in Congress and the states has the responsibility of decision making, and even presidential candidates can't

always afford to indulge in irresponsible position taking. This shift of opposition "leadership" away from Congress to pundits feeds back into the dominant mode of presidential leadership—extreme media attacks from pundits generate presidential counterattacks, with the White House propaganda machine generating a stream of sound bites asserting the plebiscitary authority of our Fearless Leader. In moments of crisis, this overheated environment will encourage the president to claim inherent authority to act decisively, overcoming or ignoring the objections raised by assorted naysayers in Congress and the courts.

This dynamic will be at its maximum if the president gains his office through extremist appeals to primary activists; but even candidates who campaign as centrists will be sorely tempted to take this path in times of emergency.

Recall that George W. Bush was elected as a mainstream moderate, running on a platform that made him seem almost indistinguishable from the equally moderate Al Gore. Ask yourself how the last decade would have gone if the victor in 2000 had instead campaigned as a proud representative of the Republican right wing.

I have been dealing with the president's transformation from an eighteenth-century notable to a nineteenth-century party magnate to a twentieth-century tribune to a twenty-first-century demagogue, asserting extraconstitutional authority to master the latest crisis threatening the Republic.

But the modern president not only dominates the polity. He also commands a vast bureaucratic machine: will it resist, or facilitate, his demagogic impulses?

The Framers were in no position to frame this question, let alone resolve it. They supposed that administration, like politics, would be a gentleman's game. The principal jobs were placed in the hands of local notables, who served as collectors of the

customs, United States attorneys, and the like. It would take a century before anything resembling a bureaucratic corps of expert officials began to take on a significant role in American government.

The only expertise the Founders recognized was of the legal variety—and they took a giant step beyond John Locke in insulating the judges from politics. In Locke's view, the judiciary was simply a part of the executive, and did not deserve treatment as an independent branch of government.[50] The Founders disagreed—building on their colonial experience, they took strong measures to protect the judges from political pressures. That was as far as they could see. They didn't worry about their system's operation in a world where the president had control over a massive federal bureaucracy—such a prospect simply was beyond the horizon of eighteenth-century thought. But we do have to worry about it—because the Founders' system has had a perverse impact upon the modern bureaucratic state in America, vastly increasing the dangers of a runaway presidency in the century ahead.

Begin with the basics. The modern bureaucracy has become a central arena in the ongoing competition between the president and Congress for political ascendancy. Both sides bring their own distinctive weapons to the struggle. Congressional committees use their powers over the budget to threaten agencies with financial reprisal if they don't move in the direction demanded by leading senators and representatives.[51] The president counters with his power over personnel. He can't rely on long-time civil servants to stand up to congressional browbeating. If he hopes to maintain bureaucratic momentum behind his own policies, he must put his political appointees in command positions—and rely on their loyalty to fend off congressional resistance to White House initiatives.

These imperatives have played themselves out in different ways over time. First, presidents have won the right to colonize

the bureaucracy with more and more of their political appointees. The number of top-level positions requiring Senate confirmation has grown from 196 under the Kennedy administration to 786 under Clinton to 1,141 under George W. Bush.[52] The president can also fill many key posts unilaterally, giving him the authority to make 3,000 appointments in all.[53] No other advanced democracy allows its chief executive to place an army of political loyalists into positions where they can override the judgments of professional civil servants on the basis of presidential priorities.

Second, modern presidents have surrounded themselves with a White House staff of superloyalists—numbering more than 500 in recent years.[54] This large staff plays a key role in further centralizing presidential control. This is a modern development. It was only in 1939 that President Roosevelt won the right to name six "presidential assistants" to serve on his staff. Until then, the president governed through his cabinet, relying only on occasional advisers loaned to him by one or another department. But over the past two generations, the White House staff has become a powerhouse. White House "czars" sometimes have more power than cabinet secretaries.

Over the decades, presidents have provided their White House staff with new tools for bending the vast bureaucracy to their will. The construction of these centralizing techniques has been a bipartisan project from Nixon to Obama, but Ronald Reagan made a decisive breakthrough.[55] He was the first to issue an executive order to ensure that the vast federal bureaucracy complied with his favored regulatory philosophy: in his case, economic cost-benefit analysis. The Reagan order required all agencies in the executive branch to submit a regulatory analysis to a special White House office before promulgating major regulatory initiatives.

No congressional statute authorized this step. To the contrary, Congress has generally put full regulatory responsibility on a particular agency or cabinet department, without explicitly giving the president the right to intervene. Nevertheless, President Reagan transformed his Office of Information and Regulatory Affairs[56]—pronounced "Oh, Ira" inside the Beltway—into the supreme regulator for the entire executive branch.

Reagan, and then George H. W. Bush, used OIRA as a key element in a broader campaign against the big-government philosophy left behind by the New Deal and the Great Society. A half-century of legislation had entrenched activist principles into governing law—to the point where even a Republican-led bureaucracy often believed itself legally compelled to embark on large-scale interventions. But agency regulators now confronted a final obstacle in OIRA, which frequently rejected their proposals—generating broad protests at the ongoing White House effort to use cost-benefit analysis to undermine the rule of law.

These protests didn't deter the Reagan-Bush White House from continuing centralized review, but it did put OIRA under a cloud when the Democrats returned to power in 1992. With advocates for stronger regulation returning to policy making positions, one might have expected them to call upon President Clinton to abolish OIRA and liberate the departments to pursue their statutory mandates.

Nothing like this happened. President Clinton not only retained OIRA but pushed the project of centralization to new heights. So far as he was concerned, the problem with OIRA was its antiregulatory bias: it could reject departmental initiatives as too costly, but it couldn't push regulators in aggressive new directions. Since Clinton was a true believer in activist government, he quickly moved to remedy this deficiency.

His White House staff began to issue something called "presidential directives" to kick-start the regulatory process in the agencies. These directives did not leave it up to the agency to design its own regulatory program after undertaking an in-depth study of one issue or another. White House staffers often told the agency what the president wanted the regulations to look like (at least in general terms) and gave it a specific deadline to come up with regulations for further review by OIRA. To top it off, Clinton typically went into the pressroom himself to announce his top-down initiatives with great fanfare.

He repeated this credit-claiming ritual when the bureaucracy responded with a concrete regulatory proposal. After gaining the approval of OIRA, agency heads stood in the shadows as the president took the spotlight to announce his latest initiative to the public.

Congress never explicitly authorized this latest power grab. But this fact didn't lead to widespread legal condemnation of Clinton's great leap forward. To the contrary, it provoked liberal legal thinkers to develop ingenious theories that aimed to fill the statutory void.

The most notable contribution was a hundred-page essay on "presidential administration" by Elena Kagan. She had played an important role as a White House staffer in designing the Clinton initiative. She then proceeded to defend it on the pages of the *Harvard Law Review*. Written shortly before she became Harvard's dean, it presents a vigorous defense of the legality and wisdom of Clinton's breakthrough.[57]

Kagan is not just another legal apologist for presidential power. She fully recognizes that centralization brings new dangers. While the White House staff is full of smart people, the agencies they now purport to direct are full of long-time professionals who have spent years trying to understand the complex re-

alities they seek to regulate. The recent power shift inevitably changes the balance of policy making away from agency expertise and toward politicized efforts to implement the president's "mandate." Kagan also acknowledges that presidential administration carries a new danger: "lawlessness—that Presidents, more than agency officials acting independently, tend to push the envelope when interpreting statutes."[58]

This dynamic became particularly prominent when Clinton lost Congress to the Republicans in 1994. Since Clinton could no longer hope for significant legislative achievements, he

> came to view administration as perhaps the single most critical—in part because the single most available—vehicle to achieve his domestic policy goals. . . . [N]othing was too bureaucratic for the President. In event after event, speech after speech, Clinton claimed ownership of administrative actions, presenting them to the public as his own—as the product of his values and decisions. He emerged in public, and to the public, as the wielder of "executive authority" and, in that capacity, the source of regulatory action. As a result, during the Clinton years, the "public Presidency" became unleashed from the merely "rhetorical Presidency" and tethered to the "administrative Presidency" instead.[59]

Kagan notes that Clinton's presidential pretensions generated recurring bouts of lawlessness as the bureaucracy tried to fulfill the president's directives. Nevertheless, she concludes that the dangers of charismatic lawlessness are outweighed by the president's unique claims to democratic legitimacy. If he is to fulfill the high hopes that Americans have invested in the presidency, he simply must be in a position to overcome the bureaucratic inertia and tunnel vision that prevents fulfilling his electoral mandate.[60]

In treating the risk of lawlessness as an acceptable price to pay for presidential centralization, Kagan's essay played a key

role in building a bipartisan elite consensus in support of strong executive prerogatives.[61] It is no surprise, then, that both Bush and Obama have continued down the centralizing path blazed during the Clinton years.[62]

I mean to challenge this Beltway consensus.[63] The larger framework presented in this chapter permits us to glimpse a darker possibility: By constructing a new form of presidential administration, centrists like Clinton and Obama are preparing the way for a tragic future in which extremist presidents take the center of the bureaucratic stage. Especially when confronting congressional opposition, they will use their White House staff to give the bureaucracy marching orders to implement their charismatic visions. In generating a steady stream of presidential directives, the superloyalists in the White House will refuse to defer to expert assessments of the facts, or traditional understandings of the law, provided by the agencies. They will call upon the entire executive branch to join the exciting enterprise of executing the president's mandate from the People. And these instructions will receive an enthusiastic reception—since the bureaucracy will be under the command of presidential appointees, who gained their deputy assistant secretaryships on the basis of their partisan loyalties.

Is this what we really want?

I have been trying to shake Americans out of their complacent assumption that the past is prologue and that we will continue to keep the presidency under constitutional control. The presidency of the twenty-first century is a vastly different institution from its predecessors. Instead of supposing that the Founders told us (almost) all we need to know, we should recognize that the modern system generates three distinctive dangers.

The first is extremism, which I have been defining in terms of a president's distance from the median voter: Do his posi-

tions approximate those held by mainstream Americans, or do they track the left or right wing? If the latter, the president counts as an extremist, regardless of the content of his positions. Call this *structural* extremism because it doesn't depend on claiming that left- or right-wingers are substantively wrong in their critique of mainstream values. Indeed, the "extremists" of one generation have often launched a morally compelling critique that ultimately transforms the status quo.

But in America, it is not enough to be right. Before you can impose your views on the polity, you have to convince your fellow citizens that you're right. That's what democracy is all about. So it makes good sense to require the president to gain the support of Congress even when his vision is morally compelling. He should not be allowed to lead the nation on a great leap forward through executive decree.

Especially since his self-righteous campaign might actually be pushing the nation over the precipice into moral disaster. After all, his appeal to left or right extremists hardly ensures ethical insight. All it guarantees is a great deal of applause from supporters as the president breaks through institutional roadblocks to lead the American People to the promised land. The modern primary system makes this extremist scenario an all too real possibility.

It also promotes a second great danger: a politics of unreason. Once presidents have relied on their media gurus to sound-bite their way to the White House, they are naturally predisposed to believe in their near-magical powers. But even when a moderate gains the presidency, media manipulation will be an entrenched part of twenty-first-century politics. The president will not sit on the sidelines and allow his opponents to drive him into a corner by their intemperate sound-bite campaigns—especially since the American system gives him the power to tower over his rivals in the media wars. It makes sense, then, to treat the politics

of unreason as a distinctive evil that may be deployed by presidents of all varieties—centrists as well as extremists.

The same is true of our third problem: presidential unilateralism. From the beginning of the republic, the Constitution gave the president a "first-mover" advantage in dealing with the other branches. George Washington, no less than Barack Obama, could act unilaterally, and place the burden on Congress or the Supreme Court to undo the damage—either by passing a statute or declaring his actions illegal or unconstitutional. But this first-mover advantage has a very different meaning in a bureaucratic world in which the White House staff can create sweeping changes that will be very hard to reverse once they are set in motion.

Extremism. Irrationality. Unilateralism. These elements will interact with one another in different ways over the course of the twenty-first century, generating a wide variety of patterns. Sometimes one or two elements will be politically salient, but the worst pathologies will involve all three. Under these scenarios, an extremist president relies on his media manipulators to project his sound bites and images over the cacophony of voices generated by his opponents in Congress and elsewhere. At the same time presidential loyalists place the power of the federal bureaucracy at his command, substituting his dictates for the rule of law. Under these conditions, both Congress and the courts may be reduced to impotence, or if they resist, the institutionalized presidency may become the springboard for an authoritarian takeover.[64]

This grim prognosis depends on structures, not personalities, permitting us to move beyond knee-jerk reactions to the politics of the day. Most obviously, the election of President Obama has, for many, sufficed to dispatch any serious doubts about the system: Good-bye, imperial presidency; hello, America's first black president, and the nation's remarkable capacity for constitutional renewal!

This moment of triumph has already passed, giving way to pervasive uncertainty. Despite some major legislative triumphs during his first two years in office, Obama's restless followers demand more assertive leadership—recalling his brave words in the campaign. But how can Obama give them what they want when he lacks the votes in Congress?

He may be charismatic, but he is no extremist: there is little chance of his running roughshod over congressional prerogatives, even those as indefensible as the filibuster. But the next insurgent president may not possess the same sense of constitutional restraint. He may insist on fulfilling his self-proclaimed popular mandate even if it provokes a profound constitutional crisis. So long as he has enough partisan supporters in the Senate, the prospect of impeachment will not serve as a significant deterrent.

What happens next?

This initial survey doesn't permit an answer. We cannot glimpse the full extent of our predicament without bringing the military into the foreground. As the next chapter suggests, this will complicate our story, but not diminish its darker aspect.

2

THE POLITICIZED MILITARY

Our eighteenth-century Constitution was written for a republic of notables. It supposed that the Electoral College would consist of great landowners, merchants, and lawyers who would filter out demagogic claptrap and choose presidents who were seasoned statesmen following the example set by George Washington. The chief executive, consulting with his fellow establishment types in the Senate, would then appoint lesser notables as judges, diplomats, and customs officials to take on the very modest tasks of the federal government.

When Thomas Jefferson settled down in the White House in 1802, the executive establishment residing in Washington, DC, consisted of 132 federal officials of all ranks. (One was Jefferson's personal secretary, who served as his entire staff.) Moving beyond the nation's capitol, the "executive branch" consisted of 2,875 civilian officials. About 2,300 were revenue collectors and deputy postmasters.[1]

The Constitution now governs a very different world—party primaries have displaced the Electoral College, allowing extremist candidates to mobilize true believers; presidents rely on consultants to manipulate public opinion; the separation of powers concentrates power in the White House and politicizes the operation of a massive bureaucracy. These three factors have transformed the presidency into something the Founders wouldn't recognize. It is now a large and complex institution that can operate as a launching pad for charismatic extremism

and bureaucratic lawlessness. We now turn to consider a similar, but different, transformation on the military side of the government.

The president's position as commander in chief was also designed for a republic of notables. The Founders expected the same group who ran the civilian government to take command of the army at moments of crisis. Given the Atlantic Ocean, the European superpowers could not easily launch a serious attack, and it was much too expensive to prepare for one in advance. In 1802, for example, the entire army, navy, and marine corps numbered 6,500 men—and this was during a time of totalizing European war, when Britain and France were aggressively threatening American interests.[2] If an invasion did take place, the Founders relied on local notables to rally citizen militias and lead a counterattack on behalf of the people, in the manner of Washington and his fellow officers during the Revolution.[3]

All of this seems quaint today. We rely on a professional officer corps for leadership on the high-tech battlefield of the twenty-first century. But when the Founders were writing the Constitution in 1787, professionalism wasn't a real-world option. The first serious steps toward a modern officer corps were only taken twenty years later—when the Prussians responded to their crushing defeat by Napoleon by starting to churn out officers trained in the science of war. Even after Europe began to get serious about military education, America lagged far behind. West Point was primarily a school for civil engineers during the early decades;[4] the service academies began to concentrate on military strategy only after the Civil War.[5]

Despite this fundamental transformation, one Founding concern remains alive and well today. We continue to have a deep constitutional commitment to the principle of civilian control: the professional military should take orders from democratically elected politicians on the big issues of war and peace.

But principles can become banalities without ongoing efforts to make them into operational realities. This has been the fate of civilian control over the past half-century. The rise of the professional military raises a host of distinctive problems, and yet the last major constitutional thinker to confront them was Samuel Huntington. His 1957 book, *The Soldier and the State,* continues to shape the thinking of specialists,[6] but it has been forgotten by scholars in law and political science who consider broader constitutional issues. They have turned a blind eye to evolving institutional realities that have placed the future of civilian control in jeopardy.

When Huntington published his book, America was at the dawn of a new age of civil-military relations. From George Washington to Dwight Eisenhower, victory in war catapulted triumphant generals into the White House, but peacetime was a different matter. The officer corps remained on the periphery of politics because the country refused to invest heavily in a large military establishment. Deeply suspicious of a standing army, Americans principally relied on geography for their security. While top generals and admirals lobbied Congress on particular issues, the center of American politics was elsewhere—the tariff, the banks, slavery, populism, economic crises.

The Cold War marked a turning point. The country now had millions under arms, and the officer corps would play a central role in peace as well as war. In response to America's rise as a superpower, the Truman administration constructed new foundations for civilian control. The Department of Defense, with a strong civilian presence, was superimposed upon the old military departments, and a National Security Council in the White House gave the president new institutional resources to deal with the steady stream of military demands.

Huntington was pessimistic about the future of these experiments. He did not think they would restrain the rising political

power of the military, and he suggested that we had a new problem on our hands. Generals would not only dominate the political stage after winning some glorious victory on the battlefield. They would intervene on a permanent basis, undermining core principles of civilian control. But Huntington was writing at an early stage in the new era. The question is whether his pessimistic predictions have been vindicated.

The answer is yes. The 1980s marked a turning point: the Reagan years saw an increase in the political power of the chairman of the Joint Chiefs of Staff, an erosion of effective civilian control in the Pentagon and National Security Council, and a transformation of the senior officer corps into a partisan Republican force. These developments are now entrenched, and they require us to rethink fundamentals.

Traditional constitutional thought follows Montesquieu in separating power into three—and only three—aspects: legislative, executive, and judicial. Under modern conditions, however, the systemic threats generated by "executive" power in contemporary life don't arise from a single source. On the civilian side, the dangers come from charismatic extremism and bureaucratic lawlessness; but on the military side, they come from an increasingly politicized officer corps. When a charismatic president encounters a politicized military, lots of different things can happen. We must consider a number of scenarios, each requiring separate attention.

But I am getting ahead of myself. The place to begin is with my debt to Huntington—which is real, but limited. It would be pointless to elaborate on points of disagreement. My aim here is to build on some of his key insights, adapting them for my own purposes. So blame me, not Huntington, for what follows—though it's only fair for me to acknowledge his influence from time to time.

I will be distinguishing between two forms of civilian control.[7] *Participatory* control represents the Founders' strategy. Under this approach, civilians control the military by joining the military for short tours of duty before returning to civilian life.

Participatory control is not entirely obsolete. Until the Vietnam War killed the draft, the rank and file was largely composed of ordinary civilians on short tours of duty—and this played a key role in maintaining democratic accountability for the use of military force. It remains possible, though not likely, that a civilian draft will return in the future.[8] But so far as the officer corps is concerned, there is no going back, and Huntington is right to insist that this permanent transformation requires a different strategy to sustain civilian control.

Call it *supervisory* control. Under this approach, Americans rely on democratically elected leaders to keep the officer corps in its rightful place. While politicians should consult with the generals as to the military feasibility of their goals, it is up to civilians to make the big decisions. When a supervisory system is firmly in place, the officer corps cannot leverage its technical expertise to supplant democratically elected politicians in their central role. The key question is whether the American Constitution contains the institutional resources needed for an effective supervisory system.

Huntington denied this. He agreed that America largely kept the officer corps in check during its first 150 years, but attributed this to nonconstitutional factors. Most obviously, the Atlantic Ocean made massive military expenditure seem like a pointless luxury to the dominant commercial classes, who refused to pay the bill. But now that America had become a superpower, Huntington didn't believe that the Constitution was equal to the task. Huntington's villain was the Founding separation of power between the president and Congress, which generated intense

competition between the branches in a way that would inexorably politicize the officer corps.

We have already encountered a version of this problem in a different context. The last chapter focused on the politicization of the civilian bureaucracy and located its source in interbranch competition. Modern presidents politicize the upper reaches of the bureaucracy to fend off congressional efforts to undermine executive priorities. Presidents fear that civil servants will defer to special pleading by congressional barons and pursue their objectives at the expense of White House initiatives. As a consequence, they have replaced civil servants with political loyalists in the higher reaches of the bureaucracy and rely on them to protect presidential priorities against congressional erosion.

This "replacement strategy" won't work on the military side of the government. While presidents often place loyal incompetents into top posts on the civilian side, they can't get away with the same thing when it comes to the military. There would be a howl of protest if the commander in chief tried to nominate a loyalist-civilian as chairman of the Joint Chiefs of Staff. If the military is to become politicized, the separation of powers must operate in a different fashion—and here is where Huntington's argument comes in.

On his view, the ongoing competition between House, Senate, and president provides a continuing temptation for military self-aggrandizement on matters large and small. Most obviously, the services are constantly seeking political support for their favorite weapons, organizing congressional coalitions to fight off episodic challenges from civilian budget-cutters in the White House and the higher reaches of the Pentagon.

But I will be focusing on the military's role in high politics, not its endless effort to get more money for its favorite high-tech weapons. Huntington believed that the ongoing competition between the White House and congressional barons would

give top officers endless opportunities to become an independent political force—allowing them to tip the balance of political support in one direction, then another, as the competing branches struggled for power.

The high command might, of course, refuse this structural invitation to play politics. It might follow a professional code that dictated rigorous self-restraint on hot-button issues—speaking in the most anodyne terms on contested matters until they were settled by the contending parties in control of the House, Senate, and presidency. But when Huntington looked around in the early 1950s, this didn't seem very likely.

And given the structural transformations of the Reagan years, the politicization of the high command is now a central fact of American politics.

Begin with the Goldwater-Nichols Act of 1986. Until then, the Joint Chiefs of Staff did not have the capacity to present a united front to its civilian bosses. It was a forum for intense interservice rivalry, with each chief fiercely promoting his service's distinctive interests and weapon systems. The chairman could only present the unanimous views of the Joint Chiefs.[9] Since there was often a deadlock, he could not "force a resolution, [or] substitute his own advice to give to the civilian authorities."[10] His reports tended to paper over sharp differences with amorphous policy recommendations, leading a string of presidents to complain about the quality of military advice.[11]

Goldwater-Nichols changed all that—transforming the military into a unified force that can play the president off against Congress in the service of its own political vision. This wasn't the central aim of the statute, which focused on functional, not constitutional, imperatives.[12] When the military failed to free the hostages in Iran, and then botched the invasion of Grenada,

it looked like interservice rivalries were undermining even minor operations.[13]

Congress responded with a sweeping reorganization. It subordinated the individual services to regional commanders in each "unified combatant command."[14] If officers hoped to become generals or admirals, they would be required to serve tours within these unified commands and gain a broader view. Over time, this organizational change would revolutionize the attitudes of rising officers—intense commitment to a particular service would no longer pay off in promotions.[15]

Goldwater-Nichols also transformed the role of the chairman of the Joint Chiefs. He was no longer a mediator for the competing services but the military's "principal" spokesman at meetings of the National Security Council.[16] Colin Powell quickly exploited this new opportunity.[17] As chairman under George H. W. Bush, he treated the Joint Chiefs as a purely advisory body: "I did not have to take a vote among the Chiefs before recommending anything. I did not even have to consult them, though it would be foolish not to do so."[18] Supported by a powerful staff,[19] he now had the capacity to frame the key military-strategic options to the civilians on the NSC, and he used this power to outmaneuver his hawkish secretary of defense, Dick Cheney, and provide a military endorsement for George H. W. Bush's more flexible response to the decline and fall of the Soviet Union. He then implemented his Powell Doctrine,[20] advocating overwhelming military superiority in the runup to the first Iraq War. When his policy was rewarded by a sweeping victory in the field, he became the first "celebrity" chairman.

In earlier eras of American history, Norman Schwartzkopf, the victorious field commander in Iraq, might have parlayed his rapid triumph over Saddam into a brilliant political career—going down the path marked by the likes of George Washing-

ton and Andrew Jackson and Dwight Eisenhower. But for the first time in history, it was Colin Powell, the paradigmatic armchair general, who dominated the media coverage and gained enduring political influence.[21]

The triumphant bureaucratic-warrior then began to lecture Bill Clinton on his responsibilities during the presidential campaign of 1992—writing a *New York Times* op-ed opposing American intervention in Bosnia,[22] following up with a *Foreign Affairs* article elaborating his broad strategic vision: "As chairman of the Joint Chiefs of Staff of the U.S. armed forces, I share the responsibility for America's security. I share it with the president and commander in chief, with the secretary of defense and with the magnificent men and women—volunteers all—of America's armed forces."[23]

In this remarkable preamble, Powell is staking a claim to membership in a supreme troika, "shar[ing] responsibility" with the civilian president and secretary of defense. His public interventions on "Don't ask, don't tell" were no less remarkable, since they involved an issue of public morality far removed from questions of military strategy.[24] The rise of the "celebrity" chairmanship was creating a large challenge to the principle of civilian control—all the more so because it did not generate a negative response from the larger public.

Bill Clinton noticed. As Powell emerged as a potential presidential rival on the Republican ticket in 1996, he tried to coopt him by offering the job of secretary of state. Powell refused the invitation (twice),[25] but in deciding on his successor, Clinton recognized that the character of Powell's office had changed. Presidents had traditionally promoted one of the sitting members to the chairmanship of the Joint Chiefs. Clinton looked elsewhere in search of a chairman who would give him more reliable political support. General John Shalikashvili was only the chief of a regional command when Clinton made him chairman.

Once elevated to the top job, he greatly assisted Clinton in gaining public support for military initiatives in Haiti and Bosnia.[26]

Shalikashvili was a highly competent officer. But his appointment put younger officers on notice that, in a world of celebrity chairmanships, presidents were concerned with politics, as well as professionalism, in making their picks.[27]

The Bush years also made a paradoxical contribution to the politicization of the high command. They began with a strong reaffirmation of civilian control, but they ended with the president in chaotic retreat, politicizing the military further in a rearguard defense of his authority as commander in chief.

The rise and fall of Donald Rumsfeld is the more notorious half of the story. Even before September 11, Rumsfeld was vigorously asserting civilian leadership, provoking the Joint Chiefs to rethink Cold War legacies and to confront the challenges of twenty-first-century warfare. Given the difficulty of the task, he was making real headway. The Pentagon hadn't seen anything like it since the heady days of Robert McNamara.[28]

Rumsfeld was also successful in imposing his strategic vision in the run-up to the second Iraq War—maintaining civilian control despite the operation of the separation of powers. When a Senate hearing gave a public platform to army chief General Shinseki, he used it to warn the nation that a successful occupation of Iraq would require "several hundred thousand" troops.[29] Rumsfeld responded by humiliating Shinseki during his remaining time in office—refusing even to attend his retirement ceremony.[30]

Which leads to the promised paradox. Shinseki's opposition is already playing a part in a retrospective morality play, in which the civilian Rumsfeld is cast as the archvillain and the professional military as the heroes. Like McNamara's failure in Vietnam, Rumsfeld's failure in Iraq may well discredit further

aggressive efforts at civilian control for a long time to come—opening the way for future military men to dominate the political stage.

This is just what happened during Bush's final years. Faced with rising opposition to the Iraq War, the president lost control of Congress to the Democrats in the 2006 elections. At the same time, a bipartisan group of notables serving in the Iraq Study Group urged an about-face in Iraq, endorsing a phased withdrawal and a sweeping diplomatic initiative.[31]

Bush responded to these pressures by firing Rumsfeld, but this was merely a gesture to deflect his critics. In a final effort to redeem his military gamble, he ordered more, not fewer, troops into Iraq. But at the end of the day, he was obliged to convince Congress to appropriate the extra money needed to sustain his "surge" into the future. With his poll numbers sinking into the 30s,[32] how was he to gain support from a Democratic Congress?

The president used General David Petraeus, his new commanding general in Iraq, as his principal political weapon. The climax came on September 11, 2007. As the nation paused to remember the attack on the Twin Towers and the Pentagon, the president's general appeared on television as the steely-eyed hero of the hour, urging Congress to endorse the "surge" as a key step in our ultimate victory in "the war on terror."[33] In fact, if not in name, it was an army general who was calling the shots—an especially bitter pill for a president who had celebrated his supreme control over a "unitary executive."

The president didn't pick Petraeus by accident. The general had already helped out by emphatically supporting his Iraq policy in a *Washington Post* op-ed during the president's reelection campaign in 2004.[34] In selecting Petraeus right after the 2006 election, he was picking a commander who had already demonstrated his loyalty. Petraeus's critical role in rescuing the president in 2007 emphasized the military's political authority

and set the stage for an early challenge to the Obama presidency: the Afghan war.

In deciding on the future of this conflict, Obama was in a far stronger political position than Bush. He was doing well in the polls and remained a compelling presence on the political scene. He didn't need the military nearly as much as his lame-duck predecessor did. Nonetheless, the Pentagon quickly began a public initiative to push him into its favored strategy.

Mike Mullen, the chairman of the Joint Chiefs, had already publicly opposed Obama's position on the Iraq war during the election campaign.[35] In early September 2009, he had a high-visibility opportunity to pressure Obama on Afghanistan. At Senate hearings on his confirmation to a second term as chairman, Mullen made an aggressive case for a long-term commitment.[36] At about the same time, David Petraeus, in an interview with the *Washington Post,* was backing a "fully resourced, comprehensive counterinsurgency campaign."[37]

The generals were throwing their support behind a confidential report by General Stanley McChrystal, the Afghan field commander, who warned of "mission failure" unless the American commitment was increased by 40,000—from 60,000 to 100,000 troops.[38] To drum up further support, Mullen then summoned the bureau chiefs of five television networks to a background briefing, telling them that "the McChrystal Plan had to be adopted in full, including a five- to eight-year commitment of forces, maybe longer, or the United States faced defeat."[39]

With Obama beginning a series of top-level strategy sessions on September 13, the Pentagon escalated its pressure campaign: on September 17, it leaked McChrystal's report to the press, with the White House suspecting the Joint Chiefs as the source.[40] Then McChrystal followed up with a show of defiance. At a question-and-answer session in London, he was asked whether

he could support a battle plan, championed by Vice President Biden, that relied on drone aircraft and special forces, rather than a large troop surge. His response: "The short glib answer is no." This verged on outright insubordination, and Obama immediately summoned him for a private dressing-down.[41]

But the president reserved his real fire for Mullen and Secretary of Defense Gates. Calling them to the Oval Office, he condemned the Pentagon campaign as "disrespectful of the process" and insisted on knowing "here and now" whether the secretary and the chairman would faithfully carry out any and all presidential commands.[42] This finally got their attention, and Gates quickly made a public speech emphasizing that it was "imperative" for generals to advise the president "candidly but privately."[43] The public pressure campaign finally came to an end.

As for Mullen, he described himself as "chagrined" by the strong presidential push-back, especially since he viewed himself as a proponent of civilian control.[44] Perhaps he was right to be surprised. Despite his efforts to pressure Obama on Iraq (during the campaign) and Afghanistan (during the run-up to decision), he had indeed earned a reputation as a relatively nonpartisan chief.[45] But this only suggests how hyperpoliticized the office has become.

The meaning of this latest misadventure is still uncertain. Despite Obama's strong reaction to the public challenge to his authority, the military managed to get a lot of what it wanted: the president finally did endorse a McChrystal-style surge of 30,000 to 40,000 troops.[46] Nevertheless, the military didn't get everything. In particular, the president refused to make the "five- to eight-year commitment" that Mullen had been lobbying for. Obama insisted that the "surge" would be temporary, and that troops would begin to leave Afghanistan by July 2011—in plenty of time for the next presidential election.[47]

We shall see whether the president makes good on this promise. At the very best, we are left with an ambiguous precedent: Does Obama's escalation of the Afghan war suggest that even a popular president caved in to the military? Or is it a case of a strong president shutting down the military effort to browbeat him—and then using his own best judgment to craft a sensible middle course?

Or a bit of both?

Whatever the answer, it doesn't affect my basic thesis: Since the passage of the Goldwater-Nichols Act of 1986, the accumulating precedents established by Colin Powell and his successors may well explode in the face of some future president. Call it the "Colin Powell scenario," under which a celebrity chairman of the Joint Chiefs, or a renowned regional commander, leads a public campaign to bring his "commander in chief" into line with prevailing military opinion. But next time around, the escalating conflict between the chairman and the president may get out of hand, precipitating a constitutional crisis.

The political power of the military is enhanced by a second dynamic. When the postwar generation created the Defense Department and the National Security Council, it aimed to place the new and massive military establishment under firm civilian leadership.[48] But the past generation has seen a serious erosion of this commitment—key "civilian" positions are increasingly colonized by retired officers whose basic values have been shaped by their successful military careers.

Once again, the Reagan administration marked a turning point. Before 1980, the Senate confirmed forty-two secretaries of the army, navy, and air force, and nearly all were civilians in fact as well as name. Only one had fifteen years of military service, and only 17 percent had served for as many as five years; after 1980, twenty-seven have been confirmed, and nearly a quar-

ter had fifteen years of service, while 44 percent had five years.[49] Only the secretary and undersecretary of defense remain reliably civilian.[50]

Military colonization is also proceeding in the White House. The National Security Council only gradually turned itself into a powerhouse, with the big shift coming in 1960. That was when John Kennedy revolutionized the job of national security advisor by naming McGeorge Bundy. Like his predecessors, Bundy was a civilian, coming to the position after a brilliant career at Harvard.[51] But he vastly increased the job's importance, becoming a key player on the president's team. His success paved the way for a series of intellectual leaders—Walt Rostow, Henry Kissinger, and Zbigniew Brzezinski—who often eclipsed their secretaries of state during the presidencies of Johnson, Nixon, and Carter. The only exception to the rule of civilian control was Brent Scowcroft, who served as advisor to Gerald Ford when Henry Kissinger was dominating the field as secretary of state.

Things changed under Reagan. After running through two undistinguished civilian advisors in three years, Reagan wanted heavyweight James Baker to reinvigorate the job, but retreated when his initiative provoked bureaucratic opposition. He then made a fateful turn to the military—choosing Colonel Robert "Bud" McFarlane, and then Vice Admiral John Poindexter.[52]

The result was the Iran-Contra catastrophe. In the words of Ivo Daalder and I. M. Destler: "Had the president stuck to his guns and appointed Baker as his NSC Advisor, it is inconceivable that the kind of shenanigans and outright illegalities that characterized the NSC during the next three years would have occurred. Baker was too aware of the political context of the presidency and the conduct of foreign policy and much too savvy to let anything like that come to pass. Reagan would later admit that his failure to appoint Baker was a 'turning point' for his administration—but the recognition would come too late."[53]

Even when Reagan finally recognized his mistakes, he did not respond by returning the NSC advisorship to civilian control. To the contrary, he named Colin Powell to the job near the end of his term, and George H. W. Bush followed up with Brent Scowcroft, the retired lieutenant general who had also served under Ford. Neither Powell nor Scowcroft could provide the intellectual firepower of a Bundy, Kissinger, or Brzezinski, but they did well enough to blot out the disastrous precedents left by McFarlane and Poindexter, making the position ripe for further military colonization at later moments.[54] Most notably, when Barack Obama named the former commandant of the Marine Corps, James Jones, to serve as his NSC advisor, nobody seriously questioned the propriety of his choice. In contrast to the secretary of defense, the NSC advisor is no longer a position that is specially reserved for civilian control.[55]

Perhaps September 11 helps account for this and other recent cases of military colonization. Consider the CIA, whose directorship has increasingly been occupied by civilian outsiders capable of bringing a broad perspective to agency operations.[56] But in response to its recent intelligence failures, the CIA has lost its status as lead agency. Nowadays its director no longer gives the president his daily briefing in the Oval Office. This is a job for the new director of national intelligence, who is in charge of coordinating the vast surveillance effort. There have been three directors thus far: the first was a civilian; the next two, recently retired admirals.[57]

A similar pattern prevails at the Defense Department. Its recent decision to create an undersecretary of defense for intelligence is a big deal—the new office ranks just behind the reliably civilian undersecretary in the department's pecking order.[58] But only the first incumbent was a civilian, and he has been followed by a retired three-star general. If this military turn continues, the undersecretary will not function as a civilian check

on the enormous intelligence operations run by the department's Defense Intelligence Agency or its National Security Agency—both under the leadership of active-duty three-stars. He will be looking at the world through the same professional prism as his subordinates.

When he leaves the Pentagon to talk with the president's new director of national intelligence, the conversation will continue in the same vein—so long as the director is a military man, one retired three-star general will be talking to another retired three-star.[59] And if they get together to give the president advice, he undoubtedly will want to hear the opinion of his four-star national security advisor.[60]

The principle of civilian control is losing its basis in sociological reality: senior officers are talking to (retired) senior officers about high matters of policy on a regular basis. These daily discussions make nonsense of the old-fashioned idea that military men should defer to "civilians" on the big issues and restrict their advice to the instrumental relationship between military means and political ends. The point of the principle is to engage active-duty officers in day-to-day contact with supervisors who are more closely attuned to the values emerging from democratic politics. Existing trends endanger this fundamental point.

So does another recent change in the Pentagon command system. Starting in the 1980s, retired officers began to serve as "senior mentors" to active-duty officers, helping them plan strategy, oversee war games, and generally advise on high military matters. This system encourages top officers to turn to senior military statesmen for advice when the going gets tough—there are now about 160 "mentors."[61] If these trends continue, active-duty generals will have fewer opportunities to create strong personal bonds with real civilians at the Pentagon. But they will be constantly relying on the advice of politically savvy mentors

who have shared their life-experience. To whom, then, will they turn at the next crisis in civilian-military relations?

Retired officers are not only mentoring top-ranking officers; they are also serving as their unofficial ambassadors to the general public. Former generals have become fixtures as pundits on news shows—where they appear as independent analysts, although some are mouthpieces for Pentagon talking points.[62]

More ominously, retired officers organized a "revolt of the generals" against Donald Rumsfeld, setting the stage for his removal by President Bush after the 2006 election. As they led the charge against the civilian leadership, they made it plain that they were speaking for many of their active-duty colleagues.[63]

The generals' complaints about Rumsfeld's policies may well have had merit, but the next "revolt" may be spectacularly wrongheaded. Nevertheless, its leaders will use the success of the 2006 uprising as a precedent to legitimate their ill-considered assault on civilian authority.[64] The credibility of their campaign will be further enhanced by the widespread belief that the Joint Chiefs failed to push pack hard enough when Robert McNamara ran the Pentagon during the Vietnam War.[65] By placing the principal responsibility for Vietnam and Iraq on arrogant civilians, this story line legitimates a more assertive military role in the future.

I have been focusing on institutional dynamics: how the separation of powers thrusts the military into politics; how the Goldwater-Nichols Act created a new political platform for the military by permitting "celebrity" generals to speak on its behalf; how the sociological foundations of civilian control at the Pentagon have been eroding; how senior generals are increasingly looking for guidance to retired military, not civilian, leaders for practical advice.

But it is time to turn away from the policy-making heights to a more general consideration of the officer corps. Here, too,

there has been a profound shift. At the beginning of the twentieth century, strict nonpartisanship was the professional norm. The overwhelming majority of officers even refused to vote, since it required them to think of themselves as partisans for the time it took to cast a secret ballot. As late as World War II, iconic figures like General Omar Bradley continued to insist that voting was inappropriate.[66]

But change was already in the air. In the midst of total war, the federal government took extraordinary steps to enable millions of citizen-soldiers to cast absentee ballots, and senior officers slowly began to take part: 25 percent of the nation's colonels and generals voted in the 1944 election. Political participation continued to increase during the postwar period, but this did not immediately lead to intense partisanship. While more officers were Republicans than Democrats, most remained above the fray. As late as 1976, 55 percent of the higher ranks (majors and above) continued to identify as independents. After all, both parties shared a commitment to a strong defense in the battle against Communism. And so long as this bipartisan consensus remained intact, the military could look upon party divisions on other issues with a good deal of detachment.

Vietnam marked a decisive change. With leading Democrats challenging the Cold War consensus, party politics now began to threaten key military interests, and many officers began abandoning their detached stance. With the rise of Ronald Reagan, the top rank of the officer corps moved from 33 percent Republican in 1976 to 53 percent in 1984. By 1996, 67 percent of the senior officer corps were Republicans, and only 7 percent were Democrats—the basic pattern continues through 2004.[67] While there are the usual short-term fluctuations,[68] we get a better sense of the future by turning to the next generation: What do cadets in the service academies think?

The best data comes from West Point, and it is not encouraging. A survey taken in the run-up to the 2004 election indicates that 61 percent of the cadets were Republicans, 12 percent were Democrats, and the rest were independent.[69] Almost half of the cadets said that "there was pressure to identify with a particular party as a West Point cadet." While Republican cadets tended to minimize this pressure, other cadets disagreed. Two-thirds of non-Republicans affirmed its existence, as did four-fifths of the small minority who were brave enough to identify themselves as Democrats (in a confidential survey).[70]

Increasing partisanship places obvious pressure on the fundamentals of civilian control. But today's officer corps doesn't have a firm grasp on basic principles. Studies suggest that "a majority of active-duty officers believe that senior officers should 'insist' on making civilian officers accept their viewpoints";[71] 65 percent of senior officers think it is OK to go public and advocate military policies they "believe are in the best interests of the United States";[72] and 57 percent assert that "in wartime, civilian government leaders should let the military take over running the war."[73] In contrast, only 29 percent believe that high-ranking civilians, rather than their military counterparts, "should have the final say on what type of military force to use."[74]

There seems to be greater support for certain fundamentals: 89 percent believe that "the military should not publicly criticize a senior member of the civilian branch of the government,"[75] and 92 percent recognize that high-ranking civilian officials "should have the final say on whether or not to use military force."[76] It's also good to hear that only 35 percent thought they were free to express their political views "just like any other citizen"[77]—less than a majority, but a pretty high number nevertheless.[78]

There is more bad news when surveys consider the reactions of civilian elites, and the general public, to similar issues. They sug-

gest that even civilians don't stand up for civilian control. Indeed, they are often more pro-military than the military itself.[79]

I don't want to put too much weight on these path-breaking studies. There are too few of them, and I suspect that traditional principles would gather far more support—especially on the civilian side—if the president forcefully made a case for them at a moment of crisis.

Nevertheless, these findings should serve as a warning flag to the military, and especially to military educators. By all accounts, the curricula of the service academies and the war colleges give remarkably little attention to the central importance of civilian control. Nor do they expose up-and-coming officers to intensive case studies and simulations designed to give them a sense of the principle's real-world implications.[80]

A generation ago, the great scholar Morris Janowitz decried this educational failure at a time when the officer corps had not yet become hyperpoliticized.[81] His prescient warnings have been taken up by a new generation of scholars. But there has been little to show for it—a few gestures, nothing more.[82]

We face new constitutional realities—on the one side, a potentially extremist presidency, with the institutional capacity to embark on unilateral action on a broad front; on the other, a politicized high command, which has assumed a powerful role in defining the terms of national debate and decision on a broad front.

These two developments require a new complexity in defining the threats coming out of the Most Dangerous Branch. We can no longer take for granted the president's position as "commander in chief." We must consider scenarios in which the high command can play an independent political role—sometimes dangerously expanding the powers of an extremist presidency, sometimes reducing the "commander in chief" to a figurehead.

Before we can assess these dangers realistically, we must place them in a larger context. If confronted with a sufficiently blatant military challenge to presidential authority, the commander in chief can be expected to push back, and he will have many tools at his disposal for mobilizing public support behind him. The prospect of presidential push-back will itself serve as a powerful deterrent, reducing the likelihood of some of the darkest scenarios to near zero.

But other pathologies remain real possibilities—or so I shall suggest in the next chapter.

PART TWO

THE QUESTION OF LEGITIMACY

3

THREE CRISES

The Founders left us with an emphatic anxiety and a potential cure. Their anxiety: "enlightened statesmen will not always be at the helm." Their cure: divide power amongst the three branches so that "ambition [will] counteract ambition."[1]

History has driven a wedge between diagnosis and remedy. The Founders thought that Congress would be the most dangerous branch, and split it into two. But the presidency now poses the greater danger—dominating the political scene with formidable powers of mass manipulation in extremist causes.

Within this context, the Founding cure has made the disease worse. The Philadelphians never imagined that the president would stand at the head of a massive bureaucracy and professional officer corps. They did not see how their system would concentrate power in the White House staff and politicize the bureaucracy and the high command. Yet constitutional lawyers mindlessly repeat the Founding mantras without reflecting on current realities.

Or so I have argued in Part One.

I have saved the worst for last. Just as the dynamics of politics and organization have changed over the centuries, so have the principles of legitimacy that shape our public life—and in ways that may permit the president or the military to convince the general public that their power grabs are actually *legitimate*.

These developments are occurring at two interacting levels—political and legal. The present chapter deals with the political side, isolating two rising modes of public justification—"government by emergency" and "government by public opinion poll"—for special concern. Especially when used in combination, they enable the president or the military to create new paradigms of legitimacy that might well convince many Americans to give their support to unconstitutional assertions of power.

The next chapter turns to institutional developments in the executive establishment that will permit the presidency to launch a powerful challenge to the traditional role of the Supreme Court. Over the past half-century, two new institutions—the Office of Legal Counsel and the White House Counsel—have vastly increased their constitutional authority. When added together, they form an elite professional corps that produces legal opinions of the highest technical quality. Indeed, many of the lawyers in these offices have previously served as law clerks for justices of the Supreme Court—and so it is hardly surprising that their opinions have the same highly polished appearance. There is one big difference: they almost always conclude that the president can do what he wants. Presidents can then publish these respectable-looking opinions to give legal legitimacy to their power grabs—and with a speed that will allow the executive's understanding of the law to shape professional opinion long before the Supreme Court gets a chance to speak. Call this "executive constitutionalism."

If the president plays his cards right, he can mix political and legal legitimations into a potent combination that may silence the justices. When the Court finally moves to center stage after many months or years have passed, it may no longer think it prudent to render a high-visibility judgment on the big issues. By that point, the president may have managed to win a great deal of support from public and professional opinion—and the

Court might not be able to count on broad support for a constitutional counterattack. When placed on the defensive, the justices may find it wiser to retreat from the fray, declare the entire matter a "political question," and allow the executive branch to get away with its power play.

The Court has been confronted with similar showdowns in the past—and it has often decided to push forward and order the president to obey its commands. But, once again, it is a mistake to view the past as prologue. Government by emergency, government by opinion poll, and executive constitutionalism are combining in ways that threaten a fundamental shift in the balance of perceived legitimacy over the course of the twenty-first century. It will take a particularly brave, or a particularly lucky, Court to resist this shift and take on the presidency at a moment of crisis.

Let's start with the political side of the legitimacy question. To define the problem, we need a sketch of core principles that will establish a historical baseline.

Our constitutional tradition roots all our leading institutions in popular sovereignty, but in a distinctive fashion. The separation of powers virtually guarantees that large-scale change can occur only at a deliberate pace. Two aspects of the system play a key role. First, the staggered terms in office—two for the House, four for the president, six for the Senate, and life for the Supreme Court—mean that a single electoral victory doesn't normally generate control over all the key levers of power. Second, each branch of government has different reelection incentives—key members of the House and Senate may buck the national leadership to satisfy the demands of their local constituencies; the Court majority may represent very different political and legal views than those advanced by the president. This, too, slows down the pace of major changes—often forcing the president to

settle for interstitial victories despite his ambitious plans for a decisive break with the past.[2]

This contrasts sharply with the patterns generated by parliamentary systems. The classical British system sets the constitutional stage in a way that emphasizes the authority of the House of Commons, and *only* the House, to speak for the People—even when the broader public is barely paying attention to the parliamentary chatter. If the prime minister and her party have the courage of their convictions, they are in a position to claim a decisive popular mandate after a single electoral victory.

In contrast, the American system tends to undercut the pretensions of any particular branch to serve as the uniquely privileged spokesmen for the People. In passing legislation, the House speaks for the People, but its proposals are often rejected by the Senate, which *also* claims to speak for the People—but in a different way. And even when the two Houses get together, their judgments are sometimes vetoed by the president, who asserts that he, not Congress, better understands what the People want. And even when all political branches join forces, the Supreme Court can say that they've gotten it all wrong. Under this system, it takes a series of victories at the polls before a rising political movement can *earn* the special authority to speak in the name of We the People.

Nevertheless, it can be done. During the eighteenth and nineteenth centuries, Americans successfully reconstructed constitutional fundamentals during the Founding and Reconstruction; and the same thing happened during the New Deal and civil rights revolution of the twentieth century—or so I have argued elsewhere.[3]

Have no fear: I don't intend to repeat myself. I'd only want to caution against a misleading catchphrase that my work has introduced into the larger conversation. My theory of "constitutional moments," when reduced to a sound bite, can create

the misimpression that the American tradition authorizes big changes to occur in a split second—after all, that's what a "moment" literally amounts to.

But it takes a lot longer for the American People to make up its mind. While the British *can* turn on a dime when the voters send a new majority party into the House of Commons, a successful constitutional moment in America takes at least a decade before a rising movement can demonstrate the broad and sustained popular support required to speak authoritatively for the People.[4]

This fundamental point is now at risk. Two evolving practices provide the basis for a different legitimating paradigm—in which the president claims a direct mandate from the People for sweeping action that shatters constitutional principles within a single term of office.

The first dynamic has deeper roots in the American tradition. Presidents have long asserted a unilateral power to act in wartime—with Lincoln famously suspending habeas corpus at the onset of the Civil War. And there has always been a temptation to extend war talk beyond the paradigm case posed by military conflict on the battlefield: Andrew Jackson was already declaring war on the Bank of the United States, indulging in legally problematic uses of executive power to revolutionize the financial system.[5] But this was the exception, rather than the rule, during the first century and a half.[6] Wars came to an end, and with them, a return to normalcy. Other crises had shorter half-lives.

No longer. Since Truman led the nation into a "police action" in Korea, presidents have claimed authority to take the country to war without the consent of Congress. At the same time, the White House is forever extending martial metaphors to demonstrate political seriousness. The War on Poverty, the War on Crime, the War on Drugs, the War on Terror—this incessant drumbeat keeps alive the president's special mystique as

commander in chief, with its claims to unilateral authority when things get tough.

These pseudowars have one thing in common: they will never end. The constant martial posturing prepares the public mind for the proposition that presidential unilateralism is always a legitimate option in the twenty-first century.

Beyond the mindless war talk, the modern presidency has won sweeping legal authority from Congress to declare emergencies and to take unilateral action in response to a broad range of crises—some serious, some trivial. Presidents have consistently made energetic use of these powers. They have repeatedly issued executive orders that explore the vague boundaries of their statutory authority—and have frequently moved beyond them.[7]

Efforts to rein in these abuses have failed. In response to the Watergate scandal, Congress passed statutes that terminated all existing emergencies and provided a framework for congressional control over future emergency decrees. But these statutes were poorly drafted, and presidents have continued issuing emergency decrees without effective checks and balances.[8] The accumulating precedents left by seventy-five years of practice provide a foundation for future, and yet more drastic, invocations of presidential power in the twenty-first century.[9]

The normalization of emergency power expresses deeper realities. When the Constitution was written, it took weeks or months to learn of a crisis, and it took even more time to kick-start the primitive governmental apparatus into action. On occasion, the news was sufficiently alarming to require a quick decision, and the president catapulted himself into the breach. But the ordinary pace of nineteenth-century life made these emergency actions extraordinary. Generally speaking, news of a "crisis" would only trickle in, and first impressions would often prove misleading; slow-moving responses permitted revision as

the news unfolded. Within this temporal horizon, interbranch deliberation often seemed perfectly feasible, even under threatening circumstances.

Not now. TV and the Internet immediately convey gripping scenes of dramatic crises—an economic catastrophe today, a terrorist attack tomorrow. As we experience this remarkable speed-up in social time, we get in the habit of expecting rapid corrective action to the rapid-fire reports of disaster—expectations that are often frustrated by the slow and deliberate pace of legislation set up at the Founding. These frustrations begin to generate a pervasive sense that America's distinctive lawmaking system isn't equal to modern challenges. "Checks and balances" begins to seem another way of describing a "crisis in governability."[10]

In contrast, the president's bureaucratic-military machine is always primed for engagement. The stage is set for the constant use of emergency rhetoric to justify problematic legal action: "The laws are simply inadequate to confront the present peril, and we can't afford to wait. The president has no choice but to exercise his inherent powers. He must act now in the name of the People, and confront Congress with a fait accompli. That's what Abe Lincoln did in the early months of the Civil War; that's what FDR did during the Great Depression; and that's what any great president must do as he confronts the crisis of the moment."

Call this "government by emergency," and it contains three features: (1) the invocation of a crisis (2) to justify deeply problematic, or blatantly illegal, executive action that (3) has enduring legal consequences, lasting long beyond the initial "crisis" has passed. This places the burden on Congress or the courts to restore the old regime disrupted by presidential intervention—no easy matter. Congress must be willing to override a presidential veto; or the courts must be willing to risk a head-on confrontation with the presidency.

Such things have happened, but they don't happen very often. And this is the reason that government by emergency is a fundamental threat to the American constitution: it legitimates the idea that the presidency may revolutionize the status quo in a matter of moments, without the decade-long process of mobilized deliberation and decision required by the standard operation of the separation of powers. We have just lived through a particularly grim period of government by emergency during the Bush years. But my point is not to revisit the blatant abuses and illegalities of the recent past. It is to insist that they provide a window on the pathologies of the future.

Coming after Watergate and Iran-Contra, the Bush administration's "war on terror" cannot be viewed as an aberration. It is simply the latest expression of a great truth of presidential government: "A crisis is a terrible thing to waste."[11]

Government by emergency is already an entrenched part of our repertoire of constitutional legitimation. This isn't quite true of a second large development: "government by opinion poll." We are dealing with a shift in public understanding that is going on right before our eyes.

I have already explored how polling has transformed the strategic side of politics, providing presidents with new weapons for waging a politics of unreason. My present point goes beyond polling's instrumental importance to the way it is reshaping the very idea of democratic legitimacy.

We are in the midst of an epochal change: Public opinion polling is becoming the functional equivalent of an ongoing referendum on the performance of the president, and this is a potentially dangerous development—providing future incumbents with a new, and distinctly plebiscitary, defense for an unconstitutional takeover.

To take the measure of this transformation, glance backward to the political world as it was experienced by Americans from the Founding to the days of Franklin Roosevelt. During this era, there were no serious public opinion polls, only regularly scheduled elections. Once a candidate won on Election Day, his status as a democratically legitimate leader had been settled definitively for two or four or six years. Political rivals would, of course, regularly denounce incumbents as "out of touch" with public opinion, but that was just partisan talk—they had no way to prove their point. They would have to wait till the next election generated some more hard numbers. Until then, duly elected politicians were the best available representatives of the People.

This cornerstone of political common sense is eroding today under the drip-drip-drop of constant public opinion polling. The democratic standing of the president and Congress now goes up and down like the stock market. Sure, Obama won with 53 percent of the vote, but next year, he might be up or down by 25 percentage points. Ordinary Americans have learned to take these numbers very seriously: a president with 80 percent support has a lot more democratic legitimacy than the same president at 22 percent.

I'm not saying that this view is correct. Despite their scientistic pretensions, polls have lots of methodological problems—and there are large philosophical objections as well.[12] But I'm not engaging in pure philosophy here, much less scientific critique. I'm pointing to a fact: Right or wrong, decades of polling have had a profound impact on the public mind. Nowadays, Americans simply take it for granted that the polls serve as a kind of privatized voting system, providing a rolling referendum on the president's democratic standing. To mark this point, I will say that polls presently serve as a *democratic supplement* to the official legitimation the president receives on Election Day.

If this is true, it is only a short step to a darker prospect—in which polls not only supplement but displace election returns as the authoritative democratic legitimator. To make my point, I return to the grim themes announced in the preceding chapters—this time elaborating some decline-and-fall scenarios in more detail. In assessing their plausibility, keep in mind that the military regularly obtains approval ratings exceeding 80 percent—compared, say, to the 50-ish ratings characteristic of the Supreme Court.[13]

1. The next electoral college crisis

Election Day is a cliff-hanger. The election systems in Florida, and several other swing states, collapse. Nobody can say which presidential candidate will emerge victorious. The nation watches helplessly as armies of lawyers begin haggling over the contested returns. With different state courts coming down with conflicting opinions, the litigants race to the Supreme Court and plead for a quick resolution.

But this time, the Court says no. The complex litigation raises too many questions for a quick decision. The lingering bitterness left behind by Bush v. Gore reasserts itself with renewed force. The airwaves and Internet are full of angry warnings of retribution if the justices impose another president on the American people—and the Democratic candidate is particularly cagey when asked whether his party will take it on the chin again.

The Court issues a brief opinion declaring the entire matter a "political question," and the candidates take the next step marked out by the Constitution. The swing states send competing election certificates to Congress—the secretary of state from Florida, for example, certifying that Mr. Democrat has won, while the governor certifies Mr. Republican.[14]

During the first week in January, all eyes turn to Washington, to see how well our eighteenth-century Constitution re-

sponds to America's twenty-first century problem. Truth to tell, the Founders failed to think this issue through, and every time their "system" has been put to the test—in 1800, in 1824, in 1876, in 2000—it has generated a desperate, and sometimes extraconstitutional, effort to work around it.

The historical complexities are endless, but for now, it will suffice to highlight a few basic points.[15] Begin with the constitutional text: "The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted."[16]

The Founders have managed to pick the worst possible presiding officer: the president of the Senate is the vice president of the departing administration, and frequently is his party's candidate for the top job in the next election. This is, of course, what happened in Al Gore's case.

Fortunately, Gore proved to be a good sport when he presided over the January session of Congress that declared Bush the winner. But that was only because the Supreme Court had intervened earlier to resolve the issue, and Gore had accepted the legitimacy of its decision.

There is no reason to think that this will happen the next time around. Even if it turns out that the departing VP isn't running for the presidency, he will probably be an ally of his party's candidate—and Congress will resound with loud cries of bad faith when, as presiding officer, he tries to deal with a host of contentious issues.

And the proceedings are sure to be contentious. After putting the Senate president in charge, the Constitution doesn't tell him how to resolve contested elections. Speaking in the passive voice, it merely says that "the Votes shall then be counted." Worse yet, it seems to leave it up to the Senate president to resolve contested questions, without Congress getting into the

act: it says that he will open the certificates "*in the presence* of the House and Senate"—not, for example, "*under the supervision* of the House and Senate."

These Founding blunders generated serious trouble as early as 1800, when America struggled through its first great disputed election. Thomas Jefferson was running against John Adams, but since Jefferson was Adams's VP, the Constitution placed him in the awkward position of presiding over his own election dispute.

Jefferson was unequal to temptation, and abused his authority. The records show that some of the electoral votes he needed for victory were illegal under other provisions of the Constitution. Nevertheless, he placed these invalid votes into his own column in his capacity as Senate president. And he did this without asking the House and the Senate to approve his rulings. Jefferson's precedent threatens to make mischief until this silly system is decisively changed.[17]

Three-quarters of a century later, the protagonists in the disputed election of 1876 didn't want to risk a repeat performance, and they created an entirely extraconstitutional election commission to resolve the contest between Hayes and Tilden.[18] Congress passed a statute a few years later, giving it a key role in resolving disputes in the future. Apart from its questionable constitutionality, the statute is obsolete, and fails to cover problems that may easily arise in modern election contests.[19]

This, and much more,[20] will be exploited for all it is worth by the contending candidates—with the Senate president and his opponents in Congress engaging in endless moves and countermoves before a bewildered public. As the clock ticks onward to January 20, and the inauguration of a new president, anxiety levels move into the red zone: How *are* we going to get out of this mess?[21]

By looking at the public opinion polls. Suppose that Gallup and Pew and the rest speak with one voice: Mr. Republican is now the choice of 60 percent of American voters—both nationally and in the contested states. Nevertheless, the constitutional impasse continues past Inauguration Day—with battalions of lawyers advancing clever legal arguments in support of the shifting positions advanced by their political protagonists.

The public is not amused, and its sigh of relief is almost audible when the chairman of the Joint Chiefs calls a halt to these shenanigans in the name of national security. He demands that Congress seat Mr. Republican. Within a couple of days, the polls give overwhelming support to the chairman's intervention—and Congress buckles before the judgment of the People, as registered by the polls, and enforced by (a strongly Republican) military.

Pretty serious. But at least this displacement of civilian authority occurs at the expense of the least legitimate part of the Constitution. The Electoral College has long since lost the support of Americans—or so the polls tell us![22]

Military intervention is never a good idea—even when it is in an effort to return the system to normal, with the president, Congress, and Court checking-and-balancing one another. Especially if the military meets with general applause, their intervention creates a dangerous precedent for other, more dubious, assertions of power.

2. The extremist scenario

Thanks to Bush v. Gore, everybody recognizes that our antiquated Founding machinery will explode at random moments in the twenty-first century. But one of my main aims has been to put the spotlight on a second scenario that is emerging out of the modern system of presidential primaries.

Suppose that the winning candidate gains office by convincing his primary voters to "send a message" of radical change to

Washington. Claiming a mandate from the People on Election Day, he comes before Congress and demands satisfaction of key priorities in his State of the Union Address. Perhaps we will hear President Rightist insisting that the nation can no longer tolerate tens of millions of illegal immigrants in our midst, and that he has no choice but to detain or deport them "with all deliberate speed." Or perhaps President Leftist will be demonizing the banks, condemning them for creating a great conspiracy and strangling the nation's hopes for prosperity, and demanding their immediate nationalization in the name of the People.

After a few months of heated debate, only one thing is clear: the president doesn't have the votes to carry his sweeping initiative through the House and Senate.

Here is where the polls come in. The media manipulators in the White House Communications Office have come up with a masterful strategy—supporting the president's demands with story lines and sound bites that strike a responsive chord with a broad public.[23] For the moment at least, the polls show that the president has 65 percent of the voters behind him.

In contrast, his opponents are suffering from the standard kinds of disorganization generated by the congressional system. Different committee chairmen and party leaders launch disjointed attacks while opposition pundits lead a series of hot-button assaults. This cacophony of dissenting voices doesn't help Congress in its battle for public support—the opinion polls give the president much higher popularity ratings, as they almost always do.[24]

Nevertheless, the constitutional system keeps the president in check. If he hopes to carry through his radical scheme, it isn't enough for him to win a single election. He and his party will have to return to the voters again and again, and keep on win-

ning elections for a decade or so before he can both push his program through Congress and make enough Supreme Court appointments to create a judicial majority in support of his radical initiative.

The president is entirely unwilling to wait. He knows that his current wave of enthusiastic support won't last forever, and that the twists-and-turns of political fortune might well leave him a bitter and frustrated man. If he is to take advantage of his momentary ascendancy, he must make his move now: "The People have spoken twice: first a majority elected me, and now two-thirds of the voters are supporting me in poll after poll. Americans are fed up with blind obstructionism. It is time for decisive action."

His patience exhausted, the president institutes his program by decree—insisting that it is the only way to preempt a looming national emergency. His disorganized opponents talk loudly about impeachment, but to no avail: though the president's partisans in Congress are a minority, they have enough votes in the Senate to stop a serious effort at removal. In the meantime, his White House staff and political appointees in the bureaucracy move expeditiously to transform the president's edicts into reality—while the military watches and waits for a moment to intervene.[25]

The scenario challenges a basic dichotomy. Max Weber taught us long ago to distinguish between charismatic and rational-bureaucratic claims to political authority. But my scenario undermines this classical distinction. My hypothetical president is combining *both* kinds of appeal into a single toxic bundle—he not only speaks in the ecstatic voice of a movement leader, but he has "(pseudo)scientific" poll numbers "to prove" that he does indeed represent the People.[26]

3. The crisis scenario

Now let's add a genuine crisis—another 9/11, another economic meltdown, but this time on a larger scale. Under this

scenario, there is no need for an extremist president to generate a constitutional crisis (though an extremist certainly won't help matters). It's enough if the crisis galvanizes national support behind the president. Quite suddenly, the president's poll numbers ascend to dizzying heights—look, he's at 85 percent!

But it happens that his enemies are in control of Congress, and they refuse to cave in—or at least they refuse to accede to his most extreme demands.

So the president simply ignores them and does what he wants to do—citing, once again, the polls to demonstrate what the People *really* want.[27] His actions might be very drastic indeed. For example, the *Washington Post* reported in 2005 that the Pentagon had already "devised its first-ever war plans for guarding against and responding to terrorist attacks in the United States, envisioning 15 potential crisis scenarios and anticipating several simultaneous strikes around the country."[28] As to the legal basis for this sweeping intervention, the *Post* was told that "the dispatch of ground troops would most likely be justified on the basis of the president's authority under Article 2 of the Constitution to serve as commander in chief and protect the nation."[29]

The legal claim is deeply problematic.[30] But this will hardly stop a president from baldly asserting it. Government by emergency and government by public opinion poll are combining to create an anticonstitutional tidal wave.

This scenario recalls the theories of Carl Schmitt, who famously emphasized how a state of emergency might supply a political leader with the opening to destroy a constitutional system. But as in the case of Weber, the rise of public opinion polling makes Schmitt's ideas a little old-fashioned.

Schmitt rightly emphasizes that demagogues must devise their own means of legitimating their break with constitutional

forms. The Maximum Leader doesn't merely seize power. He gathers his supporters for mass demonstrations in which they ecstatically thunder their support for the chief. Schmitt calls this "the shout," and glories in its exercise. On his view, the "shout" reveals the true foundation of politics—the unmediated will to power.

To put it mildly, I take a different view of constitutional legitimacy. But I definitely want to incorporate Schmitt for my own purpose—which is to confront the potential pathologies of the modern American system. From this diagnostic point of view, poll numbers represent a high-tech form of "shouting."[31]

It's well established that these numbers express a large number of knee-jerk responses. When talking to an interviewer on the telephone, people find it embarrassing to tell pollsters that they really haven't given much thought to the political issues they are raising. Instead of saying they "Don't Know," they create the illusion of civic competence by providing "seat of the pants" answers.

In generating a steady flow of precise numbers, the polls disguise a hard truth—most Americans are astonishingly ignorant about politics.[32] Like the classical "shout," poll numbers represent a momentary spasm of political will, unfettered by the need to think matters through. And polling is a much more effective form of shouting, precisely because it seems to substitute the cool and dispassionate findings of rigorous social science for televised images of mass hysteria.

There are more crisis scenarios,[33] but I've said enough to make the basic point. For two centuries, the American Constitution has resisted the notion that a single election is enough to justify sweeping change in governing principles—insisting upon a more deliberate kind of constitutional politics, enduring for a decade

or two, before a movement can earn the institutional authority to enact sweeping changes in the name of the People. But the modern presidency has become the great accelerator—it not only can impose radical changes with astonishing speed, but it can convince many Americans that it is acting legitimately.

Of course, the White House sound-bite machine won't persuade everybody. Lots of Americans will resist, and organize, and fight for the old Constitution. What happens next?

Once again, conditions may be ripe for military intervention. But assuming restraint on this front, one final factor looms large: the Supreme Court. Will the Court serve as a beacon for resistance, decisively condemning presidential usurpation? Or will it retire from the field, declaring the entire affair a "political question"?

A lot will depend on the contingencies of judicial personality and legal ideology. But a final structural development will also come into play—and in a way that favors the presidency. In contrast to earlier conflicts, the Supreme Court will no longer operate as the only arbiter of constitutional legitimacy. Its monopoly will be challenged by rising institutions within the executive branch—which will predictably enter the field with authoritative-looking opinions forcefully defending presidential prerogative.

And these executive branch lawyers will act quickly, framing the public debate before the Court gets a chance to hear the test cases moving up the judicial hierarchy. Even if the justices later decide to intervene, their opinion(s) will only serve as part of an institutional point-counterpoint—with the ensuing legal chatter generating confusion amongst the general public.

In the meantime, the president will be acting decisively to create facts on the ground—ordering his appointees in the bureaucracy to follow the legal opinions of the White House

Counsel and Justice Department, not those of the Supreme Court—leaving the military as a potential arbiter.

The scenario may seem shocking, but as the next chapter suggests, the threat posed by executive constitutionalism is a very real one.

4

EXECUTIVE CONSTITUTIONALISM

Over the past two centuries, presidents have repeatedly challenged the Supreme Court's authority to rein them in. Thomas Jefferson, Andrew Jackson, Abraham Lincoln, all denied the legitimacy of major Court decisions; and Franklin Roosevelt was prepared to do the same at critical moments—but the Court backed down before it became necessary.

We have been lulled into a false sense of security by two modern precedents: Dwight Eisenhower's decision to enforce the Supreme Court's orders at Little Rock, despite his obvious unhappiness with Brown v. Board of Education; and Richard Nixon's decision to obey the Court's order to hand over the Watergate tapes, despite its damning evidence of his own involvement in the scandal. The next time around, the president may not have the character of an Eisenhower or the fears of a Nixon—if only because he can count on enough committed partisans to acquit him at an impeachment trial.

But he *will* be in a position to deploy new tools to give his challenges to the Court enhanced legal respectability. An anecdote can serve to introduce the point. In 1977, a disgraced Richard Nixon went on television to rehabilitate himself before the public. His effort backfired when he famously defended Watergate by explaining that "when the president does it, that means that it is not illegal."[1] In the future, presidents won't have to make such brazen claims. They can rely on two executive branch institutions—the Office of Legal Counsel in the Justice

Department and the Office of Counsel to the President in the White House—to give their constitutional imprimatur to presidential power grabs.

These two offices have risen to prominence with astonishing speed. The Office of Legal Counsel only began to collect its legal opinions in authoritative volumes in 1977—the very year that Nixon went on TV.[2] Within the space of a single generation, it has now legitimated its law-declaring authority within the larger legal community. We have even reached a point where a leading scholar has collected the OLC's opinions in a casebook—encouraging students to treat them with the same high seriousness they accord Supreme Court opinions.[3] In contrast to the OLC, the White House Counsel (WHC) has been less visible to the broader public. But this, too, is changing as the WHC becomes an increasingly powerful force within the executive establishment.

There is only one problem. This steady stream of authoritative-looking opinions is produced under conditions that allow short-term presidential imperatives to overwhelm sober legal judgments.

I shall be exploring the mismatch between *partisan process* and *legal authoritativeness* in two stages. The mismatch takes on a particularly obvious form in the case of "presidential signing statements"—a recent innovation in which the president approves a bill sent to him by Congress but simultaneously declares that some provisions are unconstitutional, and that he will refuse to obey them *even though he is signing them into law.* I then consider the mismatch more broadly, by telling the curious history of the Office of Legal Counsel and the White House Counsel. As we shall see, historical accidents largely account for the superpoliticized way in which the OLC and WHC engage in the practice of executive constitutionalism today.

Nevertheless, the increasing authoritativeness of their legal pronunciamentos will create serious problems going forward. During previous centuries, opinions of the Court were accorded unquestioned centrality by the broader legal community; but the rise of executive constitutionalism threatens to shatter the Court's de facto monopoly—putting the justices on the defensive in their future showdowns with the presidency. If the president's lawyers manage to gain broad professional support for their legal opinions, the Court will think twice before confronting a runaway presidency. If the justices can't even count on a united legal profession to back them up, on whom *can* they rely in the struggle for public support?

The rise of presidential signing statements serves to introduce the mismatch. When nineteenth-century presidents had a constitutional objection to a bill, they explained their problem in a veto message. They did not sign the bill and simultaneously declare that they would refuse to obey parts of it. There were very few exceptions, and these provoked heated controversy.[4]

Things only began to change in the twentieth century, as presidents started to hold press conferences and speak on the radio. Within this new media environment, presidents used bill signings to congratulate supporters and to mobilize them for further victories. But more serious legal discussions gradually crept in, though constitutional challenges remained rare, and outright refusals to enforce statutes even rarer.[5]

The Reagan administration changed all this. As Samuel Alito, a rising young star in the Justice Department, explained: "Under the Constitution, . . . the President's approval is just as important as that of the House or Senate[.] [I]t seems to follow that the President's understanding of the bill should be just as important as that of Congress."[6]

But Alito quickly spotted a big problem: presidents have only ten days to sign or veto a bill, which means that "very little time has been available for the preparation and review of such statements. These time constraints will become much more troublesome if presidential signing statements become longer, more substantive, and more detailed."[7]

To prevent slipshod work, Alito suggested that presidents evade the ten-day time limit.[8] Instead of presenting a full-fledged legal analysis in such a brief period, they should simply sign the bill and announce that a formal statement would be forthcoming later. Otherwise, Alito feared that the administration's brave initiative would never "achieve much importance."[9]

Alito was half-right: churning out signing statements within ten days did turn out to be "troublesome" (to put it mildly). But their slapdash character did not discredit the entire effort. Signing statements rose to constitutional significance through sheer force of numbers: Reagan repudiated eighty-six different statutory provisions, and George H. W. Bush picked up the pace further, attacking forty-eight provisions a year during his term.[10] But would the escalating practice survive the transition to a Democratic administration?

The answer was a resounding yes. With the Office of Legal Counsel affirming the innovation's legitimacy,[11] Clinton issued challenges at the rate of 18 provisions a year—more than enough to entrench the practice further.[12] This set the stage for massive escalation during the years of George W. Bush, with the president repudiating 146 provisions a year or 1,168 in total—more than all other presidencies combined.[13] Recently, the American Bar Foundation has issued a ringing statement condemning signing statements as unconstitutional.[14] And President Obama has responded to growing criticism by reducing the flow of signing statements to a trickle. But he has by no means repudiated the practice.[15]

Apparently, its practical political benefits are too tempting to ignore. When presidents veto legislation on constitutional grounds, they must spend precious political capital beating back congressional efforts to override their veto. But thanks to the Reagan Revolution, it is no longer necessary to bear this burden: presidents can enforce the provisions they like and declare the others unconstitutional. Yet this exercise in executive aggrandizement comes at a fearsome cost: it gets the general public in the habit of hearing presidents proclaim that they can take the briefest look at the Constitution and insist that Congress (and the rest of us) should treat their casual constitutional pronouncement with high seriousness.[16]

The rise of the *decisionistic presidency*, if you will forgive this ugly expression, is enhanced by the character of the signing statements. They typically contain a few conclusory paragraphs, without any pretense at sustained legal analysis.[17] This shabby legal form suggests the irregularity of the process: while guidelines do exist, each administration has invented its own way of preparing signing statements.[18] Under Reagan and Clinton, there was heavy reliance on the Office of Legal Counsel;[19] under President George H. W. Bush, White House lawyers took the lead.[20]

There is more to this process than meets the eye. The OLC is constantly on the lookout for constitutional issues raised by pending legislation. When it spots a problem, it joins a larger executive lobbying campaign aimed at eliminating the offensive provision from the bill.[21] This effort can generate lots of conversation between the OLC, the White House, and concerned agencies about the key issues. If the White House campaign fails and Congress insists on the problematic provision, these earlier discussions provide an important resource when the president repudiates the provision in a signing statement. Although his staff only has ten days to prepare the text, their previous

position papers can provide the basis for a relatively sophisticated assessment of the constitutional issues.

But this pattern of executive consultation can't arise when large constitutional issues are raised by last-minute legislative compromises that take the president's lawyers by surprise. And even at its best, the process suffers from severe deficiencies. In lobbying Congress, the executive branch operates as a strong advocate for presidential prerogative. But in drafting signing statements, its aim should be very different: it is not enough to conclude that a provision is unwise, but instead that it is so patently unconstitutional as to justify constitutional repudiation.

This requires a shift in intellectual and emotional gears—from spirited advocacy to sober assessment of the statute's long-term impact on the system of checks and balances. This requires a tough psychological transition under the best of conditions and the executive lawyers aren't operating under the best conditions. They are writing up the signing statement after lots of lobbying that has led to the executive's defeat in Congress. This isn't the context for the exercise of serious constitutional judgment.

Especially since the president's legal staff isn't even required to write up a thoughtful document that confronts the key constitutional issues in a reasoned fashion. As we have seen, signing statements are brief and conclusory assertions of authority. Even if the writers of these texts actually thought hard and long about the issues, they don't deign to tell the rest of us how they have reached their conclusions. So far as ordinary Americans can see, signing statements are celebrations of sheer presidential will.

No surprise, then, that this is precisely what they became during the administration of George W. Bush—when a single White House lawyer, David Addington, came to dominate the process, even though he wasn't even counsel to the president

but served as Vice President Cheney's principal lawyer.[22] The image of Addington churning out hundreds of conclusory denunciations of congressional legislation should not divert us from the larger point: even under more normal conditions, it is simply impossible to undertake a thoughtful analysis of complex constitutional questions within the space of ten days. In spotting this issue early on, Samuel Alito was pointing to something very important: while he was wrong in predicting failure, the ten-day deadline *should* have condemned the Reagan initiative to self-destruct.

But it hasn't. To the contrary, a clever maneuver by the Reagan Justice Department has allowed the statements slowly to gain credibility in the courts. In 1986, the Department managed to convince law-book publishers to include presidential signing statements as part of each statute's official legislative history. Until then, it was tough for lawyers to find out whether a statute had provoked a statement, and if so, what it said. But suddenly, it was easy for advocates to consult them as they prepared their legal briefs, and to press them forward for judicial consideration when it served their purposes.

This gambit worked: During the first two centuries in the history of the republic, only six federal courts cited a signing statement in a published opinion.[23] But since 1986, there have been at least sixty-four cases. While they have not been particularly crucial in judicial decision making, the change in citation practices makes the statements increasingly seem an entirely legitimate source of law.[24]

This sets the stage for more egregious abuses in the future. Imagine, for example, some future president signing a multibillion-dollar spending bill while attaching a signing statement that ignores the limits that Congress has placed on his use of the money. Instead, he claims inherent constitutional authority to spend the money in the way he decides will protect the

nation against an impending catastrophe. With the authority of signing statements already recognized by the courts, it will seem increasingly legitimate for the secretary of the treasury to follow presidential instructions and ignore congressional spending restrictions.

There is a precedent, the secretary will explain (with a straight face), for following the president's signing statement. During the early months of the Civil War, Abraham Lincoln not only ordered Salmon P. Chase, his Treasury secretary, to spend two million dollars without congressional authorization or appropriation, he named three "trusted citizens" as the recipients of the funds because he "doubted the loyalty of certain persons in the government departments."[25] If Chase obeyed his president, his twenty-first-century successor explains, shouldn't I obey mine?

After all, Lincoln raided the treasury unilaterally. His twenty-first-century counterpart is acting under an appropriations bill passed by Congress and is "merely" freeing himself, in his signing statement, from statutory restrictions that unconstitutionally impinge on his powers to protect the nation during a terrible time of emergency. What is more, the president isn't giving the money to some trusted cronies, in the manner of Lincoln; he is ordering the Treasury to supply critical resources to the front-line military and civilian authorities confronting the crisis. If the great Lincoln had the authority to act decisively in the nineteenth century, surely the current president has an equal right to act decisively in the face of the crises of today?

Or so the secretary will declare, as he follows the law laid down in the signing statement and provides his president with funds in flagrant violation of congressional limitations.

In conjuring up this scenario, I hardly wish to predict how it will all play out in the heat of the moment. Perhaps there will be a strong counterreaction, with opponents pointing to the Bar

Association's attack on signing statements to make their case. Perhaps Congress will win in the resulting standoff; but perhaps it will lack the courage to buck the tide, especially if the president's emphatic efforts to resolve the crisis puts him at 75 percent in the public opinion polls.

All we can say right now is this: Over the short space of twenty-five years, modern presidents have gone a remarkably long way in legitimating the notion that they can disobey statutes after the most casual gesture in the direction of the Constitution.

Despite the rise and rise of signing statements, they still seem a tricky innovation to most constitutionalists. In contrast, the jury has reached a unanimous verdict on a second—and far more important—form of executive branch constitutionalism. Recent scandals have catapulted the opinion-writing division of the Justice Department—its elite Office of Legal Counsel—into the public eye. John Yoo, and his secret "torture memos," have become notorious symbols of the abuse of power by the Bush administration. These scandals, one might suppose, would provoke calls for fundamental reform of the Office where Yoo worked.

Nothing like this has happened. The prevailing sentiment seems to be that the OLC is a sound institution and that it should be preserved more or less intact. This is a mistake. The "torture memos" do not represent a momentary aberration but a symptom of deep structural pathologies that portend worse abuses in the future.

Given the recent scandals, critics do recognize the need for some fine-tuning—especially where publication of OLC opinions is concerned. Many remain secret, and others are published only after many years have passed. This seems increasingly unacceptable, and leading lawyers have joined together to issue a

public call for greater and speedier publication. If opinion writers know that their words will be scrutinized by their professional peers, they will be less willing to engage in the doctrinal extremism displayed by the Yoo memos—or so it is hoped.[26]

Secret OLC opinions pose obvious problems, but openness won't resolve deeper difficulties. Indeed, publication may only serve to give the OLC a more prominent role in legitimating future presidential power grabs. When its authoritative-looking pronouncements appear at moments of crisis, the OLC can provide the president with crucial legal reinforcement for his usurpations. The problem, once again, is the mismatch between the partisan process through which the executive branch formulates its legal opinions and their rising claim to legal authoritativeness.

This mismatch isn't nearly as obvious as in the case of presidential signing statements. The official "memoranda" produced by the OLC often resemble Supreme Court opinions in their painstaking analyses of precedent and scholarly opinion—a sharp contrast to the pathetic legal documents that accompany presidential signing ceremonies. But with rare exceptions,[27] the OLC's conclusions strongly support executive authority.

There is one formal difference. The Supreme Court always deals in concrete cases, but OLC memoranda occasionally take the form of sweeping constitutional pronunciamentos.[28] Both Democrats and Republicans indulge in this practice. Walter Dellinger, head of Clinton's OLC, wrote up a comprehensive statement of the administration's position on the separation of powers, superseding a similar—and even more aggressive—memo written by William Barr during the Reagan years.[29] Dellinger's pronunciamento was withdrawn in turn by the Bush OLC—this time without replacing it with another large pronouncement.[30] Nevertheless, Bush's OLC issued sweeping statements on other fronts—issuing a memorandum, for example, that made

extravagant (but learned) claims asserting the president's authority to wage a worldwide "war on terror" without gaining consent from Congress.[31]

Pronunciamento writing holds obvious dangers during the next presidential power grab. Under this scenario, the OLC does not content itself with the piecemeal justification of one or another problematic executive action. It creates an impressive-looking framework that asserts sweeping authority for an entire program of self-aggrandizement.

But how likely is this grim scenario? Isn't the Office of Legal Counsel more likely to serve as a legalistic brake than as a constitutional accelerator?

To assess relative probabilities, consider the OLC's distinctive mode of operation. Although it ranks as an equal of the other great divisions of the Department of Justice, it only consists of two dozen lawyers. This makes it similar to another bastion of legal elitism, the office of the Solicitor General (SG), which argues for the government before the Supreme Court.

But unlike the SG, career government attorneys don't regularly obtain top positions at the OLC.[32] Instead, the entire leadership changes with every administration. The law professors and high-powered attorneys who fill these posts are accomplished professionals—but they get their jobs through political connections. They are assisted by some recent top-flight graduates of leading law schools, who serve as attorney-advisors for two or three years and then use their prestigious credential to propel themselves higher into the legal stratosphere.[33] Seasoned government lawyers are few and far between.[34] The office is long on talent but short on institutional memory—strong in a belief in their president, weak in recognizing the rightful authority of Congress.

The staff spends much of its time fielding e-mails and telephone calls from executive departments asking for guidance on

tough legal issues, and it has powerful institutional incentives to deal with these requests in an impartial fashion. But as we shall see, these standard incentives don't apply in the special, but all-important, case of the White House.[35]

But let's begin with the standard case—in which the White House isn't involved, and the OLC is responding to requests for legal advice from executive departments. Although it is often said that the office's legal guidance is authoritative within the executive branch, there is no strong statutory basis for this claim (except in the case of the military).[36] The OLC's broader authority has a more practical basis: if different agencies interpret the same statutory and constitutional language in different ways, there is potential for enormous confusion. So the departments have a strong interest in resolving potential conflicts by submitting their disputes to a neutral arbiter. The OLC can discharge this coordinating function if—but only if—it operates in a professional and impartial fashion.

Over the decades, the office has discharged this function admirably, and now that it has established its credibility, executive departments may sometimes ask its opinion even where there is no interagency conflict. This will happen when it anticipates bitter political controversy if it relies on its own general counsel to announce the department's legal views. By referring the matter to the OLC, it may deflect a political attack that would otherwise be coming in its direction. For this strategic gambit to succeed, the OLC must continue to maintain its reputation for legal professionalism.

The OLC has adopted procedures that reinforce these role expectations. While it resolves most departmental queries informally, it moves into legalistic mode when these initial efforts fail—requiring agencies to file brief-like statements of their positions. When two or more departments are involved, this generates something like an adversary process, in which institu-

tional rivals argue for competing perspectives on disputed statutory and constitutional questions. An OLC team then prepares a formal opinion. Generally speaking, this team effort is led by one of the OLC's principal lawyers, assisted by an attorney-advisor, and backed up with a "secondary review" from another principal attorney. Broad consultation with other affected agencies is common.[37]

This process often generates a legal product that looks like a judicial opinion. But appearances are deceiving. In contrast to a court, the OLC adopts a self-consciously facilitative approach to the parties before it.[38] When it finds their legal arguments unpersuasive, it doesn't respond by writing an opinion telling them so. It affirmatively works with them to "recommend lawful alternatives to legally impermissible executive branch proposals."[39] It will only condemn their initiatives as a last resort.

This facilitative approach reaches its maximum when the president is the OLC's client. In this case, the OLC finds itself in a competitive relationship with the White House Counsel's (WHC) office—another elite group led by a team of high-powered practitioners and law professors, assisted by brilliant young up-and-comers. The counsel's office under Obama has a staff of forty, with twenty-five serving as full-time legal advisors.[40] It doesn't need to rely on the OLC for an opinion on high-priority issues. It can write one in the White House. If its informal conversations with the OLC suggest a serious disagreement, the White House Counsel can simply refuse to ask the OLC for a formal opinion on the matter. After cutting the Justice Department out of the loop, the White House Counsel can provide the president with his own staff's legal opinion as the basis for moving forward.

The White House will take this step with some reluctance, since the OLC option does have substantial appeal. Over the past half-century, the OLC has worked hard at cultivating a

reputation for disciplined legal judgment that the White House Counsel can only envy. An OLC opinion helps legitimate the president's initiative—but only, of course, if it approves it. And if the WHC has reason to expect a no, it's better for the White House lawyers to write up their own legal memo telling the president yes.

This has happened often over recent decades, without anybody considering it improper.[41] After all, the Constitution says that it's up to the president "to take care that the laws be faithfully executed." If he decides to rely on his own counsel's opinion, the military and civilian authorities can be counted on to follow his lead. Surely, the OLC will be in no position to lead a campaign for legalistic resistance—indeed, it may not even find out about the president's decision until it makes the headlines.

If the OLC is cut out of the loop too frequently, its reputation will begin to suffer, impairing its general effectiveness. As we have seen, the OLC's authority over the rest of the bureaucracy lacks a strong statutory foundation—the departments submit tough questions to the OLC because of the office's reputation for rigorous legal analysis, and they follow its opinions because everybody else is doing so, and defiance would mark them out as outlaws within the executive establishment. But this virtuous cycle could readily unravel if the president regularly ignores the OLC in making key decisions.

These institutional realities are reflected by the special procedures used by the OLC to consider White House requests. In contrast to the standard case, the OLC doesn't ask the White House to prepare a brief-like statement of its position before it moves into the opinion-writing phase.[42] Instead, it engages in a lengthy back-and-forth on the legal issues—providing White House lawyers an ample opportunity to make an educated guess as to the OLC's likely opinion before committing themselves to a formal request.[43] Given the OLC's powerful interest

in remaining in the loop, the informal give-and-take encourages the OLC to say yes in borderline cases.

But there is little reason to suppose that the OLC will be inclined to say no in the first place. The men and women who inhabit the OLC are very similar to the lawyers at the WHC. They come out of the same elite class of high-powered attorneys and law professors who use their political connections to get better and better jobs when their party takes control of the executive branch. They are on the same presidential team—and inclined to support the president when the going gets tough.[44]

These similarities in personnel are counterbalanced by differences in institutional perspective. The OLC's docket is broad, but does not extend to explicitly political issues. In contrast, the White House Counsel takes the lead on Supreme Court nominations and other hot-button issues.[45] Given this fact, it's particularly tough for the counsel to provide legal advice without giving undue weight to short-term political imperatives.

White House counsels aren't invariably political operatives. Some have come to the job with well-established reputations for independent judgment, and they have remained faithful to their legal convictions under difficult conditions. But I am concerned with institutional dynamics, not the vagaries of individual character. From this perspective, the counsel's office is the last place to look for a *systematic* legal check on overweening presidential ambition.

If only by comparison, the OLC is an oasis of legalism. While the White House Counsel is appointed by the president, the head of the OLC owes his job to something more than presidential favor. He must be confirmed by the Senate, and so is more likely to be a person of independent stature. He may also sometimes count on his boss, the attorney general, to protect him from White House pressures. Since the 1960s, the AGs have been too busy to participate actively in drafting opinions.[46] Nevertheless,

they sometimes serve as a buffer against overreaching by enthusiasts from the White House Counsel's office.

But only sometimes.[47] In the aftermath of the Watergate scandal, Presidents Ford and Carter symbolized their return to the rule of law by appointing strong legalists, like Edward Levi and Griffin Bell, as attorneys general. These men made it clear that the OLC was not going to be a mouthpiece for the White House.[48] But more often, AGs are key players on the president's team and may serve as a conduit for, not a check upon, White House pressure.

If we look ahead to the next presidential power grab, it would be a mistake to rely too heavily on larger structures to safeguard the OLC's institutional independence. The requirement of Senate confirmation and the role of the attorney general may sometimes serve as an important check on hyperpoliticization, but they may fail when they are needed most.

Perhaps the OLC possesses its own bureaucratic resources for legalistic resistance? Its historical roots go back to the Solicitor General's office, which won a very considerable independence from White House pressure over the course of the twentieth century. The SG provides an example that the OLC has sought to emulate in asserting its constitutional independence, sometimes successfully.[49] Nevertheless, there are structural differences between the two offices that make it far more difficult for the OLC to sustain an independent stance.

In dealing with the White House, the solicitor general has a priceless advantage over the Office of Legal Counsel: When the president's lawyers push him to endorse overly aggressive constitutional arguments before the Supreme Court, the SG can respond by telling them this will only alienate swing justices. If the White House wants to win the case, the SG will explain, it should allow him to push a more moderate legal line. Since the SG is intimately acquainted with each justice's views and atti-

tudes, the president's lawyers will be hard put to second-guess his calls for legal restraint. They will often retreat in the face of the SG's determined opposition.

But the OLC finds itself in a very different position—particularly on key questions of executive power and national security that are central to its ongoing relationship to the White House. These are matters on which Supreme Court pronouncements are rare and ambiguous. Even when the courts rule on a dispute, they typically enter the field so cautiously that the current president may have left office before the Court hands down a major decision. As a consequence, the OLC doesn't have the same big bargaining chip in dealing with the White House: it can't say that an extreme position will only lead to an embarrassing legal rebuff in the courts. But if it can't say that, what *can* it say to resist short-term political pressures?

Many leaders of the OLC have danced around this dilemma in law review articles and after-dinner speeches. Jack Goldsmith, for example, gained broad praise when he withdrew Yoo's torture memo during the short time he served as head of Bush's OLC. Yet he has taken great pains to insist that "[l]egal advice to the President . . . is neither like advice from a private attorney nor like a politically neutral ruling from a court. It is something inevitably, uncomfortably, in between."[50]

What *precisely* does Goldsmith's double negative signify? It's small comfort to hear that the OLC isn't like the hard-driving private lawyer who is constantly cutting legal corners to give his client what he wants. This doesn't provide much in the way of positive guidance. If the OLC isn't aspiring to provide "a politically neutral ruling," what is it aspiring to?

The question gained new urgency and visibility as news of Abu Ghraib and the torture memos leaked to the public. With the Bush Justice Department under fierce attack, leading members of Clinton's OLC tried to make a constructive contribution

to the debate by formulating Guiding Principles for the future operation of the office.[51] Their effort, however, only serves to emphasize the bipartisan character of the threat that future OLCs will act as presidential rubber stamps.

For starters, the Guiding Principles make absolutely no effort to insulate the OLC from White House pressures. They explicitly assert that the office's constitutional interpretations may appropriately take into account "the views of the President who currently holds office." While they caution against legal analysis that is "merely instrumental to the President's policy preferences," they see the OLC as "serv[ing] both the institution of the presidency and a particular incumbent, democratically elected President." Given their "democratic" mandate, presidents can sometimes rightfully refuse to "comply with laws they deem unconstitutional."

To soften this blow, the Guiding Principles assure us that such cases will be "rare." But the Clinton group undercuts this concession by remarking that the "precise contours" of presidential unilateralism are "the subject of some debate." Worse yet, it declares the entire debate "beyond the scope of this document"—leaving it to future OLCs to take extreme positions on this crucial issue.[52]

These twists and turns of legalese cannot conceal the crucial point: at a time when the furor over torture opened up the possibility of fundamental reform, the Clinton group rallied to reaffirm the OLC's role as constitutional apologist for the sitting president. It is hardly surprising that leading members of the Bush OLC have returned the favor by voicing support for the Clintonians' Guiding Principles.[53]

In Part Three, I will be challenging this bipartisan consensus. But for now, it will suffice to make a less dramatic point: Even during more normal times, the Guiding Principles generate an institutional dynamic that encourages the development

of a one-sided jurisprudence over time.[54] As each OLC defers to the views of its "democratically elected president," it passes on an increasingly presidentialist set of opinions for the next OLC to build upon. This "ratchet" effect is much in evidence in recent decades—regardless of the political party in the White House. If anything, the rejection of the private lawyer model invites a more pretentious style of legal development, in which the OLC offers a principled but ever more sweeping vision of presidential power.

Which returns me to the operation of the OLC during the early years of the "war on terror." Jay Bybee, then head of the office, had specialized in other legal areas, and understandably looked to his deputy, John Yoo, to provide intellectual leadership. Yoo was a rising young professor at Berkeley, whose faculty had promoted him precisely because they found high academic merit in his constitutional studies of presidential power. If anybody at the OLC could provide the requisite kind of *principled* elaboration of executive authority, it was Yoo.

Yoo's constitutional principles were extremely conservative. That's not an accident—leading lawyers in the OLC *regularly* get their jobs through political connections, and their legal views always correspond broadly to the governing philosophies of their presidents. There is also nothing surprising about Yoo's close contact with White House lawyers as he went about writing up his legal glorifications of presidential power. As we have seen, the OLC always gives the White House a very privileged role in its deliberations—exempting it from the arm's-length procedures it imposes on other parts of the vast executive establishment.

The only thing remarkable in Yoo's case is the intensity of his White House involvement. In response to 9/11, White House Counsel Alberto Gonzales convened an ad hoc group to confront the novel problems posed by the "war on terror." Given

the OLC's past history of informal consultations with the White House, it was only natural for Gonzales to invite Yoo into his "war council" and that he would become an active participant. Yoo's involvement was a predictable bureaucratic response to the new challenges posed by emergency conditions—representing an intensification, not a repudiation, of past practices of collaboration between the OLC and the White House.

The OLC's performance in the aftermath of 9/11 was no aberration. In entering the OLC, and transforming it into a legal apologist for presidential power, John Yoo was knocking on an open door—and the next time around, some other true believer will find himself in the very same place.

And once he opens the door, it will prove very tough to slam it shut—or so the sequel to the Yoo story suggests. Much gratified by the OLC's work, the president rewarded its chief, Jay Bybee, a prestigious judgeship on the Court of Appeals. This left a vacancy at the top of OLC, and White House lawyers lobbied hard for John Yoo—only to meet resistance from the attorney general himself. John Ashcroft didn't seem to have large objections to the substance of Yoo's extreme jurisprudence. He vetoed him for turfish reasons: Yoo hadn't sufficiently cleared his White House engagements with the DOJ, thereby threatening Ashcroft's sense of command over his Department.[55] If Yoo had been more diplomatic in dealing with Ashcroft, he could have taken command of the Office as assistant attorney general, following up with another round of legal pronunciamentos that escalated the presidentialist momentum yet further. The institutional environment did not contain a strong self-correcting mechanism.

Nevertheless, Ashcroft's veto did intervene, so the search was on for another highly placed academic with strongly conservative constitutional views. Jack Goldsmith, an up-and-coming professor at Harvard Law School, seemed an ideal candidate.

But in their rush to fill the job, his interviewers didn't take the time to find out that he wasn't quite the super-duper conservative they thought he was.[56] When Goldsmith became assistant attorney general, it only took him a couple of months to decide that Yoo's "torture memos" were legally indefensible. While he withdrew one of Yoo's opinions quickly, he left another outstanding until the Abu Ghraib scandal became public. This memo had insulated CIA agents, and others, from the specter of future criminal prosecution—giving them a good-faith basis for believing that waterboarding, and other obvious forms of torture, were legal. Goldsmith began to worry about this memo as well, even though its revocation would deprive the president's faithful servants of their "get out of jail free cards." Once the scandal broke, he did take action and withdrew this memo quickly. But to guarantee that his decision would hold up, he simultaneously announced his resignation. This, he explained, would make it tough for the White House to reverse his decision "without making it seem like I resigned in protest."[57]

Battered by the political pressures, Goldsmith had held on to his job for only nine months: "important people inside the administration had come to question my fortitude for the job *and my reliability* (emphasis supplied)."[58] That left the OLC in the lurch: without Goldsmith's assistance, would it cut back on the range of interrogation techniques that Yoo had authorized?

The answer was no. While the OLC eliminated some of Yoo's more egregious assertions of presidential authority, they continued to uphold the legality of waterboarding and other gross forms of abuse![59]

As the wheels of executive justice slowly turned out more legal judgments, the awful photographs from Abu Ghraib were adding fuel to the fire of political opposition, leading to the passage of new antitorture legislation in 2005. In approving the bill, however, President Bush added a signing statement that reserved

his rights "as Commander in Chief" to continue appropriate practices of interrogation. Once again the OLC backed up its commander in chief with another legalistic defense of the very same techniques that had generated public protest. Despite Bush's precipitous political decline during his second term, the OLC managed to maintain much of Yoo's legal legacy, staging strategic retreats on only a few issues.[60]

President Obama has repudiated the Bush memos on torture and interrogations,[61] but he has done nothing to correct the structures that generated them—even though his own Justice Department has made them plain for all to see. The moment of truth came when the department passed official judgment on the professional ethics of Bybee and Yoo for their role in the torture memo affair.

The department's investigation had begun in October 2004 shortly after one of the torture memos was leaked to the public, and it initially resulted in a strongly negative verdict on Bybee and Yoo by the department's Office of Professional Responsibility. These opinions, however, were kept confidential until the final process of review had been completed. Somehow or other, the Bush administration managed to defer its day of reckoning until after it left office. The department only announced its final judgment in January 2010. After six years of collective pondering, it completely exonerated Bybee and Yoo of all charges of unprofessional conduct.

The department recognized that the torture memos had presented "incomplete and one-sided" arguments, and that Jack Goldsmith, in withdrawing them, found that they had "no foundation in prior OLC opinions, or in judicial decisions, or in any other source of law."[62] But this wasn't enough, in its judgment, to say that the opinion writers had acted unprofessionally.

Lest you suppose that this conclusion was politically motivated, you would be absolutely wrong. David Margolis, the de-

partment official reaching this conclusion, is a long-time government lawyer who has long played an outstanding role in many other investigations into professional ethics. His decision making was carefully insulated from political control. While his analysis is debatable, this is not the place to debate it.[63]

My point is institutional, not personal. The department's decision dramatically increases the likelihood of more legal excesses during the next crisis. We have seen that the entire setup at the OLC—its mode of recruitment, its relationship to the White House, its deference to "the views of the President who currently holds office"—propels its top lawyers toward presidentialist apologetics. But these dynamics have now been reinforced by the department's act of exoneration. The next time around, top lawyers at the OLC will look around them to find Jay Bybee sitting as a judge on the federal court of appeals, and John Yoo brazenly insisting, on countless talk shows, that he was right all along. And they will be perfectly aware that Goldsmith's resignation did not fundamentally change the path taken by his successors at the Bush OLC.

Given all this, why should they be tempted to resist—let alone resign—in response to some future White House demand for more legal memos defending the indefensible?

This is the question that nobody is asking in the Obama administration. Confident that *their* president won't be repeating Bush's outrages against the law, nobody in the administration is confronting the need for *fundamental* structural reform. It is business as usual at the OLC and WHC: every day brings new and urgent issues into these offices for urgent resolution; it's hard enough to keep up the pace, and there's no time left to worry about tomorrow's problems, let alone those that may or may not arise in a decade or two.

All this is entirely understandable, if not precisely admirable. Nevertheless, America's political leaders *have* sometimes

managed to take the longer view. The Founders' Constitution would have perished long ago without these repeated exercises in institutional adaptation to meet the challenges of a changing world. The present generation has benefitted greatly from this living tradition of constitutional adaptation; and it has a special obligation to continue modifying present arrangements to preserve republican self-government for our children and grandchildren.

We are failing to fulfill this duty.

If we place the torture memos in larger historical perspective, there is yet more reason for pessimism. Both the White House Counsel and the OLC are evolving in ways that threaten more acute breakdowns in the decades ahead.

Consider how recently the president's lawyers have become an institutional force. The White House Counsel was an accidental creation of Franklin Delano Roosevelt. During the war, Roosevelt asked his long-time buddy Sam Rosenman to serve on his staff.[64] Before he came to the White House, Rosenman was a judge in New York, and Roosevelt hit upon the idea of calling the "judge" his "counsel to the president."[65] But in fact, Rosenman was a speechwriter and political advisor. His legal tasks were so minimal that he didn't need a legal staff to help him out.[66]

Roosevelt's appointment set the pattern for the next thirty years, with presidents awarding the honorific title of "counsel" to trusted aides who served a host of political functions. While they mixed in a smattering of legal advice from time to time,[67] the attorney general retained his undisputed position as the president's preeminent legal advisor—only he had an army of high-powered lawyers at his beck and call, while the president's counsel usually worked without the help of a single first-rate legal staffer.

Things began to change, again by accident, under Richard Nixon. He followed standard practice by rewarding John Ehrlich-

man, a top political aide, with the honorific "counsel to the president." But he soon put Ehrlichman in charge of his new Domestic Council, and the 30-year-old John Dean managed to get the vacant counsel's job.[68] The young Dean didn't have the heft to play the traditional role of senior statesman, so Nixon's chief of staff, Bob Haldeman, used him for special assignments.

Dean proved to be a first-rate entrepreneur and managed to build up a small legal staff to "tackle anyone and everyone's problems and do it discreetly. We gave advice on the divorce laws to staff members whose marriages had been ruined, and we answered questions about immigration law for the Filipino stewards who worked in the mess," as he explains in his autobiography, *Blind Ambition*.[69] He struck gold when he set up shop to advise White House staffers on conflict-of-interest problems: "It seems that when you really get to know a man's personal financial situation, . . . you can end up in his confidence if you play it right. And once you're in his confidence, he sends you business. What we've got to do is service that business. . . . When we get a question, we've got to fire back the right answer, fast."[70] When Dean's involvement in Watergate forced his resignation in 1973, he left behind an office that hummed with the energies of five ambitious lawyers.

Curiously, it was Watergate that preserved Dean's problematic legacy. The scandal encouraged high officials to protect themselves by hiring their own legal aides. Vice President Gerald Ford, for example, hired a legal counsel for the first time, setting a precedent that ultimately allowed Dick Cheney to transform his counsel, David Addington, into a central player in the Bush White House.[71]

But this brave new world was far beyond the horizons of the early 1970s. The Office of Counsel to the President remained a low-visibility operation, whose future remained in doubt until Jimmy Carter cemented it into the executive establishment.[72]

As usual, the decision had nothing to do with the institutional merits, and everything to do with short-term politics: Carter was sinking in the polls and sought to revive his flagging fortunes by appointing Lloyd Cutler as his counsel in 1979. Cutler was one of the great lawyer-statesmen of his generation, and he gave the office a new prominence—using it as a springboard for public interventions on major constitutional questions.[73] At the same time, his stellar reputation acted as a recruiting magnet for superlawyers to serve on his staff.[74]

Cutler was no empire builder. WHC remained the same tiny operation that Dean had bequeathed to his successors. Nevertheless, Cutler successfully established the office as an elite operation at the center of power. While his successors have varied in stature over the decades,[75] they have managed to sustain the legitimacy of the operation—and the staff gradually rose from five to forty during the scandal-ridden Clinton administration. The Bush years began with a cutback to fifteen, but it gradually grew to thirty or so by the end.[76] Quite remarkably, the intense controversy generated by Counsel Alberto Gonzales, and his successors, failed to halt the continuing rise of the office—which has grown to the low-40s during the early Obama Administration.[77] What is more, Obama has managed to recruit an extraordinary group of leading law professors and high-powered practitioners, confirming the office's super-elite status.[78]

Contrast the rise and rise of the White House Counsel to the slow decline in the attorney general's pretensions as the president's preeminent lawyer.

Begin from the beginning. During the Founding period, attorneys general weren't in charge of a large bureaucracy—the Justice Department was a creation of Reconstruction. They were not even expected to abandon private practice. The position served as a token of honor—that incumbents often assumed at

considerable cost, since they were paid at half the rate of other Cabinet officers.[79] Within this forgotten world, one of the attorney general's major tasks was writing advisory opinions on matters confronting the government—and though they complained bitterly about their low pay, their dependence on their private incomes gave them ample space for the exercise of independent legal judgment. Basically, they were doing the president a favor, and there was neither dishonor nor financial loss in retiring from the fray.

As federal business increased, this system gradually unraveled. By the 1850s, Caleb Cushing had gone full-time and won full pay, but he was overwhelmed with his opinion-writing duties—showing up in his office at seven in the morning to keep up.[80] James Speed was even missing church on Sunday as he churned out opinions under Lincoln and Johnson.[81]

The creation of the Justice Department in 1870 didn't ease the pressure—the "Department" began with only two assistants and a solicitor general helping out the overburdened AG. But as Justice grew over the next half century, the AG began to delegate much of his opinion-writing work to one or another aide—making final revisions if time, and the opinion's importance, permitted.[82]

As the decades passed, preparatory work began to gravitate toward the solicitor general and his small staff of elite lawyers. This made perfect sense. The office was already in the business of briefing large legal questions for the Supreme Court, and it seemed especially suited to help out the AG with opinion writing.[83] In 1925, the SG's role was formalized within the department.[84]

Then the Great Depression hit, and the federal government began a vast expansion of its regulatory mission. The proliferation of new executive agencies increased the demand on Justice to provide legal guidance when agency interpretations

conflicted—and the SG responded by assigning a special assistant SG to take on the opinion-writing function. By the 1950s, this special part of the SG's office gradually evolved into the current Office of Legal Counsel.[85]

During all this time, the White House Counsel existed in name only—and the Justice Department continued to sustain its position as the only serious legal advisor to the president. Moreover, the Office of Legal Counsel, like its predecessor unit within the Solicitor General's office, was largely populated by career lawyers, who tempered the presidentialist impulses of the political appointee at the top.[86] But just as Jimmy Carter was naming Lloyd Cutler as White House Counsel, his administration was also changing the character of the OLC. From Carter onward, political appointees would dominate the top positions, and the staff of attorney-advisors would largely consist of brilliant young professionals, not seasoned old-timers with decades of government experience.[87]

The OLC inherits a great tradition, but its present politicized condition resembles its mighty rival in the White House. What is more, its claim to legal authority is already visibly declining. For all the notoriety of the "torture" memos, it was White House Counsel Alberto Gonzales—not Jay Bybee or John Yoo at the OLC—who advised the president that the Geneva Conventions were "quaint" remnants of the past that did not apply to the war on terror.[88]

During the early Obama years, the White House Counsel's pretensions expanded further. He not only provided the president with confidential advice, he also began to defend the president in public, challenging the OLC's traditional role as the leading legal spokesman for the president.[89]

I am hardly the first to remark upon this ongoing shift in the balance of power from the OLC to the WHC. Peter Wallison

glimpsed the same dynamic when reflecting on his experience as counsel to President Reagan:

> The White House staff always wins over the agencies and his cabinet, always because they're closer to the President. . . . If there's a constitutional question about the president's power, if they want, they can make that decision on their own without consulting the OLC. Wherever you get a situation like that where some group has first opportunity and doesn't even have to inform the other group, over time, that first group is going to grow larger and larger and more competent, and eventually freeze out the second group completely. For this reason, eventually, the White House Counsel's Office will freeze out the Office of Legal Counsel. I think that's the long-time trend.[90]

Nothing is inevitable. But if the Obama team succeeds in erasing the scandalous reputation that the White House Counsel's office acquired during the Bush years, Wallison's prediction may well be vindicated in a decade or two. Once again, we will see the Counsel's office pressing the Office of Legal Counsel to generate constitutional apologias for presidential prerogative—and supplementing them with its own pronunciamentos if the OLC is insufficiently enthusiastic.

Only this time, these authoritative-looking declarations will be public, not private; and they will serve as the basis for a series of executive orders to presidential loyalists in the far-flung bureaucracy. As they follow their president, and ignore their department's traditional understandings of statutory mandates, Congress will respond by passing more statutes—which the president will approve with the addition of signing statements that declare their key provisions unconstitutional, hence unenforceable.

The president's critics will take their case to the courts, which will respond with a cacophony of opinions from district and

appeals judges throughout the nation. In the meantime, the attorney general and White House counsel will publicly reaffirm their confidence in their own legal opinions, and the president will direct his political loyalists in the bureaucracy to remain steadfast to the rule of law—as the executive has interpreted the law. They will obey, despite the scattershot of contrary legal opinions handed down in the lower courts.

With the bureaucracy creating facts on the ground, the president will appeal for support to the American people. As voters rally to his sound bites, the pollsters will give testimony to the breadth of his support: it appears that 82 percent of Americans are standing behind their president at this moment of crisis, with 64 percent convinced that he is on solid ground in insisting on the executive version of the rule of law.

As the matter moves to the Supreme Court, the justices consider their options—as do the military commanders, who stand on the sidelines and ponder the polls, the crisis, and the upcoming election, with deep concern.

I leave it to you to complete this tale of decline and fall.

PART THREE

RECONSTRUCTION

5

ENLIGHTENING POLITICS

I have been adopting a pathological perspective. The question is not whether the presidency is a constitutional battering ram—it has played a revolutionary role in the past, and it will do so in the future.[1] It is whether the twenty-first century will see a quantum leap in the presidency's destructive capacities. My answer is yes.

There is a brighter side. Throughout American history, great presidencies have been forces for democratic renewal as well as institutional destruction. And there are pluses, as well as minuses, to many of the particular developments I have been emphasizing. The rise of the primary system not only increases the risk of extremist presidencies; it revitalizes the citizenship commitments of ordinary Americans as they engage in the larger project of self-government. The separation of powers not only politicizes the bureaucracy; it injects dynamic leaders into the higher reaches of government, bringing new ideas and insights. There is a bright side to some, if not all, of the other changes we've considered.

Nonetheless, it is past time to confront the dark side. Constitutionalists should quit celebrating the Miracle at Philadelphia, and consider what, if anything, can be done to redesign the constitutional machine to minimize its risk of spinning out of control. The Founders were great men, but they were not supermen—they could not anticipate the rise of political parties, mass media, and massive bureaucratic and military establishments, let alone

the ways in which they would combine to transform the presidency into a real and present danger to the Republic.

There is nothing new to my basic claim. In path-breaking work, my colleague Juan Linz has led students of comparative government to appreciate the perils of presidentialism and its role in precipitating democratic breakdowns around the world.[2] Robert Dahl has recently sounded the alarm in his recent book on American democracy.[3] In applying for membership in the Yale School of Republican Anxiety, I have taken a different tack. Linz and Dahl emphasize the poor performance of presidentialist systems in other countries, but I have been telling a homegrown story of decline and fall. I have been taking exception to American exceptionalism on exceptionalist grounds.

It is one thing to sound the alarm; quite another for others to rally to the cause of reform. At earlier moments of crisis in the life of the modern presidency, a major political party was ideologically prepared to launch a broad-ranging critique. After Roosevelt generated shock waves by packing the Court with liberals, consolidating activist government, and winning four terms in office, Republicans led a bipartisan coalition to support major new restraints on presidential power, including the Administrative Procedure Act and the Twenty-second Amendment. When Nixon shocked the country in the Watergate scandal, Democrats launched a wide-ranging campaign against the imperial presidency—passing the War Powers Resolution, the National Emergency Act, and the Foreign Intelligence Surveillance Act, among others.

But today, both major parties are in love with the presidency. Democrats yearn to follow in the footsteps of Franklin Roosevelt and renew the progressive tradition for the twenty-first century. Republicans await the second coming of Ronald Reagan and, in the meantime, defend broad presidential prerogatives in the name of the Founders.[4] Although President Bush's

"war on terror" represents the greatest outbreak of presidential illegality since Watergate, we are not seeing anything like a post-Watergate response: no Congressional hearings probing the deeper causes of the crisis; no strong effort by constitutional conservatives of both parties to press forward with new landmark legislation safeguarding against future presidential abuses.

President Obama has renounced torture. And he has promised to close Guantanamo someday. But he has not launched a sweeping critique of the Bush legacy, and even his more positive steps are based on nothing more than an executive decree—permitting the next president to reverse course simply by issuing another round of decrees.[5]

The point of this book isn't merely to emphasize the failure of the president and Congress to confront the larger issues raised by the flagrant abuses of the Bush years—though this is obviously important. It is to open up a larger public debate that may create a more auspicious climate for a serious effort to reform our institutions before it is too late.

The first step is to distinguish between the tragic and pragmatic aspects of our situation. Some elements of our constitutional regime are so deeply entrenched that it would be silly to campaign for their revision. The most obvious example is the presidency itself.

Plenty of countries do very well, thank you, with constitutions that don't operate on American lines. In a parliamentary system, voters don't pick presidents directly. They vote for members of parliament, who then form a majority coalition that selects the prime minister. If voters don't like the results, they choose a different majority at the next general election. Instead of separating the executive from the legislature, the parliamentary system makes the prime minister depend for his office on a solid legislative majority.

The Founders believed that this was a formula for tyranny.[6] But when they wrote in 1787, nothing like modern parliamentary government existed. And their speculations have turned out to be completely wrong. The British were the great pioneers in the nineteenth century, and their Westminster model has been greatly improved during the twentieth—with European nations like Germany and Spain taking the lead in innovative constitutional designs.[7] Despite the Founders' dire predictions, parliamentary systems have proven entirely compatible with the protection of fundamental rights—while delivering democratic responsiveness at the same time.

All this makes comparative constitutional law an intellectually exciting subject, but these foreign developments haven't made the slightest dent in American confidence in their ancient institutions. The historical achievements of Franklin Roosevelt and his successors have made an independently elected presidency a fundamental part of the living Constitution. Americans would look with downright astonishment at a reform proposal calling for parliamentary government in the United States. So far as they are concerned, presidential elections provide the most important mechanism through which ordinary citizens can influence the political future of the country. They are thoroughly unprepared to give away this power to members of Congress and rely on them to choose a good chief executive.

And that is that. Reformers must take the independently elected presidency as a fixture of the existing regime—the pragmatic task is to think creatively about restraining the pathological tendencies of the office.

The same is true for the presidential primary.[8] The disastrous Democratic Convention of 1968 discredited the very idea that professional politicians should dominate the nomination of presidential candidates. For today's Americans, the right of pri-

mary voters to participate directly in choosing candidates is a fundamental aspect of popular sovereignty. Unless and until the risk of presidential extremism becomes a horrible reality, the primary system is here to stay.

It is even tough to reform the system in minor ways that reduce the extremist threat. Consider, for example, a federal law requiring "open" primaries that would allow non–party members to join in selecting presidential candidates. Under the "open" scenario, independents and Republicans would not be powerless if, for example, an extremist candidate were gaining momentum in the early Democratic primaries. They could show up at later primaries and vote with Democratic moderates to defeat a hard-left candidate in the homestretch. Opening the voting rolls would hardly guarantee this result—but it might help on the margin.[9]

Nevertheless, the Supreme Court has put this option off the table. It recently declared that "open" primary laws are unconstitutional—especially when they aim to change a party's political positions.[10] The Court was nearly unanimous, and its judgment provides a revealing perspective on the strengths and limits of the pathological perspective I have been adopting. On the one hand, the majority was absolutely right to see open primary laws as trenching on fundamental freedoms. As Justice Scalia says, what could be "more important" to a political party "than selecting a nominee"?[11]

And yet, surely the stability and sobriety of the Republic is no small matter? How, then, to resolve the conflict?

This is the point at which constitutional lawyers tend to blather on about the need to "balance" the costs and benefits of competing approaches. But to reach a proper balance, it would be nice to know the chances that one or both of the major parties will be the springboard for extremist candidacies within the

foreseeable future. And it is precisely at this point that my crystal ball goes cloudy: While the chances aren't zero, who can say whether they are 5 percent or 35 percent or . . . ?

Given the imponderables, the "balancing" slogan trivializes the nature of the requisite decision. Rather than engaging in a cool assessment of costs and benefits, we are confronting a tragic choice between two values of the highest importance. When faced with the choice, I would vote with Scalia, and say that we should stand firm for political freedom. But if you agree, this only makes it more urgent for us to be on the lookout for other—more acceptable—measures that promise to reduce the extremist risk.

Moving from process to substance, two additional features of the modern regime pose tragic choices. The first is the national commitment to activist government—dedicated to the on-going pursuit of economic welfare, social justice, and environmental integrity. These activist principles legitimate a massive bureaucratic apparatus, which can also serve as a politicized engine for presidential power grabs. Second, there is the commitment to world power, with a growing capacity to support counter-insurgency operations in far-off places. As the military perfects its role in state building in foreign lands, a politicized officer corps increases its capacity to intervene domestically during moments of crisis. Nevertheless, a "strong military" is a deeply embedded fixture of the current regime.

These four fixtures—an independently elected presidency, direct presidential primaries, activist government at home, and military interventions abroad—impose serious limits on the agenda for pragmatic reform. But I hope to convince you that a large space remains for creative innovation that will reduce, if not eliminate, the risk of runaway presidencies.[12]

Nothing is eternal. Within a generation or two, a politics of fiscal irresponsibility might well create a crisis in the welfare state,

forcing a radical cutback in the domestic responsibilities of the national government. Or a series of bloody but counterproductive wars might induce much-needed revisions in our foreign policy. In confronting these challenges, Americans might manage to use direct primaries to select a president who provides the nation with constructive leadership. Or the pathologies of presidential extremism and lawlessness may prove overwhelming, generating a crisis of the first magnitude. If Americans manage to fight back for freedom, they will be forced to rethink many aspects of current constitutional orthodoxy.

But I'm interested in more short-term results. I hope to encourage a serious reform conversation that might help us preempt the coming crisis and yield significant results within the next decade or so. Since we are dealing with multiple pathologies, we shouldn't be aiming for a single magical solution. We should take up our problems one at a time—and consider whether something sensible can be done to combat the politics of unreason, to reduce the risk of Electoral College blowups, to control presidential lawlessness, to discipline the use of emergency powers, and to cultivate an ethos of civilian control over the military. Some of my proposals are small, some are bigger, but none are fully adequate—and I urge you to come up with more and better ideas.

Begin with the politics of unreason. Our Enlightenment Founders were deeply concerned with demagoguery, but they thought the House of Representatives would be its primary source—this is one of the big reasons they added a Senate and a president into the institutional mix.[13] But now that the White House has become the platform for the demagogue-in-chief, how to develop a new institutional response?

By interrogating a key Founding presupposition. The Philadelphia Convention relied heavily on political representatives to

refine the relatively uninformed views of the general citizenry. This made sense in an eighteenth-century world in which politics had not yet become a specialized profession. Before the rise of well-organized parties, politics was dominated by leading landowners and merchants and lawyers who looked upon public office as an aspect of their broader claim to social leadership.

These political notables, as I have called them, didn't depend on electoral success for their economic prosperity, which was rooted instead in a slave plantation, a successful merchant enterprise, or a legal practice. If they lost an election, they didn't need to look for a new full-time job. They could simply take up their well-established pursuits.

Nor did electoral defeat signify a loss of social status—especially if they could tell themselves that they had stood up for the public good against the pressures of small-minded constituents. Indeed, a defeat by the voters might serve as a badge of civic honor amongst their social peers. This distinctive political ethos served as the context for the Founding expectation that notables like George Washington and Thomas Jefferson would continue to gain the presidency for the indefinite future.

Two centuries onward, modern politics is dominated by professionals, not notables. These politicos are very much interested in reelection—their continued status, and economic position, depend on it. They are surrounded by pollsters who constantly tell them the best ways to arouse, not resist, the passions and prejudices of their constituents. Even principled politicians are under enormous competitive pressure to succumb to a manipulative politics of unreason. After all, if your opponents will batter you with hot-button sound bites, it won't do your principles much good if you lose the election. The only good defense is a sound-bite offense!

Some politicians may resist this downward cycle, and some may even be rewarded by the voters for their sober self-restraint.

But the existence of these survivalists doesn't undermine my main point: politicians in general, and presidents in particular, face very different incentives from those prevailing at the Founding.

If today's constitutionalists are to respond effectively to the dangers of demagogy, we cannot afford to repeat the constitutional formulas of 1787. To sustain the Founding spirit in a different age, we must design new institutions that encourage modern politicians to move beyond sound-bite democracy.

My principal proposal tries to harness a second large social change to offset the professionalization of politics. While modern presidents have new incentives to debase political discourse, modern citizens have new capacities to resist. They have never been better educated; and they are increasingly working in computer-driven environments that invite them to develop their powers of symbolic expression and critical thinking. How, then, to encourage them to deploy these skills in politics as well as on the job?

Here is where my work with Jim Fishkin enters. Our book, *Deliberation Day*,[14] proposes a new national holiday held two weeks before presidential elections. Registered voters will be called to neighborhood meeting places to discuss the central issues raised by the campaign. Nobody would be forced to attend. But if tens of millions of citizens took up the invitation, it would radically change incentives for political professionals.

They would be forced to treat their fellow citizens with new respect. With millions of votes hanging in the balance, sheer self-interest will compel them to move beyond sound-bite politics and make their case within the context of sustained popular discussion on Deliberation Day.

DDay starts with a familiar sort of televised debate between the leading candidates. After the TV show, local citizens take charge as they engage the main issues in small discussion groups of fifteen and in larger plenary assemblies. The small groups

begin where the televised debate leaves off. Each spends an hour defining questions that the national candidates left unanswered. Everybody then proceeds to a plenary assembly to hear their questions answered by local representatives of the rival political parties.

After lunch, citizens repeat the morning procedure. By the end of the day, they will have moved far beyond the top-down television debate of the morning. Through a deliberative process of question-and-answer, they will achieve a bottom-up understanding of the choices confronting the nation. Discussions that begin on DDay will continue throughout the run-up to Election Day, drawing millions of non-attenders into the escalating national dialogue.

Too good to be true? I'm sure you can spot a lot of problems in transforming this initiative into an operational reality: How to deal with fringe candidates and third parties? What about individual troublemakers intent on disruption? Isn't the whole thing much too costly?

Answers to some questions simply require number-crunching: For example, Fishkin and I estimate that it would cost about $2 billion to run a Deliberation Day for 50 million voters—and that includes a free lunch and free transportation by school bus to and from 90,000 sites across America.[15] This doesn't seem too high a price to pay for Americans to move beyond a politics of unreason.

But most of the important questions—like problems posed by third parties and disruptive citizens—can't be solved through cost accounting. They require more creative exercises in institutional design. My book with Fishkin takes up such problems in detail, though we certainly don't suppose that our responses represent the last word.

For now, it's more important to emphasize that Deliberation Day has been field-tested in a series of pilot projects that dem-

onstrate its practical promise. Fishkin calls them "deliberative polls," and he has been fine-tuning their design in fifty-plus experiments around the world over the last fifteen years—ranging from the United States to the European Union to the People's Republic of China, and beyond.[16] Participants meet for face-to-face discussion under formats that serve as a model for the give-and-take on Deliberation Day.[17]

These discussions take place under conditions that allow a rigorous scientific assessment of the ways DDay might change our politics. For starters, participants are selected through sampling techniques that guarantee a representative cross section of their larger communities. Next, they are interviewed face to face—no telephones!—both before and after the discussions take place. This permits a disciplined comparison of the extent to which deliberation actually changes participants' understanding of the facts as well as their bottom-line value judgments. After fifteen years of work, Fishkin and his collaborators have generated an accumulating fund of data that speak to the key question: Would a well-constructed Deliberation Day have a serious impact on public opinion?

The answer is yes. Participants are far better informed on the issues at the end of the day. Deliberation makes a difference in the group's final judgments—there is a statistically significant change in more than two-thirds of the cases. The process is very democratic. Voters from all classes learn and change their opinions—not just the more educated. Sometimes the change is small, but sometimes it is large—swings of ten percentage points are quite common as participants learn the facts and discuss their normative implications.[18]

This point is crucial for my argument. Fishkin's findings suggest that Deliberation Day would operate as a powerful check on a presidential politics of unreason.[19] If a good performance on DDay can generate a ten-point swing, the leading candidates

will try to make sure that their side comes out on top. During the run-up to DDay, they will be flooding the airwaves and Internet with "infomercials" that provide partisans with arguments to persuade the undecided at their neighborhood centers; they will be conducting field seminars for their 90,000 party spokesmen to enable them to respond effectively to the barrage of questions raised by fellow citizens at plenary sessions; and once the exit polls from DDay start rolling in, they will beef up their arguments in a last-ditch effort to explain why their side should win in their struggle over the future for America.

Deliberation Day won't usher in an Enlightenment era of "government by discussion." Passionate commitment, and mobilized engagement, will always matter in politics. And rightly so: unless tens of millions of Americans really care about their country's political future, they will simply sit on the sidelines and allow well-organized interests to buy their way into political power. Reason without passion can generate mass indifference—just as passion without reason can generate mass hysteria. But at the moment, we don't have much to fear from a hyperrational politics—the challenge is to ensure a space for the continuing force of sustained argument in American political life. Deliberation Day answers this need.

It will also reshape the way presidents govern. Public opinion polling plays deeply problematic roles in contemporary politics, and DDay will ameliorate some of the worst pathologies. For starters, presidents will no longer be much impressed by the typical poll that reports Americans' instant reactions to a short telephone call. So far as the White House is concerned, the key test will come at the next election, and by then, another DDay will give citizens a chance to test their quickie reactions after a day's sustained discussion.

Under the reformed system, traditional polls will be a poor guide to the electoral future. If the White House wants to test likely voter reaction, it will substitute deliberative polls for the old-fashioned kind. This is the only way to simulate DDay conditions and find out how citizens would respond to policy initiatives after hearing *serious arguments* on both sides. This change in polling practice will generate a shift in the balance of power within the White House—away from sound-bite specialists toward staffers who are seriously concerned with the substantive merits of presidential initiatives.

Nothing wrong with that.

DDay will also cut down the appeal of traditional polling as a democratic legitimator. It will still matter whether the president is running at 30 percent or 75 percent in traditional instant polls. But it will matter less—even when the president is flying high, his critics will claim that his numbers will sink dramatically once the American people settle down for a day's deliberation. The president's defenders will, of course, say similar things when his instant-poll numbers are sinking precipitously—claiming that once he gets a chance to explain himself on DDay, his numbers will skyrocket!

This point-counterpoint will provide a new frame for the daily polling report. It won't be as easy to view the president's daily poll numbers as the latest returns from a rolling referendum on his democratic standing. The numbers game will appear as a very poor substitute for the ultimate question: What will Americans say once they get a chance to get together and talk through the issues before the next election?

DDay's reassertion of the value of deliberation is particularly important at a time when professional journalism is disintegrating before our eyes. For all its weaknesses, the modern

newspaper has been a bulwark of the politics of reason in the twentieth century. But the free dissemination of news on the Internet is destroying the business model that made serious journalism economically viable. Except for the financial press, newspapers have failed to convince readers to pay for online access, but they continue to try, and I hope they succeed.

But if readers don't succumb to the charms of PayPal—and quickly—we are in trouble. There has been a 43 percent drop in newspaper advertising revenue between 2005 and 2009, forcing a dramatic decline in jobs for journalists.[20] These grim realities are harbingers of a worldwide crisis that undermines the very foundation of liberal democracy.

The future belongs to the Internet, but blogging won't suffice to fill the void. It will allow lots of amateurs to detect scandals if each blogger spends a little bit of time searching for bits of incriminating evidence. But serious investigative reporting requires weeks of sustained inquiry, and the ongoing cultivation of contacts, to get to the heart of the problem. This requires real money—and how will it be raised?

Aside from the usual appeals for tax breaks and bailouts, the more innovative proposals come in two types. On the private side, there have been calls for charities to endow newspapers or to subsidize political reporting. On the public side, the success of public broadcasting in America and Britain provides a working paradigm that might be extended to the written word.

Both models have serious flaws. The problem with a BBC-style solution is clear enough. It is one thing for government to serve as a major source of investigation, though even this seems problematic without much stronger safeguards against an ideological takeover by a runaway presidency.[21] Expanding the role of PBS to the print media is far too dangerous: it could mean the death of critical inquiry just at the moment we need it most.

There are serious problems with private endowments as well. For starters, there is the matter of scale. Pro Publica, an innovative private foundation for investigative reporting, is currently funding thirty-two journalists—a drop in the bucket.[22] It is hard to make the case for a massive increase in private funding when university endowments are crashing throughout the world, imperiling basic research.

More fundamentally, private endowments have intrinsic weaknesses. Insulated from the profit motive, they will pursue their own agendas without paying much attention to the issues the public really cares about. While they can play an important supplementary role, they can't be relied on to occupy the vacuum left by big-city newspapers.

Are we at an impasse?

Here's an idea that I've been developing with my friend Ian Ayres: the Internet news voucher. Under our proposal, Internet users click a box whenever they read a news article that contributes to their political understanding. These reader "votes" would be transmitted to a National Endowment for Journalism, which would compensate the news organization originating the article on the basis of a strict mathematical formula: the more clicks, the bigger the check from the Endowment.

Some might find this prospect daunting. Readers may flock to sensationalist sites and click to support their "news reports." But common sense, as well as fundamental liberal values, counsels against any governmental effort to regulate the quality of news.

Nevertheless, some basic restrictions should apply. For starters, the government should not be in the business of subsidizing libel. It should limit grants to news organizations prepared to put up an insurance policy to cover the costs of compensating people whose reputations they destroy through false reporting. This means that a news organization must go into the marketplace and satisfy an insurance company that they have

the resources to do serious fact-checking. It's only if they pass this market test that they can open their voucher account with the Foundation.

The Endowment should also refuse to fund pornography—even if some of its viewers cynically check the box asserting that it has "contributed to their understanding of public issues."[23] But within these very broad limits, we should leave funding decisions to the countless clicks of ordinary citizens.[24]

To achieve this objective, each clicker will have to convince the Endowment that she is a real person, and not merely a computer program designed to inflate the article's popularity. As a consequence, she will have to spend a few seconds typing in some random words or syllables. Though the time spent typing may seem trivial, it will serve to discriminate between the cynics and the citizens. After all, the reader won't receive any private reward for "wasting" her time, day after day, clicking her approval of the articles deserving public support. She will participate only if she wants to share in the project of creating a vibrant public dialogue.

This click system can be understood as an Internet-friendly voucher mechanism, giving ordinary Americans the financial power to fill the hole left by the failure of the newspaper's traditional business model. When viewed from this angle, it shares the same aspirations as a recent proposal for a "citizenship news voucher" made by leading journalism scholars—though ours is designed to be as Internet friendly as possible.[25]

From a broader perspective, the Internet news voucher bears a family resemblance to Deliberation Day. Both initiatives create microenvironments that create a politics of discussion—in the case of DDay, by reserving an entire day for face-to-face confrontation with the leading issues; in the case of the electronic voucher, by creating an everyday context in which Americans can spend a passing moment to sustain the ongoing dialogue.

With Endowment funds clicking into their accounts, news organizations will have a powerful incentive to support investigative reporting that generates broad public interest. They will also invest in provocative political commentary that puts the news in context. There will be lots of clicks for scandalmongering and the like, but that's the price we have to pay for a system that won't be readily overwhelmed by the next authoritarian push from the presidency.

Before the clicking can begin, the Endowment would have to build an Internet highway connecting readers to articles to its central accounting office. This doesn't look too tough: much of the software already exists, and the remaining design problems seem solvable. Once the system is up and running, there will be an ongoing need to prevent scams that inflate the numbers through computer manipulations.[26]

This is difficult but doable. Some governmental monitoring of insurance companies will also be required, and the ban on pornography will be an administrative headache. Without minimizing the problems, the creation of an effective system of electronic news vouchers seems well within our reach.

I have said enough to make my larger point: Without new checks-and-balances—like Deliberation Day, the Deliberative Poll, and the Internet news-voucher—the slide toward a presidential politics of unreason will only accelerate over time.

We have been exploring the dark side of freedom of speech. The First Amendment gives politicians the right to define their own campaign strategies without government censorship. Under modern conditions, this allows them to develop ever more scientific ways of exploiting knee-jerk reactions, especially anxiety and fear. Since we can't censor the politicians, the only constitutional response is to provide the citizenry with resources for critical reflection. Hence, the need to devise new institutions.

Our second task is different. It requires the reform of an anachronism, not the creation of twenty-first-century opportunities. But that doesn't make it easier. The problem is clear enough: the Electoral College is a time bomb that will explode at the next close contest. Yet nobody seems inclined to do anything serious to fix the machine ahead of time.

The reason is the Constitution's system of formal amendment, which requires two-thirds of Congress and three-fourths of the states to approve a reform initiative. This means that thirteen states can kill an amendment—and there will be plenty of small states eager to exercise this veto. After all, they have a lot to gain from the existing formula that gives even the smallest state three electoral votes—two for its senators, and one for its representative. A state like Wyoming, with 0.2 percent of the national population, votes with three times its strength in the Electoral College. Indeed, every state containing less than North Carolina's 2.8 percent share of the population is overrepresented.[27] Since the small-state veto makes formal amendment a political nonstarter, it is tempting to close our eyes and ignore the obvious dangers posed by our antiquated system.[28]

But despite appearances, there is a realistic hope for constructive change. The current impasse has spurred creative efforts to devise a reform that could be adopted outside the formal amendment system. Five states have already joined together in an interstate compact—the Popular Sovereignty Initiative—that promises a decisive shift in effective control over the Electoral College. In signing the compact, each state declares its intention to cast its electoral votes for the presidential ticket that wins the national vote even if it loses locally. Once states with a majority of 270 electoral votes join the compact, they will be in a position to revolutionize the current system. No longer would the College grant vastly disproportionate influence to the small states. By engaging in bloc voting, the states joining the initia-

tive will guarantee an equal say to all American citizens, regardless of their place of residence.

It's about time that we made this change. The present setup made sense before the Civil War, when it was plausible to view the president as the presiding officer of a loose federation of states. But the achievements of a series of modern presidents—Theodore Roosevelt, Woodrow Wilson, Franklin Roosevelt, Lyndon Johnson, and Ronald Reagan—have transformed the nature of the office. Mainstream Americans now take it for granted that the presidency is *the* central spokesman for their national concerns, leaving it to Congress to represent local and regional interests. It is entirely appropriate to change the Founding system to bring it in line with the living Constitution and to give each American equal standing in the selection of our leading national representative. While the great presidential transformations of the twentieth century have brought great dangers in their wake, the right response is to respond directly to these dangers, not continue an anachronistic system that only serves to increase the chances of a grave crisis.

In moving beyond the status quo, the states entering the new compact are well within their constitutional rights. Article Two explicitly says that each state may "appoint" its electors "in such Manner as the Legislature thereof may direct." During the early Republic, legislatures often appointed their electors directly, without referring the matter to the voters.[29] They definitively rejected this approach only in response to the changing understanding of democracy expressed by Americans during the Jacksonian era. It's perfectly appropriate for the states to respond similarly to the changing meaning of presidential elections in the twenty-first century and guarantee the White House to the national winner.

Five states, with sixty-one electoral votes, have already joined the compact.[30] No less important, both houses of the California legislature approved the initiative before Governor Arnold

Schwarzenegger vetoed it. If the next governor responds more positively, California's assent could well provoke other big states to join the initiative and push it beyond the 270-vote threshold.[31]

If this happens, the proposed compact declares that it will become fully operational. But under the Constitution, it must pass a final test—gaining the approval of a majority in both Houses of Congress.[32] This is a far less onerous requirement than that demanded for a formal amendment under Article Five—and it could well be achievable, depending on the politics of the moment.

Congress should use its approval power judiciously. It shouldn't rubber-stamp the states' agreement without passing new federal legislation of its own. Otherwise, the compact could generate an even bigger crisis at the next close election.

Here is the problem: The interstate agreement creates a deadline for each state to make a "final determination of the number of popular votes cast . . . for each presidential slate." But it doesn't say what happens if the courts are still considering challenges to the initial results.[33] Without a solid nationwide count, how are initiative states to know which candidate is deserving of its bloc vote?

Only Congress can answer this question, and in the process, it can clean up legal confusions inherited from past efforts to resolve election disputes. The last time Congress passed a statute on the matter was in 1887, and as Chapter 3 suggested, this effort left a legal legacy that will encourage cynical manipulation and bitter political impasse at the next contested election.

The new statute should clarify the present confusion—setting a new timetable for state returns, creating new federal standards for the conduct of presidential elections, and providing for new forms of federal assistance in the case of disputed election returns.

It should also minimize the impact of the Founder's blunder in designating the departing vice president as the presiding officer dealing with disputed vote counts. Since the old VP is often a leading presidential candidate, the new statute should take special efforts to ensure that he will merely serve as a ceremonial figure.

Under the revised system, the key decision will involve the determination of the national vote totals. The statute should create a bipartisan commission of leading political scientists to determine this matter. While the commission investigates, the states should postpone the formal meetings at which their electors cast official presidential ballots. In identifying the winner, the commission won't have to resolve all disputes in all states—it simply must find that the national margin of victory is large enough to make the remaining state disputes irrelevant in identifying the nationwide winner.

The commission's finding will then provide a solid basis for the electors in the compact states to cast their 270-plus votes. Instead of the political free-for-all invited by the legal framework inherited from the nineteenth century, a modern statute should protect the integrity of the commission's findings and prevent the Senate president, or Congress, from ad hoc political interventions. This is a bare-bones outline, which would require lots of elaboration once the initiative gets closer to the finish line.[34] For now, it's enough to emphasize the key point: We should not wait passively until our antiquated electoral machine explodes once again. We should seize the opportunity offered up by the Popular Sovereignty Initiative and create a system that makes sense in the twenty-first century.

We got away lucky the last time. While an Electoral College crisis is never exactly fun, 2000 was the perfect year for it to happen. The country was enjoying an unparalleled period of peace and prosperity. The leading contenders made every effort

to blur their underlying disagreements. In the halcyon days before September 11, nobody supposed that much was at stake in the choice between Bush and Gore.

The next vote-counting disaster may strike at a much less propitious moment—when ideologically polarized political parties are struggling for the White House under conditions of grave economic or military distress.

The time to act is now.

6

RESTORING THE RULE OF LAW

I have been dealing with the relationship between presidents and voters—the rise of a charismatic politics of unreason, the fall of professional journalism, and the explosive potential of our antiquated electoral machinery. It's time to move inside the Beltway and consider the presidency's ongoing confrontation with the other great power centers: Congress, the Supreme Court, and the Pentagon.

The institutional presidency is on the march. The White House Counsel and the Office of Legal Counsel have gained the capacity to mount an effective challenge to the Supreme Court during the next presidential power grab. Whatever else can be said of the Court, it is relatively independent of short-term politics, it hears both sides of the argument, and it locates its judgments within a centuries-long conversation over fundamental principles.

In contrast, the rising system of executive constitutionalism is entirely controlled by presidential loyalists. These skilled professionals do not understand themselves as impartial judges, but as the president's lawyers—and even the loftiest view of this role can rapidly deteriorate into aggressive advocacy during crises. At these moments, the Justice Department's capacity to crank out impressive-looking legal pronunciamentos is dangerous. It permits the presidency to move aggressively on the legal front during the months and years before the Supreme Court gets a chance to confront the big issues raised by the latest

power grab. With the bureaucracy and military following the president's marching orders, his media-machine will be slicing and dicing the work of the Justice Department to convince the general public that everything is on the legal up-and-up. Within this environment, it is all too likely that the Court will use the "political question" doctrine to stage a dignified retreat and allow the plebiscitary presidency to work its will.

It doesn't have to be that way. But we must rethink our tradition to design a suitable response. As early as 1793, the Supreme Court refused George Washington's request to interpret key provisions of the treaty with France, insisting that it had no jurisdiction to issue advisory opinions.[1] Chief Justice John Marshall famously followed up in *Marbury* with a theory of judicial review that was based on the model of a private lawsuit. In this familiar view, the Court gets into the act only when a litigant suffers a particularized injury and asks the justices to rectify the situation in the name of the Constitution. Within this private-law framework, the matters addressed by the White House Counsel and the Office of Legal Counsel often fail to raise judicial questions, since they arise at a time before any private actor has suffered a concrete and particularized setback.

This traditional system of judicial review provided a sufficient check-and-balance on the presidency in Marshall's time—when the entire federal establishment numbered in the low thousands and the president was unable to make charismatic media appeals for public support. But under twenty-first-century conditions, courts can no longer sit back and relax until somebody can convince the judiciary that he or she has a justiciable injury. While legal myth reassures the justices that they will have the final say when a "case or controversy" finally arrives in their court, they can no longer count on the public (or the profession) to support this claim at crunch time.

It would be best if the Supreme Court recognized the danger and radically expanded its understanding of the meaning of "case [or] controversy." But there is zero chance of this happening any time soon. The *Marbury* model is far too entrenched in judicial circles for the Court to attempt a sweeping reappraisal of existing doctrine.

If progress is to come, it will be through vigorous public debate over the shocking outbreak of presidential illegality in the war on terror. The "torture memos" generated by the Office of Legal Counsel under George W. Bush symbolize the extraordinary collapse of executive constitutionalism at moments of crisis. It would be a tragic mistake to view this episode as a momentary aberration in the life of the modern presidency. To the contrary, it was an entirely predictable consequence of the present institutional setup—which puts the meaning of national security law at the mercy of a politicized Office of Legal Counsel and a superpoliticized White House Counsel. Since the Supreme Court won't intervene early enough to check similar abuses in the future, the only remaining option is to create a new institutional mechanism that will put a brake on the presidential dynamic before it can gather steam.

Call it the Supreme Executive Tribunal, and its nine members will think of themselves as judges for the executive branch, not lawyers for the sitting president. Members of the tribunal will serve (staggered) twelve-year terms, giving each president the chance to nominate three judges during his four years in office. Nominees must gain Senate confirmation—encouraging the president to put forward candidates with established reputations as fair-minded jurists, not political operatives. The staggered terms will lead different presidents and different Senates to support nominees expressing different constitutional philosophies—as a consequence, the tribunal will be the site of a

complex legal conversation in which dissents and concurrences enrich an ongoing understanding of the legal issues at stake. In other words, the tribunal will look and act like a court, not like an advocate.

The president will continue to have a full staff of advocates at his command. They will have plenty to do dealing with Congress and framing legal opinions for executive departments and the White House. But these opinions will have only provisional authority, subject to full-dress adjudication by the Executive Tribunal.

As politics change, and legal argument proceeds, the dominant opinion of the tribunal will evolve—dissents will become majorities; majorities, dissents. But at any particular time, the judges will have spent a great deal of energy hammering out a consensus on core constitutional doctrines, and they will resist sudden presidential efforts to break free of these restraints—which is precisely the point of creating the tribunal in the first place.

At the same time, the tribunal's ongoing interchange with the executive branch will put a damper on unilateral assertions of power. At present, the president's lawyers develop aggressive constitutional doctrines without much fear of correction by the Supreme Court, especially in the area of war, national security, emergency powers, and the like. The Court's statements on these questions are few and far between, and executive branch lawyers are skilled at exploiting ambiguities in the Court's rare opinions to keep on expanding presidential powers.

The new tribunal will change all this. Presidential lawyers will confront the prospect of regular and timely judicial review, and this new reality will sober up the legal enthusiasts who thrive in every administration. Instead of priding themselves in cutting-edge reinterpretations of traditional doctrines, the White House Counsel and Office of Legal Counsel will be preparing for the

next case before the tribunal—and they will rightly fear that extreme positions will only serve to alienate the judges.

Over time, the ongoing exchange between advocates and jurists may encourage the Supreme Court to take a larger role in the constitutional conversation. As the tribunal debates its leading doctrines, its dissents and concurrences will allow the justices to grasp the key issues more clearly. As their understanding increases, they may well seize more opportunities to influence the future course of the tribunal's doctrinal development.

Whenever the Court does speak, the tribunal must listen. If the experiment succeeds, it will link the president and his lawyers both to the executive tribunal and to the Court, creating an enduring and evolving culture of legality at the highest reaches of the executive branch.

But, of course, the experiment might fail. We will never know unless we try.

Not that we should expect miracles: if the president keeps pressing the limits of his authority, and his party keeps winning elections, he will keep on appointing more and more latitudinarian judges to the tribunal—and the Supreme Court will take notice and assume a more cautious posture. My proposal will only slow, not eliminate, the institutional dynamics of constitutional transformation. As I explained in Chapter 3, this is all I am aiming for.

The tribunal's most important cases will be brought by members of Congress. The Supreme Court currently refuses to hear many of their complaints because members lack a personal stake in the outcome, and even when they have standing to bring a lawsuit, the justices often refuse to give senators and representatives the answer they are looking for. Under its "political question" doctrine, the justices self-consciously defer to the other branches and encourage them to work out the constitutional issue on their own.[2]

Here is where the executive tribunal comes in—creating a new forum through which Congress and the president can resolve their constitutional standoffs through the rule of law. When senators and representatives can't reasonably expect ordinary courts to consider their complaints, the tribunal will open its doors to hear their arguments. An obvious place for the tribunal to begin is with presidential signing statements—which I suppose will be a fixture of our constitutional arrangements for the foreseeable future. These slapdash documents should no longer serve as the final word from the executive branch. If a significant number of congressional representatives file an objection, the tribunal should resolve the constitutional questions after hearing advocates for both Congress and the president make their case.[3]

The same thing should happen when the president's lawyers assert a constitutional prerogative to act unilaterally in the face of statutory prohibitions—or interpret restrictive statutory language in "creative" ways that allow the president to escape the plain meaning of congressional commands. As in the case of signing statements, any opinions issued by the OLC or WHC will retain an interim validity—but once the tribunal makes up its mind, its understanding of the law will be binding on the executive branch.

At a later stage, many executive decisions will start having real-world effects that may allow particular people to begin a legal challenge that will end up in the Supreme Court—and when this happens, it will be up to the Court to make the final call. But in the meantime, the Supreme Executive Tribunal will restrain the pathological dynamics that might otherwise steamroller the Court onto the sidelines of American constitutional law.[4]

It would take lots of legal fine-tuning to turn these ideas into thoughtful legislation.[5] But the project is perfectly feasible—

this is, at least, the lesson of worldwide constitutional experience since World War II. My proposal builds on the success that other leading nations have had with similar tribunals.[6] Despite this positive verdict from other Western democracies, perhaps our own Constitution raises special problems?

The Supreme Executive Tribunal can't credibly function without a great deal of insulation from direct presidential control—and so my proposal will kick off another round in the long-standing debate over the president's removal powers. If we look to the lessons of experience, the verdict of history is clear. Over the course of the twentieth century, Congress and the president have cooperated to create a host of independent agencies like the Federal Reserve Board and the Federal Communications Commission.[7] And the Supreme Court long ago upheld statutory efforts to forbid the president from firing these agency heads simply because he didn't like what they were doing.[8]

The Rehnquist court reinforced these restrictions in a famous decision involving the statute that authorized independent prosecutors, like Kenneth Starr, to investigate high-ranking officials, notably Bill Clinton. Chief Justice Rehnquist upheld this law in a sweeping opinion that gained the support of seven justices, with only Antonin Scalia dissenting.[9]

Nevertheless, Scalia's dissent has helped spark a new wave of academic critique that seeks to repudiate the collective judgment of the twentieth century in support of independent agencies. If these critics had their say, the Supreme Court would declare all of them unconstitutional. In their view, the Constitution creates a "unitary executive," granting the president complete authority over the entire administrative establishment.[10]

Despite the scholarly agitation, the chief justice and his colleagues were entirely right in adopting a pragmatic approach. "[T]he real question," Rehnquist explained, is whether the restrictions "impede the President's ability to perform his constitutional

duty"[11] to "take care that the laws be faithfully executed."[12] Unless the "the President's need to control [an official's decision] is . . . central to the functioning of the Executive Branch,"[13] the Court should not strike down reform statutes that gain the support of the political branches.

This framework powerfully supports the constitutionality of the Supreme Executive Tribunal. Indeed, it suggests that the constitutional case is even more straightforward than those that support classical independent agencies like the Federal Reserve or the FCC. After all, these institutions are charged with the task of *executing* key statutes—and as a consequence, the policies they undertake may well conflict with presidential priorities. In contrast, the Supreme Executive Tribunal would *not* interfere with the president's core executory functions. Instead, it would greatly enhance his capacity to fulfill the constitutional command "to take care that *the laws* be faithfully executed" (my emphasis).

My argument begins with a truism that may rise to the dignity of a banality. Before a president can even begin executing the law, he must first figure out what the law requires him to do. It is not enough for him to suppose that "the law" means whatever he wants it to mean. He has an obligation to exercise this "interpretive power in good faith."[14]

The present institutional setup fails this test. It is a recipe for the subordination of law to politics. It permits a politicized staff at Justice and a superpoliticized staff at the White House to provide the president with impressive-looking pieces of paper. But nobody can say, with a straight face, that the current setup represents a good-faith institutional effort to provide him with a *balanced* understanding of the law.

To provide such an assurance, the system would have to be designed in a very different way. It must guarantee the chief

legal interpreters for the executive branch that the president can't punish them if they don't tell him what he wants to hear. It must also require them to hear vigorous adversary argument before they make up their minds on tough legal issues: without hearing both sides, how can they possibly say, *in good faith*, that they have come to a thoughtful and balanced view of the law?

Yet these elementary safeguards are entirely lacking today. They can only be provided by an institution that looks a lot like the Supreme Executive Tribunal.

In condemning the existing system, I don't deny that particular presidential lawyers—or even entire administrations—may resist the pressure to subordinate the law to short-term political imperatives. But James Madison warned us long ago that "enlightened statesmen will not always be at the helm."[15]

This Madisonian spirit should govern our reading of Article Two—so long as we recognize that we are applying the text to a bureaucratic world beyond Madison's ken.[16] Given twenty-first-century realities, the president doesn't have the time to do the hard work required for an informed legal judgment on a tough issue. If he is to fulfill his constitutional mandate, he has an obligation to design *institutions* that will reliably tell him what the law is. And if the current setup can't do the job reliably, he should work with Congress to establish better institutions that will discharge his duty to "take care that *the laws* be faithfully executed."

Congressional involvement is inevitable, since it must provide the money that will bring the new tribunal to life. It is also desirable, since Congress has a fundamental constitutional interest in ensuring the faithful execution of the law within the larger system of separation of powers. In creating the new tribunal, Congress and the president would be acting

under the constitutional authority granted them by Articles One and Two.[17]

To remain within constitutional boundaries, the tribunal's authority must be strictly limited. Its task is simply to interpret the law—it is then up to the president to decide how to execute the laws in a "faithful" fashion. This will often give him a great deal of flexibility when responding to tribunal decisions—especially those he doesn't like.

To see my point, consider that law enforcement is a costly business: it's simply unrealistic to expect the executive branch fully to enforce all federal law all the time. Even a "faithful" president must exercise lots of discretion in setting priorities—targeting some laws for intensive enforcement while stinting on others. This means that the president won't have to denounce the tribunal's handiwork if he doesn't like its opinion. He may simply consign the statute-as-interpreted to enforcement limbo: "Sorry, but there are so many other worthy statutes that also require faithful execution."

This gambit won't work in one important class of cases—those arising under statutes that impose strict restrictions on presidential power. If the tribunal says that the president *can't* torture, or *can't* assert emergency powers without congressional approval, the president can't credibly claim that obedience will cost the government extra money—among its many other vices, torture is an expensive proposition. In such cases, the president will have no choice: if he is determined to pursue his course, he must defy the tribunal.

But under very risky conditions. Once the tribunal has spoken, a wave of anxiety will ripple through the civilian and military establishment. These officials normally enjoy absolute immunity when they follow presidential orders, but they can't take this for granted if the tribunal has handed down its adverse

judgment. The tribunal's opinion puts them on notice that they risk civil and criminal liability if the president ultimately fails to sustain public support for his unilateralist adventure. This will cause them to pause before following the president's problematic commands. Indeed, given the uncertain loyalty of the bureaucratic and military establishment, perhaps the president will pause at the brink, and accept the validity of the tribunal's ruling?

Or perhaps he will respond by escalating the constitutional stakes, following down the path of Richard Nixon: "When the president does it, that means that it's not illegal." But Nixon made his famous claim four years after he left the White House.[18] When he was the sitting president, his deeds did not match his words. He did not defy the Supreme Court when it ordered him to turn over his incriminating tapes during the Watergate Affair.[19] He handed them over, even though this gave his enemies a "smoking gun" in their impeachment campaign.

Nixon's famous retreat is hardly dispositive—since it is precisely my thesis that the modern presidency is far more dangerous than it was in the 1970s. What is more, an adverse opinion from the executive tribunal will not have the weight of a negative judgment by the Supreme Court. The Court has two hundred years of history going for it, while the tribunal will be a mere fledgling. Much will depend on its success in legitimating itself during the years before the first great crisis. But it will also depend on the politics of the moment.

It would be silly to try to predict the outcome. Even if the tribunal retreats before the president's counterattack, the institutional standoff may have salutary consequences. It will alert ordinary Americans that something very troubling is taking place in Washington, making it easier for the Supreme Court to intervene effectively later on.[20]

And if the tribunal emerges successfully from its first serious encounter, its victory will signal a new beginning for the rule of law in America.

A politics of unreason. A culture of lawlessness. Can we design institutions that will check-and-balance presidentialist impulses in these directions?

Maybe so, but our thought experiments have been operating under one important constraint: we have thus far been taking the present institutional setup at the White House for granted. Rather than trying to control this central decision-making system, we have been tacking on new institutional safeguards that could serve to check its pathological tendencies. But are there practical ways to reorganize the White House itself to reduce its tendencies toward charismatic lawlessness?

Recent presidents have massively increased the power of their staff to give marching orders to the far-flung bureaucracy—and I have already called for a push-back against the dangerous escalation of these powers by the Clinton administration.[21] But the problem posed by the president's large staff goes deeper than the exercise of one or another particular power. Presidential illegalities during Watergate, Iran-Contra, and the War on Terror all had their source in the hothouse atmosphere of the White House—with hundreds of superloyalists reinforcing each other's tendency to demonize outsiders and advocate extreme measures to overcome their resistance. There is no returning to the old days before 1939 when the president governed through the cabinet. Yet there is at least one measure that might help check the worst excesses: require senatorial confirmation for all leading staffers.

When Franklin Roosevelt first won the right to name six special assistants, he evaded the traditional confirmation requirement with reassurances about the future: "These aides would

have no power to make decisions or issue instructions in their own right. . . . They would not be assistant presidents in any sense." Instead, they would simply provide the president with the information necessary to make decisions. Their principal qualification would be a "passion for anonymity."[22] And because they would exercise no decision-making authority, it would be pointless to insist on Senate confirmation.

Roosevelt was more or less faithful to his commitment. But as his tiny staff grew into the hundreds, the original understanding of 1939 no longer has the slightest relationship to reality. By any operational measure, leading White House staffers exercise real power, competing successfully with cabinet officers for influence over big decisions. They have long since lost their "passion for anonymity." Hardly a day passes without some leading staffer seizing a media opportunity to talk up the president's program. And yet, with very few exceptions, they remain immune from senatorial "advice and consent."

We are in a curious situation. The Senate takes the trouble to vote on the nomination of each new ambassador to Luxembourg,[23] but it remains on the sidelines when the president appoints his national security advisor. From time to time, the president's political opponents challenge the legitimacy of this practice, and the Senate holds hearings—at which point the president's defenders tell the senators that presidential "czars" are humble advisors without any decision-making power. This is sheer legal fiction: nobody would think of saying such silly things, except to seek the ritual blessing of the Founding Fathers on Capitol Hill.[24]

When describing British government in the nineteenth century, Walter Bagehot emphasized the importance of distinguishing the "efficient" from the "dignified" aspects of the constitution. During his day, Britain's *dignified* constitution continued to center around the queen and her court; but its *efficient* power

centers were the cabinet and the House of Commons.[25] A similar, but opposite, transformation is happening in America today—away from the legislature, and toward presidential government. This means that our dignified Constitution emphasizes Senate confirmation of cabinet officers while effective government is increasingly run out of the White House by presidential staffers.

This asymmetry in confirmation practices encourages the further centralization of power in the White House over time. If, say, the president suspects that his favorite candidate for secretary of the treasury will encounter resistance on Capitol Hill, he can avoid a confirmation fight by unilaterally appointing him White House "czar" for economic policy, nominating a secondary figure to the cabinet post.[26] Centralizing decisions by one administration create precedents for the next, accelerating the rate at which effective power shifts from the cabinet to the executive office of the presidency.

If we reestablished symmetry in confirmation practices, we would eliminate this perverse incentive. A reinvigoration of checks and balances would also encourage a culture of legality. The president could expect trouble with the Senate if he tried to surround himself with superloyal second-raters. He would have a new incentive to select men and women with established reputations as serious people in their own right. And once his top advisors won Senate confirmation, they would be in a better position to resist lawless initiatives. A resignation threat will impose a far greater cost than it does today—since the president could not appoint a successor without another confirmation battle.

The prospect of increasing staff independence will, of course, prompt fierce presidential resistance to any attack on his present powers of unilateral appointment. The president—any president—*wants* superloyalists to push his program into effect de-

spite congressional and bureaucratic resistance. As to the systemic risks generated by a hyperpoliticized staff, he will assure himself: "I'm no Richard Nixon; why make my life more difficult to prevent some future president from abusing his powers?" If Congress tries to pass legislation requiring Senate confirmation for key White House posts, the president will predictably respond with a veto threat—unless, that is, the Senate offers something very valuable in exchange.

Here is where another pathological aspect of the modern system may come to the rescue. Individual senators can now block the confirmation of hundreds of key officials in the cabinet departments for lengthy periods, gravely undermining the administration's effectiveness. By offering to eliminate this second abuse, the Senate might manage to interest the president in a grand bargain: In exchange for gaining the power to confirm top White House officials,[27] the Senate should guarantee an up or down vote on *all* executive appointments within sixty days of their nomination.[28]

Before elaborating the terms of this bargain, we should explore how and why the Senate confirmation requirement has become a significant drag on effective government. Under present practice, if a single senator chooses to "hold" a presidential nomination, there is no way for the Senate to move immediately to a final confirmation vote. For starters, the president must round-up sixty senators willing to cut off debate on the nominee. Even then, opponents can still insist on thirty hours of floor debate before the vote takes place. Floor time is the Senate's scarcest resource, and the threat to waste thirty hours on a single nominee gives senators tremendous leverage.

Which they use for all it's worth—not only to block objectionable nominees, but also to hold good candidates hostage as they bargain for presidential concessions on unrelated issues. Notorious cases abound, but Senator Jesse Helms remains the

world champion abuser. He blocked, stalled, and stonewalled the appointments of Democratic and Republican presidents alike.[29] The public record represents the tip of the iceberg. Remarkably enough, senators can impose a secret hold on nominations, and so we lack hard data.[30] Nevertheless, occasional leaks suggest the dimensions of the abuse: Senator Richard Shelby, for example, was recently embarrassed when his anonymous "hold" on *seventy* Obama nominations leaked to the press—he had imposed his sweeping veto, he explained, to obtain special federal funding for a couple of home-state projects![31]

This is no way to run a government—and yet, as in the case of so many other practices we have investigated, it does not boast a long pedigree. Senators only gained their present arbitrary power in the 1970s. Before then, they could only block a confirmation vote by launching a filibuster on the Senate floor. This was physically exhausting and politically costly: senators would look ridiculous if they speechified endlessly against the appointment of an assistant secretary of state.

Once the white South fought and lost the great filibusters of the civil rights era, Mike Mansfield, then majority leader, tried to cut down their obstructionist potential. Under his "two-track" system, filibusters were reserved for the morning while the Senate considered other business in the afternoon.[32] But even this proved too time-consuming, and over the next decade, majority leaders would only bring bills to the floor if they could count on sixty votes for cloture.[33] During the same period, they also began to rely heavily upon unanimous consent agreements to push legislation through the Senate.[34]

These changes transformed the "hold" into a powerful weapon. They had previously evolved informally as a matter of senatorial courtesy: a member would ask his party leader to "hold" a matter briefly until he could get more information on the issue.[35] But during the 1970s, senator began using "holds" stra-

tegically to object to a consent agreement or to threaten a filibuster.[36] Since they could be filed anonymously, senators did not even need to appear on the floor, creating the equivalent of a "stealth filibuster."[37] The threat was particularly powerful in the case of subcabinet nominations, whose fate doesn't generate much public attention.[38]

The overall impact has been devastating: John Kennedy took about two months, on average, to win confirmation for his initial team of nominees; Ronald Reagan, about six; George W. Bush, more than nine—and Obama may well take longer.[39] Delays only get worse when the president tries to fill openings left as his first round of appointees start leaving the government.[40] The problem is especially acute during the final years of a president's second term. A summary statistic suggests the overall impact: between 1979 and 2003, Senate-confirmed positions were, on average, vacant 25 percent of the time.[41] As the president fills these empty positions, others open up, continually undermining the team effort required for the smooth operation of cabinet departments.

The Senate isn't the only source of the problem—the presidency is also partly responsible for the increasing delay. But it's unnecessary to apportion blame to make my key point: If the Senate pushed for the power to "advise and consent" to top White House officials, it has a big bargaining chip at its disposal. By committing itself to an up-or-down vote on all executive branch nominations within sixty days, it would be offering the president the chance to govern far more effectively than he does today. This should be a tempting prospect—and worth trading for Senate oversight of key White House appointments.

Maybe not. Perhaps presidents have become so addicted to their White House superloyalists that they would refuse the Senate's offer of more effective government elsewhere in the far-flung bureaucracy. But suppose the Senate upped the ante, and

offered the president a deal that also made it easier for him to enact his big legislative initiatives into law. Under this expanded version of the "grand bargain," the Senate majority required to overcome a filibuster would be gradually reduced—it would still take sixty votes to end debate during the first twenty hours of floor discussion; then the hurdle would go down to fifty-five votes. And once the thirtieth hour passed, a simple majority would be enough to call a halt. This sliding-scale arrangement would sustain the Senate's deliberative character while giving the White House a much better chance to pass high-priority legislation.[42]

It would also bring (almost) any president to the bargaining table. While Senate vetting of his White House staff would be a bother, it would be tough to turn to down the prospect of more effective government *and* greater legislative success. After all, the Senate generally gives the president the cabinet secretaries he wants, and the same would be true of his top White House aides. The public understands that the president needs their help, and it would be politically costly for the Senate repeatedly to reject his nominations—provided that the White House sends down candidates with real stature. In contrast to the petty annoyances of Senate confirmation, the expanded version of the "grand bargain" offers the president political gains of the first magnitude.

The senators themselves will be less impressed. Each gains a lot of arbitrary power under the status quo. And as a group, they will try to deflect any serious effort at reform—if the public, and party leaders, allow them to get away with it. Nevertheless, senatorial resistance hasn't always been successful—in 1975, the filibuster-proof majority was reduced from sixty-seven to sixty.[43]

And public sentiment seems to be building for another assault on arbitrary senatorial prerogatives. My aim has been to

urge my fellow reformers to rethink their priorities as they wait for their next political opening. Critics of the filibuster typically focus exclusively on the Senate and urge an across-the-board rejection of the practice. The Senate is already the most malapportioned upper chamber in the entire world—with California's two members representing almost seventy times the population of Wyoming.[44] And the filibuster makes a bad thing even worse—giving senators representing 11 percent of the population the power to veto legislation.[45] Given its flagrantly antidemocratic character, shouldn't reformers concentrate all their energies on overcoming the Senate's bitter-end defense of its indefensible practices?

My answer has been no. The filibuster is only part of the problem, especially when it comes to the Senate's role in vetting nominations. The other part involves the dramatic erosion of the Senate's power to confirm many of the most important decision makers in the executive branch. If the Senate does not regain this power to advise and consent on the nomination of top White House officials as part of a "grand bargain," it will lose its last best hope to regain its role as an effective check on an overcentralized, and superpoliticized, executive office of the presidency.

Turning to the military, the challenge is to reinvigorate the principle of civilian control and make it a part of the ongoing professional life of the officer corps.

This should be the aim of a new Canon of Military Ethics. These canons should aim to clarify the meaning of civilian control within real-world settings. Their primary task is to elaborate context-sensitive guidelines for good practice—not to identify conduct so outrageous as to merit criminal punishment. Like the comparable canons of ethics for judges, they should presume that the officer corps is dedicated to the principles of

constitutional government, but that these principles require clarification in the modern world. Once the canons are in place, there will be a need for a system that informally cautions officers who get too close to the line and imposes administrative sanctions on blatant offenders.

The service academies and war colleges should take the lead in preparing case studies that will enable a broader confrontation with the basic issues. If we are lucky, these academic initiatives might catalyze wide-ranging reactions from the entire officer corps—including the top brass, whose conduct will be most directly affected.

Defining the new canons cannot be the exclusive preserve of the military. The guidelines will have ramifying implications for civilian policy makers at the Pentagon, in the White House, and on Capitol Hill. Real progress requires the construction of a special forum—one that invites both civilian and military leaders into a sustained effort to create a realistic code of conduct.

A creative secretary of defense could take the lead, but the best way forward is through a Presidential Commission on Civil-Military Relations. Leadership from the White House would signal the importance of the project and encourage the recruitment of top people. It would also suggest the right time frame for action: not a few months, not a few decades, but a couple of years of sustained discussion leading to a concrete proposal.

If the commission's initiative gained broad support, the president should seize the opportunity to put the canons into effect—he has ample powers to do so as commander in chief. But it would be even better for Congress to give its statutory endorsement and provide a structure for the regular revision of the canons every decade or so—modifications will surely be needed as experience accumulates over time.

This ongoing project would serve as a fundamental response to the accelerating politicization of the military. The canons

would provide the officer corps with something more than a set of practical guidelines. It would provoke a deeper reorientation to the entire question of civilian control. Through its active participation, the officer corps will be working with civilian society to construct a new military ethos for the twenty-first century.

This new ethos should be crystallized in a series of legal changes. For starters, the Department of Defense should abolish its program under which retired officers serve as "senior mentors" to the active-officer corps. The current system is an open invitation for abuse—with the high command using the mentors as political mouthpieces to denounce publicly the policies pursued by their civilian superiors. Something like this happened in the 2006 "revolt of the generals" against Donald Rumsfeld—which helped set the stage for his ouster by a reluctant president. This success will encourage further "revolts" in the future.

Mentoring only started in the 1980s—the armed forces operated perfectly well without it for two centuries, and it will manage to survive without it again. But abolishing the program is only the first step. The new canons should also forbid active-duty military from encouraging retired officers to engage in public campaigns against the civilian leadership.[46]

Statutory changes are also necessary. The president's national security advisor was almost always a civilian before the 1980s, but retired military officers are now considered to be appropriate candidates for the job. We should change the law to require a return to earlier practice and put the White House security establishment firmly under civilian control. The new director of national intelligence should also come to his job after broad exposure to the civilian world.[47]

Effective statutory reform requires building on earlier precedents. During the 1940s, Congress was faced with a similar

problem. In designing the new Defense Department, it wanted to ensure that the secretaries of the army, navy, and air force would be civilians. To achieve this objective, the statute creating the Defense Department barred retired officers from these positions until they had spent five years in civilian life.[48] This prophylactic rule should now be applied to the national security advisor and the director of national intelligence.

It should also be used more broadly within the Defense Department. In contrast to the service secretaries, other key civilian offices merely require a six-month waiting period,[49] encouraging politically savvy officers to maneuver for an almost immediate promotion to a "civilian" job after the close of their career. This has two perverse effects. It encourages top officers to pander to the politically powerful while they are on active duty. And it reduces the role of real civilians in day-to-day policy making. Given present realities—where retired officers serve in fourteen of twenty-nine key positions in the Obama DOD—there is a clear need to tighten up.[50]

A five-year waiting period isn't a panacea—it hasn't prevented a significant number of retired officers from gaining appointment as secretary of the army, navy, or air force since the 1980s.[51] But my approach does not rely on statutory reform as the principal means of reviving a healthy civil-military relationship. Statutory change only serves as a supplement to the larger transformation expressed by the canons of military ethics. If the canons are successful in fostering a new ethos, the five-year waiting period will take on a symbolic meaning, cautioning civilian higher-ups to make use of retired officers only when they are *exceptionally* well qualified. So long as the practice is limited to very special cases, it is perfectly acceptable.

All these reforms would be controversial, but I have not yet tackled the toughest issue: the problematic role of the chairman of the Joint Chiefs of Staff. Before 1986, the chairman was

principally a mediator in the incessant struggles by each service chief to gain advantage over his rivals. But Goldwater-Nichols put an end to all that, and the chairman is now in a position to speak for the entire military. This change was motivated by functional considerations—interservice rivalry undermined the coordinated efforts necessary for success on the modern battlefield. But it has turned out to have profound constitutional consequences. Now that the military can speak with one voice, it can decisively intervene in politics at times of crisis. We should face up to the existence of this reality and cut back on the chairman's mandate.

Or at least one aspect of it. I agree that we need a strong chairman to control interservice rivalry. But Goldwater-Nichols did more: it made the chairman an equal to the secretary of defense in dealing with the president, naming him as the military's "principal" spokesman at meetings of the National Security Council. The chairman has a guaranteed seat at the table, allowing him to make presentations that squarely challenge the secretary's authority over defense policy.

This undermines civilian control. The chairman should be required to convince the secretary first, without having the right to provoke a final showdown at the White House. The current system creates perverse incentives. The chairman has control of an impressive strategic staff at the Pentagon, and he should use this staff to explore the military options of central significance to the secretary. But under the present setup, he has an incentive to do the opposite if he thinks the secretary is headed in the wrong direction. After all, if the secretary makes a weak case before the NSC, this will make the chairman's rival presentation look better.

To be sure, it will take a savvy chairman to undermine the secretary's agenda without alienating him entirely. But sabotage-with-a-smile is business as usual in Washington, DC.

The secretary will always have a hard time pushing the chairman in directions he doesn't want to go. But there is no reason for making his job tougher.

Especially in an era of "celebrity generals" who have catapulted themselves into political prominence by manipulating the ongoing conflict between the president and Congress to their own advantage. At moments of grave crisis, the "celebrity" chief may speak from a politically commanding position as he makes his case before the National Security Council. If his civilian counterparts turn him down, they may pay a heavy price when melodramatic reports of the chief's opposition hit the press—as they surely will. When push comes to shove, both the secretary and the president may buckle before aggressive military demands at melodramatic sessions of the NSC.

But once we change Goldwater-Nichols, the chairman will face a different reality. He can no longer demand a seat at NSC meetings as a matter of right. He will only attend if the secretary of defense brings him along to the White House. And this won't happen if the chairman will use the opportunity to lead a sneak attack on his civilian chief.[52]

Statutory change is no panacea. The secretary will gain in influence if he has the chairman squarely behind him. He will have a strong interest in bringing the chairman along with him to critical NSC meetings—and so will try to reach an accommodation on a common policy. Nevertheless, changing the ground rules will tip the balance toward greater civilian control, since the chairman can no longer take his NSC role for granted, but must bargain with the secretary for a place at the table.

The president is always free, as commander in chief, to establish an independent channel to the chairman. But this is only a last resort: cutting out the secretary amounts to a vote of no

confidence and could provoke a resignation on principle. In short, reform of Goldwater-Nichols will mark a significant, if subtle, shift of the power balance in the secretary's direction.

It will also signal the larger need to rethink the meaning of civilian control—and thereby provide momentum for the collective effort required to develop new canons of military ethics in the modern age.

Military self-restraint won't be enough to check a runaway president at a moment of crisis. This is the lesson of George W. Bush's "war on terror," and its reign of lawlessness and torture.

President Obama has put an end to torture. He has publicly denounced the legal "mess" left by Bush at Guantanamo.[53] And he has set about cleaning up this mess.

This cleanup operation will itself be a messy business, raising a host of tough questions: Which Guantanamo detainees should be tried before federal courts? Which by a (somewhat improved) system of military commissions? And what to do with detainees who have been tortured, and cannot be tried at all?

These are hot-button issues, and given the Bush legacy of abuse, there can be no hope of reaching truly satisfactory answers. Only one thing is certain: the cleanup effort will provoke a lot of angry rhetoric in the next couple of years.

But we should not allow all the shouting to obscure the big picture. While it is important to clean up the Bush mess in a half-decent way, the big question concerns the future: what steps should we be taking now to prevent another outburst of illegality and indecency after the next terrorist attack?

Whatever Obama may be saying, presidents will long remember how Bush's tough-guy posture won him big political dividends in the aftermath of September 11. After the next major attack, there is zero chance that the president—whoever he may

be—will allow his opponents portray him as a wimpish civil libertarian, concerned with the rights of suspected terrorists. As the nation recoils from scenes of terrible devastation, the spirit of George Bush will once again be haunting the White House—calling the next crisis-president to reassert extraordinary powers as commander in chief in the "war on terror."

To his credit, Obama has retired the "war on terror" from his rhetorical arsenal. But if he is to prevent future repeats of the Bush scenario, he must go further. He should explain to the country why the "war on terror" is such a misleading way to frame the challenge of modern terrorism.

For starters, terrorism is merely the name of a technique: the intentional attack on innocent civilians. But war isn't a technical matter: it is a life-and-death struggle against a particular enemy. We made war against Nazi Germany, not the V-2 rocket.

Once we allow ourselves to declare war on a technique, we open up a dangerous path, authorizing the president to lash out at amorphous threats without the need to define them. There are tens of millions of haters in the world, of all races and religions. All are potential terrorists—and countless more might be rounded up in the net of suspicion.

There is a second big flaw. By calling it a war, we frame our problem as if it involved a struggle against a well-organized military machine. But modern terrorism has a very different genesis. It is more a product of the unregulated marketplace than massive state power.

We are at a distinctive moment in modern history: the state is losing its monopoly over the means of mass destruction. Once a harmful technology escapes into the black market, it's almost impossible for government to suppress the trade completely. Think of drugs and guns. Even the most puritanical regimes learn to live with vice on the fringe. But when a fringe

group obtains a technology of mass destruction, it won't stay on the fringe for long.

The root of our problem is not Islam or any ideology, but the free market in death. Smaller and smaller groups can obtain more and more lethal weapons at a lower and lower cost—creating a continuing risk of devastating attack. Even if Al Qaeda disintegrates, fringe groups from other places will rise to fill the gap. We won't need to look far to find them. If a tiny band of native extremists blasted the Federal Building in Oklahoma City, others will detonate suitcase A-bombs as they become available, eagerly giving their lives in the service of their self-destructive vision.

The distinctive contours of this problem aren't illuminated by standard war talk. Even the greatest wars in American history have come to an end: When Lincoln or Roosevelt asserted extraordinary war powers over American citizens, everybody recognized that they would last only till the Confederacy, or the Axis, was defeated. But the black market in weaponry—a.k.a. the "war on terror"—will never end: whatever new powers are conceded to the commander-in-chief in this metaphorical war, he will have forever.

A downward cycle threatens. After each successful attack, the president will extend his war powers further to crush the terrorists—only to find that a very different terrorist band manages to strike a few years later. This new disaster, in turn, will create a popular demand for more repression, and on and on. Even if the next half-century sees only two or three serious attacks, the pathological political cycle will prove devastating to civil liberties by 2050.

This is the grim prospect currently clouded over by the loud controversies provoked by the Guantanamo cleanup. We should be looking forward, not back—or so President Obama keeps

telling us. His challenge is to lead the nation to the real question that haunts our future: how to deal with the cycles of panic that threaten to destroy our constitutional tradition?

By recognizing that terrorist attacks pose special problems, and responding with a special statute that takes them into account. On the one hand, Congress should authorize the president to act decisively in the immediate aftermath of a terrorist attack—and take emergency steps to preempt a second strike. But on the other hand, it should take special steps to prevent the president from exploiting momentary panic to impose long-lasting limitations on liberty.

Here is a framework: My emergency statute begins by granting the president a broad range of extraordinary powers—but only for a week or two while Congress is considering the next step. His powers will then expire unless a majority of both Houses vote to continue them—but even this show of support only extends his emergency powers for two more months. The president must then return to Congress for reauthorization, and this time, a supermajority of 60 percent should be required; two months more, 70 percent; and 80 percent for every two-month extension thereafter. Except for the worst terrorist onslaughts, this "supermajoritarian escalator" will terminate extraordinary measures within a relatively short period.

That is just the point—to prevent the normalization of emergency powers. No longer could each president build on precedents established in previous "wars on terror" to expand the powers of the commander in chief after the immediate attack has passed. Congress would be repeatedly asking itself, and the nation, whether it was time for the presidency to return to normal. Sometimes its answer will be yes; sometimes, no; but the recurrent need to debate this question will mark the terrorist outbreak as an extraordinary period, not a springboard for permanent executive aggrandizement.

Defining the scope of emergency power is a serious and sensitive business—and I've given this, and other large issues, full-dress treatment in my book *Before the Next Attack*.[54] But for the present, it's best to focus on my centerpiece, the "supermajoritarian escalator," and ask the obvious question: Will it actually work to restrain presidential power during the next crisis? Or will a runaway presidency simply smash through the barriers erected by the new statute?

To fix ideas, suppose another terrorist attack devastates an American city, and on a far greater scale than September 11. In the meantime, my proposal has been enacted into law, and the president repeatedly gains legislative approval for emergency powers that sweep thousands of suspects into detention and that spies on millions of innocent Americans—all this, he tells us, to detect and prevent another small band from destroying another great American city.

A year has passed without further incident, and a triumphant president returns to Congress for an additional two-month extension. But this time, the Senate turns him down—thirty-five senators vote no, with civil libertarians on the left and the right insisting that the time has come to return to normalcy.[55] Under the statute's provisions, the president is given two months to wind up the emergency, but after that, his powers lapse.

The next move is up to the president: Will he respond by defying the landmark statute?

> My fellow Americans, my decisive actions have saved us from a second attack—and yet a minority in the Senate insists on letting the terrorists roam the streets once again. I cannot abandon my constitutional responsibility in the name of a legal technicality. Sixty-five senators agree that the state of emergency should continue—and that should be enough to satisfy any sensible citizen.

> Despite the protests of the dissenters, the Constitution does not give Congress the power to veto essential steps to secure the safety of the nation. When push comes to shove, it gives the commander in chief the final say.
>
> The state of emergency will continue in full force until we finally win our "war against terror."

Or will the president accept the statutory command, and recognize that the time has come to restore civil liberty in America?

Put yourself in the Oval Office, and consider your options. I'll be comparing two scenarios. The first describes the president's decision-making calculus under today's conditions; the second sets up a contrast with the situation that would obtain in a changed institutional environment, in which all my reforms have been adopted. The comparison suggests that my package of piecemeal reforms might make a very big difference at the next constitutional crisis.

Today: In deciding whether to defy Congress, the president obviously will consider a host of political contingencies—perhaps the polls show massive public support, or perhaps his party in Congress rallies to his defense; or perhaps not.

After judging these imponderables, he will turn to the likely reaction of the courts: will they defer to his assertions of inherent presidential authority or intervene decisively on the side of Congress?

Lawyers for detainees will be busily preparing their legal briefs during the two-month emergency wind-down period provided by the statute. And once the clock strikes midnight on the sixtieth day, they will rush to the nearest courthouse and demand their clients' release. After all, the statute's language couldn't be clearer—it says that eighty senators are needed to extend the emergency, and isn't sixty-five fewer than eighty?

Now that the state of emergency has come to an end, there is only way to keep their clients behind bars—and that is to charge them with a crime and convince a jury beyond a reasonable doubt.

Not so fast, the Justice Department will reply: the president has constitutional prerogatives that don't depend on statutes. As commander in chief, he has broad leeway in detaining and spying suspected enemy combatants in the "war on terror."[56]

The result: legal confusion in the lower courts, with the government stalling and seeking to avoid a final Supreme Court judgment. During the months that follow, the president orders his security services to keep the detainees under lock and key—while his Office of Legal Counsel, and media manipulators, push the tide of professional and public opinion in his direction.

If they are successful, the president may well be in a commanding position when a case finally does reach the Supreme Court. Of course, the justices might surprise him and come out in favor of Congress. But his moment of truth comes much earlier in the process—at the moment he ponders his options in the immediate aftermath of the Senate vote. When deciding whether to defy Congress, he may reasonably wager that the Court will turn out to be a paper tiger—and allow him to run roughshod over the emergency statute.[57]

Perhaps the politics of the moment might deter the president from taking the plunge. But at crunch time, he won't be very impressed by the prospect of the judicial confrontation that clouds his future.

Tomorrow: If he chooses to defy the statute, the thirty-five dissenting senators will immediately petition the Supreme Executive Tribunal for a ruling. The whole point of the tribunal is to uphold the rule of law in times of crisis: Will it abandon its defining mission when put to the test?

Under the statute establishing the tribunal, the senatorial complaint deserves expedited treatment, and the panel moves down the pathway to decision during the emergency wind-down period. On the fifty-ninth day, the tribunal announces its decision to an anxious public.

A strong majority upholds the constitutionality of Congress's landmark statute and declares that the president has no authority to act unilaterally and extend his emergency powers. The decision throws the military, and the security services, into a state of uncertainty. They understand that the president remains their "commander in chief," but the new canons of military ethics emphasize that only *lawful* commands deserve obedience. So doesn't the tribunal's negative judgment signify that the time for emergency detentions and spying operations has passed?

The tribunal's opinion will also serve as a reference point for the federal courts as cases begin pouring in. These judges will have the last say on the constitutional question, but they will naturally take the tribunal's opinion seriously in making up their minds. While today's lower courts generate a cacophony of opinions on national security issues, tomorrow's judges will tend to follow a tribunal opinion imposing the rule of law on the commander in chief.

This will force the president to move quickly to the Supreme Court and try to convince it to back him up in his war on Congress. This is precisely the opposite situation from that prevailing today, when the executive tries to delay the day of final reckoning. And the solicitor general will argue the president's case to the justices under relatively uncongenial conditions, since the bulk of lower-court opinion will be against the commander in chief's effort to break free of congressional restraint.

Nothing is certain. Perhaps the federal courts will be unimpressed by the tribunal's slipshod reasoning; or perhaps the tri-

bunal will back up the president's unilateralist assertions and help persuade the federal courts to go along.

But at his crucial moment of decision, the president will hesitate. He must respond rapidly when he hears the news of the 65–35 vote in the Senate. If he doesn't announce his intentions to defy the decision quickly, he will lose political momentum. So he will have to decide weeks before the tribunal will be prepared to make its ruling. After all, the executive panel will have to hear opposing arguments from lawyers representing both the Senate and the president before coming down with a decision. Only one thing will be clear as the president reaches his moment of decision: if the tribunal *does* render an adverse judgment, the bureaucratic and military reaction could be very damaging.

As the president considers his options, he will turn to the White House Counsel for advice. But his lawyers will no longer respond with extravagant legal theories in support of their commander in chief. They, too, must take the tribunal into account and soberly consider how the president's power play fits into the tribunal's evolving pattern of legal doctrine. If it threatens to punch a large hole in prevailing law—as is likely—they will caution the president to think twice before taking the constitutional offensive.

While pondering his lawyers' opinions, he will be turning to other trusted White House staffers—but these savvy men and women won't address the issue with the same partisan intensity they exhibit today. Given the new requirement of Senate confirmation, their loyalty will be tempered—somewhat—by a process that encourages the selection of more sober types with substantial reputations for independent judgment. Some advisors might even threaten to resign—leaving the president with the prospect of an angry rejection of his replacement by the Senate.

These naysayers won't dominate the White House chorus. The president will also be hearing other advisors who urge their commander in chief to ignore the new landmark statute for the good of the country—and perhaps the chairman of the Joint Chiefs of Staff will be among them. But if the president decides to reject the chairman's advice, he can avoid a melodramatic scene at the NSC in which the chairman accuses his boss of betraying the nation—and then leaks news of his confrontation to the media. At the very least, the president can tell his secretary of defense to leave the chairman sulking in the Pentagon during National Security Council meetings—not a desirable outcome, but better than the prospect of media melodrama.

Looking beyond the White House, the president may have a harder time manipulating public opinion. Perhaps the press corps—rejuvenated by the new National Endowment for Journalism—will provide a powerful forum for the defense of the rule of law, especially if the next Deliberation Day is not too far away.

None of this will deter a sufficiently determined president. Nevertheless, the changed institutional environment makes lawlessness less likely—which is all that one can hope for. And if the president does take the path marked out by the landmark statute, and declares an end to the state of emergency, he will be creating a precedent that increases the likelihood of compliance the next time around.

This before-and-after comparison supposes that you've been convinced of the merit of each and every plank in my reform program. I don't expect many converts just yet. My aim has been to begin a conversation, not to end it—and if debate finally yields a better reform package, this is all to the good.

Nevertheless, my story does contain a larger lesson that goes beyond the merits of particular proposals. Call it the promise of

holism: We should resist the temptation to search for a single magical solution to the pathologies of presidential power. We should be aiming for a reform package that may yield a whole that is larger than the sum of its parts. Particular elements of the package will contain proposals that look very different from one another—just as Deliberation Day is very different from the Supreme Executive Tribunal, which differs yet again from the Canons of Military Ethics. This is not surprising, since each initiative responds to a different pathological aspect of our problematic presidency. Nevertheless, reformers shouldn't forget the relationship of their particular proposals to the larger themes unifying the entire project—restraining the politics of unreason, upholding the rule of law.

It will be especially tough to maintain a holistic perspective, since different proposals will invite very different political responses—especially from the sitting president. Some initiatives might gain his active support; others, his fierce opposition; others, something that's closer to a yawn.

On the positive side, one or another president might find a "grand bargain" on Senate confirmations attractive—trading unilateral control over the White House staff for an enhanced prospect of legislative success and more effective government in the larger executive branch. Similarly, a landmark statute on emergency powers has the makings of a win-win situation: presidents would gain enhanced authority to act decisively during genuine emergencies; Congress would gain explicit recognition of its central role in the modern system of checks and balances.

A particularly thoughtful president might also be attracted to Deliberation Day—both because he was attracted by its promise of democratic citizenship and because he could make use of the new forum more effectively than his likely opponents. And the same is true of the National Endowment for Journalism.

Similarly, the Canons of Military Ethics might well gain widespread support from the officer corps, which would greatly profit from greater clarity in defining the boundaries of political involvement. With proper presidential leadership, we might once again find ourselves in a win-win situation.

In contrast, the chairman of the Joint Chiefs will fight against his demotion from the National Security Council. But this is very much an "inside the Beltway" issue, and if the secretary of defense is cagey, he might well win the support of the president and Congress for "a small administrative matter."

The big battle will come over the new executive tribunal. Most presidents will fiercely resist all efforts to downgrade the Office of Legal Counsel and the White House Counsel. They fully recognize that their current legal staff has an overwhelming incentive to tell them that the law allows them to do whatever they want to do. Given this fact, I hear cynics ask, why would any president ever consent to the creation of a new tribunal that might block major initiatives in the name of the rule of law?

Well, for one thing, he would be in a unique position to shape the tribunal's future development. Since he will be present at the creation of the tribunal, he will be able to nominate *all nine* members of the panel—with three judges serving for four, eight, and twelve years respectively. So long as he can obtain Senate confirmation for his choices, it will be *his* tribunal that will be making the first round of decisions that will serve as the founding precedents for future development. Judges appointed by succeeding presidents will only gradually displace his choices, and they will have a powerful institutional incentive to support the tribunal's previous decisions. Quite simply, if the new arrivals sweepingly repudiate its predecessors' precedents, the infant tribunal will soon be rendered a laughingstock as its statement

of the "law" flip-flops with every passing administration. So the founding president will shape the law not only for his administration, but for decades, and even centuries, to come.

The prospect of creating such an enduring legacy might compensate a president for the short-term risks he will be taking in transferring power away from his existing legal team. True, the new tribunal may cause him some grief during his remaining years in office, but it will also serve as his great contribution to future generations, who may honor this achievement long after much else about his presidency has been forgotten.

Different presidents will make very different trade-offs between short-term frustration and long-term legacy. The more seriously the president takes the constitutional command that he "take care that *the laws* be faithfully executed," the more likely he will favor the tribunal. Since only a law-honoring president would make such a fateful choice, it is likely that he will appoint rule-of-law judges to the new panel. These judges, in turn, are likely to get their tribunal off to a good start by writing opinions that place fundamental constitutional restraints on runaway presidencies.

The prospect of a virtuous cycle beckons—with a law-honoring presidency creating a tribunal of rule-of–law judges, who set the stage for the next generation of judges, who will be reluctant to repudiate the early opinions lest they undermine the legitimacy of their own efforts.

But all this will be a pipe dream unless and until Americans face up to the larger problem posed by the presidency in the twenty-first century. Without recognizing it, we are drifting toward a world in which Richard Nixon's infamous dictum is becoming the organizing premise of the executive branch: "When the president does it, that means that it's not illegal."[58] Although the OLC and WHC may disguise this drift toward

willfulness with talk of the president's "democratic mandate," we should not be fooling ourselves: we cannot sustain a rule-of-law presidency without fundamental institutional reform.

Other nations have faced up to similar challenges in the past. Consider the experience of France, our sister republic. Just as the first White House counsel was a buddy of Franklin Roosevelt's, the first Council of State was a bunch of Napoleon's cronies—and yet, over the course of the nineteenth century, it became the great judicial institution for the executive branch, inspiring similar developments throughout Europe.[59]

Can this happen here in the good old USA? Will we somehow move beyond the ramshackle legacy left by Franklin Roosevelt and build a new foundation for the rule of law within the executive branch?

I do not know.

Only one thing is clear: There is no chance unless we confront the dangers of a runaway presidency.

I don't have a crystal ball: I can only point to risks, not certainties. America has been lucky before; it may be lucky again, and muddle its way toward half-decent arrangements in the decades ahead. Through a series of lucky breaks, we may yet avoid a presidential juggernaut.

But our constitutional tradition leads me to hope for something more. In the very first paragraph of the very first of the *Federalist Papers*, Alexander Hamilton boldly claimed that it was up to America "to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force. . . . [A] wrong election . . . may, in this view, deserve to be considered as the general misfortune of mankind."[60]

Two centuries ago, Americans redeemed this Enlightenment hope, and an infant nation pointed the way forward. But the stakes are much higher today. If we don't take collective action to halt the juggernaut, the "wrong election" by the present generation may well indeed result in "the general misfortune of mankind."

CONCLUSION: LIVING DANGEROUSLY

If Americans are to confront the danger posed by the presidency, constitutional thought must rethink its own boundaries. Most scholarship remains focused narrowly on the judiciary and fails to appreciate that our most serious constitutional problems lie elsewhere. Compared to court-watching, even the turn to originalism is an improvement. At least it shifts our attention from the judiciary to the entire institutional regime created by the Founder's Constitution.

The originalist turn toward a regime perspective marks an essential first step, but it is not nearly enough. You can stare at the constitutional text as long as you like, and dedicate years to the historical study of the Founding and Reconstruction, and you will still fail to understand the institutional dynamics of modern American government—or glimpse the dangers that lie ahead.

The Founding legacy remains important. Most obviously, its commitment to the separation of powers, as well as its system of presidential selection, continues to have a profound impact on modern constitutional practice.

But in ways that would have surprised the Framers. For them, the Electoral College served as a check on the rise of demagogic leadership; for us, it is a time bomb that allows demagogues to have a field day when it blows up after a close presidential election. For the Framers, the separation of powers was a check on the populist pandering of the House of

Representatives; for us, it permits a charismatic president to politicize the bureaucracy and run roughshod over the rule of law. The Framers put their trust in civilian leaders to command the army at moment of crisis. We rely on a professional officer corps, and the Framers' separation of powers now permits the chairman of the Joint Chiefs of Staff to challenge basic principles of civilian control.

These ironies of history can teach different lessons. For some, they may suggest the bankruptcy of the tradition we have inherited from the Enlightenment and the need to find new forms of constitutional legitimacy. But as should be apparent by now, I don't number myself amongst these postmodern critics. My aim is to sustain the Enlightenment tradition in the twenty-first century. I do not mock the Founding commitments to a politics of reason, to civilian control, to the rule of law, to checks and balances. I simply suggest that ancestor worship won't remotely suffice to sustain these Enlightenment values under modern conditions.

If we are to understand our basic problems, let alone try to solve them, we must recognize that they are largely a product of the twentieth—not the eighteenth—century. In providing a closing summary of my argument, I will emphasize this point by marking the year when one or another potentially pathological element enters the American system. These dates will appear in the parentheses scattered throughout the following paragraphs. I will sometimes add a second year if the innovation only becomes genuinely pathological at a later point; and sometimes add a question mark to indicate that the problem emerges gradually. With these caveats, let's review the long and winding road to our current destination.

My argument began with the decisive triumph of the presidential primary and caucus system (1972). This opened a path for extremist candidates to win major party nominations—a

risk that has been enhanced by the Internet revolution (2004). Once candidates appeal directly to their party's voters, they inevitably rely on consultants in media manipulation and public opinion polling to market their message (1969, 1976). And when they gain office, they turn to the same (pseudo-)scientific consultants to package nonrational appeals to the public in their struggle for continuing political support.

Sound-bite manipulation isn't enough to allow the president to govern effectively. He also relies heavily on a superloyal White House staff (1939, 1969?) to impose his priorities on the sprawling bureaucracy (1981, 1993)—and he will also colonize the executive departments with increasing numbers of political loyalists (1970?). These politicized structures facilitate outbreaks of lawlessness—Watergate, Iran-Contra, the War on Terror—but statutory efforts to correct the problem have been relatively ineffective (1973?).

Constitutional pathologies are compounded by the increasing politicization of the military. In constructing the Defense Department (1947), the postwar generation made a sustained effort to secure civilian leadership over the peacetime military establishment. But civilian control was eroded by the Goldwater-Nichols Act (1986), the colonization of "civilian" positions by retired military personnel (1974, 1983), and the increasing political partisanship of the officer corps (1980). While generals from Washington through Eisenhower propelled themselves into the White House, they were only successful after winning great victories on the battlefield. But bureaucratic generals now began to exercise real political power inside the Beltway and beyond (1989), even though other commanders had managed to win (or lose) the real battles.

This series of transformations revolutionized the very nature of the presidency. During the nineteenth century, the president worked without a significant staff. He governed

through a cabinet containing independent political potentates who sometimes were outright rivals. These secretaries often cut independent deals with congressional barons, leaving the president on the periphery of effective power. The young Woodrow Wilson was right to proclaim that America was then living in an era of *Congressional Government* (1885).

No longer. The Constitution is now governing a system in which an institutionalized presidency rules through a politicized White House that dominates the cabinet secretaries and sets the agenda for Congress. At the same time, the president plays a complicated game with his military commanders in an effort to gain their continuing political support.

The system is also promoting different personality types to the White House. Nominees of major parties are no longer absolutely required to convince a broad range of senior politicians of their fitness for the job. While establishment support is generally an asset, the winning candidate may owe his presidency more to the media consultants and movement activists who have sustained his momentum throughout his lengthy presidential campaign. Charisma counts more, seasoned judgment counts less; a career of political achievement is always nice, but a successful career in the movies or television may be even better.

With his well-honed media skills, a charismatic president can respond to congressional resistance by appealing to the People to support the unilateral exercise of executive power. He will be particularly tempted to take this course when he is flying high in public opinion polls (1936, 1990?)—and he will be tempted to act quickly before his poll numbers fall and thereby undermine his public standing as popular tribune. In asserting the need for sweeping unilateral action, he can take advantage of a long line of precedents (1933?) authorizing unilateral action in response to real or imagined "wars" and "emergencies."

Just as the president can undercut the political establishment in Congress, he has new tools for undermining the legal establishment headed by the Supreme Court. The Office of Legal Counsel (1934) has become increasingly politicized (1976?), and the White House Counsel's staff of high-powered professionals (1971, 1979) is now (2009) even larger and more politicized than the OLC. Taken together, these rising institutions can issue legal opinions of the same professional quality as those of the Supreme Court. But all too often, their sober-looking documents will defend outrageous presidential power plays as entirely legal and constitutional.

These opinions will gain professional attention long before the Supreme Court has a chance to confront the runaway presidency—and many leading lawyers will rise to the defense of executive constitutionalism in the interim. While the president's legal critics will also have their say, the general public will be in a state of confusion by the time the Supreme Court gets into the act. If the president has played his cards right, the justices will think long and hard before provoking an institutional showdown. After all, they are in no position to rival the broad range of public appeals—from charismatic to (pseudo-)scientistic to legalistic—that the president can make on his own behalf.

Even if the justices press forward and declare the presidential power grab invalid, will the commander in chief accept their verdict? If not, how will the Court fare in the ongoing struggle for public—and military—support?

A grim picture—made grimmer by the dates in the parentheses. If the Founders had designed these pathological dynamics into their Constitution way back in 1787, it would be easy to dismiss my dark musings. After all, the American Constitution has confronted crisis after crisis since 1787, and yet the Republic has managed to survive and prosper. Even the disaster of the

Civil War was followed by the moral reawakening of Reconstruction; even the slide into Jim Crow was finally reversed by the long, hard struggles of the civil rights revolution.

The same cyclical pattern applies in the area of civil liberties. The dark days of McCarthyism did not presage a calamitous decline and fall, but a remarkable resurgence of freedom in the following decades.

So why will the twenty-first century be any different? Aren't we already witnessing the same cycle of rebirth and renewal today, with Obama correcting the worst abuses of the Bush presidency?

All of this is very comforting—until you take a hard look at the parentheses marking the rise of the "most dangerous branch" over the course of the twentieth century. Some developments can be traced back to the Roosevelt-Truman years, but it's a mistake to look upon each change in isolation. The full force of the dangerous institutional dynamic can assert itself only when (almost) *all* of the elements begin to interact with one another. Many elements began gathering steam in the 1970s, but the entire pathological dynamic didn't really emerge until the late 1980s, and it continues to accelerate.

This point should suffice to puncture complacency. Americans have indeed displayed a remarkable capacity for constitutional renewal in the past. But success in bouncing back from the Civil War or Jim Crow or McCarthyism doesn't mean that we are prepared to deal with the multiple challenges posed by the modern presidency. The past forty years suggest a darker view: Watergate, Iran-Contra, and the War on Terror each dramatized the perils of presidentialism to the general public. Yet these repeated explosions of blatant illegality have provoked increasing passivity. Only the Watergate crisis generated a sustained effort at structural reform, with Congress passing a series of landmark statutes to curb presidential abuse. These landmark statutes

proved inadequate, but there were two ways of responding to these initial failures: do better or do nothing.

The silence has been deafening. In the aftermath of Watergate, Senators Frank Church and Representative Otis Pike used their congressional hearings to provide the nation with an education on the need for fundamental reform. Nothing remotely comparable is happening today in response to the shameful acts of officially sanctioned torture during the Bush years. While Senator Feingold would love to play the part of Frank Church, he is a Don Quixote in a Senate of Sancho Panzas.

President Obama tells us that we must look forward, not backward, and I agree. But the truth is that the president isn't looking forward or backward. He is entirely oblivious to the dangers we have been canvassing: If he were trying to reduce the threat of the next runaway presidency, he would be doing much more than repudiate some of the most egregious executive orders of the Bush administration. He would be taking structural steps to make it harder for the next president to repudiate his repudiations. There are lots of things that can be done: some require institutional imagination—Deliberation Day, a National Endowment for Journalism, or new Canons of Military Ethics; others require confrontation with entrenched institutional privilege, like the Supreme Executive Tribunal or the Popular Sovereignty Initiative to revise the Electoral College. But it is business as usual in the Obama administration.

It is a mistake to put too much of the burden on Obama or the congressional leadership. They have lots of other—seemingly more pressing—problems on their hands. Our leaders will respond only if there is a larger public perception that our constitutional tradition is in very serious trouble.

This recognition is entirely lacking at present. If anything, Americans are more prone to celebrate the eternal wisdom of the Founding Fathers than they were a generation ago.

Americans do care about the future of constitutional democracy. We care enough to fight and die for it in war after war. But we refuse to look inward and seriously consider whether the foundations of our own republic are eroding before our very eyes.

Almost forty years ago, Arthur Schlesinger Jr. sounded the alarm in *The Imperial Presidency* (1973). Yet the presidency has become far more dangerous today. Americans must face up to this fact before there can be a serious prospect for constructive reform.

The great struggle for constitutional democracy will not be waged in Iraq or Afghanistan or some other distant land. It will be waged closer to home, and it will be a spiritual struggle: Will we continue to celebrate our great tradition in a chorus of self-congratulation? Or will we take a hard look at emerging realities, and rise to the occasion in a movement for constitutional renewal?

NOTES

Introduction

1. The only iconoclast in the crowd is Sandy Levinson. His book, *Our Undemocratic Constitution* (2006), reopens fundamental questions, but from a different angle. He focuses on the written text and how it imposes institutional practices that offend democratic principles. On his view, these illegitimate features are "hard-wired" into our Constitution, and nothing short of sweeping formal amendments can bring America into the modern age. My approach is historicist, not textualist. It emphasizes the way institutional changes over the generations have transformed the presidency into an especially dangerous office in the twenty-first century. This diagnosis prepares the way for a more practical reform program, which does not require the enactment of formal constitutional amendments under Article Five.

2. I take up these historical themes at greater length in my "Holmes Lectures: The Living Constitution," 120 *Harvard Law Review* 1727, 1793–1802 (2007).

3. See Bruce Ackerman, *We the People: Foundations* (1991); Bruce Ackerman and David Golove, *Is NAFTA Constitutional?* (1996); Bruce Ackerman, *We the People: Transformations* (1998); Bruce Ackerman, *The Failure of the Founding Fathers* (2005).

4. See Arthur Schlesinger Jr., *The Imperial Presidency* (1973).

1. An Extremist Presidency

1. See Alexander Hamilton, "Federalist 78," Jacob Cooke, ed., *The Federalist,* 522–523 (1961).

2. See James Madison, "Federalist 48," in Cooke, supra n. 1, at 332–38 (1961); Gordon Wood, *The Creation of the American Republic,* 553–62 (1969).

3. See James Ceaser, *Presidential Selection* (1979); Ralph Ketcham, *Presidents Above Party* (1984).

4. See Bruce Ackerman, *The Failure of the Founding Fathers* (2005).

5. The McKinley-Bryan contest of 1896 provided the first glimmer of candidate-centered campaign organizations. See Matthew Crenson and Benjamin Ginsberg, *Presidential Power: Unchecked and Unbalanced,* 114–20 (2007), as well as their broader discussion of developments over the next two generations, Id. at 123–70.

6. See Jeffrey Tulis, *The Rhetorical Presidency* (1987).

7. McKinley provided a special pressroom in the White House, and Roosevelt took the next step by providing confidential backgrounders to the press corps. But it was Wilson who went public, as part of a very self-conscious effort to transform the presidency into a unique popular tribune. See Crenson and Ginsberg, supra n. 5, at 139.

8. When Roosevelt shifted his State of the Union from the afternoon to the evening to reach the biggest radio audience, the Republican press denounced this "degradation of the Presidency and of Congress." See generally "Press Agrees the Roosevelt Message Was Political, Varies Widely in Opinion," *New York Times* 33 (January 5, 1933).

9. Party professionals faced serious challenges to their control well before 1968. See Howard Reiter, *Selecting the President: The Nominating Process in Transition* (1985). But the reforms emerging from 1968 shattered the old system beyond recall. See Larry Bartels, *Presidential Primaries and Dynamics of Public Choice,* 19 (1988). See also Byron Shafer, *Quiet Revolution* (1983), for a blow-by-blow account of the demise of the old regime.

10. I thought I'd reward avid endnote readers with one of my favorite purple passages in political science: "A leader in search of an electable ticket and patronage is likely to feel the ties of culture, ideology, and demography grow weaker in his chest as the scent of victory fills his nostrils." Reiter, supra n. 9, at 85.

11. See Alan Abramowitz, *The Disappearing Center* (2010); Joseph Bafumi and Robert Shapiro, "A New Partisan Voter," 71 *J. Pol.* 1 (2009).

12. Professor John Zaller and a team of outstanding associates have recently published a fine book on the "invisible primary." See Marty Cohen, David Krol, Hans Noel, and John Zaller, *The Party Decides: Presidential Nominations Before and After Reform* (2008), which also contains an excellent review of the literature.

13. Professor Zaller and his team go further to suggest that elite gatekeepers called the shots in eight of the nine contested nominations between 1980 and 2000 (id. at chap. 7). But they recognize that their judgment calls are controversial, and I would dispute their treatment of some cases. I don't think it's necessary to provide a blow-by-blow critique, since they recognize that the primary elections of 2004 and 2008 fail to support their claim of elite control (id. at 230, 338) and that insurgent candidacies will become increasingly important in the age of the Internet (id. at 337).

In emphasizing the risk of extremism, I am reviving an older theme expressed by leading political scientists in the 1970s, when the new primary system permitted George McGovern to win the Democratic nomination in 1972 and Ronald Reagan to mount a very serious challenge to the sitting president, Gerald Ford, in 1976. See Norman Nie, Sidney Verba, and John Petrocik, *The Changing American Voter,* chap. 17 (enlarged ed. 1979).

14. See Matthew Hindman, *The Myth of Internet Democracy,* chap. 2 (2009). My figures on the Dean campaign are derived from Hindman's valuable discussion at p. 29.

15. Id. at 36–37.

16. In the runup to the Super Tuesday primaries, McCain raised nearly twice as much as his main rival, Mitt Romney—one-fourth of his money came from small donations of $200 or less. See www.cfinst.org/pr/prRelease.aspx?ReleaseID=183.

17. When Zack Exley first organized a "virtual primary" for MoveOn.org in 2004, his explicit aim was to challenge "[t]he money primary, driven by big donors." Ari Melber, "The Virtual Primary,"

The Nation (July 12, 2007), at www.thenation.com/doc/20070730/melber.

18. "Internet Organizing Moves On Innovation," NetAction website, www.netaction.org/notes/notes93.html. MoveOn took elaborate steps to ensure the integrity of its polling procedures. See www.moveon.org/pac/primary/report.html.

19. "MoveOn Endorsement Throws Progressive Weight Behind Barack Obama," MoveOn.org (Feb. 1, 2008), at moveon.org/press/pr/obamaendorsementrelease.html.

20. See "MoveOn Endorsement," supra n. 19.

21. Clinton particularly emphasized MoveOn's role in states that chose delegates by the caucus method. See Perry Bacon Jr., "Clinton Blames MoveOn for Caucus Losses," *Washington Post* (April 19, 2008), at blog.washingtonpost.com/44/2008/04/19/clinton_blames_moveon_for_cauc.html.

Howard Dean's 2004 campaign also used the Web to enable 75,000 activists to organize face-to-face "Dean meet-ups" at local homes. An astounding 96 percent were willing to volunteer for further campaign work—even though more than half had never engaged in similar activities before. See Hindman, supra n. 14, at 31.

22. Thanks to Heather Gerken for emphasizing this point to me.

23. My discussion cherry-picks from the more complex analysis offered by Larry Bartels, supra n. 9. Bartels's empirical work is limited to the first few elections conducted under the new regime, but I expect many political scientists to put the momentum candidacies of the last two elections under the microscope in the near future.

24. See B. Dan Wood, *The Myth of Presidential Representation* (2009).

25. Before Obama, only John F. Kennedy had broken free of the convention, to deliver his acceptance speech to a giant crowd at the Los Angeles Memorial Coliseum. David Broder, "One Degree of Separation Between Obama's Speech and JFK's," *Washington Post,* A30 (Aug. 29, 2008).

26. If both parties are captured by extremists, there may be an opening for a billionaire centrist—like Ross Perot or Michael Bloomberg—to

enter the race, increasing the odds of an Electoral College crisis of the sort discussed in Chapter 3, note 20.

27. For a revealing account by an insider, see David Moore, *The Opinion Makers* (2008).

28. Roosevelt's interest in polls wasn't shared by Truman or Eisenhower. Truman was especially contemptuous: "polls did not represent facts but mere speculation, and I have always placed my faith in the known facts. . . . A man who is influenced by the polls . . . is not a man to represent the welfare of the country." Harry Truman, 2 *Memoirs* 177, 196 (1956). But these days have long since passed. See Seymour Sudman, "The Presidents and the Polls," 46 *Pub. Opin. Quart.* 300 (1982).

29. See Robert Eisinger, *The Evolution of Presidential Polling,* 2–3 (2003).

30. Id. at 4–5.

31. Dick Morris, *Behind the Oval Office: Winning the Presidency in the Nineties,* 11 (1997). Morris wrote these lines after he and Clinton quarreled, so his report must be taken with a grain of salt—but not too many grains? For a different view of Clinton's motivations, see Lawrence Jacobs and Robert Shapiro, *Politicians Don't Pander* (2000).

32. "George W. Bush Acceptance Speech," 2000 Republican National Convention, at www.usatoday.com/news/conv/118.htm.

33. See Kathryn Tenpas and Stephen Hess, "Bush's A Team: Just Like Clinton's, But More So," *Washington Post,* 5 (January 27, 2002). Bush's polling operation was located in the Republican National Committee, but it was closely supervised by the Office of Strategic Initiatives, Karl Rove's brainchild. See Kathryn Tenpas, "Words vs. Deeds: President George W. Bush and Polling," Brookings Institution (2003) at www.brookings.edu/articles/2003/summer_elections_tenpas.aspx.

34. Andrew Card, Bush's chief of staff, was up front in his manipulative mode of operation, telling reporters, "If a policy goes amok, it may not be the policy that is at fault . . . but flawed marketing." Bill McAllister, "Bush Polls Apart from Clinton in Use of Marketing," *Denver Post,* A-14 (June 17, 2001). I take Card at his word, though

others are more skeptical. Compare Tenpas, supra n. 33, with Diane Heith, *Polling to Govern: Public Opinion and Presidential Leadership,* 141 (2003). On the broader importance of manipulative media strategies, see Jacobs and Shapiro, supra n. 31.

35. The impact of presidential appeals on public opinion remains a highly controversial matter. Compare Samuel Kernell, *Going Public* (3d ed., 1997) with George C. Edwards, *On Deaf Ears: The Limits of the Bully Pulpit* (2003). The evidence of presidential impact is stronger on the foreign policy side—see James Meernik and Michael Ault, "Public Opinion and Support for U.S. Presidents' Foreign Policies," 29 *Am. Pol. Res.* 352 (2001)—although there is some support on the domestic side as well. See Canes-Wrone, *Who Leads Whom? Presidents, Policy, and the Public,* chap. 3 (2006).

Canes-Wrone advances the debate through analytical models that define conditions under which presidents make strong public appeals. I hope future work extends these models to "decline and fall" scenarios in which the president shortcuts Congress by taking unilateral action. See further discussion of this possibility at n. 64, infra.

36. George Lakoff, *Don't Think of an Elephant! Know Your Values and Frame the Debate* (2004). Lakoff has followed up with *Communicating Our American Values and Vision* (2006).

37. Lakoff says that his position represents a "New Enlightenment," arguing that classical Enlightenment views are old/obsolete. See *Communicating Our American Values,* 13–14. For all I know, focus groups agree with him, but I don't. See Bruce Ackerman, *Social Justice in the Liberal State* (1980).

38. Other proud endorsers of Lakoff's work include Nobel Prize winner George Akerloff, Sierra Club executive director Carl Pope, and Ariana Huffington, publisher of the *Huffington Post.*

39. Leonard Downie Jr. and Robert Kaiser, *News About the News: American Journalism in Peril,* 125 (2002).

40. See Jeffrey Cohen, *The Presidency in the Era of 24-Hour News,* 142 (Figure 7.1) (2008) (on the declining size of network news audience); id. at 65–66 (on the decline of hard news).

41. During the October run-up to the 2008 presidential election, 7 million viewers watched cable news during prime time. During other months, about 4 million tuned in. In contrast, an average of 23 million viewers watched prime-time network news in 2008—down from 52 million in 1980. This massive reduction swamps the rise of the cable-news audience. See "The State of the News Media: An Annual Report on American Journalism," Pew Project for Excellence in Journalism (2009); "Cable TV," at www.stateofthemedia.org/2009/narrative_cabletv_audience.php?cat=1; id.; "Network TV," at www.stateofthemedia.org/2009/narrative_networktv_audience.php?media=6&cat=2#NetAud1.

42. See Cohen, supra n. 40, at 203. Cohen also reports that newspaper readership declined from 70 percent to 60 percent between 1980 and 2000, id. at 144 (Figure 7.3). (It only began to plummet over the next decade with the Internet revolution.) Cohen is especially persuasive in suggesting how the decline of the old system is undermining traditional theories of presidential leadership. But he gives less attention to the scenarios I am emphasizing.

43. My report on job losses in journalism is derived from the Bureau of Labor Statistics, which changed its reporting categories in 2004. Before then, it aggregated journalists working in newspapers and broadcast news into a single group. More recently it has treated "broadcast news analysts" and "reporters and correspondents" separately. My own figure for 2009 adds the two categories together, to permit comparison with the 2000 report. Compare Bureau of Labor Statistics data for 2000 at www.bls.gov/oes/2000/oes273020.htm with data for 2009 at www.bls.gov/oes/current/oes273022.htm and www.bls.gov/oes/2009/may/oes273021.htm.

The hard numbers provided by BLS may underestimate the size of job losses. According to Paper Cuts, a journalism website, the newspaper industry lost more than 15,992 jobs in 2008 and 14,845 jobs in 2009. See graphicdesignr.net/papercuts. These numbers are based on self-reporting and aren't comparable to the BLS figures; nevertheless, they are ominous. For a thoughtful qualitative assessment, see Leonard

Downie Jr. and Michael Schudson, "The Reconstruction of American Journalism," *Columbia Journalism Review* (Oct. 19, 2009) ("most large newspapers" have already eliminated foreign correspondents and many of their Washington-based journalists), at www.cjr.org/reconstruction/the_reconstruction_of_american.php?page=all.

44. See Alex Jones, *Losing the News,* 3–27 (2009).

45. I do not romanticize the mass media during its "golden age." For a penetrating critique, see Robert McChesney and John Nichols, *The Death and Life of American Journalism,* chap. 1 (2010).

46. For a recent book, coauthored by a leading consultant, that celebrates these possibilities, see Mark Penn and E. Kinney Zalesne, *Microtrends: The Small Forces Behind Tomorrow's Big Changes* (2007).

47. For similar concerns, see James Ceaser, "Demagoguery, Statesmanship, and Presidential Politics," in Joseph Bessette and Jeffrey Tulis, eds., *The Constitutional Presidency,* 247 (2009).

48. Neil Smelser, William Julius Wilson, and Faith Mitchell, eds., *America Becoming: Racial Trends and Their Consequences,* vol. 2, *Commission on Behavioral and Social Sciences and Education,* 57 (Table 4.3) (2001). These data come from 1990; Americans are even better educated today.

49. See John Ackerman, "The 2006 Elections: Democratization and Social Protest," in Andrew Selee and Jacqueline Peschard, eds., *Mexico's Democratic Challenges* 92 (2010).

50. See M. J. C. Vile, *Constitutionalism and the Separation of Powers* 67 (1967).

51. See, e.g., Mathew McCubbins, Roger Noll, and Barry Weingast, "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies," 75 *Va. L. Rev.* 431 (1989).

52. See Anne Joseph O'Connell, "Vacant Offices: Delays in Staffing Top Agency Positions," 82 *S. Cal. L. Rev.* 913, 926 (2009).

53. David Lewis, *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance,* 56 (2008). O'Connell, supra n. 52, at 935.

54. I am playing it safe in saying that White House superloyalists number "more than 500." The last available breakdown is from 2005: there were 411 on the "White House staff," 61 at the National Security Council, 27 at the Domestic Policy, 24 at the Council of Economic Advisers, and 30 at the Office of Science and Technology—adding up to 556. The White House also has an outstanding support staff of about 200. See Harold Stanley and Richard Niemi, *Vital Statistics on American Politics 2007–2008*, Table 6-6: White House Staff and the Executive Office of the President, 1943–2005 (2008). There also were 210 at the Special Representative for Trade Negotiations and 473 at the Office of Management and Budget (OMB). While these offices are controlled by the president's political loyalists, they contain a larger proportion of officials who are relatively apolitical professionals or career civil servants. Nevertheless, as the text explains, OMB has played a crucial role in the project of presidential centralization.

55. For a fine overview, see Peter Shane, *Madison's Nightmare,* 146–56 (2009).

56. Technically, OIRA is part of the Office of Management and Budget, which is part of the Executive Office of the President.

57. See Elena Kagan, "Presidential Administration," 114 *Harv. L. Rev.* 2245 (2001).

58. Id. at 2349.

59. Id. at 2281–82, 2300.

60. Id. at 2331–46.

61. Kagan is a moderate compared to partisans of the unitary executive, who believe the Constitution grants the president plenary control over the bureaucracy. See, generally, Steven Calabresi and Christopher Yoo, *The Unitary Executive* (2008). Kagan believes that Congress can limit or repudiate presidential administration by passing explicit statutes that restrict presidential power. But this concession does not affect her conclusions in the vast majority of cases where Congress has not spoken explicitly.

62. Once the Republicans lost Congress in 2006, the Bush administration tightened its grip over the bureaucracy. Executive Order 13,422

required all agencies to designate a presidential appointee as its regulatory policy officer and forbade any regulatory initiative that did not meet with his approval (except where the agency head explicitly overrules the new officer's veto) (72 *Fed. Reg.* 2763 [Jan. 23, 2007]). With OIRA playing a large role in selecting the regulatory policy officers, the initiative represented yet another large step down the path of presidential centralization. But President Obama rescinded this Bush order (74 *Fed. Reg.* 6113 [Jan. 30, 2009]), while continuing Clinton's practice of issuing regulatory directives to the agencies. See, e.g., Memorandum for the Administrator of the Environmental Protection Agency (74 *Fed. Reg.* 4905, 4905 [Jan. 26, 2009]) at www.whitehouse.gov/the_press_office/Presidential_Memorandum_EPA_Waiver/.

63. My discussion draws on a larger scholarly literature critical of hypercentralized presidential administration. See Peter Shane, *Madison's Nightmare* (2009); Peter Strauss, "Overseer or 'The Decider': The President in Administrative Law," 75 *Geo. Wash. L. Rev.* 695 (2007); Lisa Bressman and Michael Vandenbergh, "Inside the Administrative State: A Critical Look at the Practice of Presidential Control," 105 *Mich. L. Rev.* 47 (2006).

64. Contemporary political science is catching up with the rising importance of presidential unilateralism. Professor William Howell has developed a general framework for analyzing the practical implications of the president's "first-mover" advantage. Operating within the "rational-choice" tradition, Howell models the extent to which the president can push outcomes toward his ideal point by exploiting the capacity of his political allies in Congress to undercut an effective statutory response. He also considers the reluctance of courts to risk all-out confrontations with executive power. See William Howell, *Power Without Persuasion* (2003). His more applied work focuses on the extent to which Congress has constrained the presidential use of military force in the modern period. See William Howell and John Pevehouse, *While Dangers Gather* (2007). The modeling efforts represented by these works should prove useful in a variety of "decline and fall" scenarios, especially in conjunction with models of the kind elaborated by Canes-Wrone, supra n. 35.

2. The Politicized Military

1. See James Young, *The Washington Community,* 29–31 (Tables 1 and 2) (1966).

2. Id. (Table 1).

3. See generally Richard Kohn, "The Constitution and National Security: The Intent of the Framers," in Richard Kohn, ed., *The United States Military Under the Constitution of the United States, 1789–1989,* 61 (1991).

4. See Robert Wettemann Jr., "A Part or Apart? The Alleged Isolation of Antebellum U.S. Army Officers," 7 *Amer. Nineteenth Cent. Hist.* 193 (2006) (correcting some of Huntington's historical claims and emphasizing the army's role in civil engineering projects during the early republic).

5. Samuel Huntington, *The Soldier and the State,* chap. 9 (1957).

6. See Suzanne Nielsen and Don Snider, eds., *American Civil-Military Relations* (2009).

7. I follow Huntington in distinguishing two forms of civilian control—he calls them "subjective" and "objective"—but I use different terms to emphasize differences in our definitions. *Participatory control* is a special case of Huntington's notion of subjective control, which he defines very broadly indeed: "subjective military control achieves its end by civilianizing the military." See Huntington, supra n. 5, at 83.

My notion of *supervisory control* is "Huntingtonian" in focusing on the role of the professional officer corps, but it is different from his notion of "objective" control. In defining his concept, Huntington asserted that politicians should specify the aims for the use of military force while the officer corps should define the means, and he believed that these two tasks could be sharply distinguished from one another. This sharp dichotomy permitted him to portray elected politicians as violating his principle of "objective" control if they invaded the military's privileged sphere of instrumental rationality: "the essence of objective civilian control is the recognition of autonomous military professionalism." Id.

Most contemporary scholars believe that Huntington was wrong in positing this sharp dichotomy between means and ends. See Nielsen

and Snider, supra n. 6, at 291–92. I agree, and my approach does not indulge this problematic premise. I focus on a single aspect of Huntington's problem: a violation of supervisory control takes place only when the military refuses to follow the commands of the civilian leadership.

In practical terms, my definition implies that McNamara or Rumsfeld did *not* violate the principle of supervisory control in micromanaging the military. I do not endorse the wisdom of their strategies in Vietnam or Iraq, but the principle of supervisory control doesn't guarantee that civilians will act wisely. It only says that it should be up to civilians, not military officers, to decide how intensively they should micromanage in making key strategic judgment calls. Whether Huntington takes a different position is a fair question. But if so, we are in fundamental disagreement.

I also disagree with Huntington on many other points, but beyond this endnote, a generalized caution should suffice: silence doesn't mean consent; I subscribe only to those Huntingtonian theses that I expressly endorse in the text.

8. Elaine Scarry, *Who Defended the Country?* 33 (2003).

9. See 50 U.S.C. §211 (1947). Peter J. Roman and David Tarr, "The Joint Chiefs of Staff: From Service Parochialism to Jointness," 113 *Pol. Sci. Quar.* 91, 94 (1998).

10. Id.

11. "At one time or another, all of the post–World War II presidents have accused the JCS of failing to fulfill its responsibilities in the policy process." Id. at 96. When disagreements were intractable, the chiefs could send a "split" paper to the Secretary of Defense and the National Security Council. But this happened rarely, since it invited civilian leaders to make policy decisions that would otherwise remain with the military. Id. at 94.

12. See Charles J. Dunlap Jr., "Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military," 12 *Wake For. L. Rev.* 341, 351–53 (1994).

13. See Roman and Tarr, supra n. 9, at 98.

14. The position of commander in chief in each military zone was created by the National Security Act of 1947. See 50 U.S.C. §15 (1947). (Thanks to Donald Rumsfeld, these commanders are now officially called CINCs, since Rumsfeld [correctly] believed that only the president should bear the title of commander-in-chief. See Dana Priest, *The Mission: Waging War and Keeping Peace with America's Military* 29 [2004]).

But before Goldwater-Nichols, the effort by CINCs to plan and execute joint operations was overwhelmed by "parochial service cultures, promotion regulations that dissuaded officers from serving in joint positions, directives that limited a CINC's authority over his forces, and the legacy of an executive-agent system for service management of the commands." Roman and Tarr, supra n. 9, at 95. Goldwater-Nichols revolutionized the system by placing the CINCs directly below the secretary of defense and the president in the chain of command, enabling them to design strategies independently of the parochial interests of the services.

Goldwater-Nichols also cut the chairman of the Joint Chiefs of Staff out of the chain of command. But it contained a proviso allowing the President to "direct that communications between the President or the Secretary of Defense and the commanders of the unified and specified combatant commands be transmitted through the Chairman of the Joint Chiefs of Staff." 50 U.S.C. §163 (1986). This has been the rule in practice, greatly strengthening the position of the chairman and the CINCs at the expense of the civilian secretaries and military chiefs of the individual services.

15. See Roman and Tarr, supra n. 9, at 101–104.

16. Previously, the statute had designated the entire Joint Chiefs, not the chairman, as principal military adviser to the NSC. Compare 50 U.S.C. §211 (1947) with 50 U.S.C. §151 (1986). Goldwater-Nichols did authorize individual service chiefs to disagree with the chairman in writing and to submit these dissents to civilian leaders. But such moves have not in fact occurred, since they would signify extreme disarray in military ranks.

17. The first chairman after the passage of Goldwater-Nichols, Admiral William Crowe, implemented the Act gradually, leaving it to Powell to exploit its full potential.

18. Bradley Graham, *By His Own Rules,* 239 (2009).

19. Given the new promotion system, service on the Joint Staff became a prize for the most able and ambitious officers, while it had previously been "populated by the soon-to-be-retired and, in the words of one flag officer on the Joint Staff, the 'sick, lame, and lazy.'" Roman and Tarr, supra n. 9, at 94.

20. Powell first elaborated his doctrine as a military assistant to Secretary of Defense Casper Weinberger, who presented it in a speech in 1984. Caspar W. Weinberger, "The Uses of Military Power," National Press Club, Washington, DC, Nov. 28, 1984, in Weinberger, *Fighting for Peace: Seven Critical Years in the Pentagon,* 433–45(1990). Powell's role in formulating the new strategy was "the most explicit [military] intrusion into policy since MacArthur's conflict with Truman." Richard Kohn, "Out of Control: The Crisis in Civil-Military Relations," 35 *The National Interest* 1, 12 (Spring 1994).

21. Powell even succeeded in preventing Schwarzkopf "from coming to Washington to brief his own offensive campaign plan." Kohn, supra n. 20, at 7.

22. Colin Powell, "Why Generals Get Nervous," *New York Times* A35 (October 8, 1992).

23. Colin Powell, "U.S. Forces: Challenges Ahead," *Foreign Affairs* 32 (Winter 1992/1993).

24. In February 1992, Powell used a House hearing to assert that "it would be prejudicial to good order and discipline to try to integrate [gays] in the current military structure." Joseph E. Persico and Colin L. Powell, *My American Journey,* 546–47(2003).

25. Clinton first tried to recruit Powell just before Election Day, Id. at 561, and again in December 1994, when Secretary of State Warren Christopher told Clinton that he wanted to step down. Id. at 602–603.

26. Powell had resisted efforts to intervene in Haiti, but Shalikashvili was ready to endorse an invasion plan. Robert Worth, "Clinton's

Warriors: The Interventionists," 15 *World Pol. J.* 43, 46 (1998). With the help of his new chairman, Clinton then modified the Powell Doctrine in the 1996 National Security Strategy, which approved intervention in cases where "important" national interests were at stake. The White House, "A National Security Strategy Engagement and Enlargement" (February 1996), at www.fas.org/spp/military/docops/national/1996stra.htm. The Powell Doctrine only authorized intervention to protect America's "vital interests." See Weinberger, supra n. 20.

27. Shalikashvili initially encountered resistance in the Pentagon, where many officers took to calling him "globocop." See Worth, supra n. 26, at 45. But Clinton responded by appointing new officers to the Joint Chiefs who followed his interventionist line: Charles C. Krulak, the new Marine Corps chief, was "maybe an even more eager sponsor of nontraditional missions than Shalikashvili was." Id. at 46–47, and Jay Johnson, the new navy chief, was also in favor of humanitarian missions. Id.

Many of Clinton's appointees to the JCS remained in office during the early period of George W. Bush's administration, contributing to the enormous strain between the military and Secretary of Defense Donald Rumsfeld. See Graham, supra n. 18, at 205–207.

28. Graham, 673.

29. In his Senate testimony, Shinseki initially deferred to official estimates. When Senator Levin pressed further, Shinseki went off the reservation to suggest that "something on the order of several hundred thousand soldiers is probably a figure that would be required." Department of Defense Authorization for Appropriations for Fiscal Year 2004, Hearings before the Committee on Armed Services, U.S. Senate, 108th Congress, S. 1050. Pt. 1. 108, 241 (2003).

Damon Coletta has suggested that Shinseki could have informed Congress of his opinion in ways that did not undermine effective civilian control. See Damon Coletta, "Courage in the Service of Virtue: The Case of General Shinseki's Testimony Before the Iraq War," 34 *Armed Forces & Soc.* 109, 116 (2007). According to Bradley Graham, Shinseki "resented Rumsfeld's often harsh, abrasive treatment of subordinates and what he perceived as arrogance and, at times, overbearing

infringement on prerogatives of military leaders." See Graham, supra n. 18, at 253.

For his part, Shinseki has sometimes denied any intention to undermine the civilian leadership, suggesting that he was merely trying to keep Rumsfeld's options open in postwar Iraq. Graham at 412. At other times, he has taken a different line, telling David Gergen "that once the senator directed that question to him, core values of honor, professionalism, and courage had left him little choice but to take the hard road." Graham at 115.

30. Id. at 477.

31. See James A. Baker III et al., *The Iraq Study Group Report: The Way Forward—A New Approach* (2006).

32. See www.pollingreport.com/BushJob.htm.

33. Petraeus testified before Congress on September 10–11, 2007, at a time when the "surge" had only been operating for three months. He warned that "a premature drawdown of our forces would likely have devastating consequences," and he also supported administration claims that "Iraq is now the central front in the war on terror." "Iraq Benchmarks," Hearings before the Committee on Armed Services, U.S. Senate, 110th Congress 110, 165, 172 (2007).

34. See David Petraeus, "Battling for Iraq," *Washington Post* B07 (September 26, 2004).

35. See Zachary A. Goldfarb, "Mullen Warns Against Obama's Iraq Troop Plan," *Washington Post* (July 20, 2008) at voices.washingtonpost.com.

36. McChrystal's report was leaked to the press on September 17, but Mullen was already praising it two days earlier in his testimony before the Senate: "I do believe that, having heard his [General McChrystal's] views and having great confidence in his leadership, a properly resourced counterinsurgency probably means more forces and without question more time and more commitment to the protection of the Afghan people and to the development of good governance." Nomination of Admiral Michael G. Mullen, USN, for Reappointment to the Grade of Admiral and Reappointment as Chairman of the Joint Chiefs of Staff, Hearings before the Committee on Armed

Services, United States Senate, 110th Congress, 1, 8 (Sept. 15, 2009). Mullen's testimony before the Senate "enraged" Rahm Emanuel, Obama's macho chief of staff, who "let the Pentagon know" of his displeasure. See Jonathan Alter, *The Promise,* 377 (2010).

My account relies on Alter's recently published book, which tells the story of Obama's first year in office on the basis of insider interviews. His blow-by-blow description of the decision-making process on Afghanistan seems remarkably well informed, and he presents it without obvious biases. Id. at chap. 21. It is also broadly compatible with previous journalistic accounts. See Peter Baker, "How Obama Came to Plan for 'Surge' in Afghanistan," *New York Times* 1 (December 5, 2009). Alter's analysis won't be the last word, but it is by far the best we have at the moment.

37. See Michael Gerson, "In Afghanistan, No Choice but to Try," *Washington Post* A23 (September 4, 2009). According to Gerson, "Petraeus is strongly behind the approach recently advocated by America's lead general in Afghanistan, Stanley McChrystal." Id. Note that Petraeus is publicly invoking McChrystal's confidential report two weeks before it was leaked to the public.

Petraeus then went further to reject the leading alternative to McChrystal's policy. On Gerson's account, "Petraeus dismisses the idea that a strategy of drones, missiles and U.S. Special Forces would be sufficient in Afghanistan." Id. Note that this is precisely the policy option that would gain the strong support of Vice President Biden at Obama's strategy sessions. See Alter, supra n. 36, at 375.

According to Alter, Mullen and Petraeus later professed innocence as to the political significance of their public statements. They did not realize, they said, that the president was placing his entire Afghan strategy under review. So they thought it was appropriate to come to the defense of earlier administration policies. Once they heard of the policy review, they stopped talking. Id. at 377.

This seems implausible. Mullen's Senate testimony took place on September 15, two days after Obama launched the first of his series of high-level strategy sessions in the White House situation room. Id. at 372. And Petraeus plainly was arguing for McChrystal's policy over its

most significant competitor. He needlessly politicized his position further by conducting his interview with Michael Gerson, a leading speechwriter for President Bush. Alter reports that the politically savvy Petraeus claims that he was unaware of Gerson's political pedigree, but if true, he should have checked out Gerson's profile before agreeing to the interview. Id. at 377.

In any event, McChrystal continued his public campaign in support of the surge even after his report was leaked to the public, until the president himself cut it short.

38. Id. at 372.

39. Id. at 376.

40. Id.

41. Id. at 378. See also, Bruce Ackerman, "A General's Public Pressure," *Washington Post* 13 (October 3, 2009).

42. Id. at 379.

43. Id. at 380.

44. Id. at 379.

45. Despite his own opposition to Obama during the presidential election race, Mullen had reminded all service personnel to stay out of politics during the campaign. See David Ignatius, "The Quiet Wisdom of Apolitical Admiral Mike Mullen," *Washington Post* (December 27, 2009) at www.washingtonpost.com/wpdyn/content/article/2009/12/25/AR2009122501284.html?nav=emailpage.

46. I say that Obama endorsed a "McChrystal-style" surge because he watered it down a bit: the field commander requested 40,000 troops, but the president authorized a surge of only 30,000 American soldiers, and said he would try to induce the (reluctant) Europeans to contribute 10,000 more troops to the NATO effort.

47. Alter, supra n. 36, at 392–93.

48. See generally Douglas T. Stuart, *Creating the National Security State* (2008).

49. Under the law, a military officer must retire at least six months before taking up a civilian position in the Defense Department, 5 U.S.C. §3326 (2009), but this legal hurdle hasn't sufficed to check the trend. Matthew Pearl, one of my outstanding research assistants, has

compiled the statistics cited in the text. He has made other calculations that confirm the tendency toward colonization. For example, only 10 percent of the service secretaries had ten or more years of military experience before Reagan. But 30 percent of more recent appointments have served for this period. Similarly, only 2 percemt of the secretaries attended four-year service academies before Reagan, and 19 percent after.

These estimates were derived from George M. Watson Jr., *Secretaries and Chiefs of Staff of the United States Air Force: Biographical Sketches and Portraits* (2001); United States Center of Military History at www.history.army.mil; U.S. Defense Department at www.defense.gov, www.af.mil/, www.navy.mil/, www.army.mil/; Harry S. Truman Library and Museum at www.trumanlibrary.com; John F. Kennedy Presidential Library at www.jfklibrary.org; Ronald Reagan Presidential Library at www.reagan.utexas.edu; *Washington Post*, "On Politics" Archive at www.washingtonpost.com/wp-srv/politics/govt/admin/admin.htm; *New York Times*, Article Archive at query.nytimes.com/search/sitesearch?srchst=cse; Biographical Directory of the U.S. Congress at bioguide.congress.gov/; and the American Presidency Project at www.presidency.ucsb.edu. The data include all years of military experience except for service in foreign militaries and state National Guard units.

50. The only exception came early, when Harry Truman appointed General George Marshall as secretary of defense. See www.defense.gov/specials/secdef_histories/.

51. Although the NSC advisor was almost invariably a civilian during the early decades, the law has never imposed a barrier on military appointments. Colin Powell, for example, remained an active duty general when serving as national security advisor.

52. McFarlane and Poindexter had different relationships to the military at the time they became advisor. McFarlane had been in the Marines for more than twenty years but had retired in 1979 and served in civilian positions in the Senate and White House before taking the job in 1983. See Lou Cannon, *President Reagan: The Role of a Lifetime,* 527 (2000). Admiral Poindexter served in the Navy for

nearly thirty years. He was on active duty when he became advisor. See David Johnston, "Poindexter Found Guilty of 5 Criminal Charges for Iran-Contra Cover-Up," *New York Times* 6 (April 8, 1990).

53. Ivo Daalder and I.M. Destler, *In the Shadow of the Oval Office,* 148–49 (2009).

54. Professors Daalder and Desler disagree with my assessment of Scowcroft's tenure. They consider him an exemplary advisor, since he managed to gain the confidence of other leading players in the administration. Id. at 315–16. I disagree: America was very much in need of a Kissinger or Brzezinski, with the intellectual firepower that might have redeemed the President Bush's promise of a "new world order." No amount of bureaucratic finesse compensates for Scowcroft's failure to help the president elaborate a compelling grand strategy as the Communist bloc disintegrated. See generally Mary Sarotte, *1989: The Struggle to Create Post-Cold War Europe* (2010).

55. In contrast to Obama, Presidents Clinton and George W. Bush relied on civilian NSC advisors.

56. The first four CIA directors were active-duty military officers, but Eisenhower's appointment of Allen Dulles in 1953 broke new ground. Dulles came to the job after playing a key role in intelligence operations during World War II, and he was a central figure in constructing the modern CIA. See generally James Srodes, *Allen Dulles: Master of Spies* (1999). But when he wasn't in government, he was (like his brother, John Foster) a partner at Sullivan & Cromwell, and his eight-year tenure served to break the military mold. Since then, only three directors have been career military officers, with the rest coming from a broad range of backgrounds. See the biographies of CIA directors at www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/directors-and-deputy-directors-of-central-intelligence/directors-of-central-intelligence.html.

57. The first director was John Negroponte, who came to the job from a distinguished diplomatic career. See www.dni.gov/faq_about.htm. He was succeeded by John Michael McConnell, who was a retired three-star vice admiral with twenty-nine years of military ser-

vice, and Dennis Blair, a retired four-star admiral with thirty-four years of service.

58. Executive Order 13394, "Providing an Order of Succession Within the Department of Defense," 70 Fed. Reg. 247 (December 27, 2005).

59. The governing statute gestures toward the principle of civilian control by barring active duty officers from serving simultaneously as director and principal deputy director of national intelligence. 50 U.S.C. §403-3a (2004). But this does not prevent an active-duty officer from serving in one position while a retired officer serves in the other. Indeed, the statute encourages a significant military presence by providing that, "under ordinary circumstances," one of these positions should be filled by an active-duty officer or someone else trained in military intelligence.

60. James L. Jones is a retired four-star general who served for forty years in the U.S. Marine Corps. At www.whitehouse.gov/administration/eop/nsc/nsa/. Jonathan Alter describes his role in the process that led to Obama's Afghanistan decision: "Jones, who had been skeptical at first of a larger footprint, came around to troop escalation. He was, after all, a retired four-star marine general, 'a Semper fi guy,' as one participant put it. As NSC advisor he might not champion the military perspective, but he sure as hell wasn't going to sandbag his old colleagues." See Alter, supra n. 36, at 381.

The director of national intelligence has a high-powered staff, whose director has consistently been an active-duty military officer. The first two staff directors have been lieutenant generals with more than thirty years of service: Ronald L. Burgess and John F. Kimmons. See www.dni.gov/press_releases/20070517_release.pdf; and www.dni.gov/kimmons_bio.htm.

61. The mentoring program began in the army during late 1980s, then spread to the joint forces command in 1995, to the air force in 2000, to the marines in 2002, and to the navy in 2004. In 2009, there were 158 senior mentors. Twenty-nine are full-time defense company executives and many others have significant relationships to the defense industry. Tom Vanden Brook, Ken Dilanian, and Ray Locker, "How

Some Retired Military Officers Became Well-Paid Consultants," *USA Today* (November 17, 2009), at www.usatoday.com/news/military/2009-11-17-military-mentors_N.htm.

Secretary Gates has recently revised the program to eliminate some of the more obvious forms of conflict of interest. See U.S. Department of Defense, "Fact Sheet: Senior Mentors Policy," at www.usatoday.com/news/pdf/mentors_facts.pdf. This reform is long overdue, but does nothing to confront the program's fundamental threat to the principle of civilian control.

62. See David Barstow, "Message Machines—Behind TV Analysts, Pentagon's Hidden Hand," *New York Times* A1 (April 20, 2008).

63. According to *Time* magazine, "There is some evidence that the retirees are speaking for other generals still on active duty. 'I think,' said former U.S. Central Command boss Anthony C. Zinni, a retired Marine four star, 'a lot of people are biting their tongues.'" Perry Bacon Jr., "The Revolt of the Generals," *Time* (April 16, 2006), at www.time.com/time/magazine/article/0,9171,1184048,00.html#ixzz0djZlYIWH.

64. See generally Richard Kohn, "Tarnished Brass: Is the U.S. Military Profession in Decline?," 171 *World Affairs* 73 (Spring 2009); Kohn, supra n. 20.

65. For the classic critique of political passivity of the high command during the Vietnam era, see H. R. McMaster, *Dereliction of Duty* (1997).

66. Huntington estimates that only one out of five hundred voted during the late nineteenth and early twentieth centuries. See Huntington, supra n. 5, at 258. See also Jason Dempsey, *Our Army,* 15 (2010)("[S]enior generals like Omar Bradley and George Marshall made a point of refraining from voting in uniform.").

67. For a more detailed historical overview, including all the data discussed here, see Id. at chap. 1. Dempsey's book contains a very valuable analysis of recent survey data, including evidence that there is less partisanship amongst the most junior officers and the rank and file. But this important point should not divert attention from Dempsey's

explicit recognition that his survey "does confirm" findings of lopsided Republican commitments amongst senior officers. Id. at 101.

68. Jason Dempsey suggests that there has been a recent "decline in Republican Party identification of 14% among active-duty army officers" between 2004 and 2007. See Id. at 186. But he bases this claim on some polls by the *Military Times*, which he recognizes should "be evaluated with caution." Id. at 178. See also Ole R. Holsti, "A Widening Gap Between the Military and Civilian Society? Some Evidence 1976–1996," 23 *Intl. Security* 5 (1999).

I would go further and say that the polls do not deserve serious attention. They are not based on standard social science techniques but merely represent the views volunteered by subscribers. Worse yet, subscribers are free to exaggerate their military rank to influence the results. Broadly speaking, these polls have a family resemblance to the notorious 1936 survey of subscribers to the *Literary Digest*, which predicted a Landon landslide over Roosevelt in the 1936 election. In contrast, the remainder of Dempsey's analysis relies on data generated through standard social science techniques.

69. When asked a follow-up question, the independent cadets "leaned" in the Republican direction, but not by the same lopsided margin. When leaners are taken into account, 75 percent of all cadets are Republicans, and 22 percent are Democrats. Id. at 166.

70. Id. at 169–70.

71. Frank Hoffman, "Bridging the Civil-Military Gap," *Armed Forces Journal* (December 2007), at www.armedforcesjournal.com/2007/12/3144666.

72. This finding, as well as others that will be noted, come from an ambitious survey conducted by the Triangle Institute for Security Studies (TISS). The survey was twenty-four pages long and contained eighty-one questions, many of which had several components. The data are especially valuable since they focus on high-ranking career officers at the level of major or higher. See Ole R. Holsti, "Of Chasms and Convergences," in Peter D. Feaver and Richard H. Kohn, *Soldiers and Civilians: The Civil-Military Gap and American National Security,* 15, 19–21

(2001) (describing the TISS study); James A. David, "Attitudes and Opinions Among Senior Military Officers and a U.S. Cross-Section, 1998–99," in Feaver and Kohn, supra (reporting additional results). It was conducted in 1998–99, and urgently requires updating. Nevertheless, something is better than nothing. For the particular finding reported here, see Id. at 120.

73. Id. (TISS survey).

74. Id. (TISS Survey). A different survey of the officer corps suggests the prevalence of disturbing views concerning press freedom. This study reports that only 31 percent believed it was appropriate for the press to publish documents indicating that "federal government officials and military leaders misled the public about a military operation." Krista E. Wiegand and David L. Paletz, "The Elite Media and the Military-Civilian Culture Gap," 27 *Armed Forces & Society* 183–84 (2001).

75. Holsti, supra n. 72, at 81.

76. See David, supra n. 72, at 120.

77. Holsti, supra n. 72, at 81.

78. Thomas Ricks expressed similar concerns when confronting similar findings in "The Widening Gap Between the Military and Society," *Atlantic Monthly* (July 1997), at www.theatlantic.com/past/docs/issues/97jul/milisoc.htm.

79. The TISS survey (see n. 72) surveyed 935 "civilian leaders" (drawn from *Who's Who* and the like) and 1,000 ordinary citizens (selected at random). See Holsti, supra n. 72, at 21. It found that the civilian grasp of basic principles was often weaker than that of military leaders. For example, 88.6 percent of military leaders, 73.0 percent of civilian nonveteran leaders, and only 66.3 percent of the general public believe that "members of the military should not publicly criticize a senior member of the civilian branch of the government." See David, supra n. 72, at 120 and Holsti, supra, at 81. Also, 39.7 percent of military leaders, 61.7 percent of civilian nonveteran leaders, and 83.8 percent of the general public believe that "members of the military should be allowed to publicly express their political views just like any other citizen." Id. Finally, 26.8 percent of military leaders and 40.7 percent

of civilian nonveteran leaders agreed that "military rather than political goals" should govern the use of force. Id. at 39.

80. Recent studies have consistently painted a grim picture. Don Snider, Robert F. Priest, and Felisa Lewis, "The Civilian-Military Gap and Professional Military Education at the Pre-Commissioning Level," 27 *Armed Forces & Society* 249, 268 (2001) (some principles of civil-military relations appear in isolated parts of the curriculum, but "it appears difficult, if not impossible, for cadets to integrate on their own a coherent understanding of the officers' role in American civil-military relations"); Damon Coletta, "Teaching Civil-Military Relations to Military Undergraduates: The Case of the United States Air Force Academy," 1, 13–14 (2007), at www.allacademic.com ("the different pieces come across more like glancing blows" than "a comprehensive introduction" to civil-military relations. Only a small number of students take an elective course that attempts a comprehensive treatment); Kathleen Mahoney-Norris, "Civil-Military Relations: Educating US Air Force Officers at the Graduate Level" 1, 19 (2007), at www.allacademic.com; Mahoney-Norris (Air War College makes no attempt to integrate civil-military relations into the broader curriculum); Marybeth Ulrich, "The Civil-Military Relations Education of the U.S. Army's Senior Officers," 1, 2–4, 16 (2007), at www.allacademic.com (failure to provide comprehensive course is symptomatic of larger failure to develop "common set of professional" norms on key civil-military issues).

81. Morris Janowitz, *The Professional Soldier*, 136 (1971).

82. The most recent book-length study reaches a similar conclusion. See Dempsey, supra n. 66, at 189.

3. Three Crises

1. James Madison, "Federalist Ten" and "Federalist Fifty-one," in Jacob Cooke, ed., *The Federalist* 60, 349 (1961).

2. Although the Supreme Court isn't elected, it too must satisfy a variety of constituencies—both political and legal—to sustain its legitimacy.

3. See Bruce Ackerman, *We the People: Foundations* (1991), *Transformations* (1998).

4. See *Foundations*, supra n. 3, chap. 10, for a discussion of the ways the American constitutional system requires a rising political movement to survive a series of electoral tests before it can legitimately speak for the People.

5. In sharp contrast to the present day, Jackson left the explicit warmongering to his political lieutenants, most notably Senator Thomas Hart Benton. See Robert V. Remini, *Andrew Jackson and the Bank War,* 141–42 (1967).

6. Even the constitutional legitimacy of the Emancipation Proclamation wasn't firmly established until the ratification of the Thirteenth Amendment, after the war. See Ackerman, *Transformations*, supra n. 3, at 131–36.

7. See generally, Jack Balkin and Sanford Levinson, "The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State," 75 *Ford. L. Rev.* 489 (2006); Jack Balkin, "The Constitution in the National Surveillance State," 93 *Minn. L. Rev.* 1 (2008).

8. See Bruce Ackerman, *Before the Next Attack,* 124–25 (2006).

9. The president will have no trouble finding apologists within the legal academy for even his most extreme acts of unilateral power. See the all-out assault on the rule of law by Eric Posner and Adrian Vermeule, *Terror in the Balance* (2007). This book combines different forms of complacency on its way to a sweeping repudiation of checks and balances. The authors not only assure us that America will never experience a Weimar-style breakdown, they also suggest that the politics of fear may sometimes be a good thing, permitting fearmongering politicians to break through counterproductive roadblocks. Given these Pollyannish premises, it's hardly surprising that they think that the real problem posed by emergencies is "libertarian panic"—the groundless fear of civil libertarians that the runaway presidency will destroy our constitutional tradition of limited government.

I hope this book serves as an antidote for this kind of happy talk. I will add only a sociological note: Posner and Vermeule teach at two of

America's great law schools, Chicago and Harvard respectively, and if their complacency gains ascendancy in these precincts, it will generate a climate of antilegalism that will have a powerful impact on many students who will later gain high office in government. This suggests that we may be dealing with increasing numbers of lawless lawyers at the Office of Legal Counsel and the White House Counsel over the coming decades. Happy talk can lead to tragedy.

10. For an insightful treatment of these themes, see William Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (2004). See also Hartmut Rosa and William Scheuerman, eds., *High-Speed Society* (2009).

11. This saying was popularized recently by Rahm Emanuel, Obama's chief of staff, but it seems to have originated earlier. See Thomas L. Friedman, "Kicking Over the Chessboard," *New York Times* W13 (April 18, 2004).

12. See Bruce Ackerman and James Fishkin, *Deliberation Day,* 5–9 (2004).

13. The recent Gallup poll presents some typical findings: 82 percent of Americans have "a great deal" (46%) or "quite a lot" (37%) of confidence in the military; 51 percent have "a great deal" (26%) or "quite a lot" (25%) of confidence in the president; 39 percent have a "great deal" (15%) or "quite a lot" (24%) in the Court; and 17 percent have "a great deal" (6%) or "quite a lot" (11%) in the Congress. Gallup, "Confidence in Institutions" Poll (June 14–17, 2009), at www.gallup.com/poll/1597/Confidence-Institutions.aspx. A similar Harris Poll generates similar results; see "Major Institutions" (Feb. 16–21, 2010), at www.pollingreport.com/institut.htm.

The Supreme Court doesn't do as well in these studies as it does normally, when respondents aren't asked about the military. In these studies, the Court typically enjoys "strong, stable aggregate support" over time that "consistently exceeds support for the [other branches of government]." Jeffrey J. Mondak and Shannon Ishiyama Smithey, "The Dynamics of Public Support for the Supreme Court," 59 *J. Pol.* 1114, 1115, 1119 (1997). Since 2000, the Court's approval rating has generally remained stable and above 50 percent in the Gallup Poll, with

only two exceptions. *See* Judiciary, www.pollingreport.com/court.htm.

The lesson here, as elsewhere, is that poll results are very sensitive to the way in which pollsters frame their questions.

14. This was a real possibility in Florida in 2000. See Bruce Ackerman, "As Florida Goes . . . ," *New York Times* A-33 (December 12, 2000).

15. They are elaborated at greater length in Bruce Ackerman and David Fontana, "Thomas Jefferson Counts Himself into the Presidency," 90 *Va. L. Rev.* 551 (2004).

16. In revising the Founding system after the electoral crisis of 1800, the drafters of the Twelfth Amendment repeated the original Constitution's vote-counting instructions to the president of the Senate. Compare Art. 2, sec. 1, cl. 3 with Amend. 12, cl. 2. It seems fair, then, to attribute the mistakes of institutional design to the Founders, although it certainly would have been nice if the draftsmen of the Twelfth Amendment had corrected the blunder.

17. David Fontana and I tell the story in Ackerman and Fontana, supra n. 15. For shorter versions, see Ackerman and Fontana, "How Jefferson Counted Himself In," *Atlantic Monthly* 84 (March 2004); Ackerman, *The Failure of the Founding Fathers,* chap. 3 (2005).

18. See Charles Fairman, *Five Justices and the Electoral Commission of 1877* (1988).

19. The 1887 statute is ambiguous in the critical case in which rival state officials submit conflicting electoral certificates. See Ackerman and Fontana, supra n. 15, at 640–43.

20. Matters become even more complex if three candidates manage to win electoral votes, with none gaining a majority. The presidency then goes to the candidate who can win a majority of the state delegations in the House of Representatives—with each state counting equally, regardless of its population! If the House is still deadlocked on Inauguration Day, then the vice president takes office until the impasse is resolved. A Senate deadlock is less likely, since it only chooses between the top two candidates, not the top three. See U.S. Constitution, Art 2, sec. 1, as altered by the Twelfth and Twentieth

Amendments. But the conjunction of House and Senate procedures may readily yield an outcome in which one party's candidate serves as president, while the other party controls the vice presidency. Confusion will be compounded, of course, if the legitimacy of the electoral vote of particular states is challenged, leaving it up to the Senate president, with the problematic assistance of the congressional statute of 1887, to resolve these electoral contests.

21. Under the terms of the Twentieth Amendment, the Senate may choose a vice president who may serve as acting president if the House hasn't resolved the matter by inauguration day. This may only compound the problem if the presidential candidate from a rival party is leading in the polls.

22. See George Edwards III, *Why the Electoral College Is Bad for America,* 32–33 (2004).

23. To put the point in terms favored by the modern manipulators, I should say that the sound-bite strategists successfully target a broad range of "micropublics," providing each with a message that resonates within its particular demographic. See Mark Penn and E. Kinney Zalesne, *Microtrends* (2007).

24. Congress's approval rating has generally remained below 40 percent since 1990 and rarely exceeds 50 percent (most notably after September 11). See Pollster.com: National Job Approval: Congress (1990–2007), www.pollster.com/polls/us/jobapproval-congressold.php. Even when George W. Bush's poll numbers dropped below 40 percent after 2005, Congress's fell even lower, sinking to a low of 18 percent in September 2008. *Compare* Congress: Job Ratings, www.pollingreport.com/CongJob.htm *with* Obama: Job Ratings, www.pollingreport.com/obama_job.htm; *and* Bush: Job Ratings, www.pollingreport.com/BushJob.htm.

25. Perhaps on behalf of the president, perhaps on behalf of Congress.

26. See Jeffrey Green, *The Eyes of the People* 140–66 (2010), for a perceptive analysis of Weber's skepticism about popular referenda.

27. For a discussion of the wonderfully named "legitimacy spin cycle," see David Moore, *The Opinion Makers,* 103–17 (2008). George

W. Bush sought to make use of polls in his "spin cycle" seeking to legitimate his decision to go to war in Iraq without obtaining the approval of the United Nations or a further vote from Congress. See Bruce Ackerman, "Never Again," *American Prospect* 24 (May 2003).

28. Bradley Graham, "War Plans Drafted to Counter Terror Attacks in U.S.: Domestic Effort Is Big Shift for Military," *Washington Post* A01 (August 8, 2005).

29. Id.

30. Current law regulating military power for domestic purposes is based on an antique statute enacted to rein in the power of the Union army after Reconstruction. The Posse Comitatus Act of 1878 reads: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both. 18 U.S.C. §1385.

This statute has been construed to impose stringent limits on military assistance to civilian police during normal times; see, e.g., United States v. Walden, 490 F.2d 372, 374 (4th Cir. 1974); Wrynn v. United States, 200 F. Supp. 457, 463–65 (E.D.N.Y. 1996). But given the law's express exception for "cases . . . expressly authorized by the Constitution," it is open for the president to argue for sweeping authority as commander in chief—which was precisely the intention of the Pentagon lawyers quoted in the *Washington Post* report.

31. To give Schmitt his due, he did glimpse the possibility that referenda might function as the modern equivalent of shouting. Schmitt was in favor of referenda, but in characteristic authoritarian fashion, he insisted that organized opposition be constrained, that the charismatic leader be given the power to manipulate the question placed before the people, and that the secret ballot be banned—vastly increasing public pressure on each citizen to announce his fervent support for the Leader. See Carl Schmitt, *Legality and Legitimacy,* 61–62, 70 (Seitzer trans. 2004).

Gallup polls provide a form of shouting that modern Americans find much more congenial—precisely because it is Gallup, not the

president, who asks the questions, and citizens provide answers under total anonymity. If the president gets high numbers under this system, Americans believe that they are offering up their shouts of praise in a thoroughly legitimate fashion, even if many respondents haven't given their answers fifteen seconds of thought.

32. See Ackerman and Fishkin, supra n. 12; James Fishkin, *The Voice of the People,* 2–7 (2009).

33. Other obvious scenarios involve a "stab-in-the-back": A popular chairman of the Joint Chiefs may denounce a president who loses one or another battle in the never-ending "war on terror." As our troops stage a humiliating exit from some foreign land, the chairman runs against the sitting president at the next election. If he wins, his victory will deter future politicians from challenging the Joint Chiefs; if he loses, presidents will have to deal with a profoundly alienated military for a very long time to come.

4. Executive Constitutionalism

1. "Nixon's Views on Presidential Power: Excerpts from an Interview with David Frost," at www.landmarkcases.org/nixon/nixonview.html.

2. The Carter OLC started with a bang, publishing more opinions during its four-year term (362) than any of its successors did in eight (Reagan: 293; George H. W. Bush: 102; Clinton: 251; George W. Bush: 166). Unlike later OLCs, it did not issue broad pronunciamentos on separation-of-powers questions, limiting itself to specific cases. See, e.g., Disposition of Nixon Memorabilia, 1 Op. OLC.l 180 (1977).

3. H. Jefferson Powell, *The Constitution and the Attorney General* (1999). This impressive casebook legitimates the work of the modern Office of Legal Counsel by placing it within a much longer historical tradition going back to the Founding itself. The casebook begins with a famous opinion by John Randolph, the first attorney general, dealing with the constitutionality of the Bank of the United States, and only prints the first opinion written by the modern OLC at page 378 (of a 697-page volume). This presentation encourages the reader to

treat the modern OLC as if were composed of modern-day Randolphs. But Randolph did not remotely confront the same institutional incentives that encourage a superpoliticized jurisprudence within today's executive branch. By sweeping together the opinions of two centuries, Powell's master narrative encourages his readers to ignore the institutional mismatch afflicting modern executive constitutionalism.

4. Presidents recognized the anomalous character of the practice. In issuing his own statement, Ulysses S. Grant described it as an "unusual method of conveying the notice of approval." See Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 73 (1998) (quoting message of Jan. 14, 1875). James Polk and Franklin Pierce made similar remarks. Id. The first signing statement is sometimes attributed to James Monroe; see Christopher S. Kelley, *The Unitary Executive and the Presidential Signing Statement* 57 (2003) (unpublished Ph.D. dissertation, Miami University), at www.pegc.us/archive/Unitary%20Executive/kelly_unit_exec_and_pres_sign_stmt.pdf. But this is anachronistic, since Monroe only issued an explanation thirty days after he signed the bill. See May, supra, at 116–17. Andrew Jackson is the originator—given his revolutionary uses of the veto power, it's hardly surprising that he also experimented with the signing statement. See Gerard N. Magliocca, "Veto! The Jacksonian Revolution in Constitutional Law," 78 *Neb. L. Rev.* 205 (1999). His only initiative along these lines generated strong opposition from the House. Congressional Research Service, *Presidential Signing Statements: Constitutional and Institutional Implications,* 2 (2007), at fas.org/sgp/crs/natsec/RL33667.pdf. When the hapless John Tyler issued a mild statement casting constitutional doubt on a statute, but deferring to the legislative judgment, it was denounced as "a defacement of the public records and archives." Kelley, supra, at 59 (quoting H.R. Rep. No. 27-909 [1842]). All in all, Kelley identifies about twenty-five presidential statements in the nineteenth century, including six that raised questions of constitutionality. In short, "[s]igning statements remained an anomaly well into the twentieth century." May, supra, at 73.

5. Kelley distinguishes three types: *constitutional* statements issue direct challenges; *political* statements may include legal arguments but don't challenge the bill's legitimacy, and operate to mobilize constituencies or to provide orientation for executive agencies; *rhetorical* statements merely claim popular credit for the statutory initiative. Using this trichotomy, Kelley finds that Hoover issued 1 constitutional and 11 rhetorical statements; Roosevelt issued 3 political and 48 rhetorical statements; Truman issued 3 constitutional, 7 political, and 108 rhetorical statements; Eisenhower issued 9 constitutional, 7 political, and 129 rhetorical statements; Kennedy issued 1 constitutional and 79 rhetorical statements; and Johnson issued 11 constitutional, 2 political, and 289 rhetorical statements. In the aftermath of Watergate, Congress went on the offensive against unchecked presidential power, and Presidents Ford and Carter responded with an increase in statements expressing constitutional concerns. But the numbers remained small—Ford issued 10 out of 130 in little more than a year; Carter 24 out of 247. See Kelley, supra n. 4, at 64, 192.

Christopher May provides another statistical measure. He identifies 92 statutes (containing 101 provisions) that were challenged between 1789 and 1980. But he finds only 12 cases in which a president clearly disobeyed the provision he had challenged—and 7 of these occurred during the Ford and Carter administrations. See May, supra n. 4, at 77–80. Otherwise, "the chief executive: (1) had to acquiesce in the measure because there was no occasion to defy it; (2) found a legal way to avoid the provision; or (3) honored the statute despite his constitutional objections." Id. at 81.

These quantitative studies require lots of judgment calls in characterizing the data. While May finds 92 cases, Kelley finds only 75 constitutional challenges between 1789 and 1980. Kelley, supra at 192. All in all, it's clear that the legitimation of signing statements has occurred only during the past generation, not before.

6. Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney Gen., Office of Legal Counsel, to the Litigation Strategy Working Group (Feb. 5, 1986), at www.archives.gov/news/samuel-alito/

accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf.

7. Id. at 2.

8. Presidents have only ten days to prepare veto statements—and yet they have managed to do a decent job over the centuries. Why, then, isn't it equally appropriate to insist that presidents come up with high-quality signing statements within the same brief period?

Because the two presidential messages perform different functions. A veto statement doesn't function as the last word on the status of a statute—it simply issues a challenge to Congress to override the veto by a two-thirds vote. If Congress comes up with the requisite two-thirds majority, the bill becomes a law, and the veto is legally irrelevant; if the override fails, the entire bill dies and nobody in the courts or the executive branch is obliged to consider the veto message in construing applicable law.

In contrast, the signing statement purports to carry enduring legal significance—defining which parts of the statute are valid law, which aren't, and how to interpret problematic provisions in the light of constitutional doubts. All these functions require a great deal of thought—and this is what makes the ten-day deadline seem arbitrary and capricious.

9. As Alito put it: "[I]f Presidential signing statements are ever to achieve much importance, I think it will be necessary to escape from the requirement of having to complete our work prior to the signing of the bill. Accordingly, after the first few efforts, the President could merely state when signing the bill that his signing is based on an interpretation to be set out in detail in a statement to be issued later." Id. at 5.

10. See Curtis Bradley and Eric Posner, "Presidential Signing Statements and Executive Power," 23 *Con. Comm.* 307, 323 (2006). See, also, Nelson Lund, "Guardians of the Presidency: The Office of Counsel to the President and the Office of Legal Counsel," 209, 221, in Cornell Clayton, ed., *Government Lawyers: The Federal Legal Bureaucracy and Presidential Politics* (1995).

11. Walter Dellinger, head of the Office of Legal Counsel, did not try to kill the practice when it was still quite vulnerable. He simply tried to narrow the grounds on which the Clinton presidency would issue statements. Dellinger's subtleties would have little effect on future administrations. See Memorandum from Walter Dellinger, Assistant Attorney Gen., Office of Legal Counsel, to Bernard N. Nussbaum, Counsel to the President (Nov. 3, 1993), at www.usdoj.gov/olc/signing.htm.

12. Bradley and Posner, supra n. 10, at 323.

13. See Christopher Kelley, Signing Statements, Reagan-Obama, at www.users.muohio.edu/kelleycs/.

14. See American Bar Association, *Task Force on Presidential Signing Statements and the Separation of Powers Doctrine,* 5 (2007), at www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf [*ABA Report*].

15. President Bush's abuse of signing statements became an issue in the 2008 presidential campaign, with John McCain promising to end the practice. But Obama only pledged to minimize their use. Michael Abramowitz, "On Signing Statements, McCain Says 'Never,' Obama and Clinton 'Sometimes,'" *Washington Post* A13 (February 25, 2008). During his first year, Obama issued eight—three purely rhetorical, five constitutional. See The American Presidency Project, *Presidential Signing Statements*, at www.presidency.ucsb.edu/signingstatements.php. The White House has recently indicated that it will not issue signing statements that merely repeat objections made previously. Instead, Obama will sign the bill and simply disregard provisions he finds problematic. But this informal policy can change at any time and does not represent a fundamental retreat on the basic issues. Charlie Savage, "Obama Takes New Route to Opposing Parts of Laws," *New York Times* A10 (January 8, 2010).

16. This fundamental point is entirely missed by Bradley and Posner, supra n. 12.

17. As the ABA put it, the signing statements of George W. Bush "are ritualistic, mechanical and generally carry no citation of authority

or detailed explanation." ABA Report, supra n. 14, at 16. See also Congressional Research Service, supra n. 4, at 5. Professors Bradley and Posner are right to emphasize that Bush does not differ from his predecessors in this respect. See supra n. 10, at 321–34. Obama's first signing statement continues this shabby tradition. See, e.g., Statement on Signing the Omnibus Appropriations Act, 2009, Mar. 11, 2009, at www.presidency.ucsb.edu/ws/index.php?pid=85848 (a bit more elaborate than usual, at 700 words!).

18. As a formal matter, the Office of Management and Budget manages the production of signing statements according to procedures set out in a 1979 circular. The Office of Management and Budget, Circular No. A-19 (Sept. 20, 1979), at www.whitehouse.gov/omb/rewrite/Circulars/a019/a019.html. It forwards new bills to each "interested" agency, "giving them 48 [!] hours to submit specific recommendations, including a draft signing statement." All these letters go to the White House "not later than the fifth day following the receipt of the enrolled bill." Id. The White House then has five days to make a final decision.

19. In both the Reagan and Clinton administrations, the White House Counsel's Office played a secondary role. See Jeremy Rabkin, "At the President's Side: The Role of the White House Counsel in Constitutional Policy," 56 *Law and Contemp. Probs.* 110 (1993); May, supra n. 4, at 138 (discussing Reagan). See Mary Anne Borrelli, Karen Hult, and Nancy Kassop, *The White House Counsel's Office*, 31 *Pres. Stud. Quar.* 561, 581 (2001) (discussing Clinton).

20. For a description of the role of White House Counsel C. Boyden Gray, see Charles Tiefer, *The Semi-Sovereign Presidency: The Bush Administration's Strategy for Governing Without Congress,* 50–59 (1994).

21. Consultation procedures within the executive are described by Trevor Morrison, "Constitutional Avoidance in the Executive Branch," 106 *Colum. L. Rev.* 1189, 1244–45 (2006), and Cornelia Pillard, "The Unfulfilled Promise of the Constitution in Executive Hands," 103 *Mich. L. Rev.* 676, 711–12 (2005).

22. As the "chief architect" of the administration's policy, Addington vetted all new legislation, drafting hundreds of ipse dixits as-

serting executive power. Lawyers at WHC and OLC seem to have played a secondary role. See Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy,* 236 (2007).

23. National Parks & Conservation Ass'n v. Kleppe, 547 F.2d 673, 678 n.16 (D.C. Cir. 1976); Clifton D. Mayhew, Inc. v. Wirtz, 413 F.2d 658, 661 (4th Cir. 1969); Creek Nation v. United States, 168 Ct. Cl. 483, 493 (1964); Grumbine v. United States, 586 F. Supp. 1144, 1146 n.4 (D.D.C. Cir. 1984); Church of Scientology of Cal. v. United States Dep't of Justice, 410 F. Supp. 1297, 1300 (C.D. Cal. 1976); DaCosta v. Nixon, 55 F.R.D. 145, 146 (E.D.N.Y. 1972).

24. See Kristy L. Carroll, "Whose Statute Is It Anyway? Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes," 46 *Cath. U. L. Rev.* 475, 503 (1997) (collecting cases up to 1997). I have updated Carroll's list through 2009. It is available on request.

25. Congress was out of session at the time of Lincoln's raid on the treasury, and this may extenuate his breach, especially since Congress approved his action retroactively. J. G. Randall, *Constitutional Problems under Lincoln*, 36–37, n. 15 (1951). But these extenuating circumstances will not prevent the president's lawyers from reading this nineteenth-century precedent expansively—this is a common occurrence in the life of American law, especially in crisis contexts.

26. See, e.g., "Principles to Guide the Office of Legal Counsel," 81 *Ind. L.J.* 1348 (2004), calling on the OLC to "publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure." Id. at 1351 (signed by a distinguished group of OLC alumni). Trevor Morrison, "Stare Decisis in the Office of Legal Counsel," 110 *Col. L. Rev.* (forthcoming, 2010), also recommends increased publication of OLC opinions.

27. "The most celebrated instance of resistance by OLC" involved William Rehnquist's challenge to President Nixon over the president's power to impound funds. See John O. McGinnis, "Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon," 15 *Cardozo L. Rev.* 375, 430 (1993).

The OLC also demonstrated its independence in rejecting President Reagan's assertion of "inherent" power to issue line-item vetoes. 12 Op. Off. Legal Counsel 159 (1988); see also Douglas W. Kmiec, "OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive," 15 *Cardozo L. Rev.* 337, 353 (1993).

I shall take up in the text the recent decision by Jack Goldsmith, as head of George W. Bush's OLC, to withdraw the "torture memos" that had been previously written by John Yoo.

28. In its most recent statement of Best Practices in 2005, the OLC states that it "generally avoids undertaking . . . a broad, abstract legal opinion," but this formulation falls far short of a hard-and-fast rule. See Memorandum from Stephen G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, to Attorneys of the Office of Legal Counsel (May 16, 2005) at www.justice.gov/olc/best-practices-memo.pdf.

29. Barr's memo provided an exhaustive overview of the ways "Congress most often intrudes . . . into the functions and responsibilities assigned by the Constitution to the executive branch." Common Legislative Encroachments on Executive Branch Authority, 13 Op. Off. Legal Counsel 248 (1989). He argued that "[o]nly by consistently and forcefully resisting such congressional incursions can executive prerogatives be preserved." Id. The memo was distributed widely to executive branch lawyers.

In 1996, Walter Dellinger, the head of Clinton's OLC, explicitly repudiated the "Barr Memo." See The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 124 n. 1 (1996). Although Dellinger "agree[d] with many of [Barr's] conclusions," he steered clear of his endorsement of Barr's embrace of "unitary executive" theory. His even longer memo elaborated a somewhat less aggressive approach, if only by comparison.

30. See the Editor's Note added to the "Dellinger memo" by the George W. Bush OLC, cautioning that the newly appointed members of the office had "certain differences in approach to the issues" but were postponing their disagreements until they confronted concrete

cases. The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 124 n.1 (1996).

31. Two weeks after September 11, the OLC had already issued an opinion written by John Yoo asserting that "the President may deploy military force preemptively against terrorist organizations or the States that harbor or support them, *whether or not they can be linked to the specific terrorist incidents of September 11th.*" The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 2001 WL 34726560 (O.L.C. Sept. 25, 2001) (emphasis added). This goes far beyond the limited terms of authorization enacted by Congress in the aftermath of September 11, which granted the president authority to use force against "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that *occurred on September 11, 2001,* or harbored such organizations or persons." Pub. L. No. 107-40, 115 Stat. 224 (2001) (emphasis added).

OLC only published Yoo's extraordinary assertion of unilateral power in December 2004. See "The Bush Administration's 'Enabling Act,'" *New American* (January 24, 2005), at www.accessmylibrary.com/coms2/summary_0286-13877347_ITM. But in the interim, Yoo's opinion had been used as authority in further aggressive OLC memoranda. See, e.g., Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, 2002 WL 3446 2401, at *6 (O.L.C. Oct. 23, 2002) ("[T]he Constitution grants the President unilateral power to take military action to protect the national security interests of the United States"); The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations, 2002 WL 34482991, at *4 (O.L.C. Mar. 13, 2002) ("[A]ny ambiguity in the allocation of a power that is executive in nature must be resolved in favor of the executive branch"). At the end of the Bush administration, Steven Bradbury drafted a "memorandum for the files" withdrawing "certain propositions stated in several opinions issued by the Office of Legal Counsel in 2001–2003." Status of Certain OLC Opinions Issued in the Aftermath of the

Terrorist Attacks of September 11, 2001, 2009 WL 1267352, at *3 (O.L.C. Jan. 15, 2009). However, he continued to assert that it was "well established that the President has broad authority as Commander in Chief to take military actions in defense of the country." Id. A Westlaw search did not yield a single opinion by the Bush OLC that explicitly repudiated Yoo's opinion of September 25, 2002.

32. See Cornelia Pillard, "The Unfulfilled Promise of the Constitution in Executive Hands," 103 *Mich. L. Rev.* 676, 716 (2005). In recent years, the OLC has typically been headed by an assistant attorney general, with three deputy assistant attorneys general directly underneath.

Much to its credit, the Obama administration has chosen a career professional to serve as one of the deputy assistant attorneys general in the office. I hope this serves as an enduring precedent. In contrast, only one of the SG's four deputies is a political appointee. See Patricia Millett, "We're Your Government and We're Here To Help: Obtaining Amicus Support from the Federal Government in Supreme Court Cases," 10 *J. App. Prac. & Process* 209, 211 (2009).

33. The OLC of George W. Bush was typical in this regard. John Yoo describes his office mates: "Most of OLC's civil service staff were young attorneys just off of or headed to a prestigious clerkship in the federal appellate courts, or even the Supreme Court. Just above them were several experts in foreign affairs, national security, or presidential power with decades of experience. . . . As a deputy to the assistant attorney general in charge of the office, I was a Bush administration appointee who shared its general constitutional philosophy. Three of the four other deputies had clerked for Justice Scalia or, like myself, Justice Thomas." John Yoo, *War by Other Means* 19 (2006); see also Tung Yin, "Great Minds Think Alike: The 'Torture Memo,' Office of Legal Counsel, and Sharing the Boss's Mindset," 45 *Willamette L. Rev.* 473, 500 (2009).

34. Cornelia Pillard explains, "OLC has balanced the higher turnover required of its deputies by employing three or four very experienced career lawyers with great familiarity with certain core practice areas, such as separation of powers, executive privilege, appointments,

executive orders, and foreign affairs." Pillard, supra n. 32, at 716, n. 125. All told, the OLC of George W. Bush contained only three career lawyers who qualified for the top-echelon Senior Executive Service. Yoo, supra n. 33, at 24.

35. An independent count of all OLC opinions indicates that 17.2 percent (202 total) have responded to White House requests since regular publication began in 1977. It's impossible to say whether this ratio is representative of the many OLC opinions that remain unpublished.

36. The OLC certainly does have the legal authority to issue opinions in the name of the attorney general; see 28 U.S.C. §511 and 28 C.F.R. §0.25 (2006). But the sole relevant statute only makes them binding on the military departments, 28 U.S.C. §513. President Carter issued an executive order that "encouraged" executive branch departments to submit interagency disputes that they were "unable to resolve." Exec. Order No. 12,146, 3 C.F.R. §310 (1980), reprinted in 28 U.S.C.A. §509 note (1992). The order "required" them to submit disputes "prior to proceeding in any court." Id. As Michael Herz suggests, the juxtaposition of "encourage" and "require" implies "that as long as they do not proceed to court, agencies are not ever required to submit a dispute to the Attorney General." *See* Michael Herz, "Imposing Unified Executive Branch Statutory Interpretation," 15 *Card. L. Rev.* 219, 229 (1993).

Over the centuries, there have been repeated disagreements, both within Congress and the executive branch, on this question. For a crisp summary, see Nancy Baker, *Conflicting Loyalties: Law and Politics in the Attorney General's Office, 1789–1990*, 3–18 (1990). See also Randolph D. Moss, "Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel," 52 *Admin. L. Rev.* 1303, 1318 (2000) ("Although subject to almost two hundred years of debate and consideration, the question of whether [and in what sense] the opinions of the Attorney General, and, more recently, the Office of Legal Counsel, are legally binding within the executive branch remains somewhat unsettled").

37. See Memorandum from Stephen G. Bradbury, supra n. 28.

38. The OLC's procedures also systematically fail to ensure that individual rights will be taken seriously, since private parties have no way of presenting arguments to the office. It is also easy to miss significant executive branch interests, especially in cases involving requests by a single department.

39. See "Principles," supra n. 26.

40. The OLC staff has remained at twenty-five since 2001. Department of Justice, General Legal Activities: Office of Legal Counsel (2010), at www.justice.gov/jmd/2011summary/pdf/fy11-olc-bud-summary.pdf.

The press routinely says that the Obama WHC has more than forty lawyers; see, e.g., Jon Ward, "White House Beefs Up Legal Staff," *Washington Times* B01 (July 21, 2009). But this number is misleading for my purposes, since about a dozen of these lawyers discharge other functions—most notably, selecting nominees for judicial office and vetting proposed high-level political appointments for compliance with conflict-of-interest laws. Personal communication with Greg Craig, White House Counsel, November 24, 2009.

41. During the Iran hostage crisis, for example, President Carter asked Lloyd Cutler, not the OLC, to tell him whether the War Powers Resolution required him to consult Congress about a covert rescue mission. White House Interview Program, "Interview by Martha Kumar and Nancy Kassop with Lloyd Cutler" 7 (July 8, 1999), at www.archives.gov/presidential-libraries/research/transition-interviews/pdfp/cutler.pdf.

During the Clinton years, White House Counsel Bernard Nussbaum did not consult OLC when he advised the president that Hillary Clinton could participate in secret strategy sessions on health care legislation without violating the Federal Advisory Committee Act. Similarly, the WHC under George H. W. Bush refused to ask the OLC for an opinion concerning the line-item veto of appropriation measures because it disagreed with the likely result. Rabkin, supra n. 19, at 88, 94. I will be considering other examples shortly.

42. When interagency disputes arise, the OLC asks each side to submit a memorandum and allows the agencies that are parties to the

dispute to respond to one another. The OLC does not require memoranda when an opinion request comes from the White House Counsel's office, the Attorney General, or the Senior Management Offices at the Department of Justice. Memorandum from Stephen G. Bradbury, supra n. 28.

43. White House lawyers are in constant contact with their counterparts at the OLC. For example, Elena Kagan and Walter Dellinger recalled exchanging lengthy phone calls in which Kagan, then in the White House Counsel's office, tried to convince Dellinger, the head of the OLC, to change his mind about legal issues. Seth Stern, "Meet the President's New Lawyers—And Their New Lawyers," *Harv. L. Bull.* (Summer 2009), at www.law.harvard.edu/news/bulletin/2009/summer/feature_3.php.

44. In discussing his nomination to head the Bush OLC, Jack Goldsmith explains that White House lawyers recommended him "in large part because I shared the basic assumptions, outlook, and goals of top administration officials." Jack Goldsmith, *The Terror Presidency* 34 (2007). The same thing is true of all other OLC heads.

45. The White House Counsel is typically involved in the nomination of federal judges and other high political appointments, but depending on the personalities involved, he or she may also serve as a leading member of the inner circle of presidential advisors on a host of other issues.

46. Baker, supra n. 36, at 11 (1990).

47. Baker describes the variety of positions that attorneys general have taken at the intersection of law and politics over the course of American history. Id. at chaps. 3–5.

48. Griffin Bell's defense of the OLC led him to the brink of resignation when President Carter overruled an OLC opinion on the basis of purely political considerations. But this was an exceptional event during the Carter presidency. See Griffin B. Bell and Ronald J. Ostrow, *Taking Care of the Law,* 25–27 (1982).

49. See n. 27, supra.

50. See Goldsmith, supra n. 44, at 34. Goldsmith offers a useful survey of the platitudes offered up by various heads of the OLC at 32–37.

51. There were nineteen signatories, including Walter Dellinger, a legal luminary who led the OLC in the Clinton years. A few signers also served in prior Republican administrations or as holdovers in the Bush administration. See Morrison, supra n. 26, at n. 13.

52. See "Principles," supra n. 26. For a more sympathetic interpretation of the Principles, see Morrison, supra n. 26.

53. See Confirmation Hearings on Federal Appointments: Hearings Before the S. Comm. on the Judiciary, 109th Cong. 766 (2005) (written responses of Steven Bradbury, Bush nominee as the head of OLC) ("The [Principles] generally reflect operating principles that have long guided OLC in both Republican and Democratic administrations"); Confirmation Hearings on the Nomination of Timothy Elliott Flanigan to Be Deputy Attorney General: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 120 (2005) (written responses of Timothy Flanigan) ("I have reviewed generally the [Principles] and agree with much of the document").

54. In 1980, the Carter OLC reviewed "the effect of the War Powers Resolution on the President's power to use military force without special congressional authorization." Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 185 (1980). It relied heavily on "historical practice and the political relationship between the President and Congress" in upholding the President's "constitutional authority to order all of the foregoing operations" during the Iran hostage crisis. Id. Later administrations ratcheted the Carter OLC's invocation of "historical practice" further by joining it with a capacious reading of related Supreme Court decisions, most notably United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). (Within executive circles, this legal move is sometimes called "Curtiss Wright, so I'm right.") See, e.g., The President's Compliance with the "Timely Notification" Requirement of Section 501(B) of the National Security Act, 10 Op. O.L.C. 159 (1986).

The George H. W. Bush OLC continued the one-way ratchet by emphasizing the precedential authority of the opinions of "this Department and *this Office*" (emphasis supplied) in upholding the presi-

dent's "power to commit United States troops abroad for the purpose of protecting important national interests." Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 8 (1992). Similarly, the Clinton OLC cited the Carter OLC opinion in upholding the "lawfulness of the President's planned deployment of United States military forces into Haiti." Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173 (1994). This set the stage for a sweeping opinion by John Yoo asserting the president's "unilateral" power to use "military force preemptively against terrorist organizations or the States that harbor or support them, whether or not they can be linked to the specific terrorist attacks of September 11." The President's Constitutional Authority, supra n. 31. In reaching this remarkable conclusion, Yoo included an entire section on the "Opinions of the Office of Legal Counsel," which reviewed related precedents from the Nixon, Carter, Reagan, George H. W. Bush, and Clinton administrations. Id. at *8–10. For further discussion of Yoo's opinion, see n. 31.

55. See Goldsmith, supra n. 44, at 24.

56. Id. at 29 (emphasizing limited scope of White House interview).

57. See Id. at 141–61, for Goldsmith's struggle with the torture memos. The quotation that concludes this paragraph comes from p. 161.

58. Id. at 161.

59. See David Cole, ed., *The Torture Memos* (2009), which contains all the relevant documents from the Bush OLC, as well as a trenchant summary of the OLC's determination to sustain the legality of waterboarding, and other forms of torture, throughout the Bush years.

60. Id. For a concise account of some of these "retreats," see Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, 2009 WL 1267352 (O.L.C. Jan. 15, 2009).

61. Obama forbade his government to "rely upon any interpretation of the law governing interrogation . . . issued by the Department of Justice between September 11, 2001, and January 20, 2009" until they were systematically reexamined by the new OLC. See Exec.

Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009). A few months later, five opinions were explicitly withdrawn. Memorandum for the Attorney General, from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, Re: Withdrawal of Office of Legal Counsel CIA Interrogation Opinions 1 (Apr. 15, 2009); Memorandum for the Attorney General, from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, Re: Withdrawal of Office of Legal Counsel Opinion 1 (Jun. 11, 2009).

62. See Memorandum from David Margolis, Associate Deputy Attorney General to the Attorney General 44 (January 5, 2010) at judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf.

I am quoting from the most vulnerable section of Margolis's report, which exonerates Bybee and Yoo from malpractice regarding their claim that the president can override the explicit congressional ban on torture and authorize inhumane practices as commander in chief. In exonerating Bybee and Yoo, Margolis relied principally on two facts: first, that other leading appointees in the Bush OLC also believed that presidential torture raised "complicated questions" and, second, that the White House was demanding a quick decision. Future Yoos will take notice and line up a few office mates to agree with extremist legal positions before issuing their memos giving the president carte blanche.

63. See David Luban, "David Margolis Is Wrong," *Slate* (February 22, 2010) at www.slate.com/id/2245531; David Luban, "What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration," Senate Judiciary Committee, Subcommittee on Administrative Oversight and the Courts, 111th Congress, 2d Session (May 13, 2009).

64. By the end of the Roosevelt administration, the original complement of six presidential assistants had increased to eleven; see Richard E. Neustadt, "Roosevelt's Approach to Staffing the White House," in Charles Jones, ed., *Preparing to Be President: The Memos of Richard E. Neustadt,* 54–61 (2000).

65. See Rosenman's account of his time in the White House, which focuses overwhelmingly on his political activities. Sam Rosenman, *Working With Roosevelt,* 370–551 (1952). Rosenman worked for Roo-

sevelt in Albany as "counsel to the governor"—undoubtedly inspiring Roosevelt's selection of a similar title when he arrived at the White House. Id. at 30.

66. "[P]ardons came through Rosenman as well, but other legal matters he left largely to Justice, which was jealous of its status as the President's legal advisor." Richard E. Neustadt, "Historical Problems in Staffing the White House," in Jones, supra n. 64, at 110–11.

67. Rosenman's successor, Clark Clifford, engaged primarily in political advising and speech writing. "To the inevitable question *What did a Special Counsel do*?" he wrote later, "the simplest and most accurate answer was: Whatever the President wanted. The title of Special Counsel was grand, but the job had no power or authority other than that conferred by the president." Clark Clifford, *Counsel to the President,* 75 (1991). Some of Clifford's successors occasionally addressed important legal issues. See Bradley H. Patterson, *The Ring of Power: The White House Staff and Its Expanding Role in Government,* 41 (1988) (Truman administration); Karen M. Hult and Charles E. Walcott, *Empowering the White House Under Nixon, Ford, and Carter,* 105 (2004)(Eisenhower administration).

Felix Frankfurter was perhaps the first observer to note the dangers lurking in these interventions: "this is an interesting illustration of how dealing with an ad hoc situation led to accretion of power in the wrong place and the contraction of authority where it properly belongs." Letter from Felix Frankfurter to Charles C. Burlingham, New York lawyer (Jan. 5, 1953) (on file with the Yale Law School Library).

68. John Dean, *Blind Ambition,* 11 (1976).

69. Id. at 39.

70. Id. at 38.

71. Ford appointed William E. Casselman II. Paul C. Light, *Vice-Presidential Power: Advice and Influence in the White House,* 95 (1984) ("As heir apparent to Richard Nixon, Ford also wanted to avoid any hint of scandal. The Agnew and Nixon problems had sensitized all of Washington to the advantages of sound legal counsel").

72. As late as 1980, Richard Neustadt was still asking Reagan's chief of staff, James Baker: "Does the President need 'his' lawyer in

the White House? Acting as such, distinct from aides who happen to be lawyers? Separate from legal staffs at Justice? Since Watergate, maybe so. But if so, it is not because the last administration left the title and the slots behind. Whether or not you decide you need a counsel-and-associates, the question is worth asking and answering before you appoint one." Jones, supra n. 64, at 112.

73. See Lloyd N. Cutler, "To Form a Government," 59 *For. Aff.* 126 (1980) (discussing constitutional barriers to effective government in foreign affairs, with a particular focus on the U.S.–Soviet agreement). Before he appointed him as his counsel, Carter had already asked Cutler to serve as the administration's spokesman to defend the constitutionality of his proposed arms control agreement with the Russians. It was only natural for Cutler to continue his public advocacy once he became Counsel. Nevertheless, it served to give new luster to his position.

74. For example, Cutler named Joseph Onek as deputy counsel and Philip Bobbitt as associate counsel. See Hult and Walcott, supra n. 67, at 115. Both went on to distinguished careers in later administrations.

75. Fred Fielding, who was John Dean's first hire, returned to head the office under Reagan. His six-year tenure stabilized its authority, which was further enhanced by Boyden Gray, an especially influential counsel to George H. W. Bush. Bill Clinton's office was remarkable for instability, with six counsels serving over eight scandal-ridden years—with Clinton calling upon Lloyd Cutler to make a repeat performance and asking another senior lawyer-statesman, Abner Mikva, to lend his authority to the hard-pressed office. See Rabkin, supra n. 19 (discussing the Reagan, George H. W. Bush, and early Clinton administrations); Charles Tiefer, supra n. 20, at 34–36 (discussing Boyden Gray's role); Mary Anne Borrelli, Karen Hult, and Nancy Kassop, "The White House Counsel's Office," 31 *Pres. Stud. Quar.* 561, 581, 583 (2001) (discussing Clinton scandals).

76. The White House Counsel's office under Reagan reached a peak of fourteen lawyers during the Iran-Contra Affair in 1987. Rabkin, supra n. 19, at 114. On the fluctuations during the Clinton years,

see Karen M. Hult and Charles E. Walcott, *Empowering the White House Under Nixon, Ford, and Carter,* 106 (2004). During George W. Bush's presidency, there were fourteen lawyers in 2005—Michael A. Fletcher, "Quiet but Ambitious White House Counsel Makes Life of Law," *Washington Post* A19 *(*June 21, 2005)—and thirty or so in 2008. Evan Perez, "White House Counsel's Job at Stake," *Wall Street Journal* A4 *(*August 4, 2009).

77. See n. 40, supra, for a functional breakdown of the current counsel's office.

78. Of the twenty-four initial appointees at Obama's WHC, twenty attended law school at Stanford or the University of Chicago or in the Ivy League; nine had clerked on the Supreme Court, and two were full professors at elite law schools. See The White House Office of the Press Secretary, "President Obama Announces Key Additions to the Office of the White House Counsel," at www.whitehouse.gov/the_press_office/ObamaAnnouncesKeyAdditionstotheOfficeoftheWhiteHouseCounsel/.

79. See Norman Spaulding, "Professional Independence in the Office of the Attorney General," 60 *Stan. L. Rev.* 1931, 1953–56 (2008).

80. Other cabinet members got to their offices at about noon! Id. at 73.

81. Id.

82. The Act establishing the Justice Department in 1870 provided for the drafting of opinions by "department solicitors," but this never happened. The attorney general delegated the job to subordinates on an ad hoc basis. See David R. Deener, *The United States Attorneys General and International Law,* 32 (1957). There was "no systematic procedure for staff preparation of opinions developed" until World War I. See Id. at 73.

83. Baker, supra n. 36, at 188, n. 62.

84. Deener, supra n. 82, at 32.

85. Id. at 73.

86. In his description of the OLC in the 1950s, David Deener described "a staff of some 15 to 20 lawyers" with "[m]any of the

attorneys enter[ing] the Office after having served in other divisions of the Department or in other government agencies." Id. at 74. Similarly, Frank Wozencraft, head of the OLC under Johnson, described a staff mostly comprised of "career lawyers who joined the office in the early Eisenhower years or more recently, following experience elsewhere in government or in private practice." Frank M. Wozencraft, "OLC: The Unfamiliar Acronym," 57 *A.B.A.J.* 33, 36 (1971). There were usually two deputy attorneys general—one "a topflight career man" and another "specially recruited from outside the government." Id. at 37.

87. For the current profile of OLC lawyers, see n. 33.

88. Gonzales's central role in repudiating the Geneva Conventions is described by John Yoo, *War by Other Means,* 39–43 (2006). Gonzales was important on many other key issues. See, e.g., Id. at 140 (asserting president's power to detain indefinitely an American citizen as an enemy combatant within the boundaries of the United States).

89. For example, Obama's counsel Gregory Craig issued a public letter to Senator Russell Feingold defending the constitutionality of the appointment of White House policy czars. Craig's defense rested on both policy and constitutional grounds. He did not claim, however, to have "resolve[d] the issue definitively"—an important caveat, but will future counsels agree? Letter from Gregory B. Craig, Counsel to the President, to Russell D. Feingold, Senator, U.S. Senate (Oct. 5, 2009), available at feingold.senate.gov/pdf/ltr_100509_czars.pdf.

90. White House Interview Program, "Interview by Martha Kumar with Peter Wallison," 17 (Jan. 27, 2000), at www.archives.gov/presidential-libraries/research/transition-interviews/pdf/wallison.pdf.

5. Enlightening Politics

1. See Stephen Skowronek, *The Politics That Presidents Make* (1997).

2. See Juan Linz, "The Perils of Presidentialism," in Arend Lijphart, ed., *Parliamentary Versus Presidential Government,* 118 (2004).

3. See Robert Dahl, *How Democratic Is the American Constitution?* (2002).

4. See Stephen Skowronek, "The Conservative Insurgency and Presidential Power," 122 *Harv. L. Rev.* 2070 (2009).

5. The Obama administration has steered clear of the extreme assertions of unilateral presidential authority made by its predecessor. Obama has instead based his antiterrorism policies on the authority vested in him by a congressional resolution authorizing the use of force, enacted in the immediate aftermath of September 11. Pub. L. No. 107-40, 115 Stat. 224 (2001). Despite this gesture to congressional authority, Obama has continued many of the deeply problematic practices of the Bush years. For a sobering overview, see Eli Lake, "The 9/14 Presidency," *Reason* (April 6, 2010), at reason.com/archives/2010/04/06/the-914-presidency.

Consider, for example, the current administration's endorsement of the Bush effort to replace Guantanamo with other military prisons, located outside the country, that might serve as "legal black holes," where suspected terrorists may be held without any review by the federal courts. The Obama Justice Department recently convinced a federal court of appeals to deny a hearing to suspected terrorists who had been seized in foreign countries and then shipped to an American military prison at Bagram Airforce Base in Afghanistan. Even though the detainees never participated in the Afghan war, the court refused to hear their challenge to their long-term incarceration. See Fadi al Maqaleh v. Gates, 2010 U.S. App. LEXIS 10384 (2010).

I cannot predict how the Supreme Court will deal with the lower court's effort to distinguish Bagram from Guantanamo. But it is disheartening to learn that Obama believes that his public commitment to close Guantanamo is compatible with a legal effort to establish Bagram Airforce Base as a new Guantanamo.

6. James Madison, "Federalist 48," in Jacob Cooke, ed., *The Federalist* 332 (1961).

7. See my essay, "The New Separation of Powers," 113 *Harv. L. Rev.* 633 (2000).

8. I'll be using "primary" as a shorthand to include caucuses.

9. This benefit of open primaries would come at a cost. During more normal times, the open system may encourage members of the

opposing party to invade their rival's primary and vote for the candidate who is easiest to beat in November. Since I reject a compulsory system of open primaries on other grounds, there is no need to explore these problems of opportunism further, since they only serve to reinforce my position.

10. Democratic Party of California v. Jones, 530 U.S. 567 (2000).

11. Id. at 574.

12. See Larry Sabato, *A More Perfect Constitution* (2007), which presents a more ambitious agenda for constitutional reform. Though I have reservations about his proposals, I applaud his effort to raise fundamental issues of constitutional design. My aim in this book is more pragmatic. I hope to advance reforms that do *not* require the enactment of sweeping formal amendments to the Constitution—a Quixotic endeavor.

From this perspective, my effort displays a similar sensibility to that of Adrian Vermeule, who is also concerned with the design of "subconstitutional" rules in his *Mechanisms of Democracy* (2007). Vermeule does not share my concern with runaway presidencies, and therefore his designs are different—though not completely different. I shall be invoking his proposal to beef up the legal capacities of Congress to engage in constitutional deliberation in support of one of my own suggestions in Chapter 6.

13. James Madison, "Federalist 62," Cooke, supra n. 6, at 418–20.

14. Bruce Ackerman and James Fishkin, *Deliberation Day* (2004).

15. For further cost estimates, see id. at 221–27 (2004).

16. For a comprehensive discussion, see James Fishkin, *When the People Speak* (2009).

17. Although the formats used in deliberative polling serve as the basis for Deliberation Day, the distinctive purposes of DDay require significant modifications. For further discussion, see Ackerman and Fishkin, supra n. 14, at 65–73.

18. For a more comprehensive assessment, see Fishkin, supra n. 16, at 133–50.

19. Although DDay may constrain the impact of sound-bite politics, some critics fear that it will only exacerbate the problem of ex-

tremism. This might happen when participants hear their own extremist inclinations endorsed by others. See, e.g., David Schkade, Cass Sunstein, and Reid Hastie, "What Happened on Deliberation Day," 95 *Calif. L. Rev.* 915 (2007). To establish the credibility of their concern about DDay's polarizing potential, the authors conducted a field experiment. Seventy-five participants were drawn from two Colorado cities—Boulder (liberal) and Colorado Springs (conservative). The two groups met separately and engaged in fifteen-minute (!) "deliberations" on global warming, affirmative action, and gay marriage, and were then urged to reach a consensus on these hot-button issues. Each participant filled out a questionnaire, both before and after these exercises, which suggested that the fifteen-minute discussions had exacerbated group polarization—the Boulder sample was more liberal, and the Colorado City sample more conservative, after the sessions had taken place.

This experiment is a parody of DDay. A fifteen-minute "deliberation" is no deliberation at all—with thirty-plus people in the room, each participant has less than thirty seconds to speak (or keep silent as one of his comrades indulges in a minute-long oration). In contrast to DDay, there was no effort to expose participants to both sides of each issue: How in the world is somebody supposed to "deliberate" on a question like global warming without exposing himself to pro-and-con debate? Given the informational vacuum, it's hardly surprising that the fifteen-minute sessions of knee-jerk reactions only confirmed extremist views. While the authors glancingly recognize that the DDay proposal is different from the one they investigate (see id. at 934), the title of their article suggests that their field experiment is somehow relevant to assessing the DDay initiative—a misleading sound bite.

In fact, data from deliberative polls reveal "no tendency at all toward polarization in Sunstein's sense." Fishkin, supra n. 16, at 131.

20. See Robert Giles, "New Economics Models for Journalism," 139 *Daedalus* 26, 33 (2010). Part of the big decline in advertising revenue comes from the sharp economic recession, but few believe that the next recovery will generate much of a bounce. See Chapter 1,

n. 43, for a discussion of job losses in journalism over the past decade.

21. Consider the controversy swirling around Kenneth Tomlinson, chairman of the Corporation for Public Broadcasting under George W. Bush. His campaign to eliminate "liberal media bias" provoked an investigation by the inspector general, who found that Tomlinson used "political tests" to recruit a new president of the organization. Paul Farhi, "Investigation Faults Ex-Chairman of CPB: Report Says Tomlinson Tried to Influence PBS Program," *Washington Post,* C01 (November 16, 2005). Tomlinson resigned shortly before the report was published.

22. See ProPublica, www.propublica.org.

23. A study of Internet traffic in March 2007 indicates that about 10 percent of all Web traffic goes to "adult or pornographic" sites, slightly more than go to all Web-mail services, and *three times* the 3 percent that go to "news and media" sites. See Matthew Hindman, *The Myth of Digital Democracy,* 60–61 (2009). Given the ratio of porno to news, cynical porno-clickers could get the lion's share of Endowment funding—undermining the point of the program and destroying the Endowment's political support.

There is no serious constitutional problem raised by excluding porno sites. The First Amendment does prohibit a broad ban on pornography, but it doesn't require the state to go further and subsidize it, especially when the pornography business is booming on the Internet. See National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) (upholding a congressional statute instructing the NEA to take into account prevailing notions of "decency and respect" held by the American public).

To put the point more affirmatively, the Endowment is a response to a new market failure generated by the Internet, which endangers the vitality of political debate, the very core First Amendment value. This market failure enables readers to appropriate copyrighted news and commentary without cost, and hence threatens the very foundations of public discourse. See generally, Robert Post, "Subsidized Speech," 106 *Yale L.J.* 151 (1996). Congress is acting well within its

rights to target its subsidy to respond to *this* market-failure and thereby enable citizens to enter the public forum and confront a broad range of fact and opinion on key issues at the center of the political agenda. See generally, Mark Yudoff, *When Government Speaks* (1983).

24. It is also possible that a range of commercial businesses might try to register with the Endowment and encourage their customers to click. But this strikes me as quite unlikely, given the enormous bad publicity attending such a move. Craig's List or Citibank has better ways of making money. If I am wrong, and non–news sites start draining significant sums from the Endowment, it might prove necessary to move beyond the ban against pornography and impose other categorical exclusions. Only time will tell. For a discussion of the constitutionality of such exclusions, see n. 23, supra.

25. See Robert McChesney and John Nichols, *The Death and Life of American Journalism*, 200–206 (2010). Under their proposal, citizens get a $200 voucher that they can give to news media on an annual basis—either by marking down the beneficiaries on their tax returns or filling out a simple form. The Ackerman-Ayres proposal differs in four respects. First, McChesney and Nichols only allow contributions to qualifying nonprofits, but there is no reason that for-profits should be excluded. If the *New York Times* or *New York Post* produces articles that readers find more informative, why should they be penalized simply because these news sources rely on commercial advertising to outcompete nonprofits in the marketplace of ideas? Second, McChesney and Nichols would have citizens give their vouchers to news organizations, while we have them click in support of particular articles. Their organizational focus might make sense as a transitional device, but our article focus is better suited to the Internet—where many readers will not visit the site of the journalistic originator but will view the news item on a site that aggregates articles from a broad range of sources. These readers should also be given the opportunity to express their support for their favorite pundits and reporters. Third, McChesney and Nichols invite citizens to express their support once a year, and in a lump-sum fashion. The click system permits a more modulated and ongoing citizenship response. Finally, it is more user

friendly, and likely to generate far broader participation than a voucher keyed to the payment of taxes.

When all is said and done, these differences should not disguise the common aspiration inspiring both proposals—to create a decentralized system through which citizens can provide monetary support for news in a world in which the old business model is collapsing.

26. The Endowment should also take steps to prevent news organizations from inflating their funding by hiring "professional clickers" to engage in this mind-numbing activity for pay. It should aim to make the costs of hiring clickers larger than the revenues they will gain per click/hour. For starters, the Endowment should program its system to accept only a single click from any computer for any article. It can also require the news report to remain on the computer screen for a few seconds before the reader can contact the Endowment. This increases the cost of professional clicking while guaranteeing that ordinary citizens actually have a chance to read the articles before they can tell the Endowment that they contributed to their civic understanding. Opportunists will come up with other ways of gaming the system, but our conversations with computer specialists suggest that the Endowment's programmers should be equal to the challenge of designing counterstrategies.

27. See Sanford Levinson, *Our Undemocratic Constitution,* 90 (2006).

28. For a broad-ranging critique, see George Edwards, *Why the Electoral College Is Bad for America* (2004).

29. See Bruce Ackerman, *The Failure of the Founding Fathers,* 31 (2005).

30. By November 2009, Hawaii, Illinois, Maryland, New Jersey, and Washington had entered the compact. For more details on the initiative, go to its website at www.nationalpopularvote.com/.

31. The initiative's website contains current reports on the compact's political status in state legislatures throughout the nation.

32. Supporters of the compact assert that it may become valid even if Congress does not approve. See www.nationalpopularvote.com/pages/answers/m15.php. But the Constitution says that "No State

shall, without the Consent of Congress, . . . enter into *any* Agreement or Compact with another state, or a Foreign Power . . ." (emphasis supplied), Art. 1, sec. 10. Congress has a powerful interest in ensuring that the compact does not destabilize the broader system through which presidents are selected, and the "necessary and proper" clause gives it constitutional authority to pass legislation to safeguard this interest.

33. The text of the compact is presented at www.nationalpopularvote.com/pages/misc/888wordcompact.php.

34. I am indebted to my friend, Akhil Amar, for clarifying my thinking. He has stated his own views on these issues in his "Kormendy Lecture: The Electoral College: Past, Present and Future," 33 *Ohio N.U.L. Rev.* 467 (2007).

6. Restoring the Rule of Law

1. See "Letter from Chief Justice Jay and Associate Justices to President Washington (8 August 1793)," in 3 Henry Johnston, ed., *The Correspondence and Public Papers of John Jay* 1782–1793 (1890).

2. See generally Developments in the Law, "Access to Courts: The Political Question Doctrine," 122 *Harv. L. Rev.* 1193 (2009) (and sources cited therein).

3. The House and Senate each has its own office of legal counsel, but the bureaus would become much more important players in the revised system. For a different design proposal that also envisions beefed-up legal competence for Congress, see Adrian Vermeule, *Mechanisms of Democracy*, 233–35 (2007).

4. The president may also want to use the tribunal when Congress isn't interested in bringing a lawsuit. As Chapter 4 notes, the OLC is continuously engaged in providing authoritative legal interpretations for executive departments, especially when they disagree. The president may well consider the new tribunal a more legitimate forum for the resolution of these disputes than the old OLC. See generally Neal Katyal, "Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within," 115 *Yale L.J.* 2314, 2337–41 (2006).

5. Among many other problems, two are worth singling out. The first is the problem of presidential reliance. Before the tribunal reaches a final judgment, the president will be relying on legal opinions rendered by the Office of Legal Counsel and the White House Counsel. If these are repudiated by the tribunal, he must be given ample opportunity to change course. While the tribunal's declaratory judgment will ordinarily deprive officials of their absolute legal immunity if they continue giving their support to the president's lawless actions, the statute should clearly state that executive officials can maintain their immunity so long as the president is engaging in a good-faith effort at compliance.

Second, problems of confidentiality will arise in national security cases, and special steps will be required to preserve state secrets. It may even be necessary for the tribunal to issue two versions of its opinion—with the public version elaborating basic principles, while the confidential version contains all the information needed for officials to act in a contextually sensitive fashion.

6. In contrast to the United States, modern constitutional systems make systematic efforts to discipline the executive through the operation of politically insulated judicial institutions. Models originating in Germany and France have had the most influence, but they are very different from one another.

The Germans discipline the executive by vastly expanding the jurisdiction of their constitutional court. For starters, the German court decisively rejects the "political question" doctrine, and takes on a binding obligation to confront constitutional issues raised by executive action, even in the field of foreign policy. See David Currie, *The Constitution of the Federal Republic of Germany* 170 (1994); Marcel Kau, *United States Supreme Court und Bundesverfassungsgericht: Die Bedeutung des United States Supreme Court fuer die Einrichtung und Fortentwicklung des Bundesverfassungsgerichts,* 321 (2007).

Similarly, the German constitution repudiates American-style limitations on standing. It expressly authorizes major institutions, as well as one-fourth of the Bundestag, to challenge legislation long before it has an impact on concrete interests. See Grundgestz, Art. 93 (1)(1–4);

Ernst Benda and Eckart Klein, *Lehrbuch des Verfassungsprozessrechts* 267–81 (1991); Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany,* 13–14 (2d ed. 1997).

This approach, which derives from Hans Kelsen's jurisprudence, has had a broad impact in other leading democracies; see Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe,* 44–45 (2000). But it requires a revolutionary revision of American understandings of judicial power, and I have not used the German model as the basis of my proposed reform.

In contrast, my proposal does bear a very distant relation to the French approach. The French do not depend on courts of general jurisdiction to impose the rule of law on the executive. They pursue the same end by insulating a specialized executive tribunal from political influence. The Conseil d'Etat contains a select body of elite jurists and civil servants who review the legality of executive initiatives before they are promulgated. See John Bell, "What Is the Function of the Conseil D'Etat in the Preparation of Legislation?," 49 *Int'l & Comp. L. Q.* 661 (2000). My Supreme Executive Tribunal follows in this tradition.

The Conseil has operated successfully since the days of the Third Republic, and it has been used as a model elsewhere in Europe. But French personnel and procedures have no close analogues to the American experience—see Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'Etat* (2010)—and I expect my Supreme Executive Tribunal to develop very different modes of operation. At most, the Conseil's success establishes that it would be wrong to dismiss, without further reflection, any initiative that involves insulating a judicial organ within the executive branch.

7. In the mid-seventies, Kenneth Davis reported there were some sixty independent agencies whose heads were insulated—in one degree or another—from unilateral presidential removal. Kenneth C. Davis, *Administrative Law of the Seventies,* 14 (1976). This is also true today, according to a government website at www.usa.gov/Agencies/Federal/Independent.shtml. But a more realistic description would emphasize the key role of the independent agencies enumerated by the

Paperwork Reduction Act, 44 U.S.C. §3502(5)(2006): "the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the Federal Maritime Commission, the Federal Trade Commission, . . . the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission. . . ."

8. See Humphrey's Executor v. Federal Trade Commission, 295 U.S. 202 (1935)(protecting an FTC commissioner against discharge by the president over policy disagreements).

9. See Morrison v. Olson, 487 U.S. 654 (1988).

10. See Saikrishna Prakash, "Imperial and Imperiled: The Curious State of the Executive," 50 *Wm. & Mary L. Rev.* 1021 (2008)(and sources cited therein). Steven Calabresi and Christopher Yoo have tried to strengthen the unitarian case by demonstrating that presidents from Washington onward have consistently opposed the creation of independent power centers in the executive branch. See their *The Unitary Executive: Presidential Power from Washington to Bush* (2008).

But their discussion of Washington suffices to refute their historical thesis. The moment of truth comes when the authors confront Washington's "genuinely puzzling" decision to approve the Bank of the United States. After all, they concede, it was "run by a board of directors of whom only a minority were to be selected by [the] President," and so transparently refutes their basic thesis.

Not to worry, Calabresi and Yoo assure us. "At most, this suggests there is precedent for an independent Federal Reserve Board but not for other independent agencies like the FTC and the FCC." Their effort to limit the damage to the Federal Reserve is entirely unpersuasive. For the Federalists, the Bank was a key policy-making instrument, but later generations might believe that other independent agencies are central for their regulatory aspirations. If a future generation thinks

that some other agency—say, the FCC—should be independent from direct presidential oversight, why should it be barred from following in Washington's footsteps?

Perhaps to anticipate this point, Calabresi and Yoo suggest that "[i]t is a little hard to see how a bank that was abolished [by Andrew Jackson] could provide precedential support for modern independent entities." Given the authors' general veneration of the Founders, their casual dismissal of the great Bank precedent established by the great Washington merely suggests their willingness to take desperate measures to save their unitarian thesis against contrary evidence. For further hand-wringing, see the rest of their discussion at 53–54.

This is the sort of thing that gives "lawyer's history" a bad name, and it is much in evidence throughout the book. For a more balanced view of the legacy of the early Republic, see Jerry Mashaw, "Recovering American Administrative Law: Federalist Foundations, 1787–1801," 115 *Yale L. J.* 1256 (2006).

11. Morrison, supra n. 9, at 691.

12. Id. at 605.

13. Id. at 691.

14. See Michael Paulsen, "The Most Dangerous Branch: Executive Power to Say What the Law Is," 83 *Geo. L.J.* 217, 321 (1994). Professor Paulsen's article elaborates the unitary executive thesis in an extreme form—so I think it is especially significant that he recognizes the existence of this good-faith obligation. Paulsen's "good faith" proviso suggests that even a Supreme Court that adopted his extreme form of unitarianism should make an exception for the Supreme Executive Tribunal—since, as my text argues, the current OLC-WHC is not a structure upon which the president may legitimately rely to produce a system of "good faith" legal judgments on the character of his legal and constitutional obligations.

15. See James Madison, "Federalist Ten," in Jacob Cooke, ed., *The Federalist* 60 (1961).

16. See Lawrence Lessig, "Fidelity in Translation," 71 *Texas L. Rev.* 1165 (1993)(on the need for translating original meanings into contemporary contexts).

17. While Article One is a familiar source for congressional authority to establish administrative tribunals, Article Two has also provided a foundation for the creation of judicial institutions throughout American history. Foreign embassies convened "consular courts" throughout the nineteenth and early twentieth centuries; see Frank Hinckley, *American Consular Jurisdiction in the Orient,* 197–203 (1906). In the aftermath of World War II, President Truman established a system of civilian courts for occupied Germany; see *Madsen v. Kinsella*, 343 U.S. 341 (1952). Once West Germany reestablished its sovereignty, the Eisenhower administration created a special United States District Court for occupied Berlin. See United States v. Tiede, 86 F.R.D. 227, 261–65 (U.S. Ct. Berlin 1979).

The Constitution does impose limitations on the powers of Congress and the president to create courts under One and Two. See *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982), and *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). But these limits are relevant only if the Supreme Executive Tribunal tries to oust traditional courts from jurisdiction over "cases and controversies" granted to them by Article Three. My proposal does not implicate these concerns, since the executive tribunal exercises jurisdiction only when there is reason to believe that the traditional courts will refuse to decide the dispute on its merits.

Similarly, no significant issues arise from my proposal to open the tribunal's jurisdiction to lawsuits from Senators and Representatives. The Constitution does bar Congress from controlling executive officials by asserting the power to fire them if it disagrees with their decisions—*Bowsher v. Synar*, 478 U.S. 714 (1986). But nothing like this is involved here. My proposed statute simply authorizes senators and representatives to raise legal questions before the tribunal; they will have no power to punish tribunal members when they reject congressional complaints.

18. See Chapter 4.

19. *United States v. Nixon,* 418 U.S. 683 (1973).

20. For more on signaling, see Bruce Ackerman, *We the People: Foundations,* 272–74 (1991).

21. See Chapter 1.

22. I am quoting from the report by a special commission headed by Louis Brownlow, which provided the basis for Roosevelt's effort at executive reorganization, at www.fas.org/sgp/crs/misc/98-606.pdf. For a retrospective appraisal, see James Fesler, "The Brownlow Committee Fifty Years Later," 47 *Pub. Ad. Rev.* 291 (1987).

23. The Constitution explicitly requires senatorial consent to the nomination of all "ambassadors, other public ministers, and consuls," Art. 2, Sec. 2.

24. Recent congressional hearings have been dominated by scholars ritualistically assuring the Senate that White House "czars" raised no constitutional problem because "any member of the White House staff, whatever the official or unofficial title of that staff member, who does not have statutory authority does not have any legal power. That is not to say that members of the White House staff are not and may not be highly influential." See, e.g., Examining the History and Legality of Executive Branch Czars: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 111th Cong. (2009) (statement of John C. Harrison, Professor of Law, University of Virginia). There was only one dissent: Matthew Spalding, of the Heritage Foundation, punctured the formalist balloon: "If executive authority is . . . a subterfuge to thwart confirmation requirements and accountability, and so evade constitutional requirements for individuals performing . . . functions normally the responsibility of cabinet secretaries . . . that require Senate confirmation. . . ." Id.

25. Walter Bagehot, *The English Constitution* (1867).

26. The prospect of bad publicity seems to have played an oversized role in President Obama's refusal to nominate his top economic advisor, Larry Summers, as secretary of the treasury. See Ruth Marcus, "Summers Storm," *Washington Post,* A17 (January 22, 2005). To avoid a few days of bad press, Obama placed Summers at the head of his Economic Policy Council, generating years of overcentralized policy making in the White House.

27. To permit the president to start strong after Inauguration Day, he should be granted the power to appoint top staffers unilaterally for

the first sixty days of his term, pending an up or down vote by the Senate during this period.

28. My proposal is limited to executive branch nominations. The confirmation of judges for lifetime appointments raises different issues. For further discussion, see n. 40, infra.

29. During the Reagan years, Helms stalled the confirmation of twenty-nine foreign policy appointees until the State Department agreed to fill six posts with his favored candidates. Joanne Omang, "Conservatives Torpedo Deal with White House on Envoys," *Washington Post,* A5 (June 28, 1985). When Clinton was in power, Helms vetoed his fellow Republican William Weld's nomination as ambassador to Mexico—but he did not use a "hold" this time, since he was then chairman of the Senate Foreign Relations Committee and simply refused to hold a hearing on the nomination. See Katharine Q. Seelye, "Weld Ends Fight Over Nomination by Withdrawing," *New York Times,* A1 (September 16, 1997).

30. Congress recently passed a provision that seemed to prohibit secret holds, requiring their publication in the *Congressional Record* and Senate calendar within six days. See Honest Leadership and Open Government Act of 2007, Pub. L. 110-81, §502. But the act contains several loopholes and no enforcement mechanism, and it hasn't had much practical impact. *See* Editorial, "It Worked for the Borgias," *New York Times,* A36 (December 7, 2009).

31. "Shelby Releases Hold on Nominees," *Huffington Post* (February 9, 2010), at www.huffingtonpost.com/2010/02/09/shelby-releases-hold-on-o_n_454653.html.

32. See Catherine Fisk and Erwin Chemerinsky, *The Filibuster*, 49 *Stan. L. Rev.* 181, 201 (1997).

33. Id. at 204.

34. *See* Steven Smith, *Call to Order: Floor Politics in the House and Senate,* 105–108 (1989).

35. *See* Walter Oleszek, " 'Holds' in the Senate," *Cong. Research Serv.* 1 (2008).

36. Scott Ainsworth and Marcus Flathman, "Unanimous Consent Agreements as Leadership Tools," 20 *Legis. Stud. Q.* 177, 189–90 (1995).

37. Fisk and Chemerinsky, supra note 32, at 203.

38. *See* Nolan McCarty and Rose Razaghian, "Advice and Consent: Senate Responses to Executive Branch Nominations 1885–1996," *Am. J. Pol. Sci.* 1122, 1129 (1999); Matthew Dull et. al., "Appointee Confirmation and Tenure: Politics, Policy, and Professionalism in Federal Agency Leadership, 1989–2009," 4, presented to the Annual Meeting of the American Political Science Association, Toronto, Ontario, Canada, September 5, 2009.

39. See Paul Light, *A Government Ill Executed,* 87–88 (2008).

40. A recent study of political officeholders between January 1982 and August 2003 found that about half (46 percent) served for less than two years, and almost one-quarter served for less than one year. B. Dan Wood and Miner P. Marchbanks, "What Determines How Long Political Appointees Serve?," 18 *J. Pub. Admin. Res. & Theory* 375, 381 (2008); see also Matthew Dull and Patrick Roberts, "Continuity, Competence, and the Succession of Senate-Confirmed Agency Appointees, 1989–2009," 39 *Pres. Stud. Quart.* 432, 436 (2009) (between 1989 and 2009, one-quarter of Senate-confirmed appointees served fewer than eighteen months, and the median tenure was two and a half years).

41. *See* Anne Joseph O'Connell, "Vacant Offices: Delays in Staffing Top Agency Positions," 82 *S. Cal. L. Rev.* 913, 962–63 (2009). The vacancy rate reached 50 percent in 1992, at the end of President George H. W. Bush's term, and again in 2000, at the end of Bill Clinton's presidency. Id.

42. I would not go further and urge the elimination of the filibuster when it comes to the confirmation of federal judges. We are dealing here with lifetime appointments and a distinct danger—that presidents will use narrow Senate majorities to push through extremist right- or left-wing judges who will spend thirty-plus years sabotaging statutes on the basis of far-out legal theories. Within this context, the sixty-vote rule makes judicial appointments a more bipartisan affair—limiting the capacity of an extremist president to throw a monkey wrench into the ongoing system. See Bruce Ackerman, "Keep Politics Off the Bench," *Los Angeles Times,* M5 (January 5, 2003); Bruce Ackerman,

"A Threat to Impartiality in the American Senate," *Financial Times,* 19 (May 16, 2005).

Statutes passed by one Congress can always be repealed by another Congress. But it takes a constitutional crisis for a new political movement to challenge an obstructionist judiciary. Such confrontations are sometimes inevitable, but they should not be multiplied needlessly. Given this functional imperative, the sixty-vote rule on judicial appointments provides an appropriate restraint on presidential efforts to project extreme ideologies beyond an incumbent's term in office.

Many other constitutional systems also take a super-majoritarian approach to the selection of judges, especially those serving on constitutional courts. In Germany, for example, judges must gain two-thirds support before the appropriate legislative body. See Kommers, supra n. 6, at 21–22.

43. For an account of the complex political and parliamentary maneuvering associated with this, and earlier efforts, to restrict the filibuster, see Bruce Ackerman, "How Biden Could Fix the Senate," *Amer. Prospect* (March 15, 2010), at www.prospect.org/cs/articles?article=how_biden_could_fix_the_senate.

44. See Sanford Levinson, *Our Undemocratic Constitution* 51 (2006); Francis Lee and Bruce Oppenheimer, *Sizing Up the Senate: The Unequal Consequences of Equal Representation* (1999).

45. Using 2009 Census Population estimates, the forty-one senators representing the least populous states (up to, and including, half of Iowa's inhabitants) amount to 33 million Americans—or 10.7 percent of the national total of 307 million.

46. The canons should also focus on the obligations of retired officers to restrain themselves from political attacks on civilian authority. Defining appropriate guidelines raises complex issues under the First Amendment, which must be carefully considered by the presidential commission charged with formulating an appropriate set of guidelines.

47. While Congress created the National Security Council in 1947, 50 U.S.C. §402, President Eisenhower created the first presidential assistant for national security affairs (as the advisor is officially known).

This was done unilaterally under a statute authorizing the president "to appoint and fix the pay of employees in the White House Office without regard to any other provision of law . . . ," 3 U.S.C. §105(a)(1). The statute goes on to say that "employees so appointed shall perform such official duties as the President may prescribe." Id. This casual treatment is no longer acceptable in defining an office as important as the NSC advisor.

48. Nobody may be appointed secretary of the army, navy, or air force "within five years after relief from active duty as a commissioned officer." 10 U.S.C. §3013. See also U.S.C. §5013(a) and U.S.C. §8013(a). The secretary and deputy secretary of defense must be retired for seven years. 10 U.S.C. §§113, 132.

49. 5 U.S.C. §3326. Worse yet, this minimal restriction can be waived under three broad conditions: (1) during a "state of national emergency," (2) when the secretary of defense and the Office of Personnel Management approve a waiver for a position that is in the "competitive service," (3) if "the minimum rate of basic pay for the position has been increased" (which occurs when the department is having trouble recruiting or retaining people in the position).

50. These numbers include all Senate-confirmed positions at the Department of Defense except for administrative positions (general counsel, installations, comptroller, public and legislative affairs, and civil works). There are sixteen retired military officers serving in forty-four positions, if we take into account those specially designated positions where the nominee can serve for up to four years before receiving Senate confirmation. These figures were based on March 15, 2010, data. For a list of appointments requiring confirmation, see Raymond F. Dubois, "DOD Presidential Appointments Requiring Senate Confirmation," Center for Strategic and International Studies, at csis.forumone.com/files/publication/100315_DOD_PAS.pdf. Information on military service is based on a search of biographies at www.defense.gov and Pentagon press releases.

51. See Chapter 2.

52. For the same reason, I would oppose a rule that would replace the chairman with the entire Joint Chiefs and guarantee this group a

seat at the table at NSC meetings. This is the situation that obtained before the passage of Goldwater-Nichols in 1986. Compare 50 U.S.C. §211 (1947) with 50 U.S.C. §151 (1986). As a matter of basic principle, it should be up to the civilian secretary to decide on the appropriate DOD delegation.

53. Barack Obama, "Remarks by the President on National Security" (May 21, 2009), at www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

54. Bruce Ackerman, *Before the Next Attack* (2007).

55. Under the terms of my framework statute, an 80 percent majority is required to extend a state of emergency once it has endured for eight months. During its early test runs, however, it would be prudent for the president's opponents to call a halt only if they could assemble a more impressive contingent. I have expressed this point in my scenario by stipulating that thirty-five senators have voted to terminate the emergency, even though my proposed statute says that twenty-one should suffice by this point.

56. This is not the place to describe the current state of the law on presidential powers. See generally David Barron and Martin Lederman, "The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding," 121 *Harv. L. Rev.* 689 (2008). For a brief assessment of the Obama administration's relationship to the legal legacy left behind by Bush, see Eli Lake, "The 9/14 Presidency," *Reason* (April 6, 2010), at reason.com/archives/2010/04/06/the-914-presidency.

57. See generally, Mark Tushnet, "Constitutional Hardball," 37 *J. Marshall L. Rev.* 523 (2004); Jack Balkin, "Constitutional Hardball and Constitutional Crises," 26 *Quinn. L. Rev.* 579 (2008); Eric Posner and Adrian Vermeule, "Constitutional Showdowns," 156 *U. Pa. L. Rev.* 991 (2008).

58. See "Nixon's Views on Presidential Power: Excerpts from an Interview with David Frost," at www.landmarkcases.org/nixon/nixonview.html.

59. See generally Jacques Chevallier, *L'Elaboration Historique du Principe de Séparation de la Juridiction Administrative et de*

L'administration Active (1970); François Burdeau, *Histoire du Droit Administratif* (1995). For an overview, see Peter Lindseth "'Always Embedded' Administration?: The Historical Evolution of Administrative Justice as an Aspect of Modern Governance," in Christian Joerges, Bo Stråth, and Peter Wagner, eds., *The Economy as a Polity,* 117, 122–23 *(*2005).

60. See Alexander Hamilton, "Federalist 1," in Cooke, supra n. 15, at 3.

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As I moved through life over the past twenty years, I was increasingly struck by a series of troublesome events that called into question the continuing health of the American constitutional system. So when I was asked by Princeton to deliver some Tanner Lectures, the invitation provoked this effort to shape my scattered observations into a sustained argument.

Many thanks to the Tanner Committee, and especially its chairman, Professor Philip Pettit, for their many acts of hospitality during my stay at Princeton in April 2010. I also profited from the critiques presented at the lectures by four very thoughtful commentators: Eric Foner, Jane Mansbridge, Jeffrey Tulis, and Adrian Vermeule. Their remarks helped me refine the final draft.

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