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Source: *Amerikastudien / American Studies*, Vol. 55, No. 2 (2010), pp. 249-286

Published by: Universitätsverlag WINTER GmbH

Stable URL: <https://www.jstor.org/stable/41158497>

Accessed: 30-03-2020 16:17 UTC

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The Return of the Imperial Presidency? The President, Congress, and U.S. Foreign Policy after 11 September 2001

FRANZ-JOSEF MEIERS

ABSTRACT

President George W. Bush's assertion of unlimited executive powers that would permit the executive branch to wage the War on Terror as the President in his role as commander-in-chief saw fit—from the treatment of 'unlawful' enemy combatants at Guantánamo Bay, to the creation of military commissions, to warrantless surveillance—elicited charges that he was subverting the Constitution and tipping the balance of power among the three branches of government. Presidential scholars like the late Arthur Schlesinger believe that the imperial presidency has been born again as a result of 9/11. Scholars in favor of executive supremacy like John Yoo argue that the new security threats to American national security, in particular terrorism and the proliferation of weapons of mass destruction, render the constitutional system of checks and balances obsolete. The two central questions this article addresses are: Has President George W. Bush put the constitutional system of checks and balances in jeopardy, or did he use his institutional resources of quick executive action properly to protect the nation and the American people against another crippling terrorist attack? Did he successfully expand presidential power as a permanent change to U.S. government, or did his unrelenting push for executive supremacy undercut his explicit goal to expand presidential authority future Presidents can wield as well?

From the onset of his presidency, President George W. Bush acted aggressively to bring the perpetrators of the terrorist attacks to justice—"dead or alive" ("Remarks"). In an address to a joint session of Congress, he promised, "Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done." The "war on terror" was not to end "until every terrorist group of global reach has been found, stopped and defeated" ("Address"). Bush was bent on preventing a second even more devastating homeland attack—a 9/11 with nuclear weapons. "Don't ever let this happen again," (qtd. in Goldsmith, *Terror Presidency* 74) he said the day after 9/11.

The White House's assertion of unlimited executive powers that would permit the executive branch to wage the War on Terror as the President in his role as commander-in-chief saw fit—from the treatment of 'unlawful' enemy combatants at Guantánamo Bay, to the creation of military commissions, to warrantless surveillance—elicited charges that the Bush administration was subverting the Constitution and tipping the balance of power among the three branches of government. Presidential scholars like the late Arthur Schlesinger believe that 9/11 has brought back the imperial presidency. In his seminal 1973 book *The Imperial Presidency* he concludes that the perennial threat to the constitutional checks and balances arises in the realm of foreign affairs. It is the assertion of inherent executive powers that defines the imperial presidency (421). In his 2004 book *War and*

the American Presidency, he concludes, “The impact of 9/11 gives more power than ever to a re-emerging imperial presidency and places the separation of powers under unprecedented strain” (66).¹

John C. Yoo, in contrast, strongly argues in favor of executive supremacy. The new security threats to American national security, in particular terrorism and the proliferation of weapons of mass destruction, render the constitutional system of checks and balances obsolete. The traditional legalistic war-making system that “places a premium on consensus, time of deliberation and approval of multiple institutions” should give way to “a flexible decision-making system” that within the permissible constitutional bounds places a premium on unilateral presidential capacity to act expeditiously and efficiently against the new threats (Yoo, *Powers* X-XI, 11-3, 293).² The salient question is whether President Bush has put the constitutional system of checks and balances in jeopardy or whether he used his institutional resources of quick executive action properly to protect the nation and the American people against another crippling terrorist attack?

My article proceeds as follows: I begin with a brief review of the constitutional setting. I next turn to the broad theory of inherent presidential powers advanced by the Bush administration and the reaction of Congress to its requests in the war on terror. The third section will discuss efforts of the judicial branch to reign in the Bush administration’s assertion of unbound executive power and efforts by the Democratic Party to use its regained majority status on Capitol Hill to change the war policy of a Republican President. I conclude with a brief summary of the results and answer the two interrelated questions of concern: Has the imperial presidency been born again as a result of 9/11? Has President Bush successfully expanded presidential power as a permanent change to U.S. government?

I. The Constitutional Setting

For the framers of the Constitution, the separation of powers was an article of faith. They saw the system of checks and balances as liberty’s first and best defense against the widespread popular fear of monarchy. They entrenched the essential precaution in favor of liberty by establishing a system of institutionally separated but functionally blended powers. The joint possession of power would provide “a greater prospect of security than the separate possessions of it by either of them,” (“Federalist No. 75” 452)³ Alexander Hamilton concluded. The overlap of powers would give each department of government a constitutional control over the others and ensure that no branch of government could overtake and supersede the others and hence drift toward tyranny. Thus, the “great security” against a concentration of powers in the same department lay “in giving each branch the constitutional means and personal motives to defend its institutional

¹ See also Rudalevige; Schwarz and Huq; Ball; Margulies; Savage, *Takeover*; Pfiffner, *Power Play*.

² See also Yoo, “War and the Constitutional Text”; *War by Other Means* X-XII; *Energy*.

³ This and all subsequent quotes from *The Federal Papers* are from Rossiter.

prerogatives from intrusion by either of the other departments” (Madison, “Federalist No. 51” 321-22).

The Founders did not entrust the constitutional system of checks and balances to ‘parchment barriers’ to prevent tyranny from entering upon the country. To prevent the supremacy of one branch over any other, each branch was granted important powers over the same area of activity. The framers saw “a large resolute breed of men,” as Walt Whitman put it (qtd. in Schlesinger, *Imperial Presidency* 419), as the lasting solution to preserve a balance of powers and interests against the intrigues of ambitious and passionate men which would guarantee the constitutional system of checks and balances. Thus, the inevitable conflicts among ambitious individuals demanded outlet but had to be kept from lasting provisions on paper so that freedom could be preserved (Sofaer, *War* 60).

The constitutional structure was based on the insight that men are not angels. As James Madison wrote, “Ambition must be made to counteract ambition. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and the next place obliges it to control itself” (“Federalist No. 51” 322). Dividing powers between the three branches, the founders harnessed human ambitions and passions in the interest of protecting liberty and constitutional democracy.

The framers did not create a political system so fragmented in structure, so divided in authority for the purpose of obstructing and hampering the operation of government in order to save the people from autocracy as Justice Louis Brandeis in a famous dissent in 1926 claimed.⁴ The purpose of the Constitution was “to form a more perfect Union.” The historical record is clear and persuasive that the inefficiency of the Continental Congress convinced the framers of the need of a separate and independent executive which could effectively execute the law in all parts of the country (Fisher, *President and Congress* 3; Sofaer, *War* 38, 45, 56; Pious 19-24). A vigorous executive was not regarded as a contradiction to “the genius of republican government,” Hamilton argued. “Energy in the executive is a leading character to the protection of the community against foreign states; [...] to the steady administration of the laws, to the protection of property [...]; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.” In view of the dismal experience of the Continental Congress, he concluded: “A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase of bad execution: And a government ill executed [...] must be in practice a bad government” (“Federalist No. 70” 423). Justice Robert Jackson correctly identified the multiple goals that motivated the framers. “While the constitution diffuses power the better to secure liberty, it also contemplates that the practice will integrate the dispersed powers into a workable government. It enjoins upon the branches separateness but interdependence,

⁴ In *Myers v. United States*, Justice Brandeis concluded, “The doctrine of the separation of powers was adopted by the convention of 1787, not to promote efficiency, but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among the three departments, to save the people from autocracy.”

autonomy but reciprocity" (*Youngstown Co. v. Sawyer*, 343 US 579). The constitutional system of checks and balances, therefore, has been designed to be both effective and safe.

The founding fathers intended to create two vigorous, active, and combative branches with significant overlapping roles in foreign affairs. The President cannot enter into treaties alone, but requires the advice and consent of two thirds of the Senate. He was not to have the king's power to go to war—that power was given to Congress; the President's primary task was to defend the country against sudden attack. The framers arranged the Constitution in a way not to let the decision to go to war be taken easily. "It will not be in the power of a single man, or a single body of men, to involve us in such distress" (qtd. in Ely 3), James Wilson said at Pennsylvania's ratification convention. Requiring Congress's assent would reduce the number of occasions on which the United States would become involved in war. The war-making power is thus divided in order to ensure "that no one man should hold the power of bringing the oppression upon us," wrote Abraham Lincoln, as a member of Congress, on 15 February 1848. The opposing view, he concluded, "destroys the whole matter, and places our President where kings have always stood" (qtd. in Bass et al. 145). It was the framers' clear intention that no one branch of government should have the sole authority to define the meaning of key constitutional provisions like the war-making power.

The constitutional system of checks and balances is troubled by uncertainty in principle and by conflict in practice. The framers did not provide guidance as to where to find the powers of the federal government in foreign affairs. Important foreign affairs powers fall in Justice Jackson's famous "twilight zone," in which the President and Congress may have concurrent authority, or in which its distribution is uncertain (*Youngstown Co. v. Sawyer*, 343 US 579). Does Article II ("The executive power shall be vested in a President of the United States") constitute a designation of an office or more a granting of power? Does the commander-in-chief clause constitute a designation of an office, as Hamilton suggested ("Federalist No. 69" 417-18), or does it imply the granting of an inherent power to determine military strategy and tactics? Does the President have permission, without authorization of Congress, to ever use force abroad? Is the power to terminate a treaty implied in the power to make it? To what extent does Congress have the right to control foreign policy, and by what means? The result was a constitution which invited the President and Congress in the words of the constitutional scholar Edwin Corwin "to struggle for the privilege of directing American foreign policy" (171; see also Sofaer, *War* 58). How this struggle would be solved was left to the necessities and exigencies of the day.

The Constitution laid the foundation for executive claims by assigning the President powers and functions that overlap with most of the powers and functions given to the legislature. Modern Presidents have repeatedly claimed that the President as the chief executive has certain powers which he deems inherent in the constitutional grant of authority in Article II and in the commander-in-chief clause. Advocates of independent, inherent presidential power over external affairs refer to James Madison, who wrote, "No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are autho-

rized; wherever a general power to do a thing is given, every particular power for doing it is included" ("Federalist No. 44" 285). The assertion of inherent power in the President, however, threatens the doctrine of separated but blended powers and the system of checks and balances (Fisher, "Invoking" 1-22; Schlesinger, *Imperial Presidency* X).

Advocates of executive power in foreign affairs have often cited John Marshall's characterization of the President as "the sole organ of the nation in its external relations and its sole representative with foreign nations"⁵ and its express approval by the Supreme Court in *United States v. Curtiss-Wright* (1936), referring to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" to support not only broad delegations of legislative power to the executive branch, but also the existence of inherent powers for the President. Marshall and *U.S. v. Curtiss-Wright*, however, did not claim that the President had sole authority to determine and control foreign policies. What both had "foremost in mind" in describing the President as the sole organ "was simply the President's role as instrument of communication with other governments" (Corwin 178; see also Schlesinger, "Legislative-Executive" 103, 105, 106; Henkin 27, 29, 31; Fisher, *Presidential War Power* 1-16, "Law" 142-44, 150). The Supreme Court's decision in *Curtiss-Wright* "gave the imperial presidency rhetorical encouragement but not constitutional vindication," Arthur Schlesinger concluded ("Legislative-Executive" 105; see also Fisher, "Foreign Policy" 152-54, *Presidential War Power* 69-73, "Law" 151; Henkin 39, 41, 42; Sofaer, "Presidential Power" 102, 120, 122). The framers envisaged institutions and procedures that assure joint congressional-executive action and promote maximum attention to the people's will (Fisher, "Foreign Policy" 154-55; Schlesinger, "Legislative-Executive" 102, 106; Koh 69).

The powers and influence of the executive and legislative branches, in practice, are not equal. The President enjoys certain great advantages. The essential qualities of unity, decision, activity, secrecy, and dispatch naturally reposed in the executive, not the legislature, make the chief executive the prime agent in dealings with foreign affairs (Hamilton, "Federalist No. 70" 424, "Federalist No. 75" 452). As head of the executive branch and the security agencies it contains, the President is best equipped among the three branches of government to respond immediately to a crisis. Especially in times of acute threats to national security, the power flows to the President. "It's of the nature of war to increase the executive at the expense of the legislative authority," Hamilton recognized ("Federalist No. 8" 68). "The power of directing and employing the common strength" in times of war "forms a usual and essential part in the definition of the executive authority" ("Federalist No. 74" 447).

The complexities of national growth, economic expansion, and the exigencies of the age of crisis after World War II all provided substantial incentives for granting new powers to the executive branch. It was the President who pre-

⁵ John Marshall's speech on 7 March 1800 in the House of Representatives is cited in *United States v. Curtiss-Wright Corporation*. 299 US 304. Supreme Ct. of the US. 1936 (argued 19, 20 Nov. 1936; decided 21 Dec. 1936).

pared the unified and coordinated policy against the perceived Soviet menace; Congress's role became that of a supporter, modifier, and legitimator of executive initiatives (Robinson 8, 14, 40, 68; see also Sundquist 91-126; Crabb, Jr. and Holt 57; Schlesinger, *Imperial Presidency* 127-30). The President's predominance in foreign affairs was further sustained by a broad foreign policy consensus that had emerged from the United States' experience during World War II and the Cold War. The Pearl Harbor paradigm demanded an active U.S. involvement in world affairs and thus implied a forceful rejection of the essential principle on which U.S. foreign policy had rested until 7 December 1941: "Peace, commerce and honest friendship with all nations—entangling alliances with none" (Jefferson; see also McDougall 39-49). The lesson of Pearl Harbor was: "If we do not nip aggression in the bud it will eventually grow and involve us. By not stopping aggressors immediately, you encourage them" (Roskin 569). America's irresistible rise to globalism was buttressed by the widespread belief at home that politics stops at water's edge. Until the Vietnam War, the broad anti-communist consensus (Holsti 25-40) within politics and society gave rise to the notion that the President embodied the enduring national interest and alone possessed the urgently needed capacity to speed of action against the global Soviet threat. For more than twenty years the President was "the virtually exclusive master of foreign policy—free to wage war wherever, by whatever means, and on whatever scale he chose" (Sundquist 126). This bipartisan foreign policy consensus came under serious challenge in the wake of the growing popular disillusionment with the Vietnam War in the late 1960s (Holsti and Rosenau; Wittkopf 166-213).

The endemic weaknesses of Congress—its decentralized and fragmented institutional structure designed both to assure thorough deliberation of legislation and to forge a broad societal consensus (Hamilton, "Federalist No. 70" 424; see also Sundquist 155-95)—impair its ability to act instantly and resolutely, notably in the field of national security. The bicameralism compounds Congress's difficulties in attaining decision and dispatch. Senator William Fulbright (D-AR), chairman of the Foreign Relations Committee, argued in a forceful acknowledgment of the inherent strength of the single-headed presidency and the manifest weaknesses of the plural legislature, "The source of an effective foreign policy under our system is presidential power [...]. While Congress has many powers under the constitution, having to do with foreign affairs, these powers do not enable the Congress to initiate or shape foreign policy, but to implement, modify, or thwart the proposals of the President [...]" (Fulbright, "American Foreign Policy" 1-13). Its structural weaknesses and the exigencies of the Cold War led Congress to erect the edifice of the modern presidency, brick by brick. Whenever the Congress felt the need for development of broad and coordinated policies, it assigned that responsibility to the executive branch. The President's primacy in the fundamental decisions of foreign and security policy was formally acknowledged in the 1947 National Security Act. Congress encouraged and accepted the role of the President as initiator and leader in foreign affairs (see Sundquist 91-126, 155-95). As a result of its own decisions, the legislative branch degenerated to an appendix of an ever more powerful and uncontrollable executive, which Senator Fulbright some years later began to castigate as

“the arrogance of power” and presidential “caesarism” (Fulbright, *Arrogance of Power; Crippled Giant* 239).

II. Executive Supremacy

9/11 gave the Bush administration the opportunity to bid for its long-cherished vision of unfettered executive power. Vice President Richard Cheney saw the nation’s tragedy as a unique opportunity to roll back the “unwise” limitations imposed on the executive branch by an “over-reaching Congress” in the aftermath of the Vietnam War and Watergate (“Vice-Presidents Appears”; “Vice President’s Remarks to the Traveling Press”; “Vice President’s Remarks at the Gerald R. Ford Journalism Prize Luncheon”)⁶ and to establish, in his words, “the monarchical notions of prerogative,” that is, a President “unimpaired” in “his constitutional powers.”⁷ Bush and Cheney share a distinctively muscular vision of executive power to act expeditiously, secretly, and independently to defend the nation and the people against a further crippling terrorist attack. Strong and decisive executive leadership rests on the President’s solitary responsibility to do what he thinks is right. The advice and consent of Congress are valuable only when they advance the goal of implementing his ideas. Consequently, Bush and Cheney resisted all attempts to share the executive’s supreme power with the legislative branch. Those who raised objections to absolute executive authority were thought to tie the President’s hands and erode his ability to do what he thought was necessary. Both saw Congress’s proper role of acquiescing in and deferring to the undeviating direction in the war on terror the “decider” charted in his own mind (Brownstein 253; Mann and Ornstein “Broken Branch” 213; Goldsmith, *Terror Presidency* 126, 205, 212-13, 215).

President Bush, more than any of his predecessors, built his political strategy upon a deeply polarized country. His congressional strategy sought legislation as close as possible to his preferences on a virtually party line basis. The key to legislative and electoral success would not be attracting Democrats and moderate independents but overwhelming them by the small majority of Republican lawmakers on Capitol Hill and by mobilizing the Republican grass roots on Election Day. His highly partisan approach to governing brought the bitter partisan polarization to a new extreme (Jacobson, *Divider*, 21-46, 243; Brownstein 237-361; Mann and Ornstein, *Broken Branch* 213; Skinner 605-22). The rise of the partisan presidency went hand in hand with a transformation of the Democratic and the Republican Party into highly centralized, ideologically coherent, and mutually repelling centers of political gravity which either overwhelmingly supported or op-

⁶ See Cheney, “Congressional Overreaching” 101-22; Didion, “Cheney” 52; Hayes 97-98, 100, 198-99, 409, 490; Gellman and Becker; Gellman 100-02; Goldsmith, *Terror Presidency* 86-9, 132; Schwarz and Huq 154-55, 160.

⁷ The Minority Report of the 1987 Iran-Contra Report argued that “the chief executive will on occasion feel duty bound to assert *monarchical notions of prerogative* that will permit him to *exceed the laws*” (emphasis added) (*Report of the Congressional Committees Investigating the Iran-Contra Affair* 465).

posed—sometimes near-unanimously—Bush’s policies (Rohde; Aldrich; Layman and Carsey 786-802; Sinclair; Mann and Ornstein, *Broken Branch* 9-16, 141-91). The deep ideological polarization not only put bipartisanship on Capitol Hill into the dustbin of history. It also encouraged a decline in congressional deliberation and a de facto delegation of authority and influence to the President. Fierce partisanship began to erode the very foundation of the U.S. constitutional system of checks and balances. As Mann and Ornstein put it, “The House looked more like a House of Commons in a parliamentary system, than of a House of Representatives in a presidential system” (*Broken Branch* 17, 12).

The case for presidential supremacy rests on two legal claims: the inherent authority of the chief executive and the commander-in-chief, and the doctrine of the unitary executive. Bush describes the authorization for use of military force passed by Congress three days after 9/11 as consistent with his understanding of the constitutional prerogative of the commander-in-chief. In a confidential memo written two weeks after 9/11, the Justice Department set the tone for all that was to come. It concluded that “the constitution vests the President with plenary authority, as commander in chief and the sole organ of the Nation in its foreign relations, to use military force abroad [...]” Under the Constitution, decisions regarding the use of military force “are for the President alone to make.” The memo added that the President with his plenary and exclusive constitutional authority over the conduct of foreign relations could “take such military actions as he deems necessary and appropriate to respond to the terrorist attacks” (“President’s Constitutional Authority” 1, 5, 19) even without congressional authorization. Following this line of reasoning, President Bush did not rely upon Congress’s Iraq war authorization as the primary source of his legal power to send U.S. forces to Iraq. As in the case of authorizing military operations in Afghanistan, Bush, in a letter to Congress on 21 March 2003, ordered military actions against Iraq “pursuant to my authority as commander-in-chief” (“Presidential Letter”; “President’s Letter to Congress on American Response to Terrorism”). The assertion of supreme executive authority affected previous U.S. adherence to legal international obligations as well. In a decision memo, signed on 7 February 2002, Bush in his capacity as “Commander in-Chief and Chief Executive of the United States” declared all suspected al Qaeda and Taliban detainees as “unlawful enemy combatants,” who did not qualify for Geneva Convention protections (“White House Releases Documents on Torture in War on Terror”). The White House used the commander-in-chief clause to argue that executive policy takes precedent over public law.

The doctrine of unitary executive has two different meanings: one simply refers to an absolute separation of powers between the three branches of government, leaving no room for congressional involvement in administrative details. The other, much broader concept, which is used by Bush, gives the executive power superior to that of the other two branches of government. It allows the executive branch to overrule the courts and Congress on the basis of the President’s unfettered authority to apply the law purely as a matter of his ongoing discretion. His oath of office “to faithfully execute the office of the President,” together with the Take Care Clause of Article II, Section 3, that the President “shall take care

that the laws be faithfully executed” entitle him to set aside any law that conflicts with his own interpretation of the Constitution. To bolster the legal claim of supreme executive authority, the infamous torture memo of 1 August 2002 argued, “In light of the President’s complete authority over the conduct of war, without a clear statement otherwise, criminal statutes are not read as infringing on the President’s ultimate authority in these areas.”⁸ Another legal memorandum sent by the Justice Department to the Pentagon on 14 March 2003 contended that the President’s inherent wartime powers largely exempted interrogators from numerous laws and treaties forbidding torture or cruel treatment. “Even if an interrogation method arguably were to violate a criminal statute, the Justice Department could not bring a prosecution because the statute would be unconstitutional as applied in this context,” John C. Yoo, then a deputy in the Justice Department’s Office of Legal Counsel wrote. The government defendant could then argue “that the executive branch’s constitutional authority to protect the nation from attack justified his actions.”⁹ In April 2003, largely because of Yoo’s memo, a Pentagon working group endorsed the continued use of coercive interrogation techniques against alien unlawful combatants held outside the United States. The Defense Department never authorized some of the harshest interrogation methods used by the CIA, including waterboarding; both memorandums were later rescinded by the Office of Legal Counsel (see Goldsmith, *Terror Presidency* 151; Eggen and White; Mazzetti).

Bush is the first President who made the explicit claim that he can ignore legal checks he thought encroach upon his plenary presidential authority. After 9/11, the White House concluded that the President had ample legal cover to defy the 1978 Foreign Intelligence Surveillance Act (FISA) and to proceed with warrantless wiretapping. Under a presidential executive order signed in 2002, the National Security Agency (NSA) secretly bypassed the FISA court for more than four years as it obtained information from telecommunication companies on international telephone calls, and international e-mail messages of U.S. citizens, permanent legal residents, tourists and other foreigners in an effort to track possible “dirty numbers” linked to Al Qaeda until *The New York Times* revealed the arrangement in mid-December 2005 (Risen and Lichtblau).¹⁰ The Justice Department concluded that the NSA activities were “constitutionally permissible and fully protective of civil liberties.” The President as “commander-in-chief and sole organ of the nation” in external relations acted “pursuant to an express or implied authorization of Congress” (United States, Dept. of Justice, “Legal Au-

⁸ Memorandum for Alberto Gonzalez, Counsel to the President, from Jay Bybee, Acting Assistant Attorney General, Office of Legal Counsel, Re: Standards for Interrogation under 18 U.S.C. 2340-2340A (1 Aug. 2002) 34. The document is reprinted in Greenberg and Dratel 172-217.

⁹ United States. Dept. of Justice. Office of Legal Counsel, Office of the Deputy Assistant Attorney General, “Memorandum for William J. Haynes II, General Counsel of the Department of Defense, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States” 18, 80.

¹⁰ For a detailed account of the NSA secret surveillance program, see Bamford; Lichtblau, *Bush’s Law*.

thorities” 2, 17). In the Authorization for Use of Military Force (AUMF) of 14 September 2001, Congress gave “express approval to the military conflict against al Qaeda and its allies and thereby to the President’s use of all traditional and accepted incidents of force in this current military conflict—including warrantless electronic surveillance to intercept enemy communications both at home and abroad.”¹¹ The administration’s lawyers went even a step further. Consistent with the expansive theory of the unitary executive they argued that the President with his “well recognized inherent constitutional authority” may not be bound by any statute enacted by Congress which “impede[s] [his] ability to perform his constitutional duty,” particularly his “solemn obligation to protect the nation” and to save “American lives” (United States, Dept. of Justice, “Legal Authorities” 1-2, 31, 35, 41-42; “President’s Radio Address” 17 Dec. 2005).

As soon as the Detainee Treatment Act prohibiting “cruel, inhuman and degrading” treatment in interrogation (Savage, “Bush Challenges Hundreds of Laws,” *Takeover* 236-41; Cooper 522; Pfiffner, *Power Play* 194-224) became law,¹² President Bush, on 30 December 2005, issued a signing statement—a presidential pronouncement laying out the terms in which he intended to interpret the law.¹³ He would construe the McCain Bill “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as commander-in-chief” (“President’s Statement on Signing of HR 2863”), thus allowing him to ignore the terms of the anti-torture law. The disclosure of secret Justice Department legal opinions on interrogation shows the unrelenting efforts of the executive branch to preserve the broadest possible latitude for “enhanced” interrogation techniques against terrorism suspects, including simulated drowning (Shane, Johnston, and Risen).¹⁴ Vice President Cheney made it clear that the President would authorize the harsh interrogation technique known as waterboarding, a simulated drowning technique, again to prevent terrorist attacks. In the past, these coercive interrogation tactics had produced “information that has saved thousands of lives.” The White House asserted that waterboarding was still legal and could be used in the future if a terrorist attack were “imminent” (My-

¹¹ Congress, however, denied President Bush the more expansive authority he sought. The Senate rejected his last minute attempt to insert in the resolution a provision that would have allowed that “necessary and appropriate force” could be used “in the United States,” thus undermining the White House argument that the AUMF could be interpreted as a repeal of FISA (see Daschle).

¹² On 5 October 2005, the Senate by a vote of 90 to 9 approved the Senate Amendment 1977 to HR 2863 (Senate, 109th Cong., 1st sess. Rec. Vote No. 249, 2005. Web. 8 Aug. 2010. <http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00249>). On 19 December, the House passed by a vote of 308 to 106 the amendment as part of the Department of Defense appropriations for the fiscal year ending 30 September 2006 (House, 109th Cong., 1st sess. Final Vote Result for Roll Call Vote 669, 2005. Web. 8 Aug. 2010. <<http://clerk.house.gov/evs/2005/roll669.xml>>).

¹³ Unprecedented in U.S. history, Bush signed more than 750 signing statements—all his predecessors signed only slightly more than 600—in which he claimed the right to ignore laws written by Congress. See also “Task Force on Presidential Signing Statements and the Separation of Powers Doctrine,” and Halstead.

¹⁴ See also “President Bush Signs Executive Order.”

ers, "Focus"; Eggen). Lastly, President Bush blocked an effort by Congressional Democrats to ban the CIA from using waterboarding and other controversial techniques. The vetoed legislation would "diminish these vital tools" intelligence officials needed "to stop" the world's "most dangerous and violent terrorists." The program, Bush said, produced "critical intelligence" that has helped the U.S. government "to prevent a number of attacks" and, hence, to keep "America safe" ("President's Radio Address" 8 Mar. 2008). The Intelligence Authorization Act for Fiscal Year 2008 passed the House, 222:199, on 12 December 2007 and the Senate, 51:45, on 12 February 2008 on partisan votes.¹⁵ The votes showed the inability of both houses of Congress to muster enough votes to reverse the President's decision. The House vote of 225 to 188 on 11 March 2008 fell 51 votes short of the two-thirds majority required.¹⁶

After the reauthorization of the Patriot Act, Bush declared in a signing statement on 9 March 2006 that he did not consider himself bound to the requirement to report to Congress on the steps taken to implement the law. "The executive branch shall construe the provisions of H. R. 3199 [...] in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, or the performance of the Executive's constitutional duties" ("President's Statement on HR 3199"). Democratic Senator Patrick J. Leahy (D-VT) objected that Bush's signing statement represented "nothing short of a radical effort to manipulate the constitutional separation of powers and evade accountability and responsibility for following the law." The White House dismissed Leahy's criticism saying that the statement underlined the President's understanding to "faithfully execute the law in a manner consistent with the constitution" (Savage, "Bush Shuns").

The authorization of warrantless surveillance and the signing statements on the Detainee Treatment Act as well as the reauthorization of the Patriot Act clearly show Bush's unrelenting efforts to put his vision of unbound executive authority into action and to protect the results of those efforts in prosecuting the war on terror. Instead of vetoing a bill, the President was using signing statements as a "back door line-item veto" (Savage, *Takeover* 231-32, 245) to declare the provision null and void. Bush put Congress on notice that he could free himself from the need to enforce those requirements of a statute he determined as an unconstitutional encroachment on his own inherent powers. The President exercised unitary power over all matters touching upon national security, thus giving him the unilateral authority to interpret the law and to force it at his own discretion, not as Congress wrote it. His assertion of plenary presidential power assumes that he himself is the ultimate interpreter of the Constitution allowing him to set

¹⁵ House. 110th Cong., 1st sess. Final Vote Result for Roll Call Vote 1160, 2007. Web. 8 Aug. 2010. <<http://clerk.house.gov/evs/2007/roll1160.xml>>; Senate. 110th Cong., 2nd sess. Rec. Vote No. 22, 2008. Web. 8 Aug. 2010. <http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=2&vote=00022>.

¹⁶ House. 110th Cong., 2nd sess. Final Vote Result for Roll Call Vote 117, 2008. Web. 8 Aug. 2010. <<http://clerk.house.gov/evs/2008/roll117.xml>>.

aside the laws of the country at will. In short, Bush's assertion of supreme executive authority implies that the "decider"¹⁷ in chief stands above the law (Pfiffner, "Contemporary Presidency" 134-35).

III. Congressional Acquiescence

Congress's response to the terrorist attacks echoed a historical pattern. In times of a national emergency, lawmakers felt they had a patriotic duty to rally behind the wartime President. After 9/11, they turned to presidential initiative and leadership. Legislators saw their primary responsibility to ratify quick executive action by approving the President's requests for the use of force, for supplementary military appropriations and for the protection of the country against another terrorist attack.

The basic contours of the War on Terror were established by Congress three days after 9/11, when it authorized the President "to use all necessary and appropriate force"—the traditional phrase that triggers the President's full military war powers—against the nations, organizations, and persons responsible for 9/11. Congress also recognized that the President possessed independent war powers as commander-in-chief, "to take action to deter and prevent acts of international terrorism against the United States" (United States. House. Joint Res. 64 H5638). Only one single member of Congress voted against the joint resolution.¹⁸

Congress adopted the Patriot Act without hearings or committee reports by a vote of 357 to 66 in the House and 98 to 1 in the Senate in the last week of October 2001.¹⁹ In late November 2002, less than six months after his request of the most sweeping reorganization of the U.S. government, President Bush signed the Homeland Security Bill into law, after the measure had passed the House by a vote of 299 to 121 and the Senate by 90 to 9.²⁰ The Senate devoted three days to the Iraq war authorization resolution, and the House half a day. On 10 October 2002, substantial majorities gave President Bush authority to wage war: 296 to 113 in the

¹⁷ On 18 April 2006, Bush, when asked about the potential move of Secretary of Defense Donald Rumsfeld, revealingly said: "But I am the decider, and I decide what is best" ("President Bush Nominates").

¹⁸ For the Senate vote on SJ Res. 23 see: Senate. 107th Cong., 1st sess. Rec. Vote No. 281, 2001. Web. 8 Aug. 2010. <http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00281>. For the House vote on HJ Res. 64 see House. Final Vote Result for Roll Call Vote 342, 2001. Web. 8 Aug. 2010. <<http://clerk.house.gov/evs/2001/roll342.xml>>.

¹⁹ House. 107th Cong., 1st sess. Final Vote Result for Roll Call Vote 398, 2001. Web. 8 Aug. 2010. <<http://clerk.house.gov/evs/2001/roll398.xml>>; Senate. 107th Cong., 1st sess. Rec. Vote No. 313, 2001. Web. 8 Aug. 2010. <http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00313>.

²⁰ House. 107th Cong., 2nd sess. Final Vote Result for Roll Call Vote 477, 2002. Web. 8 Aug. 2010. <<http://clerk.house.gov/evs/2002/roll477.xml>>; Senate. 107th Cong., 2nd sess. Rec. Vote No. 249, 2002. Web. 8 Aug. 2010. <http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=2&vote=00249>.

House and 77 to 23 in the Senate.²¹ The resolution's language had an eerie resemblance to the sweeping transfer of legislative power in the Tonkin Gulf Resolution of 1964. It authorized the President "to use the armed forces of the United States as he determines to be necessary and appropriate in order to defend the national security of the United States against the continuing threat posed by Iraq." Iraq continued "to possess and develop a significant chemical and biological weapons capability"; it was "actively seeking a nuclear weapons capability" and it "was supporting and harboring terrorist organizations," including "members of al Qaeda." Iraq's hostile intent and destructive capabilities were to "justify action by the United States to defend itself" ("Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq").

Democratic supporters like Minority Leader Richard Gephardt emphasized that the bipartisan resolutions (HJ Res. 114; SJ Res. 46) recognized congressional war prerogatives by requiring presidential consultation and reporting based on the "War Powers Resolution Requirements" provisions, and required the Bush administration to seek United Nations support before going to war. Critics like Senator Joseph Biden (D-DE) argued that the introduction of the Hastert-Gephardt language into the Senate resolution had effectively killed their efforts for a more restrictive authorization. Ignoring Senator Patrick Leahy's (D-VT) warning "not [to] pass a Tonkin Gulf Resolution" (*Cong. Rec.*, 9 Oct. 2002: S10154), Congress gave President Bush the discretion to determine the extent of the Iraqi threat to the national security of the United States; it transferred to the commander-in-chief the sole authority to go to war and to conduct the war in Iraq as he saw fit. As Senator Robert Byrd (D-WV) bitterly complained, by "being hounded into action on a resolution that turns over to President Bush the Congress's power to declare war," members of Congress were "walk[ing] away from their Constitutional responsibilities [...] [and] giv[ing] away the authority to determine when war is to be determined" (Byrd, "Rush to War"). Like thirty-eight years ago in Vietnam, the decision to go to war against Iraq rested in the hands of *one* person.

Congressmen abdicated their institutional responsibility to engage in informed legislative deliberations. They failed to insist that the President lay out the choices, the risks, and possible consequences of massive intervention. Neither did armed service committees pursue questions concerning the lethal nexus of terror networks, terror states, and weapons of mass destruction, President Bush's main justification for military action against Iraq, or the force size, post-invasion plans, and the role of reserves and National Guards (Fisher, "Deciding," 395-98, 403-08, 410). By approving the blank check resolution on Iraq with veto-proof majorities, legislators effectively surrendered their war-making powers to the executive branch and prematurely associated themselves with a war policy the Democratic

²¹ For the votes on the joint resolution HR Res.114 see House. 107th Cong., 2nd sess. Final Vote Result for Roll Call Vote 455, 2002. Web. 8 Aug. 2010. <<http://clerk.house.gov/evs/2002/roll455.xml>>; Senate.107th Cong., 2nd sess. Rec. Vote No. 237, 2002. Web. 8 Aug. 2010. <http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=2&vote=00237>.

majority later found unworthy of support when Iraq had descended into chaos after the fall of Saddam's regime. Senator Byrd criticized Congress's failure to consider "the fundamental and monumental questions of whether the United States should go to war." He was puzzled over Congress's "rush to war." "There is no debate, no discussion, no attempt to lay for the nation the pros and cons of this particular war. There is nothing. We stand passively mute in the U.S. Senate" (Byrd; *Cong. Rec.*, 12 Feb. 2003: S2268-2270). One national security official in the Bush administration said, "The passivity of Congress during this period made it easier to go to war. Rumsfeld and Wolfowitz are saying: We can't tell you how long it will take, or what it will cost, that's unknowable. Why did Congress accept that?" (qtd. in Ricks 88). The Republicans were not inclined to ask their own President probing questions. They emphasized the importance of supporting the executive on a pre-eminent national security question. With the 2002 midterm elections little more than three weeks away, Democratic leaders, reluctant to be caught again on the wrong side of history as they had been during the national debate on the first Iraq war in 1990/91, decided that political prudence lay in getting the vote off the table as soon as possible by supporting a Republican President on a war favored by almost two out of three Americans ("Spinning on Iraq").

In sum, Congressmen behaved more like a deferential arm of the executive branch than like the independent and coequal branch of government the founders intended. At key moments, Congress rallied round the commander-in-chief and passed legislation that provided the Bush administration with the legal foundation to enforce its notion of unbound executive power. Congressmen not only acquiesced to Bush's power grab and encouraged more unilateral behavior in the executive. They even rallied behind the President when the commander-in-chief was fixed upon a course of disaster. The measurable decline in Congress fulfilling its principal constitutional duty of independent deliberation led to what Thomas E. Mann and Norman Ornstein termed "the broken branch" (*Broken Branch* 13, 17, 212, 215, 225, 226, 229, 235, 243).²²

IV. The Supreme Court Reigns In

Bush's drive for unbound executive power and his stubborn refusal to put his counter-terrorism policies on a firm legal foundation invited a backlash of the judicial branch of government. As David Addington, Vice President Cheney's Counsel at the time, rightly predicted, "We're going to push and push until some larger force makes us stop" (qtd. in Goldsmith, *Terror Presidency* 126).

The first blow to the Bush administration's claim of plenary authority came in 2003, when sixteen Guantánamo detainees appealed to the Supreme Court for writs of habeas corpus, arguing that they had engaged in no terrorist acts and had not been combatants against the United States. On 28 June 2004, the Supreme

²² For an opposing view, see Howell and Pevehouse, *While Dangers Gather*, "When Congress Stops."

Court in *Rasul v. Bush*²³ overturned decisions of the District Court and Court of Appeals and ruled that federal courts did have jurisdiction to hear habeas corpus cases from detainees in Guantánamo.²⁴ The Court based its decision on the status of the U.S. naval base at Guantánamo Bay, a 115 square km parcel of land which has been leased in perpetuity from Cuba since 1903. “By the express terms of its agreements with Cuba, the United States exercises ‘complete jurisdiction and control’ over the Guantánamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.” That the detainees were not U.S. citizens did not matter; they were persons being held for more than two years without any charges having been made against them and in a location over which the United States exercised complete control. The Court therefore decided that “[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority” outside the United States. The Court noted that it did not decide on a constitutional right of the sixteen appellants but on the statutory grounds of the habeas corpus jurisdiction of the courts. Justice Paul Stevens, who delivered the opinion of the Court, wrote, “We therefore hold that § 2241 confers to the District Court Jurisdiction to hear petitioners’ habeas corpus challenge to the legality of their detention at Guantanamo Bay Naval Base” (“Opinion of Justice Stevens”).²⁵

Another former Guantánamo inmate, Yaser Esam Hamdi, who had been moved to a Navy brig in South Carolina after it was discovered that he had been born in the United States and was thus a U.S. citizen, also appealed for a writ of habeas corpus. In deciding against the Bush administration’s contention that it was entitled to hold U.S. citizens indefinitely for the purpose of interrogation, Justice Sandra O’Conner, in writing for a plurality of the Court, emphasized “the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law.” In a stern rebuke of the Bush administration’s argument that U.S. courts had no jurisdiction over cases concerning detainees, she pointed out, “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. [...] Unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.”²⁶

²³ *Rasul et al. v. Bush*, 542 US 466. Supreme Ct. of the US. 2004 (argued 20 Apr. 2004; decided 28 June 2004).

²⁴ The two courts agreed with the administration that they did not have jurisdiction to hear the pleas because foreign nationals captured outside the United States could not appeal to U.S. courts. In *Johnson v. Eisentrager*, the Supreme Court had ruled that alien appellants had to be present in the sovereign territory of the United States. The appellants—German soldiers captured by U.S. forces in China—could be tried by military commission and did not have the right to appeal to federal courts for writs of habeas corpus (see *Johnson v. Eisentrager*, argued 17 Apr. 1950; decided 5 June 1950).

²⁵ The Habeas Corpus Statute, 28 U.S.C., sec. 2241, gives federal courts the jurisdiction to hear habeas corpus appeals. See “Title 28, Part VI, Chapter 153, § 2241,” U.S. Code Collection.

²⁶ *Hamdi et al. v. Rumsfeld, Secretary of Defense, et al.* 542 US 507 (03-6696). Supreme Ct. of the US. 2004 (argued 28 Apr. 2004; decided 28 June 2004).

In late June 2006, the Supreme Court handed the administration another defeat. In *Hamdan v. Rumsfeld*²⁷ it rejected the administration's claim that it had the right to try suspected terrorists in military commissions created by President Bush in a military order on 13 November 2001 under complete executive authority ("President Issues Military Order"; see also Gellman and Becker; Savage, *Take-over* 134-39). The Court concluded that the military commissions and procedures established by President Bush were not explicitly approved by Congress. The ruling also struck down the provision in the Detainee Treatment Act of 2005 which denied all foreign "enemy combatants" their right to go to court via writ of habeas corpus.²⁸

In a further blow to the administration, the Court held that the legal protections of common article 3 of the Geneva conventions also applied in the war against al Qaeda. The President has to comply with the provisions of the Uniform Code of Military Justice (UCMJ) and common law of war. For the majority of the Court, Justice John Paul Stevens argued, "Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanctions of Congress, institute tribunals for the trial and punishment of offenses, either of soldiers or civilians, unless in cases of a controlling necessity." As the necessity did not exist in the case of Salim Ahmed Hamdan, he ruled the "commission's procedures illegal." He concluded "that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions." The commissions thus broke the Geneva Convention Common Article 3, which provides that detainees "as a minimum" are entitled to be tried "by a regularly constituted court affording all the judicial guarantees [...] recognized as indispensable by civilized people." The Hamdan ruling repudiated President Bush's claim that he had plenary constitutional authority to imprison terrorism suspects indefinitely. If the government wanted to try Hamdan for a crime, it had to use regularly constituted courts that comply with minimal requirements of procedural due process protection. The Supreme Court thus sent a clear message that even a wartime commander-in-chief must "comply with the rule of law that prevails in this jurisdiction," Justice Stevens wrote in the majority opinion ("Opinion of Justice Stevens").

As a result of the Supreme Court's decision in Hamdan, the administration sought legislation from Congress that would authorize military commissions and define the limits on the rights of the detainees. In late September 2006, the still Republican controlled Congress enacted the Military Commissions Act of 2006.²⁹

²⁷ *Hamdan v. Rumsfeld*. 548 US 557 (05-184). Supreme Ct. of the US. 2006 (argued 28 Mar. 2006; decided 29 June 2006). See also Elsea.

²⁸ The Detainee Treatment Act of 2005 required the Defense Department to set up Combatant Status Review Tribunals (CSRTs). The set of procedures in the CSRTs was expected to substitute for the writ of habeas corpus. In fact, the president, not a federal court, would hear a detainee's final appeal.

²⁹ The Military Commissions Act of 2006 passed the House by a vote of 253 to 168 on 27 September 2006 and the Senate by 65 to 34 the next day. See House. 109th Cong., 2nd sess. Final Vote Result for Roll Call Vote 491, 2006. Web. 8 Aug. 2010. <<http://clerk.house.gov/evs/2006/roll491.xml>>; Senate. 109th Cong., 2nd sess. Rec. Vote No. 259, 2006. Web. 8 Aug. 2010. <<http://>

The new act does four things. It strips the right of the detainees to habeas corpus. It allows the President to determine the meaning and application of the Geneva Convention. It denies the courts jurisdiction to hear challenges to her interpretation. Finally, it gives the President the power to detain indefinitely anyone he suspects of having provided material support to hostilities against the United States. In essence, with the Military Commission Act, Congress legalized what President Bush had previously considered his sole constitutional authority. "Taken as a whole," *The New York Times* noted, "the law will give the President more power over terrorism suspects than he had before the Supreme Court decision" (Scott Shane and Adam Liptak; see also Ackerman; Savage, *Takeover*, 319-22; Pfiffner, "Contemporary Presidency" 132).

John C. Yoo, a fierce advocate of unbound executive power, welcomed the bill as a "stinging rebuke" of the Supreme Court's "power grab." It would, in essence, "restore to the President command over the management of the war on error" ("Sending a Message").

On 12 June 2008, the Supreme Court, for the third time in four years, rejected President Bush's policy of holding foreign prisoners under exclusive control of the military at Guantánamo Bay. The Court in *Boumediene v. Bush*³⁰ rejected the government's argument that the Constitution affords prisoners no rights because they have been designated as enemy combatants or because of their presence at Guantánamo. They argued that the law and the authority of independent judges extend to Guantánamo Bay. The writ's history and origins show that protection of the habeas privilege was one of the few safeguards of liberty specified in the Constitution. This right extends even to foreigners captured in the War on Terrorism, particularly when they have been held for as long as six years without charges. Secondly, the Court argued the Detainee Treatment Act (DTA) of 2005 and the Military Commissions Act (MCA) of 2006 denied detainees their right to file habeas corpus petitions in federal courts. The DTA prohibited future habeas corpus appeals to common-law courts though such appeals were sanctioned by law. The military tribunals established by the MCA to determine the status ("enemy combatants") or guilt of Guantánamo prisoners were an "inadequate substitute" for habeas corpus hearings in proper federal court hearings. The habeas privilege entitles the prisoner to "a meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of the relevant law." The Court agreed with the petitioners that there is "a considerable risk of error in the tribunal's findings of fact." Instead, an independent federal court conducting the collateral proceeding must have "some ability to correct any errors, to assess the sufficiency of the Government's evidence, and to admit and consider relevant exculpatory evidence that was introduced during earlier proceeding." The MCA violated the Suspension Clause of the Constitution by eliminating habeas corpus although the requirements of the Constitution in Article 1, Section 9—"rebellion

www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00259.

³⁰ *Boumediene et al. v. Bush*. 06-1195, 06-1196. Supreme Ct. of the US. 2007 (5 Dec. 2007; decided 12 June 2008).

or invasion”—do not exist. Lastly, the Court argued that the elimination of statutory habeas jurisdiction threatens the “indispensable mechanism for monitoring the separation of powers.” The Court pointed out that the habeas privilege was “one of the few safeguards of liberty specified in the Constitution [...]; the writ has a centrality that must inform proper interpretation of the Suspension Clause.” The Suspension Clause protects detainee rights by “a means consistent with the Constitution’s essential design, ensuring that [...] the Judiciary will have a time-tested device, the writ, to maintain the delicate balance of governance” (Boumediene et al. v. Bush). Delivering the majority opinion, Justice Anthony M. Kennedy wrote, “Within the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the executive to imprison a person.” He summed the profound reservations of the judicial branch against both political branches, “The laws and Constitution are designed to survive, and remain in force, in extraordinary times. [...] To hold that the political branches may switch the Constitution on or off at will, would lead to a regime in which they, not this court, say what the law is” (“Opinion of Justice Kennedy”).

Through misjudgement and overreaching, the Bush administration ended up with the very result it sought to avoid. The ruling has deprived the supposedly law-free zone of its principal *raison d’être* and thus has thrown into disarray the administration’s detention strategy. The Court is deeply opposed to arbitrary, indefinite detention without judicial review. The majority of five judges has made it repeatedly clear petitioners have the constitutional privilege of habeas corpus to challenge the grounds of their imprisonment before a common-law court. The Supreme Court put the legislative branch on notice that it is determined to articulate its power to review acts of Congress. If the habeas privilege is to be denied to detainees, Congress must act in accordance with the Suspension Clause’s constitutional requirements. Lastly, the Judiciary is determinant to use the centrality of the writ to protect and preserve the “delicate balance of governance.” The two central messages of the Supreme Court to the other two branches of U.S. government are: The War on Terrorism cannot invalidate the rule of law and the separation-of-powers foundation of the Constitution. Thus Congress and the executive branch face the politically and constitutionally delicate and complex task of “enact[ing] a comprehensive legislation to the problem of detentions in the war against terrorism, both clearly defining ‘the content of law’ and creating appropriate procedures for making those judgments” (Wittes).

V. The New Democratic Majority Steps In

Despite their sweeping victory in the November 2006 election, Democrats have been unable to force a single, substantial change in the President’s war policy. The majority party is caught in a double bind. There are internal fissures among Democratic lawmakers on the question of challenging President Bush over the war. Moderate Democrats who want to end the war are afraid to cut off funding for the troops in Iraq, fearing that such a move would expose the Democrats to

Republican charges of undercutting hard pressed fighting men and of being soft on terrorism. The vote of 67 to 29 on 16 May 2007 against the proposal of Democratic Senator Russell Feingold (D-WI) to block money for major combat operations in Iraq beginning in spring 2008 demonstrated that a significant majority of Democratic Senators remain unwilling to use the power of the purse for a quick withdrawal of forces.³¹

Secondly, a narrowly Democratic Senate does not have the 60 votes to prevent a Republican filibuster, let alone the 67 votes to override a Bush veto on any war legislation. The first war spending measure approved in late April 2007 would have ordered withdrawal beginning 1 October 2007.³² Bush vetoed the funding bill on 1 May. In his message to the House, the President invoked language he used in his signing statements, declaring that “this legislation is unconstitutional because it purports to direct the conduct of the operations of war in a way that infringes upon the powers vested in the President by the Constitution, including as commander-in-chief of the Armed Forces” (“President Bush Rejects”; “Message”). The House vote of 222:203 the next day fell 61 votes short of an override.³³ The closest the Democratic majority in the Senate came to forcing the Bush administration to alter its war plans was on 19 September 2007, when the amendment offered by Senator James Webb (D-VA) to the National Defense Authorization Act for Fiscal Year 2008 gained 56 votes—four short of the 60 Democrats needed to advance legislation that would have required troops to return to a one-to-one rotation in the time spent on duty in Iraq or Afghanistan and the time spent at home.³⁴

Skirmishing over war funding has continued over the whole year. In mid-November, the House by a vote of 218 to 203 approved \$50 billion of the \$196 billion that President Bush had requested for military operations in Afghanistan and Iraq. It attached many strings to the Orderly and Responsible Iraq Redeployment Appropriations Act. It would have required, among other things, troop withdrawals to begin within 30 days, with a goal of full withdrawal by mid-December 2008. As in the past, the measure died in the Senate.³⁵ The 53 to 45 vote in favor of the

³¹ Senate. 110th Cong., 1st sess. Rec. Vote Number 167, 2007. Web. 8 Aug. 2010. <http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00167>. Another vote on an amendment introduced by Senator Feingold on 3 October 2007 to end the war funding by June 2008 drew 28 supporters. See Senate. 110th Cong., 1st sess. Rec. Vote No. 362, 2007. Web. 8 Aug. 2010. <http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00362>.

³² The measure HR 1591 passed the House by a vote of 218 to 208 on April 25 and the Senate by 51 to 46 the next day. House. 110th Cong., 1st sess. Final Vote Result for Roll Call Vote 265, 2007. Web. 8 Aug. 2010. <<http://clerk.house.gov/evs/2007/roll265.xml>>; Senate. 110th Cong. 1st sess. Rec. Vote Number 147, 2007. Web. 8 Aug. 2010. <http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00147>.

³³ House. 110th Cong., 1st sess. Final Vote Result for Roll Call Vote 276, 2007. Web. 8 Aug. 2010. <<http://clerk.house.gov/evs/2007/roll276.xml>>.

³⁴ Senate. 110th Cong., 1st sess. Rec. Vote No. 341, 2007. Web. 8 Aug. 2010. <http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00341>.

³⁵ House. 110th Cong., 1st sess. Final Vote Results for Roll Call 1108, 2007. Web. 8 Aug. 2010. <<http://clerk.house.gov/evs/2007/roll1108.xml>>.

bill, however, fell seven short of the 60 votes needed to cut off debate.³⁶ Democrats having come to power with the belief they had received a mandate to end the war soon closed the first session of the 110th Congress on 19 December 2007 with a House vote of 272 to 142 that sent Bush \$70 billion in unrestricted war funding as part of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008.³⁷

The legislative battles during the first session of the 110th Congress ended with a sobering lesson for the new Democratic majority leadership: Democrats relentlessly challenged President Bush without passing sweeping legislation to cut the funding of the war or the troops fighting it, and, at the same time, they have gone along both with Bush surge strategy and with the supplementary funding requests. In short, the Democrats wanted it both ways, “opposing the war and enabling Bush to keep it going full speed and full cost ahead,” *The New York Times* poignantly observed (“Editorial: Another \$200 Billion”).

The outcome underscores the surprising political clout of a President whose approval ratings have slid to a historic low. Democrats’ biggest failure stemmed from expecting more Republicans to take an independent stance on Iraq. Bush had been able to hold on to nearly all Senate Republicans who remained steadfastly opposed to any timeline to bring U.S. forces back home. While many Republicans have grown dissatisfied with the war, not enough signaled willingness to break with the President on the overarching policy—only a handful of GOP senators supported a less stringent withdrawal bill offered by Senator Webb. “There’s been no shift toward us,” Senator Carl M. Levin (D-MI), chairman of the Armed Services Committee, conceded (Kane). Without more Republican defections, Democrats were unable to compel the President to change course any time soon. President Bush gained the added time he said he needed to demonstrate that the new counterinsurgency strategy is succeeding. Bush’s 30,000 U.S. troops surge remains in place until this summer. The troop total will likely be 140,000, about 8,000 more than when the U.S. troop build-up began in January 2007 (“Pentagon Releases”). Any further changes before 20 January 2009 regarding force size and the mission depend on his decision.³⁸

Even though 2007 did not become the year of shifting course (McMahon), the oversight hearings and the command of the legislative agenda provided a good opportunity for the Democrats to sharpen the division between the two parties

³⁶ Senate. 110th Cong., 1st sess. Rec. Vote No. 411, 2007. Web. 8 Aug. 2010. <http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00411>.

³⁷ House. 110th Cong., 1st sess. Final Vote Results for Roll Call 1186, 2007. Web. 8 Aug. 2010. <<http://clerk.house.gov/evs/2007/roll1186.xml>>. A day earlier, the Senate had approved the bill (HR 2764) by a vote of 70 to 25 (Senate. 110th Cong., 1st sess. Rec. Vote No. 439, 2007. Web. 8 Aug. 2010. <http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00439>).

³⁸ Defense Secretary Gates has abandoned a hope that U.S. force levels could drop to about ten brigades or 100,000 troops in Iraq by the end of the Bush administration. Asked at a Senate hearing on 10 April 2008 whether he thinks that would happen, he said, “No, Sir” (U.S. Department of Defense (DoD), “News Briefing”; Baker and DeYoung; Spiegel and Barnes; Myers and Shanker, “Bush Signals”; Tyson and White).

on the critical question of when the United States should extricate itself from Iraq and how it will be done. The political showdown on Capitol Hill allowed the Democrats to frame the war issue in advance of the November 2008 elections by portraying Republican lawmakers as obedient followers of President Bush's botched Iraq policy. "What we have done is [sic] made it very difficult for Republicans to continue to hide on whether they agree with the President or not on Iraq," Senator Joseph R. Biden (D-DE), chairman of the Foreign Relations Committee, said (Murray and Balz). The fact that there will still be about as many troops in Iraq in summer 2009 as there were on the day of the Democratic sweep in November 2006 as well as the staggering scale of U.S. expenditures in the War on Terror and its cost to a U.S. economy on the verge of a recession and the federal budget facing a massive deficit of more than \$400 billion in 2008,³⁹ provide powerful talking points for the Democrats arguing to an increasingly unsatisfied and restive public that the only way to change course in Iraq is by changing the regime in the White House (Kane; Baker; Myers and Shanker, "Bush Given Iraq"; Levey).

The precipitous decline in violence in some important parts of Iraq resulting from a combination of the U.S. troop increase, changed U.S. tactics, and Sunni tribal uprising in Anbar province, on the other hand, provided Republicans with opportunities to portray the Democrats as defeatists who were failing to recognize the military's efforts and achievements and who were wishing to snatch defeat from the jaws of victory. If Iraq looked partly salvageable, Democratic presidential candidates had to explain how a Democratic administration would get U.S. troops out of Iraq quickly without squandering security gains made over the months of the troop increase that should enable the Iraqi government to stand on its own (see also "McCain Addresses"; Brooks; Krauthammer). In short, the opposing positions taken by the Democratic and Republican nominees on Iraq underscored once more the unprecedented partisan disunity in the United States, where Democrats and Republicans appear to live in separate moral and intellectual universes.

The new majorities on the Hill did not effectively challenge President Bush's dominance on homeland security issues even after the public disclosure of President Bush's secret wiretapping program in December 2005 by *The New York Times* set off an intense national debate over the proper balance between protecting the country from another terrorist attack and ensuring civil liberties. After fiercely resisting Congressional demands, the Bush administration agreed in early 2007 to place the warrantless eavesdropping program under the FISA court. In July, intelligence officials approached Congress about revising the law on an urgent basis, arguing that a ruling by a FISA judge had sharply restricted their ability to intercept foreign-to-foreign-communications passing through telecommunications switches on American soil. In early August, Congress passed the Protect America Act with the changes the administration had sought. The House voted 227 to 183 and the Senate 60 to 28 to endorse the measure.⁴⁰ The law in many

³⁹ For a detailed account see Congressional Budget Office, "Possible Costs"; Stiglitz and Blimes.

⁴⁰ 16 Democratic senators and 41 Democratic House members joined their Republican colleagues in support of the bill (Senate. 110th Cong., 1st sess. Rec.Vote No. 309, 2007. Web. 8 Aug.

ways altered the original Foreign Intelligence Surveillance Act (FISA) of 1978. The NSA director and the Attorney General could authorize the surveillance of all communications between individuals inside the United States and terrorist suspects “reasonably believed” to be overseas without individualized warrants traditionally required by the FISA court. The law also gave the administration greater power to force telecommunication companies to cooperate by orders from the attorney general and the director of intelligence. National security letters—administrative subpoenas used in suspected terrorism and espionage cases—allowed the FBI to require telecommunication companies and banks to provide personal records about their customers without a judge’s approval. The court’s only role was to examine the procedures used by the government in the surveillance *after* it had been conducted.⁴¹ Democrats managed a minor victory requiring a sunset clause effective 180 days after the bill had been signed by President Bush on 5 August 2007 to allow for a more thorough review of the issue (“President Bush Commends”; Risen; Lichtblau and Hulse).

As the House and the Senate worked on a replacement bill through the fall and early winter, the main stumbling block turned out to be the administration’s insistence that telecommunication companies that had collaborated with federal agencies should be given retroactive immunity from prosecution. Some forty lawsuits had been filed against major electronic telecommunication service providers like AT&T, Sprint Nextel, and Verizon Communications from customers charging them with violating their privacy by conducting wiretaps of their phones and e-mails at the direction of the White House without court orders (Lichtblau, “Senate Votes”). After months of wrangling, Democratic and Republican leaders struck a deal in late June 2008 which met all of the administration’s principal demands. The measure gave the executive branch broader latitude in eavesdropping on people abroad and at home, it reduces the role of the secret intelligence court in overseeing certain operations, and it settled the crucial issue how to strike a balance between appropriate court review and the avoidance of protracted litigation against phone companies. A provision originally added by the Senate on 12 February 2008 but not approved at that time by the House⁴² retroactively immunizes telecommunication companies from any legal liability for their roles in the warrantless wiretapping program approved by President Bush after 9/11. The final deal (HR 6304—FISA Amendments Act of 2008) includes a narrow review by a district court to determine whether the companies being

2010. <http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00309>; House. 110th Cong., 1st sess Final Vote Result for Roll Call Vote 836, 2007. Web. 8 Aug. 2010. <<http://clerk.house.gov/evs/2007/roll836.xml>>).

⁴¹ For a detailed account see Bazan.

⁴² While the Senate approved by 68 to 29 votes the immunity clause within the FISA Amendments Act of 2007, the House passed its latest version on the Restore Act on 14 March 2008 by 213 to 197 votes that still permitted lawsuits against telecommunication companies (Senate. 110th Cong., 2nd sess. Rec. Vote No. 20, 2008. Web. 8 Aug. 2010. <http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=2&vote=00020>; House. 110th Cong., 2nd sess. Final Vote Result for Roll Call Vote 145, 2008. Web. 8 Aug. 2010. <<http://clerk.house.gov/evs/2008/roll145.xml>>).

sued received formal requests or directives from the administration to take part in the program. Once such a finding is made—the administration would assert that those directives had been issued—the lawsuits “shall be promptly” dismissed (HR 6304—FISA Amendments Act of 2008). The new law expands the federal government’s surveillance powers. It authorizes the Attorney General and Director of National Intelligence to jointly authorize, for periods up to one year, the electronic surveillance of persons “reasonably believed to be located outside the United States” in order to acquire foreign intelligence information under specified limitations, and to direct a phone company to immediately provide the government with all the information, facilities, and assistance necessary to accomplish an acquisition, and to maintain under security procedures any records concerning such an acquisition. The legislation also expands the government’s power to invoke emergency wiretapping procedures. While the NSA would be allowed to seek court orders for broad groups of foreign targets, the law creates a new seven-day period for directing wiretaps at foreigners without a court order in “exigent” circumstances if government officials assert that important national security information would be lost. The law also expands the period for emergency wiretaps on American citizens from three to seven days without court order if the attorney general certifies there is probable cause to believe the target is linked to terrorism.

With the Democrats sharply divided, the measure passed the House by 293 to 129 votes on 20 June and the Senate by a vote of 69 to 28 on 9 July 2008—105 Democratic representatives voted with 188 Republican Representatives for the measure, and 21 mostly moderate Democratic senators aligned themselves with 47 Republican senators.⁴³ President Bush said Congress had passed “a vital piece of legislation” that would make it easier for his administration and future administrations “to protect the American people”; he signed the bill into law (PL 110-261) the following day (Murray; Lichtblau, “Senate Approves”). Joining their Republican colleagues’ efforts in retroactively legalizing the administration’s NSA program, many Democrats, including Senator Barack Obama (D-IL), the Democratic presidential candidate, were wary of handing the Republicans a potent political weapon in the forthcoming Presidential and Congressional elections to call the Democrats soft on terrorism for insisting on tight restrictions on intelligence gathering which were seen as weakening the nation’s defense in the fight against terrorism. Mr. Obama’s decision to vote for what he called “an improved but imperfect bill” after he had backed a failed attempt to strip the immunity provision from the bill through an amendment⁴⁴ symbolized the continuing difficulties that Democrats faced in striking a position on national security issues even against

⁴³ House. 110th Cong., 2nd sess. Final Vote Result for Roll Call Vote 437, 2008. Web. 8 Aug. 2010. <<http://clerk.house.gov/evs/2008/roll437.xml>>; Senate. 110th Cong., 2nd sess. Rec. Vote No. 168, 2008. Web. 8 Aug. 2010. <http://senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=2&vote=00168>.

⁴⁴ The amendment introduced by Senator Christopher Dodd (D-CT) received only 32 votes, all of them from Democrats, including Obama; 18 moderate Democrats lined up with all 46 Republicans against it (Senate. 110th Cong., 2nd sess. Rec. Vote Number 164, 2008. Web. 8 Aug. 2010. <http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=2&vote=00164>).

a weakened Republican President. In sum, the FISA Amendments Act of 2008 handed President Bush one more victory in a series of hard-fought clashes with a Democratic-led Congress over national security issues.

VI. Maintaining the Delicate Balance of Governance

“Enlightened statesmen will not always be at the helm.”
(Madison, “Federalist No. 10” 80)

The relationship between the Bush administration and Congress after 9/11 can be summarized as follows:

First, text, context, structure, and history of the U.S. Constitution all undermine Bush and Cheney’s bid for unbound executive power as a substitute for the entire government. The presidency has clearly not been designed as a Republican form of monarchy. As Thomas Paine argued in “Common Sense,” “In America THE LAW IS KING. For as in absolute governments the King is law” (emphasis in original). Or as Chief Justice Marshall observed in 1803: “The government of the United States has been emphatically termed a government of laws, not of men” (*Marbury v. Madison*, 5 US 137). Executive authority can only be properly understood in light of the powers assigned to the other two branches, in a system of overlapping, rather than exclusive authorities. The duty of the ‘decider’ is a shared and joint responsibility.

Second, an aggressive assertion of unilateral executive power was met with Congressional subservience. The Republicans saw themselves more as a group of foot soldiers in the President’s army than as members of an independent and coequal branch of government. And the Democrats gave in to White House demands, fearing the electoral fallout as the Republicans hammered them for being soft on terrorism and undermining national security.

Third, the marginal influence of the new Democratic majority on Bush’s war policy highlights how difficult it is for the legislative branch to force a Republican President to change his war policy once Congressmen have given him power to go to war. The majority in the Senate, unless it controls 60 votes, can do little without the consent of the minority. The power of the purse, Congress’s “most complete and effectual weapon with which any constitution can arm immediate representatives of the people,” as Madison called it (“Federalist No. 58” 359), remains blunt as long as both houses of Congress are unable to muster bipartisan majorities to override a presidential veto.

Fourth, arranging the executive supreme authority makes the nation no safer. Executive overreaching and legislative complaisance in the war on terror confirm the lessons drawn from more than 200 years of American history: when government responds to security threats by ignoring the constitutional checks and balances, America’s security, its moral example, and its standing in the world are all diminished.

The article began by asking the question whether the imperial presidency has been born again as a result of 9/11. Following the framers’ deep skepticism of

unchecked and unbalanced powers, the answer is twofold: Bush's monarchical notion of presidential prerogative has brought back many of the vices of Schlesinger's imperial presidency, and Congress has failed in its constitutional responsibility to hold the President to account.

Playing the role of judge, jury, and prosecutor, President Bush used the nation's tragedy to seize ever more power for his vision of unfettered executive powers. Time and again, he has twisted the law to justify almost any tactic in his anti-terrorism crusade, all in the name of protecting the country and the people. Bush's aggressive assertion that when it comes to the War on Terror, the President is the "decider" and nobody can stop him turns the intent of the framers upside down. "If you interpret the constitution's saying that the President is commander-in-chief to mean that the President can do anything he wants and can ignore the laws you don't have a constitution: you have a king," Grover Norquist, with his conservative views close to the Bush White House said (qtd. in Drew 10). Madison put it this way, "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many [...] may just be pronounced the very definition of tyranny" ("Federalist No. 47" 301). In short, America's problem, now as then, is "a usurping king called George" (Kettle).

The central irony is that Bush's one-man approach and his over-reliance on judicial vindication has undercut his explicit goal to expand the presidential authority future Presidents can wield as well. By having pushed unilateral executive power to its limits, Bush undermined his own legitimacy and left the presidency weaker than when he started. His assertion of executive supremacy tarnished "the status and reputation of executive power in general" and exposed future presidencies to "a harmful suspicion and mistrust by Congress and the courts, whose assistance they need." His imperial notion, 'I exist therefore I decide,' ignores the truism that the truly strong President is the one who recognizes his responsibility and opportunity to convince the other branches of government to come around to his point of view. Abraham Lincoln and Franklin D. Roosevelt clearly understood and practiced this well in times of war. Bush's lack of faith in the democratic process makes him a less effective wartime leader than his greatest predecessors (Goldsmith, "Terror Presidency" 140, 192, 210, 212-13, 215, "Cheney Fallacy").

The 2008 Presidential and Congressional elections were a stinging rebuke of President Bush and his policies at home and abroad. Voters took an even more unfavorable view of Bush in 2008 than they had in 2006. The leading source of disaffection had shifted from the Iraq war to the imploding economy. The negative views of his economic performance left Bush with the lowest pre-election approval rating any president in the 70 years such surveys have been taken has ever had. Barack Obama's victory in the presidential elections and the enlargement of Democratic majorities in the Senate and the House of Representatives in the Congressional election in November 2008 are the "consequential legacies of the Bush administration" (Jacobson, "2008 Presidential and Congressional Elections" 27; see also Jacobson, "Referendum").

By rubber stamping the executive, lawmakers let their constitutional powers slip through their fingers. A Republican-led Congress is as much to blame as President Bush for the disastrous war in Iraq, because lawmakers abrogated their

constitutional tasks and acquiesced to executive initiative and leadership. Unless Congress is vigilant and forceful, violations of the founders' constitutional system of checks and balances start to multiply as the abuse of executive power and the involvement in highly expansive wars of choice have plainly demonstrated.

The success of the framers' constitutional system of checks and balances designed to connect the ambitions of public officials to the interests with the institutions in which they serve and to encourage, by overlapping authority, a healthy competition between the executive and legislative branches of U.S. government is no guarantee that their intentions are realized in practice. Major developments unanticipated by the framers threaten to undermine the constitutional balance of power where each branch of the federal government vigorously defends its own constitutional prerogatives against the other:

- the rise of the modern, powerful Presidency in the twentieth century
The explosive growth of government during World War I and the emergence of the modern welfare state in the wake of the Great Depression in the 1930s resulted in a dramatic expansion of the responsibilities of the federal government. Lawmakers assigned to the President the role of initiator and leader and created institutional facilities to enable him to serve in that capacity. The President emerged as the most important single participant in the policy process (Sundquist 37-90, 127-54).
- the rise of the United States to a superpower after World War II
In the age of crises, it was again the President who had the essential institutional and material capacities to respond quickly and effectively to the strategic and existential threats posed by the axis powers during World War II and then to the Soviet Union during the Cold War. The President prepared the unified and coordinated policy while Congress acquiesced to executive initiatives and leadership and provided the institutional and material resources to contain the perceived Soviet expansionist menace (Robinson 8, 14, 40, 43, 46, 68).
- the endemic weaknesses of Congress
Congress has evolved in response to the personal needs of its members. The rewards they seek are best attained through wide dispersal of power within both houses. Congress's fragmented and decentralized power structure impairs its capacity to act quickly and develop and coordinate comprehensive policies. Whenever Congress has recognized the necessity for expeditious action at home and abroad, it has responded by building up what came to be known as the modern presidency (Sundquist 155-95, 417-39).
- the rise of bitter partisan polarization
The era of 'hyperpartisanship' weakened the institutional incentives that the founders had assigned to Congress to jealously defend its constitutional prerogatives vis-à-vis the executive. Partisan acrimony on the Hill has led to a voting pattern according to which the President's party almost unanimously supports his policies, while the opposition party adopts a 'no' strategy, refusing to cooperate on virtually anything the President proposes. The rise of a bipolar political system has resulted in a commensurate decline in congressional deliberation and a de facto delegation of authority and influence to the President. "Congress in the post-2000 period looked more like an army of the

Second Branch, a supine, reactive body more eager to submit to presidential directives than to assert its own prerogatives” (Mann and Ornstein, *Broken Branch* 16, “When Congress Checks Out” 80).

The rise of the modern presidency makes the system of checks and balances dependent upon the good judgment of the respective President to use his executive powers wisely. It is no guarantee against the abuse of executive power or the engagement in poorly planned and implemented wars of choice with steep human and material costs. The Achilles heel of the constitutional system of checks and balances is its failure to establish a perfect political system that can prevent under any circumstances a costly turn against the founders’ ideals.

The search for a perfect constitutional balance of power, however, is elusive, as the founding fathers clearly recognized. Given man’s inherent fallible nature, the system of checks and balances remains the best guarantor of liberty in a constitutional government (Feldman). The U.S. Constitution has endured through Civil War, World War II, and the Cold War “because it provides a foundation of principles that can be applied pragmatically” (Obama). It has allowed course corrections when needed to return to the founders’ ideals of a constitutional system of checks and balances and a pragmatic, common sense policy at home and abroad. And it has allowed course corrections when needed to return to the founders’ ideals of a constitutional system of checks and balances and to pursue a pragmatic, common sense policy at home and abroad. As Justice Jackson concluded, “With all its defects, delays and inconveniences, men have discovered no technique for long to preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberation” (*Youngstown Co. v. Sawyer*, 343 US 579).

In sum, the security of the United States, even in times of increasing asymmetric terrorist threats, cannot be left to the exclusive judgement of a single person. The constitutional design requires more than one set of keys to open Pandora’s Box of war. As the late constitutional scholar Alexander Bickel keenly observed, “Singly, either the President or Congress can fall into bad errors, of commission or omission. So they can together, too, but that is somewhat less likely, and in any event, together they are all we’ve got.” Neither Congress nor the President can assure the nation that it is truly wise on war power issues. “The only assurance lies in process, in the duty to explain, justify and persuade, to define the national interest by evoking it, and thus to act by consent” (Bickel 18). The quintessential condition of a proper functioning system of checks and balances is *mutuality* of responsibility and respect within the executive and legislative branches of U.S. government.

President Bush’s successor can learn from the experiences of the last eight years and return to the founders’ path of collaborative policymaking. Political debate is one of the strengths of a democracy even in wartime, for it allows the President to educate Congressmen and the public on the importance of his policies, to convince them that he is acting in good faith to protect the nation, and to learn about and correct his errors. As Justice Stephen Breyer wrote with regard to the Supreme Court’s 2006 ruling, “Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine—through democratic means—how

best to do so" (*Hamdan v. Rumsfeld*, 548 US 557). Any policy—from sending U.S. armed forces into harms way, the surveillance of terrorist suspects to the detention of enemy combatants—has to be based on law and subject to congressional oversight *and* judicial scrutiny. President Barack Obama recognizes the double task facing his administration. "[W]e will safeguard what we must to protect the American people, but we will also ensure the accountability and oversight that is the hallmark of our constitutional system. [...] I will deal with Congress and the Courts as coequal branches of government" (Obama).

The basic recognition of executive preponderance in foreign decision making to respond expeditiously and efficiently to the exigencies of the day simply means that the powerful presidency requires greater vigilance than ever to preserve the constitutional balance and to prevent violations of liberty at home and "the search of monsters to destroy" abroad (Adams). Even though the Supreme Court successfully resisted the prerogative theory of expansive executive authority, the truth is that the third branch of U.S. government cannot do much to restore Congressional authority. Congress must stand up for its constitutional rights. Lawmakers must be protective of their institution and their independent legislative authority. The functioning of a constitutional government of separated institutions sharing powers critically hinges upon Congress's ability and willingness to assert its own institutional prerogative even in a time of a national emergency. As *The Washington Post* Columnist David S. Broder put it, "We need an infusion of men and women committed to Congress as an institution—to engaging with each other seriously enough to search out and find areas of agreement and join hands with each other to insist on the rights and prerogatives of the nation's legislature, not make it simply an echo chamber of presidential politics" (Broder). Nothing is more corrosive to the system of checks and balances than Congressional submissiveness to executive claims and assertions of inherent, open-ended powers.

The central challenge facing the American political system after 9/11 remains as acute as at the time of the founding fathers, to devise means of reconciling a strong and purposeful Presidency with equally strong and purposeful forms of democratic control by Congress. It may well be that the exact allocation of power as envisaged by the framers does not meet the exigencies of a twenty-first-century superpower. As the balance may shift between the executive and legislative branches, coordination, cooperation, and shared responsibilities must endure. "The search for ways to make the partnership real is the truest fidelity to the deeper intentions of the framers," Arthur Schlesinger rightly observed (Schlesinger, "The Legislative-Executive" 106). An unequivocal and unwavering institutional commitment of *both* branches to shared responsibilities is the litmus-test that U.S. constitutional democracy works and the best prerequisite for good politics at home and abroad. In sum, the well-being of the nation and the American people will be best preserved by political leaders on *both* sides of Pennsylvania Avenue who have stitched checks and balances on their breasts.⁴⁵

⁴⁵ I extend Schlesinger's basic argument about a strong constitutional presidency to Congress as well (see *Imperial Presidency* 418).

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