

NOTES

PREFACE

1. John Lewis Gaddis, *Strategies of Containment* (New York: Oxford University Press, 1982), vii; the terms themselves, he notes, come from J. H.exter.
2. Arthur M. Schlesinger Jr., *The Imperial Presidency* (Boston: Houghton, Mifflin, 1973), x.
3. Dissent to *Rumsfeld v. Padilla*, 03–1027 (June 28, 2004).

CHAPTER 1

1. See, e.g., Karen DeYoung and Colum Lynch, “Bush Lobbies for Deal on Iraq,” *Washington Post* (March 12, 2003), A1; on that date alone the *Post* ran twenty-four stories with the word *Iraq* in the lead paragraph.
2. *Congressional Record*, February 12, 2003, S2268–70.
3. Ryan quoted in Juliet Eilperin, “On War, Congress Gets Earful: Divided Electorate Vents to Lawmakers,” *Washington Post* (March 19, 2003), A14; Blunt quoted in Carl Hulse and David Firestone, “On the Hill, Budget Business as Usual,” *New York Times* (March 23, 2003), A19.
4. Department of Justice Brief, *John Doe I, et al., v. George W. Bush, et al.*, U.S. Court of Appeals, 1st Circuit No. 03–1266 (2003).
5. Wilson quoted in John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton: Princeton University Press, 1993), 3. For an opposing view, see John C. Yoo, “War and the Constitutional Text,” *University of Chicago Law Review* 69 (fall 2002): 1639–84.
6. *Congressional Record*, March 11, 2003, H1721; David E. Rosenbaum, “Votes in 2 Chambers Back Bush Tax Cuts,” *New York Times* (March 22, 2003), A8; Alan Fram, “On Budget, Republicans Say Wartime Is No Time for Dissent,” *Boston Globe* (March 21, 2003), A2.

7. Sheryl Gay Stolberg, “An Order of Fries, Please, but Do Hold the French,” *New York Times* (March 12, 2003), A1.

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

9. The resolution (H.J. Res. 114) was signed by President Bush on October 16, 2002, and became Public Law 107–243. “For Gephardt, Risks and a Crucial Role,” *Washington Post* (October 3, 2002), A1; Alison Mitchell, “Law-makers Begin Push to Give Bush Authority on Iraq,” *New York Times* (October 4, 2002), A1.

10. Dana Priest, “Congressional Oversight of Intelligence Criticized,” *Washington Post* (April 27, 2004), A1; *Congressional Record*, October 10, 2003, S10233.

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

12. Schlesinger, *Imperial Presidency*, 377.

13. James T. Patterson writes, “The war . . . accelerated the rise of an imperial presidency and contributed powerfully—thanks to Nixon’s quest for control—to the constitutional crisis of Watergate.” *Grand Expectations: The United States, 1945–74* (New York: Oxford University Press, 1996), 769.

14. Stanley I. Kutler, *The Wars of Watergate* (New York: Knopf, 1990).

15. Transcript of June 23, 1972, Oval Office conversation between Nixon and Haldeman, Nixon Presidential Materials Project, National Archives and Records Administration.

16. Michael Schudson, *Watergate in American Memory: How We Remember, Forget, and Reconstruct the Past* (New York: Basic Books, 1992), 20–27; James Madison, *Federalist* No. 51, in Clinton Rossiter, ed., *The Federalist Papers* (New York: Mentor, 1961), 321–22.

17. James Sundquist, *The Decline and Resurgence of Congress* (Washington, DC: Brookings Institution, 1982); Melvin Small, *The Presidency of Richard Nixon* (Lawrence: University Press of Kansas, 1998), 310.

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

19. “The President’s News Conference, April 18,” *Public Papers of the Presidents, 1995*, 547.

20. R. W. Apple Jr., “Testing of a President,” *New York Times* (December 12, 1998), A1.

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

22. *Public Papers of the Presidents, 1995*, September 25, 1475.

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

24. “Authorization for Use of Military Force,” Public Law 107–40 (September 14, 2001).

25. Neil A. Lewis and Eric Schmitt, “Detainees Facing Years in Cuba Brig,” *International Herald Tribune* (February 14, 2004), 1; Department of Justice, Office of Legal Counsel, memorandum for Alberto R. Gonzales, Counsel to the President, “Standards of Conduct for Interrogation under U.S.C. §§ 2340–2340A,” August 1, 2002, 34ff. Additional discussion of these topics may be found in chapter 7.

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

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

28. Adam Nagourney, “Shift of Power to White House Reshapes Political Landscape,” *New York Times* (December 22, 2002), A1.

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

30. Donald R. Wolfensberger, “The Return of the Imperial Presidency?” *Wilson Quarterly* (spring 2002): 36–41; Arthur M. Schlesinger Jr., “The Imperial Presidency Redux,” in Schlesinger, *War and the American Presidency* (New York: W. W. Norton, 2004), 45–67.

31. Nixon quoted in conversations of July 1, 1972, and May 11, 1973, in Stanley I. Kutler, *Abuse of Power: The New Nixon Tapes* (New York: Free Press, 1997), 92, 453; Victor Lasky, *It Didn’t Start with Watergate* (New York: Dial Press, 1977).

32. Quoted in Thomas E. Cronin, “‘Everybody Believes in Democracy Until He Gets to the White House . . .’: An Examination of White House-Departmental Relations,” *Law and Contemporary Problems* 35, no. 3 (1970): 573–625.

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

34. Schudson, *Watergate in American Memory*, chap. 1; Dalia Sussman, “Watergate: Some Sorta Scandal, Right?” *ABC News* (June 17, 2002), reports the results of an ABC News poll conducted June 7–9, 2002, by TNS Intersearch; Suzanne Garment, *Scandal: The Culture of Mistrust in American Politics*, paperback ed. (New York: Anchor, 1992), 41.

35. Quoted in Robert Dallek, *An Unfinished Life: John F. Kennedy, 1917–1963* (Boston: Little, Brown, 2003), 132.

CHAPTER 2

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

2. Randolph is quoted in Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Knopf, 1996), 257. For a detailed description of the Constitutional Convention as it led to the drafting of Article II, see, among many sources, Rakove, *Original Meanings*, chap. 9, and Forrest McDonald, *The American Presidency: An Intellectual History* (Lawrence: University Press of Kansas, 1994), chap. 7.

3. Cato, often identified as Gov. George Clinton of New York, Letter V of November 22, 1787, in Ralph Ketcham, ed., *The Anti-Federalist Papers and the Constitutional Convention Debates* (New York: Mentor, 1986), 317f.

4. Madison, *Federalist* No. 48 and No. 51, in Rossiter, ed., *Federalist Papers*.

5. Baldwin quoted in McDonald, *American Presidency*, 177.

6. Henry, speech of June 7, 1788, in Ketcham, *Anti-Federalist Papers*, 213–14; Cato, Letter V, in Ketcham, *Anti-Federalist Papers*, 317–21; Hamilton, *Federalist* Nos. 69, 70, 77, and Madison, *Federalist* No. 51, in Rossiter, ed., *Federalist Papers*.

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

8. Edward S. Corwin, *The President: Office and Powers*, 5th rev. ed., with Randall W. Bland, Theodore Hinson, and Jack W. Peltason (New York: New York University Press, 1984), 3.

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

10. H. L. Mencken, *Notes on Democracy* (New York: Alfred A. Knopf, 1926), 185; Erwin C. Hargrove and Michael Nelson, *Presidents, Politics, and Policy* (New York: Alfred A. Knopf, 1984), 45–46.

11. John Hart, *The Presidential Branch*, 2d ed. (Chatham, NJ: Chatham House, 1995); he credits Nelson Polsby with the phrase.

12. “The Pacificus-Helvidius Letters,” in Michael Nelson, ed., *The Evolving Presidency*, 2d ed. (Washington, DC: CQ Press, 2004), 39–47 (emphases in original). For more detail on the proclamation, see Stanley Elkins and Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788–1800* (New York: Oxford University Press, 1993), 336–65.

13. John Locke, *Second Treatise of Government*, ed. C. B. Macpherson (Indianapolis: Hackett, 1980 [1690]), 84; see §§159–160 generally.

14. Theodore Roosevelt, *An Autobiography* (New York: Da Capo Press, 1985 [1913]), 372; William Howard Taft, *Our Chief Magistrate and His Powers* (1916), quoted in the extremely useful Christopher H. Pyle and Richard M. Pious, eds., *The President, Congress, and the Constitution: Power and Legitimacy in American Politics* (New York: Free Press, 1984), 70–71.

15. David Gray Adler and Michael A. Genovese, “Introduction,” in Adler and Genovese, eds., *The Presidency and the Law: The Clinton Legacy* (Lawrence: University Press of Kansas, 2002), xxii, xxiii, xxv; see also Supreme Court Justice James McReynolds’s dissent in *Myers v. United States* (1926).

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

17. Jefferson to John V. Colvin, September 10, 1810, reprinted in Pyle and Pious, *President, Congress*, 62; Roosevelt, *Autobiography*, 371; Buchanan quoted in Richard Pious, *The American Presidency* (New York: Basic Books, 1979), 48.

18. Hamilton, *Federalist* No. 70 (and see Jay, *Federalist* No. 64), in Rossiter, ed., *Federalist Papers*; “Pacificus,” no. 1.

19. Pyle and Pious, *President, Congress*, 78. More generally, see Pious, *American Presidency*, 55–60; Phillip Shaw Paludan, *The Presidency of Abraham Lincoln* (Lawrence: University Press of Kansas, 1994), 71.

20. Lincoln, Message to Congress, July 4, 1861; Lincoln to Albert G. Hodges, April 4, 1864, reprinted in Pyle and Pious, *President, Congress*, 65 (emphases in originals).

21. Schlesinger, *Imperial Presidency*, 64.

22. Quoted in Wilfred E. Binkley, *President and Congress*, 3d rev. ed. (New York: Vintage, 1962), 185.

23. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

24. William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York: Alfred A. Knopf, 1998), 221.

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

26. *In re Neagle*, 135 U.S. 1 (1890) (emphasis in original); *In re Debs*, 158 U.S. 564 (1895). More broadly, see Peter M. Shane and Harold H. Bruff, *Separation of Powers Law* (Durham, NC: Carolina Academic Press, 1996).

27. *U.S. v. Midwest Oil Co.*, 236 U.S. 459 (1915).

28. Sidney M. Milkis and Michael Nelson, *The American Presidency: Origins and Development, 1776–2002*, 4th ed. (Washington, DC: CQ Press, 2003), 119–21. Whig presidents were exceptions; William Henry Harrison, in his brief term, argued that the notion that presidents better understood “the wants and wishes of the people than their representatives” was “preposterous.” See Milkis and Nelson, *American Presidency*, 132.

29. Arthur Schlesinger argues this was not the intent in any case. See Arthur M. Schlesinger Jr., “How to Democratize American Democracy,” in Schlesinger, *War and the American Presidency*, 85–86.

30. James W. Ceaser, *Presidential Selection: Theory and Development* (Princeton: Princeton University Press, 1979), 74.

31. James Bryce, *The American Commonwealth*, vol. 1 (New York: Macmillan, 1888), 100. See also Milkis and Nelson, *American Presidency*, 129; Ceaser, *Presidential Selection*, chap. 3.

32. Ceaser, *Presidential Selection*, 170 and, more generally, chap. 4, esp. 197–212; see also Jeffrey K. Tulis, *The Rhetorical Presidency* (Princeton: Princeton University Press, 1987).

33. Tulis, *Rhetorical Presidency*, 17–20, 128; see also Samuel Kernell, *Going Public: New Strategies of Presidential Leadership*, 3d ed. (Washington, DC: CQ Press, 1997).

34. James Sterling Young, *The Washington Community, 1800–1828* (New York: Columbia University Press, 1966), 165.

35. James L. Sundquist, *The Decline and Resurgence of Congress* (Washington, DC: Brookings Institution, 1981), 130–31.

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

37. Leonard White, *The Federalists* (New York: Macmillan, 1948), 370.

38. Milkis and Nelson, *American Presidency*, 137.

39. Employment statistics are from Harold W. Stanley and Richard G. Niemi, *Vital Statistics on American Politics, 1999–2000* (Washington, DC: CQ Press, 1999), table 8–8.

40. See Louis Fisher, *Constitutional Conflicts between Congress and the President*, 4th rev. ed. (Lawrence: University Press of Kansas, 1997), 88–89; David M. Kennedy, *Over Here: The First World War and American Society* (New York: Oxford University Press, 1980); Harold Relyea, of the Congressional Research Service, “National Emergencies in the United States,” statement before the House Judiciary Committee, Subcommittee on the Constitution, February 28, 2002, 9–10.

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

42. Kenneth R. Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton: Princeton University Press, 2001), 66–67, 75; see also Phillip J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* (Lawrence: University Press of Kansas, 2002), 4–8.

43. Madison quoted in David Gray Adler, “Clinton, the Constitution, and the War Power,” in Adler and Genovese, eds., *Presidency and the Law*, 22; Corwin, *President: Office and Powers*, 262.

44. See Pyle and Pious, *President, Congress*, chap. 5; Lincoln is quoted on p. 322; see also Schlesinger, *Imperial Presidency*, 63. For a longer review through the lens of Vietnam, see Jacob K. Javits, with Don Kellerman, *Who Makes War: The President Versus Congress* (New York: William Morrow, 1973).

45. Roosevelt, *Autobiography*, 568.

46. From his 1908 book, *Constitutional Government in the United States*, quoted in Binkley, *President and Congress*, 215.

47. Richard E. Neustadt, *Presidential Power: The Politics of Leadership* (New York: Wiley, 1960), 5.

48. Fred I. Greenstein, “Toward a Modern Presidency,” in Fred I. Greenstein, ed., *Leadership in the Modern Presidency* (Cambridge, MA: Harvard University Press, 1988), 3; William E. Leuchtenburg, *In the Shadow of FDR: From Harry Truman to Ronald Reagan* (Ithaca: Cornell University Press, 1983). As Leuchtenburg put it elsewhere, “By almost all accounts, the presidency as we know it today begins with Franklin Delano Roosevelt.” See Leuchtenburg, “Franklin D. Roosevelt: The First Modern President,” in Greenstein, *Leadership*, 7.

49. Greenstein, “Modern Presidency,” 4.

50. Quoted in James MacGregor Burns, *Roosevelt: The Lion and the Fox* (New York: Harvest, 1956), 151.

51. Kernell, *Going Public*, 75, 79.

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

53. See Martha Joynt Kumar, “The Office of the Press Secretary,” in Martha Joynt Kumar and Terry Sullivan, eds., *The White House World* (College Station: Texas A&M University Press, 2003), 236.

54. For a detailed discussion of the history of the Brownlow Committee, see Matthew J. Dickinson, *Bitter Harvest: FDR, Presidential Power, and the Growth of the Presidential Branch* (New York: Cambridge University Press, 1997), chap. 3; a useful short history of the EOP is John Burke, “The Institutional Presidency,” in Michael Nelson, ed., *The Presidency and the Political System*, 7th ed. (Washington, DC: CQ Press, 2003). Staffing figures are from Lyn Ragsdale, ed., *Vital Statistics on the Presidency*, rev. ed. (Washington, DC: CQ Press, 1998), table 6–1.

55. Milkis and Nelson, *American Presidency*, 294ff; Hart, *Presidential Branch*;

Stanley L. Falk, “The National Security Council under Truman, Eisenhower, and Kennedy,” *Political Science Quarterly* 79 (1964): 403–34; Andrew Rudalevige, *Managing the President’s Program: Presidential Leadership and Legislative Policy Formulation* (Princeton: Princeton University Press, 2002), chap. 3; Bradley Patterson, *The White House Staff* (Washington, DC: Brookings Institution, 2000); Paul Schott Stevens, “The National Security Council: Past and Prologue,” *Strategic Review* 17 (1989): 58.

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

57. Clinton Rossiter, *The American Presidency* (New York: Harcourt, Brace, and World, 1956), 104; Aaron Wildavsky, “Salvation by Staff,” in Wildavsky, ed., *The Presidency* (Boston: Little, Brown, 1969); Peter W. Sperlich, “Bargaining and Overload: An Essay on Presidential Power,” in Wildavsky, ed., *The Presidency*, 188; contemporary textbook authors like Joseph Kallenbach and Louis Koenig took a similar stance. Note that Wildavsky proposed strict ground rules for staff behavior: in this sense he believed in salvation by staff but not through faith alone.

58. Sundquist, *Decline and Resurgence*, 133–37.

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

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

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

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

63. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935); *U.S. v. Curtiss-Wright Export Corp. et al.*, 299 U.S. 304 (1936); Mayer, *With the Stroke of a Pen*, 70–74.

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

65. Robert H. Jackson, “Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers,” 39 *Op. Attorney General* 484, August 27, 1940.

66. Barton J. Bernstein, “The Road to Watergate and Beyond: The Growth and Abuse of Executive Authority Since 1940,” *Law and Contemporary Problems* 40 (spring 1976): 76–77; Schlesinger, *Imperial Presidency*, 114; Pious, *American Presidency*, 54ff.

67. Truman quoted in Kernell, *Going Public*, 25; Bernstein, “The Road to Watergate,” 81.

68. It is interesting to note that Richard Nixon, then a senator, voted against allowing Truman the authority to move troops without congressional

approval. See Dean Acheson, *Present at the Creation: My Years in the State Department* (New York: W. W. Norton, 1969), 415; Bernstein, “The Road to Watergate,” 79n105; Schlesinger, *Imperial Presidency*, 135–40.

69. NSC-68 quoted in Gaddis, *Strategies of Containment*, 91; the entire document is now available from various sources, including the Federation of American Scientists Web site, <http://www.fas.org/irp/offdocs/nsc-hst/nsc-68.htm> (accessed April 22, 2004).

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

71. See *Nardone v. U.S.*, 302 U.S. 379 (1937); Bernstein, “Road to Watergate,” 64; Robert H. Jackson, *That Man: An Insider’s Portrait of Franklin D. Roosevelt* (New York: Oxford University Press, 2003), 68–73.

72. Athan Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (Philadelphia: Temple University Press, 1978); Nicholas M. Horrock, “238 Break-Ins Committed by FBI over 26 Years,” *New York Times* (September 26, 1975), 1; William C. Banks and M. E. Bowman, “Executive Authority for National Security Surveillance,” *American University Law Review* 50 (October 2000): 1–130.

73. Neustadt, *Presidential Power*, 3. Or, as the presidency scholar Louis W. Koenig put it in a 1965 article title, “More Power to the President (Not Less),” *New York Times Magazine* (January 3, 1965).

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

75. Charles Beard, *President Roosevelt and the Coming of the War, 1941* (New Haven: Yale University Press, 1948); Bernstein, “The Road to Watergate and Beyond,” 78; survey is cited in Thomas E. Cronin, “A Resurgent Congress and the Imperial Presidency,” *Political Science Quarterly* 95 (summer 1980): 210.

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

77. Neustadt, *Presidential Power*, 167, 184–85; testimony before Senate Government Operations Committee, 1963, quoted in Schlesinger, *Imperial Presidency*, 166.

78. James MacGregor Burns, *The Deadlock of Democracy* (Englewood Cliffs, NJ: Prentice-Hall, 1963); James MacGregor Burns, *Presidential Government: The Crucible of Leadership*, paperback ed. (Boston: Houghton Mifflin, 1973 [1965]), 330, 346–47.

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

80. George C. Herring, *America’s Longest War: The United States and Vietnam, 1950–1975*, 2d ed. (New York: Alfred A. Knopf, 1986), 135–41; for public opinion data see Lawrence R. Jacobs and Robert Y. Shapiro, “Lyndon Johnson, Vietnam, and Public Opinion,” *Presidential Studies Quarterly* 29 (September 1999): 608.

CHAPTER 3

1. Schlesinger, *Imperial Presidency*, x, 252.

2. Cranston quoted in Leuchtenburg, “Franklin D. Roosevelt,” 35; Marcus Cunliffe, “A Defective Institution?” *Commentary* (February 1968): 28; George Reedy, *The Twilight of the Presidency*, paperback ed. (New York: Mentor, 1970), 27; Hargrove and Nelson, *Presidents, Politics, and Policy*, 4–5.

3. Robert Dallek, *Flawed Giant: Lyndon Johnson and His Times, 1961–1973* (New York: Oxford University Press, 1998); Michael A. Genovese, *The Watergate Crisis* (Westport, CT: Greenwood, 1999); Kutler, *Wars of Watergate*; Keith W. Olson, *Watergate: The Presidential Scandal That Shook America* (Lawrence: University Press of Kansas, 2003).

4. Stephen E. Ambrose, *Nixon: Volume III, Ruin and Recovery, 1973–1990* (New York: Touchstone, 1992), 61.

5. See the bibliographic essays in James T. Patterson, *Grand Expectations: The United States, 1945–1974* (New York: Oxford University Press, 1996), and Melvin Small, *The Presidency of Richard M. Nixon* (Lawrence: University of Kansas Press, 1999).

6. Hugh Sidey, *A Very Personal Presidency* (New York: Scribners, 1968), 98.

7. Hart, *Presidential Branch*; John Burke and Fred Greenstein, with Larry Berman and Richard Immerman, *How Presidents View Reality: Decisions on Vietnam, 1954 and 1965* (New York: Russell Sage, 1989); Irving Janis, *Groupthink: Psychological Studies of Policy Decisions and Fiascoes*, 2d ed. (Boston: Houghton Mifflin, 1982).

8. John H. Kessel, *The Domestic Presidency: Decision-Making in the White House* (North Scituate, MA: Duxbury Press, 1975), 18; Karen M. Hult and Charles E. Walcott, *Empowering the White House: Governance under Nixon, Ford, and Carter* (Lawrence: University Press of Kansas, 2003), 166.

9. White House and EOP staff figures are from Hart, *Presidential Branch*, table 4.2; Ragsdale, *Vital Statistics on the Presidency*, tables 6.1–6.3; on the Nixon chief of staff operation, see Hult and Walcott, *Empowering the White House*, 19–20.

10. Frederick C. Thayer, “Presidential Policy Processes and ‘New Administration’: A Search for Revised Paradigms,” *Public Administration Review* 31 (1971): 555.

11. David Archer, quoted in Kessel, *Domestic Presidency*, 81; John Ehrlichman to Cap Weinberger, no title, June 26, 1972, White House Subject Files, folder [CF] FG 6–16: *Office of Management and Budget, 1971–74*, Nixon Presidential Materials Staff, College Park, Maryland. More generally, see Andrew Rudalevige, “The ‘M’ in OMB: The Office of Management and Budget and Presidential Management of the Executive Branch, 1939–2003,” paper presented at the 2003 annual meeting of the American Political Science Association, Philadelphia, August 2003.

12. Jacobs and Shapiro, “Lyndon Johnson, Vietnam,” 592–616; Lawrence R. Jacobs and Robert Y. Shapiro, “The Rise of Presidential Polling: The Nixon White House in Historical Perspective,” *Public Opinion Quarterly* 59 (summer 1995): 163–95.

13. Stephen Hess, *Organizing the Presidency*, 2d ed. (Washington, DC: Brookings Institution, 1988 [1976]), 6; Ehrlichman quoted in Harold Seidman and Robert Gilmour, *Politics, Position, and Power*, 4th ed. (New York: Oxford University Press, 1986), 82.

14. Richard P. Nathan, *The Plot That Failed: Nixon and the Administrative Presidency* (New York: John Wiley & Sons, 1975).

15. *Adams v. Richardson*, 480 F.2d 1159 (1973); “Statement on Signing the Military Appropriations Authorization Bill,” November 17, 1971, *Public Papers of the Presidents, 1971*; *Local 2677 v. Phillips*, 358 F. Supp. 60 (1973).

16. J. Anthony Lukas, *Nightmare: The Underside of the Nixon Years* (New York: Penguin, 1988), 19–21.

17. Lukas, *Nightmare*, 22; Kutler, *Wars of Watergate*, 104–8.

18. Dean memo quoted in Kutler, *Wars of Watergate*, 104.

19. Transcript from Kutler, ed., *Abuse of Power*, 149–50.

20. Lukas, *Nightmare*, 12–13; and see Kutler, *Wars of Watergate*, 77f.

21. Small, *Presidency of Richard M. Nixon*, 86.

22. Athan Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (Philadelphia: Temple University Press, 1978), 149; see also James Kirkpatrick Davis, *Spying on America: The FBI’s Domestic Counterintelligence Program* (Westport, CT: Praeger, 1992).

23. Reprinted in Ward Churchill and Jim Vander Wal, *The COINTEL-PRO Papers: Documents from the FBI’s Secret Wars against Domestic Dissent* (Boston: South End Press, 1990), 125, 213–16; Small, *Presidency of Richard M. Nixon*, 158f.

24. Theoharis, *Spying on Americans*, 121ff.
25. David Wise, *The American Police State* (New York: Random House, 1976), 183–96; see also Theoharis, *Spying on Americans*; Lukas, *Nightmare*, 36–39; Nelson Rockefeller et al., *Report to the President by the Commission on CIA Activities within the United States* (hereafter Rockefeller Commission Report), June 6, 1975, (Washington, DC: U.S. Government Printing Office), on-line at http://history_matters.com/archive/church/rockcomm/contents.htm (chapter 11); John M. Crewdson, “CIA Men Opened Three Senators’ Mail and Note to Nixon: Panel Says Aides Inspected Correspondence of U.S. Citizens for Twenty Years,” *New York Times* (September 25, 1975), 1.
26. Small, *Presidency of Richard Nixon*, 157f; Attorney General John Mitchell quoted in Schlesinger, *Imperial Presidency*, 257; conversation in Kutler, *Abuse of Power*, 515.
27. Mitchell in Sidney E. Zion, “Fight Over Wiretaps,” *New York Times* (June 22, 1969), E16. Testimony of John D. Ehrlichman, July 24, 1973, in Gerald Gold, ed., *The Watergate Hearings: Break-in and Cover-up* (New York: Bantam Books, 1973), 511.
28. Schlesinger, *Imperial Presidency*, 258f. The Commission on Campus Unrest was chaired by Republicans William Scranton and W. Matthew Byrne.
29. Quoted in Lukas, *Nightmare*, 31.
30. Kutler, *Wars of Watergate*, 99, with Krogh’s memo quoted on 97–98; Tom Wicker, *One of Us: Richard Nixon and the American Dream* (New York: Random House, 1991), 628–29.
31. Lukas, *Nightmare*, 30–37; Richard Reeves, *President Nixon: Alone In the White House* (New York: Simon & Schuster, 2001), 235–36.
32. Lukas, *Nightmare*, 15, 17.
33. Wicker, *One of Us*, 626–28; Wise, *American Police State*; Lukas, *Nightmare*, 47–62.
34. Kutler, *Wars of Watergate*, 112.
35. Quoted in Lukas, *Nightmare*, 70.
36. Kutler, *Abuse of Power*, 10.
37. Kutler, *Abuse of Power*, 6.
38. Kutler, *Wars of Watergate*, 109; Lukas, *Nightmare*, 71; Kutler, *Abuse of Power*, 16.
39. Lukas, *Nightmare*, 91.
40. Lukas, *Nightmare*, 94, 104; Fred Emery, *Watergate: The Corruption of American Politics and the Fall of Richard Nixon*, paperback ed. (New York: Touchstone, 1995), 60–62; John Ehrlichman, *Witness to Power: The Nixon Years* (New York: Simon and Schuster, 1982), 399–407; Richard M. Nixon, *RN: The Memoirs of Richard Nixon*, paperback ed. (New York: Touchstone, 1990), 514.
41. George Lardner Jr. and Walter Pincus, “Watergate Burglars Broke into Chilean Embassy as Cover, Tapes Show,” *Washington Post* (February 26, 1999),

A9. The United States helped overthrow Allende in 1973; see the discussion of this in the section on war powers in this chapter.

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

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

44. Rozell, “Clinton Legacy,” 62; Nixon, “Statement on Executive Privilege, March 12,” and “Statement about the Watergate Investigations, August 15,” both in *Public Papers of the Presidents, 1973*, 185, 701.

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

46. Nixon, “Statement on Executive Privilege”; Schlesinger, *Imperial Presidency*, 251; Rozell, *Executive Privilege*, 62ff.

47. Hearings before the Senate Subcommittee on Intergovernmental Relations, “Executive Privilege, Secrecy in Government, Freedom of Information,” 93d Congress, 1st session, April 10, 1973, vol. 1, 20, 45, 51.

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

49. 88th Congress, H. J. Res 1145 (Public Law 88–408).

50. Louis Fisher, *Presidential War Power* (Lawrence: University Press of Kansas, 1995), 116.

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

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

53. Javits, with Kellerman, *Who Makes War*, 259.

54. Leonard C. Meeker, “The Legality of U.S. Participation in the Defense of Vietnam,” *U.S. Department of State Bulletin*, March 28, 1966, 483f; Schlesinger, *Imperial Presidency*, 184.

55. Pyle and Pious, *President, Congress*, 340.
56. Dallek, *Flawed Giant*, 262–68; Pyle and Pious, *President, Congress*, 317–18; James Sundquist, *Decline and Resurgence*, 123–24, 239–40.
57. Herring, *Longest War*, chap. 6; Fisher, *Presidential War Power*, 119–20.
58. Quoted in Roger Morris, *An Uncertain Greatness: Henry Kissinger and American Foreign Policy* (New York: Harper & Row, 1977), 4.
59. Schlesinger, *Imperial Presidency*, 198.
60. Larry Berman, *No Peace, No Honor: Nixon, Kissinger, and Betrayal in Vietnam* (New York: Free Press, 2001), 104. The reference is to longtime Nixon spiritual adviser and well-known evangelist Rev. Billy Graham.
61. Herring, *Longest War*, 225; Berman, *No Peace*, 50–51.
62. *Public Papers of the Presidents, 1970*, 405–9.
63. Herring, *Longest War*, 234–39; Seymour M. Hersh, *The Price of Power: Kissinger in the Nixon White House* (New York: Summit Books, 1983), chap. 16; Sundquist, *Decline and Resurgence*, 251.
64. Francis D. Wormuth, “The Nixon Theory of the War Power: A Critique,” *California Law Review* 60 (May 1972): 623–703; Sundquist, *Decline and Resurgence*, 249; Pyle and Pious, *President, Congress*, 337–38. Cases cited by Rehnquist included the *Prize Cases* and *Durand v. Hollins*.
65. Herring, *Longest War*, 248, 252–54.
66. Sundquist, *Decline and Resurgence*, 255–56; Kirsten Lundberg, “Congressional Oversight and Presidential Prerogative: The 1991 Intelligence Authorization Act,” Case C14-01-1605.0, Kennedy School of Government Case Program, Harvard University, 2001.
67. John Prados, *Presidents’ Secret Wars*, rev. ed. (Chicago: Ivan R. Dee, 1996), 308–10 and chap. 13 generally. Hersh, in *Price of Power* (81), puts the number killed at over forty thousand, though Herring, *Longest War* (232), thinks even twenty thousand is too high.
68. Hersh, *Price of Power*, chaps. 14–15; Prados, *Secret Wars*, 300–303 and chap. 14 generally. Helms is quoted on p. 275.
69. Hersh, *Price of Power*, 259.
70. Gregory F. Treverton, *Covert Action: The Limits of Intervention in the Postwar World* (New York: Basic Books, 1987), 98–107; Hersh, *Price of Power*, 258–96; Prados, *Secret Wars*, 317–21.
71. Prados, *Secret Wars*, 322–24; Hersh, *Price of Power*, 187.
72. Berman, *No Peace*, 238.
73. Allen Schick, *Congress and Money: Budgeting, Spending, and Taxing* (Washington, DC: Urban Institute Press, 1980), 17.
74. Harold Laswell, *Politics: Who Gets What, Where, and How* (New York: Meridian Books, 1958 [1936]).
75. Madison, *Federalist* No. 58, in Rossiter, ed., *Federalist Papers*, 359.
76. Edwin L. Dale Jr., “Washington Report: Why U.S. Budget Figures Miss the Mark,” *New York Times* (June 15, 1975), F4; more generally see Allen

Schick, with Felix LoStracco, *The Federal Budget: Politics, Policy, Process* (Washington, DC: Brookings Institution, 2000), chap. 1.

77. James P. Pfiffner, *The President, Budget, and Congress: Impoundment and the 1974 Budget Act* (Boulder, CO: Westview, 1979), chap. 2; Schick, *Federal Budget*, 14; Sundquist, *Decline and Resurgence*, 200.

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

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

80. See the Revenue and Expenditure Control Act of 1968 (Public Law 90–364); Schick, *Congress and Money*, 35–37.

81. Quoted in Louis Fisher, *Congressional Abdication on War and Spending* (College Station: Texas A&M Press, 2000), 117. A “balanced full employment budget” was meant to be balanced if the nation reached full employment. The nation did not, and the budget was not. See Allen J. Matusow, *Nixon’s Economy: Booms, Busts, Dollars, and Votes* (Lawrence: University Press of Kansas, 1998), 91, 164, 205–6.

82. Roy Ash to Nixon, “Establishment of Departmental Objectives,” April 4, 1973; “Congress and the Budget Battle,” September 11, 1973; “Battle of the Budget—Phase II,” May 8, 1973. All in White House Central Files: Staff Member and Office Files: Roy Ash, Box 7, *Ash Memos to the President, February 1973 to December 1973*, Nixon Presidential Materials Staff.

83. Fisher, *Abdication*, 118; this section is drawn largely from Fisher, *Abdication*, 115–20, and Pfiffner, *President, Budget, and Congress*, 41–44.

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

85. Nixon quoted in Schick, *Congress and Money*, 43; Humphrey quoted in *Congressional Record*, February 20, 1973, S2873; *Local 2677 v. Phillips*, 358 F. Supp. 60 (1973).

86. Quoted in Sundquist, *Decline and Resurgence*, 86–87.

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

88. Small, *Presidency of Richard Nixon*, 212; Sundquist, *Decline and Resurgence*, 212; Fisher, *Abdication*, 119.

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

90. Gallup Polls of May 26–29 and June 16–19, 1972; Olson, *Watergate*, chap. 2; Theodore H. White, *The Making of the President 1972* (New York: Atheneum, 1973).

91. Colson was evidently angered that some of his staff had taken the previous weekend off. See Stephen E. Ambrose, *Nixon: Volume II, The Triumph of a Politician, 1962–1972* (New York: Simon & Schuster, 1989), 605. Mitchell quoted in Olson, *Watergate*, 176.

92. Olson, *Watergate*, 30ff; Small, *Presidency of Richard Nixon*, 254f.

93. Kutler, *Abuse of Power*, 67–69; Emery, *Watergate*, 205.

94. Kutler, *Abuse of Power*, 252–54; Gerald Gold, ed., *The White House Transcripts: Submission of Recorded Presidential Conversations to the Committee on the Judiciary of the House of Representatives by President Richard Nixon* (New York: Bantam, 1973), 155.

95. Herbert Kalmbach, testimony of July 16, 1973, in Gold, *Watergate Hearings*, 447–48.

96. Kutler, *Abuse of Power*, 112–13; more generally see the Watergate cites already presented and Anthony Corrado, *Paying for Presidents: Public Financing in National Elections* (New York: Twentieth Century Fund Press, 1993), 4–5. The 1971 law was the original Federal Election Campaign Act, which replaced the 1925 version of the Federal Corrupt Practices Act.

97. Herbert E. Alexander, *Financing Politics: Money, Elections, and Political Reform* (Washington, DC: CQ Press, 1976), 112–18; Olson, *Watergate*.

98. Small, *Presidency of Richard Nixon*, 264–66.

99. Alexander, *Financing Politics*, 119–20.

100. Colson memo reprinted as Exhibit 121 in “Testimony of Witnesses,” Book III, *Hearings before the House Committee on the Judiciary pursuant to H. Res 803*, 93d Congress, 2d Session, July 12–17, 1974, 483–87; see also Lukas, *Nightmare*, 182ff. A transcript of the Nixon-Kleindienst conversation of April 19, 1971, is available from the Nixon Presidential Materials Staff or on-line at <http://www.washingtonpost.com/wp-srv/nation/specials/watergate/watergatefront.htm> (accessed October 13, 2004).

101. Kutler, *Abuse of Power*, 116.

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

103. Phillip Trimble, “The President’s Foreign Affairs Power,” *American Journal of International Law* 83 (October 1989): 752.

104. Gary Orren, “Fall from Grace: The Public’s Loss of Faith in Government,” in Joseph S. Nye Jr., Philip D. Zelikow, and David C. King, eds., *Why People Don’t Trust Government* (Cambridge, MA: Harvard University Press, 1997), 81.

105. Schlesinger, *Imperial Presidency*, 275.
 106. Ambrose, *Nixon*, Vol. III, 508.

CHAPTER 4

1. Stephen Krasner, “Structural Causes and Regime Consequences,” in Krasner, ed., *International Regimes* (Ithaca: Cornell University Press, 1983), 2.
2. *Congressional Record*, April 18, 1973, 13190. For an array of similar quotes see Sundquist, *Decline and Resurgence*, chap. 1.
3. Sundquist, *Decline and Resurgence*, 1, 7. See also Cronin, “Resurgent Congress,” 209–37.
4. Press conference quoted in John Hershey, *Aspects of the Presidency: Truman and Ford in Office* (New Haven: Ticknor & Fields, 1980), 141; Gerald R. Ford, *A Time to Heal* (New York: Harper & Row, 1979), 132; more broadly, see Shirley Anne Warshaw, *Powersharing: White House-Cabinet Relations in the Modern Presidency* (Albany: State University of New York Press, 1996), 94 and chap. 4 generally; Hult and Walcott, *Empowering the White House*, 31–35.
5. Carter quoted in Warshaw, *Powersharing*, 101; Jordan quoted in Dom Bonafede, “Carter White House Staff Is Heavy on Functions, Light on Frills,” *National Journal* (February 12, 1977); see also Hult and Walcott, *Empowering the White House*, 38.
6. Warshaw, *Powersharing*, 108; Hult and Walcott, *Empowering the White House*, 166; Bonafede, “Carter White House Staff.”
7. It was, perhaps, Nixon’s needs that were the problem. On Nixon’s staffing, and the similarity of Ford and Carter to the Nixon model, see Hult and Walcott, *Empowering the White House*.
8. David Halberstam, *The Best and the Brightest* (New York: Fawcett Crest, 1973), 556; John M. Orman, *Presidential Secrecy and Deception: Beyond the Power to Persuade* (Westport, CT: Greenwood Press, 1980), 107–8.
9. *U.S. v. Nixon*, 418 U.S. 683 (1974); see the full documentation from the case in Leon Friedman, ed., *United States v. Nixon: The Complete Case* (New York: Chelsea House, 1974).
10. Rozell, *Executive Privilege*, 72, 75, 90, and chap. 4 generally; George Lardner Jr., “Secrecy System Pronounced Sound,” *Washington Post* (December 9, 1988), A25.
11. Public Law 93–579; Herbert N. Foerstel, *Freedom of Information and the Right to Know: The Origins and Applications of the Freedom of Information Act* (Westport, CT: Greenwood, 1999), 65–67.
12. Johnson, “Statement by the President upon Signing S. 1160,” Office of the White House Press Secretary, July 4, 1966, available at <http://www.gwu.edu/~nsarchiv/nsa/foia/FOIAR%20release66.pdf> (accessed April 2, 2004); *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973); Sen.

Edmund Muskie's comments in the *Congressional Record*, October 17, 1974, S36083–84; Foerstel, *Freedom of Information*, chap. 2.

13. Public Law 93–502; Edward Levi, “Attorney General’s Memorandum on the 1974 Amendments to the Freedom of Information Act,” February 1975, available at <http://www.usdoj.gov/foia/74agmemo.htm> (accessed April 2, 2004); Foerstel, *Freedom of Information*, 49.

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

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

16. Public Law 92–463; Jay S. Bybee, “Advising the President: Separation of Powers and the Federal Advisory Committee Act,” *Yale Law Journal* 104 (October 1994): 51–128. Note that groups advising the CIA or Federal Reserve are normally exempt and that meetings may be closed using the same criteria as the Sunshine Act.

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

18. *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972).

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

20. Quoted in Lukas, *Nightmare*, 541.

21. Levi guidelines quoted in Athan G. Theoharis, “FBI Surveillance: Past and Present,” *Cornell Law Review* 69 (April 1984): 889.

22. “No agency . . . shall request or otherwise encourage, directly or indirectly, any person, organization, or government agency to undertake activities forbidden by this Order or by applicable law.” Executive Order 12036 (January 24, 1978); Geoffrey R. Stone, “The Reagan Amendment, the First Amendment, and FBI Domestic Security Investigations,” in Richard O. Curry, ed., *Freedom at Risk* (Philadelphia: Temple University Press, 1988), 277.

23. Theoharis, “FBI Surveillance,” 889–90.

24. FISA is Public Law 95–511, codified at 50 U.S.C. §§ 1801–1862; *In re: Sealed Case 02–001*, U.S. Foreign Intelligence Surveillance Court of Review (November 18, 2002), 3–5, 8ff. Sen. Birch Bayh (D-IN) quoted in George Lardner Jr., “Carter Signs Bill Limiting Foreign Intelligence Surveillance,” *Washington Post* (October 26, 1978), A2.

25. Senate Special Committee on the Termination of the National Emergency, 1973, quoted in Cooper, *By Order of the President*, 39–40; Cronin, “Resurgent Congress,” 213.

26. Harold C. Relyea, “National Emergency Powers,” Report 98–505-GOV, Congressional Research Service, June 28, 2001. After the *Chadha* decision invalidated the legislative veto, a joint resolution was substituted for the concurrent resolution.

27. Sundquist, *Decline and Resurgence*, 332; Paul C. Light, *Monitoring Government: Inspectors General and the Search for Accountability* (Washington, DC: Brookings Institution, 1993). See also the testimony of comptroller David M. Walker presented in *Inspectors General: Enhancing Federal Accountability*, GAO Report 04–117T (October 8, 2003). The main Inspector General Act is Public Law 95–452; however, the first inspector general was appointed in the Department of Health and Human Services in 1976 to investigate allegations of Medicaid fraud. Another was included in the newly created Energy Department in 1977.

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

29. Sundquist, *Decline and Resurgence*, 344–45; Barbara Hinkson Craig, *The Legislative Veto: Congressional Control of Regulation* (Boulder, CO: Westview, 1983), 18–20.

30. Craig, *Legislative Veto*, 19–26; Sundquist, *Decline and Resurgence*, 354.

31. Sundquist, *Decline and Resurgence*, 332.

32. Schlesinger, *Imperial Presidency*, 330.

33. S. Report 129, 91st Congress, 1st session, quoted in Fisher, *Abdication*, 58–61, and Sundquist, *Decline and Resurgence*, 246.

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

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

36. *Congressional Record*, October 10, 1973, 33550; see also the debate of November 7, 1973.

37. War Powers Resolution (Public Law 93–148), sections 2–5, 8; Kissinger quote (though it is hard to believe he meant it) in John T. Rourke, *Congress and the Presidency in U.S. Foreign Policymaking* (Boulder, CO: Westview, 1983), 286; Javits in *Congressional Record*, November 7, 1973, 36187.

38. Kathryn S. Olmsted, *Challenging the Secret Government: The Post-Watergate Investigations of the CIA and FBI* (Chapel Hill: University of North Carolina

Press, 1996), 46; see also Kirsten Lundberg, “Congressional Oversight”; Pyle and Pious, *President, Congress*, 384; Gregory F. Treverton, “Intelligence: Welcome to the American Government,” in Thomas E. Mann, ed., *A Question of Balance: The President, the Congress, and Foreign Policy* (Washington, DC: Brookings Institution, 1990), 76.

39. Seymour Hersh, “Huge CIA Operation Reported in U.S. against Anti-war Forces, Other Dissidents in Nixon Years,” *New York Times* (22 December 1974), 1.

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

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

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

43. Rockefeller Commission Report, 149.

44. Executive Order 11905 (Ford); Executive Order 12036 (Carter); Gates, *From the Shadows*, 135–40, 142; Charles R. Babcock, “Spy Agency Infighting Hurt U.S., Turner Says,” *Washington Post* (May 13, 1985), A3.

45. Robert M. Gates, *From the Shadows* (New York: Touchstone, 1997), 60–61; Public Law 96–450; see also Fisher, *Presidential War Power*, 174; Loch K. Johnson, *The Making of International Agreements: Congress Confronts the Executive* (New York: New York University Press, 1984), 137; Treverton, “Intelligence,” 77–80.

46. Johnson, *Making of International Agreements*, 136; Frank J. Smist Jr., *Congress Oversees the United States Intelligence Community, 1947–1989* (Knoxville: University of Tennessee Press, 1990), chap. 5.

47. Fisher, *Presidential War Power*, 173–76. The Clark Amendment was named for Sen. Dick Clark (D-IA).

48. Johnson, *Making of International Agreements*, 59, table 17. Other figures are from Ragsdale, *Vital Statistics on the Presidency*, tables 7–1, 7–2.

49. See Public Law 92–403 (1 U.S. Code 112b), amended by Public Law 95–426.

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

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

52. Sundquist, *Decline and Resurgence*, 206.

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

54. But he assured Nixon: “As a matter of principle, however, your con-

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

55. Russell Train was the administrator of the EPA.

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

57. Fisher, *Abdication*, 119.

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

59. Schick, *Congress and Money*, 22.

60. Public Law 93–250.

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

62. G. Calvin Mackenzie, “The State of the Presidential Appointments Process,” in Mackenzie, ed., *Innocent until Nominated: The Breakdown of the Presidential Appointments Process* (Washington, DC: Brookings Institution, 2001), 10.

63. Quoted in Steven M. Gillon, “*That’s Not What We Meant to Do*”: *Reform and Its Unintended Consequences in Twentieth-Century America* (New York: W. W. Norton, 2000), 203.

64. Corrado, *Paying for Presidents*, 1.

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

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

67. Public Law 95–521; Carter, “Remarks on Signing S. 555 Into Law,” October 26, *Public Papers of the Presidents, 1978*, 1854–56.

68. *CQ Almanac, 1975* (Washington, DC: CQ Press, 1976), 519–20; *CQ Almanac, 1978* (Washington, DC: CQ Press, 1979), 835–50.

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

70. 28 CFR §0.37; Katy J. Harriger, *The Special Prosecutor in American Politics*, 2d rev. ed. (Lawrence: University Press of Kansas, 2000), 44. Because of these regulations, the Supreme Court later held in *U.S. v. Nixon*, the office was

sufficiently removed from the president to move the tapes dispute out of the realm of “intrabran­ch” argument.

71. See *Hearings on S.2803 and S. 2978 Before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary*, 93d Congress, 2d Session (1974).

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

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

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

75. Quotes from 28 U.S.C. §§592–94. See Jack Maskell, *Independent Counsel Provisions: An Overview of the Operation of the Law*, Congressional Research Service Report 98–283A (March 20, 1998); Joseph S. Hall, Nicholas Pullen, and Kandace Rayos, “Independent Counsel Investigations,” *American Criminal Law Review* 36 (summer 1999): 809–33.

76. Harriger, *Special Prosecutor*, 234–35.

77. Robert J. Spitzer, “The Independent Counsel and the Post-Clinton Presidency,” in Adler and Genovese, eds., *Presidency and the Law*, 89–94; “The Independent Counsel Act: From Watergate to Whitewater and Beyond,” Symposium, *Georgetown Law Journal* 86 (July 1998).

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

79. *Morrison v. Olson*, 487 U.S. 654 (1988), 705, 711, 713f.

80. Garment, *Scandal*, 83.

81. G. Calvin Mackenzie, with Michael Hafken, *Scandal Proof: Do Ethics Laws Make Government Ethical?* (Washington, DC: Brookings Institution, 2002), 83.

82. Gerhard Casper, “The Constitutional Organization of the Government,” *William and Mary Law Review* 26 (winter 1985): 187–88.

83. Dom Bonafede, Daniel Rapoport, and Joel Havemann, “The President versus Congress: The Score since Watergate,” *National Journal* (May 29, 1976), 738.

84. Gordon S. Jones and John A. Marini, eds., *The Imperial Congress: Crisis in the Separation of Powers* (New York: Pharos Books, 1988), 1.

CHAPTER 5

1. Richard M. Nixon, *In the Arena*, paperback ed. (New York: Pocket Books, 1991), 238; Thomas M. Franck, ed., *The Tethered Presidency: Congressional Restraints on Executive Power* (New York: New York University Press, 1981); Marvin Stone, “Presidency: Imperial or Imperiled?” *U.S. News and World Report* (January 15, 1979), 88; Harold M. Barger, *The Impossible Presidency* (Reading, MA: Addison-Wesley, 1984).

2. Michael Lind, “The Out-of-Control Presidency,” *New Republic* (August 14, 1995), 18, 23. For an early treatment of the Reagan presidency’s importance, see Ryan J. Barilleaux, *The Post-Modern Presidency: The Office after Ronald Reagan* (Westport, CT: Praeger, 1988).

3. Francine Kiefer, “Clinton Perfects the Art of Go-Alone Governing,” *Christian Science Monitor* (July 24, 1998), 3; see also David Gray Adler, “Clinton in Context,” in Adler and Genovese, eds., *Presidency and the Law*.

4. Mayer, *With the Stroke of a Pen*, 24. A good example is the International Emergency Economic Powers Act, described in chapter 4 and discussed further in chapter 6.

5. Pfiffner, *President, Budget, and Congress*, 132; Fisher, *Abdication*, 125; Schick, *Congress and Money*, 254.

6. Reagan, with just under 51 percent of the popular vote, won forty-four states and 91 percent of the Electoral College in 1980; this was due in part to the presence of third-party candidate John Anderson in the race. On the economic program, see Reagan’s January 20 inaugural address and his February 18 “Address Before a Joint Session of the Congress on the Program for Economic Recovery,” *Public Papers of the Presidents, 1981*; William E. Pemberton, *Exit with Honor: The Life and Presidency of Ronald Reagan* (Armonk, NY: M. E. Sharpe, 1998); Kernell, *Going Public*, 149 and more generally chap. 5.

7. Hedrick Smith, *The Power Game: How Washington Works*, paperback ed. (New York: Ballantine, 1988), 460–63; David A. Stockman, *The Triumph of Politics: Why the Reagan Revolution Failed* (New York: Harper & Row, 1986), 200; Kernell, *Going Public*, 148; Pemberton, *Exit with Honor*, 103.

8. See Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2005: Historical Tables* (Washington, DC: U.S. Government

Printing Office, 2004), table 7.1; Office of Management and Budget, *Citizens' Guide to the Federal Budget, Fiscal Year 2000* (Washington, DC: Government Printing Office, 1999), table 2-2.

9. Aaron Wildavsky, *The New Politics of the Budgetary Process* (Glenview, IL: Scott, Foresman, 1988), 205; Gallup Organization, "Short Questions Q.24," *Gallup Poll Monthly* 355 (April 1995): 29; *Congressional Record*, February 2, 1995, H1089.

10. Included here are the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982, the Deficit Reduction Act of 1984, the Consolidated Omnibus Reconciliation Act of 1985, the Tax Reform Act of 1986, and the Omnibus Reconciliation Act of 1987.

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

12. Fisher, *Abdication*, 131.

13. See *Bowsher v. Synar*, 478 U.S. 714 (1986).

14. Waxman in *Congressional Record*, December 11, 1985, 36075; CBO staffer Phil Joyce quoted in Rubin, *Balancing the Budget*, 53; see also Fisher, *Abdication*, 136.

15. These quotes are, respectively, Rep. Peter Blute (R-MA) in *Congressional Record*, February 2, 1995, H1092, and Rep. William Martini (R-NJ) before the House Government Reform and Oversight Committee, January 12, 1995.

16. Cohen in *Congressional Record*, March 22, 1995, S4308; Michel in Fisher, *Abdication*, 144.

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

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

19. *Clinton v. City of New York*, 524 U.S. 417 (1998); Nixon, *In the Arena*, 237; Fisher, *Abdication*, 151.

20. Jonathan Weisman, "The Tax-Cut Pendulum and the Pit," *Washington Post* (October 8, 2004), A1; see also the figures at the Treasury Department's Bureau of the Public Debt Web site, <http://www.publicdebt.treas.gov>. The amount used here is the "net interest" figure used by the Office of Management and Budget.

21. Congress's 2004 attempt to pass transportation reauthorization bogged down in conference committee after the House passed a \$275 billion bill and the Senate one that cost \$318 billion. The bills contained some three thousand earmarks, most famously the two "bridges to nowhere" (nearly literally) pushed by Rep. Don Young (R-AK) and totaling \$325 million. Figures from Congressional Budget Office, *The Budget and Economic Outlook: An Update, September 2004* (Washington, DC: CBO, 2004); Office of Management and Budget, *Budget of the United States Government, Fiscal Year 2006* (Washington, DC: U.S. Government Printing Office, 2005), table S-1; Brian Friel, "Defending Pork," *National Journal* (May 8, 2004): 1404–9; Edmund L. Andrews, "Trim Deficit? Only If Bush Uses Magic," *New York Times* (February 7, 2005), C1. See also David Baumann, "Why Government by CR Matters," *National Journal* (November 1, 2003); Alexis Simendinger, David Baumann, Carl M. Cannon, and John Maggs, "Sky High," *National Journal* (February 7, 2004).

22. President's News Conference, November 4, 2004, Office of the White House Press Secretary. The president went on, "I think it would help the executive branch work with the legislative branch to make sure that we're able to maintain budget discipline." An item veto was included in the president's budget proposals in fiscal years 2003, 2004, 2005, and 2006 and regained special salience after the 2004 election. See Louis Fisher, *A Presidential Item Veto*, Report RS21991, Congressional Research Service (December 2, 2004). Gallup poll data reported in Simendinger et al., "Sky High," 375.

23. Richard Oppel Jr., "Bush Plans for Tax Cuts Barely Avert House Setback," *New York Times* (March 31, 2004), A18; Jim VandeHei, "Bush Enacts Fourth Tax Cut," *Washington Post* (October 5, 2004), A8; Edmund L. Andrews, "How Tax Bill Gave Business More and More," *New York Times* (October 13, 2004), A1. For a good sample of the promises made during the presidential campaign, see the transcripts of the three debates between John F. Kerry and George W. Bush in September and October 2004.

24. Quoted in Ron Suskind, *The Price of Loyalty: George W. Bush, the White House, and the Education of Paul O'Neill* (New York: Simon & Schuster, 2004), 291.

25. Andrew Taylor and John Cranford, "Omnibus-Wielding Majority Finds Power in the Package," *CQ Weekly* (November 20, 2004), 2724; "Missed Deadlines," *National Journal* (January 10, 2004), 101; Sheryl Gay Stolberg, "In Congress, Growing Doubts on Spending Process," *New York Times* (November 24, 2004), A19; Andrew Taylor, "Correcting Resolution on Tax Return Language Ties up Last Loose End," *CQ Weekly* (December 11, 2004), 2930.

26. Baumann, "Why Government by CR Matters," 3345; Elizabeth Drew, *Showdown: The Struggle between the Gingrich Congress and the Clinton White House*, paperback ed. (New York: Touchstone, 1997).

27. David Baumann, "The Breakdown of the Budget Process," *National Journal* (January 10, 2004), 96–97.

28. Andrew Taylor, “GOP Gropes for Way Out of Appropriations Morass,” *CQ Weekly* (September 4, 1999), 2043; Specter quoted in Victoria Allred, “Versatility with the Veto,” *CQ Weekly* (January 20, 2001), 176.

29. Barbara Sinclair, “Context, Strategy, and Chance: George W. Bush and the 107th Congress,” in Colin Campbell and Bert A. Rockman, eds., *The George W. Bush Presidency: Appraisals and Prospects* (Washington, DC: CQ Press, 2004); Janet Hook, “\$328-Billion Spending Bill Caps House Year,” *Los Angeles Times* (December 9, 2003), A18; Dan Morgan, “House Passes \$328 Billion Spending Bill,” *Washington Post* (December 9, 2003), A1; “Omnibus Negotiations Center on Policy Riders, Debt Limit,” *CQ Today MIDDAY Update* (November 10, 2004); Stolberg, “Growing Doubts”; Bush in “President’s News Conference,” December 20, 2004, Office of the White House Press Secretary.

30. Dan L. Crippen, “Observations on the Current State of the Federal Budget Process,” address at the fall symposium of the American Association for Budget and Program Analysis, November 22, 2002. Available at CBO Web site, <http://www.cbo.gov> (accessed October 14, 2004).

31. *Deconstructing Distrust*, Pew Research Center for the People and the Press, released March 10, 1998, available on-line at <http://people-press.org/reports/print.php3?PageID=593> (accessed April 28, 2004), Q3, Q6, Q19 (which presents parallel National Election Studies data covering 1958–96); G. Calvin Mackenzie and Judith M. Labiner, “Opportunity Lost: The Rise and Fall of Trust and Confidence in Government after September 11,” report for the Center for Public Service, Brookings Institution, May 30, 2002, table 1.

32. Garment, *Scandal*, 2.

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

34. Reagan statement from “The President’s News Conference,” June 18, *Public Papers of the President, 1985*, 779. For a succinct discussion and useful bibliography of Iran-contra, see Dickinson, *Bitter Harvest*, chap. 1. The scandal is also addressed in chapter 6.

35. Lawrence E. Walsh, *Final Report of the Independent Counsel for Iran/contra Matters, Volume I: Investigations and Prosecutions* (Washington, DC: United States Court of Appeals, District of Columbia Circuit), August 4, 1993, 561.

36. For Dole, see Douglas Jehl, “Republicans Honor Weinberger,” *New York Times* (February 19, 1993), A18; James C. Roberts, “CPAC over Thirty Years: Conservatives Have Come a Long Way,” *Human Events Online* (February 3, 2003), 16, available at <http://www.humaneventsonline.com/article.php?id=272> (accessed May 24, 2004); Walter Pincus, “Bush Pardons Weinberger in Iran-Contra Affair,” *Washington Post* (December 25, 1992), A1. Meese is quoted in Richard L. Berke, “The Iran-Contra Report: Report Is Dividing the Parties Again,” *New York Times* (January 19, 1994), A9; Jeffrey Toobin, *A Vast Conspiracy* (New York: Touchstone, 2000), 70.

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

38. George Stephanopoulos, *All Too Human: A Political Education* (Boston: Little, Brown, 1999); Toobin, *Vast Conspiracy*, 66; Louis Fisher, “The Independent Counsel Statute,” in Mark J. Rozell and Clyde Wilcox, eds., *The Clinton Scandal and the Future of American Government* (Washington, DC: Georgetown University Press, 2000).

39. Quoted in Toobin, *Vast Conspiracy*, 67.

40. For a broad narrative overview, see Michael Isikoff, *Uncovering Clinton* (New York: Crown, 1999); Peter Baker, *The Breach: Inside the Impeachment and Trial of William Jefferson Clinton* (New York: Scribner, 2000); Kenneth W. Starr, *The Starr Report: The Findings of Independent Counsel Kenneth W. Starr on President Clinton and the Lewinsky Affair* (New York: PublicAffairs, 1998).

41. Fisher, “The Independent Counsel Statute,” 67–68; Spitzer, “Independent Counsel,” 98–99.

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

43. Acting Assistant Attorney General Dennis K. Burke to George W. Gekas, Chairman, Subcommittee on Commercial and Administrative Law, House Judiciary Committee, letter of April 13, 1999, reprinted at <http://www.brook.edu/dybdocroot/gs/ic/Burke/01.htm> (accessed February 5, 2004).

44. Corrado quoted in Ruth Marcus and Charles Babcock, “The System Cracks under the Weight of Cash,” *Washington Post* (February 9, 1997), A1; Zell Miller, “A Sorry Way to Win,” *Washington Post* (February 25, 2001), B7.

45. *Buckley v. Valeo*, 424 U.S. 1 (1976).

46. Gillon, “*That’s Not What We Meant to Do*,” 214–15.

47. David B. Magleby, ed., *Outside Money: Soft Money and Issue Advocacy in the 1998 Congressional Elections* (Lanham, MD: Rowman & Littlefield, 2000), chaps. 3–4.

48. Gillon, “*That’s Not What We Meant to Do*,” 222–23; Sorauf, *Inside Campaign Finance*, 148.

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

Presidential Campaign Finance,” in Adler and Genovese, eds., *Presidency and the Law*; Gillon, “*That’s Not What We Meant to Do*,” 227.

50. Marcus and Babcock, “The System Cracks”; see also Jane Mayer, “Inside the Money Machine,” *New Yorker* (February 3, 1997): 33–34; Gillon, “*That’s Not What We Meant to Do*,” 226; Dick Morris, *Behind the Oval Office: Winning the Presidency in the Nineties* (New York: Random House, 1997), 150–53.

51. Quoted in Corrado, *Paying for Presidents*, 10; spending figures for 1996–2004 are from the Center for Responsive Politics, available at <http://www.opensecrets.org> (accessed October 14, 2004).

52. *McConnell, et al. v. Federal Election Commission*, 02–1674 (2003).

53. One estimate tallied spending by 527 groups at \$386 million during the 2004 campaign: see “‘04 Elections Expected to Cost Nearly \$4 Billion,” Center for Responsive Politics, October 21, 2004. RNC chair Ed Gillespie quoted in Glen Justice, “F.E.C. Declines to Curb Independent Fund-Raisers,” *New York Times* (May 14, 2004), A16; Eliza N. Carney, Peter H. Stone, and James A. Barnes, “New Rules of the Game,” *National Journal* (December 19, 2003). Note that a federal district court judge ruled in September 2004 that the FEC’s regulations were “deficient” and would need to be rewritten, but her decision was immediately appealed and in any case did not affect the 2004 election. See Glen Justice, “Judge, Clarifying Decision, Says Spending Rules Stand,” *New York Times* (October 20, 2004), A22.

54. Michael Slackman, “G.O.P. Convention Cost \$154 Million,” *New York Times* (October 14, 2004), A1; Anthony Corrado, “Financing the 2000 Elections,” in Gerald M. Pomper, ed., *The Election of 2000* (Chatham, NJ: Chatham House, 2001), 95.

CHAPTER 6

1. Edwin Meese, III, *With Reagan: The Inside Story* (Washington, DC: Regnery, 1992), 322.

2. Terry M. Moe, “The Politicized Presidency,” in John Chubb and Paul E. Peterson, eds., *New Directions in American Politics* (Washington, DC: Brookings Institution, 1985), 235; Barilleaux, *Post-Modern Presidency*. But see Richard Rose, *The Postmodern President: The White House Meets the World* (Chatham, NJ: Chatham House, 1988), who argues that the president’s inability to manage the global community that so drastically affects the outcomes of the policies he pursues makes him “postmodern” in the sense of that word in other academic disciplines: fragmented and searching for meaning and “truth.”

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

self-conscious. See Louis Fisher, *Recess Appointments of Federal Judges*, Report RL31112, Congressional Research Service, September 5, 2001; Pete Earley, “Reagan Names Interim Board for Legal Services Corp.: Recess Appointments Bypass Senate,” *Washington Post* (November 24, 1984), A1; Myron Struck, “Reagan’s Recess Hirings Elicit Resentment,” *Washington Post* (July 11, 1984), A17; Henry B. Hogue, *Recess Appointments: Frequently Asked Questions*, Report RS21308, Congressional Research Service, September 10, 2002, 2.

4. See John Anthony Maltese, “The Presidency and the Judiciary,” in Nelson, ed., *Presidency and the Political System*, 510–11; David A. Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (Chicago: University of Chicago Press, 1999), chap. 6.

5. Richard P. Nathan, *The Administrative Presidency* (New York: Macmillan, 1983), 75; on “responsive competence,” see Moe, “Politicized Presidency”; Stephanopoulos, *All Too Human*, 210; Suskind, *Price of Loyalty*, 48–49 (emphasis in original); Rudalevige, “The ‘M’ in OMB.”

6. Paul C. Light, *Thickening Government* (Washington, DC: Brookings Institution, 1995), 190–92 (these figures are for executive branch positions classified at levels EL-1 through EL-5); Thomas J. Weko, *The Politicizing Presidency: The White House Personnel Office, 1948–1994* (Lawrence: University Press of Kansas, 1994); Mackenzie, “The State of the Presidential Appointments Process,” and James P. Pfiffner, “Presidential Appointments: Recruiting Executive Branch Leaders,” both in Mackenzie, ed., *Innocent until Nominated*, 37, 56–57.

7. Karen M. Hult, “The Bush White House in Comparative Perspective,” in Fred I. Greenstein, ed., *The George W. Bush Presidency: An Early Assessment* (Baltimore: Johns Hopkins University Press, 2003), 69.

8. Fisher, *Recess Appointments*; Neil A. Lewis, “Bypassing Senate for Second Time, Bush Seats Judge,” *New York Times* (February 21, 2004), A1, quoting Sen. Charles Schumer (D-NY); Sheryl Gay Stolberg, “Democrats Issue Threat to Block Court Nominees,” *New York Times* (March 27, 2004), A1; Neil A. Lewis, “Deal Ends Impasse Over Judicial Nominees,” *New York Times* (May 19, 2004), A17.

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

10. Barilleaux, *Post-Modern Presidency*, 17–21.

11. See Dickinson, *Bitter Harvest*, figure 1.2.

12. John Hart, “President Clinton and the Politics of Symbolism: Cutting the White House Staff,” *Political Science Quarterly* 110 (autumn 1995): 385–403.

13. Emanuel quoted in Alexis Simendinger, “The Paper Wars,” *National Journal* (July 25, 1998), 1737; Mayer, *With the Stroke of a Pen*, 79–87; Cooper, *By Order of the President*, 232 and chap. 2 generally. See also William G. Howell, *Power without Persuasion: The Politics of Direct Presidential Action* (Princeton: Princeton University Press, 2003), 83–85.

14. Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* (New Haven: Yale University Press, 1990), 46–48; Relyea, “National Emergency Powers.”

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

16. Cornelius M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy*, 3d ed. (Washington, DC: CQ Press, 2003).

17. W. Andrew Jack, “Note: Executive Orders 12,291 and 12,498: Usurpation of Legislative Power or Blueprint for Legislative Reform?” *George Washington University Law Review* 54 (May 1986): 521. See also the texts of those executive orders and, more generally, Mayer, *With the Stroke of a Pen*, 125–34. For a recent appraisal, see Cindy Skrzycki, “Tiny OIRA Still Exercises Its Real Influence Invisibly,” *Washington Post* (November 11, 2003), E1.

18. In February 2004 more than sixty scientists, including twenty Nobel Prize winners, signed a letter charging that the administration had disbanded advisory committees, salted other committees with unqualified members, and “censored reports by others when their scientific conclusions conflicted with administration policies,” especially in regard to a draft EPA report on global warming. See James Glanz, “At the Center of the Storm over Bush and Science,” *New York Times* (March 30, 2004), D1; Tom Hamburger and Alan C. Miller, “Mercury Emission Rule Geared to Benefit Industry, Staffers Say,” *Los Angeles Times* (March 16, 2004), A1; Andrew C. Revkin, “Bush vs. the Laureates: How Science Became a Partisan Issue,” *New York Times* (October 19, 2004), F1; more broadly, see Alexis Simendinger, “How Bush Flexes His Executive Muscles,” *National Journal* (January 26, 2002), 233.

19. Cooper, *By Order of the President*, 90–91, 94–96, 101, 105.

20. See Cooper, *By Order of the President*, 144. For example, Reagan called them National Security Decision Directives, George H. W. Bush called them National Security Directives, Clinton called them Presidential Decision Directives, and George W. Bush called them National Security Presidential Directives.

21. Cooper, *By Order of the President*, 165, 194–95, and chap. 6 generally.

22. “Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002,” November 28, *Public Papers of the Presidents, 2001*, 1459; Cooper, *By Order of the President*, chap. 7, esp. 204–5.

23. Examples are largely from Cooper, *By Order of the President*, chap. 7; for George H. W. Bush, see also Charles Tiefer, *The Semi-Sovereign Presidency* (Boulder, CO: Westview, 1994); for George W. Bush, see *Public Papers of the Presidents, 2001*, May 24, 575, and December 28, 1554. In 1988 Reagan refused to enforce an extension of the requirement that certain departmental budget

requests be included in the White House budget (as noted in chapter 3, these requirements arose to constrain the Nixon administration).

24. *Ameron, Inc., et al., v. U.S. Army Corps of Engineers, et al.*, 787 F.2d 875 (3d Cir. 1986); on the difficulty of overturning signing statements, see Cooper, *By Order of the President*, 222; 18 Opinions of the Office of Legal Counsel 199 (November 2, 1994), available at <http://www.usdoj.gov/olc/nonexecut.htm> (accessed February 8, 2005), which also contains examples of Supreme Court decisions that ignored the chance to rule signing statements out of order, from *Myers v. U.S.* in 1926 to *Freytag v. Commissioner* in 1991.

25. *INS v. Chadha*, 462 U.S. 919 (1983); Fisher, *Constitutional Conflicts*, 155.

26. Jessica Korn, *The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto* (Princeton, NJ: Princeton University Press, 1996); Joel D. Aberbach, “What’s Happened to the Watchful Eye?” *Congress and the Presidency* 29 (spring 2002), table 1; David Naither, “Congress as Watchdog: Asleep on the Job?” *CQ Weekly* (May 22, 2004), 1190. On the wave of stalled reauthorization bills, see Alex Wayne and Bill Swindell, “Capitol Hill Gridlock Leaves Programs in Limbo,” *CQ Weekly* (December 4, 2004), 2834.

27. K. Daniel Glover, “‘In the Belly of the Beast,’” *National Journal* (November 1, 2003), 3350–52; Light, *Monitoring Government*, 212ff. and chap. 8.

28. Stone, “Reagan Amendment,” 278–79; Banks and Bowman, “Executive Authority”; *Alliance to End Repression v. City of Chicago*, 742 F.2d 1007 (7th Cir. 1984).

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

30. Banks and Bowman, “Executive Authority”; David Cole, *Enemy Aliens* (New York: New Press, 2003), 185–86.

31. Gates, *From the Shadows*, 191ff.; John M. Oseth, *Regulating U.S. Intelligence Operations* (Lexington: University Press of Kentucky, 1985), 148ff.

32. Oseth, *Regulating U.S. Intelligence Operations*, 153–59; Executive Order 12333.

33. Gelbspan, *Break-ins, Death Threats, and the FBI*, 14–15.

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

35. “According to the accompanying interpretive memorandum prepared by the Justice Department, the FBI may authorize a full investigation if there are

statements threatening or advocating the use of violence, and an apparent ability to carry out the violence in a way that would violate federal law.” The tools allowed during preliminary investigations were also expanded. Banks and Bowman, “Executive Authority,” 108.

36. Public Law 104–132; Public Law 104–208; *CQ Almanac, 1996* (Washington, DC: CQ Press, 1997), section 5, 18ff.; Banks and Bowman, “Executive Authority,” 109–11.

37. *U.S. v. Nixon*, 418 U.S. 683 (1974); Rozell, *Executive Privilege*, 96–99; Fisher, *Constitutional Conflicts*, 187–88.

38. Rozell, *Executive Privilege*, 106–7.

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

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

41. Quoted in Ellen Nakashima and Dan Eggen, “White House Seeks to Restore Its Privileges,” *Washington Post* (September 10, 2001), A2.

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

43. Executive Order 13233 (Bush); Executive Order 12667 (Reagan). An earlier attempt by the Reagan Justice Department to provide former presidents with absolute privilege over their records, as an aspect of regulatory cost-benefit analysis, was overturned by the circuit court in 1988; see *Public Citizen v. Burke*, 843 F. 2d 1473 D.C. Cir. (1988), and Bruce P. Montgomery, “Nixon’s Ghost Haunts the Presidential Records Act: The Reagan and George W. Bush Administration,” *Presidential Studies Quarterly* 32 (December 2002): 796–99.

44. Montgomery, “Nixon’s Ghost,” 801–7.

45. Quoted in Rozell, *Executive Privilege*, 98.

46. Edwin Meese, III, “Attorney General’s Memorandum on the 1986 Amendments to the Freedom of Information Act,” December 1987, available at <http://www.usdoj.gov/04foia/86agmemo.htm> (accessed April 2, 2004); Public Law 99–570; Foerstel, *Freedom of Information*, 51–57; Diana M. T. K. Autin, “The Reagan Administration and the Freedom of Information Act,” in Curry, ed., *Freedom at Risk*, 69–72.

47. See Foerstel, *Freedom of Information*, 59.

48. The Clinton executive order was Executive Order 12958; some 900

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

49. Thomas Blanton, director of the private National Security Archive, quoted in Dana Milbank and Mike Allen, "Release of Documents is Delayed," *Washington Post* (March 26, 2003), A15. More broadly—and for similar reaction by legislators of both parties—see Alison Mitchell, "Cheney Rejects Broader Access to Terror Brief," *New York Times* (May 20, 2002), A1; Alexis Simendinger, "The Power of One," *National Journal* (January 26, 2002); Kirk Victor, "Congress in Eclipse," *National Journal* (April 5, 2003), 1069–70.

50. *Walker v. Cheney*, Civil Action 02–0340, U.S. District Court for the District of Columbia (December 9, 2002), 17 (the roster of task force members is on pp. 5–6); "GAO Press Statement on *Walker v. Cheney*," February 7, 2003, available on-line at http://www.house.gov/reform/min/pdfs/pdf_inves/pdf_energy_cheney_gao_no_appeal_state.pdf (accessed April 24, 2004); Dana Milbank, "GAO Ends Fight with Cheney Over Files," *Washington Post* (February 8, 2003), A4; Peter Brand and Alexander Bolton, "GOP Threats Halted GAO Cheney Suit," *The Hill* (February 19, 2003).

51. Theodore B. Olson et al., Brief for the Petitioners, *Cheney v. U.S. District Court for the District of Columbia*, U.S. Supreme Court Case 03–475, April 2004.

52. Judicial Watch brief quoted in Linda Greenhouse, "Administration Says a 'Zone of Autonomy' Justifies Its Secrecy on Energy Task Force," *New York Times* (April 24, 2004), I16; *Cheney v. U.S. District Court for the District of Columbia*, No. 03–475 (decided June 24, 2004). The appeals court subsequently dismissed the suit in May 2005.

53. Foerstel, *Freedom of Information*, 71; *Taylor v. Dept. of the Army*, 684 F.2d 99 (D.C. Circuit 1982).

54. Louis Fisher and David Gray Adler, "The War Powers Resolution: Time to Say Goodbye," *Political Science Quarterly* 113 (spring 1998): 1.

55. Adler's article, in homage to Francis Wormuth, is entitled "The Clinton Theory of the War Power," *Presidential Studies Quarterly* 30 (March 2000): 155.

56. Arguably, recent deployments in Colombia and the Philippines providing hundreds of military advisers to those countries' governments could be

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

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

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

59. Quoted in Fisher and Adler, “Time to Say Goodbye,” 5.

60. U.S. Department of Justice Office of Legal Counsel, letter of September 27, 1994, quoted in Fisher and Adler, “Time to Say Goodbye,” 11n36; Clinton in *Public Papers of the President, 1994*, 1419.

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

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

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

64. Fisher, *Presidential War Power*, 140–41; Peter Huchthausen, *America’s Splendid Little Wars: A Short History of U.S. Military Engagements, 1975–2000* (New York: Viking, 2003), chap. 4.

65. Fisher, *Presidential War Power*, 194–97. For a parallel argument, see Ely, *War and Responsibility*, 119–20.

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

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

68. See Barry M. Blechman, *The Politics of National Security* (New York: Oxford University Press, 1990), 186; see also Huchthausen, *Splendid Little Wars*.

69. Burgin, “Rethinking the Role of the War Powers Resolution,” 23–24, 40–42.
70. The Senate vote was 52–47; the House tally was 250–183. The quoted resolutions are H. Con. Res. 32 and H. Res. 95 of 1991.
71. Grimmatt, *War Powers Resolution*, 4–5.
72. *Campbell v. Clinton*, 52 F. Supp. 2d (D.D.C. 1994); more generally, see Ronald J. Sievert, “Campbell v. Clinton and the Continuing Effort to Reassert Congress’ Predominant Constitutional Authority to Commence, or Prevent, War,” *Dickinson Law Review* 105 (winter 2001): 157–79. The Powell quote, from *Goldwater v. Carter*, is on p. 167.
73. Gingrich quoted in Fisher, *Abdication*, 111; Dole quoted in Bob Woodward, *The Choice* (New York: Simon & Schuster, 1996), 332; Gilman in Barry Schweid, “U.S. Troops Stay in Bosnia, House Rejects Test of War Powers Act,” *Chicago Sun-Times* (March 19, 1998), 37.
74. King in Timothy Burger, “Near-Total Support from Congress,” *New York Daily News* (August 21, 1998), 6; Thompson in Jack Torry, “Congress Approves Attacks by U.S.,” *Pittsburgh Post-Gazette* (August 21, 1998), A15.
75. R. W. Apple Jr., “House to Debate Impeachment Today as US Continues Air Assault on Iraq,” *New York Times* (December 18, 1998), A1; Francis X. Clines, “In Capitol, One Crisis Too Many,” *New York Times* (December 17, 1998), A29.
76. Johnson, *Making of International Agreements*, 136.
77. Leslie Gelb, “Overseeing of CIA by Congress Has Produced Decade of Support,” *New York Times* (July 7, 1986), A1; Olmsted, *Challenging the Secret Government*, 63, 181; *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (New York: W. W. Norton, 2004), 105–6.
78. Olmsted, *Challenging the Secret Government*, 177; *CQ Almanac, 1986*, 70; Theodore Draper, *A Very Thin Line: The Iran-Contra Affairs* (New York: Touchstone, 1991), 586; Koh, *National Security Constitution*.
79. Kenneth E. Sharpe, “U.S. Policy toward Central America: The Post-Vietnam Formula under Siege,” in Nora Hamilton et al., eds., *Crisis in Central America: Regional Dynamics and U.S. Policy in the 1980s* (Boulder, CO: Westview, 1988), 21–24.
80. Draper, *Very Thin Line*, 18–24.
81. Draper, *Very Thin Line*, chap. 17.
82. Indeed, even when military aid resumed in 1986 after Nicaraguan president Daniel Ortega’s ill-considered visit to Moscow, and a presidential finding brought the CIA back into the operation, the agency was instructed not to inform the oversight committees. See Treverton, *Covert Action*, 4.
83. Draper, *Very Thin Line*, 343–46.
84. See Koh, *National Security Constitution*, who argues that the system has not been reformed even in the scandal’s wake. Louis Fisher has commented that

“efforts to understand the full dimensions [of the scandal] . . . were regularly thwarted by the strategy of destroying or withholding information, denying classified documents, and issuing presidential pardons. . . . There is hardly a shadow of political accountability.” “Constitutional Violence,” in Adler and Genovese, eds., *Presidency and the Law*, 198.

85. Quoted in Lundberg, “Congressional Oversight,” 27.

86. *9/11 Commission Report*, 104–7; Martin Kady II and Helen Fessenden, “Conference without Compromise Threatens Intelligence Rewrite,” *CQ Weekly* (October 16, 2004), 2455.

87. *Dames & Moore v. Regan* 452 U.S. 654 (1981); Loch Johnson, *Making of International Agreements*, 125–33 (quote is on p. 133); Kiki Caruson, “International Agreement-making and the Executive-Legislative Relationship,” *Presidency Research Group Report* 25 (fall 2002): 21–28.

88. See Pyle and Pious, *President, Congress*; see also David Gray Adler, “Termination of the ABM Treaty and the Political Question Doctrine,” *Presidential Studies Quarterly* 34 (March 2004): 156–66. Case references are *Goldwater v. Carter*, 444 U.S. 996 (1979); *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002).

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

90. Byrd in *Congressional Record*, December 13, 2001, S13120.

91. William J. Bennett, *The Death of Outrage: Bill Clinton and the Assault on American Ideals* (New York: Free Press, 1998); Nelson, *Presidency and the Political System*; David T. Canon and Kenneth R. Mayer, “Everything You Thought You Knew about Impeachment Is Wrong,” in Leonard V. Kaplan and Beverly I. Moran, eds., *Aftermath: The Clinton Impeachment and the Presidency in the Age of Political Spectacle* (New York: New York University Press, 2001), 47.

CHAPTER 7

1. See, e.g., Frank Bruni, “Bush Cites News Article to Renew Attack on Gore’s Fund-Raising,” *New York Times* (September 15, 2000), A31; Cheney quoted from NBC News broadcast interview of January 27, 2003, in Tom Curry, “Executive Privilege Again at Issue,” MSNBC.com, February 1, 2003, available at <http://www.msnbc.com/news/695487.asp?cp1=1> (accessed May 1, 2004); Adam Clymer, “Judge Says Cheney Needn’t Give Energy Records to Agency,” *New York Times* (December 10, 2002), A1; Card quoted in Alexis Simendinger, “Power Plays,” *National Journal* (April 17, 2004), 1168. Bush quoted in *Weekly Compilation of Presidential Documents* 38 (March 13, 2002), 411.

2. Nagourney, “Shift of Power to White House,” A1; Victor, “Congress in Eclipse,” 1066–70; Obey quoted in Lisa Caruso, “You’ve Got to Know

When to Hold 'Em," *National Journal* (July 12, 2003), 2258; Hagel quoted in David E. Rosenbaum, "In the Fulbright Mold, without the Power," *New York Times* (May 3, 2004), A16.

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

4. See Proclamation 7463, "Proclamation of National Emergency by Reason of Certain Terrorist Attacks"; text of Bush address from *CQ Almanac, 2001* (Washington, DC: CQ Press, 2002); Waters quoted in Carolyn Lochhead and Carla Marinucci, "'Freedom and Fear Are at War': Message to Americans, Warning to Taliban," *San Francisco Chronicle* (September 21, 2001), A1.

5. *Congressional Record*, September 14, 2001, H5682, S9416-18; Nancy Kassop, "The War Power and Its Limits," *Presidential Studies Quarterly* 33 (September 2003), 513-14; John Lancaster and Helen Dewar, "Congress Clears Use of Force, \$40 Billion in Emergency Aid," *Washington Post* (September 15, 2001), A4.

6. Eric Schmitt, "New Power to Down Jets Is Last Resort, Rumsfeld Says," *New York Times* (September 28, 2001), B7.

7. "President Delivers State of the Union Address," January 29, 2002, Office of the White House Press Secretary; Kassop, "War Power and Its Limits"; *National Security Strategy of the United States of America*, September 17, 2002, available at <http://www.whitehouse.gov/nsc/nss.html> (accessed May 4, 2004), especially part V. Note that additional details on the policy, some classified, were released in December 2002; the classified version evidently discussed the use of preemptive nuclear strikes to halt the transfer of weapons of mass destruction. See Mike Allen and Barton Gellman, "Preemptive Strikes Part of U.S. Strategic Doctrine," *Washington Post* (December 11, 2002), A1.

8. Public Law 105-338.

9. Suskind, *Price of Loyalty*, 70-76; Glenn Kessler, "U.S. Decision on Iraq Has Puzzling Past," *Washington Post* (January 12, 2003), A1; Bob Woodward, *Plan of Attack* (New York: Simon & Schuster, 2004); John Donnelly, "Cheney States Case for Action on Iraq," *Boston Globe* (August 27, 2002), A1.

10. Mike Allen and Juliet Eilperin, "Bush Aides Say Iraq War Needs No Hill Vote," *Washington Post* (August 26, 2002), A1.

11. Rumsfeld to Jim Lehrer, *PBS Newshour*, September 18, 2002; he also said at a July 30 news conference, "Are there al-Qaeda in Iraq? Yes." This remark quoted in Allen and Eilperin, "Bush Aides." For similar claims see, for example, Todd S. Purdum, "The U.S. Case against Iraq: Counting Up the Reasons," *New York Times* (October 1, 2002), A5. Princeton's Anne-Marie Slaughter quoted in Neil A. Lewis with David E. Sanger, "Bush May Request Congress's Backing on Iraq, Aides Say," *New York Times* (August 29, 2002), A1.

12. DeLay quoted in Alison Mitchell and Carl Hulse, “Congress Authorizes Bush to Use Force Against Iraq,” *New York Times* (October 11, 2002), A1; Daschle quoted in Anne E. Kornblut and Susan Milligan, “President Seeking Free Hand on Iraq,” *Boston Globe* (September 20, 2002), A1.

13. Quoted in Susan Milligan, “Bush Insists on Plan to Use Force without UN Backing,” *Boston Globe* (October 2, 2002), A16.

14. Public Law 107–243; Bush quoted in Ron Suskind, “Without a Doubt,” *New York Times Magazine* (October 17, 2004).

15. United Nations Security Council Resolution 1441, November 8, 2002; “U.S. Secretary of State Addresses the U.N. Security Council,” February 3, 2003, transcript from the Office of the White House Press Secretary, available at <http://www.whitehouse.gov/news/releases/2003/02/20030205-1.html> (accessed May 10, 2004); “Remarks to the Nation: President Says Saddam Hussein Must Leave Iraq Within 48 Hours,” March 17, 2003, transcript from the Office of the White House Press Secretary, available at <http://www.whitehouse.gov/news/releases/2003/03/20030317-7.html> (accessed May 10, 2004).

16. Kerry in debate of Democratic candidates at the University of Southern California, February 25, 2004; see also Jodi Wilgoren, “Kerry Says His Vote on Iraq Would Be the Same Today,” *New York Times* (August 10, 2004), A18.

17. David Barstow, William J. Broad, and Jeff Gerth, “How the White House Embraced Disputed Arms Intelligence,” *New York Times* (October 3, 2004), A1; see also Dana Priest, “Inquiry Faults Intelligence on Iraq,” *Washington Post* (October 24, 2003), A1; Richard W. Stevenson, “Remember ‘Weapons of Mass Destruction?’” *New York Times* (December 18, 2003).

18. “The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa,” President Bush told Congress on January 28, 2003.

19. Woodward, *Plan of Attack*, 249; Greg Miller, “Cheney Is Adamant on Iraq ‘Evidence,’” *Los Angeles Times* (January 23, 2004); James Fallows, “Blind into Baghdad,” *Atlantic* 293 (January–February 2004): 52–77; Condoleezza Rice, “Why We Know Iraq Is Lying,” *New York Times* (January 23, 2003); poll data from April 11–13, 2003, and March 23–24, 2003, reported in the trend data for the *New York Times*/CBS News Poll, April 23–27, 2004, reported in the *Times* on April 29.

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

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

21. *Senate Intelligence Report*, 239–57; Barstow, Broad, and Gerth, “How the White House Embraced Disputed Arms Intelligence”; Kay’s October 2, 2003, statement before the House Permanent Select Committee on Intelligence, the House Appropriations Committee Subcommittee on Defense, and the Senate Select Committee on Intelligence; and Greg Miller, “Insider Faults CIA on Iraq Analysis,” *Los Angeles Times* (January 31, 2004), A1; Dana Priest, “Inquiry Faults Intelligence on Iraq,” *Washington Post* (October 24, 2003), A1; Charles Duelfer, *Comprehensive Report of the Special Advisor to the Director of Central Intelligence on Iraq’s Weapons of Mass Destruction*, Central Intelligence Agency, September 30, 2004; Woodward, *Plan of Attack*, 434–42; Jonathan Landay, “Iraqi Defector, Source on WMD Claims, Was Cited as Unreliable,” *Philadelphia Inquirer* (May 18, 2004), A1; *9/11 Commission Report*, 66, 334; 9/11 Commission Staff Statement No. 15, 5, available at http://www.9-11commission.gov/staff_statements/staff_statement_15.pdf (accessed October 18, 2004).

22. Michael Ignatieff, “Lesser Evils: What It Will Cost Us to Succeed in the War on Terror,” *New York Times Magazine* (May 2, 2004), 49–50; Douglas Jehl, “Caution and Years of Budget Cuts Are Seen to Weaken C.I.A.,” *New York Times* (May 11, 2004), A1; Woodward, *Plan of Attack*, 107.

23. *9/11 Commission Report*, 403–16; Executive Orders 13354 and 13355; Douglas Jehl and David E. Sanger, “Bush Signs Order Bolstering CIA Director’s Power,” *New York Times* (August 27, 2004), A1; Walter Pincus, “CIA Chief’s Power a Hurdle in Intelligence Reform,” *Washington Post* (October 17, 2004), A13; Andrew Taylor, “In ‘Farce,’ Senators Pick Apart Oversight Restructuring Plan,” *CQ Weekly* (October 9, 2004), 2390; “Recommended, and Actual, Intelligence Reorganization,” *CQ Weekly* (December 11, 2004), 2942; Walter Pincus, “National Intelligence Director Proves to Be Difficult Post to Fill: Uncertainties over Role, Authority, Are Blamed for Delays,” *Washington Post* (January 31, 2005), A4. For discussion of U.S. Code, Titles 10 and 50, and Department of Defense interpretations of them, see Barton Gellman, “Secret Unit Expands Rumsfeld’s Domain: New Espionage Branch Delving into CIA Territory,” *Washington Post* (January 23, 2005), A1; see also Seymour M. Hersh, “The Coming Wars: What the Pentagon Can Now Do in Secret,” *New Yorker* (January 24–31, 2005).

24. Seymour M. Hersh, “Moving Targets: Will the Counter-Insurgency Plan in Iraq Repeat the Mistakes of Vietnam?” *New Yorker* (December 15, 2003); Hersh, “Coming Wars”; Jim Hoagland, “Bremer’s Legacy,” *Washington Post* (May 6, 2004), A35.

25. James Risen, David Johnston, and Neil A. Lewis, “Harsh C.I.A. Methods Cited in Top Qaeda Interrogations,” *New York Times* (May 13, 2004): A1; Bob Drogin, “Abuse Brings Deaths of Captives into Focus,” *Los Angeles Times* (May 16, 2004), A1; Dana Priest, “Memo Lets CIA Take Detainees out of Iraq: Practice Is Called Serious Breach of Geneva Conventions,” *Washington Post* (October 24, 2004), A1; Douglas Jehl, “U.S. Action Bars Right of Some Cap-

ured in Iraq,” *New York Times* (October 26, 2004), A1; Jack Goldsmith, Office of Legal Counsel, “Re: Permissibility of Relocating Certain ‘Protected Persons’ from Occupied Iraq,” draft memo of March 19, 2004, to Alberto Gonzales, White House Counsel. A similar but even broader conclusion was reached by OLC in October 2003; see Jehl, “U.S. Action.”

26. Bradley Graham, “Number of Army Probes of Detainee Deaths Rises to 33,” *Washington Post* (May 22, 2004), A17; more broadly see James P. Pfiffner, “Torture as Public Policy,” unpublished manuscript, George Mason University School of Public Policy, 5; and Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers* (New York: Cambridge University Press, 2005).

27. *Ex parte Quirin*, 317 U.S. 1 (1942); Louis Fisher, “Military Tribunals: A Sorry History,” *Presidential Studies Quarterly* 33 (September 2003): 491.

28. Gonzales memo of January 25, 2002, entitled “Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban,” quoted in John Barry, Michael Hirsh, and Michael Isikoff, “The Roots of Torture,” *Newsweek* (May 24, 2004), 30–31; Rumsfeld quoted in Katharine Q. Seelye, “First ‘Unlawful Combatants’ Seized in Afghanistan Arrive at U.S. Base in Cuba,” *New York Times* (January 12, 2002), A7 (emphasis added); Seymour Hersh, “The Gray Zone: How a Secret Pentagon Program Came to Abu Ghraib,” *New Yorker* (May 24, 2004); John Hendren, “Officials Say Rumsfeld OK’d Harsh Interrogation Methods,” *Los Angeles Times* (May 21, 2004), A1. The full texts of the Gonzales and OLC memos, and many others besides, were later made public and are collected on-line in various places, including the FindLaw.com Web site, and in Greenberg and Dratel, eds., *Torture Papers*.

29. Antonio Taguba, *Article 15–6 Investigation of the 800th Military Police Brigade*, U.S. Army (February 26, 2003); this is one of several official reckonings, with others in progress. Journalistic treatments include Seymour M. Hersh, “Torture at Abu Ghraib,” *New Yorker* (May 10, 2004), and *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: HarperCollins, 2004); Barry, Hirsh, and Isikoff, “Roots of Torture”; Douglas Jehl and Eric Schmitt, “Afghan Policies on Questioning Taken to Iraq,” *New York Times* (May 21, 2004), A1; Douglas Jehl, Steven Lee Myers, and Eric Schmitt, “Abuse of Captives More Widespread, Says Army Survey,” *New York Times* (May 26, 2004), A1; Neil A. Lewis, “Broad Use of Harsh Tactics Is Described at Cuba Base,” *New York Times* (October 17, 2004), A1; Jehl, “U.S. Action.”

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

Gonzales, “Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340–2340A,” Office of Legal Counsel, U.S. Department of Justice, August 1, 2002, 1–6, esp. 3.

31. Bybee, “Standards of Conduct,” 31–39; Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, U.S. Department of Defense, April 4, 2003, 21 and Section III generally. More generally, see Pfiffner, “Torture as Public Policy,” 12–14. Pfiffner points out that Article I, Section 8, of the Constitution gives Congress power “to make rules for the government and regulation of the land and naval forces.” The later administration position may be found in the written responses of Alberto Gonzales to Sen. Joseph Biden and other members of the Senate Judiciary Committee during confirmation hearings on his elevation to attorney general, January 2005.

32. President’s Military Order of November 13, 2001, esp. Sections 1–4, 7, as printed in the *Federal Register* 66, 57833ff; Alberto Gonzales, “Martial Justice, Full and Fair,” *New York Times* (November 30, 2001); Joseph Lelyveld, “‘The Least Worst Place’: Life in Guantánamo,” in Richard C. Leone and Greg Anrig Jr., *The War on Our Freedoms: Civil Liberties in an Age of Terrorism* (New York: PublicAffairs, 2003); Neil A. Lewis and Eric Schmitt, “Cuba Detentions May Last Years,” *New York Times* (February 13, 2004), A1; Neil A. Lewis, “Justice Memos Explained How to Skip Prisoner Rights,” *New York Times* (May 21, 2004), A12; Tim Golden, “After Terror, a Secret Rewriting of Terror Law,” *New York Times* (October 24, 2004), A1; Tim Golden, “Administration Officials Split over Stalled Military Tribunals,” *New York Times* (October 25, 2004), A1.

Bush quoted in Lelyveld, “Least Worst Place,” 104; Rumsfeld quoted in Wayne Washington, “Rumsfeld Defends Detainee Conditions,” *Boston Globe* (January 28, 2002), A1; Marine Major Michael Mori, quoted in Neil A. Lewis, “Military Defenders for Detainees Put Tribunals on Trial,” *New York Times* (May 4, 2004), A1. Mori gave the example of motions (for the admission of evidence, e.g.), which are not decided by the panel of judges but by the officer who approved the charges against the defendant in the first place. See also the arguments of defense counsels Lt. Commander Charles Swift in Jess Bravin, “As War Tribunal Opens, Legality Is Challenged,” *Wall Street Journal* (August 25, 2004), B1, and Lt. Colonel Sharon Shaffer in Jess Bravin, “U.S. Tribunal’s Hearings Befuddle Attorneys, War-Crimes Suspects,” *Wall Street Journal* (August 30, 2004), A2. The case in question was *Hamdan v. Rumsfeld*, Civil Action No. 04–1519, United States District Court for the District of Columbia (November 8, 2004); the decision is under appeal as of this writing.

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

34. For a more detailed approach to this question, see Jennifer Elsea, “Presidential Authority to Detain ‘Enemy Combatants,’” *Presidential Studies Quarterly* 33 (September 2003): 585; Kassop, “War Powers,” 517–20.

35. Sessions and Hatch quoted in Robin Toner, “Senators Spar Carefully in Hearing on Security,” *New York Times* (December 7, 2001); Relyea, “Presidential Authority,” 596–97.

36. See the cases of *Rasul v. Bush* (03–334) and *Al Odah v. U.S.* (03–343), administration brief, 15–17; Barry, Hirsh, and Isikoff, “Roots of Torture”; petitioners’ brief in *Odah*, 22–23; *Al Odah v. U.S.* (02–5251), U.S. Court of Appeals, D.C. Circuit (March 11, 2003).

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

38. “Combatant Status Review Tribunal Order Issued,” U.S. Department of Defense News Release No. 651–04, July 7, 2004; Toni Locy, “Tribunal Orders Release of Guantánamo Detainee,” *USA Today* (September 8, 2004); Neil A. Lewis, “Guantánamo Prisoners Getting Their Day, but Hardly in Court,” *New York Times* (November 8, 2004), A1.

39. Dana Milbank and Robin Wright, “Off the Mark on Cost of War, Reception by Iraqis,” *Washington Post* (March 19, 2004): A1; *Paying for Iraq’s Reconstruction*, Congressional Budget Office, January 23, 2004.

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

41. Jonathan Weisman and Thomas E. Ricks, “Increase in War Funding Sought,” *Washington Post* (October 26, 2004), A1; Public Law 109–13.

42. Bremer quoted in Kirk Victor, “Escalating Hostilities,” *National Journal* (October 4, 2003), 3021; Warner quoted in Richard A. Oppel Jr., “In Rebuff to Bush, Senate Raises Bar for Tax Cuts,” *New York Times* (March 11, 2004), A20; John Diamond, “Buying Own Gear Is Common for Troops,” *USA Today* (June 25, 2003). The supplemental budget became Public Law 108–106 on November 6, 2003.

43. For details of the Emergency Response Fund, see the *Congressional Record*, September 14, 2001, S9413; Woodward, *Bush at War*, 137; Dan Moran, “Democrats Question Use of 9/11 Emergency Fund,” *Washington Post* (April 27, 2004), A19; Woodward interview with Matt Lauer on NBC’s *Today*, April 19, 2004.

44. Public Law 108–106, §3001 et seq.; Bush, “Statement on Signing the Emergency Supplemental Appropriations Act for Defense and for the Recon-

struction of Iraq and Afghanistan, 2004,” *Weekly Compilation of Presidential Documents* 39 (November 6, 2003): 1549.

45. Ariana Eunjung Cha and Renae Merle, “Line Increasingly Blurred Between Soldiers and Civilian Contractors,” *Washington Post* (May 13, 2004), A1; David Barstow, “Security Companies: Shadow Soldiers in Iraq,” *New York Times* (April 19, 2004), A1; Dan Baum, “Nation Builders for Hire,” *New York Times Magazine* (June 22, 2003), 32.

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

47. Erik Eckholm, “Top Army Official Calls for a Halliburton Inquiry,” *New York Times* (October 25, 2004); Letter of May 6, 2003, Rep. Henry A. Waxman to U.S. Army Corps of Engineers; Letter of November 6, 2003, Waxman to U.S. AID; memo of March 10, 2004, Waxman to Democratic Members of House Government Reform Committee entitled “New Information about Halliburton Contracts,” all available at <http://www.house.gov/reform/min/> (accessed May 14, 2004); Victor, “Escalating Hostilities,” 3021; Public Law 108–106, §§2202–03.

48. Jackie Spinner and Ariana Eunjung Cha, “U.S. Decisions on Iraq Spending Made in Private,” *Washington Post* (December 27, 2003), A1; L. Elaine Halchin, *The CPA: Origins, Characteristics, and Institutional Authorities*, Report RL32370, Congressional Research Service, April 29, 2004.

49. Public Law 107–296; Gail Russell Chaddock, “Federal Work Culture Set for Makeover,” *Christian Science Monitor* (December 11, 2002), 2; Christopher H. Schmitt and Edward T. Pound, “The Power of the Fine Print,” *U.S. News & World Report* 135 (December 22, 2003): 27, referring to Section 214(a)(1)(D)(ii); “Statement by the President,” Office of the White House Press Secretary, November 25, 2002, available at <http://www.whitehouse.gov/news/releases/2002/11/20021125-10.html> (accessed May 14, 2004).

50. Philip Shenon and Elisabeth Bumiller, “Bush Allows Rice to Testify on 9/11 in a Public Session,” *New York Times* (March 31, 2004), A1; “Excerpts from White House Letter on Rice’s Testimony,” *New York Times* (March 31, 2004), A14. The charges against Bush had been raised in testimony and a book by former NSC counterterrorism aide Richard A. Clarke.

51. Card memo and guidance of March 19, 2002, Justice Department Web site, available at <http://www.usdoj.gov/oip/foiapost/2002foiapost10.htm> (accessed May 13, 2004); the Heritage Foundation’s Mark Tapscott, “Growing Secrets Increase Concern: Loopholes Abound to Hide Information,” *Harrisburg Patriot-News* (November 24, 2002), F1; Dana Milbank, “Under Bush, Expanding Secrecy,” *Washington Post* (December 23, 2003): A19; Christopher H. Schmitt and Edward T. Pound, “Keeping Secrets,” *U.S. News & World Report* 135 (December 22, 2003): 18–29; “Washington in Brief,” *Washington Post* (February 1, 2005), A4.

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

ans, Defense Lawyers,” *St. Louis Post-Dispatch* (November 11, 2001), B1; “Remarks of Attorney General John Ashcroft: Attorney General Guidelines,” May 30, 2002, U.S. Department of Justice; Bill Miller, “Ashcroft: Old Rules Aided Terrorists; FBI Agents Get Freer Hand,” *Washington Post* (May 31, 2002), A13.

53. David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York: New Press, 2003), 25; Adam Liptak, Neil A. Lewis, and Benjamin Weiser, “After Sept. 11, a Legal Battle over Limits of Civil Liberty,” *New York Times* (August 4, 2002), A1; Lyle Denniston, “Justices Won’t Review Secret Deportation Hearings,” *Boston Globe* (May 28, 2003), A3. Note that the 6th Circuit Court of Appeals ruled for opening hearings, warning ominously that “democracies die behind closed doors.” That ruling was not appealed, meaning that hearings would stay open in the four states of the 6th Circuit Court of Appeals and closed elsewhere. The FOIA charges noted in note 51 were in relation to these detention cases.

54. For information on TIA and other data collection efforts, see Ann Davis, “Data Collection Is Up Sharply Following 9/11,” *Wall Street Journal* (May 22, 2003), B1; Michael Sniffen, “High-Tech Spying Program Closed,” *Chicago Tribune* (September 25, 2003), 11; “Washington in Brief,” *Washington Post* (September 26, 2003), A14; and the documents collected by the Electronic Privacy Information Center at <http://www.epic.org/privacy/profiling/tia> (accessed April 17, 2005). TIA director John M. Poindexter defends the program in “Finding the Face of Terror in Data,” *New York Times* (September 10, 2003), A25.

55. Public Law 107–56; Charles Doyle, “Section by Section Analysis of the USA PATRIOT Act,” CRS RL31200, Congressional Research Service, December 10, 2001; Kathleen M. Sullivan, “Under a Watchful Eye,” in Leone and Anrig, eds., *War on Our Freedoms*; Harry F. Tepker, “The USA PATRIOT Act,” *Extensions* (fall 2002): 9–13; Bob Barr, “Testimony Submitted to the Senate Judiciary Committee Concerning the USA PATRIOT Act, the SAFE Act, and Related Matters,” September 22, 2004, available at <http://judiciary.senate.gov> (accessed October 25, 2004); Keith Perine, “Judge Puts Civil Liberties Ahead of Patriot Act Provision,” *CQ Weekly* (October 2, 2004), 2305. The case is *John Doe and ACLU v. Ashcroft, et al.*, expected to be heard by the Second Circuit Court of Appeals in 2005.

56. Shelby report in Cam Simpson, “Murky ‘Wall’ a Scapegoat for 9/11 Failures,” *Chicago Tribune* (April 15, 2004), 24; Stuart Taylor Jr., “9/11: Save Some Blame for Courts that Created the ‘Wall,’” *National Journal* (April 17, 2004); see also the response to Ashcroft by former Justice Department official Jamie S. Gorelick, his main target, in “The Truth about ‘the Wall,’” *Washington Post* (April 18, 2004), B7. See also the *9/11 Commission Report*, 78–80.

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

58. Eric Lichtblau, “Secret Warrant Requests Increased in 2003,” *New York Times* (May 3, 2004), A18.

59. For a discussion on the “thoughtful” end of the spectrum, see the essays in Leone and Anrig, eds., *War on Our Freedoms*; Cole, *Enemy Aliens*. The on-line magazine *Slate* also produced a substantive four-part series entitled “Should You Be Scared of the Patriot Act?” available at <http://slate.msn.com/id/2087984/> (accessed May 20, 2004).

60. “President: FBI Needs Tools to Track Down Terrorists,” remarks at FBI Headquarters, Office of the White House Press Secretary, September 25, 2001.

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

62. *CQ Almanac, 2001* (Washington, DC: CQ Press, 2002), 1–10; Tepker, “PATRIOT Act,” 10. For a detailed but rather self-promoting list of changes to administration proposals, see the section-by-section analysis of the Patriot Act produced by Sen. Patrick Leahy (D-VT) and available at <http://leahy.senate.gov/press/200110/102401a.html> (accessed May 19, 2004). The vote on the conference committee report was 98–1 in the Senate (only Feingold dissented) and 357–66 in the House.

63. Neil A. Lewis, “Ashcroft Defends Antiterror Plan and Says Criticism May Aid Foes,” *New York Times* (December 7, 2001), A1; Adam Clymer, “Justice Dept. Balks at Effort to Study Antiterror Powers,” *New York Times* (August 15, 2002), A14; Dan Eggen, “Ashcroft Assailed on Policy Review,” *Washington Post* (August 21, 2002), A2; Dan Eggen, “White House Intensifies Efforts to Safeguard Patriot Act,” *Washington Post* (January 30, 2004), A2; John Ashcroft to Sen. Orrin Hatch, letter of January 28, 2004. While Justice was unable to respond to congressional inquiry, Attorney General Ashcroft did manage to squeeze in a multicity speaking tour in 2003, promoting the Patriot Act to hand-picked law enforcement audiences, and the Justice Department also launched an extensive Web site, <http://www.lifeandliberty.gov>, to combat what it claimed were inaccuracies in critics’ accounts of the act.

64. James B. Comey, Deputy Attorney General, “A Review of Counter-Terrorism Legislation and Proposals,” statement to the U.S. Senate Committee on the Judiciary, September 22, 2004, available at <http://judiciary.senate.gov> (accessed October 25, 2004).

65. Eric Lichtblau, “Ashcroft Seeks More Power to Pursue Terror Suspects,” *New York Times* (June 6, 2003); Michael Isikoff, “Brooklyn’s Version of Abu Ghraib?” *Newsweek* (May 24, 2004), 5; *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, Office of the Inspector General, U.S. Department of Justice, June 2003; Office of the Inspector General, U.S. Department of Justice, *Supplemental Report on September 11 Detainees’ Allegations of Abuse at the*

Metropolitan Detention Center in Brooklyn, New York, December 2003; *Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act*, Office of the Inspector General, U.S. Department of Justice, July 2003; Sarah Kershaw and Eric Lichtblau, “Spain Had Doubts before U.S. Held Lawyer in Madrid Blasts,” *New York Times* (May 26, 2004), A1; Eric Lichtblau, “Inquiry into FBI Questioning Is Sought,” *New York Times* (August 18, 2004), A16; Adam Liptak, “For Post-9/11 Material Witness, It Is a Terror of a Different Kind,” *New York Times* (August 19, 2004), A1; J. M. Kalil and Steve Tetreault, “Patriot Act: Law’s Use Causing Concerns,” *Las Vegas Review-Journal* (November 5, 2003); U.S. Department of Justice, *Report from the Field: The USA PATRIOT Act at Work* (July 13, 2004), available at http://www.lifeandliberty.gov/docs/071304_report_from_the_field.pdf (accessed October 25, 2004).

66. Ashcroft quoted in Lichtblau, “Ashcroft Seeks More Power”; “President Bush Calls for Renewing the USA PATRIOT Act,” Hershey, Pennsylvania, Office of the White House Press Secretary, April 19, 2004; Alexander Bolton, “Presidential Push Fails to Quell GOP Fear of Patriot Act,” *Hill* (May 12, 2004); Anita Ramasastry, “Patriot II: The Sequel,” Findlaw.com (February 17, 2003); Martin Kady II and Helen Fessenden, “Conference without Compromise Threatens Intelligence Rewrite,” *CQ Weekly* (October 16, 2004), 2455; Dan Eggen, “Measure Expands Police Powers: Intelligence Bill Includes Disputed Anti-Terror Moves,” *Washington Post* (December 10, 2004), A1.

67. Theodore Olson et al., “Brief for the Respondents in Opposition,” *Hamdi v. Rumsfeld* (U.S. Supreme Court, 03–6696); Paul J. McNulty et al., “Brief for Respondents–Appellants,” *Hamdi v. Rumsfeld* (4th Circuit Court of Appeals, June 19, 2002); *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Circuit, 2002); “Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy,” July 24, 2002; Elsea, “Presidential Authority to Detain,” 584–85, 591.

68. Olson quoted in Charles Lane, “In Terror War, 2nd Track for Suspects,” *Washington Post* (December 1, 2002), A1; more broadly, see Elsea, “Presidential Authority to Detain,” 591–94; Anthony Lewis, “Security and Liberty: Preserving the Values of Freedom,” in Leone and Anrig, eds., *War on Our Freedoms*, 52–58; Richard B. Schmitt, “Government Says Padilla Plotted High-Rise Attacks,” *Los Angeles Times* (June 2, 2004), A1.

69. Linda Greenhouse, “Detention Cases before Supreme Court Will Test Limits of Presidential Power,” *New York Times* (April 18, 2004), I19; administration briefs submitted at various levels regarding *Padilla v. Rumsfeld* and *Rumsfeld v. Padilla*; 2d Circuit opinion in *Padilla v. Rumsfeld* (December 18, 2003). The transcript of the oral arguments before the Supreme Court may be found on the Court’s Web site, http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03–1027.pdf (accessed May 10, 2004).

The Non-Detention Act is Public Law 92–128, codified at 18 USC 4001 (a);

as noted in chapter 4, it was passed to repeal the Emergency Detention Act of 1950.

70. *Hamdi v. Rumsfeld*, 03–6696, and *Rumsfeld v. Padilla*, 03–1027, both decided June 28, 2004.

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

72. Neil A. Lewis, “Disagreement over Detainees’ Legal Rights Simmers,” *New York Times* (November 1, 2004), A15; Lewis, “Guantánamo Prisoners Getting Their Day”; Dan Eggen, “Two Indicted on Charges Related to Terrorism,” *Washington Post* (September 17, 2004), A3. On the government’s original official position on Hamdi, see the “Declaration of Donald D. Woolfolk,” submitted June 13, 2002, as part of the administration’s court filings. Woolfolk testified that “permitting such access to detainee Hamdi may create substantial harm to U.S. national security interests.”

73. July 2001, October 2001, and May 2002 figures are from Mackenzie and Labiner, “Opportunity Lost,” tables 1–2; October 2003 figures are from *Newsweek* poll of October 9–10, reported briefly in Howard Fineman and Karen Breslau, “Arnold’s Earthquake,” *Newsweek* (October 20, 2003): 26–31, and in more detail in *Newsweek’s* press release: “*Newsweek* Poll: California Recall Election Reaction,” PR Newswire, October 11, 2003.

74. The statute is the 1982 Intelligence Identities Protection Act. See, e.g., Eric Lichtblau, “Special Counsel Is Named to Head Inquiry on C.I.A. Leak,” *New York Times* (December 31, 2003), A1.

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

Illegal,” *New York Times* (May 4, 2004), A17; Robert Pear, “Inquiry Proposes Penalties for Hiding Medicare Data,” *New York Times* (September 8, 2004), A16; Ceci Connolly and Mike Allen, “Medicare Drug Benefit May Cost More Than Reported: New Estimate Dwarfs Bush’s Original Price Tag,” *Washington Post* (February 9, 2005), A1.

76. Alexis Simendinger, “The Papers, Please,” *National Journal* (November 1, 2003), 3354; David E. Sanger, “When Goals Meet Reality,” *New York Times* (March 31, 2004), A1; Eric Schmitt, “Defense Leaders Faulted by Panel in Prison Abuse,” *New York Times* (August 24, 2004), A1; Douglas Jehl and Eric Schmitt, “Army’s Report Faults General in Prison Abuse,” *New York Times* (August 26, 2004), A1.

77. Robert Novak, “Iraq Reconstruction Held Up by D.C. Infighting,” *Chicago Sun Times* (February 26, 2004), 43; John W. Dean, “More Than Just His Location Remains Undisclosed: Why Dick Cheney’s Secrecy Scheme for Pre-9/11 Information Makes No Sense,” FindLaw.com, available at <http://writ.news.findlaw.com/dean/20020524.html> (accessed April 24, 2004). Dean would go on to elaborate his claim, arguing that the Bush administration’s assertions of secrecy were, in the words of his book, *Worse than Watergate* (Boston: Little, Brown, 2004). See also Jim Rutenberg, “White House Keeps a Grip on Its News,” *New York Times* (October 14, 2002), C1.

78. Anne Kornblut and Wayne Washington, “GOP Rebukes Daschle for War Plan Criticism,” *Boston Globe* (March 19, 2003), A1; Dana Milbank, “Tying Kerry to Terror Tests Rhetorical Limits,” *Washington Post* (September 24, 2004), A1.

79. Presidential support scores from *CQ Almanacs* for relevant years, 1994–2002; Joseph J. Schatz, “With a Deft and Light Touch, Bush Finds a Way to Win,” *CQ Weekly* (December 11, 2004), 2900. Hook, “\$328-Billion Spending Bill,” A18; Morgan, “House Passes \$328 Billion Spending Bill,” A1; Daschle comments in *Congressional Record*, January 23, 2004, S207. The House Resolution was H.Res. 557, adopted March 17, 2004. The Rudman report is cited in “Rudman-Foley Task Force Scolds Congress on Homeland Security Oversight,” *CQ Today Midday Update* (December 10, 2004).

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

report detailing one month's worth of insurgent attacks in Iraq is detailed in James Glanz and Thom Shanker, "Iraq Study Sees Rebels' Attacks as Widespread," *New York Times* (September 29, 2004), A1.

81. Pentagon consultant quoted in Hersh, "The Gray Zone"; David E. Rosenbaum, "Uncertainty Reigns as Nov. 2 Nears," *New York Times* (October 31, 2004), IV2.

82. Eric Schmitt, "Senators Assail Request for Aid for Afghan and Iraq Budgets," *New York Times* (May 14, 2004), A1; Tyler Marshall, "The Conflict in Iraq: Unease Shadows Bush's Optimism," *Los Angeles Times* (September 17, 2004), A1.

83. Sen. John Cornyn (R-TX) quoted in Carl Hulse and Christopher Marquis, "G.O.P. Split Over Inquiry on Prisoner Abuse," *New York Times* (May 19, 2004), A12.

CHAPTER 8

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

2. Carter in Rudalevige, *Managing the President's Program*, 134; Sorensen in Charles Roberts, ed., *Has the President Too Much Power?* (New York: Harper's Magazine Press, 1974), 27.

3. Schlesinger, *Imperial Presidency*, x (emphasis in original).

4. Jackson, concurring opinion to *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

5. Nixon, *In the Arena*, 238.

6. Kenneth A. Shepsle, "The Changing Textbook Congress," in John Chubb and Paul Peterson, eds., *Can the Government Govern?* (Washington, DC: Brookings Institution, 1989).

7. Robert Bendiner, *Obstacle Course on Capitol Hill* (New York: McGraw-Hill, 1964), 15.

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

9. Quoted in Lundberg, "Congressional Oversight," 24.

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

11. Madison in Mayer and Canon, *Dysfunctional Congress?* 48; Schultze in Rudalevige, *Managing the President's Program*, 127.

12. Terry Moe, "The Politics of Bureaucratic Structure," in Chubb and Peterson, eds., *Can the Government Govern?*; Fiorina, *Congress: Keystone*.

13. Neustadt, *Presidential Power*, 317. For extended treatments of rather dif-

ferent uses of the term *postmodern*, see Rose, *Postmodern President*, and Barilleaux, *Post-Modern Presidency*. As noted in chapter 6, my conclusion is closer to Barilleaux's, though owing much to Rose's discussion of global pressures on American policy.

14. Theodore B. Olson et al., "Brief for the Petitioner," *Rumsfeld v. Padilla* (03–1027), 37.

15. Cheney, "Congressional Overreaching in Foreign Policy," in Robert A. Goldwin and Robert A. Licht, eds., *Foreign Policy and the Constitution* (Washington, DC: American Enterprise Institute, 1990), 120; Washington quoted in Stuart Taylor Jr., "An Invasion of Iraq Requires the Approval of Congress," *National Journal* (August 31, 2002), 2434.

16. Letter to William Herndon, quoted in Pyle and Pious, *President, Congress*, 298–99 (emphasis in original).

17. See the transcript in H. L. Pohlman, *Constitutional Debate in Action: Governmental Powers* (New York: HarperCollins, 1995), 182–83 and chap. 4 generally.

18. For Kleindienst's testimony, see Pohlman, *Constitutional Debate in Action*, 232–34; for *U.S. v. Nixon*, see Leon Friedman, ed., *United States v. Nixon: The Complete Case* (New York: Chelsea House, 1974), 480, 574, 596.

19. From the transcript of the oral arguments before the U.S. Supreme Court in *Rumsfeld v. Padilla*, April 28, 2004, available from the Court's Web site, <http://www.supremecourtus.gov>.

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

21. Preemption and prevention are not, of course, the same thing. Preemption supposes imminence: a "direct, immediate, specific threat," such as an invading force massed on one's border. As such, it has had far more legitimacy over time. See Schlesinger, *War and the American Presidency*, 23–24.

22. NSC-68 is discussed in chapter 2. Robert Kennedy, from the transcript of a meeting held on October 22, 1962, in Ernest R. May and Philip D. Zelikow, eds., *The Kennedy Tapes: Inside the White House during the Cuban Missile Crisis* (Cambridge, MA: Harvard University Press, 1997), 234. Kennedy had earlier (October 18) argued, “We’ve fought for fifteen years with Russia to prevent a first strike against us. Now, in the interest of time, we do that to a small country? I think it’s a hell of a burden to carry” (149). See also Schlesinger, *War and the American Presidency*, 22–23.

23. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948).

24. Corwin, *President: Office and Powers*, 218; Rehnquist, *All the Laws but One*, 219.

25. Justice Jackson, dissenting opinion to *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); Justice Arthur Goldberg, in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), mirroring Jackson’s language in *Terminiello*.

26. William S. White, “Daughter Chides Truman on Talk,” *New York Times* (April 18, 1955), 12.

27. Brandeis, dissent to *Myers v. U.S.*, 272 U.S. 52 (1926); Anthony Lewis, “Farce or Tragedy,” *New York Times* (February 2, 1976), 23; Gingrich quoted in Haynes Johnson and David S. Broder, *The System: The American Way of Politics at the Breaking Point*, paperback ed. (Boston: Little, Brown, 1997), xiv.

28. Quoted in Victor, “Escalating Hostilities,” 3023.

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

30. Sundquist, *Decline and Resurgence*, 155.

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

32. Schlesinger, *Imperial Presidency*, 375.

33. Vandenberg in James Reston, “Bewildered Congress Faces World Leadership Decision,” *New York Times* (March 14, 1947); Ron Paul, in “Congress Abdicates War Powers,” *New American* (November 4, 2002), 5; LBJ in Ely, *War and Responsibility*, 53.

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

35. See, among many others, Nelson Polsby, *The Consequences of Party Reform* (New York: Oxford University Press, 1983); Thomas E. Patterson, *Out of Order* (New York: Vintage, 1994); Martin P. Wattenberg, *The Rise of Candidate-Centered Politics* (Cambridge, MA: Harvard University Press, 1992). Some scholars have argued that party elites have by now managed to adapt somewhat

to the primary process by manipulating funding and activist endorsements. See Marty Cohen, David Karol, Hans Noel, and John Zaller, *Beating Reform: The Resurgence of Parties in Presidential Nominations* (Chicago: University of Chicago Press, forthcoming.)

36. Ceaser, *Presidential Selection*, 16.

37. Richard F. Fenno Jr., *Home Style: House Members in Their Districts* (Boston: Little, Brown, 1978), 168 and chap. 7.

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

39. Staff figures from Norman J. Ornstein, Thomas E. Mann, and Michael J. Malbin, eds., *Vital Statistics on Congress, 1999–2000* (Washington, DC: American Enterprise Institute, 2000), chap. 5. Days spent in session available from the calendar of the House of Representatives, compiled at <http://thomas.loc.gov/home/ds/index.html> (accessed January 17, 2005). The average number of House session days in the decade 1970–79 was 160; by 1990–99 this figure had fallen to 135, itself skewed upward by the very busy “Republican Revolution” session of 1995. For the post-9/11 sessions of 2002 and 2003, the House was in session just 126 and 138 days, respectively, and just 110 days in 2004.

40. O’Neill quoted in Morris P. Fiorina, “The Presidency and Congress: An Electoral Connection?” in Nelson, ed., *Presidency and the Political System*, 2d ed., 424; David Maraniss and Michael Weisskopf, “*Tell Neut to Shut Up!*”: *How Reality Gagged the Gingrich Revolution* (New York: Touchstone, 1996), 179. See, generally, Norman J. Ornstein and Thomas E. Mann, eds., *The Permanent Campaign and Its Future* (Washington, DC: American Enterprise Institute, 2000).

41. For a good brief review of incumbency advantage, see Gary King, “Constituency Service and Incumbency Advantage,” *British Journal of Political Science* 21 (January 1991): 119–28. For 2004, see, e.g., Charlie Cook, “2004 Competitive House Race Chart,” *Cook Political Report*, May 14, 2004. Cook felt that only fourteen races, 3 percent of the total, could be considered “toss-ups.” See <http://www.cookpolitical.com> (accessed May 26, 2004).

42. *Vieth v. Jubelirer*, No. 02–1580 (decided April 28, 2004). See also David G. Savage and Scott Gold, “Justices Order Review of Texas’ Political Map,” *Los Angeles Times* (October 19, 2004), A10.

43. See the *New York Times*/CBS News Poll, October 28–30, 2004; for 1972–2002 data see the National Election Studies Guide to Public Opinion and Electoral Behavior, available at <http://www.umichap.edu/~nes/nesguide/> (accessed May 24, 2004); Keith T. Poole and Howard Rosenthal, *Congress: A Political-Economic History of Roll Call Voting* (New York: Oxford University Press, 2000) and on-line updates at http://voteview.uh.edu/default_recpol.htm (accessed May 24, 2004).

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

ation on the theme, “Presidential Power and Public Prestige: A ‘Snarly Sort of Politics,’” paper presented at the “*Presidential Power Revisited*” Conference, Woodrow Wilson International Center for Scholars, Smithsonian Institute, June 1996. For the role of the size of legislative majorities, see Howell, *Power without Persuasion*. John Stuart Mill, *Considerations on Representative Government* (London: Parker, 1861), 251.

45. R. Douglas Arnold, *The Logic of Congressional Action* (New Haven: Yale University Press, 1990).

46. Hatch quoted in Lewis, “Ashcroft Defends Antiterror Plan.”

47. The quote is Finley Peter Dunne’s fictional Mr. Dooley; but see the more rigorous treatments in Forrest Maltzman, Lee Sigelman, and Paul J. Wahlbeck, “Supreme Court Justices Really Do Follow the Election Returns,” *PS: Political Science and Politics* 37 (October 2004): 839–42, and the classic Robert A. Dahl, “Decision Making in a Democracy: The Supreme Court as a National Policy-Maker,” *Journal of Public Law* 6 (1958): 279–95.

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

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

50. Austin Ranney, “Broadcasting, Narrowcasting, and Politics,” in Anthony King, ed., *The New American Political System* (Washington, DC: AEI Press, 1990).

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

52. The phrase “vast right-wing conspiracy” was coined by First Lady Hillary Rodham Clinton in early 1998. See, e.g., David Maraniss, “Clinton & Clinton: First Lady’s Energy, Determination Bind a Power Partnership,” *Washington Post* (February 1, 1998), A1. See more broadly Jim Carville, *And the Horse He Rode in On: The People Vs. Kenneth Starr* (New York: Simon & Schuster, 1998); Joe Conason and Gene Lyons, *The Hunting of the President: The Ten Year Campaign to Destroy Bill and Hillary Clinton* (New York: St. Martin’s, 2000).

53. Bush remarks in “Bush Welcomes President Chirac to White House,” November 6, 2001, Office of the White House Press Secretary, and in “President’s Remarks at Ask President Bush Event in Derry, New Hampshire,” September 20, 2004, Office of the White House Press Secretary; Ashcroft quoted in Lewis, “Ashcroft Defends Antiterror Plan”; Hastert quoted in Anne Kornblut and Wayne Washington, “GOP Rebukes Daschle for War Plan Criti-

cism,” *Boston Globe* (March 19, 2003), A1; DeLay quoted in his office’s press release of December 16, 2003 entitled “Dean Flew Over the Cuckoo’s Nest,” available at <http://www.majorityleader.gov/news.asp?FormMode=Detail&ID=208> (accessed May 20, 2004), and in Mike Allen, “Bush Apologizes, Calls Abuse ‘Stain’ on Nation,” *Washington Post* (May 7, 2004), A1. The congressman in question was Rep. John Murtha (D-PA).

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

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

56. For recent examples from the war on terror, see Sen. Edward Kennedy’s speech to the Senate of May 10, 2004, or Rep. Robert Wexler’s (D-FL) House speech of March 17, 2004.

57. Taft quoted in Schlesinger, *Imperial Presidency*, 137, and from his speech to the Executive Club of Chicago, December 19, 1941, quoted among many other places in Michael Tomasky, “Dems’ Fightin’ Words,” *American Prospect* 13 (August 26, 2002).

58. Robert Dahl, “Introduction,” in John Hersey, *Aspects of the Presidency: Truman and Ford in Office* (New York: Ticknor & Fields, 1980), xi.