In the late 1970s, former president Richard Nixon had claimed to the Senate and the American public that a president had power to set aside laws enacted by Congress. Few then accepted Nixon's blunt assertion that "when the president does it, that means that it is not illegal." But his claim was not forgotten. Ten years later, in 1987, the same claim reappeared in the minority section of a congressional report about the Iran-Contra scandal. According to the minority report, "the Chief Executive will on occasion feel duty bound to assert monarchical notions of prerogative that will permit him to exceed the laws." The leading congressional advocate of this view was a new representative from Wyoming by the name of Richard Cheney; when four commercial airplanes became instruments of mass murder on the morning of September 11, 2001, Dick Cheney had become vice president of the United States.

At the onset of a national emergency, Americans understandably turn to the White House for leadership. As head of the executive branch and the security agencies it contains—the FBI, the CIA, and the Department of Defense—the President is best equipped among the three branches of government to respond immediately to crisis. On 9/11, jets scrambled, emergency services rallied, and law enforcement began investigations, as indeed they should have. More than five years later, however, at the time of this writing, the executive remains the dominant, almost exclusive, branch of government choosing and wielding national security tools in response to terrorist threats. President George W. Bush acts with little deference to or collaboration with Congress or the federal courts on matters he considers relevant to national security. Further, the views of the Iran-Contra minority report are now official policy and practice of the United States. For the first time in American history, the executive branch claims authority under the Constitution to set aside laws permanently—including prohibitions on torture and warrantless eavesdropping on Americans. A frightening idea decisively rejected at America's birth—that a president, like a king, can do no wrong—has reemerged to justify torture and indefinite presidential detention.

This is a book about how this new theory of unchecked presidential power
developed and why it is embarrassingly wrong. This theory upsets the delicate balance of our constitutional government, sullies the nation's name, and hurts vital counterterrorism campaigns. The theory is not a response to 9/11, but, as the 1987 minority report suggests, has long been nurtured by the leaders of today's Bush Administration. Moreover, the executive branch's mistakes are uncannily familiar. During the Cold War, intelligence agencies slipped into similar sorts of overreaching and abuse because of a lack of checks and balances. But Cold War errors are multiplied in scale today by the theory of unlimited presidential power.

This "monarchical executive" argument is deployed to many ends: for example, to defeat laws barring both torture and cruel or degrading treatment; to underwrite the "outsourcing" of torture to other countries, such as Syria and Egypt; to detain individuals, including Americans, indefinitely without any due process; to spy on Americans' telephone calls and e-mails in violation of federal statutes and, at times, the Fourth Amendment; and to infiltrate and keep watch on domestic groups protesting government policy.

The framers of the Constitution and those who ratified it were acutely aware of threats both from overseas and from chief executives who wished to set aside the law. They recognized that if democratic government was to persist, no single individual—selected by lineage or popular suffrage—could be blindly trusted to wield power wisely. So they restrained each branch of government from grasping excess power and dominating the others. This system of checks and balances was unique to the new republic. As James Madison explained, arguing for the Constitution's ratification,

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government, which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place, oblige it to control itself.\(^3\)

The Constitution entrenched not only a public power to judge leaders at the ballot box but also "auxiliary precautions" to stymie leaders' inevitable efforts to immunize themselves from accountability. Reflecting Madison's insights, the Constitution does not simply divide government power among three separate branches—a lawmaking part in Congress; a law-executing part in the president and his departments and agencies; and an adjudicative part in the federal courts—it also fashions a system of separate institutions sharing power, thus restraining each other from power's abuse. No one branch may entirely ignore the others when the nation's interests are at stake. Indeed, in a majority of vital decisions implicating constitutional values of national importance, each of the three branches typically plays some role. Contrary to much recent commentary, questions of national security are no exception to this rule. The Founders also believed this system of "checks and balances" was liberty's first and best defense.\(^4\) The Bill of Rights followed as supplemental protection.

The checks and balances were termed "auxiliary" by the Founders because the American public was to have the final checking power at the ballot box. But democratic accountability at the polls is also intertwined with the checks and balances imposed by separate branches sharing powers. For the public to play its proper checking role at the ballot box, citizens must know what is done by government in their name. Between periodic elections, Congress and the courts are tasked with preventing the executive branch from obscuring policies and their consequences from public scrutiny and thus entrenching itself against electoral testing. Democracy cannot be reduced to a biennial trip to the polling station.

Yet at many points in American history, fear and crisis have temporarily shifted power to executive branch officials who have been tempted to ignore the Constitution's wise restraints. Decisions to ignore the Constitution's system of checks and balances, however, have rarely made the nation safer.\(^5\)

In 1798, a mere decade after the Constitution's passage, President John Adams and his Federalist Party allies in Congress forced through the Alien and Sedition Acts in response to fears of French revolutionary radicalism. These Acts criminalized citizens' speech critical of the government and allowed deportation, by order of the president alone without judicial review, of aliens deemed dangerous. Legal historian Geoffrey Stone explains that the Sedition Act, although defended as a way to strengthen the nation in its impending war with France, in fact "served primarily as a political weapon to strengthen the Federalists in their "war" against political opponents led by Vice President Thomas Jefferson. Federalist prosecutors argued that it was criminal for ordinary citizens to "raise surmises and suspicions of the wisdom" of the president's "measures." Thomas Cooper, a publisher and pamphleteer critical of the Adams Administration who was charged under the Sedition Act, argued to a jury that "I know in England their King can do no wrong, but I did not know till now that the President of the United States had the same attribute." Cooper and nine other citizens were nevertheless convicted of the "crime" of criticizing the Administration.\(^6\)

The twentieth century again witnessed executive officers using unilateral security powers for political gain during the Palmer Raids. After World War I, the Department of Justice launched dragnet raids against immigrant communities, arresting and deporting thousands of innocent people without warrants.
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the former Soviet Union and Great Britain, had no organized secret intelligence services. What previously was ad hoc and informal became bureaucratic, regularized, and effective—a powerful tool concentrated almost exclusively in presidents’ hands. The FBI’s domestic security activities burgeoned. The CIA and the National Security Agency (or NSA) were born and rapidly expanded to enormous proportions. In 2005, the federal government spent $44 billion on the intelligence community’s sixteen agencies and 100,000 staff.13

With the swift growth of intelligence and security agencies came unprecedented secrecy. From the Alien and Sedition Acts to the Japanese American internment, executive branch overreaching largely took place in plain sight of the public. During the Cold War, secrecy justified in the name of “national security” hid governmental actions from Congress and the public, further undermining the Constitution’s checks and balances.

Intelligence agencies’ excesses during the Cold War came to public light most comprehensively in 1975–1976, through an investigation conducted by a Senate Select Committee known as the Church Committee after its chair, Senator Frank Church of Idaho.14 In Part I of this book, we detail the Church Committee’s investigation of the intelligence agencies, particularly the FBI, the CIA, the NSA, and other components of the Defense Department. The Church Committee found that these agencies had exceeded their authority through abusive surveillance and disruption of political activity at home (e.g., trying to provoke Martin Luther King Jr. to commit suicide) and unwise overseas covert action (e.g., hiring the Mafia to try to assassinate Cuba’s Fidel Castro, and supporting the overthrow of Chile’s democratically elected government). Although men and women of the intelligence agencies directly committed abuses, the most serious breaches of duty were those of presidents and other senior executive branch officials who, the Church Committee determined, had the “responsibility” for controlling intelligence activities and generally failed to assure compliance with the law.15

The Church Committee identified four key institutional flaws in government operating procedures that fostered reckless and immoral use of intelligence powers. These flaws undermined checks and balances during the Cold War, and are being repeated today to the detriment of the nation’s security, compounded now by the “monarchical executive” theory.

First, national security activities were organized under ambiguous laws and fuzzy instructions. These imprecise mandates placed no effective constraint on national security agencies. When laws fail to channel or limit the executive’s use of power, Congress fails in its threshold checking function.

The second institutional flaw diagnosed by the Committee was that senior executive branch officials gave implicit orders to violate the law. Sometimes these took the form of euphemism, sometimes winks and nods. Together, am-

or access to counsel. Eyeing a run for the White House and playing to the ethnic prejudices of the day, Attorney General A. Mitchell Palmer, chief instigator of these raids, condemned the detainees as people with “sly and crafty eyes . . . lopsided eyes, sloping brows and misshapen features.” Executive power in the name of national security, operating without accountability, instead secured political goals.

In February 1942, some twenty years after Palmer’s folly, President Franklin Delano Roosevelt issued a presidential order interning 117,000 Japanese Americans on the West Coast in “relocation camps.” Initially, this decision was made without congressional approval or judicial input. Cooler heads within the Administration reacted with alarm. Even before the internment, when lesser restraints on aliens were under discussion, Attorney General Robert H. Jackson warned the President not to make “scapegoats” of all aliens as “Germany has made [scape]goats of all Jews.” The FBI and military officials said the “vast majority” of Japanese Americans were “loyal to the United States.” In the end, although both Congress and the Supreme Court gave post hoc approval to the internments, not a single documented act of espionage, sabotage, or treasonable activity of a person of Japanese descent living on the West Coast occurred.8

It was irrational fear and prejudice—marching in lockstep with Roosevelt’s narrow electoral calculations—that propelled the Japanese internment. General John DeWitt, responsible for the army on the West Coast, rendered a report recommending internment of all West Coast Japanese Americans. His report is recognized today as a “travesty” based on “unsubstantiated and even fabricated assertions.” DeWitt saw no danger that this Court, the attack upon its validity has carried the day in the court of public opinion.10

These examples of executive overreaching motivated by fear, prejudice, partisan bias, or parochial gain find homes in our constitutional heritage today—as examples of what not to do. One hundred and sixty-four years after Thomas Cooper’s Sedition Act conviction, the Supreme Court, in the New York Times v. Sullivan case, observed that “although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”11 Four decades after the internment of Japanese Americans, Congress and President Ronald Reagan apologized for “the fundamental injustice” and offered financial reparations.12 Although the Japanese American detentions were never formally repudiated, the Supreme Court’s opinion authorizing them has nonetheless become a byword for judicial abdication.

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The third flaw was that executive branch officials relied on an expectation of permanent secrecy to shroud the broad outlines and guiding assumptions of policy—not just operational specifics—from testing before Congress and the public. Secrecy further corroded officials' inclination to ask themselves whether their decisions would violate the law. Time and again during the Cold War, executive branch officials broke clear laws without a second thought, thinking they would never be held to account for their trespasses.

Finally, feeble congressional oversight of national security activities translated into an utter failure of accountability. Until the mid-seventies, Congress either did nothing to put an end to executive branch adventurism or knowingly turned a blind eye. As Supreme Court Justice Robert H. Jackson warned, ultimate power may rightly belong to Congress, "but only Congress itself can prevent power from slipping through its fingers."17

These institutional failings disabled the constitutional decision-making process envisaged by the Founders. They overly empowered the executive branch and yielded policies counter to our nation's elementary commitments to liberty, human dignity, and decency. The absence of initial legal restraints and subsequent oversight meant that intelligence agencies extended unwarranted powers beyond even initial targets. This entirely predictable consequence is dubbed "mission creep." During the Cold War period, those charged with protecting America thus moved, for example, from disrupting communists to disrupting civil rights leaders, antiwar protestors, and other social activists. Institutional failings led to plainly illegal acts—sometimes purposeful, sometimes because, as one federal agent explained, "we never gave it a thought."18

While the Church Committee stimulated some important statutory reforms, by the mid-1980s many of the same flaws began to reappear.

Today, a new and more hazardous incarnation of executive overreach is in evidence. Part II of this book details three of the leading ways in which the post-September 11 executive branch is misusing its intelligence and security powers: authorizing illegal torture and abuse in American-run facilities overseas; endorsing the "extraordinary rendition" system, whereby detainees are transferred for torture to other countries whose human rights records the State Department condemns; and engaging at home in illegal executive detention and spying. The growth of the intelligence bureaucracy during the Cold War means that the damage the executive branch can inflict when it oversteps the laws unchecked by other branches has increased exponentially.

With the exception of domestic spying—a conspicuous common feature of executive lawbreaking during the Cold War and again today—the specific forms of overreaching are new. But procedural failings familiar from the Cold War past are visible again. Ambiguous laws and fuzzy instructions, indirect orders, the expectation of permanent secrecy, and failures of congressional oversight all allow the White House and the intelligence and security agencies under its purview to adopt abusive tactics and drift into sweeping application of harsh tactics to innocent people.

Today, the President also deploys the monarchical executive theory to justify and shelter overreaching by intelligence and security agencies. Part III of this book explains how this theory developed, why it is wrong, and why it is significantly more dangerous than Cold War practices. It also explores how government lawyers played a pivotal role in bringing forth a monarchical executive.

The monarchical executive theory was not simply a response to 9/11. It was a realization of the vision first articulated in the Iran-Contra minority report headlined by then-congressman Dick Cheney. Within weeks of the 9/11 attacks, Vice President Cheney and his senior legal advisor David Addington, who had also been at Cheney's side in the Iran-Contra investigation, urged that the Administration ignore prohibitions on government searches contained in the Constitution's Fourth Amendment and in a host of federal prohibitions and start intercepting Americans' e-mails and telephone calls. Similar logic was also soon used to justify extraordinary rendition and indefinite detention without trial.19

The executive branch has many means at its disposal to put the monarchical executive theory into action. Inevitably, executive branch lawyers must interpret the laws when they apply them. This gives the Administration an opportunity to exploit ambiguities or simply sidestep legal obligations. Post-9/11, the Department of Justice drafted legal opinions that reinterpreted the laws in unreasonable, and clearly erroneous, ways. Government lawyers also argued that the presidents could ignore the law simply by invoking unspecified "national security" concerns. These legal opinions remained secret—so neither Congress nor the public knew of the laws being set aside. Dissenters within the executive branch were excluded from decision making; some were pushed out of government. And the President, when signing laws, began issuing declarations that he did not intend to follow literally hundreds of provisions of law.

But presidential unilateralism has not made the nation safer. Overreaching and the resulting abuse of elementary human rights costs us our liberties and others' support; it drives some into the arms of the enemy; and it corrodes the moral center of our nation's constitutional heritage. As General Colin L. Powell explained in September 2006, condemning an executive branch effort to water
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down antitorture rules, "The world is beginning to doubt the moral basis of our fight against terrorism." In the current battle for hearts and minds—where success must be measured in terms of our ability to dissuade recruits to the enemy and to attract the support of allies—the resulting harm is great. Dodging the law, the President and other high officials are forced into hypocrisy or falsehoods to justify their illicit or immoral actions. Such mendacity inevitably saps both our international allies' confidence in us and our own rule of law.

Five years of President George W. Bush's "war on terror" confirm a lesson drawn from 230 years of American history: when government responds to security threats by ignoring the Constitution's checks and balances, America's security, its moral luster, and its standing in the world are all diminished.

The 2006 elections showed in stark relief the centrality of checks and balances, of oversight and accountability. Few elections have so plainly been a referendum on the conduct of a presidency. Iraq, of course, was central. But more than the specifics of troop withdrawals and military strategy, it was real accountability voters emphatically demanded. Dozens of successful candidates accused their opponents of being "rubber stamps" for the Administration. The election of 2006 was thus a mandate for Congress to play its proper constitutional role. And it offers leaders of both parties a chance to remedy past errors.

This book does three things. First, it describes what went wrong. It is a Baedeker to the paths not taken, showing the consequences of oversight's absence in a constitutional system spun out of balance. Second, it explains why untrammeled executive power, power wholly out of keeping with the basic American constitutional order, is hazardous to America's safety and its values. Finally, it offers a road map for citizens and legislators of both parties who wish to reestablish the checks and balances that define our government and its place in the world.

From the nation's founding on, we have been at our strongest when policies are formulated by deliberative, open, and democratic processes, and when they embody the values underpinning the Declaration of Independence and the Constitution. Without the clarity that informed criticism brings, and without candid public debate about goals and means, our security policy all too often becomes illicit, foolish, and harmful.

The current situation demands a meaningful democratic dialogue that openly, soberly, and without recrimination wrestles with how America ought to deal with terrorism threats. What is needed now is a bipartisan commitment to real oversight, and a rejection of the executive unilateralism that brought us torture, "extraordinary rendition," and domestic surveillance. This means not just oversight, as the voters in the 2006 election sought. It also demands a reconsideration of the structures through which we achieve accountability. We must reach solutions through well-informed public debate. This means letting go of tools fashioned in the dark of unilateral White House deliberation. It means letting go of policies that cause us to lose both the goodwill of mankind and our own self-respect and integrity. And it means an informed dialogue that avoids cheap prejudice or partisan politics. There is no "Republican" or "Democratic" way to deal with terrorism. To be critical of the current Administration is not necessarily to be partisan. Rather, these are tough questions for all Americans. As Abraham Lincoln proposed at an earlier, far bloodier moment in American history, we must enter the debate "with malice toward none; with charity for all . . . to bind up the nation's wounds."
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Conclusion: A Republic, If You Can Keep It

A lady asked Dr. Franklin [as he left the Philadelphia Constitutional Convention] Well Doctor what have we got a republic or a monarchy. A republic replied the Doctor if you can keep it.
—Papers of Dr. James McHenry on the Federal Convention of 1787

The Constitution endures so long as the American people preserve it.

Since 1787, each new generation of Americans has asked itself whether it would take up the "unfinished work" begun by Franklin and his fellow delegates. Will, today, the form of government established in the Constitution of 1787 persevere? Or, by fear or inadvertence, will it slip away?

In the name of national security, the Administration of President George W. Bush claims that the Constitution's structure of separated branches sharing powers is inadequate. It claims we must place unfettered, absolute trust in the executive branch. Our nation's history—from the Sedition Act to the illicit domestic spying and disruption and the harmful foreign covert actions exposed by the Church Committee—teaches that such claims are dangerous, as well as unfounded. As the Church Committee wrote, imprecise and open-ended authorizations, "coupled with the absence of any outside scrutiny," invariably have led "to improper use of intrusive techniques against American citizens who posed no criminal or national security threat to the country." And the actions of the Bush Administration since 9/11 prove once again that power cannot be safely entrusted to one person alone.

With an arrogance born of historical amnesia, the Bush Administration invoked 9/11 to claim a power unprecedented on this side of the North Atlantic to suspend or wholly circumvent laws passed by Congress barring torture, detention without judicial review, and wiretapping without warrants. Its claims were not simply responses to the threat manifested on 9/11. Rather, fifteen years earlier, Dick Cheney and David Addington had made the very same claims for sweeping executive power in their Iran-Contra minority report. September 11 gave them the opportunity to implement this long-cherished vision, and a chance to slander and scare opponents with the smear of disloyalty.

Why should we be concerned about the monarchist claims of executive power? We have shown that these claims contravene the Founding Generation's understanding of human nature, the language of the Constitution, the history of its adoption, and judicial precedent. But the case against the monarchic vision of presidential power is not just that it is wrong. It is also that it is harmful to American interests. Said to make us safer, it in fact makes us less secure.

Because all human beings are flawed, and none are "angels," and because power corrupts, our Constitution sought to increase the chance of wise—and reduce the chance of foolish—decisions by involving all three branches in important decisions. The Bush Administration believes only the executive, or a small coterie within the executive, should determine key policies, acting largely in secret. As they reject a role for the other branches at home, so they act internationally without genuine consultations with our allies overseas.

The Administration insists that its plunge into torture, its lawless spying, and its lock-up of innocents have made the country safer. Beyond mere posturing, they provide little evidence to back up their claims. Executive unilateralism not only undermines the delicate balance of our Constitution, but also lessens our human liberties and hurts vital counterterrorism campaigns. How? Our reputation has always mattered. In 1607, Massachusetts governor John Winthrop warned his fellow colonists that because they were a "City on a Hill," "the eyes of all people are upon us."" Thomas Jefferson began the Declaration of Independence by invoking the need for a "decent respect to the opinions of mankind." In today's battle against stateless terrorists, who are undeterred by law, morality, or the mightiest military power on earth, our reputation matters greatly.

Despite its military edge, the United States cannot force needed aid and cooperation from allies. Indeed, our status as lone superpower means that only by persuading other nations—and their citizens—that our values and interests align with theirs, and so merit support, can America maintain its influence in the world. Military might, even extended to the globe's corners, is not a sufficient condition for achieving America's safety or its democratic ideals at home. To be "dictatrix of the world," warned John Quincy Adams in 1821, America "would be no longer the ruler of her own spirit." A national security policy loosed from the bounds of law, and conducted at the executive's discretion, will unfailingly lapse into hypocrisy and mendacity that alienate our allies and corrode the vitality of the world's oldest democracy.

The 9/11 Commission concluded that success against the terrorists themselves is not simply a matter of killing or capturing people. It means neutralizing their ideology. It means stopping their ideas from spreading, viruslike, seeding new recruits, new threats. Thus, French scholar Giles Kepel explains that "the Bush Administration's war on terror...succeeded in stirring up un-
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post-9/11 victory. By undermining America’s moral credibility, the administration’s hypocrisies lent unwarranted credence to the apocalyptic, confrontational ideologies of bin Laden and his fellow travelers, ideologies that seek to depict America and Europe as implacably hostile to Islam in an effort to garner wider support in the Muslim world.6

Making the executive supreme makes the nation no safer—either from its enemies or its own worse impulses. Indeed, the abiding genius of the Founding Generation was its rejection of the idea that unchecked unilateral power is ever properly vested in any one branch of government. Our government was framed “to control itself,” as James Madison wrote in the Federalist Papers. “Ambition must be made to counteract ambition.” Dividing powers between three branches, the Founders harnessed human passions in the cause of limited government. Madison, again writing in the Federalist Papers, provided the enduring explanation for this division of government: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” For this reason, the framers and ratifiers of the Constitution entrenched “the essential precaution in favor of liberty” by fashioning a Constitution of separate branches that shared powers so that “the whole power of one department” would never be exercised “by the same hands which possess the whole power of another department.”7

Under our Constitution, the people therefore elect a “body of citizens” in Congress with “enlightened views and virtuous sentiments.” These representatives have the lion’s share of national power—unless they surrender their independent power. Many of those powers concern war making and foreign affairs, and the latter are often inextricable from questions of war and peace. But a monarchical vision of presidential power neuters these congressional powers. It renders hollow the elaborate process of representative democracy if a single person can alter in secret the laws that protect human liberty and bodily integrity, and then cloud from public sight the consequences of these acts. The threat of terrorism will not end soon. To the contrary, accelerating technological change makes it easier to unleash destructive force against innocents. This time of terror will last well into the twenty-first century. Al Qaeda and its terrorist allies act without moral qualms. Without question, our responses must be resolute, resourceful, and determined. But in their zeal to help defend the nation, the President and his subordinates have lost sight of the Constitution’s guidance without clear gains to the nation’s safety. Reaction to the errors and excesses of the Bush Administration, however, cannot mean a retreat into fortress America. As former Church Committee member Gary Hart warned, “Insecurity has shredded national boundaries, leapfrogged great armies, and is all around us.”8 A retreat from the world would not make us safer.

Recognizing therefore that the battles will be long and hard, the Republic must nonetheless endure. Staying the course charted by the original Constitution means resisting the lures of unchecked power, which cannot be a long-term solution and which, in any case, works poorly even in the short-term. Constitutional government under law, the kind crafted in the Constitution and left to succeeding generations’ care, demands the division and dispersion of power between the three branches.

So, what can we do? First and foremost, to rebuild the Constitution’s checks and balances, the Congress must act—as the Supreme Court began to do in its 2006 decision on military commissions—by enacting meaningful limiting legislation and by holding effective oversight hearings. This process began in fall 2006, as legislators considered a gamut of legislation on military commissions, coercive interrogations, and indefinite lockup. But this debate has been hindered by a lack of information and a surfeit of partisanship. Instead of measured debate and meaningful responses, Congress reduced accountability, most importantly by cutting back on the protection of habeas corpus. For the gain of a few sound bites in a midterm election, legislators of both parties shamefully sold a heritage of historical liberty dating back to the Magna Carta. All too often, however, we have seen, “the text of the Constitution places all the power in Congress, but the structure of the presidency is such, and the structure of Congress is such, that the power tends to flow from Congress to the presidency and that leadership tends to be looked for in the President.” Congress’s unwillingness to take responsibility for difficult security decisions shows predictable human weakness. As Yale law scholar Charles Black noted in 1975, “ Pretending not to have power is a way of passing the buck; and Congress has abundantly passed the buck.”

Torture policy, extraordinary rendition, warrantless domestic spying, indefinite presidential lockup: the executive branch developed all of these tactics without Congress’s knowledge and with total disregard for statutory prohibitions. Even after the 2006 election, government lawyers continued to press the monarchical executive theory in a challenge to the NSA’s warrantless domestic spying presented in Michigan federal court. And in Washington, D.C., other Justice Department lawyers argued that one Guantánamo detainee should not be permitted to speak to his lawyer lest he reveal what coercive tactics (or torture) were used in his interrogation. But Congress can make a difference here. Sixty years ago, Senator Harry Truman knew that to monitor the activities of the Roosevelt Administration was not to seek revenge or to obstruct the government—it was the only way to assure that taxpayer interests would be protected and that the war would be waged effectively. Oversight alone, to be sure, rarely will be enough to steer policy. But does anybody truly
preceded hatred for America around the world." Kepel accordingly ranks America's decision to adopt its enemies' tactics as bin Laden's most important post-9/11 victory. By undermining America's moral credibility, the administration's hypocrisies lent unwarranted credence to the apocalyptic, confrontational ideologies of bin Laden and his fellow travelers, ideologies that seek to depict America and Europe as implacably hostile to Islam in an effort to garner wider support in the Muslim world.

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believe that we would have seen the explosion of illegal activity, unjustifiable torture, and legal end runs had the Administration been required to defend its actions before empowered and diligent congressional overseers?

Congress will change its ways when voters start demanding that it fulfill its Constitutional mandate. We need a new “contract” between representatives and their electors, one in which all recognize that neither security nor liberty are partisan issues, and that a Congress that leaves too much to the White House is a Congress that falls far short of its duties. Voters, both Democratic and Republican, must ask their candidates whether they are willing to fulfill their constitutional responsibilities.

Yet, to do so means overcoming long-standing structural and partisan difficulties. The Bush Administration has parlayed national security into a partisan issue, stifling and polarizing debate, echoing the days of the Alien and Sedition Acts. Control of the White House and Congress by one party inevitably dampens oversight even more. According to Harvard Law School professor Daryl Levinson, political party affiliation is now “a much more important variable in predicting the behavior of members of Congress vis-à-vis the President than the fact that these members work in the legislative branch.” From the start of national politics, the theory of separate branches with distinct institutional interests foundered against the reality of national political parties. Since the election of 1800, moreover, chief executives have claimed a special popular mandate in election victories, and asserted a transcendent claim to national leadership that allowed legislators to ride a president’s coat tails. This mythic mandate, political scientist Robert Dahl argues, “not only impairs deliberation but also other means to a more enlightened understanding on the part of citizens and the Congress” of the common good.

Congress today is also brutally fissured. In the House, most seats are blatantly gerrymandered to reduce democratic competition and push winners away from the center. Legislators stagger under a flood of federal campaign monies. Democracy is compromised in this fractious, dollars-soaked milieu. But the stakes today are too high, both for political parties and the American people, for corrosive partisan games to persist.

There are, moreover, 535 members of Congress, speaking in a Babel of voices; there is but one president. The executive branch benefits from “unity” and “duration,” making decision-making quicker, although not wiser. Today, the executive also draws on intelligence resources backed by at least forty-four billion dollars spread across sixteen intelligence agencies that employ one hundred thousand agents and analysts. It controls what information the Congress and the people get from the intelligence community, and thus can contort public understanding of the value of intelligence activities.

Overcoming partisanship, the myth of the presidential mandate, and the structural disadvantages of being a multimember body, demand more than a one-time fix. As an initial matter, the Church Committee demonstrated that nonpartisan investigations and oversight are feasible even in the face of presidential intransigence. And the Church Committee cannot be written off as an isolated incident. The 9/11 Commission similarly strived to overcome party bias, even arranging its seating to break up clusters of Republicans and Democrats. Similarly, three decades before the Church Committee, Harry Truman, as a senator, conducted a vast investigation that effectively exposed military waste and inefficiency during World War II, even while his own party held the White House.

Beyond reducing partisanship, Congress needs to find enduring statutory mechanisms to ensure that it has the information and the corrective devices to identify and stop mission creep, plausible deniability, and outright flouting of the law. It still needs, in other words, to heed the calls for comprehensive statutory organization of intelligence agencies that came from both the Church Committee and the 9/11 Commission. Pivotal to both the Church Committee and 9/11 Commission reform agendas was the need for new framework statutes for intelligence agencies, laws that laid down clear responsibilities and, by implication, imposed clear limits on intelligence work. Yet this need, acknowledged by various Congresses and White Houses, has never been met.

Congress has failed to match the rapid growth of intelligence agencies with a legal infrastructure for supervising and restraining those agencies. More than fifty years after the National Security Act, the CIA still operates with skeletal statutory guidance. The NSA only recently obtained a statutory mandate—but one that is still far too ambiguous. “Sunshine” laws, designed to promote openness in government, make too many exceptions for the national security state. By contrast, the New Deal led to tremendous growth in the federal bureaucratic apparatus for conducting domestic policy. Congress, the executive branch, and the courts nevertheless developed new tools to preserve the checks and balances of constitutional governance. Congress, for example, enacted the Administrative Procedure Act, which elaborated procedural frameworks for agency rule-making and adjudications. Courts developed judicial doctrines that ensured that agencies took their rule-making and adjudication roles seriously. And agencies developed internal versions of separated powers (for example, firewalls between agency enforcement and agency adjudication staff) to improve the quality of governance.

Carefully designated framework statutes are needed to delineate clear missions. Recognizing the fickleness of partisan tides, Congress also needs to entrench oversight structures that ensure a continuous flow of accurate information about the functioning (and malfunctioning) of the executive branch. New statutes, for example, would contain stronger internal checking mecha-
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Overcoming partisanship, the myth of the presidential mandate, and the structural disadvantages of being a multimember body, demand more than a one-time fix. As an initial matter, the Church Committee demonstrated that nonpartisan investigations and oversight are feasible even in the face of presidential intransigence. And the Church Committee cannot be written off as an isolated incident. The 9/11 Commission similarly strived to overcome party bias, even arranging its seating to break up clusters of Republicans and Democrats. Similarly, three decades before the Church Committee, Harry Truman, as a senator, conducted a vast investigation that effectively exposed military waste and inefficiency during World War II, even while his own party held the White House.

Beyond reducing partisanship, Congress needs to find enduring statutory mechanisms to ensure that it has the information and the corrective devices to identify and stop mission creep, plausible deniability, and outright flouting of the law. It still needs, in other words, to heed the calls for comprehensive statutory organization of intelligence agencies that came from both the Church Committee and the 9/11 Commission. Pivotal to both the Church Committee and 9/11 Commission reform agendas was the need for new framework statutes for intelligence agencies, laws that laid down clear responsibilities and, by implication, imposed clear limits on intelligence work. Yet this need, acknowledged by various Congresses and White Houses, has never been met.

Congress has failed to match the rapid growth of intelligence agencies with a legal infrastructure for supervising and restraining those agencies. More than fifty years after the National Security Act, the CIA still operates with skeletal statutory guidance. The NSA only recently obtained a statutory mandate—but one that is still far too ambiguous. “Sunshine” laws, designed to promote openness in government, make too many exceptions for the national security state. By contrast, the New Deal led to tremendous growth in the federal bureaucratic apparatus for conducting domestic policy. Congress, the executive branch, and the courts nevertheless developed new tools to preserve the checks and balances of constitutional governance. Congress, for example, enacted the Administrative Procedure Act, which elaborated procedural frameworks for agency rule-making and adjudications. Courts developed judicial doctrines that ensured that agencies took their rule-making and adjudication roles seriously. And agencies developed internal versions of separated powers (for example, firewalls between agency enforcement and agency adjudication staff) to improve the quality of governance.

Carefully designated framework statutes are needed to delineate clear missions. Recognizing the fickleness of partisan tides, Congress also needs to entrench oversight structures that ensure a continuous flow of accurate information about the functioning (and malfunctioning) of the executive branch. New statutes, for example, would contain stronger internal checking mecha-
nisms, such as inspectors general and special counsel. Whistleblowers would receive protection from retaliatory action. As Georgetown law professor Neal Katyal suggests, Congress might want to create dedicated channels for anonymous dissent from the field, such as the Foreign Service currently has. At present even internal dissent is stifled. In one telling incident in mid-2006, a CIA contractor who posted on an internal blog a criticism of the Administration’s decision to use coercive interrogation measures had her job terminated and was subsequently threatened with criminal prosecution for her comments.19

Effective national security policy also demands far more openness. Unregulated secrecy hides error and bureaucratic failure from public sight. As political theorist Sissela Bok explains in her book on the topic, it allows bureaucrats “to correct mistakes and to reverse direction... often without embarrassing explanation.” Secrecy is necessary on occasion. But it often makes us less safe. Legislators (and the public) are disabled from meaningful debate when the executive branch conceals vital changes in law and policy. Misrepresentations also abound in Administration speechesifying on national security. Secretary of State Condoleezza Rice promised that prisoner transfers would not end in torture. President Bush implied that spying would not be conducted without warrants. And he said simply that “we don’t sanction torture,” trading on our natural disbelief that America could or would stealthily turn into a nation that uses the rack and the screw. In each case, these were outright deceptions, or, at a minimum, blatant misrepresentations.20

Secrecy and misrepresentation have a place in the bag of national security policy makers—but only when used to shelter the national interest.21 Secrecy ought not to be used to obscure excesses, embarrassments, and failures of the executive branch—or to prevent much needed course corrections. But the executive branch rarely will make honest differentiations between these two categories; it will, more often than not, read the evidence in its own favor. Moreover, the executive branch’s interest in keeping secrets can compound its failure to respond to real security problems when the problem of retaining secrets overshadows the need to deal with real risks. Indeed, the 9/11 Commission’s members properly condemned the Defense Department and the Federal Aviation Authority for hiding details of the failures in military responses to the attacks from the Commission and the public. Such failures are better identified and fixed than glossed over.22

External checks on executive branch classification decisions are therefore essential. Today, the Administration has carefully managed the press’s access to classified information. Six months after the New York Times first broke the story of NSA warrantless spying, the Justice Department convened a grand jury in Alexandria, Virginia, to pursue indictments under the Espionage Act, a criminal statute long considered in tension with the First Amendment. In Congress, it made sure that “[i]nformed questions [were] cut off at the source.” This is an unconscionable failure of congressional will that renders the nation far less safe. The Church Committee proved that congressional bodies can handle national security “secrets” with care. It further proved that many secrecy claims were little more than makeweight efforts to block the public from learning of an agency’s mistakes and misdeeds. This remains true today. Questions about what can properly be kept from the public are entirely in the hands of presidents, leaving them free to declassify selectively for narrow partisan or protective ends. Again, Congress has the tools to address excessive secrecy, both by investigations and by laws, should it decide to use them.23

Secrecy also fosters public hypocrisy. Presumably, the Secretary of State and the President made their misleading statements because, while willing to benefit from torture, they understood the revulsion the rest of the world and most Americans would have to such methods. But their hypocrisy, once exposed, causes even greater harm. We believe Americans still would say, as the Church Committee concluded, that while “crisis makes it tempting to ignore the wise restraints that make [us] free... each time we do so, each time the means we use are wrong, our inner strength, the strength that makes us free is lessened.”24

At the beginning of the chain of democratic responsibility stand the people. It is the people who are entitled to decide the course of the Republic based on a clear view of the facts. They alone can call their legislators and presidents to account and keep the Constitution alive. To meet Franklin’s challenge in times of terror is their collective work of conscience. For, as Judge Learned Hand eloquently argued, democracy lives or dies in the hearts and minds of its citizens, and “when it dies there, no constitution, no law, no court can save it.”25

What was wrought with human hands in Philadelphia in 1787 can today by human hands be undone. Benjamin Franklin, of course, did not see his successors’ task as an easy one; nor was it. And yet it is our task, the “great task remaining before” us, a task that demands what Lincoln at Gettysburg termed “the last full measure of devotion,” to carry on, to persist another step into the future, for another generation, bearing unceasingly forward against the tide “the unfinished work” of America’s Constitution.
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