



The Myth of the (Bush) Imperial Presidency

By Gary J. Schmitt

How will President Barack Obama view his powers once in office? Certainly, the majority of his supporters have argued that President George W. Bush abused the office's powers and expect Obama to take a more modest view of his authority. Yet, in times of war, when U.S. security is threatened, presidents typically push their executive powers forward. This is something the Founders surely understood. While Bush could have been more skillful in making the case for his policies and in his dealings with Congress, he did not exceed his authority.

Turn to most any political science book on American government or legal casebook in constitutional law, and the impression one gets is that the U.S. Constitution has largely been a dead letter for some time now. It is dead, scholars argue, either because the document was written so broadly to begin with that it can be interpreted in any way a politician or justice feels is necessary, or because the principles that originally informed the Constitution are so passé that they rightly need to be ignored if the country is to be effectively and democratically governed.

But against this current of thought runs the actual practice of American politics. In particular, one finds that when presidents make decisions in the area of national security that are unpopular or become unpopular, the opposition will turn to the Constitution to decry the president's supposed misuse of his intended powers. Most often, the charge is that the president has become "imperial."¹ Instead of being an agent of the law and confined within the strictures of the Constitution, a president will stand accused of standing above the law and bypassing our system of checks and balances in the mode echoing past royal rule. Most famously, this was the charge leveled at President Richard Nixon (and to a more limited degree his

predecessor, Lyndon Johnson) during the Vietnam War years; it has been resurrected to apply to the Bush administration and its handling of the Iraq war and, more generally, the war on terror.²

Hence, it turns out that the Constitution is not so dead—at least when it comes to challenging presidents in time of an unpopular war. Although the instinct to challenge the government's use of power by looking to the Constitution is a healthy one, it remains to be seen whether the actual reading of the Constitution is accurate when applied to presidential powers.

Generally speaking, those who see the president as acting in an imperial manner view the presidency as having limited powers and requiring the assent of Congress in some fashion or another before taking action in critical national security matters. The president is a small "e" executive, occupying an office largely designed to carry out the decisions of the other branches of government.

Against this view, however, stands the commentary of perhaps the greatest analyst of the American political system, France's Alexis de Tocqueville. After describing in volume one of *Democracy in America* the weakness of the presidency at the time he visited the United States in 1830, he commented:

If the executive power is less strong in America than in France, one must attribute

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the cause of it perhaps more to circumstances than laws. It is principally in relations with foreigners that the executive power of a nation finds occasion to deploy its skill and force. If the life of the Union were constantly threatened, if its great interests were mixed every day with those of other powerful peoples, one would see the executive power grow larger in opinion, through what one would expect from it and what it would execute.³

Tocqueville concluded by noting that “the president of the United States possesses almost royal prerogatives, which he has no occasion to make use of, and the rights which, up to now, he can use are very circumscribed: *the laws permit him to be strong, circumstances have made him weak.*”⁴

For Tocqueville, then, the “whiggish” or weak view of the presidency is misleading. In fact, the president’s authorities are inherently substantial—needing only the right state of affairs to be drawn out and exercised. In the 1830s, the country was focused on domestic affairs, and, as a result, presidents of the time were in practice less important than Congress. Issues such as tariffs and internal improvements were bound to be fodder for the House and Senate to exercise their unique talents in debating, horse-swapping, and mustering up legislation to codify the consensus they had reached. But looking more deeply than even his American contemporaries, Tocqueville saw in the presidency an office that would become increasingly commanding once the United States rose to the great-power status he believed it would eventually achieve.

What the Framers Had in Mind

At first reading, Tocqueville’s understanding of the presidency appears to be at odds with that of the founding generation, who, after all, revolted against what they saw as the British monarchy’s despotic use of its powers. And, indeed, concerns about the potential executive abuse of power did lead them to establish a federal government (Articles of Confederation) that had but a single congressional body to handle all its affairs and create a slew of new state governments in which the vast majority made the governor decidedly subordinate to the legislature.

But a decade’s worth (1776–87) of unstable governments and ineffective governance led many in that same generation to rethink the utility of a unitary, independent chief executive. Under the Articles, for example,

Congress exercised a variety of powers, some clearly legislative in nature and others concerned with directing the new republic’s foreign and defense affairs. It was these latter concerns—which they consistently and explicitly described as being “executive” in nature—that in fact took a considerable bulk of the members’ time. Here, time and again, they found the lack of an independent, single executive to be debilitating. Negotiations with foreign powers were needlessly prolonged and muddled, there was poor execution of the decisions that they did make, the war effort was complicated by the constant meddling of Congress, and it proved difficult to keep secrets.⁵ As a result, by the time the Constitutional Convention met in the spring of 1787, a priority for key members of that founding generation was to establish an executive that could, in the words of *Federalist* 70, act with “decision, activity, secrecy, and dispatch.” Unlike the Articles, which had collapsed legislative and executive powers into a single body (Congress), the new constitutional system, based on the separation of powers principle, was intended primarily not to check executive power but actually to free it up.

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As noted above, it is a misperception that the founding generation thought that executive power was limited to the administration of a government’s laws. Although still working through how exactly to best institutionalize executive power in a republican government, it consistently kept clear the distinction between legislative, executive, and judicial kinds of powers. These powers might overlap in some cases, but, on the whole, when the Founders talked about executive power, they did so in the manner of Locke and Montesquieu, meaning that the holder of that power was concerned not only with the execution of the laws, but also with foreign and defense affairs.⁶

For example, in 1785, when James Madison was asked for his advice about what Kentucky’s constitution should look like once the territory became a state, he admitted that he was perplexed when it came to describing the

post of governor. The reason he gave is that, other than the responsibility of executing the laws, “all the great powers which are properly executive” had already been “transferred to the federal Government,” referring to the contemporary Congress’s control of foreign and defense affairs.⁷ Similarly, when the delegates to the Constitutional Convention first met, they were presented with an initial outline for the new constitution by the Virginia delegation, the so-called Virginia Plan. Under this plan, the new federal executive was both to “administer” the laws and to exercise the “Executive Rights vested in the Congress” of the Confederation.⁸

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Indeed, the real problem facing the Convention was not what constituted executive power, *per se*, but how to create an executive office that could properly carry out what Madison had called “the great powers” and yet not create a monarch in practice. This is the reason why, when today’s constitutional scholars and jurists look to the Convention for guidance on what a particular presidential power might mean, they find little with which to work. The delegates’ real focus, on which they spent the vast majority of their time when it came to the presidency, was devising an office that could wield those authorities effectively and responsibly, not defining what those powers were.

For the Founders, the president’s list of authorities mattered, but so did the character of office that would exercise them. There was no better example of this “lesson learned” from the period following 1776 than the contrast between the leadership exhibited by the governor of New York and the lack of leadership from Pennsylvania’s executive. Although the two executives had a similar list of authorities, the New York governor was considered to be the strongest of the state executives, while Pennsylvania’s was judged to be quite weak, if not the weakest. The key difference was that the former was a single executive, elected for a three-year term, with no limits on reelection and limited veto power; meanwhile, the latter was a body of twelve, with rotating membership, no prospects for immediate reelection, and no veto power. New York’s governor was the state’s unquestionable leader politically, and it was this institutional model that served largely as the basis for the presidency that emerged from the Convention.

The importance of the institutional aspects of the presidency is highlighted by the most authoritative analysis of the Constitution, the *Federalist*. In the seventieth essay, Publius argues that “energy in the executive is a leading character in the definition of good government” and that “the ingredients which constitute energy in the executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.” Note that “powers” is only one of four elements that go into making a capable chief executive; the other three features are aspects of the office.

When attempting to understand presidential behavior, commentators will typically overlook this aspect of the Founders’ work.⁹ As the *Federalist* makes clear, the goal was to create an institution that would have not only powers, but also the independence and interest in using those powers in a forceful and purposeful way. The Constitution’s drafters were not interested in an executive who would sit on his hands; they wanted a president who could check the legislature if need be, give direction to the policymaking process as required, and, most critically, meet unforeseen contingencies and threats to the country’s security. While the Constitution does not guarantee that a president will always take the initiative in these areas, it does virtually everything it can to allow, even encourage, a president to do so.

Hence, however much one may agree or disagree with the particular decisions made by Bush in the wake of the attacks of 9/11, his overall behavior is consonant with what the Constitution’s framers would have expected from a president facing such a threat. And while Bush began his term with the expectation that America was in a period of “strategic pause” and his own policies would be of a more “humble” sort, as Tocqueville noted, the pull of circumstances necessitated a much different agenda and correspondingly different vision of the powers he needed to exercise.

An Imperial President?

Critics of the Bush presidency tell a different story, of course. They see an administration that has ignored standing law; violated treaty obligations; undermined the most basic of civil liberties; and, on the whole, used its powers to avoid congressional, judicial, and public oversight. And perhaps worst of all, it used its administrative sway over the intelligence community to foster a case for going to war in Iraq that was built on a tissue of lies.

Although the last charge may be the most serious, it is also the one easiest to rebut. The fact is, the Bush administration's case against Saddam—be it the failure to abide by standing United Nations resolutions, continuing to work on banned weapons of mass destruction (WMD), or consorting with known terrorists and terrorist organizations—is virtually identical to the case President Bill Clinton's national security team was publicly and aggressively making in 1998 when it believed it might have to go to war with Iraq. Moreover, whatever the debates within the intelligence community over this or that aspect of Iraq's WMD program, the overwhelming consensus within the community (as well as the intelligence agencies of our major allies) was that he was still engaged in trying to develop those capabilities. And although it turned out to be an inaccurate picture, the main reason for the flawed estimates was Saddam's own efforts to hide the fact that he no longer had such capabilities, believing the deception would serve to deter either Iran or the West from taking military action against him.¹⁰

As for ignoring the law, the most commonly cited example is the White House's decision to engage in warrantless electronic surveillance, ignoring in the process the requirements of the Foreign Intelligence Surveillance Act (FISA) to get a court order before targeting any U.S. citizen for surveillance. Indeed, the White House did ignore that law, believing both in intent and design FISA had "grown dramatically out of date."¹¹ As more than one commentator has correctly noted, FISA was a law intended to help convict known spies, not prevent terrorist acts.¹²

But the president's case for ignoring the specific law was not built on expediency alone. First, it was by no means a stretch for the administration to argue that when Congress passed the Authorization for Use of Military Force (AUMF) resolution in the aftermath of 9/11, it was providing the president with general war-making authority against al Qaeda and its supporters and that, as such, it also carried with it adjunct powers necessary to fulfill the president's obligation "to deter and prevent acts of international terrorism against the United States" as stated in the resolution's preamble. In *Hamdi v. Rumsfeld* (2004), for example, the Supreme Court read the AUMF as authorizing not only the use of force, but also powers traditionally thought to be incidental to that broader mandate, of which the collection of intelligence has traditionally been one.

Moreover, as the FISA court itself recognized in a 2002 review, all previous federal appellate courts have "held

that the President did have an inherent authority to conduct warrantless searches to obtain foreign intelligence information. . . . We take for granted the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power."¹³ The Court's view was once Congress's view as well. When Congress passed the Omnibus Crime Control and Safe Streets Act in 1968, which detailed among other things the procedures federal law-enforcement authorities had to go through to get a wiretap, the law explicitly stated that nothing in this act "shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack."

According to the president's critics, however, Bush upped the imperial ante not only by bypassing standing statutes, but also by violating treaty obligations and in so doing suspending perhaps the most fundamental of constitutional rights, that of the writ of *habeas corpus*.¹⁴

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In the first instance, the administration is accused of failing to abide by the Third Geneva Convention in its handling of captured al Qaeda and Taliban fighters. That accord, signed by the United States in 1949 and subsequently ratified by the U.S. Senate, sets out in fairly extensive detail how prisoners of war are to be treated. Along with the Fourth Geneva Convention, which governs the treatment of civilians during war, and an addendum to the Third Convention, known as Protocol I, which extends prisoner-of-war status to captured guerrilla fighters, the Geneva Accords seem to leave little room for denying fighters and terrorists captured on the battlefield of Afghanistan or inside Pakistan the rights set out under the conventions.

President Ronald Reagan in 1987, however, explicitly rejected submitting Protocol I to the Senate for ratification. In doing so, the administration maintained an older view that there was still a useful distinction to be maintained between soldiers who fought in uniform under a legitimate sovereign authority and those combatants, such as terrorists, who did not. Here the Reagan

administration was in step with a prior Supreme Court decision that “unlawful combatants” were “deemed not to be entitled to the status of prisoners of war” and as “offenders against the law of war subject to trial and punishment by military tribunals.”¹⁵

Nor was the Bush administration flying against precedent and case law when it set up the detention facilities at Guantanamo Bay and created a virtual state of limbo for the detainees. Over the years, in both Republican and Democratic administrations, the base at Guantanamo had been used to house for indefinite periods Haitian and Cuban refugees whom the government intended neither to put on trial nor to allow into the United States. Both the Clinton administration and the earlier Bush administration had used Guantanamo precisely because they believed doing so put the detainees outside the reach of the U.S. courts and, hence, precluded challenges to those detentions by writs of *habeas corpus*.

Here again, the Bush administration had court precedent on its side. In 1950, the Supreme Court explicitly rejected a *habeas* appeal by foreign combatants held by American forces outside U.S. sovereign territory. In the majority opinion, Justice Robert Jackson dismissed the appeal (made by German prisoners convicted of war crimes by an American military commission operating abroad) by pointedly noting that there was “no instance where a Court, in this or any other country where the writ is known, has issued [a *habeas corpus* writ] on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.”¹⁶

Even Bush’s use of “signing statements”—written pronouncements issued by a president upon signing a bill into law—to announce his intention not to be bound by some feature of the law on constitutional grounds is not an administration invention. Signing statements have been around since the time of James Monroe, although they have come into much wider use during the past four presidencies. It was the Clinton Justice Department that wrote: “If the President may properly decline to enforce a law, at least when it unconstitutionally encroaches on his powers, then it arguably follows that he may properly announce to Congress and the public that he will not enforce a provision of an enactment he is signing.”¹⁷

And while civil libertarians decry (sometimes justifiably) how the FBI and other federal law enforcement agencies are employing the new investigative powers granted them by the Patriot Act and other laws, those

measures were duly enacted by Congress, and they remain on the books. For all the worries about abuse of power, nothing this administration has done compares with previous executive branch responses to perceived threats on the home front—be it Abraham Lincoln’s suspension of *habeas corpus* during the Civil War, Franklin Roosevelt’s mass internment of Japanese immigrants and U.S.-Japanese citizens at the start of World War II, or the so-called Palmer Raids in which Woodrow Wilson’s administration rounded up thousands of suspected anarchists and leftists after World War I.

As these last examples suggest, the assertion of presidential power may not always be wise and may well be constitutionally debatable. But it is a virtual certainty that, in times of war or when American security is perceived to be directly threatened, presidents will ignore laws they see as violating their larger constitutional duties to wage war successfully and to protect the homeland. And, in turn, they will use gray or uncharted areas in the law to push their executive powers forward. Given how little prepared the United States was in its laws, institutions, and tools to deal with the global jihadist threat following 9/11, it should come as no surprise that Bush moved as aggressively as he did. Undoubtedly, neither the Constitution’s framers nor Tocqueville would have been surprised.

Principle and Prudence: Lessons from the Past

Bush’s presidency has not been the imperial presidency its critics claim. Indeed, on the most important issue—going to war, both in Afghanistan and Iraq—he has sought and received congressional approval. Lest we forget, there have been any number of presidents (Harry Truman in Korea and Clinton in Kosovo, to take but two obvious examples) who have gone to war without the sanction of Congress or the traditional justification of using the military to protect American lives or property. And, again, while the president’s harshest opponents do not accept the legal and constitutional grounds the administration has put forward to justify his decisions, any objective assessment would conclude that Bush has acted within the general bounds of what the laws and precedents permit.

If there is any kernel of truth to the charge that Bush’s presidency has been imperial, it rests with the fact that the Constitution invites presidents, through its broad delegation of “the executive power” and the office’s

unique institutional features, to be assertive in times of crisis. But if so, then what does it mean to call something “imperial” when it is fueled by the fundamental law of the land itself?

The Bush White House has been right to assert its constitutional authorities, but it could have been more adroit in how it went about doing so. The cost has been new laws and new court decisions that, instead of upholding precedents and authorities friendly to the exercise of presidential power, have begun to curtail them.

Take, for example, how George Washington handled the first major foreign policy crisis that arose under the new constitution. Fearing that a general war in Europe in 1793 between revolutionary France and the surrounding monarchic powers would inadvertently drag the young (and unprepared) United States into the conflict, Washington issued on his own authority the Neutrality Proclamation. He then followed up the proclamation with decisions and a set of administratively instituted rules intended to enforce it. In doing so, Washington was asserting a prerogative to interpret treaty obligations that involved matters of war and peace and to constrict the behavior and commercial activities of private citizens, all done without the color of any guiding law or consultations with Congress.¹⁸

Then, of course, there is the example of Lincoln during the country’s greatest crisis, the American Civil War. Lincoln, on his own authority and guided by his presidential oath “to preserve, protect and defend the Constitution,” spent monies never appropriated by Congress, suspended the writ of *habeas corpus*, created military commissions to try civilians, issued the Emancipation Proclamation, and openly defied the Supreme Court by refusing to abide by Chief Justice Roger Taney’s order to uphold the writ in the case of Marylander and Southern sympathizer John Merryman.¹⁹

It is also useful to note, however, that in time both Washington and Lincoln turned to Congress for its stamp of approval for the actions they had taken in the immediate stages of the crisis each faced. In Washington’s case, he waited until Congress was scheduled to come back into session (December 1793)—more than six months after

the proclamation’s issuance and time enough for his decisions to take hold and allow for the American public’s desire to come to France’s assistance to cool down. In contrast, Lincoln called Congress back into special session for July 4, 1861, five months before the regularly scheduled session. Yet he did so in mid-April, allowing more than two and a half months for the members to make their way to Washington. “At a time when telegraphs and railroads were common, Congress surely could have been convened sooner. Implicitly obliged to convene Congress to deal with the national crisis, Lincoln used both the independence of his office and the discretion built into the convening authority to give himself a bit more leeway—and thus a bit more power to control the national government’s response to the crisis—than would have been the case if Congress had been convened at the earliest possible moment.”²⁰

With these two examples, we see presidents exercising their authorities to the fullest but in a manner that also seems prudent constitutionally. Yes, the Founders had created a presidency designed to take the lead in such instances and empowered the president with both the authorities and autonomy to do so, but they also set in place a potential check on the president’s decisions by creating a system in which Congress or the Supreme Court would play “Monday morning quarterback”—exposing malfeasance when called for; adding or cutting off funds when necessary; passing laws to regularize the exercise of executive discretion without undermining it; and, in the face of truly egregious behavior, being ready to impeach a president. It is a wise president who understands that reality as well.

At some point, it is inevitable that Congress or the Supreme Court will want its say in these critical matters. Reading the Constitution as though it is simply a legal document in which the powers of each branch are distributed in a 100 percent coherent, black-and-white manner, as many a presidential lawyer is wont to argue, is a recipe for problems down the road. The fact is, the broad discretion a president wields in many of these instances will bleed into the rights and authorities of the other branches and, hence, will be seen by them as something to be contested. Moreover, as history shows, having Congress confirm what a president does in times of an emergency is not particularly difficult; nor is it a zero-sum game in which one is simply conceding to Congress the right to define a presidential prerogative. What we remember and cite in the cases of Washington and Lincoln is, after all, not what measures

Congress eventually passed, but what actions the two presidents took.

Since the 1970s there has been a good deal of confusion about the appropriate division of powers under the Constitution when it comes to foreign and defense affairs.²¹ The Bush White House has been right in principle to push back against the idea that Congress is either its equal in this policy area or that it has the power to define exactly how a president may exercise his authorities. But could it have been more adroit in how it went about making that case? Almost certainly.²² The cost has been new laws and new Supreme Court decisions that, instead of upholding precedents and authorities friendly to the exercise of presidential power, have begun to curtail them. Whether the issue is one of electronic surveillance, military commissions, due process rights for detainees, or even interrogation techniques, what the president once might have gotten without much compromise has become a partisan issue in which the president is given less discretion. Again, it is understandable why the administration took the positions it did. What is less certain is whether it was prudent to do so.

Notes

1. The most famous explication of this thesis is Arthur M. Schlesinger, *The Imperial Presidency* (Boston: Houghton Mifflin, 1973).

2. See, for example, Jonathan Mahler, "After the Imperial Presidency: Will the New President and Congress Undo the Executive-Power Plays and Constitutional Abuses of the Bush Years?" *The New York Times Magazine*, November 9, 2008; Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (New York: Little, Brown, 2007); and Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power after Watergate* (Ann Arbor: University of Michigan Press, 2006).

3. Alexis de Tocqueville, *Democracy in America*, trans. and ed. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), 118.

4. *Ibid.*, 119. Emphasis added.

5. On these points, see Jerrilyn Green Marston, *King and Congress: The Transfer of Political Legitimacy, 1774–1776* (Princeton, NJ: Princeton University Press, 1987); and Charles C. Thach Jr., *The Creation of the Presidency: 1775–1789* (Baltimore: Johns Hopkins University Press, 1969), chap. 3.

6. Both Locke and Montesquieu, the political thinkers most often cited by the Founders, saw foreign and defense matters as falling principally under the executive. See Locke, *Second Treatise*

on Government, para. 146–47; and Montesquieu, *Spirit of the Laws*, bk. 11, chap. 6. Reflecting that view, Publius in *Federalist* 74 notes that "[t]he power of directing and employing the common strength forms an usual and essential part in the definition of the executive authority."

7. Letter from James Madison to Caleb Wallace, August 23, 1785.

8. Max Farrand, ed., *The Records of the Federal Convention of 1787: Volume I* (New Haven, CT: Yale University Press, 1911), 44.

9. A notable exception to this is Joseph M. Bessette and Jeffrey Tulis, "The Constitution, Politics, and the Presidency," in *The Presidency in the Constitutional Order*, ed. Joseph M. Bessette and Jeffrey Tulis (Baton Rouge: Louisiana State University Press, 1981). An updated version of this essay will appear in Joseph M. Bessette and Jeffrey Tulis, eds., *The Constitutional Presidency* (Baltimore: Johns Hopkins University Press, forthcoming).

10. On the Clinton administration's case against Saddam and related points, see Project for the New American Century, *Iraq: Setting the Record Straight* (April 2005), available at www.newamericancentury.org/iraq-042005.pdf (accessed January 7, 2009).

11. Perhaps the most balanced and sensible account of FISA's shortcomings and what might be done about them is found in Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (New York: Penguin, 2008), chap. 8.

12. See *ibid.*, 228; Richard A. Posner, "The Reorganized U.S. Intelligence System after One Year," *National Security Outlook* (special edition, April 2006), available at www.aei.org/publication24213/; and Gary J. Schmitt, "Constitutional Spying: The Solution to the FISA Problem," *The Weekly Standard*, January 2, 2006, available at www.aei.org/publication23628/.

13. *In re: Sealed Case*, 310 F.3d 717 (2002).

14. Under article 1, section 9 of the U.S. Constitution, "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it." With this privilege, an individual can force the government to state to a court the legal grounds for his or her detention.

15. *Ex Parte Quirin* (1942).

16. *Johnson v. Eisentrager* (1950).

17. The November 1993 Justice Department memorandum to White House counsel Bernard Nussbaum is available at www.usdoj.gov/olc/signing.htm (accessed January 7, 2009). It was signed by then–assistant attorney general and head of the Office of Legal Counsel Walter Dillinger. As the memorandum suggests, although there is a reasonable case to be made for presidential signing statements, it is also true that, when the objections in signing statements are carried out by an administration ignoring some requirement of the law, the practical

impact is to give the president something akin to a line-item veto—a power the Supreme Court has declared unconstitutional in *Clinton v. New York* (1998). My own view is that if a president believes an element of the law violates his constitutional powers, his proper constitutional role is to veto the measure, forcing a kind of constitutional dialogue between Congress and the president. But ultimately, if Congress believes its powers of legislation are being undermined by signing statements, then it has sufficient remedies through its other powers, such as control of the public purse, to rein in that practice.

18. For a more extended analysis of Washington's handling of the crisis of 1793 and its implications for understanding presidential power, see Gary J. Schmitt, "Washington's Proclamation of Neutrality," in *The Constitutional Presidency*, ed. Joseph M. Bessette and Jeffrey Tulis.

19. For a readable overview of Lincoln's use of presidential powers in addressing the domestic threat, see late chief justice William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Vintage, 1998).

20. Joseph M. Bessette and Gary J. Schmitt, "The Power and Duties of the President: Recovering the Logic and Meaning of Article II," in *The Constitutional Presidency*, ed. Joseph M. Bessette and Jeffrey Tulis.

21. Two examples of this confusion are the War Powers Resolution (1973) and FISA (1978), both of which were meant to codify the idea that the primary operating principle of the constitutional system is one of "checks and balances." What the Constitution demands, under this view, is a two-key approach to public authority: no branch gets to act in key instances without

concurrent approval from a second branch. But this approach conflates the checks and balances that do exist with its more fundamental system of separated powers. Although obviously some checks do exist—like the president's qualified veto over legislation or the Senate's role in confirming nominations—they are not the norms for government action, but rather, as Jefferson noted while Washington's secretary of state, the exceptions. The more accurate view of the constitutional order is for the president, Congress, and the Supreme Court to do their own thing, each interacting with the others indirectly and rarely concurrently. In short, they are equal branches, but they typically do not exercise that equality in the same ways or at the same time. Perhaps the most notable and substantive attempt to counter the checks and balances view of the Constitution as it applies to presidential and congressional power is the minority report of the *Report of the Congressional Committees Investigating the Iran-Contra Affair* (November 1987), part II ("The Foreign Affairs Powers of the Constitution and the Iran-Contra Affair"), which was directed by then-representative Dick Cheney (R-Wyo.). For a sober review of what the minority report did and did not argue, see Michael J. Malbin, "The Iran-Contra Minority Redux," *The Daily Standard*, July 17, 2007, available at www.weeklystandard.com/Content/Public/Articles/000/000/013/883lnwyk.asp (accessed January 7, 2009).

22. For an analysis of this point and its potential consequences, see Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: W. W. Norton, 2007; paperback, forthcoming), available through www.aei.org/book910/.