

ARTICLE

National Security and Double Government

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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.

—James Madison¹

Abstract

National security policy in the United States has remained largely constant from the Bush Administration to the Obama Administration. This continuity can be explained by the “double government” theory of 19th-century scholar of the English Constitution Walter Bagehot. As applied to the United States, Bagehot’s theory suggests that U.S. national security policy is defined by the network of executive officials who manage the departments and agencies responsible for protecting U.S. national security and who, responding to structural incentives embedded in the U.S. political system, operate largely removed from public view and from constitutional constraints. The public believes that the constitutionally-established institutions control national security policy, but that view is mistaken. Judicial review is negligible; congressional oversight is dysfunctional; and presidential control is nominal. Absent a more informed and engaged

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¹ THE FEDERALIST NO. 51 (James Madison).

electorate, little possibility exists for restoring accountability in the formulation and execution of national security policy.

Introduction

Few who follow world events can doubt that the Obama Administration's approach to multiple national security issues has been essentially the same as that of the Bush Administration.² The Obama Administration, like its predecessor, has sent terrorism suspects overseas for detention and interrogation;³ claimed the power to hold, without trial, American citizens who are accused of terrorism in military confinement;⁴ insisted that it is for the President to decide whether an accused terrorist will

² While this Article considers only national security policy, it is important to note that elements of national security policy bear directly upon U.S. foreign policy generally and, indeed, upon domestic policy. The Bush/Obama view that "homeland security [is] the be-all and end-all of grand strategy," for example, has required maintaining "the security apparatus that supported drone attacks on Al Qaeda targets" in countries such as Yemen, which in turn has shaped U.S. engagement in the Middle East and the muted U.S. response to the Arab Spring. "Drones, not democracy, drive American policy." VALI NASR, *THE DISPENSABLE NATION: AMERICAN FOREIGN POLICY IN RETREAT* 180–81 (2013). See ROBERT J. SPITZER, *COMPARING THE CONSTITUTIONAL PRESIDENCIES OF GEORGE W. BUSH AND BARACK OBAMA: WAR POWERS, SIGNING STATEMENTS, VETOES* 2 (2012); Richard M. Pious, *Obama's Use of Prerogative Powers in the War on Terrorism*, in *OBAMA IN OFFICE* 255, 256 (James A. Thurber ed., 2011); Richard M. Pious, *Prerogative Power in the Obama Administration: Continuity and Change in the War on Terrorism*, 41 *PRESIDENTIAL STUD.* Q. 263, 264 (June 2011).

³ David Johnston, *U.S. Says Rendition to Continue, but with More Oversight*, N.Y. TIMES, Aug. 24, 2009, <http://www.nytimes.com/2009/08/25/us/politics/25rendition.html>, [<http://www.perma.cc/09SBNeUFE4B/>].

⁴ Peter Baker, *Obama to Use Current Law to Support Detentions*, N.Y. TIMES, Sept. 23, 2009, http://www.nytimes.com/2009/09/24/us/politics/24detain.html?_r=0, [www.perma.cc/0j8wrqrjEVL] ("The Obama administration has decided not to seek new legislation from Congress authorizing the indefinite detention of about 50 terrorism suspects being held without charges at Guantanamo Bay, Cuba, officials said Wednesday. Instead, the administration will continue to hold the detainees without bringing them to trial based on the power it says it has under the Congressional resolution passed after the attacks of Sept. 11, 2001, authorizing the President to use force against forces of Al Qaeda and the Taliban."); see also Matthew C. Waxman, *Administrative Detention: Integrating Strategy and Institutional Design*, in *LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM* 43, 45 (Benjamin Wittes ed., 2009) (describing how the Obama Administration has "continued to defend a broad authority to detain suspected al Qaeda and affiliated terrorists based on the law of war").

be tried by a civilian court or a military tribunal;⁵ kept the military prison at Guantánamo Bay open,⁶ argued that detainees cannot challenge the conditions of their confinement,⁷ and restricted detainees' access to legal counsel;⁸ resisted efforts to extend the right of habeas corpus to other off-shore prisons;⁹ argued that detainees cannot invoke the Geneva Conventions in habeas proceedings;¹⁰ denied detainees access to the International Committee of the Red Cross for weeks at a time;¹¹ engaged the United States in a military attack against Libya without congressional approval, in

⁵ See Anne E. Kornblut & Carrie Johnson, *Obama Will Help Select Location of Khalid Sheik Mohammed Terrorism Trial*, WASH. POST, Feb. 12, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/02/11/AR2010021105011_pf.html, [<http://www.perma.cc/0PSRibPn6Wi>] (“President Obama is planning to insert himself into the debate about where to try the accused mastermind of the Sept. 11, 2001, attacks, three administration officials said . . .”).

⁶ *Guantanamo Bay Still Unresolved*, NPR.ORG (Jan. 14, 2013, 12:00 PM), <http://www.npr.org/2013/01/14/169334679/guantanamo-bay-still-unresolved>, [<http://www.perma.cc/0iLHqVYKmJf/>].

⁷ See Gov't Brief at 3, *Bostan v. Obama*, 674 F. Supp. 2d 9 (D.D.C. Apr. 9, 2009) (No. 1:05-cv-00883).

⁸ Charlie Savage, *Judge Rejects New Rules on Access to Prisoners*, N.Y. TIMES, Sept. 6, 2012, http://www.nytimes.com/2012/09/07/us/judge-rejects-limits-on-lawyers-access-to-guantanamo-prisoners.html?_r=0, [<http://www.perma.cc/0ua3YPrxbSS/>] (“Accusing the Obama administration of ‘an illegitimate exercise of executive power,’ a federal judge on Thursday rejected the government’s effort to impose new restrictions on lawyers’ access to prisoners at Guantanamo Bay, Cuba, if they were no longer actively challenging the prisoners’ detention in federal court.”).

⁹ Charlie Savage, *Obama Upholds Detainee Policy in Afghanistan*, N.Y. TIMES, Feb. 21, 2009, http://www.nytimes.com/2009/02/22/washington/22bagram.html?_r=0, [<http://www.perma.cc/0QcYjY9QLE3/>] (“The Obama administration has told a federal judge that military detainees in Afghanistan have no legal right to challenge their imprisonment there, embracing a key argument of former President Bush’s legal team.”). None of the sixty-seven non-Afghan prisoners held at Bagram Air Force base has been formally tried. Kevin Sieff, *In Afghanistan, a Second Guantanamo*, WASH. POST, Aug. 5, 2013, http://www.washingtonpost.com/world/in-afghanistan-a-second-guantanamo/2013/08/04/e33e8658-f53e-11e2-81fa-8e83b3864c36_print.html, [<http://www.perma.cc/0gmuzShiTwz/>]. Many have been cleared for release by informal military review boards, but most of those were never freed. *Id.*

¹⁰ Gov't Brief, *supra* note 7 (“Congress has recently and unambiguously precluded reliance on or invocation of the Geneva Conventions in habeas cases or in any other civil action; the Military Commissions Act of 2006 (‘MCA’) reflects the well-established principle that the Geneva Conventions are not judicially enforceable by private individuals.”).

¹¹ Alissa J. Rubin, *Afghans Detail Detention in ‘Black Jail’ at U.S. Base*, N.Y. TIMES, Nov. 28, 2009, <http://www.nytimes.com/2009/11/29/world/asia/29bagram.html?pagewanted=all>, [<http://www.perma.cc/0ptmkdcFGpG/>] (“An American military detention camp in Afghanistan is still holding inmates, sometimes for weeks at a time, without access to the International Committee of the Red Cross, according to human rights researchers and former detainees held at the site on the Bagram Air Base.”).

the face of no actual or imminent threat to the nation;¹² and continued, and in some respects expanded, the Bush Administration's ballistic missile defense program.¹³

The Obama Administration, beyond ending torture, has changed “virtually none” of the Bush Administration's Central Intelligence Agency (“CIA”) programs and operations,¹⁴ except that in continuing targeted killings, the Obama Administration has increased the number of covert drone strikes in Pakistan to six times the number launched during the Bush Administration.¹⁵ The Obama Administration has declined to prosecute those who committed torture (after the President himself concluded that waterboarding is torture);¹⁶ approved the targeted killing of American

¹² See Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 15, 2011, <http://www.nytimes.com/2011/06/16/us/politics/16powers.html?pagewanted=all>, [<http://www.perma.cc/0p5uDsF7tMf/>] (“The White House, pushing hard against criticism in Congress over the deepening air war in Libya, asserted Wednesday that President Obama had the authority to continue the military campaign without Congressional approval because American involvement fell short of full-blown hostilities.”).

¹³ See ANDREW FUTTER, BALLISTIC MISSILE DEFENSE AND U.S. NATIONAL SECURITY POLICY: NORMALIZATION AND ACCEPTANCE AFTER THE COLD WAR 134–58 (2013).

¹⁴ Sarah Moughty, *Top CIA Official: Obama Changed Virtually None of Bush's Controversial Programs*, FRONTLINE (Sept. 1, 2011, 11:02 AM), <http://www.pbs.org/wgbh/pages/frontline/iraq-war-on-terror/topsecretamerica/top-cia-official-obama-changed-virtually-none-of-bushs-controversial-programs/>, [<http://www.perma.cc/0sdUgvQfkEr/>] (quoting former CIA Acting General Counsel John Rizzo: “With a notable exception of the enhanced interrogation program, the incoming Obama administration changed virtually nothing with respect to existing CIA programs and operations”).

¹⁵ Peter Bergen & Megan Braun, *Drone is Obama's Weapon of Choice*, CNN.COM (Sept. 19, 2012, 10:37 AM), <http://www.cnn.com/2012/09/05/opinion/bergen-obama-drone>, [<http://www.perma.cc/0RFNWZGDoM8/>] (“[President Obama] has already authorized 283 strikes in Pakistan, six times more than the number during President George W. Bush's eight years in office. As a result, the number of estimated deaths from the Obama administration's drone strikes is more than four times what it was during the Bush administration – somewhere between 1,494 and 2,618.”).

¹⁶ See Scott Shane, *No Charges Filed on Harsh Tactics Used by the C.I.A.*, N.Y. TIMES, Aug. 30, 2012, http://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html?_r=2&pagewanted=1&pagewanted=all&, [<http://perma.cc/0kL2rS3VBWE>] (“Attorney General Eric H. Holder Jr. announced Thursday that no one would be prosecuted for the deaths of a prisoner in Afghanistan in 2002 and another in Iraq in 2003, eliminating the last possibility that any criminal charges will be brought as a result of the brutal interrogations carried out by the C.I.A. . . . the decision will disappoint liberals who supported President Obama when he ran in 2008 and denounced what he called torture and abuse of prisoners under his predecessor.”).

citizens (Anwar al-Awlaqi and a compatriot¹⁷) without judicial warrant;¹⁸ rejected efforts by the press and Congress to release legal opinions justifying those killings or describing the breadth of the claimed power;¹⁹ and opposed legislative proposals to expand intelligence oversight notification requirements.²⁰ His administration has increased the role of covert special operations,²¹ continuing each of the covert action programs that President Bush handed down.²² The Obama Administration has continued the Bush Administration's cyberwar against Iran (code-named "Olympic Games")²³ and sought to block lawsuits challenging the legality

¹⁷ Mark Mazzetti, Charlie Savage & Scott Shane, *How a U.S. Citizen Came to be in America's Cross Hairs*, N.Y. TIMES, Mar. 9, 2013, <http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html?pagewanted=all>, [http://www.perma.cc/0thgVJziYSx/] ("For what was apparently the first time since the Civil War, the United States government had carried out the deliberate killing of an American citizen as a wartime enemy and without a trial.").

¹⁸ See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 8, 2011, <http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-a-citizen.html?pagewanted=all>, [http://www.perma.cc/0tDjQbpbLFC/].

¹⁹ Scott Shane & Mark Mazzetti, *White House Tactic for C.I.A. Bid Holds Back Drone Memos*, N.Y. TIMES, Feb. 20, 2013, <http://www.nytimes.com/2013/02/21/us/politics/strategy-seeks-to-ensure-bid-of-brennan-for-cia.html?pagewanted=all>, [http://www.perma.cc/03bnHH29pzk/] ("The White House is refusing to share fully with Congress the legal opinions that justify targeted killings The refusal so far to share more of the opinions with Congress, or to make redacted versions of the memos public, comes despite a pledge of greater transparency by President Obama in his State of the Union address on Feb. 12.").

²⁰ Walter Pincus, *White House Threatens Veto on Intelligence Activities Bill*, WASH. POST, Mar. 16, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/15/AR2010031503720.html?hpid=sec-politics>, [http://www.perma.cc/0vqjVN4sCKV/] ("The White House has renewed its threat to veto the fiscal 2010 intelligence authorization bill over a provision that would force the administration to widen the circle of lawmakers who are informed about covert operations and other sensitive activities.").

²¹ Karen DeYoung & Greg Jaffe, *U.S. 'Secret War' Expands Globally as Special Operations Forces Take Larger Role*, WASH. POST, June 4, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/06/03/AR2010060304965_pf.html, [http://perma.cc/0EPuhJEqXCL] ("Beneath its commitment to soft-spoken diplomacy and beyond the combat zones of Afghanistan and Iraq, the Obama administration has significantly expanded a largely secret U.S. war against al-Qaeda and other radical groups, according to senior military and administration officials.").

²² MARK MAZZETTI, *THE WAY OF THE KNIFE: THE CIA, A SECRET ARMY, AND A WAR AT THE ENDS OF THE EARTH* 225 (2013).

²³ See DAVID E. SANGER, *CONFRONT AND CONCEAL: OBAMA'S SECRET WARS AND SURPRISING USE OF AMERICAN POWER* 188–203 (2013).

of other national security measures,²⁴ often claiming the state secrets privilege.²⁵

The Obama Administration has also continued, and in some ways expanded, Bush-era surveillance policies. For example, the Obama Administration continued to intercept the communications of foreign leaders;²⁶ further insisted that GPS devices may be used to keep track of certain citizens without probable cause or judicial review²⁷ (until the Supreme Court disapproved²⁸); continued to investigate individuals and groups under Justice Department guidelines re-written in 2008 to permit

²⁴ Adam Liptak, *Justices Turn Back Challenge to Broader U.S. Eavesdropping*, N.Y. TIMES, Feb. 26, 2013, <http://www.nytimes.com/2013/02/27/us/politics/supreme-court-rejects-challenge-to-fisa-surveillance-law.html>, [<http://www.perma.cc/0f6RQErGey7/>] (describing how the Supreme Court ruled “that the journalists, lawyers and human rights advocates who challenged the constitutionality of the [FISA Amendments] could not show they had been harmed by it and so lacked standing to sue” and how “[t]he Obama administration defended the law in court, and a Justice Department spokesman said the government was ‘obviously pleased with the ruling.’”).

²⁵ Charlie Savage, *Obama’s War on Terror May Resemble Bush’s in Some Areas*, N.Y. TIMES, Feb. 17, 2009, <http://www.nytimes.com/2009/02/18/us/politics/18policy.html?pagewanted=all>, [<http://www.perma.cc/0EuB1yXzZFY/>]; see Ryan Devereaux, *Is Obama’s Use of State Secrets Privilege the New Normal?*, NATION, Sept. 29, 2010, <http://www.thenation.com/article/155080/obamas-use-state-secrets-privilege-new-normal#>, [<http://www.perma.cc/0ViNXrCjZDi/>].

²⁶ Scott Wilson & Anne Gearan, *Obama didn’t know about surveillance of U.S.-allied world leaders until summer, officials say*, WASH. POST, Oct. 30, 2013, http://www.washingtonpost.com/politics/obama-didnt-know-about-surveillance-of-us-allied-world-leaders-until-summer-officials-say/2013/10/28/0cbacefa-4009-11e3-a751-f032898f2dbc_story.html, [<http://perma.law.harvard.edu/0Udk99ndnJm/>]; Alison Smale, Melissa Eddy & David E. Sanger, *Data Suggests Push To Spy on Merkel Dates to ’02*, N.Y. TIMES, Oct. 28, 2013, http://www.nytimes.com/2013/10/28/world/europe/data-suggests-push-to-spy-on-merkel-dates-to-02.html?_r=0, [<http://perma.law.harvard.edu/0WjiCMF31p1/>].

²⁷ Adam Liptak, *Court Case Asks if ‘Big Brother’ Is Spelled GPS*, N.Y. TIMES (Sept. 10, 2011), <http://www.nytimes.com/2011/09/11/us/11gps.html>, [<http://www.perma.cc/0jEBCJDuAi5/>] (describing how the Obama Administration argued that “requiring a warrant to attach a GPS device to a suspect’s car ‘would seriously impede the government’s ability to investigate leads and tips on drug trafficking, terrorism and other crimes’”).

²⁸ See *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (“We hold that the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’”); see also Adam Liptak, *Justices Say GPS Tracker Violated Privacy Rights*, N.Y. TIMES (Jan 23, 2012), http://www.nytimes.com/2012/01/24/us/police-use-of-gps-is-ruled-unconstitutional.html?pagewanted=all&_r=0, [<http://www.perma.cc/0ENtVZv7e6r/>]. (“The Supreme Court on Monday ruled unanimously that the police violated the Constitution when they placed a Global Positioning System tracking device on a suspect’s car and monitored its movements for 28 days.”).

“assessments” that require no “factual basis” for FBI agents to conduct secret interviews, plant informants, and search government and commercial databases;²⁹ stepped up the prosecution of government whistleblowers who uncovered illegal actions,³⁰ using the 1917 Espionage Act eight times during his first administration to prosecute leakers (it had been so used only three times in the previous ninety-two years);³¹ demanded that businesses turn over personal information about customers in response to “national security letters” that require no probable cause and cannot legally be disclosed;³² continued broad National Security Agency (“NSA”) homeland surveillance;³³ seized two months of phone records of reporters and editors of the Associated Press for more than twenty telephone lines of its offices and journalists, including their home phones and cellphones, without notice;³⁴ through the NSA, collected the telephone records of millions of

²⁹ Charlie Savage, *F.B.I. Focusing on Security Over Ordinary Crime*, N.Y. TIMES, Aug. 23, 2013, http://www.nytimes.com/2011/08/24/us/24fbi.html?_r=0, [http://www.perma.cc/U8JM-4BKC]. From 2009 to 2011, the FBI logged 82,325 such assessments. *Id.*

³⁰ See Michael S. Schmidt, *Ex-C.I.A. Officer Sentenced to 30 Months in Leak*, N.Y. TIMES, Jan. 25, 2013, <http://www.nytimes.com/2013/01/26/us/ex-officer-for-cia-is-sentenced-in-leak-case.html?ref=waterboarding>, [http://www.perma.cc/0JZzFgyAtME/] (“A former Central Intelligence Agency officer was sentenced on Friday to 30 months in prison for disclosing the identity of a covert agency officer to a freelance writer, representing the first time that a C.I.A. officer will serve prison time for disclosing classified information to the news media. The sentencing in federal court here of John C. Kiriakou, 48, who served as an agency analyst and counterterrorism officer from 1990 to 2004, was the latest development in the Obama administration’s unprecedented crackdown on government leaks.”).

³¹ Elizabeth Shell & Vanessa Dennis, *11 ‘Leakers’ Charged with Espionage*, PBS NEWSHOUR, Aug. 21, 2013, <http://www.pbs.org/newshour/multimedia/espionage/>, [http://perma.cc/E27L-KRMY].

³² Ellen Nakashima, *White House Proposal Would Ease FBI Access to Records of Internet Activity*, WASH. POST, July 29, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/28/AR2010072806141.html>, [http://perma.law.harvard.edu/0o9xk1AifSe] (“To critics, the move is another example of an administration retreating from campaign pledges to enhance civil liberties in relation to national security.”).

³³ Charlie Savage & James Risen, *Federal Judge Finds N.S.A. Wiretaps Were Illegal*, N.Y. TIMES, Mar. 31, 2010, <http://www.nytimes.com/2010/04/01/us/01nsa.html>, [http://perma.law.harvard.edu/0bWyABEng2m] (“A federal judge ruled Wednesday that the National Security Agency’s program of surveillance without warrants was illegal, rejecting the Obama administration’s effort to keep shrouded in secrecy one of the most disputed counterterrorism policies of former President George W. Bush. In a 45-page opinion, Judge Vaughn R. Walker ruled that the government had violated a 1978 federal statute requiring court approval for domestic surveillance when it intercepted phone calls of Al Haramain, a now-defunct Islamic charity in Oregon, and of two lawyers representing it in 2004.”).

³⁴ Charlie Savage, *Phone Records of Journalists Seized by U.S.*, N.Y. TIMES, May 13, 2013, http://www.nytimes.com/2013/05/14/us/phone-records-of-journalists-of-the-associated-press-seized-by-us.html?pagewanted=all&_r=0, [http://perma.cc/0DS9VmcDerU].

Verizon customers, within the United States and between the United States and other countries, on an “ongoing, daily basis” under an order that prohibited Verizon from revealing the operation;³⁵ and tapped into the central servers of nine leading U.S. internet companies, extracting audio and video chats, photographs, emails, documents, and connection logs that enable analysts to track foreign targets and U.S. citizens.³⁶ At least one significant NSA surveillance program, involving the collection of data on the social connections of U.S. citizens and others located within the United States, was initiated after the Bush Administration left office.³⁷

³⁵ Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, THE GUARDIAN, June 5, 2013, <http://www.guardian.co.uk/world/2013/jun/06/nsa-phone-records-verizon-court-order>, [<http://perma.law.harvard.edu/02efbNFu6kz>]; see Charlie Savage & Edward Wyatt, *U.S. Is Secretly Collecting Records of Verizon Calls*, N.Y. TIMES, June 5, 2013, <http://www.nytimes.com/2013/06/06/us/us-secretly-collecting-logs-of-business-calls.html>, [<http://perma.law.harvard.edu/0XwUvKmBN1N>]; Ellen Nakashima, *Verizon providing all call records to U.S. under court order*, WASH. POST, June 6, 2013, http://articles.washingtonpost.com/2013-06-05/world/39766583_1_court-order-secret-court-verizon, [<http://perma.law.harvard.edu/0h9ns6o3WPz>]. For further discussion, see Part IV.D *infra*.

³⁶ Barton Gellman & Laura Poitras, *Documents: U.S., British intelligence mining data from nine U.S. internet companies in broad secret program*, WASH. POST, June 6, 2013, http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_print.html, [<http://perma.cc/03Ln5QPbWr>]; James Ball & Spencer Ackerman, *NSA loophole allows warrantless search for US citizens' emails and phone calls*, THE GUARDIAN, Aug. 9, 2013, <http://www.theguardian.com/world/2013/aug/09/nsa-loophole-warrantless-searches-email-calls>, [<http://perma.law.harvard.edu/0ETnqUSomG/>].

³⁷ James Risen & Laura Poitras, *N.S.A. Gathers Data on Social Connections of U.S. Citizens*, N.Y. TIMES, Sept. 28, 2013, <http://www.nytimes.com/2013/09/29/us/nsa-examines-social-networks-of-us-citizens.html?pagewanted=all>, [<http://perma.law.harvard.edu/0oMAghojGHO/>].

These and related policies were formulated and carried out by numerous high- and mid-level national security officials who served in the Bush Administration and continued to serve in the Obama Administration.³⁸

Given Senator Obama's powerful criticism of such policies before he took office as President, the question,³⁹ then, is this: Why does national

³⁸ These included Dennis Blair, President Obama's Director of National Intelligence from 2009 to 2010, who served as Commander-in-Chief of the U.S. Pacific Command in the Bush Administration; John Brennan, CIA Director and former Assistant to the President for Homeland Security in the Obama Administration, who served in the Bush Administration as Chief of Staff to CIA Director George Tenet, Deputy Director of the CIA, and Director of the National Counterterrorism Center; James B. Comey, FBI Director in the Obama Administration who served as Deputy Attorney General in the Bush Administration; James Clapper, Obama's Director of National Intelligence since 2010, who served as President Bush's Under Secretary of Defense for Intelligence; Robert Gates, Secretary of Defense in the Obama Administration from 2009 to 2011 and also in the Bush Administration; Stephen Kappes, Deputy Director of the CIA in the Obama Administration from 2009 to 2010, who served in that same position in the Bush Administration; Michael Leiter, Director of the National Counterterrorism Center under Obama from 2009 to 2011 and earlier under President Bush; Douglas Lute, Obama's coordinator for Afghanistan and Pakistan on the National Security Staff from 2009 to 2013, who served in the Bush Administration as Assistant to the President and Deputy National Security Advisor for Iraq and Afghanistan; Stanley A. McChrystal, Commander, International Security Assistance Force (ISAF) in Afghanistan in the Obama Administration, who served in the Bush Administration as Director of the Joint Staff from August 2008 to June 2009 and as Commander of the Joint Special Operations Command from 2003 to 2008; William McCraven, who served as Obama's Commander of the Joint Special Operations Command (JSOC) from 2009 to 2011 and also in the Bush Administration; Michael Mullen, who served as Obama's Chairman of the Joint Chiefs of Staff from 2009 to 2011 and also in the Bush Administration; Michael Morrell, Obama's Deputy Director of the CIA from 2010 to 2013, who served as Associate Deputy Director in the Bush Administration; Robert Mueller, Obama's FBI Director from 2009 to 2013 and also in the Bush Administration; Victoria Nuland, Obama's State Department spokesperson, who served as Deputy National Security Adviser to Vice President Dick Cheney; and David Petraeus, Obama's Director of the Central Intelligence Agency from 2011 to 2012, who served in the Bush Administration as Commander of United States Central Command, U.S. Forces in Afghanistan, and the Multinational Force in Iraq; and John Rizzo, the CIA's General Counsel in the Obama Administration in 2009 and also in the Bush Administration. See JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 27–28 (2012); MAZZETTI, *supra* note 22, at ix–xi; Jeremy W. Peters, *Senate Backs F.B.I. Chief and Considers Other Picks*, N.Y. TIMES, July 29, 2013, <http://www.nytimes.com/2013/07/30/us/politics/senate-approves-comey-to-lead-the-fbi.html>, [<http://perma.law.harvard.edu/0CFLXbX9yAE/>].

³⁹ While I focus on the continuation of Bush Administration policies by the Obama Administration, earlier administrations also have adhered to preexisting national security programs. Among the more prominent examples are the prosecution of the war in Vietnam and the pursuit of a system of anti-ballistic missile defense. See *generally* FUTTER, *supra* note 13; R.W. KOMER, *BUREAUCRACY DOES ITS THING: INSTITUTIONAL CONSTRAINTS ON U.S.-GVN PERFORMANCE IN VIETNAM (1972)*; see also COLUMBA PEOPLES, *JUSTIFYING BALLISTIC MISSILE DEFENCE: TECHNOLOGY, SECURITY AND CULTURE* (2010).

security policy remain constant even when one President is replaced by another who as a candidate repeatedly, forcefully, and eloquently promised fundamental changes in that policy?

I. Bagehot's Theory of Dual Institutions

A disquieting answer is provided by the theory that Walter Bagehot suggested in 1867 to explain the evolution of the English Constitution.⁴⁰ While not without critics, his theory has been widely acclaimed and has generated significant commentary.⁴¹ Indeed, it is something of a classic on the subject of institutional change generally, and it foreshadowed modern organizational theory.⁴² In brief, Bagehot's notion was as follows.

Power in Britain reposed initially in the monarch alone. Over the decades, however, a dual set of institutions emerged.⁴³ One set comprises the monarchy and the House of Lords.⁴⁴ These Bagehot called the "dignified" institutions—dignified in the sense that they provide a link to the past and excite the public imagination.⁴⁵ Through theatrical show, pomp,

⁴⁰ See WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* (Cornell Univ. Press 1963) (1867). Bagehot brought *The Economist* magazine to prominence; his own eminence became such that the middle years of 19th-century England were sometimes referred to as the "Age of Bagehot." M. A. Goldberg, *Trollope's The Warden: A Commentary on the "Age of Equipoise,"* 17 *NINETEENTH-CENTURY FICTION* 381, 381 (1963).

⁴¹ Bagehot's theory is still analyzed today. See, e.g., Gerard N. Magliocca, *The Constitution Can Do No Wrong*, 2012 *U. ILL. L. REV.* 723, 726 (2012) ("Walter Bagehot's *The English Constitution* is a classic study of the parliamentary system during the 1860s, but his work is timeless due to its emphasis on function over form. While *The Federalist* was the first modern study on how constitutions should be organized, *The English Constitution* was the first to ask why people obey their constitutions."); Thomas O. Sargentlich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 *WM. & MARY L. REV.* 679, 688 (1993) ("[Woodrow] Wilson's critique in the 1880s was directly influenced by Bagehot's study of the English Constitution, which was published in 1867 and in the United States in 1877. Indeed, Wilson specifically noted his intellectual debt to Bagehot."); Adam Tomkins, *The Republican Monarchy Revisited*, 19 *CONST. COMMENT.* 737, 738 (2002) ("Bagehot matters, even now. His work is of great importance to contemporary constitutional scholarship, both in Britain and to some extent also in the United States.").

⁴² See, e.g., Terry M. Moe & Michael Caldwell, *The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems*, 150 *J. INSTITUTIONAL & THEORETICAL ECON.* 171, 171–72 (1994) ("It is telling that the most widely cited analyses [include] Walter Bagehot's *The English Constitution* [1873] [t]he modern literature has echoed these same themes").

⁴³ BAGEHOT, *supra* note 40, at 176.

⁴⁴ *Id.* at 67–68, 82–86, 89.

⁴⁵ *Id.* at 61.

and historical symbolism, they exercise an emotional hold on the public mind by evoking the grandeur of ages past.⁴⁶ They embody memories of greatness. Yet it is a second, newer set of institutions— Britain’s “efficient” institutions—that do the real work of governing.⁴⁷ These are the House of Commons, the Cabinet, and the Prime Minister.⁴⁸ As Bagehot put it: “[I]ts dignified parts are very complicated and somewhat imposing, very old and rather venerable; while its efficient part . . . is decidedly simple and rather modern . . . Its essence is strong with the strength of modern simplicity; its exterior is august with the Gothic grandeur of a more imposing age.”⁴⁹

Together these institutions comprise a “disguised republic”⁵⁰ that obscures the massive shift in power that has occurred, which if widely understood would create a crisis of public confidence.⁵¹ This crisis has been averted because the efficient institutions have been careful to hide where they begin and where the dignified institutions end.⁵² They do this by ensuring that the dignified institutions continue to partake in at least some real governance and also by ensuring that the efficient institutions partake in at least some inspiring public ceremony and ritual.⁵³ This promotes continued public deference to the efficient institutions’ decisions and continued belief that the dignified institutions retain real power.⁵⁴ These dual institutions, one for show and the other for real, afford Britain expertise and experience in the actual art of governing while at the same time providing a façade that generates public acceptance of the experts’ decisions. Bagehot called this Britain’s “double government.”⁵⁵ The structural duality, some have suggested, is a modern reification of the “Noble Lie” that, two millennia before, Plato had thought necessary to insulate a state from the fatal excesses of democracy and to ensure deference to the golden class of efficient guardians.⁵⁶

⁴⁶ *Id.* at 250.

⁴⁷ *Id.* at 61.

⁴⁸ *Id.* at 66–68.

⁴⁹ *Id.* at 65.

⁵⁰ *Id.* at 266.

⁵¹ *Id.* at 97, 248–51, 255.

⁵² *Id.* at 176.

⁵³ *Id.*

⁵⁴ *See id.* at 176–77.

⁵⁵ *Id.* at 263.

⁵⁶ R.H.S. Crossman, *Introduction* to WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 27 (Cornell Univ. Press 1963) (1867).

Bagehot's theory may have overstated the naiveté of Britain's citizenry. When he wrote, probably few Britons believed that Queen Victoria actually governed. Nor is it likely that Prime Minister Lord Palmerston, let alone 658 members of the House of Commons, could or did consciously and intentionally conceal from the British public that it was really they who governed. Big groups keep big secrets poorly. Nonetheless, Bagehot's enduring insight—that dual institutions of governance, one public and the other concealed, evolve side-by-side to maximize both legitimacy and efficiency—is worth pondering as one possible explanation of why the Obama and Bush national security policies have been essentially the same. There is no reason in principle why the institutions of Britain's juridical offspring, the United States, ought to be immune from the broader bifurcating forces that have driven British institutional evolution.

As it did in the early days of Britain's monarchy, power in the United States lay initially in one set of institutions—the President, Congress, and the courts. These are America's "dignified" institutions. Later, however, a second institution emerged to safeguard the nation's security. This, America's "efficient" institution (actually, as will be seen, more a network than an institution) consists of the several hundred executive officials who sit atop the military, intelligence, diplomatic, and law enforcement departments and agencies that have as their mission the protection of America's international and internal security. Large segments of the public continue to believe that America's constitutionally established, dignified institutions are the locus of governmental power; by promoting that impression, both sets of institutions maintain public support. But when it comes to defining and protecting national security, the public's impression is mistaken. America's efficient institution makes most of the key decisions concerning national security, removed from public view and from the constitutional restrictions that check America's dignified institutions. The United States has, in short, moved beyond a mere imperial presidency to a bifurcated system—a structure of double government—in which even the President now exercises little substantive control over the overall direction of U.S. national security policy. Whereas Britain's dual institutions evolved towards a concealed republic, America's have evolved in the opposite direction, toward greater centralization, less accountability, and emergent autocracy.

The parallels between U.S. and British constitutionalism are, of course, inexact. In the United States, the transfer of power has not been purposeful, as Bagehot implied it was in Britain.⁵⁷ Members of America's efficient institutions have not secretly colluded in some dark plot aimed at wresting control over national security from its dignified institutions. What may appear in these institutions' collective motivation as conscious parallelism has in fact been a wholly open and, indeed, unabashed response to incentives deeply rooted in the legal and political structures in which they operate.

Some of the evolutionary drivers, on the other hand, have been similar in both countries. Electoral incapacity, for example, has been key. Organized deception would be unnecessary, Bagehot suggested, and the trappings of monarchy could be dispensed with if Britain's population had been generally well-educated, well-off, and politically intelligent.⁵⁸ But he believed it was not.⁵⁹ The lower and middle classes were "narrow-minded, unintelligent, incurious";⁶⁰ they found educated discourse "unintelligible, confused and erroneous."⁶¹ Bagehot wrote: "A life of labour, an incomplete education, a monotonous occupation, a career in which the hands are used much and the judgment is used little"⁶² had produced "the last people in the world to whom . . . an immense nation would ever give" controlling authority.⁶³ No one will ever tell them that, of course: "A people *never* hears censure of itself,"⁶⁴ least of all from political candidates. The road to public respect (and re-election) lies in ingratiation. So long as their awe and imaginations remain engaged, however, the public could be counted upon to defer—if not to their real rulers, then to what Bagehot referred to as "the theatrical show" that accompanied the apparent rulers.⁶⁵ The "wonderful spectacle" of monarchical pomp and pageantry captured the public's

⁵⁷ This was the inference of the eminent Bagehot scholar R.H.S. Crossman, writing in 1963. Crossman, *Introduction*, *supra* note 56, at 25–26 (referring to "conscious concealment," "organized deception," and "mass deception").

⁵⁸ BAGEHOT, *supra* note 40, at 97.

⁵⁹ *Id.* at 249.

⁶⁰ *Id.* at 63.

⁶¹ *Id.*

⁶² *Id.* at 250.

⁶³ *Id.* at 248.

⁶⁴ *Id.* at 251.

⁶⁵ *Id.* at 248.

imagination, convinced the public that they were not equal to the greatness governance demanded, and induced them to obey.⁶⁶

America's population today is of course far removed from the Dickensian conditions of Victorian England. Yet the economic and educational realities remain stark.⁶⁷ Nearly fifty million Americans—more than 16% of the population and almost 20% of American children—live in poverty.⁶⁸ A 2009 federal study estimated that thirty-two million American adults, about one in seven, are unable to read anything more challenging than a children's picture book and are unable to understand the side effects of medication listed on a pill bottle.⁶⁹ The Council on Foreign Relations reported that the United States has “slipped ten spots in both high school and college graduation rates over the past three decades.”⁷⁰ One poll found that nearly 25% of Americans do not know that the United States declared its independence from Great Britain.⁷¹ A 2011 *Newsweek* survey disclosed that 80% did not know who was president during World War I; 40% did not know who the United States fought in World War II; 29% could not identify the current Vice President of the United States; 70% did not know that the Constitution is the supreme law of the land; 65% did not know what happened at the constitutional convention; 88% could not identify any of

⁶⁶ *Id.* at 249.

⁶⁷ These realities seem hard to square with the suggestion that politics and public opinion provide constraints that can substitute for the rule of law, resting as they do upon the acknowledged premise that “a wealthy and educated population is a strong safeguard of democracy.” ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 14 (2010).

⁶⁸ *Census: U.S. Poverty Rate Spikes, Nearly 50 Million Americans Affected*, CBS DC (Nov. 15, 2012, 10:01 AM), <http://washington.cbslocal.com/2012/11/15/census-u-s-poverty-rate-spikes-nearly-50-million-americans-affected/>, [<http://perma.law.harvard.edu/0b3qiirRh4W/>]. In 2012, the poverty level for a family of four was \$23,050 in total yearly income. *Computations for the 2012 Annual Update of the HHS Poverty Guidelines for the 48 Contiguous States and the District of Columbia*, U.S. DEP'T OF HEALTH & HUM. SERVICES, <http://aspe.hhs.gov/poverty/12computations.shtml>, [<http://perma.law.harvard.edu/0RNu9XipUH1/>] (last updated Feb. 9, 2012).

⁶⁹ Greg Toppo, *Literacy Study: 1 in 7 U.S. adults are unable to read this story*, USA TODAY, Jan. 8, 2009, http://usatoday30.usatoday.com/news/education/2009-01-08-adult-literacy_N.htm, [<http://perma.law.harvard.edu/0ubbbK5zDPb7/>].

⁷⁰ *Renewing America—Remedial Education: Federal Education Policy*, COUNCIL ON FOREIGN REL. (June 2013), <http://www.cfr.org/united-states/remedial-education-federal-education-policy/p30141>, [<http://perma.law.harvard.edu/07e5QqRd5mV/>].

⁷¹ *7/1: Independence Day—Seventeen Seventy When?*, MARIST POLL (July 1, 2011), <http://maristpoll.marist.edu/71-independence-day-dummy-seventeen-seventy-when/>, [<http://perma.law.harvard.edu/0QYaZAeM15H/>] (“[A]bout one in four Americans doesn't know from which *country* the United States declared its independence.”).

the writers of the Federalist Papers; 27% did not know that the President is in charge of the Executive Branch; 61% did not know the length of a Senate term; 81% could not name one power conferred on the federal government by the Constitution; 59% could not name the Speaker of the House; and 63% did not know how many justices are on the Supreme Court.⁷² Far more Americans can name the Three Stooges than any member of the Supreme Court.⁷³ Other polls have found that 71% of Americans believe that Iran already has nuclear weapons⁷⁴ and that 33% believed in 2007 that Saddam Hussein was personally involved in the 9/11 attacks.⁷⁵ In 2006, at the height of U.S. military involvement in the region, 88% of American 18- to 24-year-olds could not find Afghanistan on a map of Asia, and 63% could not find Iraq or Saudi Arabia on a map of the Middle East.⁷⁶ Three quarters could not find Iran or Israel,⁷⁷ and 70% could not find North Korea.⁷⁸ The “over-vote” ballots of several thousand voters—greater in number than the margin of difference between George W. Bush and Al Gore—were rejected in Florida in the 2000 presidential election because voters did not understand that they could vote for only one candidate.⁷⁹

There is, accordingly, little need for purposeful deception to induce generalized deference; in contemporary America as in Bagehot’s Britain, a healthy dose of theatrical show goes a long way.

⁷² *Take the Quiz: What We Don’t Know*, NEWSWEEK, Apr. 4, 2011, at 58.

⁷³ *New National Poll Finds: More Americans Know Snow White’s Dwarfs Than Supreme Court Judges, Homer Simpson Than Homer’s Odyssey, and Harry Potter Than Tony Blair*, BUS. WIRE (Aug. 14, 2006, 9:00 AM), <http://www.businesswire.com/news/home/20060814005496/en/National-Poll-Finds-Americans-Snow-Whites-Dwarfs>, [<http://perma.cc/6VU5-V48G>].

⁷⁴ *CNN Poll: Americans Believe Iran has Nuclear Weapons*, CNN.COM (Feb. 19, 2010, 12:00 PM), <http://politicalticker.blogs.cnn.com/2010/02/19/cnn-poll-american-believe-iran-has-nuclear-weapons/>, [<http://perma.law.harvard.edu/0hxacRqVRf>].

⁷⁵ Kathy Frankovic, *Polls, Truth Sometimes at Odds*, CBSNEWS.COM (Feb. 11, 2009, 4:15 PM), http://www.cbsnews.com/2100-501863_162-3253552.html, [<http://perma.law.harvard.edu/0MjaPmmoEYD>].

⁷⁶ NATIONAL GEOGRAPHIC-ROPER PUBLIC AFFAIRS, *2006 Geographic Literacy Study 22–24* (May 2006), available at <http://www.nationalgeographic.com/roper2006/pdf/FINALReport2006GeogLitsurvey.pdf>, [<http://perma.law.harvard.edu/0T7nCc74Q9p>].

⁷⁷ *Id.* at 24–25.

⁷⁸ *Id.* at 22.

⁷⁹ *See Newspaper: Butterfly Ballot Cost Gore White House*, CNN.COM (Mar. 11, 2001, 8:43 AM), <http://edition.cnn.com/2001/ALLPOLITICS/03/11/palmbeach.recount/>, [<http://perma.law.harvard.edu/0Aiwr7KNj6Z>] (“Voters confused by Palm Beach County’s butterfly ballot cost Al Gore the presidency, The Palm Beach Post concluded Sunday.”).

II. The Trumanite Network

“The trained official,” Bagehot wrote, “hates the rude, untrained public.”⁸⁰ “He thinks that they are stupid, ignorant, restless”⁸¹ President Harry Truman’s Secretary of State Dean Acheson, not renowned for bluntness, let slip his own similar assessment of America’s electorate. “If you truly had a democracy and did what the people wanted,” he said, “you’d go wrong every time.”⁸² Acheson’s views were shared by other influential foreign policy experts,⁸³ as well as government officials;⁸⁴ thus emerged America’s “efficient” national security institution.⁸⁵

⁸⁰ BAGEHOT, *supra* note 40, at 196. For a recent, comprehensive treatment of the problem of political ignorance, see generally ILYA SOMIN, *DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER* (2013).

⁸¹ BAGEHOT, *supra* note 40, at 196.

⁸² MICHAEL H. HUNT, *THE AMERICAN ASCENDANCY: HOW THE UNITED STATES GAINED AND WIELDED GLOBAL DOMINANCE* 149 (2007) (quoting WALTER LAFEVER, *AMERICAN POLICY-MAKERS, PUBLIC OPINION, AND THE OUTBREAK OF THE COLD WAR, 1945–50*, at 60 (1977)).

⁸³ The diplomatic historian Thomas A. Bailey wrote in 1948 that “[d]eception of the people may become increasingly necessary, unless we are willing to give our leaders in Washington a freer hand Just as the yielding of some of our national sovereignty is the price that we must pay for effective international organization, so the yielding of some of our democratic control of foreign affairs is the price that we may have to pay for greater physical security.” THOMAS A. BAILEY, *THE MAN IN THE STREET* 13 (1948). Walter Lippmann, then the nation’s preeminent columnist, wrote in 1955 that the “people have imposed a veto upon the judgments of informed and responsible officials Mass opinion . . . has shown itself to be a dangerous master of decisions when the stakes are life and death.” WALTER LIPPMANN, *THE PUBLIC PHILOSOPHY* 20 (Transaction Publishers 1989) (1955). George Kennan wrote that he felt a “distaste amounting almost to horror for the chaotic disorder of the American political process.” GEORGE F. KENNAN, *MEMOIRS: 1950–1963*, at 322 (1972). Irving Kristol, godfather of modern neoconservatism, said that “the notion that there should be one set of truths available to everyone is a modern democratic fallacy. It doesn’t work.” There are, he contended, “different truths for different kinds of people.” *Quoted in* Ronald Bailey, *Origin of the Specious: Why do neoconservatives doubt Darwin?*, 29 *REASON* 22, 24 (1997).

⁸⁴ The “foreign service,” said Dean Rusk, “does not share their view that the world was created at the last presidential election or that a world of more than 160 nations will somehow be different because we elected one man rather than another as president.” BARRY RUBIN, *SECRETS OF STATE* 99 (1985).

⁸⁵ Acheson’s “philosophical tendencies aligned him with the Establishment, which, at home and abroad, represented the status quo,” Justice Douglas wrote. WILLIAM O. DOUGLAS, *THE COURT YEARS 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 289 (1980). “Under Acheson,” said Douglas, “the nation set its foot on the dreary path it was to follow for the next decades.” *Id.*

Before examining the origins and contemporary operation of those institutions, let us adopt more neutral terms that better describe their historical roots. The terms “efficient” and “dignified” have taken on somewhat different implications over the years and, to put it delicately, imply qualities that not all contemporary American institutions fully embody.

James Madison was perhaps the principal architect of the constitutional design.⁸⁶ Honoring Madison’s founding role, this Article will substitute “Madisonian” for “dignified,” referring to the three branches of the federal government formally established by the Constitution to serve as checks on the instruments of state security. Under the Madisonian system, Congress was given power to “raise and support Armies”;⁸⁷ to “provide and maintain a Navy”;⁸⁸ to “make Rules for the Government and Regulation of the land and naval Forces”;⁸⁹ to “provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions”;⁹⁰ and to “provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”⁹¹ The commander-in-chief of the armed forces was to be a civilian, the President.⁹² The President was authorized to make treaties, but only with the advice and consent of two thirds of the Senate.⁹³ No special immunities were carved out for the military from judicial process, to be exercised by courts with jurisdiction over “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties”⁹⁴

⁸⁶ See generally EDWARD M. BURNS, *JAMES MADISON, PHILOSOPHER OF THE CONSTITUTION* (1938); RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* (1971); ADRIENNE KOCH, *MADISON’S ADVICE TO MY COUNTRY* (1966); JACK N. RAKOVE, *JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC* (3d ed. 2007); ROBERT A. RUTLAND, *JAMES MADISON, THE FOUNDING FATHER* (1987).

⁸⁷ U.S. CONST. art. I, § 8, cl. 12.

⁸⁸ *Id.* art. I, § 8, cl. 13.

⁸⁹ *Id.* art. I, § 8, cl. 14.

⁹⁰ *Id.* art. I, § 8, cl. 15.

⁹¹ *Id.* art. I, § 8, cl. 16.

⁹² *Id.* art. II, § 2, cl. 1.

⁹³ *Id.* art. II, § 2, cl. 2.

⁹⁴ *Id.* art. III, § 2, cl. 1.

These constitutional provisions thus divide power over national security. Animating the separation of powers is a well-known theory. Madison believed that dividing authority among the three branches of government would cause the members of each of the three branches to seek to expand their power but also to rebuff encroachments on their power.⁹⁵ An equilibrium would result, and this balance would forestall the rise of centralized, despotic power. But more than mere institutional design was required; the government Madison envisioned was not a machine that would check itself.⁹⁶ Essential to the effectiveness of these checks and the maintenance of balance was civic virtue—an informed and engaged electorate.⁹⁷ The virtue of the people who held office would rest on the intelligence and public-mindedness of the people who put them there. Absent civic virtue, the governmental equilibrium of power would face collapse.⁹⁸ This is the Madisonian model.

President Harry S. Truman, more than any other President, is responsible for creating the nation's "efficient" national security apparatus.⁹⁹ Under him, Congress enacted the National Security Act of 1947, which unified the military under a new Secretary of Defense, set up the CIA, created the modern Joint Chiefs of Staff, and established the National Security Council ("NSC").¹⁰⁰ Truman also set up the National Security Agency, which was intended at the time to monitor communications abroad.¹⁰¹ Friends as well as detractors viewed Truman's role as decisive.¹⁰² Honoring Truman's founding role, this Article will substitute "Trumanite" for "efficient," referring to the network of several hundred high-level military, intelligence, diplomatic, and law enforcement officials within the Executive Branch who are responsible for national security policymaking.

⁹⁵ See THE FEDERALIST No. 10 (James Madison).

⁹⁶ *Id.*

⁹⁷ See *infra* text at notes 576–81.

⁹⁸ *Id.*

⁹⁹ For an account of the origins and growth of the U.S. national security apparatus, see MICHAEL J. HOGAN, A CROSS OF IRON: HARRY S. TRUMAN AND THE ORIGINS OF THE NATIONAL SECURITY STATE, 1945–1954 (1998).

¹⁰⁰ National Security Act of 1947, 50 U.S.C.A. §§ 3002–3003, 3021 (West 2013).

¹⁰¹ See S. REP. NO. 94–755, at 736 (1976). For a discussion of the NSA's role in the surveillance of domestic communications, see *infra* Part IV. D.

¹⁰² Justice William O. Douglas, for example, expressed concern about the growing influence of the military on U.S. foreign policy. DOUGLAS, *supra* note 85, at 292.

A. Origins

President Truman's national security initiatives were controversial, with liberal and conservative positions in the debate curiously inverted from those prevalent in current times. In the late 1940s and early 1950s, congressional liberals generally supported Truman's efforts to create more centralized national security institutions on the theory, held by many and summarized by Michael Hogan, that "peace and freedom were indivisible, that American power had to be mobilized on behalf of democracy 'everywhere,' and that tradition had to give ground to this new responsibility."¹⁰³ Senator Hubert Humphrey of Minnesota, for example, dismissed objections to the constitutionality of the new arrangements: "It is one thing to have legalistic arguments about where the power rests," he said, but another to straitjacket a President in trying to deal with a totalitarian state capable of swift action.¹⁰⁴ Stalin could strike a deathblow at any time, he argued; "[t]hose days of all the niceties and formalities of declarations of war are past"¹⁰⁵ Under these conditions, "it is hard to tell . . . where war begins or where it ends."¹⁰⁶ Senator Paul Douglas of Illinois insisted that U.S. military power should support democracy "everywhere."¹⁰⁷ Unanswered aggression would lead only to further aggression, he suggested, requiring the United States to move to a posture of permanent military preparedness.¹⁰⁸

Conservatives in Congress, on the other hand, feared that Truman's ballooning national security payrolls, reliance upon military solutions to tackle international problems, and efforts to centralize national security decision-making posed a threat to democratic institutions and the principle of civilian leadership. Republican Senator Edward V. Robertson of Wyoming, for example, worried that Truman's military consolidations could amount to the creation of an "embryonic" general staff similar to that of Germany's Wehrmacht.¹⁰⁹ A new national intelligence agency, he said,

¹⁰³ HOGAN, *supra* note 99, at 330.

¹⁰⁴ 97 CONG. REC. 2854, 3098 (1951).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ 97 CONG. REC. 247 (1951).

¹⁰⁸ *See* 97 CONG. REC. 244–47 (1951).

¹⁰⁹ 93 CONG. REC. 5246, 5247 (1947).

could grow into an American “gestapo.”¹¹⁰ Republican Senator William Langer of North Dakota and his allies believed that the Soviet threat was exaggerated; the real enemy was the Pentagon, they believed, where “military leaders had an insatiable appetite for more money, more men, and more power, whatever the cost to democracy.”¹¹¹ The conservatives invoked the specter of a “garrison state,” a “police state,” and a “slave state” run by “power-grabbing bureaucrats.”¹¹² They saw peacetime military conscription as “aping the military clique of Hitler” and leading to a “complete militarization of the country,” creating a “permanent military caste.”¹¹³ Republican Congresswoman Katherine St. George of New York, recalling Washington’s Farewell Address, foresaw the possibility of military domination of the nation’s civilian leadership.¹¹⁴ Republican Senators John Bricker and Robert Taft of Ohio and Homer Capehart of Indiana voted to cap the size of active U.S. military forces in part to halt what they regarded as “a drift from ‘congressional responsibility’ to ‘administrative policymaking’ . . . which would destroy the ‘liberty of the people.’”¹¹⁵ “The truth is that we are slowly losing our freedoms as we move toward the garrison state,” said the Republican leader of the House of Representatives, Joseph W. Martin of Massachusetts.¹¹⁶

Truman himself appeared to share these concerns, at least to an extent. He was “very strongly anti-FBI,” according to his aide Clark Clifford.¹¹⁷ Truman was “afraid of a ‘Gestapo’” and wanted to “hold [the] FBI down,” which he regarded as “dangerous.”¹¹⁸ Although a military officer would be permitted to head the CIA, Truman accepted an amendment to the National Security Act under which the Agency would be prohibited from performing any “police, subpoena, law enforcement powers, or internal security functions.”¹¹⁹ As for the military, while wasteful

¹¹⁰ 93 CONG. REC. 8320 (1947).

¹¹¹ HOGAN, *supra* note 99, at 154.

¹¹² *Id.* at 319–20.

¹¹³ *Id.* at 155.

¹¹⁴ 97 CONG. REC. 3374 (1951).

¹¹⁵ HOGAN, *supra* note 99, at 321.

¹¹⁶ 97 CONG. REC. 6982 (1951) *quoted in* Hogan, *supra* note 99, at 338.

¹¹⁷ *Quoted in* HOGAN, *supra* note 99, at 255.

¹¹⁸ *Quoted in id.*

¹¹⁹ National Security Act of 1947, 50 U.S.C.A. § 3036(d)(1) (West 2013). *See generally* DOUGLAS T. STUART, CREATING THE NATIONAL SECURITY STATE: A HISTORY OF THE LAW THAT TRANSFORMED AMERICA (2012).

duplication had to be eliminated and better coordination established, Truman feared that collective deliberation could force the President to share responsibility and decisionmaking power, resulting in a diminution in presidential authority and a weakening of civilian control over the military.¹²⁰ With half of the members of the new National Security Council coming from the military, Truman believed it would be difficult for the President to ignore their recommendations, even though their counsel was only advisory.¹²¹ Truman was particularly annoyed by inter-service rivalries and pressure from military lobbyists to increase their services' budgets.¹²² "We must be very careful that the military does not overstep the bounds from an economic standpoint domestically," he wrote.¹²³ He also believed that "[m]ost of them would like to go back to a war footing."¹²⁴ But he considered the new national security apparatus necessary to rein in the military as well as to improve the United States' ability to respond to the looming Soviet threat. The Hoover Commission had warned in 1949 that the Joint Chiefs had come to act as "virtually a law unto themselves"¹²⁵ and that "centralized civilian control scarcely exists" in certain military departments.¹²⁶ Internecine warfare among the services had come to undermine the nation's defense. Truman believed that his new national security architecture was the best bet to bolster the capacity of the nation to meet security threats while safeguarding the democratic institutions that the newly-empowered military and intelligence organizations were expected to protect.¹²⁷

¹²⁰ HOGAN, *supra* note 99, at 37.

¹²¹ *Id.*

¹²² *See generally id.* at 36–37.

¹²³ *Quoted in id.* at 109.

¹²⁴ *Quoted in id.*

¹²⁵ THE COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, THE NATIONAL SECURITY ORGANIZATION: A REPORT TO THE CONGRESS 11 (1949), available at http://www.foia.cia.gov/sites/default/files/document_conversions/45/national_sec_org.pdf.

¹²⁶ *Id.* at 9.

¹²⁷ *See* Aaron L. Friedberg, *Why Didn't the United States Become a Garrison State?*, 16 INT'L SEC. 109, 123–31 (1992). For a discussion of the broader historical evolution of the "garrison state," see generally MILTON J. ESMAN, THE EMERGING AMERICAN GARRISON STATE (2013).

B. Operation

Sixty years later, sitting atop its national security institutions, an intra-governmental network that has descended from what Truman created now manages the real work of preventing the country from, in Acheson's phrase, "go[ing] wrong."¹²⁸ The *Washington Post's* landmark 2011 study of Truman's modern handiwork, "Top Secret America," identified forty-six federal departments and agencies engaged in classified national security work.¹²⁹ Their missions range from intelligence gathering and analysis to war-fighting, cyber-operations, and weapons development. Almost 2,000 private companies support this work, which occurs at over 10,000 locations across America.¹³⁰ The size of their budgets and workforces are mostly classified, but it is clear that those numbers are enormous—a total annual outlay of around \$1 trillion and millions of employees.¹³¹ "The nightmare of the modern state," Henry Kissinger has written, "is the hugeness of the bureaucracy, and the problem is how to get coherence and design in it."¹³²

Coherence and design, however, must come largely from the bureaucracy itself. Presidents can appoint only between 3,000 and 4,000

¹²⁸ HUNT, *supra* note 82, at 149.

¹²⁹ See *Top Secret America: Government Organizations*, WASH. POST, <http://projects.washingtonpost.com/top-secret-america/gov-orgs/>, [<http://perma.law.harvard.edu/0tjWr3B3gJd/>] (last visited Apr. 13, 2013); see generally DANA PRIEST & WILLIAM M. ARKIN, *TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE* (2011).

¹³⁰ Dana Priest & William M. Arkin, *A hidden world, growing beyond control*, WASH. POST, July 19, 2010, <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/print>, [<http://perma.law.harvard.edu/0aNktQ4JCum/>] ("Some 1,271 government organizations and 1,931 private companies work on programs related to counterterrorism, homeland security and intelligence in about 10,000 locations across the United States.").

¹³¹ See, e.g., GORDON ADAMS & CINDY WILLIAMS, *BUYING NATIONAL SECURITY: HOW AMERICA PLANS AND PAYS FOR ITS GLOBAL ROLE AND SAFETY AT HOME 1* (2010) ("Including the cost of operations in Iraq and Afghanistan, combined spending for national security, including national defense, international affairs, and homeland security, was more than three-quarters of a trillion dollars in fiscal year (FY) 2009, about 80 percent more in real terms than in FY 2001."); Chris Hellman & Mattea Kramer, *Our Insanely Big \$1 Trillion National Security Budget*, MOTHER JONES (May 23, 2012, 3:00 AM), <http://www.motherjones.com/politics/2012/05/national-security-budget-1-trillion-congress>, [<http://perma.law.harvard.edu/0UFkLYtVjSU/>] (totaling the budgets of all national security-related agencies in the federal government—including those that support veterans—and concluding that "the national security budget in fiscal 2013 will be nearly \$1 trillion").

¹³² Saul Pett, *Henry A. Kissinger: Loyal Retainer or Nixon's Svengali?*, WASH. POST, Aug. 2, 1970, at B3.

individuals (including domestic policy officials).¹³³ Of the 668,000 civilian employees in the Department of Defense and related agencies in 2004, only 247 were political appointees.¹³⁴ Several hundred policymakers, therefore, must be drawn from the national security bureaucracy to oversee and direct it. They include, but are not limited to, the President’s personal assistants, approximately 175 professional staff members of the National Security Council¹³⁵—“the single most powerful staff in Washington.”¹³⁶ Among this larger group of national security policymakers that comprise the National Security Council are careerists as well as “in-and-outers”—political appointees, academics, analysts from think tanks, military officers, and other officials seconded from executive agencies.

These several hundred officials comprise America’s Trumanite network. They sit at the pinnacle of what Professor Jack Goldsmith has called “Washington’s tight-knit national security culture.”¹³⁷ After spending their professional lives writing what they did not sign, finally they sign what they did not write. They are not yet driven to work in the morning by a black car but are one step away. They are more likely to have been to Kabul than Tulsa. They visit the hinterlands of fly-over America on holidays, if then. They seldom appear on television and seek neither celebrity nor wealth. High school class trips do not visit their offices. Awake at night they

¹³³ See, e.g., Lyndsey Layton & Lois Romano, ‘Plum Book’ Is Obama’s Big Help-Wanted Ad, WASH. POST, Nov. 13, 2008, http://articles.washingtonpost.com/2008-11-13/politics/36810686_1_plum-book-executive-secretary-job-seekers, [<http://perma.law.harvard.edu/084DcU22qjN/>] (describing how “[a]bout one-third” of the more than 8,000 jobs in the “Plum Book” “are strictly presidential appointments—that is, patronage positions that will go largely to Democrats who know how to network”); Camille Tuutti, *How to become a presidential appointee*, FCW (Nov. 9, 2012), <http://fcw.com/articles/2012/11/09/hire-presidential-appointees.aspx>, [<http://perma.law.harvard.edu/0JDFgRBqEyv/>] (“Not all of the jobs listed in the Plum Book can be filled at the discretion of the administration, however. There are roughly 4,200 jobs that can be filled at the discretion, Palguta said, and 500 to 600 of them have some special statutory exceptions or are time limited.”).

¹³⁴ DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 82 (2008).

¹³⁵ See ALAN G. WHITTAKER, ET AL., NAT’L DEF. UNIV., *THE NATIONAL SECURITY POLICY PROCESS: THE NATIONAL SECURITY COUNCIL AND INTERAGENCY SYSTEM* 14 (2011), available at <http://www.virginia.edu/cnsl/pdf/national-security-policy-process-2011.pdf>.

¹³⁶ CHRISTOPHER C. SHOEMAKER, *THE NSC STAFF: COUNSELING THE COUNCIL* 1 (1991).

¹³⁷ GOLDSMITH, *supra* note 38, at 29.

think about the implications of the next Stuxnet,¹³⁸ not ten-year treasury yields. Success lies in being in the big meeting, reading the key memo—being part of the big decision. The Trumanites draw little overt attention but wield immense, unnoticed power.

Unlike “the best and the brightest” of earlier times, the Trumanites are not part of big decisions because of wealth, family connections, or an elite education. Most have no assured financial or social safety net to save them should they slip. They are “in” because they are smart, hard-working, and reliable, which among other things means unlikely to embarrass their superiors. What they may lack in subtlety of mind or force of intellect they make up in judgment.¹³⁹ Love of country draws the Trumanites to their work but so also do the adrenaline rush of urgent top-secret news flashes, hurried hallway briefings, emergency teleconferences, intense confrontation, knowing the confidential sub-plot, and, more broadly, their authority. The decisions they secretly shape are the government’s most crucial. They are Trollope’s Tom Towers: “It is true he wore no ermine, bore no outward marks of a world’s respect; but with what a load of inward importance was he charged! It is true his name appeared in no large capitals . . . but what member of Parliament had half his power?”¹⁴⁰

The Trumanites are, above all, efficient, or at least efficient relative to the Madisonians. They can move quickly. They are concise summarizers; they know their superiors have as little time as they do and need pre-digested ideas. They face no need for hearings or markups or floor debates and afford no occasion for briefs, oral arguments, or appeals. True, the interagency process does take time; papers do have to be cleared and disagreements resolved. But, again—relative to the Madisonian institutions—the Trumanite network is the paragon of efficiency. “The decisive reason for the advance of bureaucratic organization,” Max Weber noted, “has

¹³⁸ Stuxnet was a computer worm believed to have been released by the United States and Israel as part of a cyber operation to damage Iran’s nuclear facilities. *See generally In classified cyberwar against Iran, trail of Stuxnet leak leads to White House*, WASH. TIMES, Aug. 18, 2013, <http://www.washingtontimes.com/news/2013/aug/18/trail-of-stuxnet-cyberwar-leak-to-author-leads-to-/?page=all>, [<http://perma.cc/WD4V-MYEP>].

¹³⁹ *See* C. WRIGHT MILLS, *THE POWER ELITE* 354 (1956).

¹⁴⁰ ANTHONY TROLLOPE, *THE WARDEN* 190 (Bernhard Tauchnitz 1859) (1855). However, “their prestige is a sort of ex-officio prestige,” in the words of a more contemporary observer, “awarded for performance and function and revocable for lack of it.” WILLIAM H. WHYTE, JR., *THE ORGANIZATION MAN* 343 (1957).

always been its purely technical superiority over any other form of organization.”¹⁴¹

The Trumanites share the public’s faith in American exceptionalism, but they are not ideologues. As Bagehot said of Britain’s analogous institution, “[it] is permanently efficient, because it is not composed of warm partisans.”¹⁴² Trumanites are, above all, rationalists. They appear at all costs sound, responsible, serious, and disinterested, never extreme or sentimental, never too far ahead of policy or too far behind it, creative but not too creative, never boringly predictable, and, above all, never naïve. They are, in Bagehot’s words, “in contact with reality.”¹⁴³ They go only “where [they] think[] . . . the nation will follow.”¹⁴⁴ “[T]he way to lead them—the best and acknowledged way—is to affect a studied and illogical moderation.”¹⁴⁵ Their objective is to be *uncategorizable*—neither predictably hard-line nor predictably soft-line, weighing options on their merits but remaining always—for it is, after all, national security that is at stake—tough.

“[T]his cast of mind,” C. Wright Mills concluded, “defines international reality as basically military.”¹⁴⁶ John Kenneth Galbraith recalled the friendly counsel of McGeorge Bundy, National Security Advisor to Presidents John F. Kennedy and Lyndon Johnson: “Ken,” Bundy told him, “you always advise against the use of force—do you realize that?” The result of being typecast, Galbraith said, was that on security issues he found himself always like an Indian, “firing occasional arrows into the campsite from the outside.”¹⁴⁷ Les Gelb, former president of the Council on Foreign Relations and an Assistant Secretary of State in the Carter Administration, later explained his initial support of the Iraq War as “symptomatic of unfortunate tendencies within the foreign policy

¹⁴¹ MAX WEBER, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 214 (Hans Gerth & Charles Mills eds. & trans., Routledge 2009) (1948).

¹⁴² BAGEHOT, *supra* note 40, at 159.

¹⁴³ *Id.* at 160.

¹⁴⁴ *Id.* at 151.

¹⁴⁵ *Id.* at 159.

¹⁴⁶ MILLS, *supra* note 139, at 222. James Carroll has suggested that by 1965, “[f]or the first time in [American] history, military assumptions undergirded America’s idea of itself.” JAMES CARROLL, *HOUSE OF WAR: THE PENTAGON AND THE DISASTROUS RISE OF AMERICAN POWER* 29 (2006).

¹⁴⁷ DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST* 60 (1972).

community, namely the disposition and incentives to support wars to retain political and professional credibility.”¹⁴⁸ One must always retain credibility, which counsels against fighting losing battles at high credibility costs, particularly for a policy option that would play in Peoria as a weak one. Whether the policy is in reality the most effective is beside the point. It is the appearance that matters, and in appearance, the policy must seem hard-hitting. That reality permeates national security policymaking. “[T]he White House [was] ever afraid,” Vali Nasr has written, “that the young Democratic President would be seen as ‘soft.’”¹⁴⁹ To have gone against the military on Afghanistan would have made the President look weak. “Mr. President,” advised an NSC staff member, “I don’t see how you can defy your military chain” on Afghanistan force levels.¹⁵⁰ “No Democratic president can go against military advice, especially if he asked for it,” said CIA Director Leon Panetta.¹⁵¹

C. Threat Exaggeration

The Trumanites’ propensity to define security in military and intelligence terms rather than political and diplomatic ones reinforces a powerful structural dynamic. That dynamic can be succinctly stated: *Overprotection of national security creates costs that the Trumanite network can externalize; under-protection creates costs that the network must internalize.* The resulting incentive structure encourages the exaggeration of existing threats and the creation of imaginary ones. The security programs that emerge are, in economic terms, “sticky down”—easier to grow than to shrink.

The Trumanites sacrifice little when disproportionate money or manpower is devoted to security. The operatives that they direct do not

¹⁴⁸ Les Gelb & Jeanne-Paloma Zelmati, *Mission Unaccomplished*, 13 DEMOCRACY 10, 24 (2009).

¹⁴⁹ NASR, *supra* note 2, at 36.

¹⁵⁰ BOB WOODWARD, OBAMA’S WARS 319 (2010).

¹⁵¹ *Id.* at 247. The President’s staff were furious after a meeting with the President and military leaders. “The generals and admirals are systematically playing him,” they said, “boxing him in.” *Id.* at 173.

incur trade-off costs.¹⁵² The Trumanites do, however, reap the benefits of that disproportionality—a larger payroll, more personnel, broader authority, and an even lower risk that they will be blamed in the event of a successful attack.¹⁵³ Yet Madisonian institutions incur the costs of excessive resources that flow to the Trumanites. The President must submit a budget that includes the needed taxes. Members of Congress must vote for those taxes. A federal agency must collect the taxes. When it comes to picking up the tab, Trumanites are nowhere to be seen.

If national security protection is inadequate, on the other hand, the Trumanites are held accountable. They are the experts on whom the Madisonian institutions rely to keep the nation safe. They are the recipients of Madisonian largesse, doled out to ensure that no blame will be cast by voters seeking retribution for a job poorly done. In the event of a catastrophic attack, the buck stops with the Trumanites. No Trumanite craves to be the target of a 9/11 commission following a catastrophic failure. Thus they have, as Jeffrey Rosen put it, an “incentive to exaggerate

¹⁵² President Eisenhower was aware of those costs:

Every gun that is made, every warship launched, every rocket fired signifies, in the final sense, a theft from those who hunger and are not fed, those who are cold and not clothed. This world in arms is not spending money alone. It is spending the sweat of its laborers, the genius of its scientists, the hopes of its children . . . This is not a way of life at all in any true sense. Under the cloud of threatening war, it is humanity hanging from a cross of iron.

Dwight D. Eisenhower, “The Chance for Peace” Delivered Before the American Society of Newspaper Editors (Apr. 16, 1953), *available at* http://www.eisenhower.archives.gov/all_about_ike/speeches/chance_for_peace.pdf, [<http://perma.law.harvard.edu/0dDgSZnNkrE>].

¹⁵³ President Eisenhower wrote:

Some day there is going to be a man sitting in my present chair who has not been raised in the military services and who will have little understanding of where slashes in their estimates can be made with little or no damage. If that should happen while we still have the state of tension that now exists in the world, I shudder to think of what could happen in this country

Letter from Dwight D. Eisenhower to Everett E. Hazlett (Aug. 20, 1956), *quoted in* WILLIAM BRAGG EWALD, JR., *EISENHOWER THE PRESIDENT* 248 (1981) (date of letter provided by Eisenhower Library, Abilene, Kansas).

risks and pander to public fears”¹⁵⁴—“an incentive to pass along vague and unconfirmed threats of future violence, in order to protect themselves from criticism”¹⁵⁵ should another attack occur.

Indeed, a purely “rational” actor in the Trumanite network might hardly be expected to do anything other than inflate threats. In this way, the domestic political dynamic reinforces the security dilemma familiar to international relations students, the quandary that a nation confronts when, in taking steps to enhance its security, it unintentionally threatens the security of another nation and thus finds its own security threatened when the other nation takes compensatory action.¹⁵⁶ An inexorable and destabilizing arms race is thereby fueled by seemingly rational domestic actors responding to seemingly reasonable threats—threats that they unwittingly helped create.

The budget figures, compiled by David Sanger,¹⁵⁷ reflect the incentive structure within which the Trumanite network has emerged and thrives. Over the last decade the defense budget has grown 67% in real terms.¹⁵⁸ It now is 50% higher than it was for an average year during the Cold War¹⁵⁹—greater than the spending of the next twenty largest military powers combined.¹⁶⁰ During the decade following the 9/11 attacks, the United States spent at least \$3.3 trillion responding to the attacks.¹⁶¹ This represents \$6.6 million for every dollar al Qaeda spent to stage the attacks.¹⁶²

It is unclear the extent to which the specific threats at which the Obama national security policy is directed have been inflated; that information is classified, and the handful of Trumanites in a position to

¹⁵⁴ JEFFREY ROSEN, *THE NAKED CROWD* 222 (2004).

¹⁵⁵ *Id.* at 79.

¹⁵⁶ See generally Robert Jervis, *Cooperation Under the Security Dilemma*, 30 *WORLD POL.* 167 (1978).

¹⁵⁷ SANGER, *supra* note 23, at 417.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 418.

¹⁶¹ *Id.*

¹⁶² *Id.*

know the truth of the matter can hardly be expected to disclose it.¹⁶³ No reliable outside threat assessment is available. Although it is the Madisonians, not the Trumanites, who are expert in assessing the preferences of the public, including public risk tolerance—the Madisonians are the ones who hear out constituents, litigants, and lobbyists—the only way to know whether more insurance is needed is to ask the same Trumanite network that will gladly provide it. If the precise nature of the threatened harm is uncertain, what is not uncertain is the fear of threats, which is essential to the maintenance of the Trumanite network’s power—for the fundamental driver of Trumanite power has been emergency, the appearance of threats that must be addressed immediately, without bringing in the Madisonian institutions. “[A]n entire era of crisis in which urgent decisions have been required again and again,”¹⁶⁴ in the words of Senator J. William Fulbright, has given rise to the Trumanites’ power. Speedy decisions are required that the Madisonian institutions are ill-equipped to make; the Trumanites have the means at their disposal to act quickly. The perception of threat, crisis, and emergency has been the seminal phenomenon that has created and nurtures America’s double government.

¹⁶³ Since, as we have seen, doing so would lead to prosecution. David Carr, *Blurred Line Between Espionage and Truth*, N.Y. TIMES, Feb. 26, 2012, <http://www.nytimes.com/2012/02/27/business/media/white-house-uses-espionage-act-to-pursue-leak-cases-media-equation.html>, [http://perma.law.harvard.edu/0JyHP2USEcP] (“The Espionage Act, enacted in 1917 to punish those who gave aid to our enemies, was used three times in all the prior administrations to bring cases against government officials accused of providing classified information to the media. It has been used six times since the current president took office.”). One of the rare exceptions to threat inflation has been Glenn Carle, former CIA officer and deputy national intelligence officer for transnational threats on the National Intelligence Council. The CIA, he concluded, has been “spinning in self-referential circles” in which “our premises were flawed, our facts used to fit our premises, our premises determined, and our fears justified our operational actions, in a self-contained process that arrived at a conclusion dramatically at odds with the facts.” GLENN L. CARLE, *THE INTERROGATOR: AN EDUCATION* 275 (2011). Yet the participants in this process have deluded themselves into believing in their rationality. Their analyses “were all sincerely, ardently held to have constituted a rigorous, rational process to identify terrorist threats . . .” *Id.* Scholars of the process of intelligence analysis confirm that the conformist instinct is pervasive. “Like other bureaucrats,” Steve Chan observed, “intelligence analysts have to conform with the regime’s basic views about the nature and morality of international relations if they wish to be treated as ‘responsible’ and ‘serious.’” Steve Chan, *Intelligence Stupidity: Understanding Failures in Strategic Warning*, 73 AMERICAN POLITICAL SCIENCE REVIEW 178 (Mar. 1979).

¹⁶⁴ J. William Fulbright, *Foreword* to MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990), at xiv.

D. Secrecy

What has held the Trumanites together during this era is what Bagehot believed held Britain's efficient institutions together: loyalty, collective responsibility, and—most importantly—secrecy.¹⁶⁵ “Secrecy, once accepted, becomes an addiction,” Edward Teller said.¹⁶⁶ The Trumanite network is not alone in accepting the need for secrecy in national security matters—the Madisonian institutions do as well—but in breadth and depth, the Trumanites' opaqueness is striking. Trumanites can have no real discussions with family or friends about work because nearly all of their work is classified. They hold multiple compartmented clearances. Their offices are located in the buildings' expensive real estate—the Pentagon's E-Ring, the CIA's Seventh Floor, the State Department's Seventh Floor. Key pads lock their doors. Next to their desks are a safe and two computers, one unclassified and the other classified. Down the hall is a SCIF¹⁶⁷ where the most sensitive briefings take place. They speak in acronyms and code words that the public has never heard and, God (and the FBI) willing, never will hear. The experts they consult are their colleagues. Outside expertise, when needed, is difficult to tap. The Trumanites sign non-disclosure agreements under which they promise to submit for prepublication review anything they write on the subject of their work. Outside experts have signed nothing; normally they do not even hold a security clearance. Outside experts can thus provide insights but are not in the flow of intelligence and have little sense of the internal, organizational decisionmaking context in which issues arise. Nor have they any particular loyalty to the group, not being a part of it.

The Trumanites have additional incentives to keep information to themselves. Knowing that information in Washington is power, they are, in the words of Jack Balkin, both information gluttons and information

¹⁶⁵ BAGEHOT, *supra* note 40, at 65, 68, 90, 100, 248, 249.

¹⁶⁶ Quoted in TED GUP, NATION OF SECRETS: THE THREAT TO DEMOCRACY AND THE AMERICAN WAY OF LIFE 14 (2008).

¹⁶⁷ A “SCIF” is a “sensitive compartmented information facility.” Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST, July 19, 2010, <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/print>, [<http://perma.law.harvard.edu/0JayDShhKua>] (describing SCIFs as “special rooms encased in metal or permanent dry wall, impenetrable to eavesdropping tools and protected by alarms and a security force capable of responding within 15 minutes”).

misers.¹⁶⁸ They are information gluttons in that they “grab as much information as possible”; they are information misers in that they try to keep it from the public. Potential critics, power competitors, and adversaries are starved for information concerning the Trumanite network while it feasts on information concerning them. The secrecy of Trumanite activities thus grows as the privacy of the general public diminishes and the Trumanites’ shared “secret[s] of convenience”¹⁶⁹ bind them more tightly together.

The Trumanites’ ability to mask the identity of “the decider” is another factor that accounts for the network’s durability and resilience. Efforts by the press and congressional oversight committees to pinpoint exactly who is responsible for a given policy are easily deflected by the shield of secrecy provided by the network structure. Because everyone—the entire “national security team”—is accountable, no one is accountable.¹⁷⁰ The network’s success in evading questions concerning the continuation of military assistance to Egypt—despite a clear statutory prohibition against the continuation of such aid following a military coup¹⁷¹—is illustrative. Below is an excerpt from the State Department spokeswoman, Jen Psaki, answering questions from the press on July 26, 2013:

QUESTION: And who ultimately made the decision not to make a determination?

MS. PSAKI: Well, obviously, there’s a factor as it relates to the legal component, which our legal office here played a significant role in, and certainly this was discussed and agreed to through the interagency process.

QUESTION: But who decided? I mean, the buck stops somewhere. As Harry Truman said, it stopped with him. Does the buck stop with the President in this case, or with the

¹⁶⁸ Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 17–18 (2008).

¹⁶⁹ THOMAS POWERS, *INTELLIGENCE WARS: AMERICAN SECRET HISTORY FROM HITLER TO AL QAEDA* 358 (2004).

¹⁷⁰ *See generally* PAUL C. LIGHT, *THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY* (1994).

¹⁷¹ Consolidated Appropriations Act, 2012, P.L. 112-74, § 708, 125 Stat. 786, 930.

Secretary, or with the acting legal advisor of the State Department, or who? Who made the decision?

MS. PSAKI: Well, I'm not going to read out who was where on what and all the players involved in this.

QUESTION: I'm not asking that. I'm asking who made the decision.

MS. PSAKI: This was agreed to by the national security team. Beyond that, I'm not going to – I don't have anything.

QUESTION: Why are you afraid to say who made the decision?

MS. PSAKI: I'm not afraid of anything, Arshad. I'm just not—I'm not getting into more specifics than that for you.¹⁷²

Its cohesion notwithstanding, the Trumanite network is curiously amorphous. It has no leader. It is not monolithic. It has no formal

¹⁷² *Diplomacy in Action*, U.S. Department of State, Daily Press Briefing, Washington, D.C., July 26, 2013 available at <http://www.state.gov/r/pa/prs/dpb/2013/07/212484.htm#EGYPT>, [<http://perma.law.harvard.edu/02gX3aezqC8>].

structure.¹⁷³ Its actual membership blurs at the margins. Its ranks reflect the same organizational, philosophical, and personal rivalries and fissures common to all bureaucracies. Blame avoidance ranks high among its priorities.¹⁷⁴ But while Trumanites' view of the world differs at the margins, it does not differ at the core. It has been said that there is no such thing as a military mind,¹⁷⁵ but this is not true. Mills captured the military mindset; in the military, he wrote, there is an "intensified desire, too deeply rooted to examine, to conform to type, to be indistinguishable, not to reveal loss of composure to inferiors, and above all, not to presume the right to upset the

¹⁷³ Three scholars have captured the network's fluidity in describing the President's national security team as consisting of "barons" and "courtiers." I.M. DESTLER, LESLIE GELB & ANTHONY LAKE, *OUR OWN WORST ENEMY: THE UNMAKING OF U.S. FOREIGN POLICY* 156 (1984). Members of the NSC staff described the national security bureaucracy as populated by "tribes" representing different organizational interests, policy views, and personal loyalties. See WOODWARD, *supra* note 150, at 173. One of those tribes is the NSC staff itself, "which has emerged as . . . largely independent of the president's use of the NSC itself as a decisional body." CHRISTOPHER C. SHOEMAKER, *THE NSC STAFF: COUNSELING THE COUNCIL* 3 (1991). National security policy thus materializes from a shifting series of feedback loops among the tribes and their members. Lower-level Trumanites influence higher-level Trumanites, and vice versa, as one tribe, or sub-network, influences another until a decision ultimately emerges. The locus of decision-making lies below Madisonian officials, to whom "consensus" is often presented after being hashed out by lower-level officials. FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, *THE 9/11 COMMISSION REPORT* 199 (2004) ("In the NSC during the first Bush administration, many tough issues were addressed at the level of the Deputies Committee. Issues did not go to the principals unless the deputies had been unable to resolve them."); see *id.* at 210 (describing how the Bush Administration's initial policy towards covert action against al-Qaeda in Afghanistan came "from [Richard] Clarke and the NSC senior director for intelligence, Mary McCarthy," both Clinton administration holdovers, and was then reviewed by CIA Director George Tenet, himself a Clinton appointee); Alan G. Whittaker, et al., Nat'l Defense Univ., *THE NATIONAL SECURITY POLICY PROCESS: THE NATIONAL SECURITY COUNCIL AND INTERAGENCY SYSTEM* 27 (2011), available at <http://www.virginia.edu/cnsl/pdf/national-security-policy-process-2011.pdf> ("[National Security Advisers] Rice and Hadley sought to hammer out a general agreement among Principals and departments before bringing a decision paper with a recommended policy to President Bush for a final decision."). Networks arise within the network; not all presidential advisers necessarily sit within any of them.

¹⁷⁴ Emails released by the White House following the Benghazi attack revealed fierce internal jostling over draft talking points between the State Department and CIA and also within the CIA. Mark Landler, Eric Schmitt & Michael D. Shear, *Early E-Mails on Benghazi Show Internal Divisions*, N.Y. TIMES, May 16, 2013, <http://www.nytimes.com/2013/05/16/us/politics/e-mails-show-jostling-over-benghazi-talking-points.html>, [<http://perma.law.harvard.edu/0rST5477BjP/>].

¹⁷⁵ See generally RICHARD K. BETTS, *SOLDIERS, STATESMEN, AND COLD CRISES* (1991).

arrangements of the chain of command.”¹⁷⁶ Operating as it does under the long shadow of the military, the range of internal disagreement within the Trumanite network is tiny, like differences over appropriate necktie width. The conformist mentality percolates upward. Bob Woodward reported on the response to President Obama’s question as he sat down with eighteen top advisers for the second meeting of the Afghanistan-Pakistan strategy review. “‘Is there anybody who thinks we ought to leave Afghanistan,’ the President asked? Everyone in the room was quiet. They looked at him. No one said anything.”¹⁷⁷ The incident was unexceptional. “The dirty little secret here,” a former associate counsel in the Bush White House, Brad Berenson, explained, “is that the United States government has enduring institutional interests that carry over from administration to administration and almost always dictate the position the government takes.”¹⁷⁸

E. Conformism

The Trumanite network is as little inclined to stake out new policies as it is to abandon old ones. The Trumanites’ *grundnorm* is stability, and their ultimate objective is preservation of the status quo. The status quo embraces not only American power but the Trumanites’ own careers, which are steadily elevated by the conveyer belt on which they sit. Preoccupied as they are with cascading crises, swamped with memos and email and overwhelmed with meetings, Trumanites have no time to re-examine the cosmological premises on which policy is based.¹⁷⁹ Their business is reacting, day and night. Working weekends and evenings is routine; theirs

¹⁷⁶ MILLS, *supra* note 139, at 190. The military mind, Mills continued, “points to the product of a specialized bureaucratic training . . . a system of formal selection and common experiences and friendships and activities . . . instant and stereotyped obedience . . . a common outlook, the basis of which is the metaphysical definition of reality as essentially military reality.” *Id.* at 195.

¹⁷⁷ WOODWARD, *supra* note 150, at 186.

¹⁷⁸ Josh Gerstein, *Obama Lawyers Set to Defend Yoo*, Associated Press, Jan. 28, 2009. Hugh Heclo has described the presidency’s “deep structure” as comprising those elements that remain the same when the administration changes. Hugh Heclo, *The Changing Presidential Office in THE MANAGERIAL PRESIDENCY* (James P. Pfiffner, ed., 1999).

¹⁷⁹ “Most are interested in the philosophical only to the extent of finding out what the accepted view is in order that they may accept it and get on to the practical matters.” WHYTE, *supra* note 140, at 72.

are 24/7 jobs¹⁸⁰ that leave no time for pondering big pictures. They are caught up in tactics;¹⁸¹ larger ends are for memoirs. Reflecting on the “fail[ure] to take an orderly, rational approach” to Vietnam decision-making, Robert McNamara wrote that “we faced a blizzard of problems, there were only twenty-four hours a day, and we often did not have time to think straight.”¹⁸² His successors encountered an equally frenetic environment.¹⁸³ With the anger, frustration, emotion, and the mental and physical exhaustion induced in working long hours under crisis conditions, a pernicious but existing policy gradually comes to be seen as the least bad choice. The status quo is preserved by minimizing risks, which means no bold departure from the settled long-term policy trajectory. “Men who have participated in a decision,” as James Thomson succinctly put it, “develop a stake in that decision.”¹⁸⁴ Slow is therefore best. The risk of embarrassment is lower in continuing a policy someone else initiated than in sponsoring one’s own new one. If the policy fails, the embarrassment is someone else’s.

Trumanites are therefore, above all, team players. They are disinclined to disagree openly. “The further up you go,” one prominent organization theorist put it, “the less you can afford to stick out in any one place.”¹⁸⁵ As one seasoned adviser said, because “there is a real team concept and where money disputes are not usually the core, radically

¹⁸⁰ Former Pennsylvania Governor Ed Rendell considered Janet Napolitano ideally suited to head the Department of Homeland Security. “Janet’s perfect for that job,” he said. “Because for that job, you have to have no life. Janet has no family. Perfect. She can devote, literally, 19, 20 hours a day to it.” Jimmy Orr, *Ed Rendell on Janet Napolitano: Perfect because she has no life!*, CHRISTIAN SCIENCE MONITOR, Dec. 3, 2008, available at <http://www.csmonitor.com/USA/Politics/The-Vote/2008/1203/ed-rendell-on-janet-napolitano-perfect-because-she-has-no-life>, [http://perma.law.harvard.edu/0e5bpgwEZ7h]. The typical Trumanite, a classic organization man, cannot distinguish between his work and the rest of his life. WHYTE, *supra* note 140, at 164.

¹⁸¹ “[I]t is characteristic of an age of turmoil that it produces so many immediate issues that little time is left to penetrate their deeper meaning.” HENRY A. KISSINGER, *AMERICAN FOREIGN POLICY: THREE ESSAYS BY HENRY A. KISSINGER* 50 (1969). For a similar point, see MAZZETTI, *supra* note 22, at 14 (CIA has become more tactical as analysts seek career advancement by working on terrorism issues that will appear in the President’s morning intelligence briefing).

¹⁸² ROBERT S. MCNAMARA, *IN RETROSPECT* xvii (1995).

¹⁸³ President Reagan’s Defense Secretary, Caspar W. Weinberger, was reported to be “swamped,” “overwhelmed,” and “left with not enough time to look forward.” Theodore H. White, *Weinberger on the Ramparts*, N.Y. TIMES MAGAZINE (Feb. 6, 1983).

¹⁸⁴ James C. Thomson, Jr., *How Could Vietnam Happen?*, ATLANTIC MONTHLY 52 (Apr. 1968).

¹⁸⁵ WHYTE, *supra* note 140, at 172.

different views of the direction to be taken by an administration can cause serious trouble.”¹⁸⁶ He advises that a “new president should take care that his key officials in foreign policy all have a roughly similar outlook on the world and America’s place in it.”¹⁸⁷ Accordingly, once a policy is final, Trumanites rally readily round it, however much they might once have disagreed. Dissent shades into disloyalty and risks marginalization, particularly in a policy group with high *esprit de corps*. As Kissinger put it, “[s]erving the machine becomes a more absorbing occupation than defining its purpose.”¹⁸⁸ Little credit is gained by advocating for an option that has earlier been rejected. Likelier than not, one’s superior, or his superior, was present at the creation of the policy and takes pride in its authorship. “In government it is always easier to go forward with a program that does not work,” David Halberstam wrote, “than to stop it altogether and admit failure.”¹⁸⁹ Even those immersed in the policy-making process are often bewildered by its outcome. The Army chief of staff, Harold Johnson, could think of “no logical rationale” to explain the military’s continuing recommendations for incremental escalation of the U.S. war effort in Vietnam—even though the military had difficulty devising any persuasive strategy to produce victory.¹⁹⁰

The Trumanites’ commitment is therefore to process rather than outcome. “It is an inevitable defect,” Bagehot wrote, that “bureaucrats will care more for routine than for results; or, as Burke put it, ‘that they will think the substance of business not to be much more important than the forms of it.’”¹⁹¹ “Men so trained,” he believed, “must come to think the routine of business not a means but an end—to imagine the elaborate machinery of which they form a part, and from which they derive their dignity, to be a grand and achieved result, not a working and changeable instrument.”¹⁹² At a certain point, policy within such a system reaches critical mass, and its gravitational pull is too strong to escape even for

¹⁸⁶ ROBERT E. HUNTER, *PRESIDENTIAL CONTROL OF FOREIGN POLICY: MANAGEMENT OR MISHAP* 72 (1982).

¹⁸⁷ *Id.*

¹⁸⁸ KISSINGER, *supra* note 181, at 18. “What passes for planning is frequently the projection of the familiar into the future.” *Id.* at 19.

¹⁸⁹ HALBERSTAM, *supra* note 147, at 212.

¹⁹⁰ BRUCE PALMER, *THE 25-YEAR WAR: AMERICA’S MILITARY ROLE IN VIETNAM* 213 n.26 (1978).

¹⁹¹ BAGEHOT, *supra* note 40, at 195.

¹⁹² *Id.*

political appointees, who are easily co-opted.¹⁹³ “The vast bureaucratic mechanisms that emerge develop a momentum and a vested interest of their own,” Kissinger wrote.¹⁹⁴ “There is a trend toward autarky.”¹⁹⁵ There thus emerges, as Goldsmith put it, a “persistence in the interests and outlook of the national security leadership and especially of the national security bureaucracy.”¹⁹⁶

As in all government bureaucracies, the tendency is to “*get along* with others and *go along* with the system”¹⁹⁷ The safe course for an ambitious Trumanite is to propose the continuation of existing policy before the decision is made to do so; one will then be on the winning side.¹⁹⁸ Changing a big policy requires changing lots of little policies as well; small details, inconveniences perhaps, which together create major headaches for innovators.¹⁹⁹ Suggesting some limiting principle is dangerous; the facts may unexpectedly turn out to fall beyond that limit, and the author of a limit that seemed so innocuous when it was proposed would then be blamed. Trite but true, the perfect is the enemy of the good, the Trumanites know; good wheels ought not be reinvented. Thus a policy takes on a life of its own, feeding on caution, living off the bureaucratic land, resistant to the changing preferences of elected officials who come and go²⁰⁰—a “self-generating enterprise,” as Senator Frank Church described it.²⁰¹ The careerists, as President Truman himself said, “look upon the elected officials as just temporary occupants,” particularly in the realm of national security.²⁰² The careerists can always wait them out. “It has often happened in the War and Navy Departments that the generals and the admirals, instead

¹⁹³ “Self-co-optation” is the term Mills applies. Mills, *supra* note 139, at 348.

¹⁹⁴ KISSINGER, *supra* note 181, at 17.

¹⁹⁵ *Id.*

¹⁹⁶ GOLDSMITH, *supra* note 38, at 27.

¹⁹⁷ VICTOR A. THOMPSON, MODERN ORGANIZATION 91 n.1 (1961).

¹⁹⁸ James Carroll refers to the bureaucracy’s “grooved thinking” as its “metapersonal dynamics,” conditions under which “ideology and organizational loyalties and history trump[] the most acute present analysis.” CARROLL, *supra* note 146, at 302.

¹⁹⁹ See generally MORTON H. HALPERIN, BUREAUCRATIC POLITICS AND FOREIGN POLICY 99 (1974). One example of the need to change many smaller policies when changing a bigger policy is the debate over closing the Guantánamo military prison.

²⁰⁰ “The alternative to the status quo is the prospect of repeating the whole anguishing process of arriving at decisions. This explains to some extent the curious phenomenon that decisions taken with enormous doubt and perhaps with a close division become practically sacrosanct once adopted.” KISSINGER, *supra* note 181, at 20.

²⁰¹ Quoted in MAZZETTI, *supra* note 22, at 43.

²⁰² 2 HARRY S. TRUMAN, YEARS OF TRIAL AND HOPE 165 (1956).

of working for and under the Secretaries, succeeded in having the Secretaries act for and under them. And it has happened in the Department of State.”²⁰³ Truman expected that his newly-elected successor, Dwight Eisenhower, would be surprised by the bureaucratic inertia. “He’ll sit here, and he’ll say, ‘Do this! Do that!’” Truman said. “*And nothing will happen.* Poor Ike—it won’t be a bit like the Army. He’ll find it very frustrating.”²⁰⁴

Neil Sheehan²⁰⁵ reflected on why nothing would happen. Sheehan’s *Times* colleague Halberstam recalled that Sheehan came away with one impression: that “the government of the United States was not what he had thought it was; it was as if there were an inner U.S. government, what he called ‘a centralized state, far more powerful than anything else It had survived and perpetuated itself [I]t does not function necessarily for the benefit of the Republic but rather for its own ends, its own perpetuation; it has its own codes which are quite different from public codes.”²⁰⁶

The Trumanite network has achieved, in a word, *autonomy*.²⁰⁷ The maintenance of Trumanite autonomy has depended upon two conditions. The first is that the Madisonian institutions appear to be in charge of the nation’s security. The second is that the Madisonian institutions not actually be in charge.

III. The Sources of Madisonian Illusion

For double government to work, the Madisonian institutions must seem in charge, for the Trumanites’ power flows from the legitimacy of

²⁰³ *Id.*

²⁰⁴ RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 9 (1960) (emphasis added).

²⁰⁵ Sheehan was the *New York Times* reporter who obtained the Pentagon Papers and won a Pulitzer Prize for his reporting on Vietnam.

²⁰⁶ HALBERSTAM, *supra* note 147, at 409.

²⁰⁷ “What starts out as an aid to decision-makers often turns into a practically autonomous organization whose internal problems structure and sometimes compound the issues which it was originally designed to solve.” KISSINGER, *supra* note 181, at 20.

those institutions. Occasionally slip-ups occur,²⁰⁸ but its members generally maintain the appearance of Madisonian control. Without public deference to the President, Congress, and the courts, the Trumanite network could never command obedience. Behind the scenes, the Madisonians defer to them; technocratic expertise and years of experience are useful resources for any policymaker to draw upon. Madisonian complaisance is not only inevitable but useful in promoting informed and knowledgeable decisions.

Expertise, efficiency, and experience are not, however, sufficient in and of themselves to induce the Madisonians' general acquiescence in measures needed for effective governance. For all its proficiency, the Trumanite network is still too "artificial," too unfamiliar to generate public reverence.²⁰⁹ Like Britain's real rulers, the Trumanites bring up the rear in Bagehot's "splendid procession"²¹⁰ of governance. They are "secreted in second-rate carriages; no one cares for them or asks about them, but they are obeyed implicitly and unconsciously by reason of the splendour of those who eclipsed and preceded them."²¹¹ Those who preceded them are the apparent rulers, the "imposing personages" for "whom the spectators cheer"; "it is by them the mob are influenced."²¹² The Trumanite network survives by living in the Madisonian institutions' glow. Because the Trumanites could never by themselves generate the requisite public veneration, evolution toward double government was necessarily slow. Quick alteration would have been seen, Bagehot theorized, as a "catastrophic change" that would have "killed the State."²¹³

The Trumanites thus operate under a strong incentive to ensure that Madisonian institutions shine brightly. That is also in the interests of the

²⁰⁸ "We have a chance to establish our own foreign policy," CIA Director William Casey told Bob Woodward in the fall of 1985. "We're on the cutting edge. We are the action agency of the government." Powers, *supra* note 169, at 279 (quoting Bob Woodward's account of an interview with Casey). Casey's remark came a decade after Senator Frank Church had famously described the CIA as a "rogue elephant on a rampage without command." Editorial, *Let Congress Chain This Rogue Elephant*, DAYTONA BEACH MORNING JOURNAL, Sept. 12, 1975, available at <http://news.google.com/newspapers?nid=1873&dat=19750912&id=t9AhAAAIBAJ&sjid=-54FAAAAIBAJ&pg=1863,376617>, [http://perma.law.harvard.edu/0dBxnMkani].

²⁰⁹ BAGEHOT, *supra* note 40, at 90.

²¹⁰ *Id.* at 249.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 255.

Madisonian institutions themselves; its members wish to be seen by the public as in charge, for their own sake as well as the nation's. Members of Congress are loath to exhibit any lack of authority that would make them look weak and undermine their legitimacy or reelection chances. Likewise, the illusion persists that the President is the "decider" on Trumanite proposals. The Trumanites and their operational enterprises are, after all, "his." Announcements are made regularly that "he" has ordered "his" Secretary of State to do this and that "he" has ordered "his" Secretary of Defense to do that. The judiciary, too, continues to appear to be the ultimate arbiter of legality, for its own power as well as the Trumanites'. At the level of appearances—and it is above all appearances that count—interests are aligned, fed by the need simultaneously to maximize both expertise and legitimacy.

Maintaining the appearance of control and thus the ability to generate deference, Bagehot suggests, requires five attributes: historical pedigree, ritual, intelligibility, mystery, and harmony.²¹⁴ Together, these elements inspire a sense of duty, a felt obligation on the part of the public to obey.²¹⁵

Pedigree is the Madisonian institutions' strong suit. Congress, the President and the courts, unlike the Trumanites, trace their lineage directly to the Framers, whom Americans (mostly) still appear to revere. Biographies of the Founding Fathers and accounts of their virtuosity appear regularly on best-seller lists and television documentaries. Whatever else they lack, the three constitutional branches present an impressive pedigree. They owe their position to the design of individuals who many have come to regard as demi-gods—Washington, Madison, Hamilton, Franklin, and others. Many still view that design as almost divinely inspired. The public may not be directly aware of the veneration the Constitution has generated over the ages.²¹⁶ But the public partakes in the process of filling offices the Constitution established, and it thus has a derivative emotional tie to current occupants of offices that are revered through the mists of memory. And at least some part of the public knows that the earlier holders of those offices

²¹⁴ *Id.* at 82–98.

²¹⁵ *Id.* at 91–93.

²¹⁶ For example, in 1878 Gladstone commented that the Document was "the most wonderful work ever struck off at a given time by the brain and purpose of man." W. E. Gladstone, *Kin Beyond Sea*, 127 N. AM. REV. 179, 185 (1878).

also included quasi-mystical figures—Lincoln and Roosevelt, Webster and Calhoun, Marshall and Holmes. To varying extents, their images still shimmer in the public imagination and still stir the millions of tourists who flock to Washington every year, watch the History Channel, and read David McCullough.

Pedigree is reinforced by solemn ritual, which also traces to the earliest days of the Republic. The high-church ceremony of presidential inauguration confirms to American voters that the identity of the President and his policies are their choice. The State of the Union address suggests that it is the peoples' representatives in Congress who will approve or disapprove the President's proposals. An occult jargon of Latin and legalese conjures an oracular Supreme Court, sitting on high in its Greek temple, solomonically deciding cases based upon timeless principles, esoteric doctrine, and precedents that limit every institution, Madisonian and Trumanite alike. From "Hail to the Chief" to intonations of "Oyez, Oyez, Oyez" on the first Monday in October, the illusion is perpetuated that nothing has changed since the Founding. All is right with the world, and the Madisonian institutions are still on their thrones.

One reason that the public assumed that a president like Eisenhower could simply snap his fingers and change course—that the Madisonian institutions are what they seem—is that these institutions are intelligible. It requires no canniness to understand that three branches exist to make, execute, and interpret the laws. These are "easy ideas"; in Bagehot's words, "anybody can make them out, and no one can ever forget them."²¹⁷ A fourth-grade civics book can make Madisonians' jobs comprehensible. By contrast, the Trumanite network is anything but simple. Try explaining the frustrations of the inter-agency process to a general public that cannot identify the National Security Council, let alone its relationship to the intelligence and defense communities or the congressional oversight committees. Even to the extent that it is transparent, the Trumanite network is too amorphous, too byzantine, its missions and relationships too convoluted, and its powers and limits too obscure for ready public understanding.

²¹⁷ BAGEHOT, *supra* note 40, at 82.

Mystery is the fourth prerequisite of institutions that generate public obeisance. They must spark the public imagination. They must convince the public that they are not like us, that in native capacity, education, or access to secrets, they are a breed apart. “Most men . . . are encouraged to assume that, in general, the most powerful and the wealthiest are also the most knowledgeable or, as they might say, ‘the smartest.’”²¹⁸ This is particularly true if “superiors” manner of presentation is superior. The people defer to “theatrical show,” Bagehot wrote.²¹⁹ “Their imagination is bowed down; they feel they are not equal to the life which is revealed to them.”²²⁰ This requires that the Madisonian officials operate at something of a remove from the general public, “aloof”²²¹ as Bagehot writes. How they do what they do must be “hidden like a mystery.”²²² And to an extent it still is. What exactly happens in meetings in the Oval Office, in the Supreme Court conference where cases are decided, or in hearings of the Senate Intelligence Committee is shrouded in mystery.

Finally, to all appearances, harmony prevails between the Trumanite network and Madisonian institutions. This is not because the Trumanites click their heels and salute the Madisonians. Trumanites believe that the Madisonian institutions, in Bagehot’s phrase, “tend to diminish simple efficiency.”²²³ They know that needless bellicosity toward other nations often originates on Capitol Hill.²²⁴ They can tick off multiple military (mis)adventures pushed by “the civilians” that Pentagon planners prudently opposed. They know from history how Joe McCarthy and his merry band savaged the State Department,²²⁵ petrified sensible policymakers, and made the CIA a veritable political safehouse for enlightened “China hands.”²²⁶ They know how, before the Trumanite network arrived on the scene, Madisonian institutions bungled American membership in the League of Nations and toyed dangerously with

²¹⁸ MILLS, *supra* note 139, at 351.

²¹⁹ BAGEHOT, *supra* note 40, at 248.

²²⁰ *Id.*

²²¹ *Id.* at 90.

²²² *Id.*

²²³ *Id.* at 207.

²²⁴ See Theodore Sorensen, *Political Perspective: Who Speaks for the National Interest?* in *THE TETHERED PRESIDENCY* 3, 12–13 (Thomas M. Franck ed., 1981).

²²⁵ MILLS, *supra* note 139, at 201.

²²⁶ See THOMAS POWERS, *THE MAN WHO KEPT SECRETS: RICHARD HELMS AND THE CIA* 58–59, 63 (1979).

indifference and isolationism²²⁷ while Hitler's shadow lengthened.²²⁸ To the Trumanites, "[t]he nation [has] outgrown its institutions, and [is] cramped by them."²²⁹ With Acheson, they regard the Madisonian institutions as lacking the requisite expertise, experience, and seriousness of purpose needed to safeguard the nation's security. Rather, the Trumanites are not seen publicly to resist the policies set by the Madisonians because the Madisonian institutions must always be perceived as the authors of the Trumanites' projects. For the Trumanite network to be identified as the authors of initiatives such as warrantless NSA surveillance, the mining of Nicaragua's harbors, or the Bay of Pigs invasion would risk delegitimizing the Madisonian institutions—and thus undermining the ultimate power source on which the Trumanites themselves must rely, electoral assent. Ostensible harmony is therefore imperative.

Creating and maintaining this illusion is not difficult. The Madisonian institutions go along with policymaking by the Trumanites so long as it is popular, and if it is popular, their incentive is to be seen as its sponsor. Thus with the 2001 Authorization for Use of Military Force,²³⁰ hastily enacted following the September 11 attacks, Congress positioned itself to take credit for the retaliatory actions all knew, at least in general terms, the Trumanites were preparing. It is in the interests of neither to clash publicly with the other. Open confrontation calls into question both the expertise of the Trumanites as well as the seeming authority of the Madisonians. For the Madisonian institutions to challenge the Trumanite network publicly would entail an uncertain outcome and risk a loss of credibility for both, as occurred when Truman fired MacArthur, when Obama fired McChrystal, when the Supreme Court gave the press the go-ahead to publish the top-secret Pentagon Papers, or when the Church Committee roughed up the CIA. The Madisonian challenge to the CIA's enhanced interrogation program ended, unsurprisingly, with a Madisonian decision to absolve the Trumanites of all responsibility.²³¹ In clashes such as

²²⁷ See generally LYNNE OLSON, *THOSE ANGRY DAYS: ROOSEVELT, LINDBERGH, AND AMERICA'S FIGHT OVER WORLD WAR II, 1939–1941* (2013).

²²⁸ See generally MICHAEL FULLILOVE, *RENDEZVOUS WITH DESTINY: HOW FRANKLIN D. ROOSEVELT AND FIVE EXTRAORDINARY MEN TOOK AMERICA INTO THE WAR AND INTO THE WORLD* (2013); OLSON, *supra* note 227.

²²⁹ BAGEHOT, *supra* note 40, at 173.

²³⁰ Authorization for Use of Military Force of 2001, Pub. L. No. 107-40, 115 Stat. 224 (2001).

²³¹ See Moughty, *supra* note 14.

these, both sets of institutions lose a degree of public respect, albeit among different constituencies. Members of Congress, similarly, do have policy preferences, but their first objective is to stay in office. Falling out of sync with the Trumanites is not a wise strategy for career longevity. Buried in the *New York Times*' reportage on the Benghazi controversy was the tip-of-the-iceberg revelation that the House Intelligence Committee, whose members needed talking points to use with reporters in discussing the attacks, asked that they be prepared by then-Director of the CIA David Petraeus.²³² Far safer is for Congress to "approve" initiatives that, if not its own, at least appear to be.

Together, these five elements—historical pedigree, ritual, intelligibility, mystery, and harmony—foster the appearance that "The People" rule through constitutionally established institutions; they "cling to the idea that the government is a sort of automatic machine, regulated by the balancing of competing interests."²³³ Accordingly, they are wont to believe that the purpose of a presidential election is to determine whether to continue existing policy and that when a new President takes office he begins with a blank slate.²³⁴ The rhetoric of presidential campaigns reinforces this belief; it is no accident that "change" has been the recurring theme in recent elections. Congress, too, and its stance on national security policy are seen to be wholly a function of public will. If only the right person were elected and if only these right officials were to approve the right judges, policy would change. Public attention is thus deflected from networks and institutions to the individuals who hold office. Those individuals are the Madisonians, the Trumanites being all but invisible.

More sophisticated public opinion polling highlights this key distinction.²³⁵ It asks respondents whether they approve of Congress, the Presidency, and the Supreme Court as *institutions*—explaining that "institutions have their own buildings, historical traditions, and purposes

²³² Mark Landler, Eric Schmitt & Michael D. Shear, *Early E-Mails on Benghazi Show Internal Divisions*, N.Y. TIMES, May 16, 2013, <http://www.nytimes.com/2013/05/16/us/politics/e-mails-show-jostling-over-benghazi-talking-points.html?pagewanted=print>, [<http://perma.law.harvard.edu/0GPLqqA8Q7Q>].

²³³ MILLS, *supra* note 139, at 242.

²³⁴ See ANDREW J. BACEVICH, WASHINGTON RULES: AMERICAS' PATH TO PERMANENT WAR 30 (2010).

²³⁵ See JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS 44–45 (1995).

laid out in the Constitution”—and then it asks whether they approve of the officeholders—“the people currently in office” within each institution. The results are striking. When this bifurcated polling was done in the 1990s, only 24% of respondents approved of the members of Congress, 46% approved of the President (George H.W. Bush), and 73% approved of the members of the Supreme Court.²³⁶ But approval of the three institutions was overwhelming: 88% approved of Congress, 96% of the Presidency, and 94% of the Supreme Court.²³⁷ Policy is thus seen as a function of personnel rather than of institutional structure, and policy change requires merely placing different people in office. If policy does not change, the personnel—not the system—are to blame. The possibility that the *system* might somehow select the *individuals* who are within it eludes the public. The public seems not to notice that numerous senior national security offices remain vacant for months with no perceptible effect on policy.²³⁸ In the public understanding, if the Trumanites do not act quickly enough, it is because the President is not forceful enough (even though, in Eisenhower’s case, he was the Supreme Allied Commander in Europe who led the Normandy invasion). Presidents simply need to issue commands more forcefully. The details and operation of double government thus remain veiled.

Nonetheless, in the United States today, as in Bagehot’s Britain, “[m]ost do indeed vaguely know that there are some other institutions”²³⁹ involved in governance besides those established by the Constitution. But the popular conception of an “invisible government,” “state within,” or “national security state” is off the mark. The existence of the Trumanite network is no secret. The network’s emergence has not been the result of an enormous, nefarious conspiracy conceived to displace constitutional government. The emergence of the Trumanite network has not been purposeful. America’s dual national security framework has evolved gradually in response to incentives woven into the system’s structure as that structure has reacted to society’s felt needs. Yet, as a whole, Americans still

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ See PAUL C. LIGHT, A GOVERNMENT ILL-EXECUTED 87–88 (2008). It took, in fact, ten months until all of President Obama’s nominees took office. See EDWARD LUCE, TIME TO START THINKING: AMERICA IN THE AGE OF DESCENT 153 (2012).

²³⁹ BAGEHOT, *supra* note 40, at 85.

do not recognize the extent to which Madisonian institutions have come to formulate national security policy in form more than in substance.

One reason that they do not is that the double government system has exceptions. For the dual institutional structure to work, it is crucial, Bagehot believed, to “hide where the one begins and where the other ends.”²⁴⁰ Overlap is required. Enough counterexamples must exist to persuade an optimistic public that the reason for policy continuity is human, not systemic. Thus, the counterexamples must be sufficient for the public to believe that if they elect different people then policy will change, giving credence to the idea that the real institutions have not lost all power in making national security policy. Similarly, the Trumanites often include some quasi-Madisonian officers, such as the Secretaries of State and Defense, who themselves generate deference through the same theatrical show common to the Madisonian institutions. Congress, the President, and the courts do sometimes say no to the Trumanites. But they do not do so often enough to endanger double government. The Trumanite network makes American national security policy; it is occasional exceptions to that policy that are made by the Madisonian institutions.

IV. The Reality of Madisonian Weakness

Although the Madisonian institutions seem to be in charge and, indeed, to be possessed of power broad enough to remedy their own deficiencies, a close look at each branch of government reveals why they are not. A more accurate description would be that those institutions are in a state of entropy and have become, in Bagehot’s words, “a disguise”—“the fountain of honour” but not the “spring of business.”²⁴¹ The Presidency, Congress, and the courts appear to set national security policy, but in reality their role is minimal. They exercise decisional authority more in form than in substance. This is the principal reason that the system has not, as advertised, self-corrected.²⁴²

²⁴⁰ *Id.* at 176.

²⁴¹ *Id.* at 66, 97.

²⁴² “The main virtue of the system lies in its ability to self-correct” GOLDSMITH, *supra* note 38, at xv. “Self-correction is an apt description of the events of the last decade.” *Id.* at 209.

A. The Judiciary

The courts, which Hamilton called the “least dangerous” branch,²⁴³ pose the least danger to the silent transfer of power from the nation’s Madisonian institutions to the Trumanite network. Federal judicial appointees are selected, and vetted along the way, by those whose cases they will later hear: the Trumanites and their associates in the White House and Justice Department. Before an individual is named to the federal bench, a careful investigation takes place to ensure that that individual is dependable. What this means, in practice, is that appointees end up as trusted friends of the Trumanites in matters touching upon national security. Presidents do not appoint individuals who are hostile to the Trumanites, nor does the Senate confirm them. The deck is stacked from the start against challenges to Trumanite policies.

Judicial nominees often come from the ranks of prosecutors, law enforcement, and national security officials, and they have often participated in the same sorts of activities the lawfulness of which they will later be asked to adjudicate.²⁴⁴ A prominent example was former Chief Justice William Rehnquist.²⁴⁵ Before his 1971 appointment to the Supreme Court by President Richard Nixon, Justice Rehnquist served as Assistant Attorney General for the Office of Legal Counsel (“OLC”) under Attorney General John Mitchell.²⁴⁶ In that capacity, Rehnquist participated directly in military surveillance of domestic political groups, including the preparation of a memorandum for Mitchell in 1969 dealing with the Army’s role in the collection of intelligence on civilians in the United States.²⁴⁷ He also “played a critical role in drafting the 1969 presidential order that established the division of responsibility between the military and the Justice

²⁴³ THE FEDERALIST No. 78 (Alexander Hamilton).

²⁴⁴ According to Senator Richard Blumenthal, a former U.S. Attorney and state prosecutor, judges who come from the Executive Branch are “more likely to share a ‘get the bad guys’ mind-set and defer to the Justice Department.” Charlie Savage, *Roberts’s Picks Reshaping Secret Surveillance Court*, N.Y. TIMES, July 25, 2013, <http://www.nytimes.com/2013/07/26/us/politics/robertss-picks-reshaping-secret-surveillance-court.html?pagewanted=all>, [http://perma.law.harvard.edu/0zJeAXR3MvB].

²⁴⁵ See generally JOHN W. DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* (2001).

²⁴⁶ *Id.* at xiii.

²⁴⁷ Stuart Taylor, *Rehnquist Critics Press Charges that he was Unethical on Court*, N.Y. TIMES, Sept. 11, 1986, <http://www.nytimes.com/1986/09/11/us/rehnquist-s-critics-press-charges-that-he-was-unethical-on-court.html>, [http://perma.law.harvard.edu/0t88LQgzyJx].

Department for gathering of intelligence concerning during civil disturbances.”²⁴⁸ He testified before the Senate Judiciary Committee’s Subcommittee on Constitutional Rights in March 1971 that there were no serious constitutional problems with respect to collecting data or keeping under surveillance persons who are merely exercising their right of a peaceful assembly or petition to redress a grievance.²⁴⁹ After his confirmation hearings to become Chief Justice, however, he wrote in August 1986 in response to written questions from Senator Mathias that he could not recall participating in the formulation of policy concerning the military surveillance of civilian activities.²⁵⁰ The Senate confirmed his appointment by a vote of sixty-eight to twenty-six on December 10, 1971.²⁵¹ Shortly thereafter, the Court began considering *Laird v. Tatum*,²⁵² a case involving the lawfulness of Army surveillance of civilians who were engaged in political activities critical of the government.²⁵³ Justice Rehnquist declined to recuse himself, and the case was decided five to four.²⁵⁴ The result was that the case was not sent back to the trial court to determine, as the Court of Appeals had ordered, the nature and extent of military surveillance of civilian groups.²⁵⁵ Instead, Justice Rehnquist’s vote most likely prevented the discovery of his own prior role and that of his Justice Department colleagues in developing the Nixon Administration’s military surveillance policy.²⁵⁶

²⁴⁸ See Glen Elsasser, *Scholar’s Question Rehnquist’s Candor*, CHI. TRIB., Sept. 9, 1986, http://articles.chicagotribune.com/1986-09-09/news/8603070116_1_mr-rehnquist-justice-william-rehnquist-office-of-legal-counsel, [http://perma.law.harvard.edu/0ducjF4NksZ].

²⁴⁹ *Federal Data Banks, Computers and the Bill of Rights, Part 1: Hearing Before the Subcomm. on Constitutional Rights, S. Comm. on the Judiciary*, 92nd Cong. 620 (1971).

²⁵⁰ Taylor, *supra* note 247.

²⁵¹ Ken Hughes, *Presidential Recordings Program*, MILLER CENTER, (Sept. 25, 2013), <http://whitehousetapes.net/exhibit/nixon-and-supreme-court-appointment-william-h-rehnquist>, [http://perma.law.harvard.edu/0KstGeHNhuf].

²⁵² *Laird v. Tatum*, 408 U.S. 1 (1972).

²⁵³ *Id.* at 1.

²⁵⁴ *See id.*

²⁵⁵ *Id.* at 14–15.

²⁵⁶ See Note, *Justice Rehnquist’s Decision to Participate in Laird v. Tatum*, 73 COLUM. L. REV. 106 (1973); Ralph Michael Stein, *Laird v. Tatum: The Supreme Court and a First Amendment Challenge to Military Surveillance of Lawful Civilian Political Activity*, 1 HOFSTRA L. REV. 244 (1973); 132 CONG. REC. 22594 (Sept. 10, 1986) (letter from Floyd Feeney and Barry Mahoney to Hon. Strom Thurmond, U.S. Senate, Sept. 5, 1986 and accompanying memorandum, *An Analysis of the Public Records Concerning Justice Rehnquist’s Participation in Laird v. Tatum*).

Justice Rehnquist's case is but one example of the symbiosis that binds the courts to the Trumanite network. Justice Rehnquist was not the only member of the judiciary with Trumanite links. Other potential appointees had ample opportunity to prove their reliability. Justice Antonin Scalia, before his appointment to the Supreme Court, also served as Assistant Attorney General for OLC and also was appointed initially by President Nixon.²⁵⁷ During his tenure from 1974 to 1977 at OLC, Scalia later recalled, it fell to him to pass upon the legality of proposed covert operations by the intelligence community: "believe it or not, for a brief period of time, all covert actions had to be approved by me."²⁵⁸ He attended daily meetings in the White House Situation Room with Director of Central Intelligence William Colby and other top intelligence officials and decided what classified documents should be made available to Congress.²⁵⁹ He was the legal point-person in dealing with congressional requests for information on intelligence matters; on behalf of the Ford Administration he asserted executive privilege before a House investigating committee when it recommended that Henry Kissinger be cited for contempt of Congress for failing to produce classified documents concerning U.S. covert operations abroad.²⁶⁰

Justice Samuel Alito is a former captain in the Army Signal Corps, which manages classified communication systems for the military. He later became an Assistant U.S. Attorney, prosecuting drug and organized crime cases, and then an assistant to Attorney General Ed Meese before moving to OLC. There he worked, as he put it, to "increase the power of the executive to shape the law."²⁶¹ He was nominated to be a federal court of appeals judge in 1990 by President (and former Director of Central Intelligence) George H. W. Bush. Once confirmed, Judge Alito established his reliability by voting against the daughters of civilians killed in a military plane crash

²⁵⁷ *Antonin Scalia*, LEGAL INFORMATION INSTITUTE (Sept. 25, 2013), <http://www.law.cornell.edu/supct/justices/scalia.bio.html>, [<http://perma.law.harvard.edu/0smQrc7a8eV>].

²⁵⁸ *Quoted in* CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 30 (2007).

²⁵⁹ *Id.*

²⁶⁰ JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 52 (2009).

²⁶¹ SAVAGE, *supra* note 258, at 269.

to uphold the government's refusal to show a federal judge the official accident report, on grounds of the state secrets privilege.²⁶²

Chief Justice John Roberts was a law clerk for Justice Rehnquist.²⁶³ In that capacity he reportedly²⁶⁴ contributed significantly to the preparation of Rehnquist's opinion in *Dames & Moore v. Regan*,²⁶⁵ in which the Court upheld the Executive's power to extinguish pending law suits by Americans seeking compensation from Iran for property seized by the Iranian government.²⁶⁶ He moved on to the Justice Department and then President Reagan's White House Office of General Counsel, where he drafted a letter for the President responding to retired Justice Arthur Goldberg, who had written Reagan that the U.S. invasion of Grenada was of doubtful constitutionality.²⁶⁷ Roberts wrote in the reply that the President had "inherent authority in international affairs to defend American lives and interests and, as Commander-in-Chief, to use the military when necessary in discharging these responsibilities."²⁶⁸ Roberts's memos, Charlie Savage has reported, "regularly took more extreme positions on presidential power than many of his colleagues."²⁶⁹ Appointed to the U.S. Court of Appeals for the District of Columbia in 2003,²⁷⁰ Roberts, like Alito, further confirmed his reliability. He voted to uphold the system of military tribunals established by the Bush Administration²⁷¹ (which the Supreme Court overturned in *Hamdan v. Rumsfeld*,²⁷² a decision in which Roberts recused himself)²⁷³ and to uphold the power of the President, pursuant to statute, to prevent the courts from hearing certain lawsuits (in that case, brought by members of

²⁶² See generally *Herring v. United States*, 424 F.3d 384 (3d Cir. 2005).

²⁶³ *John Roberts*, LEGAL INFORMATION INSTITUTE (Sept. 25, 2013), <http://www.law.cornell.edu/supct/justices/roberts.bio.html>, [<http://perma.law.harvard.edu/0TnQQvxYmEC>].

²⁶⁴ See Tony Mauro, *The Year Roberts Had Rehnquist's Ear*, LEGAL TIMES, Aug. 1, 2005.

²⁶⁵ 453 U.S. 654 (1981).

²⁶⁶ See *id.* at 686.

²⁶⁷ SAVAGE, *supra* note 258, at 257.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 260.

²⁷⁰ Roberts, *supra* note 263.

²⁷¹ *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

²⁷² 548 U.S. 557 (2006).

²⁷³ See '*Hamdan v. Rumsfeld*': *Legal Issues & Ramifications*, NAT'L PUB. RADIO (June 29, 2006), <http://www.npr.org/templates/story/story.php?storyId=5521073>, [<http://perma.law.harvard.edu/0rAgxrMgv2>].

the U.S. military who had been captured and tortured during the Gulf War).²⁷⁴

It might be thought that these and other similarly inclined judges who adhere to views congenial to the Trumanite network have been appointed not because of Trumanite links but because of their judicial philosophy and particular interpretation of the Constitution—because they simply believe in a strong Executive Branch, a viewpoint that appointing Presidents have found attractive. Justice Scalia seemingly falls into this category.²⁷⁵ As Assistant Attorney General he testified twice before Congress in opposition to legislation that would have limited the President’s power to enter into sole executive agreements.²⁷⁶ In judicial opinions and speeches before his appointment to the Supreme Court he frequently expressed opposition to judicial involvement in national security disputes. “[J]udges know little”²⁷⁷ about such issues, as he wrote in one such case decided while he was a member of the U.S. Court of Appeals for the District of Columbia.²⁷⁸ He argued again for deference in another national security case that came before that court that raised claims of “summary execution, murder, abduction, torture, rape, wounding, and the destruction of private property and public facilities.”²⁷⁹ It was brought by plaintiffs that included twelve members of Congress, who argued violations of the

²⁷⁴ *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004).

²⁷⁵ See generally JAMES B. STAAB, *THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA: A HAMILTONIAN ON THE SUPREME COURT* 95–136 (2006); DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, *THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA* 82–90 (1996).

²⁷⁶ These are international agreements made by the President alone, without the approval of Congress or the Senate. See U.S. Senate, *Congressional Oversight of Executive Agreements—1975: Hearings before the Subcomm. on Separation of Powers of the Committee on the Judiciary*, 94th Cong. 167–203, 302–05 (1975); *Congressional Review of International Agreements: Hearings before the Subcomm. on International Security and Scientific Affairs of the Committee on International Relations*, 94th Cong. 182–200 (1976).

²⁷⁷ *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1562 (D.C. Cir. 1984) (Scalia, J., dissenting).

²⁷⁸ In *Ramirez*, the plaintiff, a U.S. citizen, claimed that the U.S. military had occupied his Honduran cattle ranch to train Salvadoran soldiers, depriving him of his property without due process of law. The court’s majority found the action to be justiciable; Judge Scalia (joined by Judges Robert Bork and Kenneth Starr) charged that that decision “reflect[ed] a willingness to extend judicial power into areas where we do not know, and have no way of finding out, what serious harm we may be doing.” *Id.* at 1551.

²⁷⁹ *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 205 (D.C. Cir. 1985).

Constitution, War Powers Resolution,²⁸⁰ and the Boland Amendments²⁸¹ (which cut off funds for the activities at issue).²⁸² Judge Scalia refused to hear arguments on the merits; where a policy had been approved by “the President, the Secretary of State, the Secretary of Defense, and the Director of the CIA,” he wrote, discretionary relief is inappropriate.²⁸³ After his appointment to the Supreme Court, Justice Scalia supported the executive-oriented approach to treaty interpretation that the Reagan Administration relied upon in arguing that deployment of a space-based anti-ballistic missile (“ABM”) system would not violate the ABM treaty (referring in his opinion to various *Washington Post* articles on the controversy).²⁸⁴ Later, in *Rasul v. Bush*,²⁸⁵ the Court’s majority held that federal district courts may exercise jurisdiction under the federal habeas statute to hear claims by foreign nationals detained by the United States. Justice Scalia dissented, denouncing the majority for “judicial adventurism of the worst sort.”²⁸⁶ In *Hamdan v. Rumsfeld*,²⁸⁷ the majority held that a military commission established by the Executive lacked power to try the defendant; Justice Scalia dissented again, insisting that that conclusion was “patently erroneous.”²⁸⁸ In *Boumediene v. Bush*,²⁸⁹ the majority held that the defendant, a foreign national, had a constitutional privilege of habeas corpus; again Justice Scalia dissented. It came as no surprise when Justice Scalia expressed concern in a 2013 speech that the lawfulness of NSA surveillance could ultimately be decided by judges—“the branch of government that knows the least about the issues in question, the branch that knows the least about the extent of the threat against which the wiretapping is directed.”²⁹⁰ When the Trumanites’ actions are at issue, submissiveness, not second-guessing, is the appropriate judicial posture.

²⁸⁰ War Powers Resolution, 87 Stat. 555, 50 U.S.C. §§ 1541–48 (amended 1982).

²⁸¹ For a chart of the unclassified Boland Amendments, see 133 Cong. Rec. H4982–H4987 (daily ed. June 15, 1987).

²⁸² *Id.*

²⁸³ Sanchez-Espinoza, 770 F.2d at 208.

²⁸⁴ *United States v. Stuart*, 489 U.S. 353, 376 (1989) (Scalia, J., dissenting).

²⁸⁵ 542 U.S. 446 (2004).

²⁸⁶ *Id.* at 506.

²⁸⁷ 548 U.S. 557 (2006).

²⁸⁸ *Id.* at 655 (Scalia, J., dissenting).

²⁸⁹ 553 U.S. 723 (2008).

²⁹⁰ Matthew Barakat, *Scalia expects NSA program to end up in court*, ASSOCIATED PRESS, Sept. 25, 2013, <http://news.yahoo.com/scalia-expects-nsa-wiretaps-end-court-145501284--politics.html>, [<http://perma.law.harvard.edu/0yuzeWJX9nE>].

It is of course true that Justice Scalia and other such judges were and are appointed because of their judicial philosophy. The *cause* of their beliefs, however, is as irrelevant as it is unknowable; whatever the cause, the effect is the same—they are reliable supporters of the Trumanites. People tend to end up in organizations with missions compatible with their larger worldview, just as people once in an organization tend to adopt a worldview supportive of their organization’s mission. Position and judicial philosophy *both* are indicia of reliability. The question is not *why* a potential judicial appointee will come down the right way. The question is *whether* the appointee might reasonably be expected to do so.

It might also be argued that these justices were not sufficient in number ever to comprise a majority on the Supreme Court. In an era of increasingly close decisions, however, one or two votes can be decisive, and it must be remembered that this cursory review embraces only the Supreme Court; numerous district and appellate court judges with ties to the Trumanite network also adjudicate national security cases. This group includes, most prominently, the closest that the nation has to a national security court²⁹¹—the eleven members of the Foreign Intelligence Surveillance Court.

The court, or FISC as it is commonly called, was established in 1978 to grant warrants for the electronic surveillance of suspected foreign intelligence agents operating in the United States.²⁹² Each judge is selected by the Chief Justice of the Supreme Court from the pool of sitting federal judges.²⁹³ They are appointed for a maximum term of seven years; no further confirmation proceedings take place, either in the Senate or the Executive Branch.²⁹⁴ The Chief Justice also selects a Chief Judge from

²⁹¹ “In more than a dozen classified rulings,” the *New York Times* reported, “the nation’s surveillance court has created a secret body of law giving the National Security Agency the power to amass vast collections of data on Americans while pursuing not only terrorism suspects, but also people possibly involved in nuclear proliferation, espionage and cyberattacks [I]t has quietly become almost a parallel Supreme Court” Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES, July 7, 2013, http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html?_r=0, [http://perma.law.harvard.edu/0rXuMcN8BSj].

²⁹² Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. § 1801 *et seq.* (2006)).

²⁹³ *Id.* § 1803.

²⁹⁴ *Id.*

among the court's eleven judges.²⁹⁵ All eleven of the sitting judges on the FISC were selected by Chief Justice John Roberts; ten of the eleven were initially appointed to the federal bench by Republican presidents.²⁹⁶ A study by the *New York Times* concluded that since Roberts began making appointments to the court, 50% have been former Executive Branch officials.²⁹⁷

Normally, of course, courts proceed in public, hear arguments from opposing counsel, and issue opinions that are available for public scrutiny. Not so with the FISC. All of its proceedings are closed to the public.²⁹⁸ The adversarial system integral to American jurisprudence is absent. Only government lawyers appear as counsel, unanswered by any real or potential adverse party.²⁹⁹ The FISC has pioneered a two-tiered legal system, one comprised of public law, the other of secret law. FISC opinions—even redacted portions of opinions that address only the FISC's interpretation of the constitutional rights of privacy, due process, or protection against unreasonable search or seizure—are rarely available to the public.³⁰⁰ Nancy Gertner, a former federal judge in Massachusetts, summed up the court: “The judges that are assigned to this court are judges that are not likely to rock the boat All of the structural pressures that keep a judge

²⁹⁵ *Id.*

²⁹⁶ Peter Wallsten, Carol D. Leonnig & Alice Crites, *For secretive surveillance court, rare scrutiny in wake of NSA leaks*, WASH. POST, June 22, 2013, http://www.washingtonpost.com/politics/for-secretive-surveillance-court-rare-scrutiny-in-wake-of-nsa-leaks/2013/06/22/df9eaae6-d9fa-11e2-a016-92547bf094cc_print.html, [<http://perma.law.harvard.edu/0JWxWwyQ9jH/>].

²⁹⁷ Charlie Savage, *Roberts's Picks Reshaping Secret Surveillance Court*, N.Y. TIMES, July 25, 2013, <http://www.nytimes.com/2013/07/26/us/politics/robertss-picks-reshaping-secret-surveillance-court.html?pagewanted=all>, [<http://perma.law.harvard.edu/03YWpWeDvGk/>]. Five judges on the court had prosecutorial experience. *Id.*

²⁹⁸ See 50 U.S.C. § 1802(a)(3), 1803(c); see also FISC R. P. 3.

²⁹⁹ “For about 30 years,” the *Washington Post* reported, “the court was located on the sixth floor of the Justice Department’s headquarters, down the hall from the officials who would argue in front of it.” Carol Leonnig, Ellen Nakashima, & Barton Gellman, *Secret-court judges upset at portrayal of ‘collaboration’ with government*, WASH. POST, June 29, 2013, http://www.washingtonpost.com/politics/secret-court-judges-upset-at-portrayal-of-collaboration-with-government/2013/06/29/ed73fb68-e01b-11e2-b94a-452948b95ca8_print.html, [<http://perma.law.harvard.edu/02ig1iUrqEW/>].

³⁰⁰ “It is transparent,” Obama said of the review procedures. “That’s why we set up the FISA court.” Greg Miller, *Misinformation on classified NSA programs includes statements by senior U.S. officials*, WASH. POST, July 1, 2013, http://www.washingtonpost.com/world/national-security/misinformation-on-classified-nsa-programs-includes-statements-by-senior-us-officials/2013/06/30/7b5103a2-e028-11e2-b2d4-ea6d8f477a01_print.html, [<http://perma.law.harvard.edu/08Rt7uj2KJ8/>].

independent are missing there. It's one-sided, secret, and the judges are chosen in a selection process by one man."³⁰¹ The Chief Judge of the FISC candidly described its fecklessness. "The FISC is forced to rely upon the accuracy of the information that is provided to the Court," said Chief Judge Reggie B. Walton. "The FISC does not have the capacity to investigate issues of noncompliance, and in that respect the FISC is in the same position as any other court when it comes to enforcing [government] compliance with its orders."³⁰² The NSA's own record proved him correct; an internal NSA audit revealed that it had broken privacy rules or overstepped its legal authority thousands of times since 2008.³⁰³

The judiciary, in short, does not have the foremost predicate needed for Madisonian equilibrium: "a will of its own."³⁰⁴ Whatever the court, judges normally are able to find what appear to the unschooled to be sensible, settled grounds for tossing out challenges to the Trumanites' projects. Dismissal of those challenges is couched in arcane doctrine that harks back to early precedent, invoking implicitly the courts' mystical pedigree and an aura of politics-transcending impartiality. But challenges to the Trumanites' projects regularly get dismissed before the plaintiff ever has a chance to argue the merits either before the courts or, sometimes more importantly, the court of public opinion. Try challenging the Trumanites' refusal to make public their budget³⁰⁵ on the theory that the Constitution does, after all, require "a regular statement and account of the receipts and expenditures of all public money";³⁰⁶ or the membership of Members of Congress in the military reserve³⁰⁷ on the theory that the Constitution does, after all, prohibit Senators and Representatives from holding "any office

³⁰¹ *Id.*

³⁰² Carol D. Leonnig, *Court: Ability to police U.S. spying program limited*, WASH. POST, Aug. 16, 2013, http://www.washingtonpost.com/politics/court-ability-to-police-us-spying-program-limited/2013/08/15/4a8c8c44-05cd-11e3-a07f-49ddc7417125_print.html, [<http://perma.law.harvard.edu/0Zo8bfYbZtS/>].

³⁰³ Barton Gellman, *NSA broke privacy rules thousands of times per year, audit finds*, WASH. POST, Aug. 16, 2013, http://www.washingtonpost.com/world/national-security/nsa-broke-privacy-rules-thousands-of-times-per-year-audit-finds/2013/08/15/3310e554-05ca-11e3-a07f-49ddc7417125_print.html, [<http://perma.law.harvard.edu/OTpFZJGW9jv/>].

³⁰⁴ See *infra* text at note 570.

³⁰⁵ See *United States v. Richardson*, 418 U.S. 166 (1974).

³⁰⁶ U.S. CONST., art. I, § 9, cl. 7.

³⁰⁷ See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

under the United States”;³⁰⁸ or the collection of phone records of the sort given by Verizon to the NSA on the theory that the law authorizing the collection is unconstitutional.³⁰⁹ Sorry, no standing, case dismissed.³¹⁰ Try challenging the domestic surveillance of civilians by the U.S. Army³¹¹ on the theory that it chills the constitutionally protected right to free assembly,³¹² or the President’s claim that he can go to war without congressional approval³¹³ on the theory that it is for Congress to declare war.³¹⁴ Sorry, not ripe for review, case dismissed.³¹⁵ Try challenging the introduction of the armed forces into hostilities in violation of the War Powers Resolution.³¹⁶ Sorry, political question, non-justiciable, case dismissed.³¹⁷ Try challenging the Trumanites’ refusal to turn over relevant and material evidence about an Air Force plane accident that killed three crew members through negligence,³¹⁸ or about racial discrimination against CIA employees,³¹⁹ or about an “extraordinary rendition” involving unlawful detention and torture.³²⁰ Sorry, state secrets privilege, case dismissed.³²¹

³⁰⁸ U.S. CONST., art. I, § 6, cl. 2.

³⁰⁹ *Clapper v. Amnesty Int’l*, 133 S. Ct. 1138 (2013). The Court found the plaintiffs’ concern that their communications would be intercepted to be “too speculative” in that they were unable to show that they had been subjected to surveillance, *id.* at 1143—which of course no one could show, because the surveillance was secret. It turned out that activities that the Court labeled “speculative” were in fact occurring as its opinion was announced. Letter from Mark Udall, Ron Wyden, Martin Heinrich, U.S. Senators, to Donald Verrilli, U.S. Solicitor Gen. 1–2 (Nov. 20, 2013), *available at* <http://www.scribd.com/doc/186024665/Udall-Wyden-Heinrich-Urge-Solicitor-General-to-Set-Record-Straight-on-Misrepresentations-to-U-S-Supreme-Court-in-Clapper-v-Amnesty> (explaining that the FISA Amendments Act has been secretly interpreted to authorize collection of communications merely about a targeted overseas foreigner and that this collection accordingly likely results in the collection “tens of thousands” of wholly domestic communications annually).

³¹⁰ *Clapper*, *supra* note 309, at 1153.

³¹¹ *See generally Laird*, 408 U.S. 1.

³¹² U.S. CONST., amend. I.

³¹³ *See Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).

³¹⁴ U.S. CONST. art. I, § 8, cl. 11.

³¹⁵ *Dellums*, 752 F. Supp. at 1150.

³¹⁶ Pub. L. No. 93-148, 87 Stat. 55 (1973) (codified at 50 U.S.C. §§ 1541–48 (1982)).

³¹⁷ *See Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1982), *aff’d* No. 87-5426 (D.C. Cir. 1988) (*per curiam*); *Crockett v. Regan*, 720 F.2d 1355 (D.C. Cir. 1983), *aff’g* 558 F. Supp. 893 (1982).

³¹⁸ *See United States v. Reynolds*, 345 U.S. 1 (1953).

³¹⁹ *See Sterling v. Tenet*, 416 F.3d 338 (4th Cir. 2005).

³²⁰ *See El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

³²¹ *See id.* at 302.

Sometimes the courts have no plausible way of avoiding the merits of national security challenges. Still, the Trumanites win. The courts eighty years ago devised a doctrine—the “non-delegation doctrine”—that forbids the delegation of legislative power by Congress to administrative agencies.³²² Since that time it has rarely been enforced, and never has the Court struck down any delegation of national security authority to the Trumanite apparatus.³²³ Rather, judges stretch to find “implied” congressional approval of Trumanite initiatives. Congressional silence, as construed by the courts, constitutes acquiescence.³²⁴ Even if that hurdle can be overcome, the evidence necessary to succeed is difficult to get; as noted earlier,³²⁵ the most expert and informed witnesses all have signed non-disclosure agreements, which prohibit any discussion of “classifiable” information without pre-publication review by the Trumanites. As early as 1988, over three million present and former federal employees had been required to sign such agreements as a condition of employment.³²⁶ Millions more have since become bound to submit their writings for editing and redaction before going to press. And as the ultimate trump card, the Trumanites are cloaked in, as the Supreme Court put it, “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress.”³²⁷ The basis of their power, the Court found, is, indeed, not even the Constitution itself; the basis

³²² In 1928, the Supreme Court found that if Congress wrote a law that contained an “intelligible principle” for subsequent interpretation, “such legislative action is not a forbidden delegation of legislative power.” *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

³²³ The only two instances in U.S. history where a congressional delegation of authority was overruled by the Supreme Court occurred in 1935. *See generally* *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 293 U.S. 495 (1935).

³²⁴ *See Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (“In light of all of the foregoing—the inferences to be drawn from the character of the legislation Congress has enacted in the area . . . and from the history of acquiescence in executive claims settlement—we conclude that the President was authorized to suspend pending claims pursuant to Executive Order No. 12294.”).

³²⁵ *See supra* text at notes 167–68.

³²⁶ *Congress and the Administration’s Secrecy Pledges: Hearing Before the Subcomm. on Legislation and Nat’l Sec. of the H. Comm. on Gov’t Operations*, 100th Cong. 93 (1988) (statement of Rep. Jack Brooks, Chairman, H. Subcomm. on Legislation and Nat. Sec.) (“According to the General Accounting Office statement to be presented today, approximately 3 million secrecy pledges have been signed as of the end of last year.”).

³²⁷ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

of Trumanite power is external sovereignty—the membership of the United States in the community of nations, which confers extra-constitutional authority upon those charged with exercising it.³²⁸

As is true with respect to the other Madisonian institutions, there are, of course, instances in which the judiciary has poached on the Trumanites' domain. The courts rebuffed an assertion of the commander-in-chief power in ordering President Truman to relinquish control of the steel mills following their seizure during the Korean War.³²⁹ Over the Trumanites' objections, the courts permitted publication of the Pentagon Papers that revealed duplicity, bad faith, and ineptitude in the conduct of the Vietnam War.³³⁰ The Supreme Court did overturn military commissions set up to try enemy combatants for war crimes,³³¹ and two years later found that Guantánamo detainees had unlawfully been denied habeas corpus rights.³³² Personnel *does* sometimes matter. Enough apparent counterexamples exist to preserve the façade.

Yet the larger picture remains valid. Through the long list of military conflicts initiated without congressional approval—Grenada, Panama, Kosovo, and, most recently, Libya—the courts have never stopped a war, with one minor (and temporary) exception. In 1973, Justice William O. Douglas did issue an order to halt the bombing of Cambodia³³³—which lasted a full nine hours, until the full Supreme Court overturned it.³³⁴ The

³²⁸ *Id.* at 318 (“It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.”).

³²⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952).

³³⁰ *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam). The Court had initially, for the first time in U.S. history, enjoined publication. *Id.* at 715 (Black, J., concurring).

³³¹ *Hamdan v. United States*, 548 U.S. 557, 567 (2006) (“[W]e conclude that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions.”).

³³² *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008) (holding that the procedures enacted as part of the Detainee Treatment Act of 2005 “are not an adequate and effective substitute for habeas corpus” and that “[t]herefore §7 of the Military Commissions Act of 2006 . . . operates as an unconstitutional suspension of the writ”).

³³³ *Holtzman v. Schlesinger*, 414 U.S. 1304, 1316 (1973) (Douglas, J.) (holding case justiciable and vacating stay of injunction against use of armed force in Cambodia).

³³⁴ *Id.* at 1304.

Court's "lawless" reversal was effected through an extraordinary telephone poll of its members conducted by Justice Thurgood Marshall. "[S]ome Nixon men," Douglas believed, "put the pressure on Marshall to cut the corners."³³⁵ Seldom do judges call out even large-scale constitutional violations that could risk getting on the wrong side of an angry public, as American citizens of Japanese ethnicity discovered during World War II.³³⁶ Whatever the cosmetic effect, the four cases representing the Supreme Court's supposed "push-back" against the War on Terror during the Bush Administration freed, at best, a tiny handful of detainees.³³⁷ As of 2010 fewer than 4% of releases from Guantánamo followed a judicial release order.³³⁸ A still-unknown number of individuals, numbering at least in the dozens, fared no better. These individuals were detained indefinitely—without charges, based on secret evidence, sometimes without counsel—as "material witnesses" following 9/11.³³⁹ One can barely find a case in which anyone claiming to have suffered even the gravest injury as the result of the Bush-Obama counterterrorism policies has been permitted to litigate that claim on the merits—let alone to recover damages. The Justice Department's seizure of Associated Press ("AP") records was carried out pursuant to judicially-approved subpoenas, in secret, without any chance for

³³⁵ DOUGLAS, *supra* note 85, at 235–37.

³³⁶ See *Korematsu v. United States*, 342 U.S. 885 (1945).

³³⁷ Kim Lane Scheppelle, *The New Judicial Deference*, 92 B.U. L. REV. 89, 91 (2012) ("In major decisions both designed to attract public attention and filled with inspiring language about the reach of the Constitution even in times of peril, the Supreme Court, along with some lower courts, has stood up to the government and laid down limits on anti-terror policy in a sequence of decisions about the detention and trial of suspected terrorists. But, at the same time, these decisions have provided few immediate remedies for those who have sought the courts' protection. As a result, suspected terrorists have repeatedly prevailed in their legal arguments, and yet even with these court victories, little changed in the situation that they went to court to challenge.").

³³⁸ Aziz Huq, *What Good Is Habeas?*, 26 CONST. COMM. 385, 429 (2010).

³³⁹ See, e.g., Adam Liptak, *Justices Block Suit Over Use of Material Witness Law Against Detainee*, N.Y. TIMES, May 31, 2011, http://www.nytimes.com/2011/06/01/us/01scotus.html?pagewanted=all&_r=0, [<http://perma.cc/J922-UNHW>] ("The Supreme Court unanimously ruled Tuesday that a man detained after the Sept. 11 attacks may not sue John D. Ashcroft, the former attorney general, for asserted misuse of the federal material witness law."); see also Donald Q. Cochran, *Material Witness Detention in a Post-9/11 World: Mission Creep or Fresh Start?*, 18 GEO. MASON L. REV. 1, 10 (2010) ("Material witness proceedings and records were sealed at the government's request, and the government did not initially reveal how many persons were detained on material witness warrants. The government has subsequently admitted to holding forty to fifty material witnesses. According to research by Human Rights Watch and the American Civil Liberties Union, however, at least seventy individuals—all male and all but one Muslim—were detained as material witnesses after 9/11.").

the AP to be heard.³⁴⁰ The FISC³⁴¹ has barely pretended to engage in real judicial review. Between 1979 and 2011, the court received 32,093 requests for warrants. It granted 32,087 of those requests, and it turned down eleven.³⁴² In 2012, the court received 1,789 requests for electronic surveillance, one of which was withdrawn. All others were approved.³⁴³ The occasional counterexample notwithstanding, the courts cannot seriously be considered a check on America's Trumanite network.

B. The Congress

Like the courts, Congress's apparent power also vastly outstrips its real power over national security. Similar to the Trumanites, its members face a blistering work load. Unlike the Trumanites, their work is not concentrated on the one subject of national security. On the tips of members' tongues must be a ready and reasonably informed answer not only to whether the United States should arm Syrian rebels, but also whether the medical device tax should be repealed, whether and how global warming should be addressed, and myriad other issues. The pressure on legislators to be generalists creates a need to defer to national security experts. To a degree congressional staff fulfill this need. But few can match the Trumanites' informational base, drawing as they do on intelligence and even legal analysis that agencies often withhold from Congress. As David Gergen put it, "[p]eople . . . simply do not trust the Congress with sensitive and covert programs."³⁴⁴

The Trumanites' threat assessments,³⁴⁵ as well as the steps they take to meet those threats, are therefore seen as presumptively correct whether the issue is the threat posed by the targets of drone strikes, by weapons of mass destruction in Iraq, or by torpedo attacks on U.S. destroyers in the

³⁴⁰ 28 C.F.R. § 50.10.

³⁴¹ See *supra* text at notes 292–302.

³⁴² *Foreign Intelligence Surveillance Act Court Orders 1979–2011*, Electronic Privacy Info. Ctr., http://epic.org/privacy/wiretap/stats/fisa_stats.html, [<http://perma.cc/GXH8-8CH3>].

³⁴³ Wallsten, *supra* note 296. This is the "robust legal regime" that unnamed Executive Branch officials claimed, following the disclosure of NSA collection of Verizon's phone records, to be "in place governing all activities conducted pursuant to the Foreign Intelligence Surveillance Act." Marc Ambinder, *U.S. responds to NSA disclosures*, THE WEEK, June 6, 2013 at <http://theweek.com/article/index/245243/us-responds-to-nsa-disclosures>, [<http://perma.cc/T9DE-ZFUU>].

³⁴⁴ ZBIGNIEW BRZEZINSKI, *POWER AND PRINCIPLE* 477 (1983).

³⁴⁵ See *supra* text at notes 152–56.

Gulf of Tonkin. Looming in the backs of members' minds is the perpetual fear of casting a career-endangering vote. No vote would be more fatal than one that might be tied causally to a cataclysmic national security breakdown. While the public may not care strongly or even know about many of the Bush policies that Obama has continued, the public could and would likely know all about any policy change—and who voted for and against it—in the event Congress bungled the protection of the nation. No member wishes to confront the “if only” argument: the argument that a devastating attack would not have occurred if only a national security letter had been sent, if only the state secrets privilege had been invoked, if only that detainee had not been released. Better safe than sorry, from the congressional perspective. Safe means strong. Strong means supporting the Trumanites.

Because members of Congress are chosen by an electorate that is disengaged and uninformed, Madison's grand scheme of an equilibrating separation of powers has failed, and a different dynamic has arisen.³⁴⁶ His design, as noted earlier,³⁴⁷ anticipated that ambition counteracting ambition would lead to an equilibrium of power and that an ongoing power struggle would result among the three branches that would leave room for no perilous concentration of power.³⁴⁸ The government's “several constituent parts” would be “the means of keeping each other in their proper places.”³⁴⁹ But the overriding ambition of legislators chosen by a disengaged and uninformed electorate is not to accumulate power by prescribing policy for the Trumanites, as Madison's model would otherwise have predicted. Their overriding ambition is to win reelection, an ambition often inconsistent with the need to resist encroachments on congressional power. All members of Congress know that they cannot vote to prescribe—or proscribe—any policy for anyone if they lose reelection. It is not that Madison was wrong; it is that the predicate needed for the Madisonian system to function as intended—civic virtue—is missing.

³⁴⁶ See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 421 (2012) (inter-branch rivalry is less likely under contemporary political conditions).

³⁴⁷ See *supra* text at notes 95–98.

³⁴⁸ *Id.*

³⁴⁹ THE FEDERALIST NO. 51 (James Madison).

As a result, Trumanite influence permeates the legislative process, often eclipsing even professional committee staff. Trumanites draft national security bills that members introduce. They endorse or oppose measures at hearings and mark-ups. They lobby members, collectively and one-on-one. Their positions appear on the comparative prints that guide members through key conference committee deliberations. Sometimes Trumanites draft the actual language of conference reports. They wait outside the chambers of the House and Senate during floor debates, ready on-the-spot to provide members with instant arguments and data to back them up. Opponents frequently are blind-sided. Much of this activity is removed from the public eye, leading to the impression that the civics-book lesson is correct; Congress makes the laws. But the reality is that virtually everything important on which national security legislation is based originates with or is shaped by the Trumanite network.

Conversely, congressional influence in the Trumanites' decision-making processes is all but nil. The courts have, indeed, told Congress to keep out. In 1983, the Supreme Court invalidated a procedure, called the "legislative veto," which empowered Congress to disapprove of Trumanite arms sales to foreign nations, military initiatives, and other national security projects.³⁵⁰ The problem with the concept, the Court said, was that it permitted Congress to disapprove of executive action without the possibility of a presidential veto.³⁵¹ A legislative proposal thereafter to give the Senate Intelligence Committee the power to approve or disapprove covert actions was rejected, on the grounds that the Court had ruled out such legislative controls.³⁵²

³⁵⁰ See *INS v. Chadha*, 462 U.S. 919, 957–59, 967–68, 1002 (1983) (White, J., dissenting) (lamenting the excessively broad sweep of the holding invalidating the "legislative veto").

³⁵¹ *Id.* at 954–55 ("Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way: bicameral passage followed by presentment to the President.").

³⁵² David L. Boren, *The Winds of Change at the CIA*, 101 *YALE L.J.* 853, 856–57 (1992) (describing President George H.W. Bush's veto of the 1991 Intelligence Authorization Bill, which would have "tighten[ed] the definitions of 'covert actions' and 'timely notice'"). Sometimes committees do continue to review policy initiatives under informal "gentlemen's agreements" with executive agencies, though the formal legality of the practice is doubtful.

Defenders of the process often claim that congressional oversight nonetheless works.³⁵³ How they can know this they do not say.³⁵⁴ Information concerning the oversight committees' efficacy remains tightly held and is seldom available even to members of Congress, let alone the general public. "Today," James Bamford has written, "the intelligence committees are more dedicated to protecting the agencies from budget cuts than safeguarding the public from their transgressions."³⁵⁵ Authorization too often is enacted without full knowledge of what is being approved.³⁵⁶ Even when intelligence activities such as the NSA surveillance are reported, meaningful scrutiny is generally absent.³⁵⁷ Members of oversight committees typically are precluded from making available to non-member

³⁵³ Jack Goldsmith, for example, has written that "[n]othing of significance happens in American intelligence without the intelligence committees, or some subset, knowing about it." GOLDSMITH, *supra* note 38, at 90.

³⁵⁴ My own experience as Legal Counsel to the Senate Foreign Relations Committee, dating to the earliest days of the congressional intelligence committees' operations, led me to a very different conclusion.

³⁵⁵ James Bamford, *Five myths about the National Security Agency*, WASH. POST, June 21, 2013, http://articles.washingtonpost.com/2013-06-21/opinions/40114085_1_national-security-agency-foreign-intelligence-surveillance-court-guardian, [<http://perma.cc/0D75bvM5Et6>].

³⁵⁶ See, e.g., Spencer Ackerman, *Intelligence committee withheld key file before critical NSA vote, Amash claims*, THE GUARDIAN, Aug. 12, 2013, <http://www.theguardian.com/world/2013/aug/12/intelligence-committee-nsa-vote-justin-amash>, [<http://perma.cc/04i8gcTQcpt>]. Bulk surveillance "certainly was approved by Congress," said Representative Jan Schakowsky. "Was it approved by a fully knowing Congress? That is not the case." Wallsten, *supra* note 296.

³⁵⁷ "The Intelligence Committee knew, and members [of Congress] could go into the Intelligence Committee room and read the documents," said a former Wyden staffer. "But they couldn't bring staff, they couldn't take notes, they couldn't consult outside legal scholars." Robert Barnes, Timothy B. Lee & Ellen Nakashima, *Government surveillance programs renew debate about oversight*, WASH. POST, June 9, 2013, http://articles.washingtonpost.com/2013-06-08/politics/39834570_1_oversight-programs-government-surveillance, [<http://perma.cc/0SLNFgSLk1G>].

colleagues classified information that is transmitted to the committees.³⁵⁸ This is true even if the activities in question are unlawful. Following the NSA surveillance leaks, for example, Senator Wyden said that he “and colleagues” believed that additional, unnamed “secret surveillance programs . . . go far beyond the intent of the statute.”³⁵⁹ The Senate Armed Services Committee has “seemed generally clueless and surprised about the legal standard”³⁶⁰ applied by the Executive in construing the scope of its authority under the AUMF.³⁶¹ The 9/11 Commission was unambiguous in its own conclusions concerning the reliability of congressional intelligence oversight; the word the Commission used to describe it was

³⁵⁸ The *Washington Post* summarized the oversight charade:

Unlike typical congressional hearings that feature testimony from various sides of a debate, the briefings in 2010 and 2011 on the telephone surveillance program were by definition one-sided affairs, with lawmakers hearing only from government officials steeped in the legal and national security arguments for aggressive spying.

Additional obstacles stemmed from the classified nature of documents, which lawmakers may read only in specific, secure offices; rules require them to leave their notes behind and restrict their ability to discuss the issues with colleagues, outside experts or their own staff.

While Senate Intelligence Committee members can each designate a full-time staffer for the committee who has full access, House members must rely on the existing committee staff, many of whom used to work for the spy agencies they are tasked with overseeing.

Wallsten, *supra* note 296.

³⁵⁹ James Risen & Charlie Savage, *On Eve of Critical Vote, N.S.A. Director Lobbies House*, N.Y. TIMES, July 23, 2013, <http://www.nytimes.com/2013/07/24/us/politics/nsa-director-lobbies-house-on-eve-of-critical-vote.html?gwh=BC248B30A3974D6BC63DC282F371EDDC>, [<http://perma.cc/0yYMwAhiLv>]. Representative F. James Sensenbrenner, Jr., one of the principal authors of the PATRIOT Act, said “his handiwork was never meant to create a program that allows the government to demand the phone records of every American.” Jonathan Weisman, *House Defeats Effort to Rein In N.S.A. Data Gathering*, N.Y. TIMES, July 24, 2013, <http://www.nytimes.com/2013/07/25/us/politics/house-defeats-effort-to-rein-in-nsa-data-gathering.html?pagewanted=all&gwh=3CE3A2AA5DEA0D4C53701D1500D32D48>, [<http://perma.cc/02vBXQiJrm>].

³⁶⁰ Jack Goldsmith, *Congress Must Figure Out What Our Government Is Doing In The Name of the AUMF*, Lawfare blog, May 17, 2013, <http://www.lawfareblog.com/2013/05/congress-must-figure-out-what-our-government-is-doing-in-the-name-of-the-aumf/>, [<http://perma.cc/0dfCRyuPCS9>].

³⁶¹ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

“dysfunctional.”³⁶² The oversight committees’ performance from the Iranian Revolution through the mining of Nicaraguan harbors,³⁶³ the Iran-Contra affair,³⁶⁴ NSA surveillance,³⁶⁵ and other similar episodes³⁶⁶ provides scant evidence to contradict the Commission’s conclusion.

C. The Presidency

One might suppose, at this point, that what is at issue is not the emergence of double government so much as something else that has been widely discussed in recent decades: the emergence of an imperial presidency.³⁶⁷ After all, the Trumanites work for the President. Can’t he simply “stand tall” and order them to do what he directs, even though they disagree?

The answer is complex. It is not that the Trumanites would not obey;³⁶⁸ it is that such orders would rarely be given. *Could not* shades into *would not*, and improbability into near impossibility: President Obama *could* give an order wholly reversing U.S. national security policy, but he *would not*, because the likely adverse consequences would be prohibitive.

Put differently, the question whether the President *could* institute a complete about-face supposes a top-down policy-making model. The illusion that presidents issue orders and that subordinates simply carry them

³⁶² 9/11 COMMISSION REPORT, *supra* note 173, at 420. See Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1060 (2008); see generally Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655 (2006).

³⁶³ See BOB WOODWARD, *VEIL: THE SECRET WARS OF THE CIA, 1981–1987* 324 (1987).

³⁶⁴ See *id.* at 486.

³⁶⁵ See Wallsten, *supra* note 296.

³⁶⁶ See WOODWARD, *supra* note 363, at 421.

³⁶⁷ For the most prominent works, see ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973); SAVAGE, *supra* note 258; ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* (2006).

³⁶⁸ There is, however, precedent for outright disobedience. During the October War, President Nixon ordered the Pentagon to “get [the resupply aircraft] in the air now”—but experienced “total[] exasperation” at the military’s unwillingness to carry out his decision. RICHARD NIXON, *THE MEMOIRS OF RICHARD NIXON* 927 (1978). “It is a relatively simple matter, in the absence of an oversight mechanism, for a disgruntled department head to simply ignore a decision by the president, or to establish so many obstacles to implementation that it is rendered meaningless.” CHRISTOPHER C. SHOEMAKER, *THE NSC STAFF: COUNSELING THE COUNCIL* 30 (1991).

out is nurtured in the public imagination by media reports of “Obama’s” policies or decisions or initiatives, by the President’s own frequent references to “my” directives or personnel, and by the Trumanites own reports that the President himself has “ordered” them to do something. But true top-down decisions that order fundamental policy shifts are rare.³⁶⁹ The reality is that when the President issues an “order” to the Trumanites, the Trumanites themselves normally formulate the order.³⁷⁰ The Trumanites “cannot be thought of as men who are merely doing their duty. They are the ones who determine their duty, as well as the duties of those beneath them. They are not merely following orders: they give the orders.”³⁷¹ They do that by “entangling”³⁷² the President. This dynamic is an aspect of what one scholar has called the “deep structure” of the presidency.³⁷³ As Theodore Sorensen put it, “Presidents rarely, if ever, make decisions—particularly in foreign affairs—in the sense of writing their conclusions on a clean slate [T]he basic decisions, which confine their choices, have all too often been previously made.”³⁷⁴

Justice Douglas, a family friend of the Kennedys, saw the Trumanites’ influence first-hand: “In reflecting on Jack’s relation to the generals, I slowly realized that the military were so strong in our society that probably no President could stand against them.”³⁷⁵ As the roles of the generals and CIA have converged, the CIA’s influence has expanded—aided in part by a willingness to shade the facts, even with sympathetic Madisonian sponsors. A classified, 6,000-word report by the Senate

³⁶⁹ Former Marine Corps General Jim Jones, Obama’s first National Security Advisor, “has emphasized the ‘bottom up’ approach to decision-making that both he and Obama favor . . . in which issues are first discussed in working groups, then brought to the ‘deputies committee’ of representatives from Cabinet departments.” Karen DeYoung, *National Security Adviser Jones Says He’s ‘Outsider’ in Frenetic White House*, WASH. POST, May 7, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/06/AR2009050604134.html?hpid=topnews&sid=ST2009050702253>, [<http://perma.cc/0gwxVfzV3vG>].

³⁷⁰ See, e.g., WOODWARD, *supra* note 150, at 344.

³⁷¹ MILLS, *supra* note 139, at 286.

³⁷² “[A] veritable political technocracy of White House aides has developed,” Hugh Heclo has written, “helping the president in the short run and in the long run entangling the presidency in an extensive network of policy activists interested in particular issues.” Hugh Heclo, *Introduction: The Presidential Illusion*, in *THE ILLUSION OF PRESIDENTIAL GOVERNMENT* 11 (Hugh Heclo & Lester M. Salamon eds., 1981).

³⁷³ See HECCLO, *supra* note 178.

³⁷⁴ Theodore Sorensen, *You Get To Walk To Work*, N.Y. TIMES MAGAZINE, Mar. 19, 1967.

³⁷⁵ DOUGLAS, *supra* note 85, at 304–05.

Intelligence Committee reportedly concluded that the CIA was “so intent on justifying extreme interrogation techniques that it blatantly misled President George W. Bush, the White House, the Justice Department and the Congressional intelligence committees about the efficacy of its methods.”³⁷⁶ “The CIA gets what it wants,” President Obama told his advisers when the CIA asked for authority to expand its drone program and launch new paramilitary operations.³⁷⁷

Sometimes, however, the Trumanites proceed without presidential approval. In 1975, a White House aide testified that the White House “didn’t know half the things” intelligence agencies did that might be legally questionable.³⁷⁸ “If you have got a program going and you are perfectly happy with its results, why take the risk that it might be turned off if the president of the United States decides he does not want to do it,” he asked.³⁷⁹ Other occasions arise when Trumanites in the CIA and elsewhere originate presidential “directives”—directed to themselves.³⁸⁰ Presidents then ratify such Trumanite policy initiatives after the fact.³⁸¹ To avoid looking like a bystander or mere commentator, the President embraces these Trumanite policies, as does Congress, with the pretense that they are their

³⁷⁶ Mark Mazzetti & Scott Shane, *Senate and C.I.A. Spar Over Secret Report on Interrogation Program*, N.Y. TIMES, July 19, 2013, <http://www.nytimes.com/2013/07/20/us/politics/senate-and-cia-spar-over-secret-report-on-interrogation-program.html?pagewanted=all&gwh=8A66075C7CF7F589C9F0023B795D679B>, [<http://perma.cc/0pAbVwjDQgJ>].

³⁷⁷ MAZZETTI, *supra* note 22, at 228.

³⁷⁸ Timothy B. Lee, *Why a more transparent NSA would be good for Barack Obama*, WASH. POST, July 3, 2013, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/03/why-a-more-transparent-nsa-would-be-good-for-barack-obama/>, [<http://perma.cc/03Dsz7syik7>].

³⁷⁹ *Id.*

³⁸⁰ *See, e.g.*, 9/11 COMMISSION REPORT, *supra* note 173, at 206 (“[T]he CIA, at the NSC’s request, had developed draft legal authorities—a presidential finding—to undertake a large-scale program of covert assistance to the Taliban’s foes. . . . [T]he [Deputies Committee] agreed to revise the al Qaeda presidential directive, then being finalized for presidential approval.”).

³⁸¹ *See, e.g.*, DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY* 45–46 (2012) (describing how the Obama Administration’s initial decision to continue using the Bush Administration’s legal arguments with regard to the state secrets doctrine was made by the Justice Department and that “Obama only learned about it after the fact, from the front page of the *New York Times*”).

own.³⁸² To maintain legitimacy, the President must appear to be in charge. In a narrow sense, of course, Trumanite policies are the President's own; after all, he did formally approve them.³⁸³ But the policies ordinarily are formulated by Trumanites—who prudently, in Bagehot's words, prevent “the party in power” from going “all the lengths their orators propose[.]”³⁸⁴ The place for presidential oratory, to the Trumanites, is in the heat of a campaign, not in the councils of government where cooler heads prevail.³⁸⁵

The idea that presidential backbone is all that is needed further presupposes a model in which the Trumanites share few of the legitimacy-conferring features of the constitutional branches and will easily submit to the President. But that supposition is erroneous. Mass entertainment glorifies the military, intelligence, and law enforcement operatives that the Trumanites direct. The public is emotionally taken with the aura of mystery surrounding the drone war, Seal Team Six, and cyber-weapons. Trumanites, aided by Madisonian leaks, embellish their operatives' very real achievements with fictitious details, such as the killing of Osama bin Laden³⁸⁶ or the daring rescue of a female soldier from Iraqi troops.³⁸⁷ They cooperate with the making of movies that praise their projects, like *Zero*

³⁸² Compare this with Gibbon's description of the imperial government of Augustus, “an absolute monarchy disguised by the forms of a commonwealth. The masters of the Roman world surrounded their throne with darkness, concealed their irresistible strength, and humbly professed themselves the accountable ministers of the senate, whose supreme decrees they dictated and obeyed.” EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 38 (D.M. Low abridgement, 1960).

³⁸³ In the same sense, “authority *formally* resides ‘in the people,’ but the power of initiation is in fact held by small circles of men. That is why the standard strategy of manipulation is to make it appear that the people, or at least a large group of them, ‘really made the decision.’” MILLS, *supra* note 139, at 317.

³⁸⁴ BAGEHOT, *supra* note 40, at 159.

³⁸⁵ For reasons such as this, Bagehot believed that classic presidential government is “incompatible with a skilled bureaucracy.” *Id.* at 201. In classic presidential government, the President manages the execution of the law; initially, with no bureaucratic counterweight, it worked. “When Thomas Jefferson settled down in the White House in 1802,” Bruce Ackerman has noted, “the executive establishment residing in Washington, DC, consisted of 132 federal officials of all ranks. (One was Jefferson's personal secretary, who served as his entire staff.)” BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 43 (2010).

³⁸⁶ William Saletan, *The Myth of Bin Laden: The false story of his life meets the false story of his death*, SLATE, May 4, 2011, http://www.slate.com/articles/health_and_science/human_nature/2011/05/the_myth_of_bin_laden.html, [<http://perma.cc/0Mn6SzRjx8S>].

³⁸⁷ David D. Kirkpatrick, *Jessica Lynch Criticizes U.S. Accounts of Her Ordeal*, N.Y. TIMES, Nov. 7, 2003, <http://www.nytimes.com/2003/11/07/national/07LYNC.html>, [<http://perma.cc/0vgrwEhbLJL>].

Dark Thirty and *Top Gun*, but not movies that lampoon them, such as *Dr. Strangelove* (an authentic F-14 beats a plastic B-52 every time).³⁸⁸ Friendly fire incidents are downplayed or covered up.³⁸⁹ The public is further impressed with operatives' valor as they are lauded with presidential and congressional commendations, in the hope of establishing Madisonian affiliation.³⁹⁰ Their simple mission—find bad guys and get them before they get us—is powerfully intelligible. Soldiers, commandos, spies, and FBI agents occupy an honored pedestal in the pantheon of America's heroes. Their secret rituals of rigorous training and preparation mesmerize the public and fortify its respect. To the extent that they are discernible, the Trumanites, linked as they are to the dazzling operatives they direct, command a measure of admiration and legitimacy that the Madisonian

³⁸⁸ The Defense Department did not cooperate in the making of *Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb* (Columbia Pictures, 1964), the classic satire in which a deranged Air Force general launches a sneak attack against the Soviet Union. *Inside the making of Dr. Strangelove* (Columbia Tristar Home Video Inc., 2000), <http://www.youtube.com/watch?v=iJ6BiRtGTAK>. In contrast, in the production of *Top Gun* (Paramount Pictures, 1986), “the Pentagon worked hand-in-hand with the filmmakers, reportedly charging Paramount Pictures just \$1.8 million for the use of its warplanes and aircraft carriers.” Navy enlistment spiked when the movie was released and the Navy set up recruitment tables at theaters where it played. David Sirota, *25 years later, how ‘Top Gun’ made America love war*, WASH. POST, Aug. 26, 2011, http://articles.washingtonpost.com/2011-08-26/opinions/35271385_1_pentagon-brass-military-budget-top-gun, [<http://perma.cc/96SN-SD8V>]. Paramount permitted the Pentagon to review the script and suggest changes. *Id.* The CIA reviewed the script of *Zero Dark Thirty* (Columbia Pictures, 2012) and successfully pushed for the removal of certain scenes that might have cast the agency in a negative light. Ben Child, *CIA requested Zero Dark Thirty rewrites, memo reveals*, THE GUARDIAN, May 7, 2013, <http://www.theguardian.com/film/2013/may/07/zero-dark-thirty-cia-memo>, [<http://perma.cc/9Z35-NL65>]. Behind-the-scenes participation by the military and intelligence services in Hollywood movie-making has been going on for decades. See JEAN-MICHEL VALANTIN, *HOLLYWOOD, THE PENTAGON AND WASHINGTON: THE MOVIES AND NATIONAL SECURITY FROM WORLD WAR II TO THE PRESENT DAY* (2005). See also DAVID L. ROBB, *OPERATION HOLLYWOOD: HOW THE PENTAGON SHAPES AND CENSORS THE MOVIES* (2004); J. WILLIAM FULBRIGHT, *THE PENTAGON PROPAGANDA MACHINE* (1971).

³⁸⁹ *2 Years After Soldier's Death, Family's Battle Is With Army*, N.Y. TIMES, Mar. 21, 2006, <http://www.nytimes.com/2006/03/21/politics/21tillman.html?pagewanted=all>, [<http://perma.cc/0W9RcrkfwUub>].

³⁹⁰ U.S. DEP'T OF STATE, 3 FAM 4800, DEPARTMENT AWARDS PROGRAM (2012); Medals of the CIA, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/additional-publications/the-work-of-a-nation/items-of-interest/medals-of-the-cia.html>, [<http://perma.cc/05YpcPJNqWQ>] (last updated June 18, 2013).

institutions can only envy.³⁹¹ Public opinion is, accordingly, a flimsy check on the Trumanites; it is a manipulable tool of power enhancement. It is therefore rarely possible for any occupant of the Oval Office to prevail against strong, unified Trumanite opposition, for the same reasons that members of Congress and the judiciary cannot; a non-expert president, like a non-expert senator and a non-expert judge, is intimidated by expert Trumanites and does not want to place himself (or a colleague or a potential political successor) at risk by looking weak and gambling that the Trumanites are mistaken. So presidents wisely “choose” to go along.

The drone policy has been a case in point. Nasr has described how the Trumanite network not only prevailed upon President Obama to continue its drone policy but succeeded in curtailing discussion of the policy’s broader ramifications:

When it came to drones there were four formidable unanimous voices in the Situation Room: the CIA, the Office of the Director of National Intelligence, the Pentagon, and the White House’s counterterrorism adviser, John Brennan. Defense Secretary Robert Gates . . . was fully supportive of more drone attacks. Together, Brennan, Gates, and the others convinced Obama of both the urgency of counterterrorism and the imperative of viewing America’s engagement with the Middle East and South Asia through that prism. Their bloc by and large discouraged debate over the full implications of this strategy in national security meetings.³⁹²

What Nasr does not mention is that, for significant periods, all four voices were hold-overs from the Bush Administration; two Bush Administration officials, Michael J. Morell and David Petraeus, headed the CIA from July

³⁹¹ In a recent poll, some 76% of the public professed confidence in the military—compared with 36% for the presidency, 34% for the Supreme Court, and 10% for Congress. Ed O’Keefe, *Confidence in Congress drops to historic low*, WASH. POST, June 13, 2013, <http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/13/confidence-in-congress-drops-to-historic-low/>, [<http://perma.cc/0LRxSUWePsu>].

³⁹² NASR, *supra* note 2, at 180.

1, 2011 to March 8, 2013.³⁹³ The Director of National Intelligence, Dennis C. Blair, had served in the Bush Administration as Commander-in-Chief of the U.S. Pacific Command and earlier as Director of the Joint Staff in the Office of the Chairman of Joint Chiefs of Staff;³⁹⁴ Brennan had been Bush's Director of the National Counterterrorism Center;³⁹⁵ and Gates had served as Bush's Secretary of Defense.³⁹⁶

Gates's own staying power illuminates the enduring grip of the Trumanite network.³⁹⁷ Gates was recruited by the CIA at Indiana University in 1965 after spending two years in the Air Force, briefing ICBM missile crews.³⁹⁸ He went on to become an adviser on arms control during the SALT talks in Vienna.³⁹⁹ He then served on the National Security Council staff under President Nixon, and then under President Ford, and again under the first President Bush.⁴⁰⁰ During the 1980s, Gates held positions of increasing importance under Director of Central Intelligence William Casey; a colleague described Casey's reaction to Gates as "love at first sight."⁴⁰¹ Casey made Gates his chief of staff in 1981.⁴⁰² When Casey died of a brain tumor, President Reagan floated Gates's name for Director, but questions about his role in the Iran-Contra scandal blocked his nomination.⁴⁰³ Gates continued to brief Reagan regularly, however, often using movies and slides (though Nancy Reagan was annoyed because he "ate all the popcorn"). Fellow CIA officers almost succeeded in blocking his

³⁹³ Michael D. Shear, *Petraeus Quits; Evidence of Affair Was Found by F.B.I.*, N.Y. TIMES, Nov. 9, 2012, http://www.nytimes.com/2012/11/10/us/citing-affair-petraeus-resigns-as-cia-director.html?pagewanted=all&_r=0, [<http://perma.cc/0cV5ws5KKsX>]; see Kimberly Dozier, *CIA deputy director Michael Morell retires*, AP (YAHOO NEWS), June 12, 2013, <http://news.yahoo.com/cia-deputy-director-michael-morell-retires-211017834.html>, [<http://perma.cc/0ksgQABtNF4>] (noting Morell's defense of "harsh" interrogation techniques).

³⁹⁴ Denis C. Blair Biography, THE ASPEN INSTITUTE, <http://www.aspeninstitute.org/policy-work/homeland-security/ahsg/members/blair>, [<http://perma.cc/0JxwutP7NVj>] (last visited Oct. 20, 2013).

³⁹⁵ Peter Bergen, *John Brennan, Obama's counterterrorist*, CNN, Feb. 7, 2013, <http://www.cnn.com/2013/02/06/opinion/bergen-brennan-counterterrorist/index.html>, [<http://perma.cc/04FqazPLoPs>].

³⁹⁶ See *supra* note 38.

³⁹⁷ POWERS, *supra* note 169, at 342–45.

³⁹⁸ *Id.* at 342.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 343.

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *Id.*

nomination when it was revived by President Bush, recalling again his role in the Iran-Contra affair.⁴⁰⁴ Gates nonetheless got the job and escaped indictment, though Independent Counsel Lawrence E. Walsh reported that his statements during the investigation “often seemed scripted and less than candid.”⁴⁰⁵ He took office as President Bush’s Secretary of Defense in 2006, overseeing the aftermath of the Iraq War, and continued in that position in the Obama Administration until July 2011.⁴⁰⁶

It is, of course, possible to reject the advice of a Gates, a Brennan, or other prominent Trumanites.⁴⁰⁷ But battle-proven survivors normally get their way, and their way is not different from one administration to the next, for they were the ones who formulated the national security policies that are up for renewal. A simple thought experiment reveals why presidents tend to acquiesce in the face of strong Trumanite pressure to keep their policies intact. Imagine that President Obama announced within days of taking office that he would immediately reverse the policies detailed at the outset of this essay. The outcry would have been deafening—not simply from the expected pundits, bloggers, cable networks, and congressional critics but from the Trumanites themselves. When Obama considered lowering the military’s proposed force levels for Afghanistan, a member of his National Security Council staff who was an Iraq combat veteran suggested that, if the President did so, the Commander of U.S. and International Security Assistance Forces (“ISAF”) in Afghanistan (General Stanley McChrystal), the Commander of U.S. Central Command (General David Petraeus), the Chairman of the Joint Chiefs of Staff (Admiral Michael Mullen), and even Secretary of Defense Gates all might resign.⁴⁰⁸ Tom Donilon, Obama’s National Security Advisor and hardly a political ingénue, was “stunned by the political power” of the military, according to Bob Woodward.⁴⁰⁹ Recall

⁴⁰⁴ *Id.* at 343. Two of Gates’ colleagues and friends in the CIA testified that he had pressured CIA analysts to exaggerate Soviet involvement in the plot to kill Pope John Paul II, and that he had suppressed and ignored signs of Soviet strategic retreat. *Id.* at 346.

⁴⁰⁵ LAURENCE E. WALSH, FINAL REPORT OF THE INDEPENDENT COUNSEL FOR IRAN/CONTRA MATTERS, Vol. I Ch. 16 (1993), available at <http://www.fas.org/irp/offdocs/walsh/>, [<http://perma.law.harvard.edu/0kNXzcfwMi1>].

⁴⁰⁶ Rowan Scarborough, *Gates’ Tenure Successful, Contradictory*, WASH. TIMES, June 26, 2011, <http://www.washingtontimes.com/news/2011/jun/26/gates-leaves-legacy-of-major-achievements-contradi/?page=all>, [<http://perma.cc/G7DA-UP8L>].

⁴⁰⁷ Obama did in fact overrule Gates’ objections to use of force against Libya. NASR, *supra* note 2, at 180.

⁴⁰⁸ WOODWARD, *supra* note 150, at 319–20.

⁴⁰⁹ *Id.* at 313.

the uproar in the military and Congress when President Bill Clinton moved to end only one Trumanite policy shortly after taking office—the ban on gays in the military.⁴¹⁰ Clinton was quickly forced to retreat, ultimately accepting the policy of “Don’t Ask, Don’t Tell.”⁴¹¹ A president must choose his battles carefully, Clinton discovered; he has limited political capital and must spend it judiciously. Staff morale is an enduring issue.⁴¹² No president has reserves deep enough to support a frontal assault on the Trumanite network. Under the best of circumstances, he can only attack its policies one by one, in flanking actions, and even then with no certainty of victory. Like other presidents in similar situations, Obama thus “had little choice but to accede to the Pentagon’s longstanding requests for more troops” in Afghanistan.⁴¹³

Presidential choice is further circumscribed by the Trumanites’ ability to frame the set of options from which the President may choose—even when the President is personally involved in the decisionmaking process to an unusual degree, as occurred when President Obama determined the number of troops to be deployed to Afghanistan.⁴¹⁴ Richard Holbrooke, the President’s Special Representative for Afghanistan and Pakistan, predicted that the military would offer the usual three options—the option they wanted, bracketed by two unreasonable alternatives that

⁴¹⁰ Eric Schmitt, *Challenging the Military; In Promising to End Ban on Homosexuals, Clinton is Confronting a Wall of Tradition*, N.Y. TIMES, Nov. 12, 1992, <http://www.nytimes.com/1992/11/12/us/transition-analysis-challenging-military-promising-end-ban-homosexuals-clinton.html>, [<http://perma.law.harvard.edu/0vVjC19sxFe>].

⁴¹¹ Paul F. Horvitz, *‘Don’t Ask, Don’t Tell, Don’t Pursue’ is White House’s Compromise Solution: New U.S. Military Policy Tolerates Homosexuals*, NEW YORK TIMES, July 20, 1993, http://www.nytimes.com/1993/07/20/news/20iht-gay_1.html, [<http://perma.law.harvard.edu/0eE1wrcChws/>].

⁴¹² A wholesale rejection of existing policies would, in addition, create severe management problems. Frequent or significant reversals by management are dispiriting, particularly when managers are seen as having lesser expertise. “Though [the decision-maker] has the authority,” Kissinger has observed, “he cannot overrule [his staff] too frequently without impairing its efficiency; and he may, in any event, lack the knowledge to do so.” KISSINGER, *supra* note 181, at 20. The successful pursuit of this objective during the early days of the Kennedy administration effectively circumscribed the latitude of presidential decision-making. “In the wake of the failure in the Bay of Pigs, Kennedy realized that he was hostage to the information and analysis that was provided to him by cabinet agencies.” DAVID J. ROTHKOPF, *RUNNING THE WORLD: THE INSIDE STORY OF THE NATIONAL SECURITY COUNCIL AND THE ARCHITECTS OF AMERICAN POWER* 90 (2004).

⁴¹³ SANGER, *supra* note 23, at 27.

⁴¹⁴ NASR, *supra* note 2, at 22–23.

could garner no support.⁴¹⁵ “And that is exactly what happened,”⁴¹⁶ Nasr recalled. It was, as Secretary Gates said, “the classic Henry Kissinger model You have three options, two of which are ridiculous, so you accept the one in the middle.”⁴¹⁷ The military later expanded the options—but still provided no choice. “You guys just presented me [with] four options, two of which are not realistic.” The other two were practically indistinguishable. “So what’s my option?” President Obama asked. “You have essentially given me one option.”⁴¹⁸ The military was “really cooking the thing in the direction that they wanted,” he complained. “They are not going to give me a choice.”⁴¹⁹

This is, again, hardly to suggest that the President is without power. Exceptions to the rule occur with enough regularity to create the impression of overall presidential control. “As long as we keep up a double set of institutions—one dignified and intended to impress the many, the other efficient and intended to govern the many—we should take care that the two match nicely,” Bagehot wrote.⁴²⁰ He noted that “[t]his is in part effected by conceding some subordinate power to the august part of our polity”⁴²¹ Leadership does matter, or at least it can matter. President Obama’s decision to approve the operation against Osama bin Laden against the advice of his top military advisers is a prominent example.⁴²² Presidents are sometimes involved in the decisional loops, as Bagehot’s theory would predict. Overlap between Madisonians and Trumanites preserves the necessary atmospherics. Sometimes even members of Congress are brought into the

⁴¹⁵ *Id.* at 23–24.

⁴¹⁶ *Id.* at 24.

⁴¹⁷ WOODWARD, *supra* note 150, at 103.

⁴¹⁸ *Id.* at 278. “It was a vintage White House trick, one that offered the illusion of choice. But even though everyone recognized this for the stunt it was, the Kissinger model remained popular.” *Id.* at 104.

⁴¹⁹ *Id.* at 280.

⁴²⁰ BAGEHOT, *supra* note 40, at 176.

⁴²¹ *Id.*

⁴²² See Graham Allison, *How it Went Down*, TIME (May 7, 2012), available at <http://content.time.com/time/magazine/article/0,9171,2113156,00.html> (“The most experienced member of his national-security team, Defense Secretary Robert Gates, opposed the raid, restating his view that putting commandos on the ground risked their being captured or killed. Vice President Joe Biden also felt that the risks of acting rather than waiting outweighed the benefits. The military leader in the loop from the outset and the most intensely engaged officer in this decision-making process, Joint Chiefs of Staff [JCS] Vice Chairman James Cartwright, preferred an air strike to boots on the ground.”).

loop.⁴²³ But seldom do presidents participate personally and directly, let alone the Madisonian institutions *in toto*. The range of presidential choice is tightly hemmed in.⁴²⁴ As Sorensen wrote in 1981, “[e]ven within the executive branch, the president’s word is no longer final”⁴²⁵ When the red lights flash and the sirens wail, it is the Trumanites’ secure phones that ring.

D. A Case Study: NSA Surveillance

Among the principal national security initiatives that the Bush Administration began and the Obama Administration continued were several surveillance programs carried out by the NSA. The inception, operation, and oversight of these programs illuminate a number of the elements responsible for policy continuity: the symbiotic relationship between Madisonian institutions and the Trumanite network; the Trumanites’ crucial role as authors, initiators, and executors of policy; the subservience of the courts; the fecklessness of congressional oversight; the secretiveness and disingenuousness of the Executive; and the incentive that all share to ensure that enough overlap exists between the Trumanite network and the Madisonian institutions to maintain a veneer of Madisonian endorsement.

The NSA was established in 1952 not by statute, but by President Truman’s Top Secret executive order.⁴²⁶ Its very existence remained unacknowledged until it received unwanted public attention in the 1970s, when a report by the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities disclosed that the NSA had kept tabs on Vietnam War opponents, assembling a “watch list” of individuals and organizations involved in the civil rights and anti-war

⁴²³ See, e.g., Senator Fulbright’s contributions to the Cuban Missile Crisis debate at the White House, Oct. 21, 1962. Audio and transcript available via David Coleman, *The Fourteenth Day: J. William Fulbright: Vietnam Dove/Cuban Hawk*, <http://jfk14thday.com/fulbright-cuban-missile-crisis/>, [<http://perma.law.harvard.edu/OCBfxjn2HrF/>].

⁴²⁴ As James Carroll has put it, “impersonal forces” (such as the Pentagon’s culture) “can have an overriding impact on the range of any one person’s possible choices, or on the efficacy with which choices are made.” CARROLL, *supra* note 146, at 302.

⁴²⁵ Sorensen, *supra* note 224, at 7.

⁴²⁶ S. REP. NO. 94-755, bk. III, at 736 (1976).

movements.⁴²⁷ The report further revealed that, between 1945 and May 1975, “[the] NSA received copies of millions of international telegrams sent to, from, or transiting the United States.”⁴²⁸ Following the committee’s investigation into domestic spying by the U.S. intelligence community, Committee Chairman Frank Church made a prophetic statement: “[The NSA’s] capability at any time could be turned around on the American people, and no American would have any privacy left, such [is] the capability to monitor everything: telephone conversations, telegrams, it doesn’t matter.”⁴²⁹ There is, Church said, “tremendous potential for abuse” should the NSA “turn its awesome technology against domestic communications.”⁴³⁰ He added:

I don't want to see this country ever go across the bridge. I know the capacity that is there to make tyranny total in America, and we must see to it that this agency and all agencies that possess this technology operate within the law and under proper supervision, so that we never cross over that abyss. That is the abyss from which there is no return.⁴³¹

⁴²⁷ The Church Committee reported that “from the early 1960s until 1973, NSA targeted the international communications of certain American citizens by placing their names on a ‘watch list.’ Intercepted messages were disseminated to the FBI, CIA, Secret Service, Bureau of Narcotics and Dangerous Drugs[], and the Department of Defense.” The communications in question were “sent with the expectation that they were private” Warrants were not secured. S. REP. NO. 94-755, bk. III, at 735 (1976). See JAMES A. BAMFORD, *BODY OF SECRETS* 428–29 (2002 ed.); JAMES A. BAMFORD, *THE PUZZLE PALACE* 323–24 (1983 ed.). “No evidence was found, however, of any significant foreign support or control of domestic dissidents.” S. REP. NO. 94-755, bk. III, at 743 (1976).

⁴²⁸ The interception program was codenamed Operation SHAMROCK. S. REP. NO. 94-755, bk. III, at 740 (1976). “In no case did NSA obtain a search warrant prior to obtaining a telegram.” S. REP. NO. 94-755, bk. III, at 765 (1976).

⁴²⁹ BAMFORD, *PUZZLE PALACE*, *supra* note 427, at 379 (quoting Senator Frank Church’s interview on *Meet the Press*, NBC (Oct. 29, 1975)).

⁴³⁰ *Intelligence Activities—The National Security Agency and Fourth Amendment Rights*, 94th Cong. (1975) (statement of Sen. Church, Chairman, Select Committee to Study Governmental Operations with Respect to Intelligence Activities).

⁴³¹ BAMFORD, *PUZZLE PALACE*, *supra* note 427, at 379.

Church, it turns out, was one of the individuals whose overseas phone calls were tapped by the NSA in the 1970s.⁴³²

In response to such concerns, Congress in 1978 enacted the Foreign Intelligence Surveillance Act (“FISA”).⁴³³ A principal purpose of the law was to prohibit the government from monitoring Americans’ electronic communications without a judicially granted warrant.⁴³⁴ FISA set up a special court, the FISC, described above,⁴³⁵ to review requests for such warrants.⁴³⁶

Even before 9/11, NSA Director Michael Hayden had proposed more expansive collection programs in a transition report to the incoming Bush Administration.⁴³⁷ Following 9/11, Hayden quickly sought approval of a program to monitor the communications of Americans living within the United States.⁴³⁸ The program “sucked up the contents of telephone calls and e-mails, as well as their ‘metadata’ logs.”⁴³⁹ The Bush Administration concluded that aspects of the proposed program probably were illegal⁴⁴⁰ and therefore considered seeking a change in the law that would permit the expanded program.⁴⁴¹ It decided against such a request, however, because it

⁴³² Matthew M. Aid & William Burr, *Secret Cold War Documents Reveal NSA Spied on Senators*, FOREIGN POLICY, Sept. 25, 2013, http://www.foreignpolicy.com/articles/2013/09/25/it_happened_here_NSA_spied_on_senators_1970s?page=full, [http://perma.law.harvard.edu/0b51cK8aL21/].

⁴³³ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. § 1801 *et seq.* (2006)).

⁴³⁴ S. REP. NO. 95-604(1), at 2–4 (1977).

⁴³⁵ See *supra* text at notes 292–302.

⁴³⁶ 50 U.S.C. § 1803 (2006).

⁴³⁷ JANE MAYER, *THE DARK SIDE: THE INSIDE STORY ON HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 69 (2008). As early as 1999 the NSA had “been pushing . . . to obtain the rule change allowing the analysis of Americans’ phone and e-mail data.” James Risen & Laura Poitras, *N.S.A. Gathers Data on Social Connections of U.S. Citizens*, N.Y. TIMES, Sept. 28, 2013, <http://www.nytimes.com/2013/09/29/us/nsa-examines-social-networks-of-us-citizens.html?pagewanted=all>, [http://perma.cc/0PML8vH3CjJ].

⁴³⁸ SAVAGE, *supra* note 258, at 128–29.

⁴³⁹ Charlie Savage & James Risen, *New Leak Suggests Ashcroft Confrontation Was Over N.S.A. Program*, N.Y. TIMES, June 27, 2013, http://www.nytimes.com/2013/06/28/us/nsa-report-says-internet-metadata-were-focus-of-visit-to-ashcroft.html?pagewanted=all&_r=0&gwh=396ED0A77EED57D930844BB4BE5D6293, [http://www.perma.cc/0ASRXkXENWa].

⁴⁴⁰ SAVAGE, *supra* note 258, at 130.

⁴⁴¹ *Id.*

concluded that Congress would not approve.⁴⁴² Instead, President Bush authorized the NSA to proceed with the program on the basis of the President's supposed independent constitutional power as commander-in-chief, spelled out in a still-classified memorandum written by John Yoo, an attorney in OLC.⁴⁴³ The program went into operation on October 4, 2001.⁴⁴⁴ A change in OLC's leadership brought a different interpretation of the law, with the result that, in March 2004, Attorney General John Ashcroft declined to re-authorize those aspects of the program (reportedly concerning internet metadata) that OLC now considered illegal, with the result that President Bush rescinded his approval to the NSA to collect internet data.⁴⁴⁵

The illegal program remained non-operational for only four months, however; during that period, Justice Department lawyers joined with NSA officials and "immediately began efforts to recreate this authority," an authority to which they believed the FISC would be "amenable."⁴⁴⁶ The Chief Judge of the FISC, Coleen Kollar-Kotelly, quickly obliged, issuing an *ex parte* order on July 14, 2004.⁴⁴⁷ Kollar-Kotelly's order permitted bulk

⁴⁴² *Id.*

⁴⁴³ *Id.* at 131. Yoo may later have disclosed the memorandum's core rationale. "I think there's a law greater than FISA," Yoo said, "which is the Constitution, and part of the Constitution is the president's commander-in-chief power. Congress can't take away the president's power in running a war." *Id.* That logic applied, Yoo presumably believed, to FISA's provision asserting the exclusivity of the procedure it established, which apparently had thitherto been uniformly honored by the administrations of Presidents Carter, Bush, Reagan, and Clinton. The NSA was denied access to Yoo's opinion but its own lawyers concluded that the NSA's recommended program was lawful; this was apparently conveyed orally, with no written legal opinion, to the NSA Director, Michael V. Hayden. The NSA lawyers "came back with a real comfort level that this was within the President's [Article II] authorities." Nomination of General Michael V. Hayden, USAF, to be Director of the Central Intelligence Agency, Hearing Before the Senate Select Committee on Intelligence, 109th Cong., 2d Sess. 54 (May 18, 2006).

⁴⁴⁴ Savage & Risen, *supra* note 439.

⁴⁴⁵ *Id.*

⁴⁴⁶ *NSA inspector general report on email and internet data collection under Stellar Wind – full document*, THE GUARDIAN, June 27, 2013, at 38–39, <http://www.theguardian.com/world/interactive/2013/jun/27/nsa-inspector-general-report-document-data-collection>, [<http://www.perma.cc/05pqqY3TDqq>].

⁴⁴⁷ Glenn Greenwald & Spencer Ackerman, *NSA collected U.S. email records in bulk for more than two years under Obama*, THE GUARDIAN, June 27, 2013, <http://www.theguardian.com/world/2013/jun/27/nsa-data-mining-authorized-obama>, [<http://perma.law.harvard.edu/0vz5A7poNbW/>]. Kollar-Kotelly had been appointed as Chief Judge by Chief Justice William Rehnquist. Prior to her appointment, she had served as an attorney in the criminal division of the Justice Department during the Nixon Administration, during the period in which Rehnquist headed OLC.

collection of internet data, with no warrant requirement;⁴⁴⁸ it “essentially gave NSA the same authority to collect bulk internet metadata that it had under the” earlier program.⁴⁴⁹ None of the other judges on the FISC was apparently told about the NSA’s secret surveillance programs.⁴⁵⁰ Nor were they told about Kollar-Kotelly’s secret order.⁴⁵¹ This was the first time the surveillance court had exercised any authority over the two-and-a-half-year-old surveillance program.⁴⁵²

The program came to public attention when the *New York Times* disclosed it on December 16, 2005.⁴⁵³ The *Times*, by its own admission, had “held that story for more than a year at the urging of the Bush administration, which claimed it would hurt national security.”⁴⁵⁴ When it was finally published, Judge James Robertson resigned his seat on the FISC “in apparent protest of the program.”⁴⁵⁵

When President Obama took office, as noted earlier,⁴⁵⁶ he continued two particularly controversial NSA surveillance programs. One was a program under which the NSA secretly collected the telephone records of tens of millions of Americans who are customers of Verizon and also collected Internet communications.⁴⁵⁷ The phone records were collected under an order issued by the FISC, also described earlier.⁴⁵⁸ The order, issued under section 215 of the PATRIOT Act,⁴⁵⁹ included phone numbers of both parties to every call, their locations, the time the call was made, and

⁴⁴⁸ Savage & Risen, *supra* note 439.

⁴⁴⁹ See *supra* note 446, at 39.

⁴⁵⁰ Savage & Risen, *supra* note 439.

⁴⁵¹ *Id.*

⁴⁵² Greenwood & Ackerman, *supra* note 447.

⁴⁵³ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, <http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&gwh=295DB8429C337294BBCB852A95CF37B6>, [http://www.perma.cc/0ceFidjgdX].

⁴⁵⁴ Margaret Sullivan, *Sources With Secrets Find New Outlets for Sharing*, N.Y. TIMES, June 15, 2013, <http://www.nytimes.com/2013/06/16/public-editor/sources-with-secrets-find-new-outlets-for-sharing.html?pagewanted=all>, [http://perma.cc/0GHhR8zyqGb].

⁴⁵⁵ SAVAGE, *supra* note 258, at 262. As a replacement, Chief Justice Roberts appointed the federal district judge who had earlier ruled in favor of Vice President Cheney in a dispute concerning access to records by the General Accounting Office. *Id.*

⁴⁵⁶ See *supra* notes 36–37.

⁴⁵⁷ See *supra* notes 34–35.

⁴⁵⁸ *Id.* (The so-called “library records” provision, as it had earlier been called.)

⁴⁵⁹ 50 U.S.C. § 1861 (2012).

the length of the call.⁴⁶⁰ The order prohibited its recipient from discussing its existence.⁴⁶¹ The second program Obama continued, PRISM, allowed the NSA to obtain private information about users of Google, Facebook, Yahoo, and other internet companies.⁴⁶² The government claimed authority for this program under section 702 of the FISA Amendments Act of 2008.⁴⁶³

When the first program, concerning telephone records, was reported by British newspaper *The Guardian*,⁴⁶⁴ criticism in Congress was muted,⁴⁶⁵ and “senior government officials” in the United States were quick to release talking points that did not deny the report but reminded everyone that “all three branches of government are involved” in these sorts of activities.⁴⁶⁶ The NSA refused, however, to release its classified interpretation of the applicable statutory authorities.⁴⁶⁷ One member of the Senate Intelligence Committee familiar with that interpretation—but prohibited from discussing it publicly—said that the government’s theory under the PATRIOT Act to collect records about people from third parties was “essentially limitless.”⁴⁶⁸ The *New York Times* had filed a Freedom of Information Act suit in 2011

⁴⁶⁰ See *supra* notes 34–35.

⁴⁶¹ Charlie Savage & Edward Wyatt, *U.S. Is Secretly Collecting Records of Verizon Calls*, N.Y. TIMES, June 5, 2013, <http://www.nytimes.com/2013/06/06/us/us-secretly-collecting-logs-of-business-calls.html>, [<http://perma.cc/0wBnEhW5ugq>].

⁴⁶² Timothy B. Lee, *Here’s everything we’ve learned about how the NSA’s secret programs work*, WASH. POST, June 25, 2013, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/25/heres-everything-weve-learned-about-how-the-nsas-secret-programs-work/>, [<http://perma.cc/0a1GcCbc42G>]; Glenn Greenwald & Ewen MacAskill, *NSA Prism program taps in to user data of Apple, Google and others*, THE GUARDIAN, June 6, 2013, <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data>, [<http://perma.cc/094q6gJSWvs>].

⁴⁶³ 50 U.S.C. § 1881a (2012).

⁴⁶⁴ Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, THE GUARDIAN, June 5, 2013, <http://www.guardian.co.uk/world/2013/jun/06/nsa-phone-records-verizon-court-order>, [<http://perma.cc/0rS1CTFkxLR>].

⁴⁶⁵ Scott Shane & Jonathan Weisman, *Earlier Denials Put Intelligence Chief in Awkward Position*, N.Y. TIMES, June 11, 2013, <http://www.nytimes.com/2013/06/12/us/nsa-disclosures-put-awkward-light-on-official-statements.html>, [<http://perma.cc/0BkVDW6HEyu>].

⁴⁶⁶ Marc Ambinder, *U.S. responds to NSA disclosures*, THE WEEK, June 6, 2013, <http://theweek.com/article/index/245243/us-responds-to-nsa-disclosures>, [<http://perma.cc/04cJmWxVNpN>].

⁴⁶⁷ See *id.*

⁴⁶⁸ James Risen & Charlie Savage, *On Eve of Critical Vote, N.S.A. Director Lobbies House*, N.Y. TIMES, July 23, 2013, at A3, available at <http://www.nytimes.com/2013/07/24/us/politics/nsa-director-lobbies-house-on-eve-of-critical-vote.html>, [<http://perma.law.harvard.edu/05UfQ2zexSE/>] (quoting Senator Wyden).

asking for the government’s interpretation of the law, but the Obama Administration refused to say, and the courts dismissed the suit.⁴⁶⁹ The upshot was that neither Congress nor the public had any knowledge that surveillance of this magnitude was permitted or whether any checks were working. As Senator Chris Coons put it: “The problem is: we here in the Senate and the citizens we represent don’t know how well any of these safeguards actually work.”⁴⁷⁰

Members of Congress were unaware of more than simply the Administration’s interpretation of the law, however. They had no knowledge about how the Administration actually used the phone records that the NSA collected. The Chairman of the Senate Intelligence Committee, Dianne Feinstein, confirmed this.⁴⁷¹ But, she added, it was important to collect phone records of the American public in case someone might become a terrorist in the future⁴⁷² (a rationale the *New York Times* called “absurd”⁴⁷³). Feinstein’s doziness was not without precedent; an earlier chairman of the Committee, Senator Barry Goldwater, claimed to know nothing about the CIA’s mining of Nicaraguan harbors—even though Director of Central Intelligence William Casey had earlier told the committee.⁴⁷⁴ By contrast, the NSA did not inform the Committee about warrantless surveillance during the Bush Administration, which the Committee, of course, never discovered on its own.⁴⁷⁵ Senators not on the Intelligence Committee

⁴⁶⁹ Savage & Wyatt, *supra* note 35.

⁴⁷⁰ Glenn Greenwald, *NSA taps in to user data of Facebook, Google and others, secret files reveal*, THE GUARDIAN, June 7, 2013, <http://www.guardian.co.uk/world/2013/jun/06/us-tech-giants-nsa-data>, [http://perma.law.harvard.edu/0uXV7jfDwJZ/].

⁴⁷¹ Editorial, *President Obama’s Dragnet*, N.Y. TIMES, June 7, 2007, at A26, available at http://www.nytimes.com/2013/06/07/opinion/president-obamas-dragnet.html?partner=rssnyt&emc=rss&_r=0, [http://perma.law.harvard.edu/0S9WTbThGAo/]. Feinstein’s indifference was not unusual. Asked by CBS’s Norah O’Donnell whether the Obama Administration’s surveillance went further than the George W. Bush Administration’s, House Majority Leader Eric Cantor said that “these are questions we don’t know the answers to.” Dana Milbank, *Edward Snowden’s NSA leaks are backlash of too much secrecy*, WASH. POST, June 11, 2013, http://articles.washingtonpost.com/2013-06-10/opinions/39869013_1_james-clapper-leaks-eric-cantor, [http://perma.law.harvard.edu/0SPH1ujqqbF/].

⁴⁷² Editorial, *supra* note 471.

⁴⁷³ *Id.*

⁴⁷⁴ WOODWARD, *supra* note 363, at 319–22.

⁴⁷⁵ James Bamford, *Five myths about the National Security Agency*, WASH. POST, June 21, 2013, http://articles.washingtonpost.com/2013-06-21/opinions/40114085_1_national-security-agency-foreign-intelligence-surveillance-court-guardian, [http://perma.law.harvard.edu/0yuetxdswu9/].

seemed equally uninterested. Normally only the senior congressional leadership is kept fully abreast of intelligence activities, said the Senate's second-ranking Democrat.⁴⁷⁶ "You can count on two hands the number of people in Congress who really know."⁴⁷⁷ When all Senators were invited to a classified briefing by senior national security officials to explain the NSA's surveillance programs, fewer than half attended.⁴⁷⁸ Little wonder that in its review of congressional oversight for intelligence and counterterrorism—which it, again, described as "dysfunctional"⁴⁷⁹—the 9/11 Commission concluded that "[t]inkering with the existing structure is not sufficient."⁴⁸⁰ "[T]he NSA," *The Economist* concluded, "lives under a simulacrum of judicial and legislative oversight."⁴⁸¹ And, it might have added, a simulacrum of honesty.

Before the leaks, James Clapper, Director of National Intelligence, testifying on behalf of the Obama Administration before Feinstein's committee on March 19, 2013, was asked directly about the NSA surveillance by Senator Ron Wyden. "[D]oes the NSA collect any type of data at all on millions or hundreds of millions of Americans?," he asked. Clapper responded, "No, sir." Wyden followed up: "It does not?" Clapper replied, "Not wittingly. There are cases where they could inadvertently perhaps collect, but not wittingly."⁴⁸²

⁴⁷⁶ Jonathan Weisman & David E. Sanger, *White House Plays Down Data Program*, N.Y. TIMES, June 8, 2007, at A14, available at <http://www.nytimes.com/2013/06/09/us/politics/officials-say-congress-was-fully-briefed-on-surveillance.html>, [<http://perma.law.harvard.edu/0qmeom2SYDX/>].

⁴⁷⁷ *Id.*

⁴⁷⁸ Connor Simpson, *The Majority of Senate Skipped a Classified PRISM Briefing*, THE ATLANTIC WIRE, June 15, 2013, <http://www.theatlanticwire.com/national/2013/06/majority-senate-skipped-classified-prism-briefing/66273/>, [<http://perma.law.harvard.edu/0xmnaub3kvK/>].

⁴⁷⁹ 9/11 COMMISSION REPORT, *supra* note 173, at 420.

⁴⁸⁰ *Id.*

⁴⁸¹ *Liberty's Lost Decade*, THE ECONOMIST, Aug. 3, 2013, at 11, available at <http://www.economist.com/news/leaders/21582525-war-terror-haunts-america-still-it-should-recover-some-its-most-cherished>.

⁴⁸² Glenn Kessler, *James Clapper's 'least untruthful' statement to the Senate*, WASH. POST, June 12, 2013, http://www.washingtonpost.com/blogs/fact-checker/post/james-clappers-least-untruthful-statement-to-the-senate/2013/06/11/e50677a8-d2d8-11e2-a73e-826d299ff459_blog.html, [<http://perma.law.harvard.edu/0rMrGXeoYj7/>].

Clapper admitted later that his testimony was false; he described it as “the least untruthful” statement he could give⁴⁸³—and it may have constituted a felony.⁴⁸⁴ Feinstein, who was presiding and who had earlier been briefed on the programs, knew that statement was false and said nothing.⁴⁸⁵ President Obama and other senior members of his administration also knew that it was false—or, if the Madisonian model were functioning as intended, should have known it was false⁴⁸⁶—and also said nothing, allowing the falsehood to stand for months until leaks publicly revealed the testimony to be false.⁴⁸⁷ Obama, finally caught by surprise, insisted that he “welcomed”⁴⁸⁸ the debate that ensued, and his administration commenced active efforts to arrest the NSA employee whose disclosures had triggered it.⁴⁸⁹ The President then proceeded to insist that the NSA was not “actually

⁴⁸³ *Id.*

⁴⁸⁴ 18 U.S.C. § 1001 (2012) (“[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willingly . . . makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined [or] imprisoned not more than 5 years . . .”).

⁴⁸⁵ Justin Amash, a Republican member of the House of Representatives, said that Mr. Clapper had “lied under oath.” Geoff Dyer, *U.S. Intelligence Chief under Scrutiny*, FINANCIAL TIMES, June 14, 2013, <http://www.ft.com/cms/s/0/2fbd05da-d44d-11e2-8639-00144feab7de.html#axzz2iqCkT9Dd>, [<http://perma.law.harvard.edu/0NqAcMaiqnX/>].

⁴⁸⁶ The question arises whether President Obama was in fact aware of major elements of the NSA’s surveillance programs. See Timothy B. Lee, *Did President Obama know about the NSA’s privacy problems?* WASH. POST, Aug. 16, 2013, <http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/16/did-president-obama-know-about-the-nas-privacy-problems/>, [<http://perma.law.harvard.edu/0jUMkjGfoBx/>]. The President’s National Security Adviser, Susan Rice, reportedly told her German counterpart that Obama knew nothing about the monitoring of Chancellor Angela Merkel’s cell phone—which the NSA began during the Bush Administration. David E. Sanger, *In Spy Uproar, ‘Everyone Does It’ Just Won’t Do*, N.Y. TIMES, Oct. 25, 2013, http://www.nytimes.com/2013/10/26/world/europe/in-spy-uproar-everyone-does-it-just-wont-do.html?hp&_r=0, [<http://perma.law.harvard.edu/0vhkjcUfg6/>].

⁴⁸⁷ See *supra* text at notes 35–37. See also Charlie Savage, Edward Wyatt, and Peter Baker, *U.S. Confirms that it Gathers Online Data Overseas*, N.Y. TIMES, June 6, 2013, at A1, available at <http://www.nytimes.com/2013/06/07/us/nsa-verizon-calls.html?ref=opinion>, [<http://perma.law.harvard.edu/0ojAbY6rfsR/>].

⁴⁸⁸ *Obama Defends NSA’s Surveillance of Phone, Web and Credit Card Use*, PBS NEWSHOUR, June 7, 2013, http://www.pbs.org/newshour/bb/government_programs/jan-june13/surveillance1_06-07.html, [<http://perma.law.harvard.edu/09xbpeX8hEa/>].

⁴⁸⁹ Criminal Complaint against Edward Snowden, No. 487, June 14, 2013 (E.D. Va.), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB436/docs/EBB-094.pdf>.

abusing its powers.”⁴⁹⁰ In fact, a May 2012 NSA audit revealed 2,776 incidents in the preceding twelve months where the agency engaged in “unauthorized collection, storage, access to or distribution of legally protected communications.”⁴⁹¹

The NSA also made misrepresentations to the FISC.⁴⁹² In a declassified 2011 opinion by the FISC’s chief judge, U.S. District Court Judge John Bates, the court said that it was “troubled that the government’s revelations . . . mark the third instance in less than three years in which the government has disclosed a substantial misrepresentation regarding the scope of a major collection program.” His court’s earlier approval of NSA’s telephone records collection, Bates wrote, was based upon “a flawed depiction” of how the NSA uses metadata, a “misperception . . . buttressed by repeated inaccurate statements made in the government’s submissions, and despite a government-devised and Court-mandated oversight regime.” “Contrary to the government’s repeated assurances,” Bates continued, the “NSA had been routinely running queries of the metadata using querying terms that did not meet the required standard for querying. The court concluded that this requirement had been ‘so frequently and systemically violated that it can fairly be said that this critical element of the overall . . . regime has never functioned effectively.’”⁴⁹³

⁴⁹⁰ Andrea Peterson, *Remember when Obama said the NSA wasn’t “actually abusing” its powers? He was wrong.*, WASH. POST, Aug. 15, 2013, <http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/15/remember-when-obama-said-the-nsa-wasnt-actually-abusing-its-powers-he-was-wrong/>, [<http://perma.law.harvard.edu/0oA1vLv2th3/>].

⁴⁹¹ *Id.*

⁴⁹² Scott Shane, *Court Upbraided N.S.A. on Its Use of Call-Log Data*, N.Y. TIMES, Sept. 10, 2013, at A14, available at <http://www.nytimes.com/2013/09/11/us/court-upbraided-nsa-on-its-use-of-call-log-data.html?pagewanted=all>, [<http://perma.law.harvard.edu/0VuDT5YZtwB/>]. The Justice Department’s Office of Professional Responsibility never investigated the FISC judges’ complaints, though one FISC judge had suggested that NSA officials could be held in contempt of court. Brad Heath, *Justice Dept. watchdog never probed judges’ NSA concerns*, USA TODAY, Sept. 19, 2013, <http://www.usatoday.com/story/news/nation/2013/09/19/nsa-surveillance-justice-opr-investigation/2805867/>, [<http://perma.law.harvard.edu/0T8nCbwWPXe/>].

⁴⁹³ Memorandum Opinion, FISA Ct., Oct. 3, 2011, at 16 n.14, available at https://www.eff.org/files/filenode/fisc_opinion_-_unconstitutional_surveillance_0.pdf; see Charlie Savage & Scott Shane, *Secret Court Rebuked N.S.A. on Surveillance*, N.Y. TIMES, Aug. 21, 2013, at A1, available at <http://www.nytimes.com/2013/08/22/us/2011-ruling-found-an-nsa-program-unconstitutional.html?pagewanted=all>, [<http://perma.law.harvard.edu/0b8rEbzAeLt/>].

As the surveillance controversy unfolded, “the NSA quietly removed from its website a fact sheet about its collection activities because it contained inaccuracies discovered by lawmakers.”⁴⁹⁴ Senator Ron Wyden, a member of the Senate Intelligence Committee, said that national security officials in the Obama Administration were “actively” misleading the American public about domestic surveillance.⁴⁹⁵ It was not clear whether he was referring to additional actions. After having claimed that the collection of bulk phone records was the primary tool in thwarting dozens of plots, a senior NSA official conceded that it had thwarted only one plot.⁴⁹⁶

On July 24, 2013, following an intense lobbying effort by Clapper and the NSA,⁴⁹⁷ the House of Representatives by a vote of 205 to 217 defeated a measure, sponsored by Representatives Justin Amash and John Conyers Jr., that would have prevented the NSA from continuing its bulk phone records collection program within the United States.⁴⁹⁸ The Obama Administration “made common cause with the House Republican leadership to try to block it.”⁴⁹⁹ During the debate the Chairman of the House Intelligence Committee, Representative Mike Rogers, revealed,

⁴⁹⁴ Greg Miller, *Misinformation on classified NSA programs includes statements by senior U.S. officials*, WASH. POST, June 30, 2013, http://articles.washingtonpost.com/2013-06-30/world/40292346_1_programs-clapper-jr-remark, [<http://perma.law.harvard.edu/0AJorGuAHH9/>]. Its action came on the same day that NSA’s General Counsel cautioned the public against believing all that was being said about NSA surveillance. “A lie can get halfway around the world before the truth gets its boots on,” said Robert Litt, alluding to Mark Twain. “Unfortunately, there’s been a lot of misinformation that’s come out about these programs.” *Id.*

⁴⁹⁵ Risen & Savage, *supra* note 468. Fox News reported that NSA Director General Keith Alexander told it—falsely—that the agency does not “hold data on U.S. citizens.” *NSA reportedly collecting phone records of millions, though officials had denied holding ‘data’ on Americans*, FOX NEWS, June 6, 2013, <http://www.foxnews.com/politics/2013/06/06/nsa-collecting-phone-records-for-millions-verizon-customers-report-says/>, [<http://perma.law.harvard.edu/0KXsDQzFrQ5/>].

⁴⁹⁶ Ellen Nakashima, *Newly declassified documents on phone records program released*, WASH. POST, July 31, 2013, http://www.washingtonpost.com/world/national-security/governments-secret-order-to-verizon-to-be-unveiled-at-senate-hearing/2013/07/31/233fdd3a-f9cf-11e2-a369-d1954abcb7e3_story.html, [<http://perma.law.harvard.edu/0FcUyeG1ueG/>].

⁴⁹⁷ See Editorial, *Absent on Presidential Power*, WALL STREET JOURNAL, July 28, 2013, <http://online.wsj.com/article/SB10001424127887323610704578630102919888438.html>, [<http://perma.law.harvard.edu/OrYbgNgaBr3/>].

⁴⁹⁸ Jonathan Weisman, *House Defeats Effort to Rein In N.S.A. Data Gathering*, N.Y. TIMES, July 25, 2013, http://www.nytimes.com/2013/07/25/us/politics/house-defeats-effort-to-rein-in-nsa-data-gathering.html?_r=0, [<http://perma.law.harvard.edu/02GcWvB9G5Z/>].

⁴⁹⁹ *Id.*

perhaps unwittingly, the relationship between the oversight committees and the intelligence agencies. “What they’re talking about doing,” he said, “is turning off a program that after 9/11 we realized we missed—we the intelligence community—missed a huge clue,” Rogers said.⁵⁰⁰

We the intelligence community: the overseers and the overseen had, at length, become one.

E. Implications for the Future

The aim of this Article thus far has been to explain the continuity in U.S. national security policy. An all-too-plausible answer, this Article has suggested, lies in Bagehot’s concept of double government. Bagehot believed that double government could survive only so long as the general public remains sufficiently credulous to accept the superficial appearance of accountability, and only so long as the concealed and public elements of the government are able to mask their duality and thereby sustain public deference.⁵⁰¹ As evidence of duality becomes plainer and public skepticism grows, however, Bagehot believed that the cone of governance will be “balanced on its point.”⁵⁰² If “you push it ever so little, it will depart farther and farther from its position and fall to earth.”⁵⁰³

If Bagehot’s theory is correct, the United States now confronts a precarious situation. Maintaining the appearance that Madisonian institutions control the course of national security policy requires that those institutions play a large enough role in the decision-making process to maintain the illusion. But the Madisonians’ role is too visibly shrinking, and the Trumanites’ too visibly expanding, to maintain the plausible impression

⁵⁰⁰ Ed O’Keefe, *Proposal to restrict NSA phone-tracking program defeated*, WASH. POST, July 25, 2013, http://articles.washingtonpost.com/2013-07-24/politics/40862333_1_obama-administration-proposal-americans, [<http://perma.law.harvard.edu/0u9PDxh5Ukf/>].

⁵⁰¹ BAGEHOT, *supra* note 40, at 251.

⁵⁰² *Id.*

⁵⁰³ *Id.*

of Madisonian governance.⁵⁰⁴ For this reason and others, public confidence in the Madisonians has sunk to new lows.⁵⁰⁵ The Trumanites have resisted transparency far more successfully than have the Madisonians, with unsurprising results. The success of the whole dual institutional model depends upon the maintenance of public enchantment with the dignified/Madisonian institutions. This requires allowing no daylight to spoil their magic,⁵⁰⁶ as Bagehot put it. An element of mystery must be preserved to excite public imagination. But transparency—driven hugely by modern internet technology, multiple informational sources, and social media—leaves little to the imagination. “The cure for admiring the House of Lords,” Bagehot observed, “was to go and look at it.”⁵⁰⁷ The public has gone and looked at Congress, the Supreme Court, and the President, and their standing in public opinion surveys is the result. Justices, senators, and presidents are not masters of the universe after all, the public has discovered. *They are just like us*. Enquiring minds may not have read enough of *Foreign Affairs*⁵⁰⁸ to assess the Trumanites’ national security policies, but they have read enough of *People Magazine*⁵⁰⁹ to know that the Madisonians are not who they pretend to be. While the public’s unfamiliarity with national security matters has no doubt hastened the Trumanites’ rise, too many people will soon be too savvy to be misled by

⁵⁰⁴ A recent case in point concerned the interception of foreign leaders’ communications, of which both the President and the Chairman of the Senate Intelligence Committee denied knowledge. See Wilson & Gearan, *supra* note 26. Some U.S. surveillance activities, explained Secretary of State John Kerry, had occurred “on autopilot.” Dan Roberts & Spencer Ackerman, *US surveillance has gone too far; John Kerry admits*, THE GUARDIAN, Nov. 1, 2013, <http://www.theguardian.com/world/2013/oct/31/john-kerry-some-surveillance-gone-too-far/print>, [http://perma.law.harvard.edu/0pw6cBkxJVq/].

⁵⁰⁵ Elizabeth Mendes & Joy Wilke, *Americans’ Confidence in Congress Falls to Lowest on Record*, GALLUP POLITICS (June 13, 2013), <http://www.gallup.com/poll/163052/americans-confidence-congress-falls-lowest-record.aspx>, [http://perma.law.harvard.edu/0VG9MijqFLu/].

⁵⁰⁶ BAGEHOT, *supra* note 40, at 100.

⁵⁰⁷ *Id.* at 138.

⁵⁰⁸ *Foreign Affairs’ 2012 circulation was 161,450. Foreign Affairs Circulation Up Nearly 10%*, FOREIGN AFFAIRS, Aug. 2, 2012, <http://www.foreignaffairs.com/discussions/news-and-events/foreign-affairs-circulation-up-nearly-10>, [http://perma.law.harvard.edu/0L3R2VrcsnF/].

⁵⁰⁹ *People Magazine’s 2013 circulation was 3,542,185. Magazine Circulation Slides In 1st Half Of 2013*, HUFFINGTON POST (AP), Aug. 6, 2013, http://www.huffingtonpost.com/2013/08/06/magazine-sales-2013_n_3715153.html, [http://perma.law.harvard.edu/0GHwAiAD6Up/].

the Madisonian veneer,⁵¹⁰ and those people often are opinion leaders whose influence on public opinion is disproportionate to their numbers. There is no point in telling ghost stories, Holmes said, if people do not believe in ghosts.⁵¹¹

It might be supposed at this point that the phenomenon of double government is nothing new. Anyone familiar with the management of the Vietnam War⁵¹² or the un-killable ABM program⁵¹³ knows that double government has been around for a while. Other realms of law, policy, and business also have come to be dominated by specialists, made necessary and empowered by ever-increasing divisions of labor; is not national security duality merely a contemporary manifestation of the challenge long posed to democracy by the administrative state⁵¹⁴-*cum*-technocracy?⁵¹⁵ Why is national security different?

There is validity to this intuition and no dearth of examples of the frustration confronted by Madisonians who are left to shrug their shoulders when presented with complex policy options, the desirability of which cannot be assessed without high levels of technical expertise. International trade issues, for example, turn frequently upon esoteric econometric analysis beyond the grasp of all but a few Madisonians. Climate change and global warming present questions that depend ultimately upon the validity of one intricate computer model versus another. The financial crisis of 2008 posed similar complexity when experts insisted to hastily-gathered executive officials and legislators that—absent massive and immediate intervention—the nation’s and perhaps the world’s entire financial

⁵¹⁰ “In 1958,” the *Washington Post* reported, “more than 70 percent of Americans said they trusted the government. Today, that number hovers in the mid-20s.” Ezra Klein, *The NSA vs. democracy*, WASH. POST, June 28, 2013, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/28/the-nsa-vs-democracy/>, [<http://perma.cc/TKH8-R4VY>].

⁵¹¹ OLIVER WENDELL HOLMES, JR., REMARKS AT A TAVERN CLUB DINNER for DR. S. WEIR MITCHELL (Mar. 4, 1900), *reprinted in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 48–49 (Richard A. Posner ed., 1992).

⁵¹² See KOMER, *supra* note 39; HALBERSTAM, *supra* note 147.

⁵¹³ See Savage, *supra* note 25.

⁵¹⁴ See generally PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY (1993); HUGH HECLLO, A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON (1977).

⁵¹⁵ See, e.g., BEVERLY H. BURRIS, TECHNOCRACY AT WORK (1993); JACQUES ELLUL, JOHN WILKINSON, & ROBERT K. MERTON, THE TECHNOLOGICAL SOCIETY (1967).

infrastructure would face imminent collapse.⁵¹⁶ In these and a growing number of similar situations, the “choice” made by the Madisonians is increasingly hollow; the real choices are made by technocrats who present options to Madisonians that the Madisonians are in no position to assess. Why is national security any different?

It is different for a reason that I described in 1981: the organizations in question “do not regulate truck widths or set train schedules. They have the capability of radically and permanently altering the political and legal contours of our society.”⁵¹⁷ An unrestrained security apparatus has throughout history been one of the principal reasons that free governments have failed. The Trumanite network holds within its power something far greater than the ability to recommend higher import duties or more windmills or even gargantuan corporate bailouts: it has the power to kill and arrest and jail, the power to see and hear and read peoples’ every word and action, the power to instill fear and suspicion, the power to quash investigations and quell speech, the power to shape public debate or to curtail it, and the power to hide its deeds and evade its weak-kneed overseers. It holds, in short, the power of *irreversibility*. No democracy worthy of its name can permit that power to escape the control of the people.

It might also be supposed that existing, non-Madisonian, external restraints pose counterweights that compensate for the weakness of internal, Madisonian checks. The press, and the public sentiment it partially shapes, do constrain the abuse of power—but only up to a point. To the extent that the “marketplace of ideas” analogy ever was apt, that marketplace, like other marketplaces, is given to distortion. Public outrage is notoriously fickle, manipulable, and selective, particularly when driven by anger, fear, and indolence. Sizeable segments of the public—often egged on by public

⁵¹⁶ See David M. Herszenhorn, *Congressional Leaders Stunned by Warnings*, N.Y. TIMES, Sept. 19, 2008, [http://www.nytimes.com/2008/09/20/washington/19cnd-cong.html?_r=1&](http://www.nytimes.com/2008/09/20/washington/19cnd-cong.html?_r=1&[http://perma.law.harvard.edu/06tEHM6sPch]), [http://perma.law.harvard.edu/06tEHM6sPch]; David M. Herszenhorn, *Administration Is Seeking \$700 Billion for Wall Street*, N.Y. TIMES, Sept. 20, 2008, <http://www.nytimes.com/2008/09/21/business/21cong.html?pagewanted=all>, [http://perma.law.harvard.edu/0uES5AUR9LZ]; see SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 207, 222, 231 (2010).

⁵¹⁷ Michael J. Glennon, *Investigating Intelligence Activities: The Process of Getting Information for Congress*, in THE TETHERED PRESIDENCY: CONGRESSIONAL RESTRAINTS ON EXECUTIVE POWER 152 (Thomas M. Franck ed., 1981).

officials—lash out unpredictably at imaginary transgressors, failing even in the ability to identify sympathetic allies.⁵¹⁸ “[P]ublic opinion,” Sorensen wryly observed, “is not always identical with the public interest.”⁵¹⁹

The influence of the media, whether to rouse or dampen, is thus limited. The handful of investigative journalists active in the United States today are the truest contemporary example of Churchill’s tribute to the Royal Air Force.⁵²⁰ In the end, though, access remains everything to the press. Explicit or implicit threats by the targets of its inquiries to curtail access often yield editorial acquiescence. Members of the public obviously are in no position to complain when a story *does not* appear. Further, even the best of investigative journalists confront a high wall of secrecy. Finding and communicating with (on deep background, of course) a knowledgeable, candid source within an opaque Trumanite network resistant to efforts to pinpoint decision-makers⁵²¹ can take years. Few publishers can afford the necessary financial investment; newspapers are, after all, businesses, and the bottom line of their financial statements ultimately governs investigatory expenditures. Often, a second corroborating source is required. Even after scaling the Trumanite wall of secrecy, reporters and their editors often become victims of the deal-making tactics they must adopt to live comfortably with the Trumanites. Finally, members of the mass media are subject to the same organizational pressures that shape the behavior of other groups. They eat together, travel together, and think together. A case in point was the Iraq War. The *Washington Post* ran twenty-seven editorials in favor of the war along with dozens of op-ed pieces, with

⁵¹⁸ For instance, when *Rolling Stone* published a profile of the Boston bomber Dzhokhar Tsarnaev that featured his picture on the cover, Boston’s mayor and Massachusetts’ governor criticized the magazine, and leading chain stores refused to sell the issue. Noam Cohen, *CVS and Walgreens Ban an Issue of Rolling Stone*, N.Y. TIMES, July 17, 2013, <http://www.nytimes.com/2013/07/18/business/media/cvs-and-walgreens-ban-an-issue-of-rolling-stone.html?gwh=4E80411E28C233B49C1C6DACD0AC588A>, [http://perma.law.harvard.edu/0B7ZX13MLDz]. The photograph was the same one that had been printed on the first page of the Sunday *New York Times* following the bombing, along with a profile of Tsarnaev. *Morning Edition*, NATIONAL PUBLIC RADIO, July 18, 2013. *Rolling Stone*’s account described Tsarnaev as a “monster.” Janet Reitman, *Jahar’s World*, ROLLING STONE, July 17, 2013, available at <http://www.rollingstone.com/culture/news/jahars-world-20130717>, [http://perma.law.harvard.edu/0NF1Si8QCpH].

⁵¹⁹ Sorensen, *supra* note 224, at 13.

⁵²⁰ “Never was so much owed by so many to so few.” Winston Churchill, Speech at the House of Commons: The Few (Aug. 20, 1940).

⁵²¹ See *supra* text at note 172.

only a few from skeptics.⁵²² The *New York Times*, *Time*, *Newsweek*, the *Los Angeles Times*, and the *Wall Street Journal* all marched along in lock-step.⁵²³ As Senator Eugene McCarthy aptly put it, reporters are like blackbirds; when one flies off the telephone wire, they all fly off.⁵²⁴

More importantly, the premise—that a vigilant electorate fueled by a skeptical press together will successfully fill the void created by the hollowed-out Madisonian institutions—is wrong.⁵²⁵ This premise supposes that those outside constraints operate *independently*, that their efficacy is not a function of the efficacy of internal, Madisonian checks.⁵²⁶ But the internal and external checks are woven together and depend upon one another.⁵²⁷ Non-disclosure agreements (judicially-enforced gag orders, in truth) are prevalent among those best positioned to criticize.⁵²⁸ Heightened efforts have been undertaken to crush vigorous investigative journalism and to prosecute and humiliate whistleblowers and to equate them with spies under the espionage laws. National security documents have been breathtakingly over-classified. The evasion of Madisonian constraints by these sorts of policies has the net effect of narrowing the marketplace of ideas, curtaining public debate, and gutting both the media and public opinion as effective restraints.⁵²⁹ The vitality of external checks depends upon the vitality of internal Madisonian checks, and the internal Madisonian checks only minimally constrain the Trumanites.

⁵²² Eric Alterman, *Think Again: Why Didn't the Iraq War Kill "The Liberal Media"?*, CENTER FOR AMERICAN PROGRESS (Apr. 4, 2013), <http://www.americanprogress.org/issues/media/news/2013/04/04/59288/why-didnt-the-iraq-war-kill-the-liberal-media/>, [<http://perma.law.harvard.edu/0pY4zq8VYFfx>].

⁵²³ *Id.*

⁵²⁴ Eugene J. McCarthy, U.S. Senator (1968), EIGEN'S POLITICAL & HISTORICAL QUOTATIONS, <http://politicalquotes.org/node/39560>, [<http://perma.law.harvard.edu/04fS3UAZxTE>].

⁵²⁵ For an argument along these lines, see GOLDSMITH, *supra* note 38, at 57 (“The press’s many revelations about the government’s conduct of the war were at the foundation of all of the mechanisms of presidential accountability after 9/11. They informed the public and shaped its opinions, and spurred activists, courts, and Congress to action in changing the government’s course.”).

⁵²⁶ “The autonomy of [public] discussions is an important element in the idea of public opinion as a democratic legitimation,” Mills noted. MILLS, *supra* note 139, at 299.

⁵²⁷ *Id.* at 266. But “the problem is the degree to which the public has genuine autonomy from instituted authority.” *Id.* at 303.

⁵²⁸ See *supra* text at notes 167 and 325.

⁵²⁹ See MILLS, *supra* note 139, at 299, 303, 305.

Some suggest that the answer is to admit the failure of the Madisonian institutions, recognize that for all their faults the external checks are all that really exist, acknowledge that the Trumanite network cannot be unseated, and try to work within the current framework.⁵³⁰ But the idea that external checks alone do or can provide the needed safeguards is false. If politics were the effective restraint that some have argued it is,⁵³¹ politics—intertwined as it is with law—would have produced more effective legalist constraints. It has not. The failure of law is and has been a failure of politics. If the press and public opinion were sufficient to safeguard what the Madisonian institutions were designed to protect, the story of democracy would consist of little more than a series of elected kings, with the rule of law having frozen with the signing of Magna Carta in 1215. Even with effective rules to protect free, informed, and robust expression—which is an enormous assumption—public opinion alone cannot be counted upon to protect what law is needed to protect. The hope that it can do so recalls earlier reactions to Bagehot’s insights—the faith that “the people” can simply “throw off” their “deferential attitude and reshape the political system,” insisting that the Madisonian, or dignified, institutions must “once again provide the popular check” that they were intended to provide.⁵³²

That, however, is exactly what many thought they were doing in electing Barack Obama as President. The results need not be rehearsed; little reason exists to expect that some future public effort to resuscitate withered Madisonian institutions would be any more successful. Indeed, the added power that the Trumanite network has taken on under the Bush-Obama policies would make that all the more difficult. It is simply naïve to believe that a sufficiently large segment of informed and intelligent voters can somehow come together to ensure that sufficiently vigilant Madisonian surrogates will somehow be included in the national security decision-making process to ensure that the Trumanite network is infused with the right values. Those who believe that do not understand why that network was formed, how it operates, or why it survives. They want it, in short, to become more Madisonian. The Trumanite network, of course, would not

⁵³⁰ For an argument along these lines, see POSNER & VERMEULE, *supra* note 67.

⁵³¹ *See id.*

⁵³² This was the solution of Crossman, writing in 1963. BAGEHOT, *supra* note 40, at 56.

mind *appearing* more Madisonian, but its enduring ambition is to become, in reality, less Madisonian.

It is not clear what precisely might occur should Bagehot's cone of government "fall to earth." United States history provides no precedent. One possibility is a prolongation of what are now long-standing trends, with the arc of power continuing to shift gradually from the Madisonian institutions to the Trumanite network. Under this scenario, those institutions continue to subcontract national security decisionmaking to the Trumanites; a majority of the public remains satisfied with tradeoffs between liberty and security; and members of a dissatisfied minority are at a loss to know what to do and are, in any event, chilled by widely-feared Trumanite surveillance capabilities. The Madisonian institutions, in this future, fade gradually into museum pieces, like the British House of Lords and monarchy; Madisonians kiss babies, cut ribbons, and read Trumanite talking points, while the Trumanite network, careful to retain historic forms and familiar symbols, takes on the substance of a silent directorate.

Another possibility, however, is that the fall to earth could entail consequences that are profoundly disruptive, both for the government and the people. This scenario would be more likely in the aftermath of a catastrophic terrorist attack that takes place in an environment lacking the safety-valve checks that the Madisonian institutions once provided. In this future, an initial "rally round the flag" fervor and associated crack-down are followed, later, by an increasing spiral of recriminatory reactions and counter-reactions. The government is seen increasingly by elements of the public as hiding what they ought to know, criminalizing what they ought to be able to do, and spying upon what ought to be private. The people are seen increasingly by the government as unable to comprehend the gravity of security threats, unappreciative of its security-protection efforts, and unworthy of its own trust. Recent public opinion surveys are portentous. A September 2013 Gallup Poll revealed that Americans' trust and confidence in the federal government's ability to handle international problems had reached an all-time low;⁵³³ a June 2013 *Time* magazine poll disclosed that

⁵³³ Joy Wilke & Frank Newport, *Fewer Americans Than Ever Trust Gov't to Handle Problems*, GALLUP POLITICS, Sept. 22, 2013, available at <http://www.gallup.com/poll/164393/fewer-americans-ever-trust-gov-handle-problems.aspx>, [<http://perma.law.harvard.edu/0HPh1ECDPL>].

70% of those age eighteen to thirty-four believed that Edward Snowden “did a good thing” in leaking the news of the NSA’s surveillance program.⁵³⁴ This yawning attitudinal gap between the people and the government could reflect itself in multiple ways. Most obviously, the Trumanite network must draw upon the U.S. population to fill the five million positions needed to staff its projects that require security clearances.⁵³⁵ That would be increasingly difficult, however, if the pool of available recruits comprises a growing and indeterminate number of Edward Snowdens—individuals with nothing in their records that indicates disqualifying unreliability but who, once hired, are willing nonetheless to act against perceived authoritarian tendencies by leaving open the vault of secrecy.

A smaller, less reliable pool of potential recruits would hardly be the worst of it, however. Lacking perceived legitimacy, the government could expect a lesser level of cooperation, if not outright obstruction, from the general public. Many national security programs presuppose public support for their efficient operation. This ranges from compliance with national security letters and library records disclosure under the PATRIOT Act to the design, manufacture, and sale of drones, and cooperation with counterintelligence activities and criminal investigations involving national security prosecutions. Moreover, distrust of government tends to become generalized; people who doubt governmental officials’ assertions on national security threats are inclined to extend their skepticism. Governmental assurances concerning everything from vaccine and food safety to the fairness of stock-market regulation and IRS investigations (not without evidence⁵³⁶) become widely suspect. Inevitably, therefore, daily life would become more difficult. Government, after all, exists for a reason. It carries out many helpful and indeed essential functions in a highly specialized society. When those functions cannot be fulfilled, work-arounds

⁵³⁴ Zeke J. Miller, *TIME POLL: Support for Snowden—and His Prosecution*, TIME, June 13, 2013, available at <http://swampland.time.com/2013/06/13/new-time-poll-support-for-the-leaker-and-his-prosecution/>, [<http://perma.law.harvard.edu/0ndPYmXw2hP>].

⁵³⁵ John Bacon & William M. Welch, *Security clearances held by millions of Americans*, USA TODAY, June 10, 2013, <http://www.usatoday.com/story/news/2013/06/09/government-security-clearance/2406243/>, [<http://perma.law.harvard.edu/0t3EVpNVYQD>].

⁵³⁶ Jonathan Weisman, *I.R.S. Apologizes to Tea Party Groups Over Audits of Applications for Tax Exemption*, N.Y. TIMES, May 10, 2013, <http://www.nytimes.com/2013/05/11/us/politics/irs-apologizes-to-conservative-groups-over-application-audits.html?pagewanted=all>, [<http://perma.law.harvard.edu/0WJfsh2fyc>].

emerge, and social dislocation results. Most seriously, the protection of legitimate national security interests would itself suffer if the public were unable to distinguish between measures vital to its protection and those assumed to be undertaken merely through bureaucratic inertia or lack of imagination.

The government itself, meanwhile, could not be counted upon to remain passive in the face of growing public obduracy in response to its efforts to do what it thinks essential to safeguard national security. Here we do have historical precedents, and none is comfortably revisited. The Alien and Sedition Acts in the 1790s;⁵³⁷ the Palmer Raids of 1919 and 1920;⁵³⁸ the round-up of Japanese-American citizens in the 1940s;⁵³⁹ governmental spying on and disruption of civil rights, draft protesters, and anti-war activists in the 1960s and 1970s;⁵⁴⁰ and the incommunicado incarceration without charges, counsel, or trial of “unlawful combatants” only a few short years ago⁵⁴¹—all are examples of what can happen when government sees limited options in confronting nerve-center security threats. No one can be certain, but the ultimate danger posed if the system were to fall to earth in the aftermath of a devastating terrorist attack could be intensely divisive and potentially destabilizing—not unlike what was envisioned by conservative Republicans in Congress who opposed Truman’s national security programs when the managerial network was established.⁵⁴²

It is therefore appropriate to move beyond explanation and to turn to possibilities for reform—to consider steps that might be taken to prevent the entire structure from falling to earth.

⁵³⁷ See GEOFFREY R. STONE: *PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2005).

⁵³⁸ See CHRISTOPHER FINAN: *FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA* (2008).

⁵³⁹ See MARTHA MINOW: *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1999).

⁵⁴⁰ For a comprehensive account, see ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* 57–100 (2006).

⁵⁴¹ See LOUIS FISHER, *THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA’S FREEDOMS* 188–210 (2008); DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* 107–28 (2007).

⁵⁴² See *supra* text at notes 109–16.

V. Is Reform Possible? Checks, Smoke, and Mirrors

Madison, as noted at the outset,⁵⁴³ believed that a constitution must not only set up a government that can control and protect the people, but, equally importantly, must protect the people from the government.⁵⁴⁴ Madison thus anticipated the enduring tradeoff: the lesser the threat from government, the lesser its capacity to protect against threats; the greater the government's capacity to protect against threats, the greater the threat from the government.

Recognition of the dystopic implications of double government focuses the mind, naturally, on possible legalist cures to the threats that double government presents. Potential remedies fall generally into two categories. First, strengthen systemic checks, either by reviving Madisonian institutions—by tweaking them about the edges to enhance their vitality— or by establishing restraints directly within the Trumanite network. Second, cultivate civic virtue within the electorate.

A. Strengthening Systemic Checks

The first set of potential remedies aspires to tone up Madisonian muscles one by one with ad hoc legislative and judicial reforms, by, say, narrowing the scope of the state secrets privilege; permitting the recipients of national security letters at least to make their receipt public; broadening standing requirements; improving congressional oversight of covert operations, including drone killings and cyber operations; or strengthening statutory constraints like FISA⁵⁴⁵ and the War Powers Resolution.⁵⁴⁶ Law reviews brim with such proposals. But their stopgap approach has been tried

⁵⁴³ See *supra* text at note 1.

⁵⁴⁴ THE FEDERALIST No. 51 (James Madison).

⁵⁴⁵ See, e.g., James G. Carr, *A Better Secret Court*, N.Y. TIMES, July 22, 2013, <http://www.nytimes.com/2013/07/23/opinion/a-better-secret-court.html?gwh=CBAFAFA2402FF2971D6B6B8812015EF6>, [<http://perma.law.harvard.edu/0XR6SHkae8Z>]; Editorial board, *Reforming the FISA court*, WASH. POST, July 23, 2013, http://articles.washingtonpost.com/2013-07-23/opinions/40859606_1_fisc-fisa-court-appointed-judges, [<http://perma.law.harvard.edu/0VDEFpeV4hR>]; Editorial board, *More Independence for the FISA Court*, N.Y. TIMES, July 27, 2013, <http://www.nytimes.com/2013/07/29/opinion/more-independence-for-the-fisa-court.html?gwh=3FBECEFF516E9AD223A555467197B941>, [<http://perma.law.harvard.edu/0Zga1CvYLPPr>].

⁵⁴⁶ See, e.g., MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY (1990).

repeatedly since the Trumanite network's emergence. Its futility is now glaring. Why such efforts would be any more fruitful in the future is hard to understand. The Trumanites are committed to the rule of law and their sincerity is not in doubt, but the rule of law to which they are committed is largely devoid of meaningful constraints.⁵⁴⁷ Continued focus on legalist band-aids merely buttresses the illusion that the Madisonian institutions are alive and well—and with that illusion, an entire narrative premised on the assumption that it is merely a matter of identifying a solution and looking to the Madisonian institutions to effect it. That frame deflects attention from the underlying malady. What is needed, if Bagehot's theory is correct, is a fundamental change in the very discourse within which U.S. national security policy is made. For the question is no longer: What should the *government* do? The questions now are: What should be done *about* the government? What *can* be done about the government? What are the responsibilities not of the government but of *the people*?

A second approach would inject legal limits directly into the Trumanites' operational core by, for example, setting up de facto judges within the network, or at least lawyers able to issue binding legal opinions, before certain initiatives could be undertaken.⁵⁴⁸ Another proposed reform would attempt to foster intra-network competition among the Trumanites by creating Madisonian-like checks and balances that operate directly within the Trumanite network.⁵⁴⁹ The difficulty with these and similar ideas is that the checks they propose would merely replicate and relocate failed Madisonian institutions without controlling the forces that led to the hollowing-out of the *real* Madisonian institutions. There is scant reason to believe that pseudo-Madisonian checks would fare any better. Why would the Trumanite network, driven as it is to maintain and strengthen its

⁵⁴⁷ This explains the Trumanite network's ready embrace of the "rules" of the United Nations Charter concerning use of force, which in their indeterminacy and malleability can plausibly be marshaled to support virtually any U.S. military action. See MICHAEL J. GLENNON, *THE FOG OF LAW: PRAGMATISM, SECURITY, AND INTERNATIONAL LAW* (2010); MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTION AFTER KOSOVO* (2001). When British Foreign Secretary Robin Cook told U.S. Secretary of State Madeleine Albright that he had "problems with our lawyers" about attacking Yugoslavia without UN Security Council approval, she responded: "Get new lawyers." James P. Rubin, *Countdown to a Very Personal War*, *THE FINANCIAL TIMES*, Sept. 30/Oct. 1, 2000, at ix.

⁵⁴⁸ ACKERMAN, *supra* note 385, at 144–45, 146, 177.

⁵⁴⁹ See generally Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 *YALE L.J.* 2314 (2006).

autonomy, subject itself behind the scenes to *internal* Madisonian constraints any more readily than it publicly has subjected itself to *external* Madisonian constraints? Why, in Bagehot's terms, would the newly established intra-Trumanite institutions not become, in effect, a new, *third* institutional layer that further disguises where the real power lies?

Indeed, intra-Trumanite checks have already been tried. When questions arose as to whether Justice Department lawyers inappropriately authorized and oversaw warrantless electronic surveillance in 2006, its Office of Professional Responsibility commenced an investigation—until its investigators were denied the necessary security clearances, blocking the inquiry.⁵⁵⁰ The FBI traditionally undertakes an internal investigation when an FBI agent is engaged in a serious shooting; “from 1993 to early 2011, FBI agents fatally shot about seventy ‘subjects’ and wounded about eighty others—and every one of those [shootings] was justified,” its inspectors found.⁵⁵¹ Following the NSA surveillance disclosures, President Obama announced the creation of an independent panel to ensure that civil liberties were being respected and to restore public confidence—a panel, it turned out, that operated as an arm of the Office of the Director of National Intelligence, which oversees the NSA.⁵⁵² Inspectors general were set up within federal departments and agencies in 1978 as safeguards against

⁵⁵⁰ Attorney General Alberto Gonzalez testified that President Bush personally intervened to halt the investigation. Neil A. Lewis, *Bush Blocked Ethics Inquiry, Official Says*, N.Y. TIMES, July 19, 2006, <http://www.nytimes.com/2006/07/19/washington/19gonzales.html?gwh=C76D59ACF61333DCF2934A12DD9A162E>, [<http://perma.cc/0RXnDpbGviT>].

⁵⁵¹ Charlie Savage & Michael S. Schmidt, *The F.B.I. Deemed Agents Faultless in 150 Shootings*, N.Y. TIMES, June 18, 2013, http://www.nytimes.com/2013/06/19/us/in-150-shootings-the-fbi-deemed-agents-faultless.html?_r=0&pagewanted=print, [<http://perma.cc/X4TP-Y7BE>]. In most of the shootings, the FBI's internal investigation was the only official inquiry. *Id.*

⁵⁵² *Obama's independent spying review team is closely tied to White House*, FOX NEWS, Sept. 22, 2013, <http://www.foxnews.com/politics/2013/09/22/obama-independent-spying-review-team-is-closely-tied-to-white-house/?intcmp=latestnews>, [<http://perma.cc/UW7D-8HZU>].

waste, fraud, abuse, and illegality,⁵⁵³ but the positions have remained vacant for years in some of the government's largest cabinet agencies, including the departments of Defense, State, Interior, and Homeland Security.⁵⁵⁴ The best that can be said of these inspectors general is that, despite the best of intentions, they had no authority to overrule, let alone penalize, anyone. The worst is that they were trusted Trumanites who snored through everything from illegal surveillance to arms sales to the Nicaraguan contras to Abu Ghraib to the waterboarding of suspected terrorists. To look to Trumanite inspectors general as a reliable check on unaccountable power would represent the ultimate triumph of hope over experience.

“Blue-ribbon” executive commissions also have been established, but they have done little to check the power of the Trumanite network. Following disclosures of illegal CIA domestic surveillance by the *New York Times*,⁵⁵⁵ President Ford created a commission within the Executive Branch to, as he put it, “[a]scertain and evaluate any facts relating to activities conducted within the United States by the Central Intelligence Agency which give rise to questions of compliance with the” law.⁵⁵⁶ Vice President

⁵⁵³ See, e.g., Ryan M. Check & Afsheen John Radsan, *One Lantern in the Darkest Night: The CIA's Inspector General*, 4 J. NAT'L SECURITY L. & POL'Y 247, 284–87 (2010) (describing how the CIA's Office of Inspector General “has generally produced better results when addressing discrete, isolated problems,” but “[w]hen the largest problems surfaced, the statutory OIG did not add significant remedial value”); *id.* at 287–88 (“[W]hen it was Dana Priest who broke *The Washington Post* story about secret CIA prisons—prisons that OIG had not investigated before the story—it leads to the conclusion that intelligence insiders deem Ms. Priest (or Mr. Risen, or Mr. Lichtblau, or Mr. Pincus, or any other investigative reporter) a more effective agent of change than OIG. And not only did the whistleblower choose Ms. Priest either instead of, or in addition to, OIG, he or she did so despite the risk of being disciplined, discharged, or even arrested for disclosing secrets to a reporter.”); see also generally LIGHT, *supra* note 514.

⁵⁵⁴ Jared A. Favole, *Inspector-General Vacancies at Agencies are Criticized*, WALL STREET JOURNAL, June 19, 2013, <http://online.wsj.com/article/SB10001424127887323300004578555491906170344.html>, [<http://perma.cc/QP2R-WY6B>].

⁵⁵⁵ See Seymour M. Hersh, *Huge CIA Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES, Dec. 22, 1974, at 1, available at http://www.nytimes.com/packages/pdf/politics/19741222_hersh.pdf, [<http://perma.law.harvard.edu/04dZrUMehPL>]; Seymour M. Hersh, *Underground for the C.I.A. in New York*, N.Y. TIMES, Dec. 29, 1974, <http://select.nytimes.com/gst/abstract.html?res=FA0C11FD355F107A93CBAB1789D95F408785F9>, [<http://livepage.apple.comperma.law.harvard.edu/0qNKSzFYoGP>].

⁵⁵⁶ Exec. Order No. 11,828, 40 Fed. Reg. 1219 (1975).

Nelson Rockefeller headed the commission.⁵⁵⁷ Rockefeller's driving resolve to "ascertain and evaluate" was disclosed in a confidential comment to William Colby, then Director of Central Intelligence, that Colby recalled in his memoirs. "Bill," Rockefeller asked him privately, "do you really have to present all this material to us?"⁵⁵⁸ He continued: "We realize that there are secrets that you fellows need to keep and so nobody here is going to take it amiss if you feel that there are some questions that you can't answer quite as fully as you feel you have to."⁵⁵⁹ The Commission's report said nothing about the CIA's efforts to assassinate Fidel Castro, though it did reaffirm the findings of the Warren Commission.⁵⁶⁰

A third internal "check," the Foreign Intelligence Surveillance Court, subsists formally outside the executive branch but for all practical purposes might as well be within it; as noted earlier, it approved 99.9% of all warrant requests between 1979 and 2011.⁵⁶¹ In 2013, it approved the NSA collection of the telephone records of tens of millions of Americans, none of whom had been accused of any crime.⁵⁶² An authentic *check* is one thing; smoke and mirrors are something else.

The first difficulty with such proposed checks on the Trumanite network is circularity; *all rely upon Madisonian institutions to restore power to Madisonian institutions by exercising the very power that Madisonian institutions lack*. All assume that the Madisonian institutions, in which all reform proposals must necessarily originate, can somehow magically impose those reforms upon the Trumanite network or that the network will somehow merrily acquiesce. All suppose that the forces that gave rise to the Trumanite network can simply be ignored. All assume, at bottom, that Madison's scheme can be made to work—that an equilibrium of power can be achieved—without regard to the electorate's fitness.

⁵⁵⁷ See *Members of Panel in Study on C.I.A.*, June 11, 1975, at 21, available at ProQuest Historical Newspapers.

⁵⁵⁸ WILLIAM COLBY, *HONORABLE MEN: MY LIFE IN THE CIA* 400 (1978).

⁵⁵⁹ *Id.*

⁵⁶⁰ SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, INTERIM REPORT: ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465, at 2 (1975) ("Although the Rockefeller Commission initiated an inquiry into reported assassination plots, the Commission declared it was unable, for a variety of reasons, to complete its inquiry.").

⁵⁶¹ See *supra* note 343 and accompanying text.

⁵⁶² See Part IV.D.

Yet Madison's theory, again,⁵⁶³ presupposed the existence of a body politic possessed of civic virtue. It is the personal ambition only of office-holders *who are chosen by a virtuous electorate* that can be expected to translate into institutional ambition. It is legislators *so chosen*, Madison believed, who could be counted upon to resist encroachments on, say, Congress's power to approve war or treaties because a diminution of Congress's power implied a diminution of their own individual power. Absent a virtuous electorate, personal ambition and institutional ambition no longer are coextensive. Members' principal ambition⁵⁶⁴ then becomes political survival, which means accepting, not resisting, Trumanite encroachments on congressional power. The Trumanites' principal ambition, meanwhile, remains the same: to broaden their ever-insufficient "flexibility" to deal with unforeseen threats—that is, to enhance their own power. The net effect is imbalance, not balance.

This imbalance has suffused the development of U.S. counter-terrorism policy. Trumanites express concerns about convergence, about potentially dangerous link-ups among narco-terrorists, cyber-criminals, human traffickers, weapons traders, and hostile governments.⁵⁶⁵ Yet their concerns focus largely, if not entirely, on only one side of Madison's ledger—the government's need to protect the people from threats—and little, if at all, on the other side: the need to protect the people from the government. As a result, the discourse, dominated as it is by the Trumanites, emphasizes potential threats and deemphasizes tradeoffs that must be accepted to meet those threats. The Madisonians themselves are not troubled about new linkages forged among the newly-created components of military, intelligence, homeland security, and law enforcement agencies—linkages that together threaten civil liberties and personal freedom in ways never before seen in the United States. The earlier "stovepiping" of those agencies was seen as contributing to the unpreparedness that led to the September 11 attacks,⁵⁶⁶ and after the wearying creation of the Department of Homeland

⁵⁶³ See *supra* text at notes 346–49.

⁵⁶⁴ Ambitions may shift slightly as seniority increases; more senior members of Congress who have risen in seniority to chair a committee may be able to curry favor with the Executive in the hopes of securing high-level appointment.

⁵⁶⁵ James Stavridis, *The Dark Side of Globalization*, WASH. POST, May 31, 2013, http://www.washingtonpost.com/opinions/how-terrorists-can-exploit-globalization/2013/05/31/a91b8f64-c93a-11e2-9245-773c0123c027_story.html, [<http://perma.cc/HL4G-XMXT>].

⁵⁶⁶ 9/11 COMMISSION REPORT, *supra* note 173, at 403, 418.

Security and related reorganizations, the Madisonians have little stomach for re-drawing box charts yet again. And so the cogs of the national security apparatus continue to tighten while the scaffolding of the Madisonian institutions continues to erode.

It is no answer to insist that, whatever the system's faults, the Madisonian accountability mechanisms have at least generated a political consensus.⁵⁶⁷ Even if consensus exists among the Madisonians themselves, the existence of a public consensus on national security policy is at best doubtful.⁵⁶⁸ Further, if the application of Bagehot's theory to U.S. national security policy is correct, whatever consensus does exist at the political level is synthetic in that it derives not from contestation among the three branches of the federal government but from efforts of the Madisonian institutions to remain in sync with the Trumanite network. That network is the moving force behind any consensus. It has forged the policies that the consensus supports; it has orchestrated Madisonian support. Finally, even if real, the existence of a Madisonian/Trumanite consensus says nothing about the *content* of the consensus—nothing about whether Madison's second great goal of protecting the people from the government has been vindicated or defeated. Autocracy can be consensus-based. The notion of a benign modern-day consensus on national security policy is, indeed, reminiscent of the observation of Richard Betts and Leslie Gelb who, reviewing agreements that emerged from national security deliberations during the Johnson Administration, concluded that “the system worked.”⁵⁶⁹ Well, perhaps; the result was Vietnam.

The second difficulty with legal and public-opinion based checks on the Trumanite network is the assumption in Madison's theory that the

⁵⁶⁷ For the argument that the United States' “harmonious system” has produced a “general consensus” that would have made “the father of the Constitution . . . smile,” see GOLDSMITH, *supra* note 38, at 210, 243.

⁵⁶⁸ Pew Center polling in July 2013 indicated that the public is split over the wisdom of U.S. counterterrorism policies. “Nearly half of Americans (47%) say their greater concern about government anti-terrorism policies is that they have gone too far in restricting the average person's civil liberties; 35% say their greater concern is that they have not gone far enough to adequately protect the country.” *Few See Adequate Limits on NSA Surveillance Program*, PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS (July 31, 2013), <http://www.people-press.org/2013/07/26/few-see-adequate-limits-on-nsa-surveillance-program/>, [<http://perma.cc/8RUA-H55L>].

⁵⁶⁹ LESLIE GELB & RICHARD BETTS, *THE IRONY OF VIETNAM: THE SYSTEM WORKED* (1979).

three competing branches act independently. “[I]t is evident that each department should have a will of its own,” says *The Federalist*.⁵⁷⁰ This is achieved by ensuring that each is “so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.”⁵⁷¹ Different policy preferences will obtain because the three Madisonian branches will act upon different motives. But when it counts, the branches do not. Each branch has the same ultimate incentive: to bring its public posture into sync with the private posture of the Trumanites.⁵⁷² The net effect is “balance,” after a fashion, in the sense that the end result is outward harmony of a sort easily mistaken for Madisonian-induced equipoise. But the balance is not an equilibrium that results from competition for power among three branches struggling “for the privilege of conducting American foreign policy,” as Edward S. Corwin memorably put it.⁵⁷³ The “system” that produces this ersatz consensus is a symbiotic tripartite co-dependence in which the three Madisonian branches fall over themselves to keep up with the Trumanites. The ostensible balance is artificial; it reflects a juridical legerdemain created and nurtured by the Trumanite network, which shares, defends, and begins with the same static assumptions. Bagehot relates the confidential advice of Lord Melbourne to the English Cabinet: “It is not much matter which we say, but mind, we must all say *the same*.”⁵⁷⁴ The Madisonian institutions and the Trumanite network honor the same counsel.

There is a third, more fundamental, more worrisome reason why the Madisonian institutions have been eclipsed, as noted earlier in this Article.⁵⁷⁵ It is the same reason that repairs of the sort enumerated above likely will not endure. And it is not a reason that can be entirely laid at the feet of the Trumanites. It is a reason that goes to the heartbeat of democratic institutions. The reason is that Madisonian institutions rest upon a

⁵⁷⁰ THE FEDERALIST NO. 51 (James Madison).

⁵⁷¹ *Id.*

⁵⁷² “Obama, like all presidents, wanted harmony. If there was anything other than that, it would get out that there had been a knockdown, drag-out fight in the Situation Room and the president would look like he had lost control of his team.” WOODWARD, *supra* note 150, at 289.

⁵⁷³ EDWARD S. CORWIN, THE PRESIDENT 1787–1984, at 201 (Randall Bland et al. eds., 5th ed. 1984).

⁵⁷⁴ Bagehot, *supra* note 40, at 68 n.1.

⁵⁷⁵ See *supra* text at notes 57–79.

foundation that has proven unreliable: a general public possessed of civic virtue.

Civic virtue, in Madison's view, required acting for the public interest rather than one's private interest.⁵⁷⁶ Madison, realist that he was, recognized that deal-making and self-interest would permeate government; this could be kept in check *in part* by clever institutional design, with "ambition . . . to counteract ambition"⁵⁷⁷ among governmental actors to maintain a power equilibrium. But no such institutional backup is available if the general public itself lacks civic virtue—meaning the capacity to participate intelligently in self-government and to elect officials who are themselves virtuous.⁵⁷⁸ Indeed, civic virtue is thus even more important,⁵⁷⁹ Madison believed, for the public at large than for public officials; institutional checks are necessary but not sufficient. Ultimately, the most important check on public officials is, as Madison put it, "virtue and intelligence in the community . . ." ⁵⁸⁰ Institutional constraints are necessary but not sufficient for the survival of liberty, Madison believed; they cannot be relied upon absent a body politic possessed of civic virtue.⁵⁸¹

Madison was not alone in this belief, though other leading political theorists have since put it differently. Minimal levels of economic well-being, education, and political intelligence,⁵⁸² Bagehot believed, are

⁵⁷⁶ THE FEDERALIST No. 51 (James Madison).

⁵⁷⁷ *Id.*

⁵⁷⁸ THE FEDERALIST No. 55 (James Madison).

⁵⁷⁹ See THE FEDERALIST NO. 55 (James Madison); Cass Sunstein, *Beyond the Republican Revival* 97 YALE L. J. 1539, 1561 (1988).

⁵⁸⁰ Madison's view was laid out in remarks to the Virginia Ratifying Convention:

I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea. If there be sufficient virtue and intelligence in the community, it will be exercised in the selection of these men; so that we do not depend on their virtue, or put confidence in our rulers, but in the people who are to choose them.

J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION VOL. III 536–37 (1836).

⁵⁸¹ THE FEDERALIST No. 55 (James Madison).

⁵⁸² BAGEHOT, *supra* note 40, at 245.

essential conditions for the universal franchise and “ultra-democracy,” as he called it, that has come to exist in the United States.⁵⁸³ Lord Bryce observed that “[t]he student of institutions as well as the lawyer is apt to overrate the effect of mechanical contrivances in politics.”⁵⁸⁴ The various repairs that have been proposed—and, ultimately, the very Madisonian institutions themselves—are in the end mechanical contrivances. Whatever their elegance, these “parchment barriers,” as Madison described laws that stand alone,⁵⁸⁵ cannot compensate for a want of civic virtue. Bagehot concurred: “No polity can get out of a nation more than there is in the nation” “[W]e must first improve the English nation,” he believed, if we expect to improve Parliament’s handiwork.⁵⁸⁶ This insight was widely shared among 19th-century English constitutionalists. John Stuart Mill (whose work on the English Constitution was published shortly before Bagehot’s) shared Bagehot’s and Bryce’s doubts about the ultimate impotence of free-standing legal rules. “In politics as in mechanics,” Mill wrote, “the power which is to keep the engine going must be sought for outside the machinery; and if it is not forthcoming, or is insufficient to surmount the obstacles which may reasonably be expected, the confidence will fail.”⁵⁸⁷

The force of these insights was not lost on prominent American jurists. Learned Hand wrote that “[l]iberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.”⁵⁸⁸ A virtuous electorate, on the other hand, would in Bagehot’s view be governed well whatever the structure of its constitution.⁵⁸⁹ But the tendency in modern societies, Bagehot believed, was “to raise the average and to lower—comparatively, and perhaps absolutely to lower—the summit”⁵⁹⁰—a

⁵⁸³ *Id.* at 215.

⁵⁸⁴ VISCOUNT JAMES BRYCE, *THE AMERICAN COMMONWEALTH* VOL. 1 357 (The MacMillan & Co. 1912) (1893).

⁵⁸⁵ *THE FEDERALIST* No. 48 (James Madison).

⁵⁸⁶ BAGEHOT, *supra* note 40, at 113, 142.

⁵⁸⁷ JOHN STUART MILL, *REPRESENTATIVE GOVERNMENT* 212–13 (1861).

⁵⁸⁸ LEARNED HAND, *THE SPIRIT OF LIBERTY* 190 (Irving Dilliard ed., 3d ed. 1960).

⁵⁸⁹ Bagehot was particularly taken with America’s New England states in this regard. “[I]f they were a separate community,” he wrote, they “would have an education, a political capacity and an intelligence such as the numerical majority of no people, equally numerous, ever possessed.” BAGEHOT, *supra* note 40, at 245. “[T]he men of Massachusetts could, I believe, work *any* Constitution.” *Id.* at 220.

⁵⁹⁰ *Id.* at 124.

forecast ominously elaborated sixty years later by Jose Ortega y Gasset in *The Revolt of the Masses*.⁵⁹¹

B. Government Cultivation of Civic Virtue

In light of these realities, should the United States, as a matter of governmental policy, actively cultivate civic virtue of the sort that permits a robust, single institutional structure of government?

It is barely possible to touch upon the main themes in this recurring debate, but the question does bear directly upon the amenability of double government to reform. The case for inculcating at least some elements of civic virtue—for attempting to foster, in Robert Dahl’s term, the “adequate citizen”⁵⁹²—is an argument from principles of civic republicanism, from the notion that individual fulfillment depends upon liberty, liberty upon self-government, and self-government upon collective deliberation concerning the common good.⁵⁹³ On this view, effective deliberation—participation in the public sphere—requires civic virtue. Civic virtue gives citizens the *capacity* to participate. One of government’s responsibilities is to help them acquire that capacity. Individuals cannot fully develop absent a supportive public sphere. Participation in self-government, and the exercise of judgment, discernment, and the responsibility that active participation entails, is not only a means to the good life but also an end in itself, an indispensable part of human social interaction and self-expression that promotes feelings of community and empathy. The net result is a public sphere in which the individual thrives.

However much republican⁵⁹⁴ principles may actually have influenced the Framers—a question on which scholarly opinion is

⁵⁹¹ JOSE ORTEGA Y GASSET, *THE REVOLT OF THE MASSES* (1932); see Michael Walzer, *Civility and Civic Virtue in Contemporary America*, 41 *SOCIAL RESEARCH* 593 (1974).

⁵⁹² Robert Dahl, *Participation and the Problem of Civic Understanding*, in *RIGHTS AND THE COMMON GOOD: A COMMUNITARIAN PERSPECTIVE* 261 (Amitai Entzoni ed., 1995).

⁵⁹³ See generally ANDREW PETERSON, *CIVIC REPUBLICANISM AND CIVIC EDUCATION: THE EDUCATION OF CITIZENS* (2011); MICHAEL SANDEL, *DEMOCRACY’S DISCONTENT* (1996); J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT* (1975); GORDON WOOD, *THE CREATION OF THE AMERICAN CONSTITUTION 1776–1787*, at 46–90, 430–67 (1969); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

⁵⁹⁴ The terms “liberal” and “republican” are used here in the classic philosophical sense, not the contemporary political sense.

divided⁵⁹⁵—there can be little doubt that in the years following the Constitution’s adoption, a competing liberal tradition has dominated American political thought. Though not all strands of liberalism and republicanism are incompatible, core principles of each are hard to reconcile. Liberalism places few demands on citizens.⁵⁹⁶ It suggests that government ought to take no position on what constitutes the good life. It sees individuals as free and independent, capable of deciding for themselves what ends to seek. No reason exists, liberals argue, to think that government knows better than the individual what character, disposition, or habits of mind are preferable. Government’s role is to respect people’s right to choose their own ends, not to interfere with their choices; unfettered individual development and fulfillment requires not governmental meddling but governmental neutrality. People acting in their own self-interest will create an aggregate order that maximizes individual satisfaction and creates a political equilibrium that is self-correcting.⁵⁹⁷ Governmental interference—governmental preference-shaping—would open the door to tyranny. No minimal knowledge of government or public affairs is required to vote; indeed, voting itself and all other forms of political participation are optional.

Liberalism’s conflicting commands, however, create a paradox for those interested in diffusing concentrated Trumanite power. On the one hand, the liberal tradition counsels alarm at the rise of unaccountable power—yet on the other hand, liberal principles also counsel alarm at the image of government propagandizing citizens to adopt *the government’s* ideas about what constitutes good government. The same liberalism that recoils at the specter of undifferentiated mass surveillance also breeds fear and loathing of local school boards and state textbook review committees spelling out a politically correct answer to what constitutes virtuous participation in accountable governance. Can the threat of concentrated governmental power be repulsed by further concentrating governmental power to address that threat? It is one thing to recognize the essentiality of

⁵⁹⁵ See Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L. J. 1539, 1566 (1988).

⁵⁹⁶ See generally MICHAEL SANDEL, LIBERALISM AND ITS CRITICS (1984); Isaac Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629 (1982).

⁵⁹⁷ For the classic statement of this view, see BERNARD MANDEVILLE, THE FABLE OF THE BEES: OR, PRIVATE VICIES, PUBLIC BENEFITS (1714).

civic virtue but quite another to believe that government is responsible for sustaining it.

Moreover, as a practical matter, it would be difficult to overcome voter ignorance that is in important respects entirely rational. Consider more closely three of the prerequisites for intelligent participation in governance: minimal intellectual acumen, sound judgment concerning policy alternatives, and an adequate informational base. The first two elements are in many respects already widely present. The fact is that “Joe Six-Pack” is neither unintelligent nor irrational. No one familiar with the rules of American football—surely among the most complicated sports in the world—can doubt the raw intelligence of anyone able to weigh the pros and cons of the nickel defense. Its moral dimensions notwithstanding, the decision whether to run a play-action fake on third-and-two is not a *conceptually* more difficult question than the decision whether to strike a high-value target located in a car in Yemen with four unidentified companions. Different types of research obviously are required, but neither matter is beyond the intellectual grasp of a person of common intelligence. The moral implications are also, of course, different, but what reason is there to believe that the Trumanites have any greater moral expertise than the average voter? It is often said that the public lacks access to the requisite information. The reality, however, is that all the material needed to make an informed judgment on the wisdom of drone strikes as a general policy—as well as 95% of the other issues the Trumanites confront—is readily available to anyone who can access the internet. One reason that the public does not do so is that, given competing demands on its time, there is no obvious reason to become more informed. National security policy remains the same from one president to the next, whomever one votes for, and even in the most politically accountable of worlds, the public still would necessarily be excluded from sensitive national security deliberations. Why waste time learning about things one cannot affect?⁵⁹⁸ A single vote, in any event, has an infinitesimally small chance of determining the outcome of an election.

⁵⁹⁸ See generally SOMIN, *supra* note 80, at 20; Ilya Somin, *When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy* 525 POL'Y ANALYSIS (2004).

American voters may not have read Voltaire, but they know that there are gardens to be tended.⁵⁹⁹ Theirs is, in key respects, rational ignorance.⁶⁰⁰

This is the nub of the negative feedback loop in which the United States is now locked. Resuscitating the Madisonian institutions requires an informed, engaged electorate, but voters have little reason to be informed or engaged if their efforts are for naught—and as they become more uninformed and unengaged, they have all the more reason to continue on that path. The Madisonian institutions thus continue to atrophy, the power of the Trumanite network continues to grow, and the public continues to disengage.

VI. Conclusion

U.S. national security policy has scarcely changed from the Bush to the Obama Administration. The theory of Walter Bagehot explains why. Bagehot described the emergence in 19th-century Britain of a “disguised republic” consisting of officials who actually exercised governmental power but remained unnoticed by the public, which continued to believe that visible, formal institutions exercised legal authority.⁶⁰¹ Dual institutions of governance, one public and the other concealed, were referred to by Bagehot as “double government.”⁶⁰² A similar process of bifurcated institutional evolution has occurred in the United States, but in reverse: a network has emerged within the federal government that exercises predominant power with respect to national security matters. It has evolved in response to structural incentives rather than invidious intent, and it consists of the several hundred executive officials who manage the military, intelligence, diplomatic, and law enforcement agencies responsible for protecting the nation’s security. These officials are as little disposed to stake out new policies as they are to abandon old ones. They define security more in military and intelligence terms rather than in political or diplomatic ones.

⁵⁹⁹ VOLTAIRE, *CANDIDE, OR OPTIMISM* (Burton Raffel trans., Yale Univ. Press 2005) (1759).

⁶⁰⁰ For one of the earliest discussions, see ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

⁶⁰¹ BAGEHOT, *supra* note 40, at 262.

⁶⁰² *Id.* at 263.

Enough examples exist to persuade the public that the network is subject to judicial, legislative, and executive constraints. This appearance is important to its operation, for the network derives legitimacy from the ostensible authority of the public, constitutional branches of the government. The appearance of accountability is, however, largely an illusion fostered by those institutions' pedigree, ritual, intelligibility, mystery, and superficial harmony with the network's ambitions. The courts, Congress, and even the presidency in reality impose little constraint. Judicial review is negligible; congressional oversight dysfunctional; and presidential control nominal. Past efforts to revive these institutions have thus fallen flat. Future reform efforts are no more likely to succeed, relying as they must upon those same institutions to restore power to themselves by exercising the very power that they lack. External constraints—public opinion and the press—are insufficient to check it. Both are manipulable, and their vitality depends heavily upon the vigor of constitutionally established institutions, which would not have withered had those external constraints had real force. Nor is it likely that any such constraints can be restored through governmental efforts to inculcate greater civic virtue, which would ultimately concentrate power even further. Institutional restoration can come only from an energized body politic. The prevailing incentive structure, however, encourages the public to become less, not more, informed and engaged.

To many, inculcated in the hagiography of Madisonian checks and balances and oblivious of the reach of Trumanite power, the response to these realizations will be denial. The image of a double national security government will be shocking. It cannot be right. It sounds of conspiracy, “a state within,” and other variations on that theme. “The old notion that our Government is an extrinsic agency,” Bagehot wrote, “still rules our imaginations.”⁶⁰³ That the Trumanite network could have emerged in full public view and without invidious intent makes its presence all the more implausible. Its existence challenges all we have been taught.

There is, however, little room for shock. The pillars of America's double government have long stood in plain view for all to see. We *have* learned about significant aspects of what Bagehot described—from some eminent thinkers. Max Weber's work on bureaucracies showed that, left

⁶⁰³ *Id.* at 263.

unchecked, the inexorability of bureaucratization can lead to a “polar night of icy darkness” in which humanitarian values are sacrificed for abstract organizational ends.⁶⁰⁴ Friedrich Hayek’s work on political organization led him to conclude that “the greatest danger to liberty today comes from the men who are most needed and most powerful in government, namely, the efficient expert administrators exclusively concerned with what they regard as the public good.”⁶⁰⁵ Eric Fromm’s work on social psychology showed how people unconsciously adopt societal norms as their own to avoid anxiety-producing choices, so as to “escape from freedom.”⁶⁰⁶ Irving Janis’s work on group dynamics showed that the greater a group’s *esprit de corps*, “the greater the danger that independent critical thinking will be replaced by groupthink, which is likely to result in irrational and dehumanizing actions directed against out-groups.”⁶⁰⁷ Michael Reisman’s work on jurisprudence has shown how de facto operational codes can quietly arise behind publicly-embraced myth systems, allowing for governmental conduct that is not approved openly by the law.⁶⁰⁸ Mills’ 1956 work on power elites showed that the centralization of authority among officials who hold a common world view and operate in secrecy can produce a “military metaphysic” directed at maintaining a “permanent war economy.”⁶⁰⁹ One person familiar with Mills’ work was political scientist Malcolm Moos, the presidential speechwriter who five years later wrote President Eisenhower’s prophetic warning.⁶¹⁰ “In the councils of government,” Eisenhower said, “we must guard against the acquisition of unwarranted influence, whether sought or

⁶⁰⁴ Max Weber, *Politics as a Vocation*, in FROM MAX WEBER, *ESSAYS IN SOCIOLOGY* 77, 128 (Hans Gerth & Charles Mills eds. & trans., Galaxy Books 2009).

⁶⁰⁵ FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 262 (1960).

⁶⁰⁶ ERIC FROMM, *ESCAPE FROM FREEDOM* viii, 185–86, 206 (1941).

⁶⁰⁷ IRVING L. JANIS, *GROUPTHINK* 13 (2d ed. 1982).

⁶⁰⁸ See generally Michael Reisman, *Representation and Power in International Organization: The Operational Constitution and Its Critics*, 103 AM. J. INT’L L. 209 (2009).

⁶⁰⁹ MILLS, *supra* note 139, at 215, 223.

⁶¹⁰ Moos was Eisenhower’s Chief Speechwriter. See, e.g., Walter Pincus, *Eisenhower’s Farewell Speech Has Wise Words on Split Government and Militarism*, WASH. POST, Dec. 13, 2013, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/13/AR2010121304986.html>, [<http://perma.law.harvard.edu/0KgZdfMlylg>].

unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.”⁶¹¹

Bagehot anticipated these risks. Bureaucracy, he wrote, is “the most unimproving and shallow form of government,”⁶¹² and the executive that commands it “the most dangerous.”⁶¹³ “If it is left to itself,” he observed, “without a mixture of special and non-special minds,” decisional authority “will become technical, self-absorbed, self-multiplying.”⁶¹⁴ The net result is responsibility that is neither fixed nor ascertainable but diffused and hidden,⁶¹⁵ with implications that are beyond historical dispute. “The most disastrous decisions in the twentieth century,” in Robert Dahl’s words, “turned out to be those made by authoritarian leaders freed from democratic restraints.”⁶¹⁶

The benefits derived by the United States from double government—enhanced technical expertise, institutional memory and experience, quick-footedness, opaqueness in confronting adversaries, policy stability, and insulation from popular political oscillation and decisional idiosyncrasy—need hardly be recounted. Those benefits, however, have not been cost-free. The price lies in well-known risks flowing from centralized power, unaccountability, and the short-circuiting of power equilibria. Indeed, in this regard the Framers thought less in terms of risk than certainty. John Adams spoke for many: “The nation which will not adopt an equilibrium of power must adopt a despotism. There is no other alternative.”⁶¹⁷

The trivial risk of sudden despotism, of an abrupt turn to a police state or dictatorship installed with coup-like surprise, has created a false

⁶¹¹ President Dwight D. Eisenhower, Farewell Address (Jan. 17, 1961), available at <http://www.ourdocuments.gov/doc.php?flash=true&doc=90&page=transcript>, [<http://perma.law.harvard.edu/ORBcuRkpTny>]. “Eisenhower had been in the military long enough to become deeply suspicious of how it sought to manipulate his decisions. Obama discovered the same thing, six decades later . . .” SANGER, *supra* note 23, at 420. Mark Mazzetti has described the transformation of the military-industrial complex into a “military-intelligence complex.” MAZZETTI, *supra* note 22, at 5.

⁶¹² Bagehot, *supra* note 40, at 196.

⁶¹³ *Id.* at 135.

⁶¹⁴ *Id.* at 190.

⁶¹⁵ See ANDREW J. BACEVICH, WASHINGTON RULES: AMERICAS’ PATH TO PERMANENT WAR 29 (2010).

⁶¹⁶ ROBERT A. DAHL, ON DEMOCRACY 186 (1998).

⁶¹⁷ JOHN ADAMS, THE POLITICAL WRITINGS OF JOHN ADAMS 361 (George W. Carey ed., 2000).

sense of security in the United States.⁶¹⁸ That a strongman of the sort easily visible in history could suddenly burst forth is not a real risk. The risk, rather, is the risk of slowly tightening centralized power, growing and evolving organically beyond public view, increasingly unresponsive to Madisonian checks and balances. Madison wrote, “There are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations.”⁶¹⁹ Recent history bears out his insight. Dahl has pointed out that in the 20th century—the century of democracy’s great triumph—some seventy democracies collapsed and quietly gave way to authoritarian regimes.⁶²⁰ That risk correlates with voter ignorance; the term *Orwellian* has little meaning to a people who have never known anything different, who have scant knowledge of history, civics, or public affairs, and who in any event have likely never heard of George Orwell. “If a nation expects to be ignorant and free, in a state of civilization,” Thomas Jefferson wrote, “it expects what never was and never will be.”⁶²¹ What form of government ultimately will emerge from the United States’ experiment with double government is uncertain. The risk is considerable, however, that it will not be a democracy.

⁶¹⁸ Max Boot, responding to concerns generated by the NSA surveillance leaks, has written that “[a]lmost all dictatorships throughout history have arisen when a strongman has seized power by force from a weak and illegitimate regime.” Max Boot, *What the Snowden Acolytes Won’t Tell You*, WALL ST. J., July 2, 2013, <http://online.wsj.com/article/SB10001424127887324436104578579150065765928.html>, [<http://perma.cc/0bAMpZrxNCp>].

⁶¹⁹ James Madison, Address at the Virginia Convention to Ratify the U.S. Constitution (June 6, 1788), CONST. SOC’Y, available at http://www.constitution.org/rc/rat_va_05.htm, [<http://perma.law.harvard.edu/0SaCmRgdSDc>].

⁶²⁰ DAHL, *supra* note 616, at 145.

⁶²¹ Thomas Jefferson, Letter to William Charles Jarvis, Sept. 28, 1820, in THE WRITINGS OF THOMAS JEFFERSON 160, 161 (Paul L. Ford, ed. 1899).

