

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 Sheikh 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 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

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&\[http://perma.cc/0kL2rS3VBWE\]](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-Awlaki 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/0ETnqUSornG/].

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. Sargentich, *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/0ubBK5zDPb7/].

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/0hxzacRqVRf].

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/0JDFgRBqEyyv/>] ("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/t/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=t9AhAAAAIbAJ&sjid=-54FAAAIbAJ&pg=1863,3766177>, [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>].