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

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

---

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

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

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

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

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

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

Constitution, War Powers Resolution,[280] and the Boland Amendments[281] (which cut off funds for the activities at issue).[282] Judge Scalia refused to hear arguments on the merits; where a policy had been approved by "the President, the Secretary of State, the Secretary of Defense, and the Director of the CIA," he wrote, discretionary relief is inappropriate.[283] After his appointment to the Supreme Court, Justice Scalia supported the executive-oriented approach to treaty interpretation that the Reagan Administration relied upon in arguing that deployment of a space-based anti-ballistic missile ("ABM") system would not violate the ABM treaty (referring in his opinion to various *Washington Post* articles on the controversy).[284] Later, in *Rasul v. Bush*,[285] the Court's majority held that federal district courts may exercise jurisdiction under the federal habeas statute to hear claims by foreign nationals detained by the United States. Justice Scalia dissented, denouncing the majority for "judicial adventurism of the worst sort."[286] In *Hamdan v. Rumsfeld*,[287] the majority held that a military commission established by the Executive lacked power to try the defendant; Justice Scalia dissented again, insisting that that conclusion was "patently erroneous."[288] In *Boumediene v. Bush*,[289] the majority held that the defendant, a foreign national, had a constitutional privilege of habeas corpus; again Justice Scalia dissented. It came as no surprise when Justice Scalia expressed concern in a 2013 speech that the lawfulness of NSA surveillance could ultimately be decided by judges—"the branch of government that knows the least about the issues in question, the branch that knows the least about the extent of the threat against which the wiretapping is directed."[290] When the Trumanites' actions are at issue, submissiveness, not second-guessing, is the appropriate judicial posture.

---

[280] War Powers Resolution, 87 Stat. 555, 50 U.S.C. §§ 1541–48 (amended 1982).
[281] For a chart of the unclassified Boland Amendments, see 133 Cong. Rec. H4982–H4987 (daily ed. June 15, 1987).
[282] *Id.*
[283] Sanchez-Espinoza, 770 F.2d at 208.
[284] United States v. Stuart, 489 U.S. 353, 376 (1989) (Scalia, J., dissenting).
[285] 542 U.S. 446 (2004).
[286] *Id.* at 506.
[287] 548 U.S. 557 (2006).
[288] *Id.* at 655 (Scalia, J., dissenting).
[289] 553 U.S. 723 (2008).
[290] Matthew Barakat, *Scalia expects NSA program to end up in court*, ASSOCIATED PRESS, Sept. 25, 2013, http://news.yahoo.com/scalia-expects-nsa-wiretaps-end-court-145501284--politics.html, [http://perma.law.harvard.edu/0yuzeWJX9nE].

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

It might also be argued that these justices were not sufficient in number ever to comprise a majority on the Supreme Court. In an era of increasingly close decisions, however, one or two votes can be decisive, and it must be remembered that this cursory review embraces only the Supreme Court; numerous district and appellate court judges with ties to the Trumanite network also adjudicate national security cases. This group includes, most prominently, the closest that the nation has to a national security court[291]—the eleven members of the Foreign Intelligence Surveillance Court.

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

---

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

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

[293] *Id.* § 1803.

[294] *Id.*

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

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

---

[295] *Id.*

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

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

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

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

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

independent are missing there. It's one-sided, secret, and the judges are chosen in a selection process by one man."[301] The Chief Judge of the FISC candidly described its fecklessness. "The FISC is forced to rely upon the accuracy of the information that is provided to the Court," said Chief Judge Reggie B. Walton. "The FISC does not have the capacity to investigate issues of noncompliance, and in that respect the FISC is in the same position as any other court when it comes to enforcing [government] compliance with its orders."[302] The NSA's own record proved him correct; an internal NSA audit revealed that it had broken privacy rules or overstepped its legal authority thousands of times since 2008.[303]

The judiciary, in short, does not have the foremost predicate needed for Madisonian equilibrium: "a will of its own."[304] Whatever the court, judges normally are able to find what appear to the unschooled to be sensible, settled grounds for tossing out challenges to the Trumanites' projects. Dismissal of those challenges is couched in arcane doctrine that harks back to early precedent, invoking implicitly the courts' mystical pedigree and an aura of politics-transcending impartiality. But challenges to the Trumanites' projects regularly get dismissed before the plaintiff ever has a chance to argue the merits either before the courts or, sometimes more importantly, the court of public opinion. Try challenging the Trumanites' refusal to make public their budget[305] on the theory that the Constitution does, after all, require "a regular statement and account of the receipts and expenditures of all public money";[306] or the membership of Members of Congress in the military reserve[307] on the theory that the Constitution does, after all, prohibit Senators and Representatives from holding "any office

---

[301] *Id.*
[302] Carol D. Leonnig, *Court: Ability to police U.S. spying program limited*, WASH. POST, Aug. 16, 2013, http://www.washingtonpost.com/politics/court-ability-to-police-us-spying-program-limited/2013/08/15/4a8c8c44-05cd-11e3-a07f-49ddc7417125_print.html, [http://perma.law.harvard.edu/0Zo8bfYbZtS/].
[303] Barton Gellman, *NSA broke privacy rules thousands of times per year, audit finds*, WASH. POST, Aug. 16, 2013, http://www.washingtonpost.com/world/national-security/nsa-broke-privacy-rules-thousands-of-times-per-year-audit-finds/2013/08/15/3310e554-05ca-11e3-a07f-49ddc7417125_print.html, [http://perma.law.harvard.edu/0TpFZJGW9jv/].
[304] *See infra* text at note 570.
[305] *See* United States v. Richardson, 418 U.S. 166 (1974).
[306] U.S. CONST., art. I, § 9, cl. 7.
[307] *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

under the United States";[308] or the collection of phone records of the sort given by Verizon to the NSA on the theory that the law authorizing the collection is unconstitutional.[309] Sorry, no standing, case dismissed.[310] Try challenging the domestic surveillance of civilians by the U.S. Army[311] on the theory that it chills the constitutionally protected right to free assembly,[312] or the President's claim that he can go to war without congressional approval[313] on the theory that it is for Congress to declare war.[314] Sorry, not ripe for review, case dismissed.[315] Try challenging the introduction of the armed forces into hostilities in violation of the War Powers Resolution.[316] Sorry, political question, non-justiciable, case dismissed.[317] Try challenging the Trumanites' refusal to turn over relevant and material evidence about an Air Force plane accident that killed three crew members through negligence,[318] or about racial discrimination against CIA employees,[319] or about an "extraordinary rendition" involving unlawful detention and torture.[320] Sorry, state secrets privilege, case dismissed.[321]

---

[308] U.S. CONST., art. I, § 6, cl. 2.

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

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

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

[312] U.S. CONST., amend. I.

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

[314] U.S. CONST. art. I, § 8, cl. 11.

[315] *Dellums*, 752 F. Supp at 1150.

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

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

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

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

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

[321] *See id.* at 302.

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

---

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

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

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

[325] *See supra* text at notes 167–68.

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

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

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

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

Yet the larger picture remains valid. Through the long list of military conflicts initiated without congressional approval—Grenada, Panama, Kosovo, and, most recently, Libya—the courts have never stopped a war, with one minor (and temporary) exception. In 1973, Justice William O. Douglas did issue an order to halt the bombing of Cambodia[333]—which lasted a full nine hours, until the full Supreme Court overturned it.[334] The

---

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

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

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

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

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

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

[334] *Id*. at 1304.

Court's "lawless" reversal was effected through an extraordinary telephone poll of its members conducted by Justice Thurgood Marshall. "[S]ome Nixon men," Douglas believed, "put the pressure on Marshall to cut the corners."[335] Seldom do judges call out even large-scale constitutional violations that could risk getting on the wrong side of an angry public, as American citizens of Japanese ethnicity discovered during World War II.[336] Whatever the cosmetic effect, the four cases representing the Supreme Court's supposed "push-back" against the War on Terror during the Bush Administration freed, at best, a tiny handful of detainees.[337] As of 2010 fewer than 4% of releases from Guantánamo followed a judicial release order.[338] A still-unknown number of individuals, numbering at least in the dozens, fared no better. These individuals were detained indefinitely—without charges, based on secret evidence, sometimes without counsel—as "material witnesses" following 9/11.[339] One can barely find a case in which anyone claiming to have suffered even the gravest injury as the result of the Bush-Obama counterterrorism policies has been permitted to litigate that claim on the merits—let alone to recover damages. The Justice Department's seizure of Associated Press ("AP") records was carried out pursuant to judicially-approved subpoenas, in secret, without any chance for

---

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

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

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

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

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

the AP to be heard.[340] The FISC [341] has barely pretended to engage in real judicial review. Between 1979 and 2011, the court received 32,093 requests for warrants. It granted 32,087 of those requests, and it turned down eleven.[342] In 2012, the court received 1,789 requests for electronic surveillance, one of which was withdrawn. All others were approved.[343] The occasional counterexample notwithstanding, the courts cannot seriously be considered a check on America's Trumanite network.

B. The Congress

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

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

---

[340] 28 C.F.R. § 50.10.
[341] *See supra* text at notes 292–302.
[342] *Foreign Intelligence Surveillance Act Court Orders 1979–2011*, Electronic Privacy Info. Ctr., http://epic.org/privacy/wiretap/stats/fisa_stats.html, [http://perma.cc/GXH8-8CH3].
[343] Wallsten, *supra* note 296. This is the "robust legal regime" that unnamed Executive Branch officials claimed, following the disclosure of NSA collection of Verizon's phone records, to be "in place governing all activities conducted pursuant to the Foreign Intelligence Surveillance Act." Marc Ambinder, *U.S. responds to NSA disclosures*, THE WEEK, June 6, 2013 at http://theweek.com/article/index/245243/us-responds-to-nsa-disclosures, [http://perma.cc/T9DE-ZFUU].
[344] ZBIGNIEW BRZEZINSKI, POWER AND PRINCIPLE 477 (1983).
[345] *See supra* text at notes 152–56.

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

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

---

[346] *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 421 (2012) (inter-branch rivalry is less likely under contemporary political conditions).
[347] *See supra* text at notes 95–98.
[348] *Id.*
[349] THE FEDERALIST NO. 51 (James Madison).

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

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

---

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

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

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

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

---

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

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

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

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

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

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

---

[358] The *Washington Post* summarized the oversight charade:

> Unlike typical congressional hearings that feature testimony from various sides of a debate, the briefings in 2010 and 2011 on the telephone surveillance program were by definition one-sided affairs, with lawmakers hearing only from government officials steeped in the legal and national security arguments for aggressive spying.
>
> Additional obstacles stemmed from the classified nature of documents, which lawmakers may read only in specific, secure offices; rules require them to leave their notes behind and restrict their ability to discuss the issues with colleagues, outside experts or their own staff.
>
> While Senate Intelligence Committee members can each designate a full-time staffer for the committee who has full access, House members must rely on the existing committee staff, many of whom used to work for the spy agencies they are tasked with overseeing.

Wallsten, *supra* note 296.

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

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

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

"dysfunctional."[362] The oversight committees' performance from the Iranian Revolution through the mining of Nicaraguan harbors,[363] the Iran-Contra affair,[364] NSA surveillance,[365] and other similar episodes[366] provides scant evidence to contradict the Commission's conclusion.

C. The Presidency

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

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

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

---

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

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

[364] *See id.* at 486.

[365] *See* Wallsten, *supra* note 296.

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

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

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

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

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

---

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

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

[371] MILLS, *supra* note 139, at 286.

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

[373] *See* HECLO, *supra* note 178.

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

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

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

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

---

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

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

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

[379] *Id.*

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

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

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

The idea that presidential backbone is all that is needed further presupposes a model in which the Trumanites share few of the legitimacy-conferring features of the constitutional branches and will easily submit to the President. But that supposition is erroneous. Mass entertainment glorifies the military, intelligence, and law enforcement operatives that the Trumanites direct. The public is emotionally taken with the aura of mystery surrounding the drone war, Seal Team Six, and cyber-weapons. Trumanites, aided by Madisonian leaks, embellish their operatives' very real achievements with fictitious details, such as the killing of Osama bin Laden[386] or the daring rescue of a female soldier from Iraqi troops.[387] They cooperate with the making of movies that praise their projects, like *Zero*

---

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

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

[384] BAGEHOT, *supra* note 40, at 159.

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

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

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

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

---

[388] The Defense Department did not cooperate in the making of *Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb* (Columbia Pictures, 1964), the classic satire in which a deranged Air Force general launches a sneak attack against the Soviet Union. *Inside the making of Dr. Strangelove* (Columbia Tristar Home Video Inc., 2000), http://www.youtube.com/watch?v=iJ6BiRtGTAk. In contrast, in the production of *Top Gun* (Paramount Pictures, 1986), "the Pentagon worked hand-in-hand with the filmmakers, reportedly charging Paramount Pictures just $1.8 million for the use of its warplanes and aircraft carriers." Navy enlistment spiked when the movie was released and the Navy set up recruitment tables at theaters where it played. David Sirota, *25 years later, how 'Top Gun' made America love war*, WASH. POST, Aug. 26, 2011, http://articles.washingtonpost.com/2011-08-26/opinions/35271385_1_pentagon-brass-military-budget-top-gun, [http://perma.cc/96SN-SD8V]. Paramount permitted the Pentagon to review the script and suggest changes. *Id.* The CIA reviewed the script of *Zero Dark Thirty* (Columbia Pictures, 2012) and successfully pushed for the removal of certain scenes that might have cast the agency in a negative light. Ben Child, *CIA requested Zero Dark Thirty rewrites, memo reveals*, THE GUARDIAN, May 7, 2013, http://www.theguardian.com/film/2013/may/07/zero-dark-thirty-cia-memo, [http://perma.cc/9Z35-NL65]. Behind-the-scenes participation by the military and intelligence services in Hollywood movie-making has been going on for decades. *See* JEAN-MICHEL VALANTIN, HOLLYWOOD, THE PENTAGON AND WASHINGTON: THE MOVIES AND NATIONAL SECURITY FROM WORLD WAR II TO THE PRESENT DAY (2005). *See also* DAVID L. ROBB, OPERATION HOLLYWOOD: HOW THE PENTAGON SHAPES AND CENSORS THE MOVIES (2004); J. WILLIAM FULBRIGHT, THE PENTAGON PROPAGANDA MACHINE (1971).

[389] *2 Years After Soldier's Death, Family's Battle Is With Army*, N.Y. TIMES, Mar. 21, 2006, http://www.nytimes.com/2006/03/21/politics/21tillman.html?pagewanted=all, [http://perma.cc/0W9RcrkfWUb].

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

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

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

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

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

---

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

[392] NASR, *supra* note 2, at 180.

1, 2011 to March 8, 2013.[393] The Director of National Intelligence, Dennis C. Blair, had served in the Bush Administration as Commander-in-Chief of the U.S. Pacific Command and earlier as Director of the Joint Staff in the Office of the Chairman of Joint Chiefs of Staff;[394] Brennan had been Bush's Director of the National Counterterrorism Center;[395] and Gates had served as Bush's Secretary of Defense.[396]

Gates's own staying power illuminates the enduring grip of the Trumanite network.[397] Gates was recruited by the CIA at Indiana University in 1965 after spending two years in the Air Force, briefing ICBM missile crews.[398] He went on to become an adviser on arms control during the SALT talks in Vienna.[399] He then served on the National Security Council staff under President Nixon, and then under President Ford, and again under the first President Bush.[400] During the 1980s, Gates held positions of increasing importance under Director of Central Intelligence William Casey; a colleague described Casey's reaction to Gates as "love at first sight."[401] Casey made Gates his chief of staff in 1981.[402] When Casey died of a brain tumor, President Reagan floated Gates's name for Director, but questions about his role in the Iran-Contra scandal blocked his nomination.[403] Gates continued to brief Reagan regularly, however, often using movies and slides (though Nancy Reagan was annoyed because he "ate all the popcorn"). Fellow CIA officers almost succeeded in blocking his

---

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

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

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

[396] *See supra* note 38.

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

[398] *Id.* at 342.

[399] *Id.*

[400] *Id.* at 343.

[401] *Id.*

[402] *Id.*

[403] *Id.*

nomination when it was revived by President Bush, recalling again his role in the Iran-Contra affair.[404] Gates nonetheless got the job and escaped indictment, though Independent Counsel Lawrence E. Walsh reported that his statements during the investigation "often seemed scripted and less than candid."[405] He took office as President Bush's Secretary of Defense in 2006, overseeing the aftermath of the Iraq War, and continued in that position in the Obama Administration until July 2011.[406]

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

---

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

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

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

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

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

[409] *Id.* at 313.

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

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

---

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

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

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

[413] SANGER, *supra* note 23, at 27.

[414] NASR, *supra* note 2, at 22–23.

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

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

---

[415] *Id.* at 23–24.
[416] *Id.* at 24.
[417] WOODWARD, *supra* note 150, at 103.
[418] *Id.* at 278. "It was a vintage White House trick, one that offered the illusion of choice. But even though everyone recognized this for the stunt it was, the Kissinger model remained popular." *Id.* at 104.
[419] *Id.* at 280.
[420] BAGEHOT, *supra* note 40, at 176.
[421] *Id.*
[422] *See* Graham Allison, *How it Went Down*, TIME (May 7, 2012), *available at* http://content.time.com/time/magazine/article/0,9171,2113156,00.html ("The most experienced member of his national-security team, Defense Secretary Robert Gates, opposed the raid, restating his view that putting commandos on the ground risked their being captured or killed. Vice President Joe Biden also felt that the risks of acting rather than waiting outweighed the benefits. The military leader in the loop from the outset and the most intensely engaged officer in this decision-making process, Joint Chiefs of Staff [JCS] Vice Chairman James Cartwright, preferred an air strike to boots on the ground.").

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

D. A Case Study: NSA Surveillance

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

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

---

[423] *See, e.g.*, Senator Fulbright's contributions to the Cuban Missile Crisis debate at the White House, Oct. 21, 1962. Audio and transcript available via David Coleman, *The Fourteenth Day: J. William Fulbright: Vietnam Dove/Cuban Hawk*, http://jfk14thday.com/fulbright-cuban-missile-crisis/, [http://perma.law.harvard.edu/0CBfxjn2HrF/].

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

[425] Sorensen, *supra* note 224, at 7.

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

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

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

---

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

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

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

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

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

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

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

Even before 9/11, NSA Director Michael Hayden had proposed more expansive collection programs in a transition report to the incoming Bush Administration.[437] Following 9/11, Hayden quickly sought approval of a program to monitor the communications of Americans living within the United States.[438] The program "sucked up the contents of telephone calls and e-mails, as well as their 'metadata' logs."[439] The Bush Administration concluded that aspects of the proposed program probably were illegal[440] and therefore considered seeking a change in the law that would permit the expanded program.[441] It decided against such a request, however, because it

---

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

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

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

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

[436] 50 U.S.C. § 1803 (2006).

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

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

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

[440] SAVAGE, *supra* note 258, at 130.

[441] *Id.*

concluded that Congress would not approve.[442] Instead, President Bush authorized the NSA to proceed with the program on the basis of the President's supposed independent constitutional power as commander-in-chief, spelled out in a still-classified memorandum written by John Yoo, an attorney in OLC.[443] The program went into operation on October 4, 2001.[444] A change in OLC's leadership brought a different interpretation of the law, with the result that, in March 2004, Attorney General John Ashcroft declined to re-authorize those aspects of the program (reportedly concerning internet metadata) that OLC now considered illegal, with the result that President Bush rescinded his approval to the NSA to collect internet data.[445]

The illegal program remained non-operational for only four months, however; during that period, Justice Department lawyers joined with NSA officials and "immediately began efforts to recreate this authority," an authority to which they believed the FISC would be "amenable."[446] The Chief Judge of the FISC, Coleen Kollar-Kotelly, quickly obliged, issuing an *ex parte* order on July 14, 2004.[447] Kollar-Kotelly's order permitted bulk

---

[442] *Id.*

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

[444] Savage & Risen, *supra* note 439.

[445] *Id.*

[446] *NSA inspector general report on email and internet data collection under Stellar Wind – full document,* THE GUARDIAN, June 27, 2013, at 38–39, http://www.theguardian.com/world/interactive/2013/jun/27/nsa-inspector-general-report-document-data-collection, [http://www.perma.cc/05pqoY3TDqq].

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

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

The program came to public attention when the *New York Times* disclosed it on December 16, 2005.[453] The *Times*, by its own admission, had "held that story for more than a year at the urging of the Bush administration, which claimed it would hurt national security."[454] When it was finally published, Judge James Robertson resigned his seat on the FISC "in apparent protest of the program."[455]

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

---

[448] Savage & Risen, *supra* note 439.
[449] *See supra* note 446, at 39.
[450] Savage & Risen, *supra* note 439.
[451] *Id.*
[452] Greenwood & Ackerman, *supra* note 447.
[453] James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&gwh=295DB8429C337294BBCB852A95CF37B6, [http://www.perma.cc/0ceFidjgdX].
[454] Margaret Sullivan, *Sources With Secrets Find New Outlets for Sharing*, N.Y. TIMES, June 15, 2013, http://www.nytimes.com/2013/06/16/public-editor/sources-with-secrets-find-new-outlets-for-sharing.html?pagewanted=all, [http://perma.cc/0GHhR8zyqGb].
[455] SAVAGE, *supra* note 258, at 262. As a replacement, Chief Justice Roberts appointed the federal district judge who had earlier ruled in favor of Vice President Cheney in a dispute concerning access to records by the General Accounting Office. *Id.*
[456] *See supra* notes 36–37.
[457] *See supra* notes 34–35.
[458] *Id.* (The so-called "library records" provision, as it had earlier been called.)
[459] 50 U.S.C. § 1861 (2012).

the length of the call.[460] The order prohibited its recipient from discussing its existence.[461] The second program Obama continued, PRISM, allowed the NSA to obtain private information about users of Google, Facebook, Yahoo, and other internet companies.[462] The government claimed authority for this program under section 702 of the FISA Amendments Act of 2008.[463]

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

---

[460] *See supra* notes 34–35.
[461] Charlie Savage & Edward Wyatt, *U.S. Is Secretly Collecting Records of Verizon Calls*, N.Y. TIMES, June 5, 2013, http://www.nytimes.com/2013/06/06/us/us-secretly-collecting-logs-of-business-calls.html, [http://perma.cc/0wBnEhW5ugq].
[462] Timothy B. Lee, *Here's everything we've learned about how the NSA's secret programs work*, WASH. POST, June 25, 2013, http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/25/heres-everything-weve-learned-about-how-the-nsas-secret-programs-work/, [http://perma.cc/0a1GcCbc42G]; Glenn Greenwald & Ewen MacAskill, *NSA Prism program taps in to user data of Apple, Google and others*, THE GUARDIAN, June 6, 2013, http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data, [http://perma.cc/094q6gJSWvs].
[463] 50 U.S.C. § 1881a (2012).
[464] Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, THE GUARDIAN, June 5, 2013, http://www.guardian.co.uk/world/2013/jun/06/nsa-phone-records-verizon-court-order, [http://perma.cc/0rS1CTFkxLR].
[465] Scott Shane & Jonathan Weisman, *Earlier Denials Put Intelligence Chief in Awkward Position*, N.Y. TIMES, June 11, 2013, http://www.nytimes.com/2013/06/12/us/nsa-disclosures-put-awkward-light-on-official-statements.html, [http://perma.cc/0BkVDW6HEyu].
[466] Marc Ambinder, *U.S. responds to NSA disclosures*, THE WEEK, June 6, 2013, http://theweek.com/article/index/245243/us-responds-to-nsa-disclosures, [http://perma.cc/04cJmWxVNpN].
[467] *See id.*
[468] James Risen & Charlie Savage, *On Eve of Critical Vote, N.S.A. Director Lobbies House*, N.Y. TIMES, July 23, 2013, at A3, *available at* http://www.nytimes.com/2013/07/24/us/politics/nsa-director-lobbies-house-on-eve-of-critical-vote.html, [http://perma.law.harvard.edu/05UfQ2zexSE/] (quoting Senator Wyden).

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

Members of Congress were unaware of more than simply the Administration's interpretation of the law, however. They had no knowledge about how the Administration actually used the phone records that the NSA collected. The Chairman of the Senate Intelligence Committee, Dianne Feinstein, confirmed this.[471] But, she added, it was important to collect phone records of the American public in case someone might become a terrorist in the future[472] (a rationale the *New York Times* called "absurd"[473]). Feinstein's doziness was not without precedent; an earlier chairman of the Committee, Senator Barry Goldwater, claimed to know nothing about the CIA's mining of Nicaraguan harbors—even though Director of Central Intelligence William Casey had earlier told the committee.[474] By contrast, the NSA did not inform the Committee about warrantless surveillance during the Bush Administration, which the Committee, of course, never discovered on its own.[475] Senators not on the Intelligence Committee

---

[469] Savage & Wyatt, *supra* note 35.

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

[471] Editorial, *President Obama's Dragnet*, N.Y. TIMES, June 7, 2007, at A26, *available at* http://www.nytimes.com/2013/06/07/opinion/president-obamas-dragnet.html?partner=rssnyt&emc=rss&_r=0, [http://perma.law.harvard.edu/0S9WTbThGAo/]. Feinstein's indifference was not unusual. Asked by CBS's Norah O'Donnell whether the Obama Administration's surveillance went further than the George W. Bush Administration's, House Majority Leader Eric Cantor said that "these are questions we don't know the answers to." Dana Milbank, *Edward Snowden's NSA leaks are backlash of too much secrecy*, WASH. POST, June 11, 2013, http://articles.washingtonpost.com/2013-06-10/opinions/39869013_1_james-clapper-leaks-eric-cantor, [http://perma.law.harvard.edu/0SPh1ujqqbF/].

[472] Editorial, *supra* note 471.

[473] *Id.*

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

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

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

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

---

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

[477] *Id.*

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

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

[480] *Id.*

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

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

Clapper admitted later that his testimony was false; he described it as "the least untruthful" statement he could give[483]—and it may have constituted a felony.[484] Feinstein, who was presiding and who had earlier been briefed on the programs, knew that statement was false and said nothing.[485] President Obama and other senior members of his administration also knew that it was false—or, if the Madisonian model were functioning as intended, should have known it was false[486]—and also said nothing, allowing the falsehood to stand for months until leaks publicly revealed the testimony to be false.[487] Obama, finally caught by surprise, insisted that he "welcomed"[488] the debate that ensued, and his administration commenced active efforts to arrest the NSA employee whose disclosures had triggered it.[489] The President then proceeded to insist that the NSA was not "actually

---

[483] *Id.*

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

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

[486] The question arises whether President Obama was in fact aware of major elements of the NSA's surveillance programs. *See* Timothy B. Lee, *Did President Obama know about the NSA's privacy problems?* WASH. POST, Aug. 16, 2013, http://www.washingtonpost.com/blogs/the-switch/wp/2013/08/16/did-president-obama-know-about-the-nsas-privacy-problems/, [http://perma.law.harvard.edu/0jUMkjGfoBx/]. The President's National Security Adviser, Susan Rice, reportedly told her German counterpart that Obama knew nothing about the monitoring of Chancellor Angela Merkel's cell phone—which the NSA began during the Bush Administration. David E. Sanger, *In Spy Uproar, 'Everyone Does It' Just Won't Do*, N.Y. TIMES, Oct. 25, 2013, http://www.nytimes.com/2013/10/26/world/europe/in-spy-uproar-everyone-does-it-just-wont-do.html?hp&_r=0, [http://perma.law.harvard.edu/0vhkjcvUfg6/].

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

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

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

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

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

---

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

[491] *Id.*

[492] Scott Shane, *Court Upbraided N.S.A. on Its Use of Call-Log Data*, N.Y. TIMES, Sept. 10, 2013, at A14, *available at* http://www.nytimes.com/2013/09/11/us/court-upbraided-nsa-on-its-use-of-call-log-data.html?pagewanted=all, [http://perma.law.harvard.edu/0VuDT5YZtwB/]. The Justice Department's Office of Professional Responsibility never investigated the FISC judges' complaints, though one FISC judge had suggested that NSA officials could be held in contempt of court. Brad Heath, *Justice Dept. watchdog never probed judges' NSA concerns*, USA TODAY, Sept. 19, 2013, http://www.usatoday.com/story/news/nation/2013/09/19/nsa-surveillance-justice-opr-investigation/2805867/, [http://perma.law.harvard.edu/0T8nCbWwPXe/].

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

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

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

---

[494] Greg Miller, *Misinformation on classified NSA programs includes statements by senior U.S. officials,* WASH. POST, June 30, 2013, http://articles.washingtonpost.com/2013-06-30/world/40292346_1_programs-clapper-jr-remark, [http://perma.law.harvard.edu/0AJoRguAHH9/]. Its action came on the same day that NSA's General Counsel cautioned the public against believing all that was being said about NSA surveillance. "A lie can get halfway around the world before the truth gets its boots on," said Robert Litt, alluding to Mark Twain. "Unfortunately, there's been a lot of misinformation that's come out about these programs." *Id.*

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

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

[497] *See* Editorial, *Absent on Presidential Power,* WALL STREET JOURNAL, July 28, 2013, http://online.wsj.com/article/SB10001424127887323610704578630102919888438.html, [http://perma.law.harvard.edu/0rYbgNgaBr3/].

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

[499] *Id.*

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

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

E. Implications for the Future

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

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

---

[500] Ed O'Keefe, *Proposal to restrict NSA phone-tracking program defeated,* WASH. POST, July 25, 2013, http://articles.washingtonpost.com/2013-07-24/politics/40862333_1_obama-administration-proposal-americans, [http://perma.law.harvard.edu/0u9PDxh5Ukf/].
[501] BAGEHOT, *supra* note 40, at 251.
[502] *Id.*
[503] *Id.*

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

---

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

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

[506] BAGEHOT, *supra* note 40, at 100.

[507] *Id.* at 138.

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

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

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

It might be supposed at this point that the phenomenon of double government is nothing new. Anyone familiar with the management of the Vietnam War[512] or the un-killable ABM program[513] knows that double government has been around for a while. Other realms of law, policy, and business also have come to be dominated by specialists, made necessary and empowered by ever-increasing divisions of labor; is not national security duality merely a contemporary manifestation of the challenge long posed to democracy by the administrative state[514]-*cum*-technocracy?[515] Why is national security different?

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

---

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

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

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

[513] *See* Savage, *supra* note 25.

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

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

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

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

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

---

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

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

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

The influence of the media, whether to rouse or dampen, is thus limited. The handful of investigative journalists active in the United States today are the truest contemporary example of Churchill's tribute to the Royal Air Force.[520] In the end, though, access remains everything to the press. Explicit or implicit threats by the targets of its inquiries to curtail access often yield editorial acquiescence. Members of the public obviously are in no position to complain when a story *does not* appear. Further, even the best of investigative journalists confront a high wall of secrecy. Finding and communicating with (on deep background, of course) a knowledgeable, candid source within an opaque Trumanite network resistant to efforts to pinpoint decision-makers[521] can take years. Few publishers can afford the necessary financial investment; newspapers are, after all, businesses, and the bottom line of their financial statements ultimately governs investigatory expenditures. Often, a second corroborating source is required. Even after scaling the Trumanite wall of secrecy, reporters and their editors often become victims of the deal-making tactics they must adopt to live comfortably with the Trumanites. Finally, members of the mass media are subject to the same organizational pressures that shape the behavior of other groups. They eat together, travel together, and think together. A case in point was the Iraq War. The *Washington Post* ran twenty-seven editorials in favor of the war along with dozens of op-ed pieces, with

---

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

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

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

[521] *See supra* text at note 172.

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

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

---

[522] Eric Alterman, *Think Again: Why Didn't the Iraq War Kill "The Liberal Media"?*, CENTER FOR AMERICAN PROGRESS (Apr. 4, 2013), http://www.americanprogress.org/issues/media/news/2013/04/04/59288/why-didnt-the-iraq-war-kill-the-liberal-media/, [http://perma.law.harvard.edu/0pY4zq8VYFx].

[523] *Id.*

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

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

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

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

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

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

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

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

---

[530] For an argument along these lines, see POSNER & VERMEULE, *supra* note 67.
[531] *See id*.
[532] This was the solution of Crossman, writing in 1963. BAGEHOT, *supra* note 40, at 56.

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

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

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

---

[533] Joy Wilke & Frank Newport, *Fewer Americans Than Ever Trust Gov't to Handle Problems*, GALLUP POLITICS, Sept. 22, 2013, *available at* http://www.gallup.com/poll/164393/fewer-americans-ever-trust-gov-handle-problems.aspx, [http://perma.law.harvard.edu/0HPh1ECRDPL].

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

A smaller, less reliable pool of potential recruits would hardly be the worst of it, however. Lacking perceived legitimacy, the government could expect a lesser level of cooperation, if not outright obstruction, from the general public. Many national security programs presuppose public support for their efficient operation. This ranges from compliance with national security letters and library records disclosure under the PATRIOT Act to the design, manufacture, and sale of drones, and cooperation with counterintelligence activities and criminal investigations involving national security prosecutions. Moreover, distrust of government tends to become generalized; people who doubt governmental officials' assertions on national security threats are inclined to extend their skepticism. Governmental assurances concerning everything from vaccine and food safety to the fairness of stock-market regulation and IRS investigations (not without evidence[536]) become widely suspect. Inevitably, therefore, daily life would become more difficult. Government, after all, exists for a reason. It carries out many helpful and indeed essential functions in a highly specialized society. When those functions cannot be fulfilled, work-arounds

---

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

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

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

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

The government itself, meanwhile, could not be counted upon to remain passive in the face of growing public obduracy in response to its efforts to do what it thinks essential to safeguard national security. Here we do have historical precedents, and none is comfortably revisited. The Alien and Sedition Acts in the 1790s;[537] the Palmer Raids of 1919 and 1920;[538] the round-up of Japanese-American citizens in the 1940s;[539] governmental spying on and disruption of civil rights, draft protesters, and anti-war activists in the 1960s and 1970s;[540] and the incommunicado incarceration without charges, counsel, or trial of "unlawful combatants" only a few short years ago[541]—all are examples of what can happen when government sees limited options in confronting nerve-center security threats. No one can be certain, but the ultimate danger posed if the system were to fall to earth in the aftermath of a devastating terrorist attack could be intensely divisive and potentially destabilizing—not unlike what was envisioned by conservative Republicans in Congress who opposed Truman's national security programs when the managerial network was established.[542]

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

---

[537] *See* GEOFFREY R. STONE: PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2005).
[538] *See* CHRISTOPHER FINAN: FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA (2008).
[539] *See* MARTHA MINOW: BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1999).
[540] For a comprehensive account, see ANDREW RUDALEVIGE, THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE 57–100 (2006).
[541] *See* LOUIS FISHER, THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA'S FREEDOMS 188–210 (2008); DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR 107–28 (2007).
[542] *See supra* text at notes 109–16.

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

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

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

A. Strengthening Systemic Checks

The first set of potential remedies aspires to tone up Madisonian muscles one by one with ad hoc legislative and judicial reforms, by, say, narrowing the scope of the state secrets privilege; permitting the recipients of national security letters at least to make their receipt public; broadening standing requirements; improving congressional oversight of covert operations, including drone killings and cyber operations; or strengthening statutory constraints like FISA[545] and the War Powers Resolution.[546] Law reviews brim with such proposals. But their stopgap approach has been tried

---

[543] *See supra* text at note 1.

[544] THE FEDERALIST No. 51 (James Madison).

[545] *See, e.g.*, James G. Carr, *A Better Secret Court*, N.Y. TIMES, July 22, 2013, http://www.nytimes.com/2013/07/23/opinion/a-better-secret-court.html?gwh=CBAFAFA2402FF2971D6B6B8812015EF6, [http://perma.law.harvard.edu/0XR6SHkae8Z]; Editorial board, *Reforming the FISA court*, WASH. POST, July 23, 2013, http://articles.washingtonpost.com/2013-07-23/opinions/40859606_1_fisc-fisa-court-appointed-judges, [http://perma.law.harvard.edu/0VDEFpeV4hR]; Editorial board, *More Independence for the FISA Court*, N.Y. TIMES, July 27, 2013, http://www.nytimes.com/2013/07/29/opinion/more-independence-for-the-fisa-court.html?gwh=3FBECEFF516E9AD223A555467197B941, [http://perma.law.harvard.edu/0Zga1CvYLPr].

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

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

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

---

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

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

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

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

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

---

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

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

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

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

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

---

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

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

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

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

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

A third internal "check," the Foreign Intelligence Surveillance Court, subsists formally outside the executive branch but for all practical purposes might as well be within it; as noted earlier, it approved 99.9% of all warrant requests between 1979 and 2011.[561] In 2013, it approved the NSA collection of the telephone records of tens of millions of Americans, none of whom had been accused of any crime.[562] An authentic *check* is one thing; smoke and mirrors are something else.

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

---

[557] *See Members of Panel in Study on C.I.A.*, June 11, 1975, at 21, *available at* ProQuest Historical Newspapers.
[558] WILLIAM COLBY, HONORABLE MEN: MY LIFE IN THE CIA 400 (1978).
[559] *Id.*
[560] SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, INTERIM REPORT: ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 94-465, at 2 (1975) ("Although the Rockefeller Commission initiated an inquiry into reported assassination plots, the Commission declared it was unable, for a variety of reasons, to complete its inquiry.").
[561] *See supra* note 343 and accompanying text.
[562] *See* Part IV.D.