Spreading Democracy or Undermining It?

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The administration of President George W. Bush has proclaimed the spreading of democracy to be the purpose of its foreign policy. To this end it has emphasised the importance of elections in Iraq and other countries. It has also encouraged democratic revolutions to overthrow undemocratic regimes ("regime change").

At the same time, however, the effort to spread democracy has been compromised by some of the actions undertaken in its name. The atrocities at Abu Ghraib prison near Baghdad have undercut the image of the United States as a liberator, and President Bush himself has described them as "the biggest mistake" of the Iraq War. In much of the world, questions are being raised as to whether the campaign to spread democracy is, in fact, a campaign to spread and consolidate American power.

Democracy means different things to different people. Americans seceded from Britain because of differences regarding popular control over taxation. They then had a civil war over the question of whether the people or the states constituted the United States. It took decades before the statement that "all men are created equal" led to the elimination of slavery, and decades more before women were given the franchise.

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Democracy, ultimately, is founded on the legitimacy of difference. In contrast to the slogan "one king, one faith, one law", the United States proclaimed "e pluribus unum": out of many, one. The Soviet leadership's recognition of the superiority of diversity over an imposed uniformity was one of the indications that the Cold War was ending. "We believe that the diversity of the world, the fact that we are different, does not make this world worse," Mikhail Gorbachev said in 1988. "On the contrary, we have the chance to compare, to exchange and to borrow from one another anything we'd like."[1] The concept of the "loyal opposition" signifies the legitimacy, even necessity, of disagreement, which is what distinguishes democracy from the totalitarianism of Stalin or Osama bin Laden.

The importance of the democratic model in ending the Cold War has not been appreciated. It is widely taken for granted that the Soviet Union was constrained by containment and beaten into the ground by a US military build-up. The current effort to use military power to spread democracy is based on the purported success of this model.

But what if that model is wrong? "The U.S. did not win a Cold War against the USSR," Pyotr Romanov, a commentator for the RIA Novosti news agency, has observed. "The USSR lost it to the U.S." The difference, he explained, is that the Soviet Union died of self-inflicted wounds. "Decay and ineffi-

1. Mikhail Gorbachev, *A Powerful Factor in World Politics* (Moscow: Novosti, 1988), pp. 8–9.

ciency were genetically programmed into the Communist system. For this reason, its disintegration started at birth."[2] In other words, US policies may have been less significant than Americans appreciate. More importantly, by practising a policy of "the enemy of my enemy is my friend", the United States helped create new problems—notably in Afghanistan—that unexpectedly emerged to threaten it.

Thus, when we talk about spreading democracy, we need to clarify, first, what we mean by democracy, and second, how its influence should be expanded. That is especially the case when we base the spreading of democracy on the argument that democracies are more peaceful than non-democracies, and that therefore the spread of democracy will enhance our security. America's Founders were obsessed with the problem of war, and they attempted to strike a balance by creating a government capable of resisting foreign aggression without itself becoming a threat to the security of the people. Three issues in their analyses stand out: the question of initiating war; the question of civil liberties; and the question of secrecy.

War

The subject of the war powers has been a matter of contention for many years. President Bush, like many of his recent predecessors, has expressed the view that presidents make the decision for war. Indeed, Congress itself reinforced that view in 2002 when it authorised the president to initiate war with Iraq if and when he saw fit—in effect transferring its constitutional responsibility to the president.

Yet, if the documents of the founding of the United States are clear on anything, they are clear on the point that the founders intended Congress, not the president, to make the decision for initiating war. When a proposal for allowing the president to make the decision was put to the Constitutional Convention on 17 August 1787, it was immediately rejected. Indeed, one of the participants, Elbridge Gerry, replied that he "never expected to hear in a republic a motion to empower the Executive alone to declare war", according to Madison's notes. In changing Congress's constitutional power from "make" to "declare" war, the convention was, Madison wrote, leaving to the executive only "the power to repel sudden attacks";[3] the power to begin or authorise a war remained with Congress.

That last point deserves emphasis. It has been widely claimed that, since countries do not normally declare war anymore, the congressional power has atrophied. Such an interpretation misconstrues the Founders' intent. In the first place, the Constitution not only gives Congress the power to declare war, but also to "grant Letters of Marque and Reprisal" (article 1, section 8). In other words, Congress has the power to authorise the initiation of any use of military force, no matter how limited. As the Supreme Court ruled in the case of *Talbot v. Seeman* (1801),

> *The whole powers of war being, by the constitution of the United States, vested in congress*, the acts of that body can alone be resorted to as our guides in this inquiry. It is

2. Pyotr Romanov, "New Medal for American Uniform", RIA Novosti, 19 May 2006 [http://en.rian.ru/analysis/20060519/48366913.html].

3. See Max Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1966), vol. 2, p. 318.

> not denied, nor in the course of the argument has it been denied, that *congress may authorize general hostilities*, in which case the general laws of war apply to our situation; *or partial hostilities*, in which case the laws of war, so far as they actually apply to our situation, must be noticed. (Italics added)

The Supreme Court's decision applied to the undeclared naval quasi-war with France at the end of the eighteenth century; the issue in question concerned the disposal of a vessel seized in 1799. Thus, the idea that we need not abide by the Constitution's strictures because the world has fundamentally changed glibly overlooks the similarities today with the situation that existed at the time the Constitution was adopted. Limited undeclared wars existed then, and the Supreme Court made it clear that Congress possessed the "whole powers" in authorising them.

It is likewise erroneous to claim that the Constitution, by proclaiming the president the commander-in-chief of the armed forces, confers vast "inherent" powers upon him. The idea that the president possesses "prerogative" powers similar to those of kings was repudiated at the Constitutional Convention, where James Wilson (according to Madison's notes of 1 June 1787) said "he did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers" since "some of these prerogatives were of a Legislative nature".[4] In *Federalist* No. 69, Alexander Hamilton elaborated on the differences between the president's powers as commander-in-chief and those of George III:

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature. (Italics in original)

In short, the designation of the president as commander-in-chief was not intended to provide any authority to initiate war, but to formalise civilian control over the armed forces. As President Bush noted in a speech to the Philadelphia World Affairs Council on 12 December 2005, before the Constitution was adopted "there was a planned military coup that was defused only by the personal intervention of General Washington". The Constitution was designed to deal with this situation by providing the president with legal authority to substitute for Washington's unmatchable personal authority. Whatever problems the republic has confronted since 1789, it has never again faced the serious prospect of a military coup.

The division of the war powers between the executive and the legislature was viewed by the Founders as one of the central contributions of the Constitution to democracy. "In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department," Madison wrote in *Helvidius* No. 4. "Hence it has grown into an axiom that the executive is the department of power most distinguished

4. Ibid., vol. 1, p. 65.

by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence."

This American model proved its worth in ending the Cold War. According to a 1988 article in the Soviet daily *Izvestia*,

> Most acts of aggression have been committed by expansionist countries under the pretext of acquiring "lebensraum" . . . It is difficult now to imagine a government in any highly developed country *with an effectively operating parliamentary system of control over executive power* being politically capable of such actions.[5] (Italics added)

Legislative control over the war powers was formalised in the Soviet Union at the end of the Cold War. "I would like to reiterate my commitment to the principle endorsed by the Congress of People's Deputies, whereby the use of armed forces outside the country without sanction from the Supreme Soviet or the congress is ruled out categorically, once and for all," Mikhail Gorbachev declared in his inaugural address as Soviet president in March 1990. "The only exception will be in the case of a surprise armed attack from outside."[6]

That Soviet transformation was, in effect, a tremendous compliment to the United States, and its rejection would undermine one of our great achievements during the Cold War. World peace—and American security—will not be enhanced if people around the world come to believe that it is acceptable in a democracy for the executive, rather than the legislature, to make the decision for initiating war.

Civil Liberties

The question of civil liberties in wartime is one of the most difficult for a democracy to confront. The Constitution provides that the writ of habeas corpus cannot be suspended except "in Cases of Rebellion or Invasion" (article 1, section 9). Because this provision appears in the section of the Constitution dealing with the powers of Congress, President Abraham Lincoln has been criticised for suspending habeas corpus during the Civil War.

This tension has re-emerged today, with proponents of presidential power claiming that the executive can detain anyone indefinitely, without right to counsel, by identifying that person as an "enemy combatant". The arguments put forward by the US Department of Justice, notably in the case of Jose Padilla, are extraordinary in their definition of executive power.

Padilla was arrested amid great fanfare in 2002. The attorney-general himself held a press conference hailing the apprehension of an al-Qaeda terrorist intent on detonating a radioactive "dirty" bomb on US soil. Within a short time, however, questions were raised about the accuracy of the government's information. For example, CBS News reported in August 2002 that "the FBI's investigation has produced no evidence that Padilla had begun preparations for an attack and little reason to believe he had any support from al Qaeda to direct such a plot".[7]

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5. S. Blagovolin, "The Strength and Impotence of Military Might: Is an Armed Conflict between East and West a Real Possibility in Our Time?", *Izvestia* (Moscow), 18 November 1988, quoted in Stanley Kober, "The End of the Soviet Threat?", in *NATO at 40*, ed. Ted Galen Carpenter (Washington, D.C.: Cato, 1990), p. 194.

6. "Upheaval in the East; Excerpts from Gorbachev Speech on Presidency", *New York Times*, 16 March 1990.

7. " 'Dirty Bomb' Suspect a Nobody?", CBS News, 14 August 2002 [http://www.cbsnews.com/stories/2002/08/27 /attack/main519996.shtml].

Instead of bringing Padilla to trial, President Bush designated him an enemy combatant and ordered him transferred from civilian to military custody—in effect denying an American citizen arrested on US territory the right of habeas corpus. When Padilla's lawyer objected, the government replied that the courts could not challenge the president's designation of a US citizen as an enemy combatant. As the Department of Justice explained in responding to Padilla's request for a writ of habeas corpus, "the President's determination as Commander in Chief that an individual is an enemy combatant should, at a bare minimum, be accorded effect by the courts as long as some evidence supports that determination."[8]

In other words, all the government has to do is produce "some evidence" in support of its claim that an American citizen is an enemy combatant, and the hands of the courts are tied. Should a court approve judicial review of a designation of someone as an enemy combatant, then the role of the court, the government argued, "is limited to confirming that there is some basis for the executive judgment and does not entail undertaking a *de novo* review for itself".[9] Nor can the defendant mount a challenge: since all the government has to do is produce "some evidence" in support of its position, the production of countervailing exculpatory evidence is irrelevant. Indeed, the government argued that the writ of habeas corpus did not apply, since Padilla, once he was transferred to military custody, was being held as a prisoner of war and not for allegedly violating any civilian criminal law. He could not even consult a lawyer because that could interfere with the government's efforts at interrogation.

This situation is, quite simply, Kafkaesque. The administration's argument amounts to saying that the president can order the armed forces to seize any American citizen, anywhere, and keep that person in a military detention facility indefinitely, simply by designating that person an enemy combatant and providing "some evidence" that in effect cannot be challenged or reviewed (since the courts are supposed to show the president "deference" in these matters). The sole apparent limitation is that this power applies only when the United States is at war. But since the "war on terror" is supposed to last for decades, that is not much of a limitation.

Underlying this breathtaking assertion of executive authority is the assumption that the president can be trusted to act in good faith and with good judgement, but that level of trust is alien to the founding principle of the American government. "If men were angels, no government would be necessary," Madison wrote in *Federalist* No. 51. Since men and women aren't angels, we cannot assume that those who govern us will be worthy of our trust. To prevent abuses of trust, government must be established so that the branches act as a check and balance against one another. "Ambition must be made to counteract ambition," Madison stressed.

Those who would defend executive authority frequently invoke Hamilton, notably his defence of a unitary executive in *Federalist* No. 70, where he writes that "energy in the Executive . . . is essential to the protection of the community against foreign attacks".

8. *Padilla v. George Bush* et al., 02 Civ. 4445 (MBM) [http://news.findlaw.com/hdocs/docs/padilla/padillabush82702grsp.pdf].

9. Ibid.

But those who would use these words to justify an expansive interpretation of the president's powers as Commander in Chief need to review Hamilton's thoughts on the subject in *Federalist* No. 69. Similarly, they might want to examine his praise of Blackstone's encomium to habeas corpus in *Federalist* No. 84.

On this question, as with the war power, those who would argue for an expansive view of executive power do not appreciate the importance the American model of civil liberties had in ending the Cold War. "We must prevent excessive power from being concentrated in the hands of a small group of people," Gorbachev warned in 1988. "We have started dividing responsibility up strictly and consistently between the Party and legislative, executive and judicial authorities."[10] Even more striking is *Izvestia*'s assessment of President Ronald Reagan when he left office:

> One of the most profound ideological and practical divergences between us and the Western-type democracies, divergences that Reagan "personally" emphasized, was our different view of the relations between the state and the individual. They assigned first place to the individual, while we assigned it to the state . . . In recent years . . . we have been gaining an understanding of the sovereignty of the human individual and have thereby found a common language with the West on a question that we used to regard as an infringement on our internal affairs—human rights.[11]

Unfortunately, those days are gone: there is no longer a meaningful dialogue between the United States and Russia on human rights. Indeed, how can the US government condemn human rights violations such as arbitrary arrests when it claims that the president can order the indefinite detention of any American citizen without effective review by the courts? Here again, it is difficult to see how the position now taken by the US government can set a good example of democracy for other countries.

Secrecy

The question of government secrecy is perhaps the most difficult confronting a democracy. When the framers completed the draft of the Constitution, Benjamin Franklin was reportedly asked whether they had created a republic or a monarchy. "A republic," he replied, "if you can keep it."

The word "republic" comes from the Latin *res publica*, which is frequently translated as "public good" (commonwealth), and which is embodied in the concluding words of Abraham Lincoln's famed Gettysburg Address, that government is "of the people, by the people, for the people". Because of the expanse of the United States, direct democracy was impossible. Hence, the Founders created a representative democracy, a "republic", in which the people elected legislators to act on their behalf.

But although the republic had been created, there was no guarantee it would endure. Indeed, the Roman precedent was not reassuring, since Rome ultimately became an empire. Franklin was emphasising that the preservation of the republican form of gov-

10. Mikhail Gorbachev, interview in *Der Spiegel* (Hamburg), 24 October 1988, quoted in Kober, "End of the Soviet Threat?", p. 187.

11. Stanislav Kondrashov, "On Ronald Reagan and Other Matters", *Izvestia* (Moscow), 19 January 1989, quoted in Kober, "End of the Soviet Threat?", p. 192.

ernment rests with the people: if they are not careful, it will slip from their grasp. If they are to keep it, they must hold officials accountable. The preservation of the republic is *their* responsibility.

To hold officials accountable, however, they must know what those officials are doing. Yet, in a dangerous world, some things must be kept secret. The Founders acknowledged this reality. "So often and so essentially have we heretofore suffered from the want of secrecy and despatch, that the Constitution would have been inexcusably defective, if no attention had been paid to those objects," John Jay wrote in *Federalist* No. 64.

The problem, therefore, is to provide for enough secrecy to allow such things as the gathering of intelligence and the negotiation of treaties, but not for so much that would allow government officials, especially in the executive branch, to escape accountability. Nowhere in a government constructed of interlocking checks and balances is the arrangement more challenging.

In Nazi Germany, people were not allowed to know what was being done in their name. The Holocaust took place in secret. "We will never speak about it in public," Heinrich Himmler told a group of SS officers in Poland in 1943. "The extermination of the Jewish people . . . is a page of glory never mentioned and never to be mentioned."[12]

The German people knew something bad was happening to the Jews—how could they not?—but they were never consulted on the question of extermination. For decades, German society has lived with the moral burden of this legacy. The First Amendment of the US Constitution, which guarantees freedom of the press, means Americans are not entitled to claim ignorance of what their government is doing in their name. They may not be guilty themselves, but so long as they live in a free society, they not only have the right but the obligation—this must be stressed, *the obligation*—to hold their government accountable, precisely because they have elected that government and are therefore responsible for its conduct.

The issue of open versus secret government was, in fact, one of the ideological faultlines on which the Cold War was fought. A Soviet political analyst argued that public access would be injurious to the political decision-making process, damaging the objectivity of policymakers:

> Pressure from public opinion could make their approach to the problems more difficult when decisions are made in public . . . a decision can be prepared more objectively and more scientifically if it is protected from the general public, which could influence it in one direction or another. It is more convenient for us like that.[13]

Undoubtedly, but the purpose of government is not supposed to be the convenience of those in charge, but the promotion of the good of the commonwealth—or *res publica*. That is why Gorbachev began his reforms by initiating a programme of *glasnost*, or openness. "We have

12. "The Complete Text of the Poznan Speech", Holocaust History Project [http://www.holocaust-history.org/himmler-poznan/speech-text.shtml].

13. Aleksandr Bovin, in *Dagens Nyheter* (Stockholm), 27 February 1983, quoted in Stanley Kober, "Why There Is a War of Ideas", in *Power, Principles & Interests: A Reader in World Politics*, ed. Jeffrey Salmon, James P. O'Leary, and Richard Shultz (Lexington, Mass.: Ginn, 1985), p. 248.

begun drafting bills that should guarantee glasnost," he wrote in 1987. "These bills are designed to ensure the greatest possible openness in the work of government."[14]

"Publicity is justly commended as a remedy for social and industrial diseases," Louis Brandeis, a future justice of the US Supreme Court, wrote in 1913. "Sunlight is said to be the best of disinfectants."[15] The question of how much sunlight the press can shine on the war on terror is now confronting Americans. Perhaps the most urgent issue concerns interrogation techniques. Reports of torture cannot be swept under the rug but must be discussed to ensure that the means used to protect us conform to our principles. "[I]n an open society, we value the rule of law and will not train soldiers to violate human rights," writes Victor Hansen, an associate professor at New England School of Law who served for twenty years as a lawyer in the Judge Advocate General's Corps, the legal branch of the US military. "An addendum to the [US Army's] Field Manual [on interrogation] that details secret techniques and sets out secret rules for their employment undermines this entire effort. A secret list such as this contradicts our efforts to demonstrate that we are an open society governed by the rule of law and that the U.S. military respects human rights."[16]

Although President Bush has signed legislation prohibiting the use of torture (or more specifically, of interrogation techniques regarded by the legislation as, in effect, torture), the "signing statement" he issued at that time states that enforcement must be "consistent with the constitutional limitations on the judicial power", which raises questions about how violations of the law could be prevented or prosecuted.[17] In these circumstances, if the president decides to interpret expansively the law he has signed, it is doubtful he would publicise the action. Rather, he would seek to restrict knowledge of the interrogation techniques because of the political firestorm their use would engender.

The issues here are central to the war of ideas that is at the root of the war on terror, just as a war of ideas was at the root of the Cold War. It is noteworthy that one of the most eloquent expressions of outrage at the administration's policy has come from Vladimir Bukovsky, a Soviet dissident who was tortured. "No country needs to invent how to 'legalize' torture; the problem is rather how to stop it from happening," he wrote when the legislation was being discussed. "If it isn't stopped, torture will destroy your nation's important strategy to develop democracy in the Middle East."[18] Or as Anne Applebaum, whose history of the Soviet gulag won the Pulitzer Prize, put it, those we are trying to influence with our values will "probably hear lectures about due process, and other rights available to people in civilized societies. But as things are going now—why on earth should they listen?"[19]

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14. Mikhail Gorbachev, *Perestroika: New Thinking for Our Country and the World* (New York: Harper and Row, 1987), p. 76.

15. Louis D. Brandeis, "What Publicity Can Do", *Harper's Weekly*, 20 December 1913.

16. Victor Hansen, "No Secret Rules on Torture", *Washington Post*, 15 December 2005.

17. White House, "President's Statement on Signing of H.R. 2863, the 'Department of Defence, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006' ", Washington, D.C., 30 December 2005 [http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html].

18. Vladimir Bukovsky, "Torture's Long Shadow", *Washington Post*, 18 December 2005.

19. Anne Applebaum, "Hollow Rhetoric on 'Rule of Law' ", *Washington Post*, 21 December 2005.

As noted, the issue here goes to the heart of democratic society. Some secrecy is necessary, but it should not interfere with the accountability of government officials, and it should not violate the values of a free society. The American people, in particular, must be mindful of their responsibility, both for themselves and for others who yearn for democracy and look to the United States as an example and an inspiration. "If the public, the mainspring of the whole checking machinery, are too ignorant, too passive, or too careless and inattentive, to do their part, little benefit will be derived from the best administrative apparatus," John Stuart Mill wrote in *Considerations on Representative Government*. "Publicity, for instance, is no impediment to evil nor stimulus to good if the public will not look at what is done; but without publicity, how could they either check or encourage what they were not permitted to see?"[20]

Mill's question is a challenge the citizens of a republic cannot evade. The United States was provided with a good "administrative apparatus", but if the people do not fulfil their responsibility, it can disappear—just as other representative democracies have done.

The Unitary Executive

As all these issues demonstrate, the Bush administration's effort to spread democracy is founded on a definition of democracy that allocates extraordinary powers to the executive. Advocates of a strong executive describe these powers as inherent and "unitary" because the Constitution places all executive power in the hands of the president, rather than distributing it. In addition, in wartime these powers are supposedly enhanced because the president is designated the commander-in-chief of the armed forces.

The question of the limits of executive power has been the source of much debate—and conflict—in the development of democracy. Magna Carta, for example, was prompted by nobles who had grown tired of King John's habit of expecting them to pay for wars he was starting. This "Great Charter" is regarded as the foundation of democracy in the Anglo-Saxon world, since it also formalised the principle of habeas corpus. Yet King John and his successors chafed under these restrictions. When Sir Edward Coke told King James I that he was not qualified to judge cases of law, the king replied that that meant he was himself under the law, a statement he condemned as treason.

England in the seventeenth century was a very bloody place, as the issue of executive authority was decided by war. In 1651 Thomas Hobbes, evidently horrified by the carnage and anarchy of his era, published a defence of unrestricted executive power. According to Hobbes, human beings need "a common power to keep them in awe and to direct their actions to the common benefit", and "the only way to erect such a common power, as may be able to defend them from the invasion of foreigners, and the injuries of one another . . . is to confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will." Hobbes rejected any limitation on such authority as counterproductive, even delusional, and although he allowed for an assembly, his preference was clearly for the power to be concentrated in "one person, of whose acts a great multitude, by mutual

20. John Stuart Mill, "The Criterion of a Good Form of Government", chap. 2 of *Considerations on Representative Government* (1861).

covenants one with another, have made themselves every one the author, to the end he may use the strength and means of them all as he shall think expedient for their peace and common defence".[21]

Hobbes's defence of unitary executive power was an improvement over King James's, since it was based on popular choice (even if the covenant is somewhat fictional) rather than divine right. Nevertheless, the English people rejected it. In 1688, the Glorious Revolution established once and for all the supremacy of parliament over the monarchy. And although the idea of co-equal branches of government is frequently used to describe the American system, that is a misinterpretation. "It is not possible to give to each department an equal power of self-defence," Madison wrote in *Federalist* No. 51. "In republican government, the legislative authority necessarily predominates."

The principal reason for a unitary executive, the Founders made clear, is to assure accountability. "One of the weightiest objections to a plurality in the Executive," Hamilton emphasised in the frequently cited *Federalist* No. 70, "is, that it tends to conceal faults and destroy responsibility." In other words, by having one person to hold responsible when anything goes wrong in the executive branch, the Founders hoped to encourage good governance. This principle is underlined by the constitutional command that the president "shall take Care that the Laws be faithfully executed" (article II, section 3).

The importance of that provision can hardly be exaggerated. Because the United States has a unitary executive, the president must not just obey the law, for that is required of every citizen. Rather, he must supervise the executive branch to be sure the laws are being *faithfully* executed. If he fails to perform this function adequately, he can be removed from office. "I think it absolutely necessary that the President should have the power of removing [subordinates] from office," Madison told the first Congress of the United States. "It will make him, in a peculiar manner, responsible for their conduct, and subject him to impeachment himself, if he suffers them to perpetrate with impunity high crimes or misdemeanors against the United States, or neglects to superintend their conduct, so as to check their excesses."[22]

Moreover, in contrast to the claims implicit in an all-powerful unitary executive, the Supreme Court made it clear that orders from the president to the armed forces are not to be obeyed if they exceed the authority granted by Congress. Delivering the opinion of the court in an 1804 decision, Chief Justice John Marshall concluded that orders from the president are not to be obeyed if they are illegal. As he explained, "the instructions cannot . . . legalize an act which without those instructions would have been a plain trespass."[23]

The American democratic system is based on a distrust of power, especially executive power. Nowhere is this more true than where

21. Thomas Hobbes, "Of the Causes, Generation, and Definition of a Commonwealth", chap. 17 of *Leviathan* (1651).

22. James Madison, quoted in "Debate in the First Congress, 1789, on the Establishment of Executive Departments and the Power of Removal from Office", in US House of Representatives, Committee on the Judiciary, 93d Cong., 1st sess., House Document 93–7 (Washington, D.C.: Government Printing Office, 1973), p. 11.

23. *Little v. Barreme*, 2 Cranch (6 US) 170 (1804) [http://www.radford.edu/~mfranck/images/490%20seminar/Little%20v%20Barreme.pdf].

the issue of war is concerned. As Abraham Lincoln explained in a letter to his law partner,

> Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you allow him to . . . make war at pleasure . . . If to-day he should choose to say he thinks it necessary to invade Canada to prevent the British from invading us, how could you stop him? You may say to him, "I see no probability of the British invading us"; but he will say to you, "Be silent: I see it, if you don't."
>
> The provision of the Constitution giving the war making power to Congress was dictated, as I understand it, by the following reasons: kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us. But your view destroys the whole matter, and places our President where kings have always stood.[24]

The United States was built on a special philosophy of democracy, and the expansive claims of executive power now being asserted are simply incompatible with it. If the United States is going to spread democracy, it should set a good example; and to set that example it must be mindful of its special history, which is filled with warnings of the dangers inherent in unchecked power. Otherwise, the example we set will not be democratic, and we would be foolish to believe it will not come back to haunt us. ❑

24. Abraham Lincoln, letter to William H. Herndon, 15 February 1848 [http://www.classic-literature.co.uk/american-authors/19th-century/abraham-lincoln/the-writings-of-abraham-lincoln-02/ebook-page-18.asp].