

# FALSE IDOL

Barack Obama and the Continuing  
Cult of the Presidency



GENE HEALY

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# INTRODUCTION

## **“The Worst Kind of Notion of the Presidency”**

Few presidents since Franklin Roosevelt have been as revered as Barack Obama—or as reviled. Since his unlikely rise to power, this “skinny kid with a funny name,” as the then state senator described himself in his keynote address at the 2004 Democratic Convention, has become the vessel into which Americans have poured their fondest hopes and their starkest fears.

“I am like a Rorschach test,” Obama has said more than once. It’s a better metaphor than he knows. Like a mirror into our own flaws, Americans’ varied and visceral reactions to our 44th president reveal our pathological relationship with the modern presidency itself.

Who is Barack Obama? Socialist or corporatist? Radical or establishment apologist? Devil, or savior, or . . . hapless schmuck? In our increasingly unhinged national conversation about the Obama presidency, he’s been all these things and more.

From talk radio, to the Newt Gingrich campaign, to Dinesh D’Souza’s sleeper hit documentary *2016: Obama’s America*, there’s long been a strange disconnect in the Right’s view of our 44th president.

Obama’s friendly façade hides a sinister figure indeed, they say: an Alinskyite cryptosocialist and/or “Kenyan anti-colonialist.” For decades before his rise to power, apparently, Obama has plotted to transform America into a country our forefathers wouldn’t recognize.

At the same time, conservatives charge, the man is totally incompetent—a pathetic amateur. He’s the living embodiment of the Peter Principle, a beta-male milquetoast out of his depth and out of his league in the corridors of power.

Meanwhile, liberals who once swooned to every hosanna of hope during Obama's ascendancy have lately begun to lash out like disillusioned acolytes snookered by a phony prophet.

In February 2008, covering the then senator Obama's victories in the early presidential primaries, MSNBC's Chris Matthews got so carried away by Obama's eloquence that he had to be cooled down by cohost Keith Olbermann, of all people. "I have to tell you, you know, it's part of reporting this case, this election," Matthews gushed, "the feeling most people get when they hear Barack Obama's speech. My—I felt this thrill going up my leg. I mean, I don't have that too often." "Steady," Olbermann cautioned.

Today, it seems the thrill is gone for the *Hardball* host, who, in a remarkable rant last fall, charged that Obama has "the worst kind of a notion of the presidency":

Stop showing us how smart you are and lead us. Ask us to do something. Pull us behind you. Enlist us in the service of our country. Ask us to do something. There is no Peace Corps. There is no Special Forces. There is no 50 mile hikes. There's no moon program. There's nothing to root for!

"The day he was inaugurated," Matthews railed, "with the Mall filled with people, African-Americans and everyone else," Obama just "sent us all home!" "Why are we in this fight with him? Just tell us, commander, give us our orders and tell us where we're going, give us the mission!"

Similarly frustrated by the president's inability to deliver, liberal *Washington Post* columnist Dana Milbank offered "A Machiavellian Model for Obama" in Jack Kennedy. Obama could take a lesson in "kneecapping" from the Kennedy brothers, Milbank insisted in a November 2011 column. JFK and RFK issued "mob-style threats" to political opponents, Milbank noted approvingly, and set the Federal Bureau of Investigation and the Internal Revenue Service loose with wiretaps and audits for steel company executives who'd dared to raise prices.

Despite the obligatory caveat, "President Obama doesn't need to sic the FBI on his opponents," Milbank observed that "the price increase was rolled back" only after

“subpoenas flew [and] FBI agents marched into steel executives’ offices.” “Sometimes, that’s how it must be. Can Obama understand that?”

When supposedly independent journalists address the president as “commander,” beg him for marching orders, and wax nostalgic about pre-Watergate abuses of power—when the putative “opposition” simultaneously denounces the president as the head of a vast conspiracy—and demands that he *do a better job*—perhaps it’s not Obama who has “the worst notion of the presidency.” Perhaps it’s us.

### **Presidential Messianism: America’s Political Religion**

What do we talk about when we talk about the presidency? Too often we sound as if we’re describing an office that bears the weight of all our hopes, dreams, and fears. On the op-ed pages and in the opinion polls, the federal chief executive is a soul nourisher, a hope giver, a living American talisman against hurricanes, terrorism, stock market turmoil, and spiritual malaise.

But with great responsibility comes great power. When we demand that the president provide seamless protection from natural disasters, economic dislocation, and terrorist strikes, we shouldn’t be surprised to find him seeking powers to match those daunting responsibilities. And with great expectations come crashing disappointments. No earthly power could possibly suffice to deliver the miracles we crave. And if the president shirks his responsibility or violates the trust invested in him, we take that betrayal very personally indeed.

If the Obama presidency has driven Americans mad, perhaps that’s because we’ve embraced a demented notion of the presidency itself.

It’s childish to blame this state of affairs on the powerlust of individual presidents or the fecklessness of particular Congresses. Presidents reliably lust for power; Congress is dependably feckless. But the Pogo Principle is the soundest explanation for what the presidency has become: We the People have met the enemy, and it is us. We built this.

In the waning days of the Bush administration, I published a book called *The Cult of the Presidency*. In it I made the case that for too long, Americans have looked to the presidency for far too much. Our Founding Fathers understood human nature too well, I argued, to ever trust one man with the responsibility and the power to heal anything and everything that ails the American body politic.

Our Constitution's Framers envisioned a constitutional "chief magistrate," as the *Federalist* describes him, an officer who'd secure the rule of law, not overturn it. But over the course of the 20th century, the modern president had become "our guardian angel, our shield against harm . . . He's America's shrink and social worker and our national talk-show host. He's a guide for the perplexed, a friend to the downtrodden—and he's also the Supreme Warlord of the Earth."

Though American politics had grown increasingly polarized, "both Left and Right agree on the boundless nature of presidential responsibility," I wrote in 2008, and "few Americans find anything amiss in the notion that it is the president's duty to solve all large national problems and to unite us all in the service of a higher calling. The vision of the president as national guardian and redeemer is so ubiquitous that it goes unnoticed."

Four years on, I might have to amend that last observation: the Obama presidency, with its outsized promises and grandiose, world-historical aspirations, has brought the messianic vision of the presidency front and center. Lately it's been kind of hard to miss.

After all, no president in recent memory has been greeted with such a cult-like aura of adulation. Nor has any recent president done quite as much as Barack Obama to stir Americans' longing for presidential salvation.

Obama seems oblivious to the fact that those irrational public expectations are a large part of his political problem. But they're a bigger problem for the rest of us. Our fixation on the fable of a presidential savior leads us to do less for ourselves and cede



ever more authority to the federal government, making the president more powerful than he was ever intended to be—more powerful than any one man should *ever* be.

### **“Peak Hope”?**

And yet despite his vast powers, the “Yes, We Can” president finds himself powerless to fulfill the audacious hopes he’s stoked. As the 2012 election looms, the “Cult of Obama” has far fewer adherents than it had in 2008. The bloom is off the rose.

Shepard Fairey, the fortysomething skate punk street artist who refashioned an AP photo into the iconic, blue and red HOPE poster, has lately confessed his doubts about the erstwhile object of his affection. Midway through 44’s tenure, Fairey opined: “Obama was the delivery device in theory. Now, I realize that he maybe is not the correct delivery device.”

Amber Lee Ettinger, the bikini-clad “Obama Girl” whose video “I Got a Crush on Obama” racked up over 16 million views on YouTube, has fallen out of love. She isn’t sure now who she’ll vote for come November 2012: “I want what this country wants. I want this country to be better. I want everyone to have jobs and for gas prices to go down.”

Well, who doesn’t? But when Obama has lost the guy who made the HOPE poster, when he’s lost “Obama Girl”—when his approval rating in the run-up to the November election had at one point fallen below Gerry Ford’s in the summer of ‘76—we’ve hit a tipping point. It seems we’ve passed “Peak Hope.”

So it goes. Barack Obama’s trajectory is a steeper version of a familiar pattern. The arc of the presidency bends toward failure.

In the chapters to come, I’ll trace that arc—and make the case that the vision of the presidency that Obama embodies has led to a dangerous concentration of power in an office primarily designed for faithful execution of the laws.

Chapter 1 begins with an irreverent look at the reverence Barack Obama inspired during his rise to power. It then turns to the frenetic pace of the early Obama administration, when, in his zeal to make good on the miracles he'd promised, Obama seemed ubiquitous and inescapable—a man with a plan to cure any ailment that vexed the American public, however monumental or trivial.

Chapter 2 focuses on Obama's foreign policy, telling the story of how the Audacity of Hope gave way to the Arrogance of Power. Though Obama took office promising to “set an example for the world that the law is not subject to the whims of stubborn rulers,” as we'll see, he's built an Imperial Presidency even more threatening and lawless than the one he'd inherited from George W. Bush.

As chapter 3 makes clear, a presidency that's unrestrained abroad inevitably begins to slip its constitutional restraints at home. The neat separation between “foreign” and “domestic”—the lines that used to hold between the president's foreign policy powers and his domestic authority—is being worn down in the pressure of financial crisis and an endless war that recognizes no fixed battlefield.

In chapter 4, we'll take a closer look at Obama's dilemma, and ours. A man who is perhaps the most powerful president in American history today appears utterly helpless and ineffectual in the face of the public's unquenchable thirst for presidential salvation. And yet, paradoxically, even as the president's popularity has eroded, the presidency's powers have continued to expand. Though the conventional wisdom holds that “presidential power is the power to persuade,” our political culture is so desperate for presidential salvation that even when our faith in the current president wanes, we continually delegate new powers to the executive branch. If this president's not worthy, surely another will come along who is.

The final chapter provides no easy answers to the problems outlined before. But it indulges an audacious hope of its own: might we actually *learn* something from these repeated cycles of infatuation and regret? Can we look past the man who holds the office and consider the possibility that our problem is the office, not the man?

## A “Teachable Moment”?

Our 44th president has been the subject of an unseemly degree of idol worship by the intelligentsia and ordinary voters alike. But the “false idol” this book targets is the modern presidency itself. Decades of longing for a national redeemer have forged an institution that promises everything and guarantees nothing, save public frustration and the steady growth of federal power.

The Obama presidency has heightened the contradictions inherent in the modern view of the office, raising hopes that no human institution could possibly fulfill. Along the way, this most “cultish” of presidencies has served to highlight the modern American presidency’s unique combination of absurdity and menace.

Is it too much to hope that Obama’s failure might, to borrow one of the president’s favorite phrases, serve as a “teachable moment,” encouraging Americans to better align our expectations with reality?

Today, we find ourselves in the middle of a particularly joyless presidential race—though you’d hardly know it from the candidates’ messianic campaign-trail rhetoric. Former Massachusetts governor Mitt Romney shares Obama’s totalistic conception of the presidency. The job isn’t limited to pedestrian matters like providing better economic stewardship: in his New Hampshire victory speech, Romney proclaimed, “Our campaign is about more than replacing a president; it is about *saving the soul of America*.” Nobody seemed particularly inspired.

Yet in a strange way, perhaps that represents progress. Last time around, recall, we had inspiration to burn. But in the giddy atmosphere of “Hope and Change,” we seemed to forget that presidential elections are for picking a constitutional officer, not anointing a prophet.

The “Cult of Obama” has been badly weakened. A “Cult of Romney” is almost impossible to imagine. At this point, it might tax even H. L. Mencken’s cynicism to imagine an American public credulous enough to believe that either of these men is the paladin we need to renew America.

We've entered an age of austerity, one in which we'll be paying good and hard for the promises of past saviors-in-chief. As we come to terms with the wreckage Obama and his predecessors have left in their wake, the messianic approach to the presidency is the last thing we need. After all, messianism helped get us into this mess. Amid the dashed dreams of the Obama era, there's never been a better time to put aside false idols and false hope.



## CHAPTER 1

### “God of All Things”

In the revival-tent atmosphere of Barack Obama’s 2008 campaign, pundits, pols, and ordinary voters thrilled to the possibilities of “Hope and Change.” Celebrities, too: “For the very first time in my life, I feel compelled to stand up and to speak out for the man who I believe has a new vision for America,” Oprah Winfrey exclaimed to a crowd of 15,000 in Des Moines in December 2007. “I am here to tell you, Iowa, he is the one. He is the one!”

The “One” won Iowa, and his crowds only got bigger—75,000 in Portland in May; 100,000 in St. Louis in October. “Think Springsteen concerts,” ABC’s David Wright advised. “If you’ve never been to an Obama rally before, go early.” If you beat the rush, he said, you’d see:

Obama’s true believers respond as though they’ve spent their whole lives out in the cold. . . . Young people hoping that Obama can redeem politics from mere partisanship; black people hoping he can finally achieve Martin Luther King’s dream; white people hoping he can redeem America from the sins of slavery and segregation.

Conservatives were quick to decry the “Cult of Obama”—conveniently forgetting that just a few years back, they’d made a flight-suited comic-book hero out of such common clay as George W. Bush.

After Bush’s infamous “Mission Accomplished” speech on the deck of the USS *Abraham Lincoln* in May 2003, *National Review Online* ran ads for the Bush “Top Gun” action figure and an article about how wonderful it was to have a presidential superhero to complement your GI Joe collection. On Chris Matthews’s *Hardball*—apparently your go-to cable news show for seamy confessions of presidential fetishism—G. Gordon Liddy even took the opportunity to admire the, er, presidential package:

Here comes George Bush. You know, he's in his flight suit, he's striding across the deck, and he's wearing his parachute harness you know—and I've worn those because I parachute—and it makes the best of his manly characteristic. Chris, run that [clip] again of him walking across there with the parachute. He has just won every woman's vote in the United States of America!

Talk about getting a tingle up your leg.

### **Bending the Arc of History**

Yet despite their faults, you couldn't fault conservatives for thinking that Obama's candidacy had taken president-worship to new levels.

A May 2008 *New York Times* story captured the unseemly atmosphere of teenybopper infatuation that prevailed at Obama campaign rallies. "You see and hear things on rope lines," the *Times*' man-on-the-scene, Mark Leibovich, reported, "get a whiff of things, too. ('I got to smell him, and it was awesome,' raved Kate Homrich, caught between Mr. Obama and a woman trying to hug him in Grand Rapids.)" Leibovich quoted one Bonnie Owens, "who got her fingers pinched by Mr. Obama after a rally in Louisville": "Best experience of my life," she enthused.

It seems that Ms. Owens hasn't had much of a life. But why pick on her? A herd of supposedly independent journalists got just as giddy in the hope-and-change-saturated days of Obama's ascendancy.

In February 2008, reporter Lee Cowan confessed that "when NBC news first assigned me to the Barack Obama campaign . . . my knees quaked a bit. . . . I wondered if I was up to the job. I wondered if I could do the campaign justice." In May, another reporter, former ABC and CBS correspondent Linda Douglass, explained why she'd decided to join Team Obama as a spokesperson: "I see this as a moment of transformational change in the country, and I have spent my lifetime sitting on the sidelines watching people attempt to make change. I just decided that I can't sit on the sidelines anymore."

That summer, *San Francisco Chronicle* columnist Mark Morford waxed New Age: “Many spiritually advanced people I know . . . identify Obama as a *Lightworker*, that rare kind of attuned being who . . . can actually help usher in a new way of being on the planet. . . . These kinds of people actually help us *evolve*.”

Obama never specifically promised to help us “evolve,” but in his election night victory speech in front of 200,000 people at Chicago’s Grant Park, he promised something equally bizarre and outlandish. On the campaign trail, candidate Obama repeatedly invoked Martin Luther King Jr.: “The arc of the moral universe is long, but it bends toward justice.” Obama deployed that image again at Grant Park on November 4: “If there is anyone out there who still doubts that America is a place where all things are possible,” the president-elect began, anyone

who still wonders if the dream of our founders is alive in our time; who still questions the power of our democracy, tonight is your answer. . . . It’s the answer that led those who have been told for so long by so many to be cynical, and fearful, and doubtful of what we can achieve to *put their hands on the arc of history and bend it once more toward the hope of a better day*.

If we weren’t satisfied with the bend in our arc, the president-elect told us, we could take hold of the thing and wrench it onward (inward?) toward the Promised Land.

I watched the speech in a basement bar in downtown D.C.’s Gallery Place neighborhood, a booming commercial strip that sometimes goes by “Chinatown.” (There are half a dozen Chinese restaurants amid the Fuddruckers and Ruby Tuesdays surrounding the Verizon Center arena, and the local Hooters features Chinese characters that translate to “Owl Restaurant.”)

When I walked upstairs and out onto 7th Street after midnight, amid the honking horns and ecstatic revelers blocking traffic, it looked for all the world like the Yanks had just liberated Paris.

In part by accident, in part by design, Barack Obama took office as the focal point of a cult of personality. Rather than damping down transcendental expectations, he fanned the flames of presidential messianism. And having embraced the notion that

America's president is responsible for all things great and small, he took to the role eagerly—an omnipresent president, offering federal solutions to our greatest ills and our smallest inconveniences alike.

But as we would soon discover, a man who is everywhere, promising to do everything, is certain only to disappoint.

### **“Not a Sparrow Falls . . .”**

“Nation's Hopes High for Obama,” the *Washington Post* reported on the eve of his inauguration. Seventy-nine percent of respondents to a *Post-ABC News* poll had a favorable impression of Obama; as the accompanying graphic showed, it was the highest score for any newly elected president since . . . Jimmy Carter. That should have inspired some caution, but the “Hopefest 2009” aura that surrounded Obama's inauguration persisted throughout the early months of his tenure.

In the wake of the inauguration, the *Politico* ran a 900-word article on “The Power of Obama's Hand,” reverentially describing how the president “uses touch to control and console simultaneously,” laying hands on supporters and opponents alike. Author Judith Warner took to her *New York Times* blog to confess: “The other night I dreamt of Barack Obama. He was taking a shower right when I needed to get into the bathroom to shave my legs.” Instead of keeping that information to herself, Warner “launched an email inquiry,” which revealed that “many women—not too surprisingly—were dreaming about sex with the president.” (Warner may have been channeling a *Will and Grace* episode from a few years earlier, in which Debra Messing's Grace announced that she dreamed she was in the shower with the Illinois senator, and “he was Baracking my world!”)

*Newsweek* editor Evan Thomas captured the prevailing mood somewhat less luridly in the summer of '09, when he went on MSNBC's *Hardball* (see what I mean?) with a tingle in his leg and a song of national unity in his heart. “In a way,” Thomas bumbled,



“Obama is standing above the country, above the world. He’s *sort of God*. . . . He’s going to bring all different sides together.”

“Sort of God,” or maybe—as a November 2010 *Newsweek* cover had it—“The God of All Things.” The graphic featured a six-armed Barack juggling a gaggle of items designed to reflect the office’s myriad responsibilities: a dove, a model house, a timepiece, a sheaf of \$100 bills, an Apache helicopter—and the globe itself.

It was a clever reference to the Hindu deity Shiva. Lord Shiva is a paradoxical god: the “physician with a thousand medicines,” who simultaneously “afflicts with fevers and illness”—both a creator of life and “the destroyer of worlds.” Some Indian-American groups took offense at *Newsweek*’s appropriating Shiva’s likeness—still, it seemed strangely appropriate.

Surely godlike powers would have been necessary to deliver the miracles Obama had promised on his journey to the presidency: “Everywhere we look, there is work to be done,” he’d proclaimed in his inaugural address—and we would do it. We’d “wield technology’s wonders” to improve health care; “harness the sun and the winds . . . to fuel our cars and run our factories”; and “transform our schools and colleges and universities to meet the demands of a new age.” “All this we can do. All this we will do.”

All this and more: on the campaign trail, Obama had pledged, among other things, to provide “a cure for cancer in our time,” to “slow the oceans’ rise,” to deliver “a complete transformation of the economy,” to “end the age of oil,” and, perhaps most quixotically, to “fundamentally change the way Washington works.”

This, then, was a president of grand dreams and vast plans. But as Obama made clear from the start, he’d sweat the small stuff too.

In his first 100 days, the new president sometimes resembled a nuclear-armed infomercial host. The days of hidden credit card fees are over!—or so Obama assured Americans in April—and with current low interest rates, there’s never been a better time to refinance your mortgage (find out more at [makinghomeaffordable.gov](http://makinghomeaffordable.gov)!).

This president would give you cash on the barrel for your old jalopy—and don't worry about America's struggling auto manufacturers: "If you buy a car from Chrysler or General Motors, you will be able to get your car serviced and repaired, just like always," Obama announced in March, because, "starting today, the United States government will stand behind your warranty." You're not gonna pay a lot for this muffler—POTUS commands it!

After the president gratuitously interjected himself into a disputed arrest in Cambridge, Massachusetts, we got August 2009's presidential "beer summit," wherein cop, collar, and commander in chief met at the White House for a "teachable moment" on civility and race relations (Bud Light for the president, Red Stripe and Blue Moon for the professor and the police officer, respectively). In September, on the first day of the school year, Obama even took time out from managing two ongoing wars and a financial collapse to have himself piped into public school classrooms all across America—telling the children to "stand up for kids who are being teased" and "wash your hands a lot"!

It seemed that not a sparrow could fall without our National Father noticing—and offering a five-point plan for sparrow recovery. Nor could one easily flee from his presence, looming as it did and does over every treadmill at the gym.

### **"Behold, I Am with You"**

The omnipresent president manifested himself ceaselessly: That summer, Obama appeared in an ad for comedian George Lopez's new TBS talk show. It looked at first like a *Forrest Gump*-style camera trick—but no, that was "44" himself, deadpanning: "George, you need to change late night. That's the kind of change I can believe in."

It never let up: a pregame message for *Monday Night Football* ("Our nation faces extraordinary challenges"); a taped appeal on *American Idol*: "*American Idol* has always been about changing lives—on the stage and around the world."

Six months into his presidency, *Politico* reported, Obama had already “uttered more than half a million words in public.” In one whirlwind week that fall, the president made his third appearance on *60 Minutes*, gave a major speech on the financial crisis on Monday, and made a record five talk-show appearances on the following Sunday. And on the eighth day, He did *Letterman*.

Teddy Roosevelt’s “bully pulpit” was an alien concept to our Constitution’s Framers. They viewed presidential speechifying as a sign of demagoguery, and thought Congress should take the lead on most matters of national policy. In office and on the campaign trail, the president was supposed to play the role of the “mute tribune,” as presidential scholar M. J. Heale put it. The nation’s chief executive was expected to pipe down, mind his constitutional business, and keep his hands to himself. From Washington to Jackson, presidents gave only a handful of speeches a year.

That norm had eroded long before Barack Obama took office; still, if there was any lingering doubt, Obama made clear that this president would never play the role of the “strong, silent type.” In his first two years in office, Obama clocked 902 speeches and statements and gave 265 interviews.

In May 2011, Obama even reserved to himself the exclusive power to spam Americans cell phones with emergency presidential text messages. The PLAN (for Personal Localized Alert Network) developed by the Federal Emergency Management Agency, is to equip all new cell phones with a special chip that allows the authorities to deliver public safety alerts, accompanied by “a unique attention signal and vibration” in the event of a crisis. “Consumers would be able to opt out of all but those presidential messages,” *CBS News* reported. From “mute tribune” to “spammer-in-chief.”

As the Obama presidency grew more ridiculous, it also grew more dangerous. At home and abroad, a president who had once promised to restore the rule of law to the executive branch would go on to claim a host of powers far more menacing than the ability to send unwanted text messages.

## CHAPTER 2

### Supreme Warlord of the Earth

It seems ages ago now, but there really was a time when some civil libertarians held out hope for the Obama administration.

“If Barack Obama were to win the Democratic nomination and the White House,” *New Republic* legal affairs editor Jeffrey Rosen exclaimed in February 2008, “he would be, among other things, our first civil libertarian president.” “Civil liberties have been among [Obama’s] most passionate interests,” Rosen wrote. As a candidate, “he has been unapologetic about these enthusiasms.” After all, had there ever before been a major presidential contender who, like Obama, had invoked habeas corpus for a campaign-trail applause line?

On that intoxicating inauguration night in January 2009, according to the *Washington Post*, defense lawyers at Guantanamo Bay “formed a boisterous conga line,” shouting, “Rule of law, baby!”

In fairness to Rosen and the Gitmo conga line, candidate Obama had worked hard to rouse those hopes, laying it on good and thick from the stump. In an August 2007 speech, Obama charged that “in the dark halls of Abu Ghraib and the detention cells of Guantanamo, we have compromised our most precious values. What could have been a call to a generation has become an excuse for unchecked presidential power.”

“It is time to turn the page,” then senator Obama intoned several times before bringing it home with the crescendo: “The separation of powers works. Our Constitution works. We will again set an example for the world that the law is not subject to the whims of stubborn rulers, and that justice is not arbitrary.”

Obama’s eloquence, combined with his background as a former constitutional law professor, led Rosen—a con law prof himself—to imagine that this professorial



president would be “likely to articulate constitutional positions and then conform his presidential actions to them, rather than take positions and then rely on lawyers to justify them.” Is it possible, Rosen briefly wondered, that Obama’s presidency might even end up “paralyzed by legalistic concerns about civil liberties”?

### **“Strange New Respect”**

He needn’t have worried. Four years on, whatever complaints you might have about the Obama presidency, it’s hardly been “paralyzed by legalistic concerns.” By now it’s clear that what Barack Obama has delivered is the same old Imperial Presidency with a dash or two of extra “Hope” in the rhetoric.

Jack Goldsmith, former head of George W. Bush’s Office of Legal Counsel, explains that the Obama administration “has copied most of the Bush program,” even “expanded some of it.” The packaging is prettier, but the product is essentially the same.

For instance, an Obama Justice Department press release in March 2009 proudly announced that the administration had abandoned the harsh phrase “enemy combatant.” Still, we can call terrorist suspects our “special friends” if we like, but 44’s approach is virtually identical to 43’s. From the start, the Obama administration’s lawyers have insisted that the president can seize suspects the world over and hold them at Afghanistan’s Bagram Air Base indefinitely, without meaningful judicial review.

The president long ago abandoned his pledge to close Guantanamo. Perhaps Obama couldn’t have helped that, given the fierce congressional resistance to closure, but virtually all other aspects of detention are within the executive’s control. And lately, the administration has used that authority to prevent many of the prisoners from meeting with their attorneys, in a decision that a *New York Times* editorial characterized as “imperiously punishing detainees for their temerity in bringing legal challenges.”

For years, the conservative *American Spectator* magazine has offered a “Strange New Respect Award,” for “once-reliable conservatives who won liberal praise by adopting liberal policies.” If there was a civil libertarian equivalent of the *Spectator*’s award, Obama would surely take the prize. Lately, the “first civil libertarian president” has enjoyed “strange new respect” from former opponents who once feared he’d run a meek, legalistic War on Terror.

The Heritage Foundation’s homeland security guru, James Carafano, isn’t someone you’d ever expect to go soft on Barack Obama. But as Carafano admitted to the *New York Times* in January 2010: “It’s not even fair to call [Obama’s policies] ‘Bush Lite’—it’s Bush. It’s really hard to find a difference that’s meaningful and not atmospheric.”

That assessment has been echoed by some of the key architects of George W. Bush’s War on Terror. Former National Security Agency head Gen. Michael Hayden, who ran the Bush administration’s illegal wiretapping program, notes a “powerful continuity” between the two presidents on national security powers: “You’ve got state secrets, targeted killings, indefinite detention, renditions, the opposition to extending the right of habeas corpus to prisoners at Bagram. . . . And although it is slightly different, Obama has been as aggressive as President Bush in defending prerogatives about who he has to inform in Congress for executive covert action.” Even former vice president Dick Cheney now grudgingly praises President Obama for leaving most of the Bush framework intact: “He’s found it necessary to be more sympathetic to the kinds of things we did.”

Indeed, in several key areas, “44” has gone even further than “43” in pushing extravagant claims of executive power.

George W. Bush never publicly asserted a presidential right to summarily execute American citizens abroad, far from any battlefield. President Obama both claims that authority and has exercised it: in the September 2011 Predator strike on New Mexico-born Anwar al-Awlaki.

And though President Bush claimed “inherent power” to attack other countries at will, he never fought a war without congressional authorization. In March 2011, Barack Obama launched a war in Libya without so much as a by-your-leave to Congress—trampling the War Powers Resolution and the Constitution in the process.

Meanwhile, on increasingly tenuous legal authority and with very little public debate, President Obama has radically expanded drone warfare to new theaters of combat, forging a foreign affairs legacy of ever-expanding powers in an ever-expanding war.

### **The “Executive Death Warrant”**

In the spring of 2010, the Obama administration leaked the news that it had authorized the targeted killing of an American citizen. On September 30, 2011, the administration made good on that threat. Just before 10:00 a.m., outside Khashef village in northeastern Yemen, as U.S. citizen Anwar al-Awlaki and several companions were leaving breakfast, two Predator drones launched Hellfire missiles at the group, killing Awlaki and Samir Khan, another U.S. citizen and the editor of al Qaeda’s English-language propaganda magazine, *Inspire*.

Awlaki, too, was best known as a propagandist—the “bin Laden of the Internet,” as a Saudi television station once described him. But starting in 2010, Obama officials insisted he’d gone “from inspirational to operational.” Administration officials—speaking mostly “on background” to reporters—accused Awlaki of helping recruit the failed “underwear bomber” of December 2009 and of helping plot the attempted bombing of two cargo planes in October 2010.

Opinions differ on how important Awlaki was to the al Qaeda effort. Gregory Johnson, a Yemen scholar at Princeton, argues that he was “far from the terrorist kingpin that the West has made him out to be.” He was a “midlevel religious functionary”—a “propaganda threat,” whose death would do little to make Americans safer.

Even so, what we can glean from the public record makes clear that the man was a genuine bastard who reveled in the death of innocents, and it's hard to get too choked up about his demise. There's an important matter of principle at stake here, however. Can the president really serve as judge, jury, and executioner over any American he deems a security threat?

Yes, He Can! insisted Ken Gude, chief of staff at the Obamaphilic Center for American Progress. Gude argues that the hit was justified under the 2001 Authorization for Use of Military Force passed after 9/11 to authorize the war in Afghanistan. That resolution gave the president the power to use "all necessary and appropriate force" against anyone who participated in the 9/11 attacks or "harbored" those who did. Thus, says Gude, Awlaki was "a legitimate military target" under the AUMF, his death "a genuine victory" for the United States.

Gude is right that the AUMF is broadly worded. Over the past decade, two administrations have used it to support military action against a host of jihadist groups whose connections to 9/11 are increasingly attenuated. And in *Hamdi v. Rumsfeld* (2004), the Supreme Court held that the AUMF authorizes the capture and detention of U.S. citizens abroad.

But as Justice Sandra Day O'Connor noted in that case, "A state of war is not a blank check for the President when it comes to the rights of the nation's citizens." Even Americans picked up on the battlefield fighting alongside the Taliban get a modicum of due process. The Constitution affords them notice and an opportunity to challenge their designation as "enemy combatants."

It's one thing to say that the AUMF authorizes the arrest of American terrorist suspects and another thing entirely to say that it authorizes their extrajudicial killing. "We needed a court order to eavesdrop on [Awlaki]," former National Security Agency head Michael Hayden mused earlier this year, "but we didn't need a court order to kill him. Isn't that something?" Yes, it is.

Pause to reflect on the likelihood that during the Bush-Cheney era a top Center for American Progress official would have endorsed an argument from W's Justice Department that the president had the power to rub out citizens it designated as terrorist suspects. "If the AUMF permits the President and the CIA to violate the foreign-murder statute," law professor Kevin Jon Heller asked, "why did it not authorize the President and the CIA to violate the torture statute? I don't recall any progressive endorsing the latter argument, so why is a progressive organization like the Center for American Progress endorsing the same argument now?"

As Heller observes, Title 18, Section 1119, of the *United States Code*, proscribing "foreign murder of United States nationals," has to be "the starting point" for analysis of the Awlaki assassination. That law makes anyone—including a CIA agent—who kills a U.S. national abroad "presumptively a murderer." Much as President George W. Bush insisted that his Magic Scepter of Inherent Authority let him ignore federal laws against torture, "the Obama administration seems to now be arguing, albeit implicitly, that Obama has the authority as Commander-in-Chief to ignore the foreign-murder statute," Heller wrote.

Ryan Alford, a scholar focused on Anglo-American legal history, goes further. The Awlaki killing is an affront to our entire constitutional tradition. With Magna Carta, King John affirmed that "no free man shall be arrested or imprisoned . . . *neither will we attack him or send anyone to attack him*, except by the lawful judgment of his peers."<sup>1</sup> The Framers incorporated that bedrock principle of Anglo-American law into the Constitution, Alford argues, by, among other things, proscribing bills of attainder and instituting strict procedural requirements for convicting citizens of treason.

As Alford sees it, President Obama's decision to kill Awlaki is an "executive death warrant" that brings to an end seven consecutive centuries of fidelity to Magna Carta: "The thirteenth century was the last time when the executive branch of any country governed by the common law had asserted that it was legal to kill a citizen on the basis of an executive order."

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<sup>1</sup> Ryan Patrick Alford, "The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens," *Utah Law Review* 2011 (4): 1203 (emphasis in original).

If the Obama administration has good responses to these arguments, we've yet to hear them publicly. The Office of Legal Counsel, the Justice Department subdivision charged with advising the president on the legality of his actions, has prepared an official memo on the targeted killing of American citizens. Yet officially, the official memo doesn't exist. At a Senate Judiciary Committee hearing last fall, Attorney General Eric Holder testified, "I will not address—cannot address—whether or not there is an opinion in this area." In response to a *New York Times* Freedom of Information Act request, the Justice Department responded that it "neither confirms nor denies" the existence of the document.

It's perfectly appropriate for the government to redact intelligence sources and methods, but if the president is going to target American citizens for death by drone, shouldn't we at least get to examine, in broad daylight, the legal and constitutional arguments for doing so? Shouldn't U.S. citizens get to hear how far the president believes this power extends? Apparently not: we're on a "need to know" basis, and they'll let us know when we need to know.

The boundaries of the administration's legal theory remain obscure, hidden behind a veil of state secrecy. What's clear enough, however, is that—despite Jeffrey Rosen's fondest hopes—Obama hasn't turned out to be the kind of president who consults the law first and takes care to conform his behavior accordingly.

In May, after interviewing "three dozen of [Obama's] current and former advisers," the *New York Times* lifted the curtain a bit on the decisionmaking process President Obama employs to determine who goes on the "kill list." Defense Department general counsel Jeh Johnson summed up Obama's approach: "Barack Obama believes in options: 'Maintain my options.'" "When [Obama] applies his lawyering skills to counterterrorism," the *Times* reported, "it is usually to enable, not constrain, his ferocious campaign against Al Qaeda—even when it comes to killing an American cleric in Yemen, a decision that Mr. Obama told colleagues was 'an easy one.'"

## **To Declare “Kinetic Military Action”**

Obama’s 2011 decision to overthrow Libyan dictator Muammar el-Qaddafi wasn’t quite so easy a call, judging by the president’s initial reluctance to add a third war in the greater Middle East to the ongoing conflicts in Iraq and Afghanistan. But as Obama made clear from the start, it was the president’s call to make.

In a nationally televised address on the evening of March 28, 2011, nine days after American forces began bombing Libya, Obama gave his first extended explanation of what we were up to and what the plan was (it’s always nice to be kept in the loop). In a speech of over 3,000 words, the president never used the word “Constitution”; referenced “Congress” only in passing (“consulting the bipartisan leadership of Congress”), and uttered the word “war” only once—in a reference to “sectarian war” as one of the dangers to be avoided as the Arab world liberalizes. Even as Tomahawk missiles pounded Tripoli, the administration went to great lengths to avoid calling the war a “war.” “Kinetic military action” was the euphemism of choice.

But one word that showed up quite a bit in the president’s speech was the first-person singular:

*I* made it clear that Qaddafi had lost the confidence of his people....

*I* said that he needed to step down from power....

*I* ordered warships....

*I* refused to let that happen....

*I* authorized military action....

*I* refused to wait....

The task that *I* assigned our forces....

*I* will never hesitate....

and so on. That particular construction hit the ear as solipsistic and presumptuous: a sort of “royal ‘I.’” More importantly, it made plain that other constitutional bodies have no significant role to play in the president’s worldview.

On the campaign trail, Senator Obama had offered a much narrower take on the president's war powers. In 2007, he answered a questionnaire about executive power that reporter Charlie Savage gave to all of the major-party candidates. Asked if the president had the authority, without congressional approval, to bomb a country that didn't represent an imminent threat to the United States, Obama replied plainly, "The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation."

That was the correct answer, consistent with the original understanding of Article I, Section 8, Clause 11, of the U.S. Constitution, giving Congress the power "to declare War." The president retained the power "to repel sudden attacks," as James Madison's notes from the Philadelphia Convention put it, but he could not undertake aggressive actions without prior congressional authorization. Constitutional scholar Michael Ramsey explains:

Every major figure from the founding era who commented on the matter said that the Constitution gave Congress the exclusive power to commit the nation to hostilities. Notably, this included not only people with reservations about presidential power, such as James Madison and Thomas Jefferson, but also strong advocates of the President's prerogatives, such as George Washington and Alexander Hamilton.<sup>2</sup>

Obama's 2007 view of presidential war powers echoed the Founding Generation consensus. James Wilson told the Pennsylvania ratifying convention that "this system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power in declaring war is vested in the legislature at large."

Like Wilson, South Carolina's Pierce Butler had been a delegate to the Philadelphia Convention, and, much to the dismay of some delegates, had actually argued for vesting the power to go to war in the president. Yet during the ratification debates, Butler assured the South Carolina legislature that the proposed constitution

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<sup>2</sup> Michael Ramsey, "The Constitution and Libya," *Opinio Juris*, March 23, 2011, <http://opiniojuris.org/2011/03/23/the-constitution-and-libya/>.



prevented the president from starting wars: “Some gentlemen [i.e., Butler himself] were inclined to give this power to the President; but it was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction.”

As Madison summed up in 1793, “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.” Were it otherwise, “the trust and the temptation would be too great for any one man.”

Yet by the spring of 2011, Obama had evolved past the Madisonian doctrine, preferring a construction that “maintained his options.”

Here at least, the administration was willing to make its legal arguments public rather than shielding them behind a veil of state secrecy. In a memo released on April 7 (but dated April Fools’ Day—make of that what you will), the Obama OLC provided its formal opinion on the president’s “Authority to Use Force in Libya.”<sup>3</sup>

In passing, the memo invoked a favorite argument of past presidents, that the War Powers Resolution, passed in 1973 over Richard Nixon’s veto, “implicitly recognized” that presidents get a 60 day “free pass” for unauthorized warmaking. But the WPR recognized no such authority; it affirmed that “the constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces”—none of which applied to Libya in 2011.

In the main, however, the OLC argued that “the President’s legal authority to direct military force in Libya turns on two questions”: (1) whether our operations in Libya

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<sup>3</sup> Caroline D. Krass, “Authority to Use Force in Libya,” Memorandum Opinion for the Attorney General, April 1, 2011, <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>.

“serve sufficiently important national interests” to make them permissible exercises of his constitutional powers as “Commander in Chief and Chief Executive” and (2) “whether the military operations that the President anticipated ordering would be sufficiently extensive in ‘nature, scope, and duration’ to constitute a ‘war’ requiring prior specific congressional approval under the Declaration of War Clause.”

Both questions are crashing non sequiturs. Whether air strikes on Libya serve “sufficiently important national interests” is quite beside the point. Again, as Senator Obama understood in 2007, “the President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation”—and Libya posed no threat, imminent or otherwise, to the United States. The week before the OLC released its Libya memorandum, Defense Secretary Robert Gates cast some doubt on just how important Libya was to American national interests. “I don’t think it’s a vital interest for the U.S.,” he admitted on NBC’s *Meet the Press*.

As for the “nature, scope, and duration” of the conflict, there’s nothing in the Constitution to suggest that congressional authorization is optional if the president thinks the war he’s launched will be *short* and *easy*.

The president had promised that our involvement in Libya would be measured in “days, not weeks.” But as weeks turned into months, the administration faced another legal difficulty: a looming deadline under the War Powers Resolution. Even in cases of national emergency or unprovoked attacks on U.S. forces, the WPR required the president to terminate U.S. engagement in “hostilities” after 60 days in the absence of congressional authorization.

As that deadline—May 20, 2011—approached, administration lawyers scrambled to find a legal rationale that would allow the administration to continue bombing. At this point, Obama’s Office of Legal Counsel became less cooperative. With the backing of Attorney General Eric Holder, acting OLC head Caroline D. Krass advised Obama that continued cruise missile and drone strikes—even if done remotely, with little risk of immediate retaliation—still qualified as engaging in “hostilities” under

the WPR, which meant that the president would have to terminate U.S. involvement in the war or radically scale it back after the 60-day limit.

That wasn't what the president wanted to hear, so he sought a second opinion. State Department legal adviser Harold Koh stood ready to oblige. Koh concocted the ingeniously helpful argument that the WPR didn't apply because Qaddafi couldn't effectively return fire. As Koh's legal opinion put it, "U.S. military operations are distinct from the kind of 'hostilities' contemplated by the Resolution's 60 day termination provision": they don't "involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof."<sup>4</sup> We were bombing Libya, sure, but that didn't mean we were engaged in "hostilities."

Given that outrage over the illegal bombing of Cambodia was part of the backdrop to the WPR's passage, it would have been pretty strange if its drafters thought presidential warmaking was A-OK, so long as you did it from a great height. As former Bush OLC head Jack Goldsmith put it: "The [Obama] Administration argues that once it starts firing missiles from drones, it is no longer in 'hostilities' because U.S. troops suffer no danger of return fire. . . . The implications here, in a world of increasingly remote weapons, are large."

Indeed: under Koh's rationale, the president can rain down destruction via cruise missiles and robot death kites at will, wherever and whenever he thinks it's advisable. But unless an American airman might get hurt, neither the Constitution nor the War Powers Resolution has been offended.

### **"Growing in Office"**

All in all, it was a marvelous exercise in legalistic doublethink: "We have never been at

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<sup>4</sup> "United States Activities in Libya," State Department Memorandum, June 15, 2011, [http://www.foreignpolicy.com/files/fp\\_uploaded\\_documents/110615\\_United\\_States\\_Activities\\_in\\_Libya\\_-\\_6\\_15\\_11.pdf](http://www.foreignpolicy.com/files/fp_uploaded_documents/110615_United_States_Activities_in_Libya_-_6_15_11.pdf).

war in Northafrica!” And yet Koh professed to believe the argument he was selling.

At times, according to *Newsweek* reporter Daniel Klaidman’s book on Obama’s terror warriors, *Kill or Capture*, Koh wondered to himself, “How did I go from being a law professor to someone involved in killing?” But by June 2011, the former Yale Law dean had made peace with his role. In a self-congratulatory speech before the American Constitution Society, Koh insisted, “I never say anything I don’t believe”—and that includes “the administration’s position on war powers in Libya.” “I’ve lived the life I wanted to live,” Koh proclaimed, “I still believe in my principles.” The only thing missing was the refrain, “I did it myyy wayyy!”

Koh’s performance was all the more remarkable when you consider his background. “For a quarter century before heading up State-Legal,” Goldsmith notes, “Koh was the leading and most vocal academic critic of presidential unilateralism in war,” a thorn in the side of the Reagan, Bush I, Clinton, and Bush II administrations.

As a younger man, Koh took the War Powers Resolution pretty seriously. In 1994, for example, he wrote to the Clinton Justice Department to protest the planned deployment to Haiti, which was carried out without a single shot being fired: “Nothing in the War Powers Resolution authorizes the President to commit armed forces overseas into actual or imminent hostilities in a situation where he could have gotten advance authorization.”

In his berth at the State Department, though, Koh had “grown in office,” becoming a full-fledged apologist for presidential warmaking and Tomahawk humanitarianism. (It profits a man nothing to give his soul for the whole world . . . but *for Foggy Bottom?*)

Koh wasn’t alone in his latter-day transformation from civil libertarian to presidential power apologist. Right up until the time he entered the Obama Justice Department in 2009, Georgetown University law professor Marty Lederman had been a passionate and vocal critic of Bush administration abuses in the War on Terror. Two years later, Lederman coauthored the (secret) legal memorandum justifying presidential drone strikes against U.S. citizens.

In 2011, liberal law professor Peter Shane, author of *Madison's Nightmare: How Executive Power Threatens American Democracy*, warned that the Obama administration “risk[s] implicitly ratifying the ideology of governance that reigned during the Bush-Cheney administration,” which was putting it pretty mildly.

“The administration has also enjoyed, and in many cases continues to enjoy, the legal counsel of some of the most thoughtful progressive lawyers one could imagine,” Shane wrote. How could this have happened? Look at Obama’s all-star legal team! George Washington University law professor Jonathan Turley had it right when he observed that “it’s always more painful for civil libertarians to be stabbed in the back by a friend.”

In his 1970 book, *The Twilight of the Presidency*, George F. Reedy, a former presidential press secretary and senior adviser to Lyndon Johnson, argued that young people should be kept away from top executive posts. “The life of the White House is the life of a court,” Reedy explained; sycophancy and intrigue are the coin of the realm, and it’s all too easy for ambitious young men and women to fall under the spell of presidents who want them to bend or break the law. “There should be a flat rule,” he wrote, “that no one be permitted to enter the gates of the White House until he is at least forty and has suffered major disappointments in life.”<sup>5</sup>

John Dean, who served prison time for his role in the Watergate cover-up as a thirtysomething White House counsel to Richard Nixon, calls Reedy’s *Twilight* “the best book on the presidency.” “There is no question in my mind,” Dean said, “that had I been ten years older at the time, I would have told Richard Nixon to go to hell much sooner than I did.”

But age and experience aren’t reliable safeguards when it comes to the temptations of power. Marty Lederman was past 40, an accomplished legal scholar with a coveted berth at Georgetown Law, when he entered the administration. Harold Koh was in his mid-50s, and had risen to the deanship of Yale Law School on the strength of a scholarly reputation built on opposition to the Imperial Presidency.

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<sup>5</sup> George Reedy, *Twilight of the Presidency* (New York: Mentor Press, 1970, 1987).

As legal aides to President Obama, the two of them assembled a theory of presidential war powers broader than anything publicly advanced by the Bush-Cheney team. The president could assassinate American citizens via drone strike far from any battlefield, keeping the whole thing secret in the name of “national security,” should anyone complain. And he could rain down destruction via cruise missiles and robot death kites virtually anywhere in the world without engaging in “hostilities.” The lure of being “in the room” when the big decisions are made must be powerful indeed.

### **Game of Drones**

In February 2010, the Defense Department gave an *LA Times* reporter a glimpse of our Brave New War, with a visit to Creech Air Force Base in Nevada, from which American pilots conduct remote war a short drive from a lap dance—and half a world away from their targets:

From his apartment in Las Vegas, Sam Nelson drove to work through the desert along wind-whipped Highway 95 toward Indian Springs. Along the way, he tuned in to XM radio and tried to put aside the distractions of daily life—bills, rent, laundry—and get ready for work.

Nelson, an Air Force captain, was heading for his day shift on a new kind of job, one that could require him to kill another human being 7,500 miles away.

From a command seat that the pilots have dubbed the “Naugahyde Barcalounger,” Nelson and his colleagues guide Hellfire-armed Reaper drones to their targets, dealing death in Afghanistan, Pakistan, and elsewhere. “Part of the job is to try to identify body parts,” Captain Nelson explained.

Our drone warriors aren’t likely to run out of targets anytime soon. Obama has not only dramatically escalated the use of Unmanned Aerial Vehicles, he’s widened the theaters in which they operate, raising the pace of attacks in Yemen, Pakistan, and Somalia—and constructing a new archipelago of drone-capable bases in East Africa and the Arabian Peninsula.

One pet right-wing theory—popularized by conservative provocateur Dinesh D’Souza and embraced by GOP presidential contender Newt Gingrich—holds that “the Kenyan anticolonial ideology” of Barack Obama Sr. drives everything Barack Jr. does. Dreams from his absentee father have led the president to “view America’s military as an instrument of neocolonial occupation,” D’Souza argued in a *Forbes* article and the hit documentary that grew out of it, *2016: Obama’s America*. Today, D’Souza marvels, “Incredibly, the U.S. is being ruled according to the dreams of a Luo tribesman of the 1950s.”

Gingrich found the notion pretty credible, actually: “the most profound insight I have read in the last six years about Barack Obama,” he told *National Review* in 2010, “the most accurate, predictive model for his behavior.”

Six months later, the model ran into a little trouble when Obama began raining cruise missiles down on the North African country of Libya. What, one wonders, would a *genuine* Afrocentric anti-colonialist make of Obama’s militarized approach to Africa? What would he think of the president’s new drone bases in Ethiopia and Djibouti, spy plane patrols from a dozen new installations throughout the continent, his deployment of U.S. special forces to Central Africa to help hunt down the bizarre death cult known as the Lord’s Resistance Army—or military drone flights over Somalia that are now frequent enough to endanger local air traffic, according to a recent United Nations report?

How great a threat to the U.S. homeland are Al Shabab, al Qaeda in the Islamic Maghreb, Boko Haram, and the other African groups we’re surveilling or targeting in the name of the War on Terror? In June, the *Washington Post* reported that some State Department officials were worried about military mission creep: “They have argued that most terrorist cells in Africa are pursuing local aims, not global ones, and do not present a direct threat to the United States.”

Dennis Blair, Obama’s director of national intelligence until he was fired in 2010, has commented that during his tenure, the emphasis on drone strikes “reminded me of body counts in Vietnam.” Another former national security official echoes: “It’s not at

all clear that we'd be sending our people into Yemen to capture the people we're targeting. But it's not at all clear that we'd be targeting them if the technology wasn't so advanced. What's happening is that we're using the technology to target people we never would have bothered to capture."

The legal authority for this ever-expanding war is becoming ever more tenuous a decade after 9/11. It rests on the Authorization for the Use of Military Force that Congress passed on September 14, 2001. That resolution gave the president the authority "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."

You can make a colorable legal argument that some of the groups we're surveilling and targeting have, by associating with members of al Qaeda central, "harbored such organizations." But we should look skeptically at any construction of the AUMF that imagines Congress has delegated its war powers in perpetuity to the president.

As for al Qaeda central, even the administration's top terror warriors are starting to admit it's a spent force. Last summer, in his first public comments after moving from Langley to the Pentagon, Defense Secretary Leon Panetta noted that al Qaeda's defeat was "within reach." When we kill or round up some 10 to 20 remaining senior operatives, Panetta said, we'll "really cripple al Qaeda as a threat to this country." Last November, top counterterrorism officials told the *Washington Post* that al Qaeda's leadership had been "reduced to just two figures whose demise would mean the group's defeat."

On the home front, as a 2010 RAND Corporation analysis put it, "Thus far, despite al Qaeda's intensive online recruiting campaign, their numbers remain small, their determination limp, and their competence poor." This alleged "existential threat" hasn't managed to set off a single bomb in 10 years, and has killed a total of 16 Americans since 9/11 (13 of them in the Fort Hood military base shooting). They appear pretty well crippled at this point.



And yet the war goes on—and expands. To commemorate the 10th anniversary of 9/11, the conservative Heritage Foundation settled on a theme: “Never Quit.” In the accompanying video, Heritage warned that “our continued security is anything but certain . . . withholding crucial resources and needlessly slashing defense” would dishonor those who died in the attacks. “We must never forget, and we must never quit.”

Say what you will about Barack Obama—he’s no quitter.

### **It’s Not Personal, Sonny, It’s Strictly Business**

However popular it may be in some quarters on the right, the notion that President Obama has taken a timid, pusillanimous, legalistic approach to what’s left of the terrorist threat cannot withstand scrutiny. By the perverse standard his predecessors set, Obama’s presidency has been strong indeed.

Throughout the Obama presidency, key players in the administration—some with distinguished academic careers built on defending the rule of law—sacrificed their principles on the altar of political expediency. But the greatest betrayal came from Obama himself. He’d stoked hope and promised change in foreign affairs—the very area where the president has the greatest ability to provide it.

In fact, it takes real strength of character for a president to exercise restraint—to uphold his constitutional oath of office and refrain from waging war when war isn’t necessary. By that standard, Barack Obama has repeatedly demonstrated that he’s as weak as they come.

Jeffrey Rosen had started issuing mea culpas for his original assessment of Obama as early as the summer of 2009. His most recent came in a March 2012 *New Republic* symposium: “During the last presidential campaign, I swooningly predicted that Barack Obama would be our first civil libertarian president. Of course, I was wrong.” But hope springs eternal; Rosen continued, “If Obama wins a second term, I hope

reelection gives him the freedom to redeem that unfulfilled promise.” American Civil Liberties Union head Anthony Romero is less forgiving. “I’m disgusted by Obama,” he told *Politico* in 2010.

It’s understandable that many civil libertarians feel betrayed by Obama’s repudiation of principles he once professed to hold dear. But since presidents reliably violate civil liberties in the name of national security, it’s folly to blame the Imperial Presidency on any one president’s personal failures. What Americans demand from the presidency shapes the president’s incentives, and those incentives play a far larger role in executive power’s growth than any given president’s character flaws.

The “God of All Things” is, as we’ve seen, responsible for securing the warranties on American cars and for getting us a lower rate on our mortgages. So of course he’s also the guardian of our safety, responsible for shielding us from any possible terrorist attack. “It’s 3 a.m., and your children are safe and asleep,” the famous 2008 Hillary Clinton campaign ad declared, over images of helpless babes, “but there’s a phone in the White House, and it’s ringing.” It’s a “dangerous world,” the narrator insisted. “Who do you want answering the phone?”

In his 2007 book *The Terror Presidency*, Jack Goldsmith wrote:

For generations the Terror Presidency will be characterized by an unrelenting fear of attack, an obsession with preventing the attack, and a proclivity to act aggressively and preemptively to do so. . . . If anything, the next Democratic President—having digested a few threat matrices, and acutely aware that he or she alone will be wholly responsible when thousands of Americans are killed in the next attack—will be even more anxious than the current President to thwart the threat.

Five years later, explaining Obama’s departure from campaign-trail civil libertarianism, Goldsmith quoted Jack Kennedy: “It is easier to make the speeches than it is to finally make the judgments.” “Once in office presidents assume responsibilities and face constraints that render their campaign views about the presidency almost entirely irrelevant,” Goldsmith argued. “Barack Obama, like Kennedy and many of his predecessors, learned this lesson on the job.”

No doubt Obama learned the right lesson for a political survivor, which, like everyone who attains the office, he is. But Goldsmith's analysis assumes that the incentives the president confronts reliably reflect both the underlying threat and the president's ability to address it. The available evidence suggests that al Qaeda and its hangers-on are anything but an "existential threat." They might, at best, be able to pull off a mall shooting or a car bombing at some point, but in a nation of 330 million people, no president can possibly prevent that.

But even if Goldsmith is wrong about the threat level, he's surely right about the underlying political dynamic. As Obama's former national security adviser James L. Jones put it to the *Washington Post* last year, "Who wants to be the guy that says we don't need [these powers] anymore and then three weeks later something happens?"

In May, the *New York Times* reported that after the failed "underwear bombing" on Christmas Day 2009, David Axelrod, Obama's longtime chief campaign strategist, started showing up at the national security team's "Terror Tuesday" meetings. Axelrod's "unspeaking presence" served as a "visible reminder of what everyone understood: a successful attack would overwhelm the president's other aspirations and achievements."

Axelrod denied the report: "I did not attend those meetings." But whether or not Axelrod's mustachioed visage loomed over the administration's national security conferences, the fear of political repercussions from another terrorist attack surely did. That, more than anything else, explains why, instead of reining in Bush-era abuses, Obama has delivered a radically expanded "Terror Presidency," with dangerous new powers for all future presidents to wield.

## CHAPTER 3

### The Warlord at Home

But surely the modern president's powers are much more limited and less susceptible to abuse on the home front. That's long been the conventional wisdom, anyway. As political scientist Aaron Wildavsky posited in his seminal 1966 article "The Two Presidencies":

The United States has one President, but it has two presidencies; one presidency is for domestic affairs, and the other is concerned with defense and foreign policy. Since World War II, Presidents have had much greater success in controlling the nation's defense and foreign policies than in dominating its domestic policies.<sup>6</sup>

Abroad, the commander in chief's discretion has few bounds, the story goes, yet within our borders he faces much greater constraints on his ability to work his will.

There's a lot to be said for the conventional wisdom: If Barack Obama woke up on any given morning and decided it looked like a good day for "kinetic military action" in Syria, he could issue the order, and the drones and Tomahawks would fly. Yet on the home front, the president cannot declaim, "Make it so!" like Captain Picard from the bridge of the *Enterprise*, and order up universal health care or a new campaign-finance regime. The president controls the U.S. military, but Congress retains formal authority over the budget and the legislative process.

Even so, in recent years we have had good reason to fear that the president's domestic powers have become dangerously unconstrained as well. As Yale Law's Jack Balkin observed on the eve of the inauguration: "Obama takes office as probably the most powerful president in American history in terms of what he can do and how he can project his power around the world, in the economy and through the new forms of

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<sup>6</sup> Aaron Wildavsky, "The Two Presidencies," *Trans-Action* 4 (December 1966): 7–14.

surveillance power that Congress has given him. . . . The American Presidency is currently on steroids, and will continue to be for a very long time to come.”

Indeed, in domestic affairs, President Obama has steadily, and in some cases dramatically, expanded executive power over American life even in areas far removed from national security. He’s done that in several ways: by capitalizing on the pressures created by the 2008–09 financial crisis; by exploiting his suzerainty over the ever-burgeoning regulatory state; and—on occasion, where he had no plausible claim to any legal authority—simply by asserting his will and daring Congress and the courts to stop him.

Moreover, it’s a mistake to suppose there’s a bright line dividing “foreign” from “domestic” when it comes to national security. A presidency powerful enough to work its will abroad is more than powerful enough to threaten liberty at home. As the Bush-Obama years have made clear, the “battlefield” is everywhere, and the War on Terror has come home.

Barack Obama has proved himself at least as power hungry as his predecessors, and the Congresses he’s faced have been even more eager to cede power than those that came before. But the American public is hardly blameless for this state of affairs. In crises real and imagined, we look first and last to the president for salvation, and our unrelenting demands for executive action drive the presidency’s growth.

The result isn’t quite what we expected, but it’s very likely what we deserve.

### **“Commander in Chief of Our Economy”**

In March 2008—that innocent season before Americans had ever heard of “auto czars,” “pay czars,” or the ungainly acronym “TARP”—presidential candidate Hillary Clinton coined an intriguing phrase: “We need a president,” she told a Pennsylvania crowd, “who is ready on day one to be *commander in chief of our economy!*”

We had a good laugh about that one over at the Cato Institute: “We eagerly await your orders, ma’am,” my colleague Jerry Taylor snarked on the Cato blog.

A few months later, however, we began to wonder whether the joke was on us. The financial collapse that began in fall 2008 gave rise to a host of new presidential powers that made “commander in chief of the economy” sound appallingly accurate.

In his “Last Hundred Days,” with his approval rating drifting as low as 25 percent, President Bush had amassed powers to rival those FDR gained in his “First Hundred.” The panicked atmosphere following the collapse of Lehman Brothers, the spread of the banking crisis to Europe, and a harrowing stock market decline led Congress to cede much of its power of the purse to the executive branch, making Treasury Secretary Henry Paulson the modern equivalent of a Roman dictator for economic affairs.

On October 3, 2008, Bush signed the Emergency Economic Stabilization Act, popularly known as TARP (for Troubled Asset Relief Program). Congress gave Treasury the power to buy “troubled assets” from “financial institutions,” expecting the administration to take toxic mortgage-backed securities off failing banks’ balance sheets. But the Bush team quickly transformed TARP into a program injecting “capital infusions” into the nation’s largest banks by having them sell shares to the federal government. At a high-pressure October 13 meeting, Paulson forced even healthy banks to comply. “It was a take it or take it offer,” a source told the *New York Times*.

By December, the Bush administration had further transformed TARP into a program giving loans to auto manufacturers—not what one typically thinks of as financial institutions. Yet Congress had defined “troubled asset” and “financial institution” broadly enough to give the administration a half-plausible argument that it could legally use the \$700 billion fund however it pleased.<sup>7</sup> When Congress refused to authorize a bailout of General Motors and Chrysler, President Bush decided to use

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<sup>7</sup> See John Samples, “Lawless Policy: TARP as Congressional Failure,” Cato Institute Policy Analysis no. 660, February 4, 2010.

TARP funds to do it anyway, on the grounds that, as a White House spokesperson put it, “Congress lost its opportunity to be a partner because they couldn’t get their job done.”

The week before Barack Obama’s inauguration, in a private summit with congressional leaders of both parties, Vice President-elect Joe Biden likened the ongoing financial collapse to the 9/11 attacks: “We are at war,” Biden told the gathering, and war cannot be fought by committee. The Brookings Institution’s William Galston wondered—in an unintentionally amusing turn of phrase—how would the new president manage to “reconcile the hope agenda with the fear agenda”?

He managed. “Fear” would serve to push through the \$787 billion stimulus package; “The time for talk is over,” the president warned in February. “If we do not act, . . . crisis could turn into catastrophe for families and businesses across the country.” “Hope”—and legislative payola—would spur passage of Obama’s massive health care overhaul—with the president repairing to each motivational technique as needed.

Along the way, Obama vigorously exercised the new economic powers his predecessor had left him, doubling the amount of TARP funds available to General Motors and getting the Treasury-appointed board of directors to push GM toward environmentally friendly cars. In March 2009, Obama “car czar” Steven Rattner summoned GM CEO Rick Wagoner to his office at Treasury to hear some bad news: The administration had decided it was time for Wagoner to go. In an unprecedented move, the president had summarily fired the CEO of a major American manufacturer.

A month later, the Obama administration flouted the basic principles of bankruptcy law in order to shaft Chrysler’s creditors and deliver a majority stake in the company to the president’s union allies. George Mason law professor Todd Zywicki summed it up:

Secured creditors—entitled to first priority payment under the “absolute priority rule”—have been browbeaten by an American president into accepting only 30 cents on the dollar of their claims. Meanwhile, the United Auto

Workers union, holding junior creditor claims, will get about 50 cents on the dollar.<sup>8</sup>

Long before Obama's newly minted chief of staff Rahm Emanuel mused that "you never want a serious crisis to go to waste," Professor Wildavsky had recognized that domestic emergencies fuel presidential power: "Great crises, such as Roosevelt's hundred days in the midst of the Depression," could make the "two presidencies" converge, allowing the chief executive to shape policy on the home front almost as thoroughly as he dominates affairs abroad. Amid the economic collapse that began in late 2008, crisis government once again gave birth to new presidential powers. America's president had effectively become commander in chief of America's auto industry—and much else besides.

### **Energy in the Executive State**

In other areas, no crisis was necessary. President Obama simply took advantage of broad authorities Congress had long ago ceded to the executive branch.

In his 1973 book *The Imperial Presidency*, which focused mainly on the president's discretion abroad, Arthur Schlesinger Jr. observed that "congressional abdication" had contributed at least as much to the growth of executive power as had "presidential usurpation." The same holds true in the domestic sphere.

In James Madison's vision, the separation of powers would be largely self-executing: "The great security against a gradual concentration of the several powers in the same department," Madison wrote in *Federalist* 51, "consists in giving to those who administer each department the necessary constitutional means and personal motives to resist the encroachments of the others." The ambition of presidents would be met and checked by the ambition of legislators. It was that incentive structure, not the

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<sup>8</sup> Todd Zywicki, "Chrysler and the Rule of Law," *Wall Street Journal*, May 13, 2009. See also Zywicki, "The Auto Bailout and the Rule of Law," *National Affairs* 7 (Spring 2011): 66.



“parchment barrier” of constitutional formalities, that was supposed to prevent any one branch from commandeering powers belonging to the others.

Things haven’t worked out as planned. Congress is an abstraction; representatives and senators are not, and their most basic interest is in getting reelected. Instead of guarding Congress’s turf, legislators happily delegate broad lawmaking authority to the executive branch so they can get back to the business of constituent service.

And why shouldn’t they? They’re rarely punished at the polls for shirking their responsibility to make the laws of the land. The American voter has long played the sucker in a legislative shell game wherein Congress cedes its constitutional responsibilities to the executive, taking credit when policies work and demanding scalps when they don’t.

Though the Constitution vests “All legislative Powers” that it grants in Congress and emphasizes that the president is supposed to execute, not make, the laws, the post–New Deal administrative state leaves most actual lawmaking power in the hands of the executive branch. Theodore Lowi, perhaps our greatest living presidential scholar, explains:

From the Roosevelt period on . . . Congress turned over most of its power to the executive branch. It delegated these powers and didn’t make clear what the rule of law was for each of these important new programs and new agencies created in the 1930s. It delegated the actual policy making power to the president, then it would be sub-delegated to a new agency or existing agency.<sup>9</sup>

“This is a poor thing for a liberal state to do,” Lowi emphasizes; “the rule of law requires that the legislature make clear what policy ought to be.” When instead it passes broad, underspecified statutes, leaving it to the executive branch to determine the rules Americans will have to live under, Congress abdicates its central constitutional responsibility.

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<sup>9</sup> “Theodore Lowi on Barack Obama,” *Zocalo Public Square*, February 27, 2009, <http://zocalopublicsquare.org/thepublicsquare/2009/02/27/qa-theodore-lowi-on-barack-obama/politics/>

Modern legislative practice has “transformed the presidency itself,” Lowi maintains, concentrating the power to both *make* and *execute* the laws in the executive branch—and encouraging the public to look to the president, personally, for the delivery of all manner of goods and services.

The Progressive champions of the administrative state favored “rule by experts,” who would be insulated from political pressure. But the president’s power over the permanent bureaucracy has expanded greatly in recent decades. Activist presidents have increasingly asserted their will, “making the regulatory activity of the executive branch agencies more and more an extension of the President’s own policy and political agenda,” as Elena Kagan explained in her 2001 *Harvard Law Review* article, “Presidential Administration.” The then Harvard law professor (now Supreme Court justice) drew on her experience as a Clinton administration policy adviser to show how, after the Democrats lost control of Congress in 1994, President Clinton used his administrative authority to push “a distinctly activist and pro-regulatory agenda.”<sup>10</sup>

In the 1980s, bright young attorneys in the Reagan Justice Department had worked doggedly to increase presidential control of the administrative state, believing that the “emerging Republican majority” in the Electoral College would allow future presidents to rein in overzealous regulators. But there was little reason, Kagan argued, to think that “presidential supervision of administration inherently cuts in a deregulatory direction.”

The Obama administration’s regulatory policies have made that abundantly clear. In May 2010, the *New York Times* hailed a “new aggressiveness” from Obama’s regulatory “cops on the beat,” quoting the president’s budget director to the effect that “smart regulation can make people’s lives better off.” Among the new initiatives is a Food and Drug Administration plan to lower the level of sodium allowed in American food, the better to “adjust the American palate to a less salty diet.” We’re going to change “embedded tastes in a whole generation of people,” an agency source bragged to the *Los Angeles Times*.

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<sup>10</sup> Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114 (2001).

The administrative state encroaches into fairly intimate areas of our lives, and we shouldn't be surprised when the president's plans for that sprawling network of bureaucracies periodically spur passionate opposition.

In January this year, Kathleen Sebelius, Obama's secretary of health and human services, announced a final rule mandating that insurers cover birth control for women. The rule included an exception for dissenting churches, but the exception did not apply to religious hospitals, universities, and charities, whose health insurance plans would be required to offer contraceptives, including the "morning-after" pill, to members at no cost.

The U.S. Conference of Catholic Bishops denounced the mandate as "literally unconscionable." In June, Catholics throughout the country got a message from the bishops inserted into their church bulletins: "When fundamental human goods, such as the right of conscience, are at stake, we may need to witness to the truth by resisting the law and incurring its penalties."

Most of the ensuing controversy focused on the question of religious liberty: was the birth control mandate a legitimately neutral law or a violation of the objectors' First Amendment right to "free exercise" of their religion? Throughout the debate, very few objected on principle to the executive branch's sweeping authority to determine what Americans' health insurance plans do and do not cover.

Even the concessions offered by the administration a month later assumed a staggering degree of presidential power. An Obama official told the *Washington Post* that "insurance companies will be required to reach out to directly offer contraceptive care free of charge" without raising premiums. Make it so! The president has commanded.

This won't be the last culture-war battle the administrative state provokes, given the vast discretion modern lawmaking practice leaves in the hands of the president and his appointees. As Philip Klein pointed out in the June 2010 *American Spectator*, the president's health reform legislation contains "more than 700 instances in which the

[HHS] Secretary is instructed that she ‘shall’ do something,” more than 200 “in which she ‘may’ take some form of regulatory action if she chooses,” and 139 occasions where the law identifies decisions that the “Secretary determines.”

By the end of that year, the *New York Times* reported, some 200 health regulators had descended on Bethesda, Maryland, taking over “three floors of a suburban office building, paying almost double the market rate for the space in their rush to get started” drafting the hundreds of rules required to implement “Obamacare.” Thanks to statutes like the 900-page Affordable Care Act and the 2,300-page Dodd-Frank financial regulation act, the *Times* explained, regulators were issuing “hundreds of sweeping financial and health care regulations that will ultimately affect most Americans,” making determinations like:

- How much should a credit-card company be able to charge a shopkeeper for administrative fees when you swipe your card for a purchase?
- Which types of financial companies are so “systemically important” to the overall economy that they should be subject to greater federal oversight?
- What services must be covered by all insurers as part of the “essential health benefits” package? And at what point would an increase in an insurer’s premiums be considered so “unreasonable” that state and federal regulators could step in?

These sorts of decisions, generating government commands that citizens are expected to follow at pain of fine or imprisonment, are what we used to call “laws.” But for decades now, most of the “laws” in this country have been generated by unelected officials of administrative agencies, who use broad authority delegated by Congress to add more than 75,000 new pages to the *Federal Register* every year.

Broad delegation of legislative authority to the executive branch—and the massive growth of the regulatory state that has accompanied it—leaves a lot of play in the joints. Congress has given the president ample opportunity to stretch his authority as he shapes the laws of the land. Barack Obama didn’t create the administrative state, but he’s taken full advantage of the opportunities it provides.

## Royal Dispensations

The structure of the modern administrative state allows executive branch officials to “make up the rules as they go along,” the University of Chicago’s Richard Epstein notes. And Americans often object when those rules directly “force us to do what we don’t want to do.” We’re less vigilant about what Epstein calls “the flip side of this problem: the risks that come with the power to create exceptions and to grant dispensations.”<sup>11</sup>

Modern megastatutes typically grant the executive the power to waive many of the strictures regulators impose. The president can use that power to reward political allies, selectively lifting burdens on constituencies that support him. He can also use it to, in effect, legislate by decree, making the waivers conditional on compliance with new sets of rules. “Government by waiver,” Epstein warns, is “among the most serious challenges to the rule of law in our time.”

Consider a relatively benign example: President Obama’s June 15, 2012, “Homeland Security Directive” called a halt to deportation proceedings for certain unauthorized immigrants who came to the United States as minors. The eligibility criteria outlined in the order roughly track the requirements of the “DREAM” Act (Development, Relief, and Education for Alien Minors), which has never quite been able to make it through Congress. A mere technicality, the president insisted; it’s “the right thing to do for the American people.”

As it happens, the president’s “royal dispensation” for young immigrants is hardly the most terrifying instance of administration unilateralism; as a policy matter, it’s a fairly humane and judicious use of prosecutorial resources. But given the context—a dramatic Rose Garden presser conducted with an eye to the impending election—it looks a lot like the president decided to unilaterally implement large parts of a bill that couldn’t be passed, ignoring his constitutional responsibility to “take Care that the Laws be faithfully executed.”

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<sup>11</sup> Richard A. Epstein, “Government by Waiver,” *National Affairs* (Spring 2001).

Worse by far was the series of conditional waivers the administration granted to 10 states, freeing them from certain requirements of George W. Bush's No Child Left Behind Act. The administration granted relief from NCLB's burdens only if states adopted "rigorous and comprehensive plan[s]" based on the "Common Core" standards favored by certain education reformers. The power to impose those standards is nowhere to be found in the law, but the conditional waivers allow the federal government to extend control even while it's lifting burdens.

Many of the major provisions of the Affordable Care Act are slated to come on line in 2014, Professor Epstein notes, and since the bill was "written with only the vaguest legislative language, it will be up to HHS bureaucrats to interpret these mandates and turn them into regulations. Inevitably, those rules will come with some waiver authority—and with it great potential for the differential application of generally applicable laws. The danger posed to the basic principles of the rule of law, therefore, is immense."

As a number of critics noted last year, the president's union allies seemed suspiciously overrepresented in the early rounds of Affordable Care Act waivers, which loosened administrative cost limits in employer health insurance plans. "What about employers who do not have the resources to navigate the waiver process?" Epstein asks. "What about those lacking the political connections to make their concerns heard in Washington?" They'll probably have to go to the back of the queue. Human nature being what it is, presidents tend to use their discretion to reward friends and punish enemies.

"We Can't Wait" was the rallying cry of President Obama's 2011 fall offensive, in which he issued a series of executive orders easing repayment of student loans ("at no cost to taxpayers," miraculously), fighting prescription drug shortages, and making it easier for homeowners to refinance their mortgages. (Around the same time, the president issued an executive order that was supposed to "cut waste and promote more efficient spending across the federal government"; so there's that.)

Obama announced the new offensive in Las Vegas, speaking at the modest but recently refurbished Las Vegas home of Jose and Lissette Bonilla. Taking a page from celebrity carpenter Ty Pennington, host of the ABC reality show *Extreme Home Makeover*, Obama basked in the Bonillas' gratitude. A \$50,000 grant from federal stimulus funds meant that the family now had bedrooms for their three children. "Mr. President, thanks to you we have a wonderful home," Mrs. Bonilla beamed.

After his visit with the Bonillas, Obama stepped outside to talk to the press: "We can't wait for an increasingly dysfunctional Congress to do its job," he declared. "I've told my administration to keep looking every single day for actions we can take without Congress."

"We're getting close to the start of the presidential campaign," CBS's Steve Kroft said to the president last December in a *60 Minutes* interview: "Do you have any hope that anything is gonna get accomplished between now and the next election?" "What I'm not gonna do is wait for Congress," Obama answered. "Wherever we have an opportunity and I have the executive authority to go ahead and get some things done, we're just gonna go ahead and do 'em."

### **I Am the Law!**

By continually ceding its legislative authority, Congress has given the president plenty of opportunities to go ahead and "get things done." But working your will unilaterally is habit-forming. And throughout his administration, President Obama has repeatedly felt emboldened to act in areas where he has no legal authority whatsoever.

Past presidents have used a number of dubious means to expand their power, Judge Richard Posner observed in July 2010: President Bush made expansive constitutional claims in the War on Terror. President Clinton aggressively interpreted his statutory authority over the regulatory state. A "third type of questionable exercise of presidential power," Posner wrote, "consists of publicly demanding that a private firm or industry or other entity conform to the President's desire, without pretending that

the President has the legal authority to require such conformity.”<sup>12</sup> A classic example was the one *Washington Post* columnist Dana Milbank was so fond of: the Kennedy administration’s mob-style tactics against the steel industry in 1962, using the Federal Bureau of Investigation, Internal Revenue Service, and the bully pulpit to fight a price increase.

“President Obama has used this device of extra-legal presidential intimidation more frequently, probably, than any President,” Posner charged, citing the administration’s response to the 2010 environmental disaster at BP’s Deepwater Horizon platform in the Gulf of Mexico.

As oil continued to spill into the Gulf that summer, Obama came under increasing pressure to act. On June 8, he told ABC’s *Good Morning America* that he was in the process of figuring out “whose ass to kick.” Given BP CEO Tony Hayward’s public conduct, the president said, he “wouldn’t be working for me” anymore by that point.

Rather than giving Hayward the Rick Wagoner treatment, the president muscled BP into setting up a \$20 billion victims’ compensation fund controlled by the federal government. BP already faced enormous potential liabilities under American tort law for the damage the spill was causing. But before any court had ruled, “extra-legal presidential intimidation” forced the company to capitulate to the administration’s demands.

Obama “did not pretend to have any legal authority to order this,” Judge Posner noted, “but BP quickly complied—as it did with the President’s insistence that it cut its dividend in order to be sure of having enough money to pay all the claims that might be made against it.” The practice, Posner said, smacks of “a kind of ‘people’s democracy’ regime, in which government stirs up public anger to force businesses to comply with extra-legal government demands.”

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<sup>12</sup> Richard Posner, “Abuse of Presidential Power?” The Becker-Posner Blog, July 18, 2010 <http://www.becker-posner-blog.com/2010/07/abuse-of-presidential-power-posner.html>



Theoretically, it ought to be easier to strong-arm a foreign oil company than to overpower a coordinate branch of the federal government. But on several occasions, President Obama has made defying Congress look easy.

On April 15, 2011, in a signing statement accompanying a continuing appropriations bill, Obama threatened to interpret his way around clear statutory language that eliminated funding for the presidential advisers informally known as the “health czar,” the “global warming czar,” the “manufacturing czar,” and the “urban affairs czar.” Those positions had all either fallen vacant or been eliminated by executive branch restructuring, but the president reserved the right to recreate them, Congress’s power of the purse notwithstanding. He objected:

Legislative efforts that significantly impede the President’s ability to . . . obtain the views of the appropriate senior advisers violate the separation of powers by undermining the President’s ability to exercise his constitutional responsibilities and take care that the laws be faithfully executed. Therefore, the executive branch will construe section 2262 not to abrogate these Presidential prerogatives.

This was as brazen a challenge to the separation of powers as any of George W. Bush’s infamous signing statements—and just as dubious constitutionally. Article II, Section 2, of the Constitution entitles the president to solicit the opinions of “the principal Officer in each of the executive Departments.” But since Congress has the power to create or abolish those departments, it surely has the lesser power to defund the president’s czars.

At a Colorado campaign stop in May 2008, candidate Obama complained that “what George Bush has been trying to do as part of his effort to accumulate more power in the presidency, is he’s been saying ‘Well, I can basically change what Congress passed by attaching a letter saying, I don’t agree with this part.’” But “that’s not part of his power. . . . I taught the Constitution for ten years. I believe in the Constitution. . . . We’re not going to use signing statements as a way of doing an end run around Congress,” Obama promised.

In office, Obama's position evolved yet again. In this case, Congress had said, "We've decided to abolish these positions." And the president responded, in essence, "You and what army?"

In January 2012, President Obama used a different legal device to make an end run around Congress. Invoking the Constitution's recess appointments clause, he installed four officials whose nominations the Senate had declined to bring to a vote.

Article II, Section 2, of the Constitution gives the president the power "to fill up all vacancies that may happen during the recess of the Senate" by granting temporary commissions. That clause serves as an "auxiliary method of appointment," Hamilton explained in *Federalist* 67, and was adopted because "it would have been improper to oblige this body to be continually in session." It was designed for a horse-and-buggy age, when we had part-time Congresses and intersession recesses lasting up to nine months—not to allow the president to ram through top executive appointments whenever the gavel drops for a momentary recess.

Obama isn't the first president to abuse the clause to appoint nominees that the Senate wouldn't confirm. His recent predecessors had collectively made hundreds of recess appointments during brief periods when the Senate wasn't in session. In 2006, the then Senate majority leader Harry Reid adopted a practice of "pro forma" sessions, in which a lone senator would gavel in, to stymie George W. Bush's abuse of the process.

But this year, Obama became the first president to invoke the power when the Senate was—according to its own rules—*actually in session*. "The Senate is functionally in recess," Obama's White House counsel insisted; the pro forma sessions invented by Senator Reid are "a procedural trick." It was a "justifiable power grab," the *Washington Post* editorial page insisted, but it had been a bridge too far even for George W. Bush, who had contemplated—and rejected—the move in 2008.

## Imperial Schizophrenia on the Right

“Time to cut back on the salty snacks!” “Free birth control for all!” “No you *won’t* defund my czars!” “*I’ll* decide when the Senate’s in session.” “Wagoner—*you’re fired!*”

All in all, the Obama years have provided a pretty imposing parade of imperial horrors. You can understand why so many on the right seem genuinely disturbed by the president’s abuses of power on the home front.

And yet some conservatives’ complaints are just a little hard to take. John Yoo, who was the key legal architect of the Terror Presidency during his tenure in Bush’s Office of Legal Counsel, has lately been heard to whinge about Obama’s “unprecedented stretching of the Constitution and the rule of law.” In *National Review Online* this summer, Yoo charged that Obama “is laying claim to presidential power that goes even beyond that claimed by the Bush administration.” How? By deciding to temporarily halt deportations of certain immigrants whose parents brought them to the United States as children (the “DREAM Act directive” discussed above). The Framers, Yoo reminds us, never intended the president to have the power to “simply choose, as the British King had, to cancel legislation simply because he disagreed with it.”

Yoo further accuses the Obama administration of planning to wage “war on the First Amendment rights of its political opponents” via executive order (the draft executive order in question, which would have forced federal contractors to disclose independent expenditures on federal elections, was never implemented). And he charges that Obama’s recess appointments are yet another “abuse” of executive authority: What’s next? Yoo asks. “Is the president going to have the authority to decide if the Supreme Court has deliberated too little on a case?”

David Addington, Yoo’s erstwhile partner in crime during the Bush years, raised the anti-imperial flag in 2011 about an Obama-backed bill that would reduce the number of executive branch posts requiring Senate confirmation. In a brief for the Heritage Foundation, Addington declared that the Constitution’s Framers “did not give the

president the kingly power to appoint the senior officers of the government by himself.” “It’s flabbergasting and, to be honest, a little chilling,” Addington commented in January about Obama’s abuse of the recess appointments clause.

“Flabbergasting,” sure—but “chilling” is a little rich coming from Addington, who as legal counsel to Vice President Cheney in 2004 mused that “we’re one bomb away from getting rid of that obnoxious [FISA] court” restricting the president’s surveillance powers.

During their tenure as leaders of the Bush terror team, both Yoo and Addington pushed hard for an extraordinary array of expanded presidential powers. Yoo argued in a key post-9/11 memo for the Office of Legal Counsel that decisions on whether and how to wage war in defense of the realm “are for the President alone to make.” If the president suspects you’re a terrorist, Yoo and Addington insisted, he doesn’t need a warrant to tap your phone, and, right here in America, he can send soldiers to search your home without offending the Fourth Amendment. He can ignore the federal statute prohibiting torture, and he can seize you on American soil and lock you up for the duration of the War on Terror (perhaps forever) without charges.

Throughout the Bush years, Yoo and Addington were cheered along by conservative legal luminaries like David Rivkin and Lee Casey, who regularly take to the *Wall Street Journal* op-ed page either to make the case for broad executive power over national security or to denounce Barack Obama as a potential tyrant for expanding federal power at home.

Obamacare’s individual mandate, Rivkin and Casey warned in 2009, “would expand the federal government’s authority over individual Americans to an unprecedented degree”—a view that Addington and Yoo share. But given their views on the authority the president enjoys whenever he invokes “national security,” it all adds up to a strikingly schizophrenic view of federal power.

I suppose it’s *possible* to imagine that the Framers crafted the American presidency to serve as the Supreme Warlord of the Earth while abroad and to remain a

constitutionally limited “chief magistrate” at home. But if that was the Framers’ intention, I think we’d need to conclude that they weren’t very bright. The *National Review*’s Kevin Williamson put it succinctly after the Supreme Court upheld Obamacare’s individual mandate last June: “A government big enough to whack its citizens with drones is big enough to make them buy health insurance.”

Besides, if you’re worried about the president accumulating “kingly powers,” then the sorts of war powers that Addington, Yoo, and their fellow travelers endorse ought to give you more to worry about than the possibility that the president might stretch his recess appointments power, grant partial amnesty to young, law-abiding immigrants, or gradually leach the salt from your Cheetos.

Wildavsky’s original thesis in “The Two Presidencies” was that the White House would generally be more successful at “controlling the nation’s defense and foreign policies” than in “dominating its domestic policies.” That’s not *wrong*, exactly—except inasmuch as it seems to imply that the president’s powers over our “defense and foreign policies” apply outside our borders, never disturbing our domestic tranquility.

That was never the case, and in the era of “Homeland Security” it’s become even more obvious that the Imperial Presidency’s weapons won’t stay pointed outward.

### **Our National Surveillance State**

In 2006, after public revelation of the Bush administration’s “Terrorist Surveillance Program,” law professors Jack Balkin and Sandy Levinson made a grim prediction: “the gradual transformation of the United States into a National Surveillance State”:

This National Surveillance State is characterized by a significant increase in government investments in technology and government bureaucracies devoted to promoting domestic security and (as its name implies) gathering

intelligence and surveillance using all of the devices that the digital revolution allows.<sup>13</sup>

New technologies and new powers concentrated in the National Surveillance State would threaten to erode civil liberties protections and the separation of powers, they warned, and neither political party would be likely to roll back their use. “Future Presidents may find that they enjoy the discretion and lack of accountability created by Bush’s unilateral gambits,” Balkin and Levinson wrote. “We suspect that the next Democratic President will likely retain significant aspects of what the Bush Administration has done.”

That’s precisely what’s happened under Barack Obama. In fact, Obama started “growing in office” even before he’d won the job. In the summer of 2008, as the election loomed, Senator Obama broke his campaign promise to filibuster “any bill that includes retroactive immunity for telecommunications companies” that had broken the law by assisting President Bush’s warrantless wiretapping efforts. By voting for the FISA Amendments Act of 2008, Senator Obama helped legalize a dragnet surveillance program he’d long claimed to oppose.

As my colleague Julian Sanchez explains, the FISA Amendments Act allows bulk collection of Americans’ electronic communications at home:

Under the FAA, a court approves general procedures for surveillance “targeting” a foreign group. But the court does not approve or (necessarily) review any intelligence agency’s own discretionary determination about which specific people’s e-mail addresses, phone lines, or online accounts should be flagged for interception in order to gather information about that foreign group. The government’s past arguments indicate that it believes it may spy on the accounts or phones of individual American citizens located in the United States under an authorization to gather information about a foreign “target.”<sup>14</sup>

Under the government’s interpretation, Sanchez suggests, “surveillance that ‘targets’ Al Qaeda is potentially surveillance of anyone talking *about* Al Qaeda, not necessarily

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<sup>13</sup> Jack M. Balkin and Sanford Levinson, “The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State,” *Fordham Law Review* 75 (2006).

<sup>14</sup> Julian Sanchez, “What the Manual by DOJ’s Top Intelligence Lawyer Says About the FISA Amendments Act,” *Cato at Liberty*, August 21, 2012, <http://www.cato-at-liberty.org/what-the-manual-by-doj-s-top-intelligence-lawyer-says-about-the-fisa-amendments-act/>.

to Al Qaeda.” This comes close to the 21st-century version of the “general warrant” the Framers’ abhorred. Not to worry though, after voting for the FAA, candidate Obama gave his “firm pledge that as president, I will carefully monitor the program.”

It’s not clear that the president has lived up to that pledge, but then again, it’s hard to check. This summer, Sen. Ron Wyden (D-OR) asked the National Security Agency for a rough estimate of how many Americans have had their communications monitored by the agency since the FISA Amendments Act passed. The NSA’s response to Wyden took some chutzpah: a “review of the sort suggested would itself violate the privacy of U.S. Persons.”

As a candidate for the Senate in 2003, Barack Obama pronounced the USA PATRIOT Act “shoddy and dangerous,” and said he’d vote to repeal it. “Shoddy” is debatable; “dangerous,” less so. PATRIOT’s Section 215 orders allow the FBI to secure secret court orders compelling third parties to produce “any tangible thing,” including financial, medical, and communications records, believed to be relevant to a terrorism investigation. National security letters allow the government to demand sensitive personal data like phone and bank records without the inconvenience of going before a judge.

But whatever misgivings Obama might once have had—or feigned—about the powers the PATRIOT Act granted, his administration has used them eagerly. Justice Department reports to Congress show record-high use of national security letters in the Obama era: more than 14,000 Americans had their records searched in 2009 using this extraordinary legal device.

By May 2011, just before key provisions of the act were scheduled to sunset, the Obama administration fought eagerly for PATRIOT’s reauthorization. In testimony before the Senate Judiciary Committee, Attorney General Eric Holder insisted, “Now, more than ever, we need access to the crucial authorities in the PATRIOT Act.”

Reauthorization came down to the wire, and the president was on a weeklong trip to Europe when it passed. An assistant awoke Obama at 5:45 a.m. Central European

Time, so he could authorize an aide back in Washington to prepare for him to sign it remotely, using the innovative and likely unconstitutional device of the presidential autopen.<sup>15</sup>

The administration appears to have a broad interpretation of its authorities under the PATRIOT Act, one that it prefers to shield from public scrutiny. In its 2011 year-end review of executive branch secrecy, the civil liberties and privacy watchdog group the Electronic Frontier Foundation noted that Obama's Justice Department had refused to release its interpretation of Section 215. There's a gap between "what the public thinks the law says and what the American government secretly thinks the law says," amounting to a "Secret PATRIOT Act," Senator Wyden has warned.

When then White House press secretary Robert Gibbs told reporters in April 2010 that "this is the most transparent administration in the history of our country," *Politico* reported that "laughter broke out in the briefing room." And if you have a dark sense of humor, the administration's record provides no end of mordant chuckles. Here's an actual headline from the *Wall Street Journal* in September 2011: "Anonymous US Officials Push Open Government."

But initially the administration seemed serious about reining in government abuse of secrecy. The day after his inauguration, President Obama announced "a new era of openness" for the federal government. "For a long time now there's been too much secrecy in this city," he said. Part of that commitment to openness included limiting the use of the state secrets privilege, which the Bush administration had invoked to bar the courthouse door to litigants who claimed they'd been harmed by extraordinary rendition, warrantless wiretapping, and other War on Terror tactics. In September 2009, Attorney General Holder announced a new policy designed to "strengthen public confidence" by limiting invocations of the privilege to extraordinary circumstances involving "significant harm to national defense or foreign relations."

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<sup>15</sup> Terry L. Turnipseed, "The President and the Autopen: It Is Unconstitutional for Someone or Something to Sign a Bill Outside of the President's Presence," August 11, 2011, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1908354](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1908354).



The new policy hasn't amounted to much. The administration invoked the state secrets privilege in litigation over the Anwar al-Awlaki assassination and refuses to divulge the Justice Department memorandum justifying the targeted killing of American citizens. And in several domestic wiretapping cases, the self-styled "most transparent administration in history" has fought to vindicate the principle that even if the government spies on Americans illegally, it can prevent them from seeking redress, because the very existence of the program is a state secret.<sup>16</sup>

In their 2011 book *Top Secret America: The Rise of the New American Security State*, *Washington Post* reporters Dana Priest and William M. Arkin chronicle the inexorable growth of a mammoth, post-9/11 "intelligence-industrial complex." Over the last decade, the executive branch has erected vast pyramids in the name of homeland security, with some 1,200 agencies filling up nearly three Pentagons' worth of new office space.<sup>17</sup>

In the needle-in-a-haystack search for terrorists, we've spent untold billions building a bigger haystack. The system vomits up some "50,000 intelligence reports each year—a volume so large that many are routinely ignored." Details about the December 2009 "underwear bomber" vanished amid that morass.

At the same time, Priest and Arkin reported, the FBI is building a massive database on thousands of Americans whose only offense is "acting suspiciously" around "a town sheriff, a traffic cop or even a neighbor." Those reports generate "a never-ending stream of information that is vague, alarmist and often useless." A top Los Angeles counterterrorism official compares it to "a garage you keep throwing junk into until you can't park your car" anymore.

Since domestic terrorist activity is rare—rarer than random mass shootings over the last 10 years—many U.S. counterterrorism agents are finding "there is just not enough

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<sup>16</sup> See, e.g., *Mohamed v. Jeppesen Dataplan*, 614 F.3d 1070 (9th Cir. 2010); *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190 (TOA).

<sup>17</sup> Dana Priest and William M. Arkin, *Top Secret America: The Rise of the New American Security State* (New York: Little, Brown & Co., 2011).

terrorism-related work to do.” So they’re using spy technology to fight ordinary crime—and have even been caught monitoring Tea Party meetings and anti-war rallies.

In the mid-1970s, the investigations of a select committee chaired by Sen. Frank Church (D-ID) revealed the frightening extent to which the Cold War-era national security state had been turned inward, threatening liberty on the home front. For three decades, the National Security Agency reviewed virtually all telegrams to and from the United States, while Army intelligence operatives maintained a domestic watchlist of over 100,000 Americans, including such dangerous security threats as folk singers Arlo Guthrie and Joan Baez.

The Church Committee’s revelations led to reinvigorated checks on the president’s national security powers. But three decades later, in the crisis atmosphere of 9/11, the federal government abandoned most of those checks, as the “War on Terror” blurred whatever line that once supposedly separated the home front from the wartime presidency unbound.

In J. Edgar Hoover’s day, domestic spying was a labor-intensive, low-tech affair, depending on index cards and on-site wiretaps. Now, with modern processing power and data-mining technology—and a National Security Agency that sweeps up and stores some 1.7 billion e-mails and phone calls daily—the possibilities for surveillance are staggering—as is the potential for abuse.

### **Slouching Toward Dystopia**

In a statement marking the 11th anniversary of September 11 this year, President Obama struck an upbeat note: “The legacy of 9/11,” he said, is “the ability to say with confidence that no adversary and no act of terrorism can change who we are.”

Who is he kidding? For us ordinary schlubs without our own planes, a visit to any American airport makes it abundantly clear that America has changed radically. The War on Terror isn’t just something that happens “over there.”

After the failed “underwear bomber” attack of 2009, the Obama administration added full-body scanners—millimeter-wave and backscatter x-ray devices (“pornoscanners,” in the vernacular)—to the post-9/11 indignity of shuffling shoeless through the security line. Under President Obama’s watch, and with his approval, the federal government began to offer American travelers an uncomfortable choice: government agents will either grope us or look at us naked.

It’s “unclear,” the Government Accountability Office reports, whether Transportation Security Administration body scanners would have caught the Christmas crotch-bomber had they been in place in 2009. But the safety we enjoy clearly owes very little to TSA’s competence and a great deal to our adversaries’ ineptitude. Terrorism analyst John Mueller notes “the rather impressive inability of the terrorists [in post-9/11 cases] to create and set off a bomb.” Indeed, “the only method by which Islamic terrorists have managed to kill anyone at all in the United States since 9/11 has been through the firing of guns—in the Little Rock and Fort Hood cases.” If you’re having trouble with pipe bombs, weapons of mass destruction are almost certainly beyond your competence. Though, as Mueller recounts, erstwhile “enemy combatant” Jose Padilla once planned a domestic nuclear attack. “His idea about isotope separation was to put uranium into a pail and then to make himself into a human centrifuge by swinging the pail around in great arcs.”<sup>18</sup>

The wannabe jihadis we’ve rounded up since 9/11 don’t appear to be the sharpest scimitars in the shed. Even so, President Obama’s TSA isn’t taking any chances. It’s taking the security theater show on the road, with roving Visible Intermodal Prevention and Response (VIPR or “Viper”) teams—an acronym that’s simultaneously witless, menacing—and appropriate.

If you can’t make it to the airport security line, VIPR squads can bring the security line to you. On cruise ships, at NASCAR races, on buses and at train stations, these TSA advance teams conducted over 9,300 random searches in 2011. In February that year, Amtrak passengers arriving in Savannah, Georgia, stepped off into a VIPR checkpoint.

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<sup>18</sup> John Mueller and Mark G. Stewart, “The Terrorism Delusion,” *International Security* 37 (Summer 2012): 81–110.

Though the travelers had already disembarked the train, agents made women lift their shirts so they could check for bra explosives. In January 2012, the *Los Angeles Times* described another VIPR search at the Charlotte, North Carolina, Amtrak station, in which “three federal air marshals in bulletproof vests and two officers trained to spot suspicious behavior watched closely as Seiko, a German shepherd, nosed [a fiftysomething lawyer’s] trousers for chemical traces of a bomb.”

Meanwhile, back at the airports, the TSA has begun exploring a new, high-tech means of smoothing the screening process: holographic customer service reps. Newark, LaGuardia, and JFK Airports have already installed “Ava” the avatar, a vivacious brunette, whose life-size image is projected onto Plexiglas screens outside the security lines. “I can say what you want, dress the way you want, and be just about anything you want me to be,” she flirts in the Port Authority’s promotional video. Like a sexier “Siri,” Ava can answer your questions about checkpoint rules and chirpily advise you on just how to assume the position.

In Gary Shteyngart’s near-future comic dystopia *Super Sad True Love Story* (2010), America’s ruling “Bipartisan Party” runs the “American Restoration Authority,” and, as one character explains, “the ARA runs the infrastructure and the National Guard, and the National Guard runs you.” An early scene has Shteyngart’s Woody-Allenish protagonist navigating the security procedures upon his return from a foreign trip:

An electronic version of John Cougar Mellencamp’s “Pink Houses” (“Ain’t that America, somethin’ to see, baby!”) twanged in my ear, and then a pixelated version of the plucky otter shuffled onto my [video] screen, carrying on his back the letters ARA, which dissolved into the shimmering legend: American Restoration Authority. The otter stood up on his hind legs, and made a show of dusting himself off. “Hi there, pa’dner!” he said, his electronic voice dripping with adorable carnivalesque. “My name is Jeffrey Otter and I bet we’re going to be friends!” Feelings of loss and aloneness overwhelmed me. “Hi,” I said. “Hi, Jeffrey.”

Later, outside JFK Airport, a National Guard tank pulls up in front of the narrator. A soldier in T-shirt and shorts climbs out of the hatch and places a highway sign next to the tank, “black letters against an orange background,” reading:

IT IS FORBIDDEN TO ACKNOWLEDGE THE EXISTENCE OF THIS VEHICLE ("THE OBJECT") UNTIL YOU ARE .5 MILES FROM THE SECURITY PERIMETER OF JOHN F. KENNEDY INTERNATIONAL AIRPORT. BY READING THIS SIGN YOU HAVE DENIED EXISTENCE OF THE OBJECT AND IMPLIED CONSENT.

—AMERICAN RESTORATION AUTHORITY  
SECURITY DIRECTIVE IX-2.11  
"TOGETHER WE'LL SURPRISE THE WORLD!"

That hits uncomfortably close to home. Every so often, when I'm walking through Washington, D.C.'s cavernous Metro system, I tear my eyes away from my twinkly smartphone, look around, and realize that if I squint just a bit, I could convince myself I'm living in a science-fiction dystopia.

It's not just the futuristic architecture. Metro's giant billboards periodically display defense-contractor ads for new weapons systems, like Northrop Grumman Global Hawks and X-47 Unmanned Combat Aerial Vehicles or Lockheed's Littoral Combat Ship—"the shape of littoral dominance has a familiar look." (It does?) Department of Homeland Security Secretary Janet Napolitano's gruff voice sporadically booms out from the loudspeaker, ordering you to say something if you see something.

Hearing her voice everywhere is "a scary thought" even to the secretary herself, Napolitano admitted in January; but that hasn't stopped DHS from expanding the campaign from public transportation stations to sports arenas and Walmart stores nationwide.

Indeed, in the middle of a fiscal crisis, Congress and President Obama have been busily subsidizing dystopia. The Obama administration has continued the Bush administration policy of using Homeland Security grants to fund the proliferation of security cameras, and military ordnance for local police departments.

Since 9/11, DHS grants have made a running start at turning Main Street America into a London-style panopticon: DHS has purchased anti-terror cameras for sleepy hamlets like Liberty, Kansas (pop. 95), and Dillingham, Alaska, which is too small for a streetlight, but big enough for 80 DHS-funded surveillance cams. And as the

*Huffington Post*'s Radley Balko notes, DHS handouts also further a burgeoning culture of police paramilitarization, funding armored personnel carriers for such "unlikely terrorist targets" as the towns of Adrian, Michigan, and Germantown, Tennessee.

In a bizarre incident last September, members of a Houston-area sheriff's department brought some of their coolest gear out to a defense contractor's training facility for a drone demonstration-slash-photo op. The \$300,000 Shadowhawk Unmanned Aerial Vehicle they were looking to buy with DHS grant money lost control and crashed into the SWAT team's Bearcat armored personnel carrier (also purchased with DHS boodle).

They bought a drone anyway. "I absolutely believe it will become a critical component on all SWAT callouts and narcotics raids and emergency management operations," Chief Deputy Randy McDaniel insisted.

McDaniel is hardly the only peace officer who feels that way. "Many law enforcement offices in the United States have purchased drones, including Montgomery, Texas, Seattle, Washington, and Gadsden, Alabama," the Electronic Frontier Foundation reports, and "the Governor of Virginia said in 2012 that he thought it would be 'great' to have drones flying over his state." A 2010 Department of Defense report emphasizes that the Pentagon and the Department of Homeland Security need "routine access to U.S. airspace" in order "to execute a wide range of missions including . . . surveillance and tracking operations."

Governments' war needs often spur technological innovation, and our decade-plus global War on Terror is no exception. Last July, the *New York Times* reported that more than 1.5 million Afghans have had biometric information, including "eye scans, fingerprints, and facial images," recorded and put on file by U.S. occupying forces, as have 2.2 million Iraqis. Using hand-held devices, soldiers and local security forces "can scan millions of digital files in seconds, even at remote checkpoints."

The fact that the Afghan security forces are mostly illiterate represented something of a hurdle, but Army ingenuity solved the problem. Now, armed illiterates can access

the database of occupation via “an easy-to-teach system of color-coded commands.” There’s still the worry that the system could eventually become a powerful tool for “ethnic, tribal, or political retaliation.” But that’s why you need “sound and responsible policies and oversight,” says Brig. Gen. Mark S. Martins, commander of something called the Rule of Law Field Force in Afghanistan.

We’ll need those “sound and responsible” policies ourselves, it seems. The *Wall Street Journal* reports that dozens of law enforcement agencies across the country are keenly interested in the commercial version of facial- and iris-recognition technology, which can be operated from an iPhone.

Meanwhile, California defense contractor AeroVironment is perfecting the “Nano Hummingbird,” a drone that weighs less than an AA battery and is capable of alighting on a window ledge to record video. The Gorgon Stare system, under development by the U.S. Air Force, features a drone-mounted, Argus-eyed camera array designed for full-spectrum surveillance. “Gorgon Stare will be looking at a whole city, so there will be no way for the adversary to know what we’re looking at, and we can see everything,” an Air Force officer bragged to the *Washington Post*. “The Department of Homeland Security is exploring the technology’s potential, an industry official said.” As the technologies of occupation migrate home, it’s worth wondering whether Americans too will be treated like the occupied.

Our “first civil libertarian president” has done much to facilitate our burgeoning National Surveillance State, and nothing at all to arrest its growth. Still, it would be a mistake to conclude that all of this reveals a conscious design on Barack Obama’s part to subvert American liberty—though if I could say otherwise in good conscience, I’d probably sell more books.

But bureaucratic mission creep is a saner explanation for the erosion of domestic liberty than D’Souzian fantasies about Obama’s hidden radicalism. The British Empire, it was said, developed in “a fit of absence of mind.” You could say much the same about the vast federal empire we’re building around counterterrorism. The status-happy feds and grant-hungry contractors described in Priest and Arkin’s book

weren't bent on subverting the American way of life—they were responding to the incentives they confronted.

But by itself, the public-choice explanation lets the American public off too easy. Those incentives were shaped by the demands Americans place on the presidency. By common consensus, we consider the president responsible for providing near-perfect safety from attacks by foreign terrorists—and we make him pay the price if and when he fails to deliver. Mueller notes that despite all the evidence to the contrary, “estimates of the likelihood of ‘another terrorist attack causing large numbers of Americans to be lost’ stood a few months after bin Laden’s death in 2011 at essentially the same level as in 2001, with more than 70 percent of respondents deeming such a dire event to be very or somewhat likely.”

Judging by the polling data, domestic drones unsettle us a bit. Otherwise, aside from a few cranks and complainers, the public doesn't seem overly perturbed by the dystopic tinge that's increasingly visible in American law and life. A 2010 *Washington Post*–*ABC News* poll showed that almost two-thirds of Americans supported TSA's adoption of full-body scanners. In 2012, Gallup reported that 54 percent of us think the agency's doing a “good”-to-“excellent” job.

“If only the czar knew” was supposedly a common lamentation uttered by 19th-century Russian peasants facing the business end of the czarist state. Then, as now, a better lament might be, “If only the czar cared.” And yet, if we don't care about lost liberties, why should he?



## CHAPTER 4

### Obama the Irrelevant?

The presidency is the most powerful office in the world, and yet presidents repeatedly complain that they feel powerless. “They geld us first, and then they expect us to win the Kentucky Derby,” Lyndon Johnson once griped to journalist David Brinkley.

President Obama had little to complain about on that score as the 2012 election approached. He’d amassed powers that past presidents could only dream of: Abroad, he commanded legions of robot assassins, ready to strike at his command. At home, as columnist Reihan Salam put it recently, “The president commands a vast array of bureaucracies devoted to shaping the way we work, travel, eat, exercise, and sleep, and the executive branch is increasingly seen as the guarantor of American prosperity.”

Yet lately, in the midst of a sputtering economic recovery, beleaguered on both sides by irate conservatives and frustrated progressives, President Obama is seemingly “God of All Things” . . . and master of none.

Obama reached his low point in 2011, a year before voters would decide on his bid for a second term. He was losing the kids, having suffered a precipitous drop in his support from younger voters. He was even losing the hipsters. “It is hard to remember now,” the *New York Observer*’s David Friedlander wrote in August 2011, but in NYC’s cooler ‘burgs back in 2008, it was

as if an old-timey party convention had met Burning Man, and it seemed like all the political clubs in town had been swept aside in favor of open-mic nights from a generation of supposedly apathetic and skeptical hipsters. They passed around Obama speeches like they were bootlegged concert tapes. They carried around dog-eared copies of *The Audacity of Hope*. . . . Even supposedly blasé Williamsburg sported a Shepherd Fairey two-toned Obama poster, with the word “Progress” stenciled in bold font below.

But by 2011, the *Observer* observed, “a new poster, featuring the president’s image superimposed over Frankenstein’s monster’s face, has been spotted around the neighborhood.”

In late November that year, as his reelection campaign was gearing up, Obama’s approval rating had dipped below Jimmy Carter’s at the equivalent point in Carter’s tenure. At 43 percent, Obama had “the worst job approval rating of any president at this stage of his term in modern political history,” *US News* reported.

In the previous election cycle, a McCain campaign ad titled “The One” mocked the messianic vibe surrounding the Obama candidacy. “It should be known,” the voice-over began, “that in 2008 the world will be blessed: they will call him ‘The One.’” The video cut to Obama on the stump: “a nation healed, a world repaired, we are the ones we’ve been waiting for!” with the narrator intoning, “He has anointed himself, ready to carry the burden of the world. . . .”

Three years later, Obama was finding out that “One” is the loneliest number. How did a candidate who’d flown so high—who’d inspired such fervor—fall so low in office?

Theodore Lowi explained it all to us in his 1986 book *The Personal President: Power Invested, Promise Unfulfilled*. Presidents get elected by promising miracles, Lowi noted, “but this is the catch: there are built-in barriers to presidents delivering on their promises, and the unlikely occasion of one doing so would only engender another round of new policies, with new responsibilities and new demands for help.”

When presidents inevitably fail to deliver, we curse them as false gods; and then, hardly missing a beat, we begin the search for a new savior. This is “a pathology,” Lowi charged, “because it escalates the rhetoric at home, ratcheting expectations upward notch by notch, and fuels adventurism abroad.”<sup>19</sup>

More than two decades later, in an interview conducted just after Obama’s inauguration, Lowi elaborated:

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<sup>19</sup> Theodore Lowi, *The Personal President: Power Invested, Promise Unfulfilled* (Ithaca, NY: Cornell University Press, 1985).

Presidents can never meet the expectations that Americans place on them. . . . All the power under the sun would not be enough to meet the expectations of the American people. . . . If you check out the rhetoric on the front pages of papers and magazines and TV, you'll see how personalized their references are: "Can he deliver? When will he deliver?" Let me repeat: All the powers in the world could not make it possible for him to do what's expected.

Obama is "going to go through the same downward spiral" other presidents have, Lowi predicted. "He'll fail, precisely because he's president. . . . I know this sounds like an awful contradiction or conundrum, but that's the presidency."<sup>20</sup>

You didn't have to be Theodore Lowi to see what was coming back in the days of hope and roses. In February 2009, a month after Obama took office, I wrote my first weekly column for the *Washington Examiner*: "Turns out That, No He Can't." Despite—or perhaps, because of—the messianic aura surrounding the inauguration, I argued, "the smart money says that by 2012, Obama will look a lot more like Jimmy Carter than FDR."

That's not to say that, like Carter, Obama will inevitably lose his bid for a second term. "If I were a betting man," Lowi said in his 2009 interview, "I'd put a fairly good bet down that Obama will be reelected. He's adorable." Still, Obama's "odds of getting out without disgrace are very low." Nor should it imply that a disgraced president loses the power he's amassed during his presidency. Alas, that's rarely the case.

In this chapter, I'll explore two paradoxes of presidential power. First, I'll trace how "the most powerful man in the world" inevitably comes to look like a helpless giant in the face of the public's unquenchable thirst for presidential salvation. Second, I'll show that, contrary to the venerable political science maxim that "presidential power is the power to persuade," the Bush-Obama years show that executive power can expand radically even when the president has lost all persuasive power. Though we regularly lose faith in the man, it seems we rarely lose faith in the office.

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<sup>20</sup> "Theodore Lowi on Barack Obama," *Zocalo Public Square*, February 27, 2009, <http://zocalopublicsquare.org/thepublicsquare/2009/02/27/qa-theodore-lowi-on-barack-obama/politics/>.

## Your Own Personal President

“The personality of the president—perhaps we should call it the personhood of the presidency,” Lowi wrote in 1986, “is a combination of Jesus Christ and the Statue of Liberty: Bring *me* your burdens. Bring *me* your hopes and fears. Bring *me* your search for salvation.” When our latest presidential savior fails to meet expectations, Americans tend to view that failure as a *personal* betrayal.

From 2009 on, the American people brought their burdens to Barack Obama eagerly. Since Obama took office, he’s received some 20,000 letters and e-mails a day, of which, understandably, he could only make time to personally respond to a carefully selected sample of 10 each day. In his book *Ten Letters: The Stories Americans Tell Their President*, *Washington Post* reporter Eli Saslow revealed that, on occasion, Obama even sent personal checks to Americans who wrote to him about their problems.

Sometimes he takes resumés as well. In an online town hall meeting earlier this year, Jennifer Wedel, a 29-year-old mother living in Texas, told the president that her husband Darin had lost his job as a semiconductor engineer with Texas Instruments. The president offered to look at Darin’s resumé and help him out. A White House staffer followed up, and “for weeks after that,” the *Fort Worth Star-Telegram* reported, “the family’s telephone rang constantly” with calls from recruiters, but the calls eventually stopped. “I did feel we got our hopes up a little,” Mrs. Wedel said three months later, “but it seems not even the leader of our country can get [Darin] a job.” (Ouch!)

On the day after Obama’s election in 2008, the *Onion* led with an article headlined “Black Man Given Nation’s Worst Job.” Not for the first time, America’s finest fake news source offered far better political insight than the leading lights of the D.C. punditocracy:

In his new high-stress, low-reward position, Obama will be charged with such tasks as completely overhauling the nation’s broken-down economy, repairing the crumbling infrastructure, and generally having to please more than 300 million Americans and cater to their every whim on a daily basis. . . . The job

comes with such intense scrutiny and so certain a guarantee of failure that only one other person even bothered applying for it.

Life imitates the *Onion*: in a 2008 lecture, Lowi ticked off a number of headlines from magazine cover stories about the presidency in the 2008 race:

“How *he’ll fix* the economy” (cover, *Fortune*); “Which *one* can fix the economy”; (cover, *American Prospect*); “How *the next president* can make America grow again” (cover, *Time*); “But could he deliver?” (cover, *The Economist*). . . . Emphasis added. This is so unbelievably primitive.

True enough, yet the public appears wedded to an “unbelievably primitive” view of presidential power over the economy.

In July 2012, a *USA Today*–Gallup poll offered Americans a slate of choices, asking, “How important a priority should each of the following issues be for the next president?” In fairness, most of the menu included items far removed from the core constitutional responsibilities of the chief magistrate. “Improving the nation’s public schools,” “setting high moral standards,” and “making healthcare available and affordable” did battle with items that are clearly part of the president’s portfolio, such as “dealing with terrorism and other international threats.” Still, “creating good jobs” came out on top, with 92 percent of respondents identifying it as “extremely” or “very important.”

A few months before that, a pair of *CBS News*–*New York Times* polls asked Americans, “Is the price of gasoline something a president can do a lot about, or is that beyond any president’s control?” More than 50 percent of respondents chose “can do a lot about,” declaring their intention to hold the president accountable for what they pay at the pump.

*Can* the president “do a lot about” the price of gasoline? We’ve heard a great deal lately about President Obama’s “war on energy”—particularly with regard to his foot-dragging on the Keystone XL oil pipeline extension, which would, if approved, connect oil fields in Alberta, Canada, to refineries on the Gulf Coast. My Cato colleagues Jerry Taylor and Peter Van Doren are in favor of the Keystone project, but

they explain that even “if the pipeline were built, all that would occur is that U.S. refineries would buy Canadian oil rather than oil from somewhere else.” Lower transportation costs would mostly “be translated into profit for the oil producers in Alberta, not into price savings for oil consumers in the United States.”<sup>21</sup>

Moreover, “despite the popular perception of President Obama as anti-oil,” Taylor and Van Doren write, “domestic oil production is increasing for the first time since the Johnson administration.” That’s mainly due to global price increases for crude oil, the ultimate driver of the price at the pump. Taylor and Van Doren note that “presidents get blamed for world market changes that occur during their time in office . . . but generally, they do not cause them.”

What about “creating good jobs”? If, as the public seems to think, that’s the president’s job, how well equipped is he to deliver? The *Washington Post*’s Ezra Klein put that question to several former chairs of the President’s Council of Economic Advisers: “How much of national job creation during a presidency can we properly attribute to the president?” “Very little,” replied Martin Feldstein, chairman of the CEA in the Reagan administration: “The key is growth of population and labor force participation.” It’s “primarily monetary policy,” the bailiwick of the independent Federal Reserve, that “affects cyclical conditions and therefore the unemployment rate.” Greg Mankiw, CEA head under George W. Bush, opined that “it would be a mistake to judge a president by the economic outcome during his administration. . . . The outcome is a function of those decisions [a president makes] and many other factors not under his control.”

No doubt the policies that the president supports can have an effect on GDP growth and job creation. President Carter’s appointment of Paul Volcker as Federal Reserve chairman helped tame runaway inflation at the cost of serious short-term pain; President Reagan’s insistence on reducing high marginal tax rates helped clear the way

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<sup>21</sup> Jerry Taylor and Peter Van Doren, “Keystone XL: Liberal Histrionics Answered With Conservative Histrionics,” *Forbes.com*, December 19, 2011, <http://www.forbes.com/sites/powerlunch/2011/12/19/keystone-xl-liberal-histrionics-answered-with-liberal-histrionics/>

for the boom times of the 1980s. But there's no guarantee that even sound policies will produce benefits in time for the next election cycle.

Conservatives and libertarians have charged that Obama's policies have created a job-killing climate of economic uncertainty. There's some truth to that: surveys of businesspeople suggest that hesitation about unknown regulatory costs is responsible for at least some of our anemic job growth. As Atlanta Federal Reserve chief Dennis P. Lockhart reported, "We've frequently heard strong comments to the effect of 'my company won't hire a single additional worker until we know what health insurance costs are going to be.'"

The Economic Policy Uncertainty Index, compiled by University of Chicago business school professor Steven J. Davis and his colleagues, indicates that levels of policy uncertainty are currently "extremely elevated" compared with recent history. However, changes in monetary policy and tax liability, over which the president has less control, appear to be bigger factors than regulatory uncertainty.<sup>22</sup>

Still, Obama administration initiatives like the Affordable Care Act and the Dodd-Frank bill leave employers radically uncertain about what new rules regulators will settle upon, and that can't possibly be helping job growth. If, as former CEA chief Mankiw put it, the question is whether the president "followed best practices for the circumstances he faced," then it seems clear that Obama has not. Still, Mankiw notes, "Randomness is a fact of economic life," and "to judge a president's economic performance strictly in terms of outcomes" is "deeply silly."

## **Master of Disasters**

But the modern presidency is a deeply silly job. In his 1956 book *The American Presidency*, political scientist Clinton Rossiter noted that the public views the federal

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<sup>22</sup> See Economic Policy Uncertainty, <http://www.policyuncertainty.com/>.

chief executive as “a combination of scoutmaster, Delphic oracle, hero of the silver screen, and father of the multitudes.”

The president is not only the “Manager of Prosperity,” Rossiter explained, he’s also the “Protector of the Peace.” Whatever natural or man-made disasters spring up during his tenure—riots, floods, tornadoes, Wall Street panics, or railroad strikes—“the people turn almost instinctively to the White House and its occupant for aid and comfort.” Should he fail to provide it, the public can be quite unforgiving.

Recall that when Hurricane Katrina hit in August 2005, liberals who had spent years calling President Bush a merciless tyrant suddenly decided Bush wasn’t authoritarian *enough* when he hesitated to declare himself generalissimo of New Orleans and muster the troops for a federal War on Hurricanes.

The spring of 2010 brought President Obama his own “Katrina moment” in the form of the BP oil spill. On April 20, an explosion at BP’s Deepwater Horizon platform, 40 miles off the Louisiana coast, led to the largest marine oil leak in history. The “blowout preventer” designed to seal the drill site in case of emergency failed, and hundreds of thousands of gallons of oil began gushing into the Gulf of Mexico.

As successive attempts to plug the Deepwater Horizon leak failed, Republicans who’d thrilled to Sarah Palin’s cry of “Drill, baby, drill!” at the 2008 GOP Convention assailed President Obama for letting the private sector take the lead in the well-capping operation. In May, Palin herself wailed that it was “taking so doggone long” for Obama “to dive in there.” From the other side of the aisle, James Carville screeched, “Man, you got to get down here and take control! Tell BP, ‘I’m your daddy!’”

What, exactly, did Palin, Carville, et al. want? A government takeover of the spill site? “To push BP out of the way would raise the question: replace them with what?” Coast Guard Admiral Thad Allen, the government’s national incident commander for the Deepwater Horizon spill, said at a White House briefing. The federal government didn’t have a Delta Force squad of well-capping specialists at the ready for the sort of disasters that happen every decade or so, and BP had superior technology and a



compelling financial incentive to stop hemorrhaging market value along with oil. BP was “exhausting every technical means possible,” Allen explained, and those were the best means available.

Most of the complaints dominating the airwaves and the op-ed pages smacked of a quasi-religious conception of the presidency. If only Obama would manifest himself at the afflicted area, shed his aura of cool reserve, and exercise the magical powers of presidential concern, perhaps the slick would recede. Obama “waited 12 days before visiting the gulf first-hand to assess response operations,” Sen. James Inhofe (R-OK) complained in *Human Events*; besides, in the months after the spill, the president had the nerve to play several rounds of golf.

Liberal columnists in America’s paper of record demanded public displays of presidential empathy. In the pages of the *New York Times*, Maureen Dowd lambasted Obama for behaving like “President Spock,” when he should have become our “Feeler in Chief.” Invoking Obama’s 11-year-old daughter who’d asked, “Did you plug the hole yet, Daddy?” Thomas Friedman urged the president to “react to this spill as a child would.” “Daddy, why can’t you even mention the words ‘carbon tax?’” asked Friedman, who, according to his *Times* bio, is a grown man in his late 50s. “I wasn’t feeling it,” Dowd and Friedman’s *Times* colleague Charles Blow grumbled after Obama insisted he was “angry” about the spill. (No, really, “I’ve seen rage from him,” Press Secretary Robert Gibbs insisted—Obama once even “clenched” his jaw.)

At a May 27 press conference, President Obama declared that “my job right now is just to make sure that everybody in the Gulf understands this is what I wake up to in the morning and this is what I go to bed at night thinking about: the spill.” A *Weekly Standard* writer blasted Obama for the “vanity” of that statement. “Read that again: The president thinks that the job of the president is to make certain the citizens correctly understand what’s on the president’s mind.” Yes, where in the world did Obama get *that* idea?

The public’s frustration was understandable. But the unreflective cry “Do something!” usually results in policies that follow the logic immortalized in the BBC

comedy *Yes, Minister*: “Something must be done. This is something. Therefore we must do it!”

In the BP case, some prominent liberals called for President Obama to make like Harry Truman and seize the company. In the *New York Review of Books*, William Pfaff, formerly a staunch critic of George W. Bush’s executive unilateralism, offered the speech he thought the president should give: “I am instructing that all BP assets within the United States . . . be temporarily seized and sequestered. . . . The disposition of those assets will eventually be determined by the courts or by a new independent federal agency.” Former Clinton labor secretary and Democratic stalwart Robert Reich insisted that if the government could fire GM’s CEO, “it should be able to put BP’s North American operations into temporary receivership in order to stop one of the worst environmental disasters in U.S. history.”

Obama stopped short of seizing BP—but, as discussed in chapter 3, in June 2010, before any American court had ruled on the company’s liability, he forced BP to set up a \$20 billion escrow fund for paying spill victims. Superlawyer Kenneth Feinberg, fresh off his gig as the president’s “pay czar” for companies receiving TARP funds, got the post of presidential “claims czar.”

In both roles, Feinberg was “unelected and in positions that do not require Senate confirmation,” Professors Mitchel Sollenberger and Mark Rozell note in their 2012 book *The President’s Czars*. Yet he “exercised some of the most significant powers of any official in the federal government.” By May 2011, BP was paying Feinberg’s law firm \$1.25 million a month in administrative fees.

The demand that the president “do something,” echoed by so many conservatives, resulted, predictably enough, in the sort of actions conservatives are supposed to rue: extralegal extortion of a private company and yet another unaccountable czar.

## The Illusion of Control

Fixing the problem beforehand with smarter regulation and sounder federal oversight would have been a far better solution, of course. As some of the smarter critics pointed out, regulators in Norway and Brazil mandate remote-controlled blowout preventers for offshore drilling, and if the Deepwater Horizon platform had such a device, it might have served to plug the leak after BP's automatic system failed. But the U.S. Minerals Management Service, the federal agency governing offshore drilling, was ill-equipped to make the right calls. A 2008 Interior Department report found that the MMS was rife with corruption and mismanagement. The president, or somebody who works for him, probably should have been on top of that.

Alas, the idea that “strong presidential leadership will bring informed coordination and purposeful efficiency to the unrestrained, chaotic sprawl of modern regulatory government,” Cornell's Cynthia Farina warned in a 2010 article, is “unrealistic, if not completely implausible.”

Keep in mind that there are 15 cabinet departments and over 160 different federal government bodies with the authority to issue regulations. The executive branch comprises some two million civilian employees, and the Executive Office of the President, colloquially known as the “White House staff”—which was created to help the president get a handle on this sprawling archipelago of agencies—is itself around 2,000 people.

“No strategy of selection and direction,” Farina writes, “allows the President to fill several thousand (or even several hundred) vacancies with people who are his alter ego—that is, who will unfailingly give him the information he would want to have (if he knew it existed) and who will reliably convey to the people who do the day-to-day work of government the message he would want them to hear.”<sup>23</sup>

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<sup>23</sup> Cynthia Farina, “False Comfort and Impossible Promises: Uncertainty, Information Overload and the Unitary Executive,” *University of Pennsylvania Journal of Constitutional Law* 12 (2010): 357–424.

As we saw in the last chapter, the president's role as "chief administrator" of the massive regulatory state gives him enormous power to manipulate the rules in ways that directly affect our lives. But it's a tougher task by far to solve the problem of bureaucratic incompetence or devise a plan to deal with every conceivable hazard life might present.

Nevertheless, the job demands that the president project an aura of steely competence. I sometimes like to imagine what a presidential press conference would be like if the president had been injected with a sodium pentothal-like drug that made him incapable of dissembling:

Well, Jim that's a good question. But, hell, I've spent the last half-hour covering what we can expect from the Arab Spring, how much long-term damage the Gulf spill will do, and what effect new HHS regulations will have on job growth. And as it happens, I don't speak Arabic. I'm not a labor economist, much less a marine biologist. And honestly, I didn't even know we'd issued that rule. I'm a whiz with a briefing book, and I'm generally comfortable blathering authoritatively about things I understand imperfectly, if at all—but there are limits.

In the confusing modern world, which seems to present endless complications and threats, we want desperately to believe that someone's in charge. But "president-centered government cannot deliver what it promises," Farina writes—and in the promising, it threatens the careful checks the Framers placed on presidential power: "any power the leader needs to meet the danger becomes his by right, for no ordinary rules can interfere with the duty . . . to preserve the group."

A look behind the curtain reveals that the presidency is an absurd monstrosity characterized by the illusion of control. Presidents help promote that illusion, and suffer for it when they can't deliver what they've promised. That dynamic extends to the legislative process, where the president is just one player among several, with limited ability to control the outcome.

Back in 2006, poking fun at the neoconservative view that we could vanquish any foe, win any war, build any nation, so long as we put our minds to it, liberal blogger Matt Yglesias coined the phrase, "the Green Lantern Theory of Geopolitics." Just as DC

Comics' Green Lantern could use his power ring to create whatever he wanted through sheer force of will, neoconservatives seemed to think that comic-book logic applied to international affairs: "the only thing limiting us is a lack of willpower."

The Green Lantern Theory doesn't work any better on the home front; even if there's a presidential will, that doesn't mean there's a way. Three years later, writing at the *ThinkProgress* blog, Yglesias addressed a similar point to progressives railing against Obama's legislative "sellouts":

You'd be hard-pressed to find an issue on which there's a majority in the House, and a majority on all the relevant House committees, and a majority on all the relevant Senate committees, and 60 votes in the Senate for some progressive bill but Barack Obama is standing in the way of reform.

In a filibuster-dominated Senate, the president usually needs a supermajority to deliver on his legislative promises, which means, at times, that the opinions of median, moderate senators hold much greater sway than the manifestation of presidential willpower.

These subtleties are lost on a lot of political elites, so it shouldn't be surprising that they're also lost on the public at large. As *Slate*'s Dave Weigel put it, for most of the country, "the understanding seems to be: We voted for a magic president, and yet things aren't magical. We need another magic president."

Again and again, as his poll numbers dropped, President Obama responded by booking TV time to give yet another magical speech. It's not surprising that Obama puts so much stock in the power of rhetoric; after all, a stirring speech at the 2004 Democratic National Convention launched him onto the political scene. And so, repeatedly, it was "back to the well."

But there's only so much a president's words can do to sway the public. In his book *On Deaf Ears: The Limits of the Bully Pulpit*, political scientist George Edwards explained that "significant changes in approval rarely follow a televised presidential address.

Typically, the president's ratings hardly move at all. Most changes are well within the margin of error—and many of them show a loss of approval.”<sup>24</sup>

In a 2010 review of polling data, Gallup reported that State of the Union addresses “rarely affect a president's public standing in a meaningful way, despite the amount of attention they receive.” From Jimmy Carter through George W. Bush, “the average change in approval [after the SOTU] has been less than a one percentage-point decline.”

In fact, too much speechifying can backfire. Today's presidents are, by their nature, “dividers, not uniters,” argues University of Maryland political scientist Frances Lee. In a 2008 article, Lee demonstrated that when presidents highlight a given issue in the State of the Union, they significantly increase the chances it will be decided by a party-line vote.<sup>25</sup> The modern president has become a lightning rod for partisan sentiment, and in his hands even a formerly nonpartisan, noncontroversial issue becomes ideologically charged.

Though he has more power than any one person should ever have, the president doesn't have nearly enough power to fulfill his promises. In business or in government, it's any manager's worst nightmare: accountability without adequate authority.

But as gangster matriarch Livia Soprano would say, “Poor you!” People willing to do what it takes to win the post ought to know what they're getting into, and they mostly get what they deserve. If the presidency is the “nation's worst job,” at least it comes with a personal chef and a private plane.

It's especially hard to feel sorry for Barack Obama. Few, if any, of his predecessors have done more than the “Yes, We Can” president to boost public expectations for presidential salvation. Like the song says, it couldn't happen to a nicer guy.

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<sup>24</sup> George C. Edwards III, *On Deaf Ears: The Limits of the Bully Pulpit* (New Haven, CT: Yale University Press, 2006). See also Ezra Klein, “The Unpersuaded,” *New Yorker*, March 19, 2012.

<sup>25</sup> Frances Lee, “Dividers, Not Uniters: Presidential Leadership and Senate Partisanship, 1981–2004,” *Journal of Politics* 70 (October 2008): 914–28.

Even so, it was almost pathetic when, last July, after much soul-searching, Barack Obama announced to CBS's Charlie Rose and viewers across the fruited plain that he'd finally figured out where his presidency has gone wrong.

"The mistake of my first term—couple of years," the president allowed, "was thinking that this job was just about getting the policy right." At times, Obama confessed, he'd forgotten that "the nature of this office is also to tell a story to the American people that gives them a sense of unity and purpose and optimism, especially during tough times." He needed to do "more explaining, but also inspiring." "Because hope is still there," the first lady added.

Barack Obama considers himself a sophisticated and nuanced guy; you wouldn't expect his descent into self-parody to be quite so unsubtle.

### **The "Incredible Shrinking Presidency"?**

Surely this most persuasive of presidents could restore his standing with a few more persuasive speeches—or so Obama seemed to think. After all, "presidential power is the power of persuasion." That's the thesis of Richard E. Neustadt's 1960 classic *Presidential Power and the Modern Presidents*, and it's become as much a part of the conventional wisdom about the office as Wildavsky's notion of the "Two Presidencies."

Every year for over two decades, the American Political Science Association has given an award in Neustadt's name to "the best book published that contributed to research and scholarship in the field of the American presidency." Neustadt, a political scientist at Columbia, served as a special assistant to President Harry Truman from 1950 to 1953. What he saw in the White House convinced him that the president's reputation with Washington power brokers and his popularity with the country at large are more important than his formal legal authorities when it comes to achieving his goals. The presidency is an inherently weak office, Neustadt argued, and to

successfully work his will, the president needs to build up political capital and spend it wisely.

Whether or not they're familiar with Neustadt, reporters and pundits take it as a given that when the power of persuasion fades, presidential power fades with it. Thus, when the president's prestige and popularity tank, we inevitably suffer through another cycle of media handwringing about an enfeebled, "shrunk" presidency.

After the Republicans lost the House and Senate in the 2006 midterms, the *Economist* led with a story on "The Incredible Shrinking Presidency." The cover featured a caricature of a dwarfish George W. Bush, his head peeking above the top of a cowboy boot.

Still, a funny thing happened in the last three years of Bush's tenure. By August 2005, in the midst of the Katrina debacle and two apparently unwinnable wars, two-thirds of the country disapproved of the president. Bush had lost the power to persuade virtually anyone; soon after, his party lost Congress. And yet the new Democratic Congress continued to expand Bush's power: in surveillance, in foreign policy, and in domestic affairs as well.

In his "Last Hundred Days," Congress gave President Bush powers he probably never imagined himself seeking. From Vice President Cheney downward, the Bush team hardly lacked for advocates of expanded executive power. But most of the "unitary executive" aficionados within the administration wanted the president to have expanded national security powers and increased ability to rein in the regulators. Few, if any, sought the power to remake the commanding heights of the U.S. economy via executive fiat. Nevertheless, those were the powers President Bush secured during his so-called lame-duck period, despite his abysmal approval rating. Nobody liked him, nobody trusted him—but everybody looked to him to solve all our problems.

Obama's midterm political difficulties produced a new round of clichéd pronouncements about the allegedly enfeebled presidency, with hardly an original headline in the bunch: "Obama's Shrinking Presidency" (Fred Barnes, *Weekly Standard*,



February 28, 2010), “Obama’s Shrinking Presidency” (Richard Cohen, *Washington Post*, September 7, 2010), “The Incredible Shrinking Obama” (Glenn Thrush and Carrie Budoff, *Politico*, September 7, 2011), and, yet again, “Obama’s Shrinking Presidency” (Lee Siegel, *Daily Beast*, October 9, 2011).

In September 2011, the *Washington Post*’s Dana Milbank announced “The Irrelevancy of the Obama Presidency.” In December, Obama made *GQ*’s list of “The 25 Least Influential People Alive,” along with Tiger Woods’s ex-caddie, the prosecutor who couldn’t convict Casey Anthony, and MTV tart Tila Tequila. Granted, the latter piece was somewhat tongue-in-cheek, but there was real venom behind the smirk. Our 44th president “should be the most transformational figure of the century,” *GQ*’s Drew Magary carped, but “instead, he wields all the power of a substitute teacher at night school.”

Where to begin? First, it’s ridiculous to complain that President Obama—a man who can launch wars without congressional approval and assassinate American citizens via drone strike, a man who sits atop an executive branch claiming authority over everything from how much salt we ingest to what sort of birth control our health insurance plans cover—is powerless.

Moreover, like Bush before him, Obama continued to receive new grants of power from Congress well after his prestige and popularity sank. In December 2011, with his approval in the low 40s, Congress handed President Obama new powers in the form of a National Defense Authorization Act that appears to leave open the question of whether the president can order the military detention of American citizens suspected of terrorism. As I write this, the House has passed a reauthorization of the sweeping surveillance powers contained in the FISA Amendments Act and the Senate looks likely to do the same. It’s a peculiar office, the presidency: apparently, it keeps shrinking, but—in terms of size and power—it never gets any smaller or less menacing.

## **How *Could* He?**

The enormous responsibilities we've invested in the president have fed the presidency's powers, but that hasn't helped the president deliver the bounties he's promised. Surely that must be the president's fault, many conclude.

"What Happened to Obama's Passion?" liberal psychology professor Drew Westen asked in a much-cited August 2011 essay in the *New York Times*. When our 44th president took office, Westen wrote, "the public was desperate for a leader who would speak with confidence, and they were ready to follow wherever the president led."

If this president had shown the confidence, passion, and boldness his early promise had suggested, that autocratic utopia could have been ours, Westen laments. But we've been so "bewitched by his eloquence" that we failed to notice Obama's character defects: chief among them, a penchant for compromise and a craven desire to please.

Obama's betrayal, Westen charges, has folded, spindled, and mutilated our "arc" once again: "The president is fond of referring to 'the arc of history,' . . . but with his deep-seated aversion to conflict and his profound failure to understand bully dynamics . . . he has broken that arc and has likely bent it backward for at least a generation." (Tom Friedman, the *New York Times*' Maestro of Mangled Metaphors, couldn't have put it better.)

Both the crestfallen Left and the periodically conspiratorial Right share the view that, whatever our disappointments and our fears, their roots can be found in the content of the president's character. Those who feel betrayed by Obama's failure to deliver, those who are convinced that his every waking move is part of a plot against the American way of life—they're united in their quest for a psychological explanation. Why does he act this way? What in his background explains it?

We do this endlessly with our presidents. Why did George W. Bush invade Iraq? Did he, as Maureen Dowd repeatedly suggested during W's tenure, have an unresolved Oedipus complex? Was Bush playing out a psychodrama rooted in envy of his more

successful father? Is Dinesh D'Souza right to suggest that Barack Obama's "daddy issues" explain his alleged hostility to American prosperity and power?

What's wrong with this president, anyway? "Does Obama really want to win?" the *Washington Times* asked last November. Perhaps not, the article charged: what else could account for his "stammering and stuttering campaign," alternatively asking for support and charging that Americans have "'fallen behind,' lost their 'ambition and imagination,' gotten 'lazy' and 'a bit soft'"?

Is Obama depressed? In 2011's *Obama on the Couch*, psychologist Justin A. Frank, author of the *New York Times* bestseller *Bush on the Couch*, suggests as much, with an extended tour through 44's unusual upbringing. Frank speculates that the successful May 2011 strike on Osama bin Laden "served a valuable function for a president seeking to balance his depressive and paranoid-schizoid positions, by providing him an enemy so universally opposed that his defeat could bring the nation together." But it's been a while since Obama killed Osama, and since then, he's had any number of setbacks. Does the president need a hug?

## **Getting Personal**

I find all this long-distance psychoanalysis silly and futile. But good luck trying to dismiss personality-based explanations for our political dilemma; in any conversation about Obama inside or outside the Beltway, discussions about the issues reliably descend into speculation about whether this president has "issues."

In the age of the "Personal President," it seems that you have to have an opinion about the president as a person. So here, for what little it's worth, I'll reluctantly offer mine. It's based on several Obama biographies, as much of his two (!) autobiographies as I could manage, and close observation of his conduct in office.

Obama looks to me like a guy out for the main chance, a striver who's been self-grooming for power since his early 20s. In that, he's much like presidents past, and

those to come, a man with the flexible morals and willingness to dissemble that are essential for anyone seeking the Ring.

There are things I like about Obama, to be sure, hints that his will-to-political-power came on a little later in life than it did for many of our presidential aspirants. He only managed to quit smoking cigarettes last year (allegedly), and his high-school yearbook page, with its veiled paeans to cannabis, humanizes him a bit and shows that he didn't always conduct himself with one eye toward future political campaigns. (The fact that Obama's done nothing to stop his Justice Department from prosecuting people for doing what he did as a teenager speaks far less well of him.)

Moreover, I can't help but find it charming that, despite his best efforts, Barack Obama makes for a pretty lousy demagogue. Last December, when he went to Osawatimie, Kansas, in an attempt to echo Teddy Roosevelt's unhinged "New Nationalism" speech a century before, it fell spectacularly flat. I won't go as far as blogger Kevin Drum, who says, "I'm delighted we have an introvert in the White House," but I approve this part of Drum's message: "You know what? I don't really like people either. This probably explains why I like Obama."

It's to Obama's credit that, with his professorial demeanor, he can't quite sell himself as a podium-pounding populist—that he can't convince the public he feels their pain. He's not Dowd's "Feeler-in-Chief," and thank God for small favors. The fact that Obama is visibly uncomfortable playing the role of the blubbery Clintonian empath is one of the few redeeming facets of his public persona.

Still, I find Obama tiresome and self-absorbed—much too certain, even long before people had any reason to care who he was, that his own internal struggles, so fascinating to him, must therefore be fascinating to the rest of us.

Despite occasional flashes of wit, and sound comic timing in his scripted remarks at White House Correspondents' Dinners, the man is pretty humorless—and unintentionally amusing because of that.

In his 2012 book about the young Barack Obama, the *Washington Post*'s David Maraniss reproduces a letter the future president sent to a college sweetheart:

I will hazard these statements—[T. S.] Eliot contains the same ecstatic vision which runs from Münzer to Yeats. However, he retains a grounding in the social reality/order of his time. Facing what he perceives as a choice between ecstatic chaos and lifeless mechanistic order, he accedes to maintaining a separation of asexual purity and brutal sexual reality. And he wears a stoical face before this. Remember how I said there's a certain kind of conservatism which I respect more than bourgeois liberalism—Eliot is of this type. . . . And this fatalism is born out of the relation between fertility and death, which I touched on in my last letter—life feeds on itself. A fatalism I share with the western tradition at times. You seem surprised at Eliot's irreconcilable ambivalence; don't you share this ambivalence yourself, Alex?

No man wants his old love letters reproduced for all the world to read. But gooey sweet nothings or awkward dirty talk might be an improvement on what we've got here.

Obama's 1995 memoir *Dreams from My Father* makes it clear that this president is a decent prose stylist. Still, with its painfully self-conscious search for "authenticity," the book reads like a duller and—if such a thing is possible—an even more careerist version of *Eat, Pray, Love*.

"Like a spy behind enemy lines," Obama writes of his entry-level job at the financial research firm Business International, "I arrived every day at my mid-Manhattan office and sat at my computer terminal, checking the Reuters machine that blinked bright emerald messages from across the globe." Sometimes, the 23-year-old Obama would imagine himself "as a captain of industry, barking out orders, closing the deal, before I remembered who it was that I had told myself that I wanted to be and felt pangs of guilt for my lack of resolve." My word: get over yourself, kid.

After a few years as a community organizer on the South Side of Chicago, it was on to Harvard Law:

I had things to learn in law school, things that would help me bring about real change. I would learn about interest rates, corporate mergers, the legislative process; about the way businesses and banks were put together; how real estate

ventures succeeded or failed. I would learn power's currency in all its intricacy and detail, knowledge that would have compromised me before coming to Chicago but that I could now bring back to where it was needed, back to Roseland, back to Altgeld; bring it back like Promethean fire.

He'd go on to become the most powerful public official in the United States, and thus, the world. "Promethean fire" from a magical president probably wouldn't have lifted Chicago's South Side out of dysfunction and poverty, but as the *New York Times Magazine* reported in August 2012, other than invoking Roseland and Altgeld in the occasional speech, Obama hasn't paid much attention to those neighborhoods since he gained "power's currency."

White House aide Valerie Jarrett, who met Obama in his early 30s, says, "He's always wanted to be president." No surprise then that, as *Newsweek* editor Jon Meacham put it in a 2009 profile of Obama, he "likes and enjoys power," even "revels" in it.

The arrogance of power periodically shines through: "I think that I'm a better speechwriter than my speechwriters," Obama told a top aide, Patrick Gaspard, at the start of his 2008 campaign: "I know more about policies on any particular issue than my policy directors. And I'll tell you right now that I'm gonna think I'm a better political director than my political director." Since Gaspard was Obama's political director at the time, that must have been a bit awkward. There's an "element of megalomania involved in thinking you should be president," candidate Obama commented in 2007, "a slight madness to thinking you should be leader of the free world." It's hard to argue with that assessment.

At one of those White House Correspondents' yukfests in 2010, that "element of megalomania" was apparent in one of the president's scripted laugh lines. Obama addressed the teen fave Jonas Brothers, seated at a nearby table: "Sasha and Malia are huge fans," he said, "but boys, don't get any ideas. Two words for you: 'predator drones.' You will never see it coming." It was as tasteless as President Bush's 2004 video for the Radio and Television Correspondents' Dinner, in which Bush looked under his desk for the missing WMDs: "Those weapons of mass destruction have got to be here somewhere." I enjoy dark, irreverent humor as much or more than the next

fellow. But when the jokester is the author of the misery he mocks, maybe he should show a little more class.

A common thread runs through much of the conservative critique of Barack Obama: that this president, with his unusual background, is somehow alienated from the American experience. According to Mitt Romney, Rick Perry, and umpteen right-wing pundits, Obama doesn't understand "American Exceptionalism" because he once allowed that the Greeks (who came up with philosophy and drama) and the British (who gave us Magna Carta and the common law) have their versions of exceptionalism too.

In the *Wall Street Journal* two years ago, Dorothy Rabinowitz called Obama "the Alien in the White House." "A great part of America," she wrote, "now understands that this president's sense of identification lies elsewhere, and is in profound ways unlike theirs." I don't get it. I find Obama anything but alien. In his Gatsby-like self-creation and his ceaseless striving for power, he's all too familiar, all too human, all too American.

And what of it? Do we need a psychobiography to explain why, like every Democratic president of the post-World War II era, Obama pushed for universal health insurance? Do we need to pore over Obama's background for evidence of leftist radicalism to explain why he backed a health care plan whose contours were crafted by the conservative Heritage Foundation and first implemented by his 2012 Republican opponent?

The notion that we're going to uncover a secret decoder ring that explains the Obama administration's centralizing policies—Kenyan anti-colonialism! Saul Alinsky!—is the mirror image of left-wing fantasies surrounding George W. Bush's alleged Oedipus complex, Skull and Bones, Haliburton, the Carlyle Group, and so on, ad nauseam.

Why did both Bush and Obama break any and all promises they made that might limit federal power? You could just as well ask, why does a Hollywood star leave his wife? Why did the scorpion sting the frog?

I began this book with an ironically Galt-like question, “Who is Barack Obama?” The intelligent answer is, “Who cares?”

### **It’s Not about Him**

“The continuity across presidencies is striking,” Eric Posner and Adrian Vermuele point out in their 2011 book *Executive Unbound: After the Madisonian Republic*:

Richard Nixon respected and advanced liberal Great Society programs. Carter supported deregulation before Reagan did; under Reagan, government spending continued its advance. . . . Bush and Obama’s policies toward the financial crisis were similar. . . . Even Obama’s health care plan resembled plans endorsed by major Republican figures at early periods. . . . [And] Obama has retained the main features of virtually every counterterror tool used by the Bush administration.

In this picture, “the influence of partisan differences is muted,” they suggest. Which is an understatement.

Whatever impulses ultimately motivate Barack Obama—whether they’re deeply buried psychological secrets or the professional politician’s workaday will to power—this president has behaved much like his predecessors.

And at this juncture, Obama looks likely to end up where Bush did. Having failed to heal the sick, stop the oceans’ rise, and teach our children well, Obama is on pace to end up one of the less popular presidents in the modern era—and one of the most powerful.

Whether or not he’s reelected, like most of his predecessors, our 44th president will leave an already too powerful office more powerful than he found it. Barack Obama deserves plenty of blame for that, particularly in the foreign affairs arena—where presidents have the most control, and where this president had promised, however implausibly, to restore constitutional constraints on his own freedom of action.



And yet there's something eerily mechanical in the way the modern state steadily expands regardless of which party or president holds the office. Our government has become a runaway train—and presidential elections increasingly look like a struggle to determine who gets to sit in the front cab and pretend he's driving.

The summer of 2011 saw the PATRIOT Act renewed by presidential autopilot, just weeks after Seal Team Six had killed Osama bin Laden. As the terrorist threat receded, the seemingly perpetual War on Terror continued, with new African bases and new targets for remote-controlled death shrikes.

Then in July, one of Washington's perennial budget fights presented an interesting wrinkle: It turned out that, if Congress failed to raise the debt limit by the statutory deadline, the executive branch could not stop spending even if it tried. The three million payments the Treasury Department issues daily would likely continue, Reuters reported, because Treasury would not be able to "re-program government computers that generate automatic payments as they fall due."

At home and abroad, the executive state was on autopilot, and it seemed there was no "blowout preventer," no manual override switch, capable of shutting it down.

## CHAPTER 5

### A Presidency without Romance

We keep hearing—especially from conservatives—that this is the most important presidential election of our lifetimes—maybe even the most important election in American history.

It's nothing less than "a plebiscite on the American Revolution," conservative radio host Dennis Prager proclaims; it's "about turning back the tide of the worldwide left that wants to essentially get rid of capitalism," Rush Limbaugh insists. It seems we're on the precipice, staring into the abyss of socialism; we can either plunge over or be led back from the brink by . . . the governor who pioneered the individual mandate and his running mate, who voted for the prescription drug entitlement, TARP, and the auto bailout. Go figure.

President Obama scoffs at the charge of "socialism," but he agrees with his ideological adversaries that the stakes in 2012 are high indeed: "When you pick up that ballot to vote," Obama admonished in his convention speech this September, "you will face the clearest choice of any time in a generation. . . . It will be a choice between two different paths for America, a choice between two fundamentally different visions for the future."

In fairness, there *is* noticeable daylight between Romney-Ryan and Obama-Biden on entitlements and economic policy. Romney has promised to help repeal Obamacare, and Ryan, repenting his past sins, has lately worked hard to put entitlement reform on the national agenda. But these aren't the only issues the next president will face, and they're hardly the ones over which he'll have the most control.

## Our Bipartisan Imperial Presidency

Can the president launch a war without Congress? How far do executive surveillance powers extend? Can the president use U.S. armed forces to seize an American citizen on American soil and hold him in a military brig? Can he authorize the targeted killing of an American citizen via robot assassin? These are core questions of federal power over which the president enjoys far more discretion than he does over the budget. And yet when it comes to the role of the presidency and the scope of executive power, there isn't a dime's worth of difference between the two tickets.

That's clear largely thanks to Pulitzer Prize-winning reporter Charlie Savage, who, over the last two presidential election cycles, has done the public a great service by getting all the major party candidates to answer questions like those above. Savage's executive power questionnaires, published in the *Boston Globe* (December 2007) and the *New York Times* (December 2011), put the candidates on record as to what they believe the Constitution does and does not allow the president to do.

As we saw in chapter 2, one of then senator Obama's answers to Savage's 2007 questionnaire came up repeatedly during the president's seven-month undeclared war in Libya last year. In 2007, Obama told Savage categorically—and correctly—that, absent “an actual or imminent threat to the nation,” the president did not have the constitutional power “to unilaterally authorize a military attack.” Alas, Obama “evolved,” or—if you prefer—*lied*.

Here, at least, Mitt Romney has been much more forthright than his opponent. In a June interview with CBS's Bob Schieffer, Governor Romney announced that the Constitution's “declare war” clause is optional: “The Iranians will have no question but that I will be willing to take military action if necessary to prevent them from becoming a nuclear threat to the world,” he said. “I don't believe at this stage, therefore, if I'm president that we need to have a war powers approval or special authorization for military force. The president has that capacity now.”

Back in 2007 at a Club for Growth meeting, then Cato president Ed Crane asked Governor Romney if he believed the president had the legal authority to send the U.S. Army to arrest an American citizen on American soil and hold him in a military brig. Romney, who went to Harvard Law, demurred, saying he'd have to talk to some smart lawyers before he made that decision.

Since then, Romney has apparently consulted some smart conservative lawyers, and they've told him that he can do pretty much whatever he wants. In his response to the war powers questions in Savage's 2011 survey, Romney asserted that the president has "inherent constitutional powers to authorize the use of military force even in the absence of an imminent threat to the U.S. Homeland" (though of course, the president should "consult closely with Congress" whenever he thinks he needs to start a war). Moreover, there "are solid grounds," Romney told Savage, to believe that the War Powers Resolution's limitations on the president's power are unconstitutional. Romney also made clear that he'd be willing to authorize military detention and targeted killing of American citizens.

If you have doubts about the constitutionality of that fearsome array of powers, if you worry about concentrating so much trust and temptation in one fallible human being's hands—as you should—then the 2012 campaign presents a pretty dispiriting choice: would you rather have a president who's already flagrantly broken his promises not to violate the Constitution, or one who tells you right up front that he'll probably commit the same abuses?

### **What Is to Be Done?**

Clearly, there's no presidential "man on horseback" ready to ride in and rescue us from the Imperial Presidency. Why would there be? How in the world could such a figure emerge from the maelstrom of glad-handing and dissembling that modern presidential campaigns have become?

Any contender for the office willingly joins a Darwinian contest that favors boundless ambition and moral flexibility. It would be pretty surprising if that selection process managed to produce a character of Cincinnatus-like, self-denying virtue. Anyone who wants the prize badly enough to do what it takes to win can hardly be expected, come January 20th, to turn around and announce: “You know what? I’d really like *less* power.”

I’ve been pretty hard on Jeffrey Rosen’s “first civil libertarian president” howler. But Rosen was right in this much at least: Barack Obama’s resumé and background suggested that he’d likely be more sympathetic to civil libertarian concerns than the ordinary professional office seeker who grasps the Ring. If ever there was a president who looked likely to restrain his own power for the good of the American constitutional order, this seemingly thoughtful and conscientious former law professor appeared to fit the bill.

And yet to say that Barack Obama “barely showed up for the fight” is to give him too much credit. There’s little evidence of a struggle: instead, from the start, Obama merely coated George W. Bush’s Terror Presidency with a gloss of soothing rhetoric and pushed the powers Bush left him further still whenever it suited his ambitions.

Presidential self-restraint won’t save us; we need external checks. Are there legislative, bureaucratic, and constitutional reforms we could adopt that would be equal to the task of cabining the Decider’s discretion?

I opened the ninth and final chapter of *The Cult of the Presidency* with the straightforward admission that I didn’t have a good prescription for curing the ills I’d examined at length in the preceding pages:

After eight chapters spent covering the problems of the presidency, the reader has every right to expect the payoff to come in the last installment, in which the author will provide a series of reforms designed to solve the problems he’s outlined. Natural as that expectation is, it’s also unrealistic.... Overweening government and the swollen presidency that inevitably accompanies it are the product of incompatible public demands.

So long as Americans cling to the romance of presidential salvation, I argued, so long as we demand what the office can never provide, “even the most well-crafted five-point plan for restoring the constitutional balance of power is likely to fail.”

Yet judging by reader feedback, *Cult*’s last chapter was by far the least popular part of the book. The admission that I couldn’t see a sure way back to the constitutional presidency didn’t insulate me from complaints that I hadn’t provided a road map to get there.

Duly chastened, I gave it another try three years later, with a chapter in *Contending Approaches to the American Presidency* (CQ Press, 2011) that included a broader review of policy reforms others had offered for reining in executive power.<sup>26</sup> Here’s a brief summary of what I covered there:

- “*Presidential Question Time*”: One way to start puncturing the insular, regal atmosphere of the office might be to adopt an American version of a British practice, in which the president would have to submit to regular grilling by his opponents in the legislature. Political scientist Bruce Buchanan argued as much in his 1978 book *The Presidential Experience*, and in 2010, a diverse coalition of pols, including Grover Norquist of Americans for Tax Reform and *Nation* editor Katrina vanden Heuvel, started a petition drive to “demand Question Time.” Their hope is that Presidential Question Time could push presidents off-script, deflate their air of majesty, and force them to listen.
- *Internal Separation of Powers*: Under this scheme, floated by then Georgetown law professor Neal Katyal in 2006, new civil service protections and bureaucratic reorganization would encourage the Office of Legal Counsel and other executive branch employees to push back against the president’s lawless demands.<sup>27</sup>

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<sup>26</sup> Gene Healy, “Libertarians and the Presidency,” in *Contending Approaches to the American Presidency*, ed. Michael A. Genovese (Washington, DC: CQ Press, 2011).

<sup>27</sup> Neal Kumar Katyal, “Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within,” *Yale Law Journal* 115 (2006): 2314.

- *Statutory Restraints on Presidential Lawmaking and Warmaking:* In recent decades, reformist legislators and academics have designed framework statutes that might empower Congress to reclaim the broad authorities it's ceded to the executive in foreign and domestic affairs. Examples include the Constitutional War Powers Amendments,<sup>28</sup> meant to give teeth to the 1973 War Powers Resolution by providing an automatic funding cutoff for unauthorized wars; the Separation of Powers Restoration Act,<sup>29</sup> aimed at restraining use of the executive order; and the Congressional Responsibility Act,<sup>30</sup> requiring Congress to vote on new federal regulations proposed by the permanent bureaucracy.
- *Carving Up the Executive Branch:* The most radical reforms challenge the very concept of the "unitary executive." Most American states have "special-purpose executives"—treasurers, state auditors, and independent attorney generals, often separately elected, who help keep the chief executive in line. Perhaps a *divided* executive, containing several independent officers that the president can't easily remove, would do a better job of protecting individual liberty than a *unified* one.

All of these reforms are worth trying, but presidential reformers face daunting odds. Measures that might conceivably pass likely wouldn't work; and those that might work would be nearly impossible to pass. Thus, arguing for ambitious statutory and constitutional innovations designed to deimperialize the presidency feels a bit like offering the political science version of the old joke about the economist trapped in a pit: "First, we assume a ladder."

Consider: If done properly, "Presidential Question Time" might knock his majesty off his pedestal, but presidents can't constitutionally be compelled to appear before members of a coordinate branch and submit to questioning. If the president agreed to

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<sup>28</sup> H.J. Res. 53, 110th Congress (2007).

<sup>29</sup> H.R. 2655, 106th Congress (1999).

<sup>30</sup> H.R. 2727, 104th Congress (1995).

the practice voluntarily, he'd surely try to stack the deck in his favor, turning it into the sort of stage-managed debate we get every election season.

Bureaucratic checks on the presidency are a worthy idea, but we can hardly expect presidents to tie their own hands. Any significant restraints would need to be imposed by Congress—and they'd also have to make it past the president's veto power. Unless there's a sudden groundswell for “internal separation of powers,” that seems unlikely.

Statutory reforms aimed at reining in delegation and executive warmaking face daunting hurdles as well. They're hard to pass and even harder to enforce. It took a unique historical moment—in the midst of the Watergate scandal and public disgust over Vietnam—for Congress to pass even the toothless War Powers Resolution we have. Passing a new WPR, with real bite, would require another rare window of political opportunity.

Moving on to our more radical proposals, we enter a political fantasyland. “Special-purpose executives” like an independent attorney general would require amending the Constitution,<sup>31</sup> and constitutional amendments are notoriously difficult to pass. Even to propose one requires a supermajority of both houses, or a convention called by two-thirds of the state legislatures (which has never happened), and two-thirds of the states need to ratify it before it becomes law. Professors Berry and Gersen, who published a 2008 paper arguing for an “unbundled executive,” admit that, politically, their proposal has “an air of absurdity about it,” and its chances of adoption are “approximately zero.”<sup>32</sup>

The pessimistic assessment above won't please anyone who was disappointed with *Cult's* lack of easy solutions to the problems presented by the modern presidency's unchecked power. There's not much I can do about that without perpetuating the comforting, but false, notion that every political problem has a workable solution. “It is what it is,” as we say in New Jersey.

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<sup>31</sup> On the latter, see “Proposals Regarding an Independent Attorney General,” *Opinions of the Office of Legal Counsel* 1 (1977): 75.

<sup>32</sup> Christopher R. Berry and Jacob E. Gersen, “The Unbundled Executive,” Public Law and Legal Theory Working Paper No. 214, University of Chicago, March 2008.



Each of the reforms outlined above depends on what we don't yet have: a Congress eager to be held accountable for its decisions, a judiciary with a stomach for interbranch struggles, and, most important, a voting public that rewards political actors who fight to put the presidency in its place. If we had all that, we'd have little need of innovative policy reforms. After all, even now, Congress retains all the legal authority it needs to restore the constitutional presidency.

"In a republican government, the legislative authority necessarily predominates," Madison wrote in *Federalist* 51, and he actually worried about whether the president would have sufficient power to resist congressional encroachment. Our Constitution grants the legislature sufficient power to make talk of "coequal branches" a misnomer. Their powers are anything but equal: Congress can remove executive officers, up to and including the president. Congress decides on the structure of the executive branch; it can create or destroy agencies and departments and regulate them through Article I, Section 8's "sweeping clause." The president has no comparable powers over Congress. There's a reason the Capitol Dome dominates the D.C. landscape, towering over the comparatively modest presidential residence down the street. The capital's design mirrors the constitutional architecture, in which Congress, not the executive, was supposed to be the prime mover in setting national policy.

The constitutional scholar Charles Black once explained:

The powers of Congress are adequate to the control of every national interest of any importance, including all those with which the president might, by piling inference on inference, be thought to be entrusted. And underlying all the powers of Congress is the appropriations power, the power that brought the kings of England to heel.

"My classes think I am trying to be funny," Professor Black continued, "when I say that, by simple majorities," Congress could shrink the White House staff to one secretary and that with a two-thirds vote, "Congress could put the White House up at auction."<sup>33</sup> But Professor Black wasn't kidding: Congress has the power to do all that

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<sup>33</sup> Charles L. Black Jr., "The Working Balance of the American Political Departments," *Hastings Constitutional Law Quarterly* 1 (1974).

if it so decides. And if Congress can sell the White House, surely it can defund illegal wars and rein in a runaway bureaucracy.

As we saw in chapter 3, Madison was wrong to think that the constitutional architecture gave individual legislators sufficient incentive to defend their institutional turf. Broad delegations of legislative authority have been the norm since the New Deal, and—outside of a couple of senators whose presidential bids were harmed by giving George W. Bush a blank check for war with Iraq—I’m unaware of any federal legislator whom the voters have punished for ceding the responsibilities the Constitution leaves to Congress.

If Congress doesn’t use the powers it has, perhaps it’s because neither the voting public nor political elites care enough about the separation of powers to demand that it do so. And if Barack Obama felt free to violate the promises he’d made in Charlie Savage’s executive power questionnaire, maybe that’s because he guessed, correctly, that he’d get away with it. Unfortunately, our political culture doesn’t take constitutional crimes and misdemeanors half as seriously as busting a “no new taxes” pledge.

### **Smells like Team Spirit**

The public is rationally ignorant about politics, and it’s probably asking too much to expect the ordinary voter to go to the polls with the defense of our constitutional order in mind. But the increasing tendency toward Red Team/Blue Team tribalism among the electorate and political elites is making the dream of downsizing the Imperial Presidency even harder. Paradoxically, partisanship is the lifeblood of the “bipartisan Imperial Presidency.”

Most Americans see the presidency through a partisan lens, darkly. If forced to think about it, we recognize that the office has become a constitutional monstrosity—at once menacing and ineffective. But in the main, we only start worrying about the

massive concentration of power in the executive branch when we don't like the faction that currently holds the scepter and the crown.

"Evolutionary psychology produces strange echoes in time, as adaptations continue to execute long after they cease to maximize fitness," intelligence theorist Eliezer Yudkowsky writes. We gorge ourselves sick on sugar and fat, and we indulge our tribal hard-wiring by picking a political "team" and denouncing the other side as evil.

"Politics is the mindkiller," Yudkowsky observes: political tribalism warps people's perceptions of basic reality, convincing partisans they're entitled to their own facts. Over the years, various pollsters have unintentionally proved that point: In a 1988 survey, over half of self-identified "strong Democrats" believed inflation had increased under President Reagan, when it had actually gone down nearly 10 points. Half the Republicans in a 1996 poll believed Bill Clinton had increased the deficit, though it dropped steadily during his tenure.

It's fun to cheer for your team and hate the other side. But far better to scratch that itch as an ardent sports fan than to do it through partisan politics. Political tribalism blinds too many of us to what Yudkowsky terms the "two-party swindle" that's making us poorer and less free. He underscores that point with a sports metaphor:

Imagine two football teams. The Green team's professional players shout the battle cry, "Cheaper tickets! Cheaper tickets!" as they rush into the game. The Blue team's professional players shout, "Better seating! Better seating!" as they move forward. The Green Spectators likewise cry "Cheaper tickets!" and the Blue Spectators of course cheer "Better seating!"

And yet every year the price of tickets goes up, and the seats get harder and less comfortable. The Blues win a football game, and a great explosion of "Better seating! Better seating!" rises to the heavens with great shouts of excitement and glory, and then the next year the cushions have been replaced by cold steel. The Greens kick a long-range field goal, and the Green Spectators leap up and down and hug each other screaming "Cheaper tickets! Hooray! Cheaper tickets!" and then tomorrow there's a \$5 cost increase.

It's not that there's a conspiracy. No conspiracy is required. . . . But somehow, after the Blue Professional Football Players have won the latest game, and they're just about to install some new cushions, it occurs to them that they'd

rather be at home drinking a nice cold beer. So they exchange a few furtive guilty looks, scurry home, and apologize to the Blue Spectators the next day.

As for the Blue Spectators catching on, that's not very likely. See, one of the cheers of the Green side is "Even if the Blues win, they won't install new seat cushions!" So if a Blue Spectator says, "Hey, Blue Players, we cheered real hard and you won the last game! What's up with the cold steel seats?" all the other Blue Spectators will stare aghast and say, "Why are you calling a Green cheer?"<sup>34</sup>

That parable illuminates the frustrating nature of most of my Obama conversations with conservative friends and family. Reject a bad argument against an admittedly bad president, point out that his predecessor committed the same offenses or worse, and they look at you like you've begun cheering for "the other side."

But our atavistic Red/Blue tribalism serves the interests of individual politicians by "getting you to *identify* with them instead of *judging* them." Once they've convinced you to do that, they can get away with murder, as Gawker.com illustrated with a neat trick at the 2012 Democratic National Convention. The reporter took a camera around the hall, asking attendees, "Can Americans trust Mitt Romney to make the call about which U.S. citizens to assassinate with drones?" It was a good question, but it left Democratic bigwigs like Sen. Carl Levin (D-MI) flummoxed and confused.

"Commoners identifying with kings was one of the great supports of the monarchy," Yudkowsky writes, but "as soon as you managed to take an emotional step back, started to think of your king as a contractor, rather than cheering for him because of the country he symbolized," you began to recognize that "the king wasn't a very good employee."

## Over the Long Haul

*Federalist* 10 reminds us that "the latent causes of faction are . . . sown in the nature of man" and that it's unlikely that we'll evolve past partisanship anytime soon. Still, the political elites who set the cues for politicians and voters alike don't have the excuse of

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<sup>34</sup> Eliezer Yudkowsky, "The Two-Party Swindle," *Less Wrong* (blog), January 1, 2008, [http://lesswrong.com/lw/mg/the\\_twoparty\\_swindle/](http://lesswrong.com/lw/mg/the_twoparty_swindle/).

rational ignorance. Man is supposed to be the ape that *reasons*, so we could surely do a better job of resisting our tribal hard-wiring when it comes to politics.

Happily, two long-term trends could improve our chances of “right-sizing” the presidency.

The first is America’s declining dominance abroad. America’s increasing global role in the 20th century and its unrivaled supremacy after the collapse of the Soviet Union helped drive the Imperial Presidency’s growth. As neoconservative luminary Charles Krauthammer wrote in 1987:

Superpower responsibilities inevitably encourage the centralization and militarization of authority. . . . And politically, imperial responsibility demands imperial government, which naturally encourages an imperial presidency, the executive being (in principle) a more coherent and decisive instrument than its legislative rival.<sup>35</sup>

As the 21st century progresses, though, the United States is likely to distance itself from those responsibilities—and, perhaps, from the domineering presidency they enabled.

In a speech at the American Enterprise Institute last year, departing defense secretary Robert Gates worried about indiscriminate cuts to the Pentagon’s \$700 billion defense budget. “A smaller military, no matter how superb,” he warned, “will be able to go fewer places and be able to do fewer things.”

In that, he echoed a 2008 report from the National Intelligence Council, the federal agency that provides “long-term strategic analysis” to the executive branch. That report, “Global Trends 2025: A Transformed World,” notes that “shrinking economic and military capabilities may force the US into a difficult set of tradeoffs between domestic versus foreign policy priorities.” By the middle of the next decade, though the United States will retain enormous military power, economic and technological advances by other nations, coupled with “expanded adoption of irregular warfare

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<sup>35</sup> Charles Krauthammer, “The Price of Power,” *The New Republic*, February 9, 1987.

tactics by both state and nonstate actors, . . . increasingly will constrict US freedom of action.”<sup>36</sup>

In the National Intelligence Council’s account, that’s a frightening prospect—though why the rest of us should be distressed isn’t quite clear. You could even be forgiven for entertaining the heretical thought that the last decade would have gone better with a U.S. military that went “fewer places” and did “fewer things.”

Still, there are those who stake a good part of their national pride on U.S. hegemony, people who can’t see the point of being an American without the vicarious thrill of knowing that America stands astride the globe like a colossus, ready to crush enemies real and imagined. The author Paul Fussell, a World War II combat veteran and longtime opponent of the romanticization of war, treated that attitude with the contempt it deserves:

I had an abusive letter just yesterday that objected very much to my “lack of patriotism” and my willingness to traduce the United States. I don’t think I do that at all. I like the United States so much that I wish it would grow up.<sup>37</sup>

If you’re a normal adult, content with a U.S. military that’s more than capable of protecting U.S. security, then you have little to fear from our waning uberpowers status. We’re quite safe. In any given year other than 9/11, terrorism kills far fewer Americans than lightning strikes and peanut allergies.<sup>38</sup> What’s more, the end of our misconceived globocop role won’t throw the world into bloody anarchy. Harvard’s Steven Pinker notes that “global violence has fallen steadily since the middle of the twentieth century,” with the number of battle deaths in interstate wars declining “from more than 65,000 per year in the 1950s to less than 2,000 per year in this

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<sup>36</sup> National Intelligence Council, “Global Trends 2025: A Transformed World,” Washington, DC, 2008, p. iv.

<sup>37</sup> “The Other Side of War,” *Atlantic Monthly*, February 1997, <http://www.theatlantic.com/past/docs/unbound/bookauth/battle/pfint.htm>.

<sup>38</sup> John Mueller, *Overblown: How Politicians and the Terrorism Industry Inflate National Security Threats and Why We Believe Them* (New York: Free Press, 2006), p. 13.

decade.”<sup>39</sup> Hard as it is to recognize, given our catastrophe-obsessed media, we live in a world that’s increasingly secure.

And it’s possible that, in the decades to come, shrinking American power and the emergence of new powers will encourage the United States to behave more like a normal country in the international sphere. That in turn could help enable a shift to a normalized presidency.

Another welcome long-term trend is increasing skepticism toward federal power. Declining faith in federal beneficence clearly hasn’t prevented the growth of presidential power or prevented the rise of the National Surveillance State. But, believe it or not, we used to be far more gullible than we are today.

For five decades, researchers at the University of Michigan have asked Americans, “How much of the time do you think you can trust the government in Washington to do what is right?” In the early 1960s, three-quarters of respondents answered “just about always” or “most of the time.” After Vietnam and Watergate, Americans weren’t quite so credulous, and the trust numbers never again reached their Kennedy/Johnson-era peak. By October 2011, the *New York Times* was reporting that “Americans’ distrust of government [is] at its highest level ever”—only 10 percent of respondents would answer “always or most of the time.”

When political trust declines, the D.C. cognoscenti typically wring their hands and hold earnest conferences at the Brookings Institution, exploring how best to restore the people’s faith in their rulers. But both Left and Right should see a silver lining in the growing cloud of public skepticism.

Conservatives can take heart because as political trust wanes, ambitious federal programs become much less likely to pass. Vanderbilt University’s Marc Hetherington, one of America’s leading scholars on the subject, writes that declining faith in the feds

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<sup>39</sup> Steven Pinker, “A History of Violence,” Edge.org, [http://www.edge.org/3rd\\_culture/pinker07/pinker07\\_index.html](http://www.edge.org/3rd_culture/pinker07/pinker07_index.html).

makes “another Great Society or New Frontier . . . unlikely in a post–Cold War world.”<sup>40</sup>

Liberals won’t be happy with that development, but there’s an upside for them as well. When Americans trust their government too readily, they tend to support policies that most liberals oppose. The post-9/11 period led to the greatest rise in political trust since Watergate, which helped George W. Bush make the case for what turned out to be a disastrous war in Iraq. Professor Hetherington’s research shows that declining trust decreases support for foreign policy adventurism.

### **A Waning Cult?**

Beltway discourse routinely condemns public distrust as “cynicism”—however sound the public’s reasons for waning faith in government. President Obama shares that view. “There are some who question the scale of our ambitions, who suggest that our system cannot tolerate too many big plans,” he piously intoned in his inaugural address: “What the cynics fail to understand is that the ground has shifted beneath them, that the stale political arguments that have consumed us for so long no longer apply.”

Yes, there are some who cast a skeptical eye on politicians’ grand designs—call them “cynics” if you like, but the last three and a half years have left them looking prescient.

The Greek columns looming behind Barack Obama at the 2008 Democratic National Convention looked grand but, as we later learned, they were made of Styrofoam. The man standing in front of them was, like those who came before, and those to come, merely another professional vote-scrounger, and never a worthy object of adulation.

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<sup>40</sup> Marc J. Hetherington and Thomas J. Rudolph, “Priming, Performance, and Political Trust,” *Journal of Politics* 70 (April 2008). See generally, Marc J. Hetherington, *Why Trust Matters: Declining Political Trust and the Decline of Liberalism*, (Princeton, NJ: Princeton University Press, 2005).



The disappointments of the Obama era haven't quite disabused Americans of the vain hope that, if we only pick the right chief executive, we can heal America and the world. But the epically uninspiring 2012 race may just do the trick.

True, throughout the GOP nomination contest, no leading contender presented a sober contrast to Barack Obama's vision of the president as National Redeemer. Far from it: the bombastic Newt Gingrich, who became the unlikely front-runner in late 2011, saw the presidency as the vehicle for achieving his longtime goal of "saving civilization." ("Longtime" is putting it mildly: the former Speaker bragged in a 2005 *GQ* interview that "I first talked about [saving civilization] in August of 1958"—when he was a rising sophomore in high school.)

The late-surging senator Rick Santorum described the job he sought as "commander in chief of this country,"—and, as he saw it, the CINC's portfolio was broad enough to include hectoring Americans about their sex lives: "One of the things I will talk about that no president has talked about before is I think the dangers of contraception in this country, the whole sexual libertine idea . . . these are important public policy issues."

On the campaign trail, Ann Romney has repeatedly recounted a conversation with her husband: "I asked him one question, and this is why we decided to run. I said, 'Mitt, can you save America?' And his answer was 'yes.'" On the stump and in his campaign ads, Governor Romney echoed that sentiment: this was "an election to save the soul of America."

And yet, despite the candidates' soul-saving rhetoric, the 2012 contest has been a great disappointment for those who view the presidency as the vehicle for national redemption. In November 2011, former Clinton labor secretary Robert Reich lamented the looming "passionless presidential race." Correctly predicting that Romney would be the GOP standard-bearer, Reich observed that "Romney inspires as little enthusiasm among Republicans as Obama does among Democrats." Thus, we'd be left "with two presidential candidates who don't inspire—at the very time in American history when Americans crave inspiration."

What of it? We crave a lot of things that aren't good for us, as our expanding waistlines attest. The Framers hoped for presidents who wouldn't capitulate to "every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests," as Hamilton explained in *Federalist* 71.

Partisan fervor and cults of personality are the enemies of sober judgment. It's skepticism, not passion, we need when evaluating potential presidents, lest we get swept away and wind up ashamed of ourselves in the morning. Nobel laureate James Buchanan, who helped found the "public choice" school of political economy, termed his approach "politics without romance." In this era of limits, we need a presidency without romance.

The president cannot be the "God of All Things"—he cannot save the national soul, and he should not be entrusted with the responsibility to try. In the trying, we've made the presidency far too powerful, and we've also made it an impossible job. By demanding what we cannot have, we've ensured that we'll get what we cannot stand. The office the Framers referred to as our "chief magistrate" was never designed to bear the weight of all our hopes and dreams.

Recognizing that is the furthest thing from "cynicism." It's the recovery of timeless wisdom: "Do not trust in princes, in mortal man, in whom there is no salvation." "America's soul" doesn't need saving, but our constitutional order is an unholy mess. Redemption can only begin when we turn away from false idols.

## ACKNOWLEDGMENTS

Over the last few years, when people asked me if I planned to write another book, I'd demur, joking that I could just update *The Cult of the Presidency* every four to eight years with details on whatever fresh hell the next president visits on the country.

The joke was on me, it seems. When it comes to presidential cults, Barack Obama turned out to be the gift that keeps on giving—an irresistible opportunity to put *Cult's* themes in front of a new set of readers. Every time I try to get out . . . *they pull me back in*.

In keeping with most other public policy e-books, *False Idol* is fairly light on the footnotes, but I'm happy to provide further documentation on request ([ghealy@cato.org](mailto:ghealy@cato.org)).

Once again, I owe thanks to quite a few friends and colleagues for their help on the manuscript. David Boaz, John Samples, Jason Kuznicki, Jude Blanchette, and Julian Sanchez provided valuable edits and advice. Much of the credit—and none of the blame—for what you read or skim goes to them.

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Over the last year, I've had many occasions to reflect on how fortunate I've been to work at the Cato Institute, one of the rare places in D.C. that doesn't put politics first. For that I owe an enormous debt of gratitude to two men: the late Bill Niskanen, longtime chairman of Cato, and Ed Crane, the Institute's founder and president emeritus.

Together, they've built an institution where principle trumps party, where you can call it like you see it, and where you get to come into work every day with the enthusiasm of the little kid who gets to tell the Emperor he's starkers.

Finally, I'd like to dedicate this book to Caitlyn, who makes me feel like the luckiest guy on earth—and who, by charming away my misanthropy, may yet ruin me for politics forever.

## ABOUT THE AUTHOR

Gene Healy is a vice president at the Cato Institute and the author of *The Cult of the Presidency: America's Dangerous Devotion to Executive Power*. He has appeared on PBS's *NewsHour with Jim Lehrer* and NPR's *Talk of the Nation*, among other venues, and his writings have been published in the *Los Angeles Times*, the *Chicago Tribune*, and elsewhere, and he is a weekly columnist for the *Washington Examiner*. Healy holds a B.A. from Georgetown University and a J.D. from the University of Chicago Law School. He is a self-hating Washingtonian who lives in the District's Mount Pleasant neighborhood, about two miles north of the White House.

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