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Article

Separation of Powers During the Forty-Fourth Presidency and Beyond

Brett M. Kavanaugh[†]

Many of the contentious, bitter, and defining disputes of the forty-second and forty-third presidencies arose out of separation of powers issues that the nation has been contending with since the Founding. And it seems to me—from having lived and worked through some of those disputes—that this is a good time to attempt to discern some lessons for the forty-fourth and future presidencies.

The challenges facing the nation at this time are urgent. By most accounts, al Qaeda is trying to commit new and even greater attacks on the United States.¹ The nation is involved in two wars, with more than 150,000 U.S. service members deployed in Iraq and Afghanistan.² At the same time, the U.S. economy is in trouble; experts have said the country might be in the worst economic crisis since the Great Depression.³

This country recently witnessed a vigorous presidential campaign in which both candidates seemed to agree that the

[†] Judge, United States Court of Appeals for the District of Columbia Circuit. This Article is adapted from remarks I made at the University of Minnesota Law School on October 17, 2008—about two weeks before the presidential election. I derived my suggestions from working in the executive and judicial branches for many years, from collaborating closely with the legislative branch on certain issues while I served in the executive branch, and from teaching separation of powers law at Harvard Law School for the last two years. Copyright © 2009 by Brett M. Kavanaugh.

1. See, e.g., Mark Mazzetti & Scott Shane, *Al Qaeda Offers Obama Insults and a Warning*, N.Y. TIMES, Nov. 20, 2008, at A1.

2. See Steven Lee Myers, *America's Scorecard in Iraq*, N.Y. TIMES, Feb. 8, 2009, at WK1 (indicating that 140,000 U.S. troops remain in Iraq); N. Atl. Treaty Org., *International Security Assistance Force* (Apr. 3, 2009), http://www.nato.int/isaf/docu/epub/pdf/isaf_placemat.pdf (showing 26,215 U.S. troops in Afghanistan).

3. See, e.g., Jon Hilsenrath et al., *Worst Crisis Since '30s, With No End Yet in Sight*, WALL ST. J., Sept. 18, 2008, at A1.

federal government is not working effectively in meeting the nation's challenges.⁴ For many months during that campaign, both sides in the political arena talked about the need for change and reform in our nation's capital.⁵ The three words "Washington is broken" became a common refrain—even in Washington.⁶

What precisely does that catchy phrase "Washington is broken" really mean? What exactly is broken in Washington, and what needs to be changed and reformed?

It seems to me that several of the foundational structures and systems in Washington are contributing to the perceived and actual problem. Many of those broken structures and systems implicate the separation of powers—and particularly, the interaction of the legislative and executive branches in performing their respective and sometimes overlapping functions under the Constitution.

Now is a good time, in my judgment, to take a cold hard look at some of the conventional wisdom about these institutions of our federal government. Are they working as they should? And if not, how can we fix them?

A good way to start the discussion is to think about some of the controversies the last two presidents have faced. Both President Bill Clinton and President George W. Bush had tumultuous tenures in office that triggered numerous separation-of-powers controversies.

In President Clinton's administration, separation of powers disputes arose over:

- War powers, and especially whether the President's decision to take offensive military action in Kosovo in 1999 was consistent with the Constitution and the War Powers Resolution, particularly after the House failed to authorize the bombing;⁷

4. See, e.g., Dan Zak, *As Campaigns Heat Up and Washington Gets Beaten Down, Are There Any Pols Who Will Sing Its Praises?*, WASH. POST, Aug. 24, 2008, at A1 (quoting the McCain and Obama presidential campaigns).

5. See, e.g., *id.*

6. See, e.g., *id.*

7. See *Campbell v. Clinton*, 203 F.3d 19, 19 (D.C. Cir. 2000); Memorandum from the Office of Legal Counsel, U.S. Dep't of Justice, to the Att'y Gen., *Authorization for Continuing Hostilities in Kosovo*, available at 2000 WL 33716980 (Dec. 19, 2000); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1090 (2008); Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149, 1149–55

- Impeachment, and whether perjury and obstruction of justice in a civil sexual harassment case and subsequent criminal investigation can constitute high crimes and misdemeanors justifying removal of a President;⁸
- The independent counsel law, concerning both the statute itself and independent counsel Kenneth Starr's exercise of his investigative and prosecutorial authority;⁹
- Executive privilege, primarily whether government attorneys and Secret Service agents enjoy a privilege in federal criminal investigations of the President;¹⁰
- Presidential immunity, particularly whether the President has the right to a temporary deferral of civil suits while in office, an issue the Supreme Court addressed in *Clinton v. Jones*;¹¹

(2001); Abraham D. Sofaer, *The War Powers Resolution and Kosovo*, 34 LOY. L.A. L. REV. 71, 71–79 (2000).

8. See *Impeachment Inquiry Pursuant to H. Res. 581 Before the H. Comm. on the Judiciary*, 105th Cong. 15–30 (1998) (statement of Kenneth Starr, Independent Counsel, Office of Independent Counsel); SUBMISSION BY COUNSEL FOR PRESIDENT CLINTON TO THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, S. DOC. NO. 106-3, at 1–3, 7 (1998); H.R. REP. NO. 105-830, at 5–7 (1998).

9. See *The Future of the Independent Counsel Act: Hearings Before the S. Comm. on Governmental Affairs*, 106th Cong. 1–5 (1999) (statement of Sen. Fred Thompson, Chairman, S. Comm. on Governmental Affairs); Michael J. Gerhardt, *The Historical and Constitutional Significance of the Impeachment and Trial of President Clinton*, 28 HOFSTRA L. REV. 349, 382–84 (1999). See generally Symposium, *The Independent Counsel Act: From Watergate to Whitewater and Beyond*, 86 GEO. L.J. 2011 (1998) (containing contributions on the topic by Michael R. Bromwich, George D. Brown, Arthur H. Christy, Samuel Dash, Joseph E. diGenova, Katy J. Harriger, Philip B. Heymann, Brett M. Kavanaugh, Norman J. Ornstein, Julie R. O'Sullivan, Jerome J. Shestack, Donald C. Smaltz, Cass R. Sunstein, and Lawrence E. Walsh).

10. See *In re Lindsey*, 158 F.3d 1263, 1278 (D.C. Cir. 1998) (per curiam) (holding that the attorney-client privilege does not prevent government attorneys from testifying in grand jury cases regarding possible criminal conduct by public officials); *In re Sealed Case*, 148 F.3d 1073, 1074 (D.C. Cir. 1998) (per curiam) (rejecting the “protective function privilege” for Secret Service agents); see also *Rubin v. United States*, 525 U.S. 990, 990 (1998) (Breyer, J., dissenting from the denial of certiorari).

11. *Clinton v. Jones*, 520 U.S. 681, 684 (1997); see also Akhil Reed Amar, *Nixon's Shadow*, 83 MINN. L. REV. 1405, 1415–16 (1999) (addressing *Clinton v. Jones*); Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL'Y REV. 53, 59–63 (1999) (same); Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty-five Years*, 83 MINN. L. REV. 1337, 1337–45 (1999) (same).

- The pardon power, most notably whether President Clinton properly used that power when he pardoned certain people at the end of his presidency;¹²
- The President's control over executive branch personnel, particularly President Clinton's decision shortly after taking office to fire all ninety-three United States Attorneys in one fell swoop;¹³
- The President's ability to obtain votes for his federal judicial nominees, as large numbers of Clinton judicial nominees never received an up-or-down vote in the Senate.¹⁴

That is a significant list. And President Bush's administration has sparked its own separation of powers disputes. Some of the most contentious struggles have been over:

- Presidential power and the wars against al Qaeda and later Iraq, most notably the controversies surrounding the detention and treatment of detainees at Guantánamo Bay and elsewhere, and the Terrorist Surveillance Program;¹⁵

12. See *President Clinton's Eleventh Hour Pardons: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 1–2 (2001) (statement of Sen. Orrin G. Hatch, Chairman, S. Comm. on the Judiciary); *The Controversial Pardon of International Fugitive Marc Rich: Hearings Before the H. Comm. on Government Reform*, 107th Cong. 2 (2001) (statement of Rep. Dan Burton, Chairman, H. Comm. on Government Reform); see also Gregory C. Sisk, *Suspending the Pardon Power During the Twilight of a Presidential Term*, 67 MO. L. REV. 13,14–16 (2002) (discussing President Clinton's controversial pardons).

13. See Paul Houston, *Reno Demands That All 93 U.S. Attorneys Offer Resignations*, L.A. TIMES, Mar. 24, 1993, at A8; David Johnston, *Attorney General Seeks Resignations From Prosecutors*, N.Y. TIMES, Mar. 24, 1993, at A1.

14. See President William J. Clinton, *The State of the Union Address by the President of the United States* (Jan. 27, 1998), in 144 CONG. REC. H30, H33 (“I simply ask the United States Senate to heed this plea and vote on the highly qualified judicial nominees before you up or down.”); President William J. Clinton, *President's Radio Address* (Sept. 27, 1997), in 33 WKLY COMP. PRES. DOC. 1442, 1442–43; see also Richard L. Berke, *Clinton Seeks Action on Court Nominees*, N.Y. TIMES, Sept. 28, 1997, at 33 (reporting on President Clinton's radio address).

15. See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2753–57 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *as recognized in* *Boumediene v. Bush*, *supra*; *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004); *Rasul v. Bush*, 542 U.S. 466, 470–73 (2004), *superseded by statute*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739; *Al-Marri v. Pucciarelli*, 534 F.3d 213, 216–17 (4th Cir. 2008) (en banc), *dismissed sub nom.* *Al-Marri v. Spagone*, No. 08-368 (U.S. Mar. 6, 2009); U.S. DEPT OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT, 1–3 (2006), *available at* <http://www>

- Executive privilege, including disputes over the Presidential Records Act and conflicts over congressional access to executive branch information;¹⁶
- The President's control over executive branch personnel,¹⁷ especially the decision to dismiss certain United States Attorneys;¹⁸
- The President's use of signing statements to indicate his view that certain laws have potentially unconstitutional provisions or applications;¹⁹ and
- The President's power to obtain a vote for his federal judicial nominees, as large numbers of President Bush's judicial nominees (like President Clinton's) never received an up-or-down vote in the Senate.²⁰

This also is a rather extraordinary list. Between the Clinton and Bush administrations, moreover, the Supreme Court considered *Bush v. Gore* and decided an issue that effectively resolved the outcome of a national presidential election.²¹ Given all of those events and controversies, it is no wonder that our

.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf; Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2047–56 (2005); Curtis Bradley et al., *On NSA Spying: A Letter to Congress*, N.Y. REV. BOOKS, Feb. 9, 2006, at 42, 42–44. See generally JACK L. GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007) (discussing the Bush administration's response to the terrorist attacks of Sept. 11, 2001); BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* (2008) (critiquing the U.S. government's war on terror).

16. See, e.g., *Citizens for Responsibility & Ethics in Wash. v. Cheney*, 580 F. Supp. 2d 168, 171–77 (D.D.C. 2008) (mem.).

17. See, e.g., *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 372–73 (2004).

18. See U.S. DEP'T OF JUSTICE, *AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006*, at 14 (2008).

19. See CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* 236–49 (2007); Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMM. 307, 308–12 (2006); Walter Dellinger, Op-Ed., *A Slip of the Pen*, N.Y. TIMES, July 31, 2006, at A17; ABA TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, RECOMMENDATION, 1 (2006), available at http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.

20. See George W. Bush, *President Bush Discusses Judicial Accomplishments and Philosophy* (Oct. 6, 2008), <http://georgewbush-whitehouse.archives.gov/news/releases/2008/10/20081006-5.html>; George W. Bush, *Remarks by the President on Judicial Confirmations* (Oct. 30, 2002), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021030-6.html>.

21. 531 U.S. 98, 109–10 (2000) (per curiam).

system of separation of powers and checks and balances has come under stress.

Based on my experience in the White House and the Justice Department, in the independent counsel's office, in the judicial branch as a law clerk and now a judge, and as a teacher of separation of powers law, I have developed a few specific ideas for alleviating some of the problems we have seen arise over the last sixteen years. I believe these proposals would create a more effective and efficient federal government, consistent with the purposes of our Constitution as outlined in the Preamble.²² Fully justifying these ideas would require writing a book—and probably more than one. My goal in this forum is far more modest: to identify problems worthy of additional attention, sketch out some possible solutions, and call for further discussion.

I. PROVIDE SITTING PRESIDENTS WITH A TEMPORARY DEFERRAL OF CIVIL SUITS AND OF CRIMINAL PROSECUTIONS AND INVESTIGATIONS

First, my chief takeaway from working in the White House for five-and-a-half years—and particularly from my nearly three years of work as Staff Secretary, when I was fortunate to travel the country and the world with President Bush—is that the job of President is far more difficult than any other civilian position in government. It frankly makes being a member of Congress or the judiciary look rather easy by comparison. The decisions a President must make are hard and often life-or-death, the pressure is relentless, the problems arise from all directions, the criticism is unremitting and personal, and at the end of the day only one person is responsible. There are not eight other colleagues (as there are on the Supreme Court), or ninety-nine other colleagues (as there are in the Senate), or 434 other colleagues (as there are in the House). There is no review panel for presidential decisions and few opportunities for do-overs. The President alone makes the most important decisions. It is true that presidents carve out occasional free time to exercise or read or attend social events. But don't be fooled. The job and the pressure never stop. We exalt and revere the presidency in this country—yet even so, I think we grossly underes-

22. See U.S. CONST., pmb. (“[I]n Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity . . .”).

estimate how difficult the job is. At the end of the Clinton presidency, John Harris wrote an excellent book about President Clinton entitled *The Survivor*.²³ I have come to think that the book's title is an accurate description for all presidents in the modern era.

Having seen first-hand how complex and difficult that job is, I believe it vital that the President be able to focus on his never-ending tasks with as few distractions as possible. The country wants the President to be "one of us" who bears the same responsibilities of citizenship that all share. But I believe that the President should be excused from some of the burdens of ordinary citizenship while serving in office.

This is not something I necessarily thought in the 1980s or 1990s. Like many Americans at that time, I believed that the President should be required to shoulder the same obligations that we all carry. But in retrospect, that seems a mistake. Looking back to the late 1990s, for example, the nation certainly would have been better off if President Clinton could have focused on Osama bin Laden²⁴ without being distracted by the Paula Jones sexual harassment case and its criminal-investigation offshoots.²⁵ To be sure, one can correctly say that President Clinton brought that ordeal on himself, by his answers during his deposition in the *Jones* case if nothing else. And my point here is not to say that the relevant actors—the Supreme Court in *Jones*, Judge Susan Webber Wright, and Independent Counsel Kenneth Starr—did anything other than their proper duty under the law as it then existed.²⁶ But the law as it existed was itself the problem, particularly the extent to which it allowed civil suits against presidents to proceed while the President is in office.

With that in mind, it would be appropriate for Congress to enact a statute providing that any personal civil suits against presidents, like certain members of the military, be deferred

23. JOHN F. HARRIS, *THE SURVIVOR: BILL CLINTON IN THE WHITE HOUSE* (2005).

24. Cf. James Bennet, *U.S. Cruise Missiles Strike Sudan and Afghan Targets Tied to Terrorist Network*, N.Y. TIMES, Aug. 21, 1998, at A1 (reporting on American missile strikes on targets linked to Osama bin Laden).

25. Cf. Richard L. Berke, *Outside Political Circles, a Deep Sense of Sadness and Shock*, N.Y. TIMES, Aug. 17, 1998, at A11 (describing President Clinton's grand jury testimony as "the most politically and legally hazardous moment" of his career).

26. I worked for Judge Starr and believe he performed his difficult legal assignment diligently and properly under a badly flawed statutory regime.

while the President is in office. The result the Supreme Court reached in *Clinton v. Jones*²⁷—that presidents are not *constitutionally* entitled to deferral of civil suits—may well have been entirely correct; that is beyond the scope of this inquiry. But the Court in *Jones* stated that Congress is free to provide a temporary deferral of civil suits while the President is in office.²⁸ Congress may be wise to do so, just as it has done for certain members of the military.²⁹ Deferral would allow the President to focus on the vital duties he was elected to perform.

Congress should consider doing the same, moreover, with respect to criminal investigations and prosecutions of the President.³⁰ In particular, Congress might consider a law exempting a President—while in office—from criminal prosecution and investigation, including from questioning by criminal prosecutors or defense counsel. Criminal investigations targeted at or revolving around a President are inevitably politicized by both their supporters and critics. As I have written before, “no Attorney General or special counsel will have the necessary credibility to avoid the inevitable charges that he is politically motivated—whether in favor of the President or against him, depending on the individual leading the investigation and its results.”³¹ The indictment and trial of a sitting President, moreover, would cripple the federal government, rendering it unable to function with credibility in either the international or domestic arenas. Such an outcome would ill serve the public interest, especially in times of financial or national security crisis.

Even the lesser burdens of a criminal investigation—including preparing for questioning by criminal investigators—are time-consuming and distracting. Like civil suits, criminal investigations take the President’s focus away from his or her responsibilities to the people. And a President who is concerned about an ongoing criminal investigation is almost inevitably going to do a worse job as President.

27. 520 U.S. 681, 684 (1997).

28. *Id.* at 709 (“If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation.”).

29. See Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 501–596 (2000 & Supp. 2006).

30. See Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2157–61 (1998).

31. *Id.* at 2157. Even in the absence of congressionally conferred immunity, a serious constitutional question exists regarding whether a President can be criminally indicted and tried while in office. See *id.* at 2158–61.

One might raise at least two important critiques of these ideas. The first is that no one is above the law in our system of government. I strongly agree with that principle. But it is not ultimately a persuasive criticism of these suggestions. The point is not to put the President above the law or to eliminate checks on the President, but simply to defer litigation and investigations until the President is out of office.³²

A second possible concern is that the country needs a check against a bad-behaving or law-breaking President. But the Constitution already provides that check. If the President does something dastardly, the impeachment process is available.³³ No single prosecutor, judge, or jury should be able to accomplish what the Constitution assigns to the Congress.³⁴ Moreover, an impeached and removed President is still subject to criminal prosecution afterwards. In short, the Constitution establishes a clear mechanism to deter executive malfeasance; we should not burden a sitting President with civil suits, criminal investigations, or criminal prosecutions.³⁵ The President's job is difficult enough as is. And the country loses when the President's focus is distracted by the burdens of civil litigation or criminal investigation and possible prosecution.³⁶

32. For fairness's sake, this proposal may also require extension of the relevant statutes of limitations.

33. See U.S. CONST. art. 1, § 3, cl. 6.

34. Brett M. Kavanaugh, Op-Ed., *First Let Congress Do Its Job: A Deep Structural Flaw in the Independent Counsel Statute*, WASH. POST, Feb. 26, 1999, at A27.

35. I think this temporary deferral also should excuse the President from depositions or questioning in civil litigation or criminal investigations.

36. In a related manner, I believe that the independent counsel statute was a major mistake for reasons I have articulated previously. See Kavanaugh, *supra* note 30, at 2134–35. Congress itself came to that conclusion in 1999 when it declined to reauthorize the statute. See, e.g., 145 CONG. REC. S7766 (daily ed. Jun. 29, 1999) (statement of Sen. Specter) (“Tomorrow, the independent counsel statute will sunset. The law is dying because there appears to be a consensus that it created more problems than it solved.”). The law itself created a perverse structure that was inconsistent with foundational principles of separation of powers and that created problems for both the President and the independent counsel. See Kavanaugh, *supra* note 30, at 2134–38. Judge Starr himself has made this same point. See *The Future of the Independent Counsel Act: Hearings Before the S. Comm. on Governmental Affairs*, 106th Cong. 425–34 (1999) (statement of Kenneth W. Starr, Independent Counsel).

II. ENSURE PROMPT SENATE VOTES ON EXECUTIVE AND JUDICIAL NOMINATIONS

Second, to make our government more effective and efficient, the Senate might consider changing the way it approaches presidential nominations to both the executive and judicial branches. The Constitution gives the Senate the power of confirming presidential nominees to both branches.³⁷ But although the constitutional text does not explicitly distinguish between standards the Senate should use in assessing such appointments, there are compelling reasons—deriving from the structure established by the constitutional text—that the Senate should approach its task differently depending on whether the appointment is to the executive or judicial branch.

Executive branch officials are subordinate to (and generally subject to removal at will by) the President. By contrast, federal judges enjoy life tenure and are independent of the political branches. Therefore, the Senate arguably should be more deferential to the President with regard to executive branch appointees (at least those in traditional executive agencies, as opposed to the so-called independent agencies), and less so with regard to judicial appointees. This observation—coupled with the imperative both to promote government effectiveness by minimizing vacancies and to treat potential appointees fairly and respectfully—prompts some specific thoughts about reforming the confirmation process.

As to *executive branch* appointments, any observer of Washington realizes that Presidents often have great difficulty filling positions requiring Senate approval because of delays in the confirmation process.³⁸ This phenomenon is particularly severe at the sub-cabinet level.³⁹ The problem has plagued both Republican and Democratic presidents especially, but not only, when the opposing party controls the Senate.⁴⁰ And it has clear costs in terms of efficiency and effectiveness. The President's full team of executive branch officials is essential to carrying

37. See U.S. CONST. art. I, § 2, cl. 5.

38. See, e.g., Paul C. Light, Op-Ed., *Late for Their Appointments*, N.Y. TIMES, Nov. 16, 2004, at A27; PAUL C. LIGHT & VIRGINIA L. THOMAS, THE MERIT AND REPUTATION OF AN ADMINISTRATION: PRESIDENTIAL APPOINTEES ON THE APPOINTMENTS PROCESS 3–4 (2000), http://www.brookings.edu/~/media/Files/rc/papers/2000/0428governance_light/20000428merit.pdf.

39. See, e.g., Light, *supra* note 38.

40. See, e.g., LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS 107 (2005).

out the President's program of regulation and enforcement. Leaving key jobs unfilled can paralyze executive branch efforts to accomplish critical missions and discourages innovative and bold executive branch action.

To be sure, in the power struggle that is Washington, Congress sometimes seems to prefer an enfeebled executive. But this is short-sighted because, as Alexander Hamilton correctly stated in Federalist No. 70, "[a] feeble executive implies a feeble execution of the government."⁴¹ The Senate could help eliminate these long-standing problems by adopting a binding rule requiring the full Senate to vote on all executive branch nominations—at least those within traditional executive agencies—within thirty days of receiving a nomination. Such a rule would conform to the Framers' idea of Senate confirmation, which was to prevent unfit characters from serving in the executive branch.⁴² As Hamilton wrote in Federalist No. 76, the Senate's confirmation power serves as "an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."⁴³

The constitutional structure does not envision the Senate confirmation process of executive officials as a tool for waging policy disputes, which are more properly contested through legislation and appropriations. After all, executive branch officials are supposed to carry out the policies and priorities of the President. And our constitutional design has a single President; if Congress wishes to cabin the Executive's discretion in implementing statutes or constrain the executive branch's programmatic decisions, it can always pass more detailed statutes or use its power of the purse. But using the confirmation process as a backdoor way of impeding the President's direction and supervision of the executive branch—of gumming up the works—is constitutionally irresponsible and makes our government function less efficiently and effectively. Wielding the confirmation process as a club against executive branch appointees would make sense in a different system of government where the agencies were not subject to presidential direction

41. THE FEDERALIST NO. 70, at 391 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

42. *Id.* NO. 76, at 423.

43. *See id.* at 425.

and supervision. That is not the system created by the Constitution.

Of course, some parts of the executive branch—the so-called “independent agencies”—are not subject to such presidential discretion and supervision. Therefore, appointees to these agencies may require greater and longer scrutiny. After all, once they assume office, they are largely immune from substantive direction and supervision by the President or anyone else, and cannot be fired at will.⁴⁴ For that reason, it may be important for the Senate to scrutinize such appointees almost as closely as the Senate scrutinizes judicial nominees. In the next part of this Article, I question whether the large number of independent agencies today is sound.⁴⁵ So long as we have independent agencies, however, both presidents and the Senate should exercise great time and care in appointing their heads. The President and Congress have little power over weak or inept leaders of independent agencies once those leaders take office.

As for *judicial appointments*, structural considerations favor a more intensive inquiry by the Senate. Article III judges are appointed for life and—unlike executive branch officials—are not subordinate to their appointing presidents.⁴⁶ That changes the constitutional dynamic.

The President deserves great deference in the selection of his own subordinates—who, after all, must follow the President’s lead and are accountable to the President who is responsible for their actions.⁴⁷ By contrast, the independence and life tenure of federal judges justifies a more searching inquiry by the Senate into their fitness and qualifications for office. Because the stakes in judicial appointments—particularly Supreme Court appointments—are higher than in executive branch appointments, the constitutional text and structure support a more robust role for the Senate in the judicial appointments process.

That said, the judicial confirmation process has become badly flawed in recent decades. Two aspects of the judicial confirmation fights have been contentious—one substantive, the

44. See *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 630 (1935).

45. See *infra* Part III.

46. See U.S. CONST. art. III; THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 41.

47. See U.S. CONST. art. II; THE FEDERALIST NO. 72 (Alexander Hamilton), *supra* note 41.

other procedural. The substantive disputes during judicial confirmations are largely inevitable. But the procedural meltdown is constitutionally inappropriate and should be fixed.

Substantively, a debate continues to bubble about whether a Supreme Court nominee's judicial philosophy is a fair basis for inquiry by the Senate (and for voting against a nomination), or whether the confirmation process should focus only on whether a nominee meets objective criteria pertaining to qualifications, temperament, ethical propriety, and the like.⁴⁸

In recent years, a rough Senate consensus has seemed to emerge, as revealed by the last four sets of hearings for Supreme Court Justices.⁴⁹ Many Senators seem to believe that a judicial nominee's general judicial philosophy is appropriate for consideration by the President and—with some deference to the President—by the Senate as well.⁵⁰ At the same time, the political ideology and policy views of judicial nominees are clearly unrelated to their fitness as judges, and those matters therefore appear to lie outside the Senate's legitimate range of inquiry.⁵¹ It is equally plain that judicial nominees do not have to answer substantive questions that might impinge on their ability to make independent judgments once confirmed. The Senate thus has not required nominees to commit themselves—directly or indirectly—on particular cases or issues.⁵² As these confir-

48. See, e.g., Frederick Liu, Comment, *The Supreme Court Appointments Process and the Real Divide Between Liberals and Conservatives*, 117 YALE L.J. 1947, 1947–56 (2008).

49. See *Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006); *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005); *Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. (1995); *Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103rd Cong. (1993).

50. Cf. William H. Rehnquist, *The Making of a Supreme Court Justice*, HARV. L. REC., Oct. 8, 1959, at 7, 10 (“[T]here are additional factors which come into play in the exercise of the function of a Supreme Court Justice.”).

51. See U.S. CONST. art. II, § 2, cl. 2 (Advice and Consent Clause); cf. John C. Eastman, *The Limited Nature of the Senate's Advice and Consent Role*, 36 U.C. DAVIS L. REV. 633, 640–47 (2003).

52. See *Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103rd Cong. 259, 287–88 (1993) (statements of Sen. Joseph R. Biden, Chairman, S. Comm. on the Judiciary and Judge Ruth Bader Ginsburg) (de-

mation proceedings showed, notwithstanding some rocky moments and deviations by individual Senators,⁵³ questions regarding general judicial philosophy can shed light on matters relevant to judicial decision making and to the Senate's ultimate decision without threatening judicial independence.

In short, the current Senate precedents suggest that the Senate will consider general judicial philosophy, with some deference to the President. But the precedents also indicate that this must be done without impinging on judicial independence.

Procedurally, however, the judicial confirmation process for Court of Appeals nominees has broken down. In recent decades, the Senate has increasingly used a multitude of procedural mechanisms to delay action on lower-court judicial nominees—by home-state senators' blue-slipping nominees, by bottling them up in committee, or by using anonymous "holds."⁵⁴ This has been a bipartisan problem—perpetrated by Republican senators on some Clinton appointees, and by Democratic senators on some Bush appointees.⁵⁵ The result has been judicial vacancies left open for years on end, nominees who put their lives on hold while waiting for Senate action that may never come, and talented lawyers who prefer to remain in other jobs instead of subjecting themselves to the whim of the Senate confirmation process.⁵⁶ The judiciary is worse off as a result.

My idea on this issue is simple, and echoes sentiments advanced in recent years by President Clinton,⁵⁷ President Bush,⁵⁸ then-Chief Justice Rehnquist,⁵⁹ and the American Bar

clining to answer specific questions about some specific past cases on the grounds that the legal issues might return to the Supreme Court for decision in a future case).

53. See sources cited *supra* note 49.

54. See THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* 164–68 (2006) (discussing the blue-slip process, "bottling up," committee holds, and filibusters).

55. See Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts*, 39 U. RICH. L. REV. 871, 889–91 (2005).

56. See THE PRESIDENTIAL APPOINTEE INITIATIVE, BROOKINGS INST., TO FORM A GOVERNMENT: A BIPARTISAN PLAN TO IMPROVE THE PRESIDENTIAL APPOINTMENTS PROCESS 6–7 (2001), <http://www.brookings.edu/~media/Files/rc/papers/2001/0405governance/0405governance.pdf> [hereinafter TO FORM A GOVERNMENT].

57. See, e.g., President William J. Clinton, President's Radio Address, *supra* note 14, at 1442–43.

58. See, e.g., President George W. Bush, Remarks on the Judicial Confirmation Process, 2 PUB. PAPERS 1929–32 (Oct. 30, 2002).

59. See, e.g., William H. Rehnquist, *Chief Justice's 2002 Year-End Report*

Association,⁶⁰ among others.⁶¹ The Senate should consider a rule ensuring that every judicial nominee receives a vote by the Senate within 180 days of being nominated by the President. Six months is sufficient time for senators to hold hearings, interest groups to register their preferences, and citizens to weigh in on the qualifications of a judicial nominee for lifetime office. At the end of that time, it seems that senators should stand and be counted. If a home-state senator or a group of ideologically-committed senators wishes to block a judicial nomination, they can do so. But they can do so by persuading their colleagues and voting, not through procedural maneuvers. In this way, voters can properly hold their senators accountable, nominees can receive prompt and respectful treatment, and key judicial vacancies can be filled without unnecessary delay.

A related and difficult question—which I do not resolve here—is whether votes on judicial nominees must be up-or-down majority votes, or whether the sixty votes currently needed under Senate rules to overcome a filibuster is appropriate for consideration of judges.⁶² Scholars and politicians have argued that constitutional text and historical practice require an up-or-down majority vote.⁶³ That said, it is also clear that the text of the Constitution gives the Senate broad freedom to set its own rules of proceeding.⁶⁴ And the Senate's filibuster rules have been in place for many years now.⁶⁵ It is not my place to settle that ongoing legal debate.

on the Federal Judiciary, THE THIRD BRANCH, Jan. 2003, at 1, available at <http://www.uscourts.gov/ttb/jan03ttb/jan03.html>.

60. See AM. BAR ASS'N, INDEPENDENCE OF THE JUDICIARY: JUDICIAL VACANCIES (2003), <http://www.abanet.org/poladv/priorities/judvac.html>.

61. See TO FORM A GOVERNMENT, *supra* note 56, at 13–14.

62. See John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 182–90 (2003); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 239–45 (1997); Laura T. Gorjanc, Comment, *The Solution to the Filibuster Problem: Putting the Advice Back in Advice and Consent*, 54 CASE W. RES. L. REV. 1435, 1454–57 (2004).

63. See, e.g., *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 108th Cong. 1–5, 22–26, 31–46 (2003) (statements of Sen. John Cornyn, Professor Steven Calabresi, Professor John Eastman, Professor Bruce Fein, and Professor Douglas Kmiec).

64. See U.S. CONST. art. I, § 5, cl. 2.

65. See Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205, 213–60 (2004) (discussing the his-

Regardless of whether there is a fifty-one-vote or sixty-vote or some other numerical vote requirement, a good way to alleviate the judicial confirmations mess⁶⁶ and help fix Washington is to agree on the ground rules, make them known to all parties ahead of time, and allow nominees to receive votes in the full Senate within 180 days.⁶⁷ Over the long run, the presidency, the Senate, and the Judiciary would all benefit from fixed ground rules regarding judicial nominations. The forty-fourth President (like the forty-second and forty-third presidents tried to do before him) and the Senate should work together to solve this procedural problem and fix the ground rules not just for the forty-fourth President but for the foreseeable future.

III. STREAMLINE EXECUTIVE BRANCH ORGANIZATION AND ENSURE THAT OFFICIALS IN INDEPENDENT AGENCIES ARE MORE ACCOUNTABLE

Third, Congress and the President should scrutinize the organizational chart of executive branch agencies, with an eye toward serious reform. The disastrous consequences of some of the highest-profile agency failures in recent years—the CIA’s mistaken assessment of Saddam Hussein’s weapons programs in 2002,⁶⁸ FEMA’s breakdown during Hurricane Katrina,⁶⁹ and the apparent failure of financial regulatory agencies in the run-up to the current economic crisis—only confirm the pressing nature of the problem.

Two aspects of this regulatory regime are in particular need of attention. The first is the extraordinary duplication,

tory of the filibuster and periodic efforts to reform or restrict its availability).

66. See STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 3–155 (1994) (describing the current criticisms of the federal judicial nominations process); BENJAMIN WITTES, *CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES* 37–85 (2006) (same).

67. President Bush, among others, argued that a failure to vote on a judicial nominee is an abdication of the Senate’s constitutional responsibility. See, e.g., President George W. Bush, Remarks at the Federalist Society’s 25th Annual Gala (Nov. 15, 2007), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071115-14.html>.

68. See COMM’N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 3 (2005).

69. See OFFICE OF INSPECTIONS & SPECIAL REVIEWS, DEP’T OF HOMELAND SEC., *A PERFORMANCE REVIEW OF FEMA’S DISASTER MANAGEMENT ACTIVITIES IN RESPONSE TO HURRICANE KATRINA* 109–10 (2006), available at http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_06-32_Mar06.pdf.

overlap, and confusion among the missions of different agencies.⁷⁰ Whether it is the Justice Department's Antitrust Division overlapping with the Federal Trade Commission,⁷¹ the Commerce Department overlapping with the Federal Communications Commission,⁷² the Department of Energy overlapping with the Federal Energy Regulatory Commission,⁷³ the Department of Labor overlapping with the National Labor Relations Board,⁷⁴ the Securities and Exchange Commission overlapping with the Commodities Futures Trading Commission and the Treasury Department,⁷⁵ or the FBI overlapping with the Drug Enforcement Agency,⁷⁶ there are problems wherever one looks. Overlapping responsibilities means redundancy, inefficiency, conflict, and unnecessary finger-pointing.

70. For one official's views on the problem, see *The Charlie Rose Show: Interview with Nate Silver, Charles Schumer, David Brooks* (PBS television broadcast Oct. 31, 2008), available at <http://www.charlierose.com/view/interview/9333>. (quoting Senator Charles Schumer as saying: "[W]e need to have a better system of regulation. No question about it. I believe we need a unitary, strong, quieter regulator. Right now the system is a mess. . . . [T]he bottom line is we have [thirty] different regulatory agencies . . . I'm talking about one regulator as opposed to thirty . . .").

71. Cf. Eric Lichtblau, *Antitrust Report Exposes Rift Between U.S. Agencies*, INT'L HERALD TRIB. (Paris), Sept. 10, 2008, at 16 (discussing a rift between the two departments on antitrust policy).

72. See U.S. GEN. ACCOUNTING OFFICE, TELECOMMUNICATIONS: COMPETITION ISSUES IN INTERNATIONAL SATELLITE COMMUNICATIONS 3 (1996) (stating that the Commerce Department, State Department and the FCC all have authority over satellite communications); Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L.J. 911, 922 (1996) (stating that several federal agencies, including the FCC and the Commerce Department, have "overlapping" authority over information policy).

73. See, e.g., Norman L. Rave, Jr., Note, *Interagency Conflict and Administrative Accountability: Regulating the Release of Recombinant Organisms*, 77 GEO. L.J. 1787, 1809 (1989) ("[F]ive agencies (NRC, Department of the Interior, Department of Energy, Federal Energy Regulatory Commission, EPA) with widely differing agendas have control over the intersection of environmental and energy policy.").

74. See Valerie A. Sanchez, *A New Look at ADR in New Deal Labor Law Enforcement: The Emergence of a Dispute Processing Continuum Under The Wagner Act*, 20 OHIO ST. J. ON DISP. RESOL. 621, 655-59 (2005) (discussing concerns about overlaps between the Department of Labor and the NLRB dating from the creation of the NLRB).

75. See JERRY W. MARKHAM, 1 A FINANCIAL HISTORY OF THE UNITED STATES 82 (2002).

76. See Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1151 (1995) (discussing the overlapping jurisdiction between the FBI, DEA, and other agencies during the "War on Drugs.").

A second, related area of concern is the questionable effectiveness and accountability of some of the numerous independent regulatory agencies.⁷⁷ These agencies are freed by statute and tradition from direct control by the President or others in the White House and traditional executive agencies.⁷⁸ The President appoints the members of these independent agencies,⁷⁹ but after that, he exercises minimal control over them and can fire them only for cause.⁸⁰ The Supreme Court has made fairly clear (albeit not crystal clear) that the for-cause standard is hard to meet,⁸¹ and therefore presidents rarely attempt to fire officials in independent agencies even when they under-perform. Indeed, presidents rarely attempt to assert any significant direction and supervision over independent agency heads as they exert their policymaking authority.⁸² Although some legal scholars posit that presidents really do exert some

77. For an effort to list all of the independent agencies, see Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, app. at 1236–94 (2000), which includes the following agencies: the Board of Governors of the Federal Reserve System, the Board of Veterans' Appeals, the Chemical Safety and Hazard Investigation Board, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Defense Nuclear Facilities Safety Board, the Equal Employment Opportunity Commission, the Farm Credit Administration, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Election Commission, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the Federal Labor Relations Authority, the Federal Maritime Commission, the Federal Mine Safety and Health Review Commission, the Federal Trade Commission, the Merit Systems Protection Board, the National Credit Union Administration, the National Indian Gaming Commission, the National Labor Relations Board, the National Mediation Board, the National Transportation Safety Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Rate Commission, the Railroad Retirement Board, the Securities and Exchange Commission, the Surface Transportation Board, the United States International Trade Commission, the Social Security Administration, and the Office of Special Counsel.

78. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628–30 (1935); cf. Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 15 (2007).

79. Cf. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 898–99 (2008).

80. *Id.* at 984.

81. See *Humphrey's Ex'r*, 295 U.S. at 629–30.

82. Cf. Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 350 (1991) (“Presidents rarely remove these commissioners . . . [and] potent factors deter active presidential supervision and removal.”).

level of control over independent agencies through indirect mechanisms,⁸³ those who have worked in a White House tend to agree that a President exercises far less practical control over independent agency heads than over the leaders of traditional executive agencies who are removable at will.⁸⁴

Independent agencies are constitutional under *Humphrey's Executor v. United States*.⁸⁵ But what is constitutional is not always wise. And there is reason to doubt whether the elaborate system of numerous independent agencies makes full sense today, at least as to the rulemaking and enforcement activities at certain agencies, as opposed to their adjudicatory functions. The independence those agencies enjoy from presidential direction and supervision may weaken the Executive and strengthen Congress's hand in the Washington power game. But this independence has clear costs in terms of democratic accountability. The basic question is this: Should the President direct and manage some of what now are "independent" agencies in the same way that he controls other agencies—by directing and supervising agency heads in their duties and removing them at will for any reason at all?

I recently watched a CNN telecast that illustrated this issue of accountability: the show purported to identify people responsible for the current financial meltdown—"naming names," in the words of the program's anchor.⁸⁶ Among those identified were current or former heads of independent agencies.⁸⁷ These individuals, like all independent agency heads, necessarily operated without meaningful substantive direction or supervision by the President. They could operate their own fiefdoms with

83. See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 596 (1984) ("[A]ny assumption that executive agencies and independent regulatory commissions differ significantly or systematically in function, internal or external procedures, or relationships with the rest of government is misplaced.").

84. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2273–74 (2001) ("[T]he existence of independent agencies can pose a particularly stark challenge to the aspiration of Presidents to control administration.").

85. 295 U.S. 602, 628 (1935) (characterizing the Federal Trade Commission as a valid "administrative body").

86. *Anderson Cooper 360 Degrees* (CNN television broadcast Oct. 20, 2008) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0810/20/acd.02.html>).

87. See *id.* (listing the former SEC chairman and the former chairman of the Federal Reserve Board of Governors as "culprits of the collapse").

little regard to what the President might have thought was the right approach.

Perhaps the most interesting illustration of this problem occurred when Senator and then-presidential-candidate John McCain called for the firing of the SEC Chairman.⁸⁸ Some immediately responded that the President has no power to fire the SEC Chairman,⁸⁹ prompting Senator McCain to quickly back down from his proposal.⁹⁰ But was Senator McCain's suggestion so unthinkable? Let us assume for a minute that the chair of an independent agency has exercised his or her rulemaking or enforcement authority in a way that is ethically and legally permissible but simply turns out to be unwise and causes great harm. Should that official be subject to removal? What if the agency head is mediocre or just average at his or her job? Normally, persons exercising tremendous executive power and responsibility are not insulated from direction, supervision, and ultimately (if necessary) dismissal, either by elected officials or by the people themselves. Why *shouldn't* someone have the authority to fire such persons at will? And if anyone is to possess that power, it must be the President. Why is it that the President should not have the power, in the first place, to direct and supervise that independent agency head in the exercise of his or her authority?⁹¹

When presidential candidates criss-cross the country for two years, engage in endless town halls, speeches, and debates, the people expect that the leader they elect will actually have the authority to execute the laws, as prescribed by the Constitution.⁹² Yet that is not the way the system works now for large swaths of American economic and domestic policy, including energy regulation,⁹³ labor law,⁹⁴ telecommunications,⁹⁵ securi-

88. Carrie Johnson, *Crisis Poses Big Test for Markets' Regulator*, WASH. POST, Sept. 19, 2008, at D1 (noting that Sen. McCain said that if he were President, he would fire the SEC Chairman).

89. See, e.g., Posting of David Wright to Political Radar, McCain Flub? Republican Says He'd Fire SEC Chair as President, <http://blogs.abcnews.com/politicalradar/2008/09/mccain-blasts-o.html> (Sept. 18, 2008, 13:47 EST).

90. See Posting of Jake Tapper to Political Punch, <http://blogs.abcnews.com/politicalpunch/2008/09/mccain-says-he.html> (Sept. 21, 2008, 20:18 EST).

91. Cf. Les Carpenter, *No Cheering in the Press Box, Except When It Comes to the Boss*, WASH. POST, Jan. 30, 2009, at E6 (quoting Bruce Springsteen discussing his choice of songs for the Super Bowl XLIII halftime show: "I'm the Boss! I decide. The Boss decides. Other people suggest or cajole, but I decide.").

92. U.S. CONST. art. II, § 1.

93. See 42 U.S.C. § 7171 (2006) ("There is hereby established within the

ties regulation,⁹⁶ and other major sectors⁹⁷ where the President has little direct role in rulemaking and enforcement actions, despite those functions being part of the executive power vested in the President by the Constitution. In short, the President is vested with the executive power and yet actually exercises a relatively small slice of that power in certain critical areas of domestic policy.

To be sure, in some situations it may be worthwhile to insulate particular agencies from direct presidential oversight or control—the Federal Reserve Board may be one example, due to its power to directly affect the short-term functioning of the U.S. economy by setting interest rates and adjusting the money supply.⁹⁸ It is possible to make a similar case, on similar grounds, for exempting other agencies from direct presidential control, and it also makes sense generally to treat administrative adjudications differently from policy decisions, rulemakings, and enforcement actions. Yet independent agencies arguably should be more the exception, as they are in considerable tension with our nation's longstanding belief in accountability and the Framers' understanding that one person would be responsible for the executive power.⁹⁹ At a minimum, the implication of affording independence to such agencies should be carefully re-examined to avoid creating overlaps between independent and non-independent agencies for no apparent reason.¹⁰⁰

Department an independent regulatory commission to be known as the Federal Energy Regulatory Commission.”).

94. See National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006) (establishing the NLRB as an independent agency to regulate aspects of labor law).

95. See Communications Act of 1934 § 4, 47 U.S.C. § 154 (2006) (establishing the Federal Communications Commission as an independent agency to regulate telecommunications).

96. See *Freytag v. Commissioner*, 501 U.S. 868, 916 (Scalia, J., concurring) (listing the Securities and Exchange Commission as an “independent regulatory agency”).

97. See *supra* note 77 and accompanying text.

98. BD. OF GOVERNORS OF THE FED. RESERVE SYS., *THE FEDERAL RESERVE SYSTEM PURPOSES AND FUNCTIONS* 5 (8th ed. 1994).

99. THE FEDERALIST NOS. 69, 70 (Alexander Hamilton).

100. See Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255, 322 (1994) (“On matters of substance, for example, regulation of the banking industry, antitrust enforcement, and employment discrimination prosecutions are concurrently managed by both the executive and independent agencies.”).

The related problems of overlapping responsibilities and excessive insulation from presidential (and hence democratic) control call out for high-level attention. Congress and the administration should seek to better organize the executive branch, eliminating overlapping responsibilities, and ensuring that public officials are properly accountable to the President and therefore to the American people. Of course, not all of the problems with agency overlap and independent agencies can or should be solved at once. And Washington is notorious for moving at a glacial pace on these kinds of structural issues. But piecemeal reform is usually better than no reform at all. And the costs of the status quo are a significant contributor to the perception and reality that “Washington is broken.”

IV. RECOGNIZE THAT BOTH THE LEGISLATIVE AND EXECUTIVE BRANCHES HAVE LEGITIMATE AND SOMETIMES OVERLAPPING ROLES IN WAR AND NATIONAL SECURITY

Fourth, in the arena of separation of powers law, one issue looms in significance well above all others: the question of war powers. The most significant issue is whether the President can order U.S. troops to initiate large-scale offensive hostilities in a foreign country without congressional approval.¹⁰¹ Despite its obvious import, I was amazed that the recent presidential and vice-presidential televised debates lasted a combined six hours without even one question about whether, and if so when, the President can commit the United States to war without prior approval from Congress.¹⁰² One would expect that this would be

101. This topic has been the subject of considerable academic debate in recent decades. See generally JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (2d rev. ed. 2004); MICHAEL GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* (1990); MICHAEL D. RAMSEY, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* (2007); Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487 (2002); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45 (2007).

102. See *The First Presidential Debate* (CNN television broadcast Sept. 26, 2008); *The Second Presidential Debate* (CNN television broadcast Oct. 7, 2008); *The Third Presidential Debate* (CNN television broadcast Oct. 15, 2008); *The Vice-Presidential Debate* (CNN television broadcast Oct. 2, 2008) (providing question-by-question accounts of the televised debates and indicating that such questions were never asked). A version of this question was put

a critically important question to be asked of a presidential candidate given our history and the President's singular constitutional role as commander in chief, yet the question was never posed during the debates.¹⁰³

The Constitution grants Congress the power to declare war.¹⁰⁴ The War Powers Resolution requires congressional authorization of a war within sixty days of hostilities, except in cases of self-defense and similar emergencies.¹⁰⁵ Before and after the War Powers Resolution was enacted in the early 1970s, however, most presidents asserted their ability to wage war—at least limited war—without any such congressional approval.¹⁰⁶ On some occasions involving more limited strikes—the

to Governor Mitt Romney in a Republican presidential primary debate on October 9, 2007. Asked whether he would need congressional authorization “to take military action against Iran’s nuclear facilities,” Governor Romney did not directly answer the question, noting that as President “[y]ou sit down with your attorneys and [they] tell you what you have to do;” he then proceeded to discuss the substance of his Iran policy. MSNBC.com, Oct. 9 Republican Debate Transcript, <http://www.msnbc.msn.com/id/21309530> (last visited Apr. 12, 2009). Senator John McCain later criticized Governor Romney’s answer for suggesting that lawyers should be involved in making such a determination. SCHotline, <http://schotlinepress.wordpress.com/2008/01/06/john-mccain-2008-launches-new-web-ad-leadership> (Jan. 6, 2008, 08:45 EST) (giving the script for John McCain’s web advertisement entitled “Leadership”).

103. Cf. *The First Presidential Debate*, supra note 102; *The Second Presidential Debate*, supra note 102; *The Third Presidential Debate*, supra note 102; *The Vice-Presidential Debate*, supra note 102 (indicating that this question was not asked). In contrast to the paucity of questions on these matters during the televised debates, *Boston Globe* reporter Charlie Savage asked the leading primary candidates of both parties a detailed set of questions concerning their views of executive power, especially in wartime. See Charlie Savage, *Candidates on Executive Power: A Full Spectrum*, BOSTON GLOBE, Dec. 22, 2007, at A1. Then-Senator Barack Obama stated during the Democratic primary campaign that “[t]he 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.” Charlie Savage, *Barack Obama’s Q&A*, BOSTON GLOBE, Dec. 20, 2007, <http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA>.

104. U.S. CONST. art. I, § 8, cl. 11.

105. War Powers Resolution, 50 U.S.C. §§ 1541–1548 (2000).

106. See, e.g., William J. Clinton, The President’s News Conference, 2 PUB. PAPERS 1417, 1419 (Aug. 3, 1994) (quoting then-President Clinton as “welcom[ing] the support of the Congress” to invade Haiti but stating that “[l]ike my predecessors of both parties, I have not agreed that I was constitutionally mandated to get it”); James A. Baker III & Warren Christopher, Op-Ed., *Put War Powers Back Where They Belong*, N.Y. TIMES, July 8, 2008, at A21 (“[E]very president since Richard Nixon has treated [the War Powers Resolution] as unconstitutional”); THE CONSTITUTION PROJECT, DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES, at viii (2005), http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_

invasions of Grenada in 1983 and Panama in 1989; the targeted missile strikes on Iraq, Afghanistan, and Sudan in the 1990s; and the broader air campaign against Kosovo in 1999—modern presidents have conducted offensive military operations without obtaining advance approval from Congress.¹⁰⁷ With regard to larger conflicts—most notably the Persian Gulf War of 1991, the Afghan War (and broader war against al Qaeda) in 2001, and the Iraq War of 2003—modern presidents have sought advance authorization from Congress before acting.¹⁰⁸

As the actions of these presidents suggest, it is ordinarily understood that seeking the approval of Congress for large-scale military operations overseas is a wise presidential course. Going to war is the most grave and significant action a nation

Use_Force_Abroad.pdf (“Since [the passage of the War Powers Resolution], presidents have consistently maintained that parts of the Resolution intrude unconstitutionally on the President’s war powers.”). Senior members of Congress have at times explicitly agreed with this proposition. *See, e.g.*, 144 CONG. REC. H11,722 (daily ed. Dec. 17, 1998) (statement of Rep. Gingrich) (seeing no need for President Clinton to obtain advance authorization from Congress before launching military strikes against Iraq); 141 CONG. REC. S17,529 (daily ed. Nov. 27, 1995) (statement of Sen. Dole) (“Now, in my view the President has the authority and the power under the Constitution to do what he feels should be done regardless of what Congress does.”).

107. *See* Andrew Rudalevige, *The Contemporary Presidency: The Decline and Resurgence and Decline (and Resurgence?) of Congress: Charting a New Imperial Presidency*, 36 PRESIDENTIAL STUD. Q. 506, 510 (2006) (noting uses of force without congressional authorization in Lebanon, Iran, Grenada, Libya, Panama, Somalia, Iraq, Haiti, Bosnia, Sudan, Afghanistan, and Kosovo).

108. The broader historical practice of seeking congressional approval is hard to assess, and would depend largely on one’s definition of “war.” The United States has “utilized military abroad in situations of military conflict to protect U.S. citizens or promote U.S. interests” hundreds of times. RICHARD F. GRIMMET, CONG. RESEARCH SERV., INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2008, at 1 (2009), *available at* <http://www.fas.org/sgp/crs/natsec/RL32170.pdf>. The U.S. has formally declared war on five occasions, including the War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World War II. *See* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 177 (1996). Congress has specifically authorized war (without a formal declaration) in other cases, including the naval war with France in the 1790s, the Barbary wars of the early 19th century, the Vietnam War, the Persian Gulf Wars of 1991 and 2003, and the War on Terror. *See id.* (asserting that the war with France, the Vietnam War, and the Persian Gulf War of 1991 were each authorized by Congress without a formal declaration); Bradley & Goldsmith, *supra* note 15, at 2050, 2074, 2076 (2005) (speaking to the 2003 war in the Persian Gulf, the War on Terror, and the Barbary wars). Lack of an advance congressional authorization vote has not prevented U.S. presidents from using military force abroad, however, most notably in the Korean War, the invasions of Grenada and Panama, and the Kosovo War. *See supra* note 107 and accompanying text.

can take. As a political and policy matter, it makes sense for there to be an inter-branch consensus among our federal elected officials, as there was (at least initially) for both the Afghan and the Iraq wars.¹⁰⁹ Such consensus maximizes public and political support for the war effort while minimizing the risk that war will be undertaken hastily without proper consideration. Even more importantly, inter-branch agreement is favored—and according to some, compelled—by the Constitution itself,¹¹⁰ in addition to the War Powers Resolution.¹¹¹ As even the most energetic defenders of executive prerogatives agree, moreover, Congress has unambiguous power over appropriating money to fund military conflicts, in addition to its other authorities over military matters.¹¹² No one denies, therefore, that Congress can stop a President from waging war by, at a mini-

109. See 148 CONG. REC. H7799 (daily ed. Oct. 10, 2002) (listing a vote in the House of 296 to 133 to authorize military action in Iraq, with bipartisan support); 148 CONG. REC. S10342 (daily ed. Oct. 10 2002) (listing a vote in the Senate of seventy-seven to twenty-three to authorize military action in Iraq, with bipartisan support); 147 CONG. REC. S9421 (daily ed. Sept. 14, 2001) (listing a vote in the U.S. Senate of ninety-eight to zero for the AUMF); 147 CONG. REC. H5683 (daily ed. Sept. 14, 2001) (listing a vote in the House of 420 to one for the AUMF).

110. See U.S.CONST. art I, § 8, cl. 11; *cf.* GLENNON, *supra* note 101, at 72 (asserting that the President's war powers are "paltry" and "subordinate to" the constitutional war powers granted to Congress).

111. The War Powers Resolution ironically may give the President more power to initiate war unilaterally than some believe is granted by the Constitution. Whereas the Constitution grants Congress the power to "declare war," which some argue means congressional authorization is required before military operations other than those undertaken in self-defense, the War Powers Resolution requires affirmative congressional authorization for a war only if the conflict lasts more than sixty days—a time period which can be extended by Congress. See U.S. CONST. art. I § 8, cl. 11; War Powers Resolution, 50 U.S.C. § 1544(b) (2000). This is not the forum in which to address how a court should necessarily rule on war powers questions, or even whether such questions are justiciable. Courts could conceivably address such questions in a number of ways, including: (1) deciding the issue to be a non-justiciable political question; (2) requiring explicit congressional authorization before the President can initiate war; (3) allowing the President to initiate war unilaterally, unless Congress has explicitly voted otherwise; (4) allowing the President to initiate war unilaterally, even in the face of an explicit negative congressional vote; and (5) treating the congressional appropriations process as the sole mechanism by which Congress can itself police the President and halt or prevent undesired wars. See *Campbell v. Clinton*, 203 F.3d 19, 20, 23 (D.C. Cir. 2000) for an example of a court grappling with a war powers issue.

112. See, *e.g.*, JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 143 (2005); *see also* U.S. CONST. art. I, § 9, cl. 7 (giving Congress the power to appropriate funds); *id.* art I, § 8 cls. 11–14 (providing further congressional powers over war-related functions).

mum, refusing to fund the war (although in some cases that may require two-thirds of both Houses to overcome a veto).¹¹³ Given that war powers are thus shared by both the President and Congress—and that unity of national effort is crucial for a war effort to succeed—most presidents and observers have seen it as vastly preferable for the President to obtain congressional approval before initiating large-scale military conflict.

But beyond the question of going to war in the first place are many subsidiary questions involving the relative roles of the President and Congress with respect to the “incident[s] of war.”¹¹⁴ To what extent can the Congress legislate and regulate the President’s activities in the war arena? And to what extent does the President require authorizing legislation to undertake a war-related activity abroad?

As an initial matter, the constitutional text makes clear that the President does not enjoy unilateral authority with respect to all incidents of war. The Constitution gives the Congress not only the power to declare war, as discussed above, but also the power to raise armies, to fund wars and armies, and to regulate captures, among other powers.¹¹⁵ In addition, Article I, Section Eight gives Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹¹⁶

Justice Jackson’s three-part framework from his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*¹¹⁷ has long been used to assess whether a President’s activities in the national security arena are permissible. Justice Jackson famously separated the exercise of a President’s wartime authorities into three categories. Category One applies when Congress has authorized the President’s actions, and his authority is thus “at its maximum.”¹¹⁸ Category Two occurs when Congress has neither authorized nor prohibited the President’s actions.¹¹⁹ Category Three applies when Congress has prohibited the Presi-

113. U.S. CONST. art. I, § 7, cl. 2.

114. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (internal quotations omitted).

115. See U.S. CONST. art. I, § 8, cls. 11–12.

116. U.S. CONST. art. I, § 8, cl. 18.

117. 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

118. *Id.* at 635.

119. *Id.* at 637.

dent's actions, but the President asserts his preclusive and exclusive commander-in-chief authority.¹²⁰ Here, Jackson maintains, the President's power is "at its lowest ebb."¹²¹

The scope of what a President can lawfully do in a Category Three situation is uncertain—and highly controversial with Congress and the public.¹²² For that reason, it seems preferable for a President to try to ensure where possible that his commander-in-chief activities take place in Category One or Two. In other words, if it appears that the President's activities may run counter to an existing statute, the President may be wise to seek clarifying legislation or commentary from Congress, a point Jack Goldsmith articulated in his thought-provoking book, *The Terror Presidency*.¹²³ Outside perhaps of a few defined areas (such as command of troop movements in battle) in which preclusive and exclusive presidential war-making authority appears settled as a matter of history and tradition, it is not likely a winning strategy—in this era of continued aggressive judicial involvement in separation of powers disputes—for a President to assume that he will be able to avoid judicial disapproval of wartime activities taken in contravention of a federal statute.¹²⁴ Recent years have demonstrated that courts are quite prepared to resolve war-related separation of powers disputes.¹²⁵

In applying Justice Jackson's *Youngstown* framework, courts have a corresponding responsibility to ensure that their opinions are especially clear and provide necessary guidance to the political branches. One major issue in recent years, for example, has been whether the broad language of the Authoriza-

120. *Id.* at 637–38.

121. *Id.* at 637.

122. Cf. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 720–21 (2008) (stating that Category Three disputes are "central to the modern law of war powers").

123. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 124 (2007).

124. *But see In re Sealed Case*, 310 F.3d 717, 746 (FISA Ct. Rev. 2002).

125. See, e.g., *Boumediene v. Bush*, 128 S.Ct. 2229, 2259 (2008); *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2762 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *as recognized in* *Boumediene v. Bush*, 128 S.Ct. 2229 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004); *Rasul v. Bush*, 542 U.S. 466, 485 (2004), *superseded by statute*, *Detainee Treatment Act of 2005*, Pub. L. No. 109-148, 119 Stat. 2739.

tion for the Use of Military Force,¹²⁶ passed in the wake of September 11, overrides more specific earlier-enacted statutes such as the Non-Detention Act,¹²⁷ the Uniform Code of Military Justice,¹²⁸ and the Foreign Intelligence Surveillance Act.¹²⁹ Arguably, the Supreme Court has sent mixed signals on that question, reading the AUMF broadly in *Hamdi*¹³⁰ and then two years later reading it more narrowly in *Hamdan*.¹³¹ This led to complaints by the *Hamdan* dissenters that the Court was reading the AUMF inconsistently.¹³² Without taking sides in the debate over whether the AUMF should have been read broadly or narrowly in connection with its effect on earlier enacted statutes, or whether the critique offered by the *Hamdan* dissenters is correct, it is enough here to say that courts owe a special duty of consistency and clarity when they decide cases in the war powers arena, including when they interpret landmark statutes such as the AUMF.

In that same vein, courts today should be cautious about finding *implied* congressional prohibition sufficient to classify a case as a Category Three situation. Modern statutory interpretation generally frowns on drawing inferences from congressional silence—recognizing that there are many reasons Congress might not enact a particular bill into law.¹³³ It is arguably even less appropriate, moreover, for a court to disallow a President's traditional wartime activity solely on the basis of congressional silence, rather than a written statute. To be sure, in *Youngstown* itself, some Justices drew meaning from the failure of Congress to enact a statute supporting President Truman's seizure; they read the congressional silence against

126. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. I 2001)).

127. 18 U.S.C. § 4001(a) (2006).

128. 10 U.S.C. §§ 801–946 (2006).

129. Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).

130. *Hamdi*, 542 U.S. at 517. Justice Souter dissented as to this broad reading. *Id.* at 547 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

131. *See Hamdan*, 126 S.Ct. at 2775. Justice Thomas would have read the Authorization more broadly. *See id.* at 2775 n.24.

132. *See Hamdan*, 126 S.Ct. at 2824–25 (Thomas, J., dissenting).

133. *See, e.g., Kimbrough v. United States*, 128 S.Ct. 558, 561 (2007) (“The statute says nothing about appropriate sentences within these brackets, and this Court declines to read any implicit directive into the congressional silence.”).

him.¹³⁴ But *Youngstown* is not a counter-example to the point because in that case the President's *domestic* action was not a traditional commander-in-chief activity to begin with—as both Justice Black's majority opinion and Justice Jackson's concurring opinion convincingly explained.¹³⁵ When, unlike in *Youngstown*, it is clear that the President is exercising his traditional commander-in-chief power and directing action to support a war effort, it appears more consistent with modern principles of statutory interpretation and judicial restraint for courts to require *express* congressional prohibition before classifying the case as a Category Three situation.

In sum, a President must thoroughly understand and appreciate the significance of *Youngstown* Category Three. And a President should strive to avoid Category Three—for reasons both legal and political. Few claims are as likely to provoke a skeptical, if not hostile, reaction from the courts, Congress, and the public as a claim that the President has a right as commander in chief to violate an express federal statute, at least unless the President's authority to act exclusively and preclusively with respect to the specific wartime activity in question is historically well-established. Avoiding Category Three could help a President alleviate the serious friction that these debates engender between the executive and legislative branches of government, and in the general public. At the same time, courts should be quick, clear, and consistent in deciding war powers questions. And as a matter of judicial restraint and proper statutory interpretation, courts should be careful about finding a commander-in-chief case in Category Three based on implied prohibitions alone.

V. CONSIDER THE POSSIBLE BENEFITS OF A SINGLE, SIX-YEAR PRESIDENTIAL TERM

Fifth, a major source of problems in Washington today is that governance can take a backseat to campaigning. Virtually every elected official complains about the distraction caused by

134. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585–86 (1952).

135. *Youngstown*, 343 U.S. at 587 (asserting that the President's Commander-in-Chief authority “need not concern us here. Even though ‘theater of war’ be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power . . . to keep labor disputes from stopping production.”); *id.* at 644 (Jackson, J., concurring) (“That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history.”).

the “permanent campaign.”¹³⁶ One of the reasons for this complaint is the frequency with which elections are held. To be sure, there is a balance, because elected officials should be accountable to the people, and elections and campaigns connect officials to the public. But today the near-constant prospect of forthcoming elections often undermines the ability to get things done in Washington.

For present purposes, I will focus only on the pitfalls of the modern presidency in the context of the permanent campaign. An analysis of two-term presidencies since the adoption of the Twenty-Second Amendment reveals some problems. To begin with, the requirement that a President prepare for and anticipate re-election leads to several concerns. It distracts from the business of running the country. It makes it harder for presidents to tackle difficult but necessary issues in their first terms. It leads to the perception (sometimes fair, sometimes not) of decisions made with an eye toward the Electoral College. In addition, eight years is too long for a President and his or her team to stay in top form. The stresses and demands of the job have led to more difficult second terms. Indeed, the second terms of the last four two-term presidencies are widely regarded as having been less successful than their respective first terms. One President resigned under the threat of near-certain impeachment and removal (Nixon),¹³⁷ one endured the major Iran-Contra scandal¹³⁸ and the bitter defeat of a Supreme Court nominee (Reagan),¹³⁹ one actually was impeached and tried in the Senate, albeit not removed (Clinton),¹⁴⁰ and one experienced setbacks in dealing with the Iraq War¹⁴¹ and responding to a major hurricane¹⁴² (George W. Bush).

136. See BRADLEY PATTERSON, *THE WHITE HOUSE STAFF: INSIDE THE WEST WING AND BEYOND* 204–18 (2000).

137. See Carroll Kilpatrick, *Nixon Resigns*, WASH. POST, Aug. 9, 1974, at A1.

138. See David Johnston, *Reagan Nears Center Stage of Iran Contra Affair*, N.Y. TIMES, Feb. 7, 1990, at A20.

139. See Linda Greenhouse, *Bork's Nomination is Rejected, Reagan 'Saddened'*, N.Y. TIMES, Oct. 24, 1987, at A1.

140. See James Bennet & John M. Broder, *Clinton Acquitted Decisively: No Majority for Either Charge*, N.Y. TIMES, Feb. 13, 1999, at A1.

141. See Susan Saulny, *Some Hitherto Staunch G.O.P. Voters Souring on Iraq*, N.Y. TIMES, May 30, 2007, at A17. On the other hand, President Bush has argued that history will look more favorably on the results of the Iraq War and particularly the “surge” he ordered late in his second term. See Kate Zernike, *Bush's Legacy vs. the 2008 Election*, N.Y. TIMES, Jan. 14, 2008, at A4.

142. See Hope Yen, *FEMA Wasting Millions in Katrina Aid, Audit Finds*,

It is unclear why recent second-term presidents have had more difficulties—and there is a danger of mistaking correlation with causation. History suggests a number of possible explanations: exhaustion, built-up bitterness from the opposing party, the inevitable aftermath of a bruising re-election, hubris, and many more. Whatever the cause, however, the end results have been clear—and sometimes not very pretty.

Creative ideas to address this problem are worth considering—even those that might seem radical at first blush. One idea is to repeal the Twenty-Second Amendment and return the nation to the original constitutional design.¹⁴³ Another possibility is to amend the Constitution to provide for a single, six-year presidential term.¹⁴⁴ A single term is hardly a novel idea. Indeed, at the Constitutional Convention in 1787, the initial vote of the Committee of the Whole was for a single seven-year presidential term.¹⁴⁵ As we know, the Framers ultimately adopted unlimited four-year terms—which was the rule until the Twenty-Second Amendment, ratified in 1951, set a limit of two four-year terms.¹⁴⁶

As between those two options—repealing the Twenty-Second Amendment or affording presidents single six-year terms—it seems to me that a single six-year term could achieve many benefits. First, it would help prevent the under-analyzed and under-appreciated onset of the fatigue that too frequently leads to executive branch missteps in second terms.¹⁴⁷ Second, and consistent with the goal discussed in Part I above of freeing the President from unnecessary distractions, a single six-year

WASH. POST, Dec. 7, 2006, at A12.

143. See Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 601–10 (1999) (describing calls for the repeal of the Twenty-Second Amendment dating from the 1950s).

144. See Lawrence L. Schack, Note, *A Reconsideration of the Single Six-Year Presidential Term in Light of Contemporary Election Trends*, 12 J.L. & POL. 749, 749 (1996).

145. See Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35, 38 (1986).

146. U.S. CONST. amend. XXII.

147. Cf. *One Six-Year Presidential Term: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 93d Cong. 4–5 (1973) (testimony of Theodore C. Sorensen, former Special Counsel to President Kennedy); Schack, *supra* note 144, at 772 (“The evidence suggests that electoral concerns increasingly contribute to an already overburdened Chief Executive . . .”). *But see* Arthur Schlesinger Jr., *Against a One-Term, Six-Year President*, N.Y. TIMES, Jan. 10, 1986, at A27.

term would avoid the enormous difficulty of being President and running a re-election campaign at the same time. I became Staff Secretary to President Bush in July 2003 and witnessed first-hand the challenges inherent in running for President and being President at the same time. It is fair to say that running for re-election while serving as President greatly multiplies the complexity of the President's already difficult job. A senator who runs for President can simply skip his Senate duties for two years. The President does not have that luxury. Third, a single six-year term would alleviate the pressure to think about re-election and the need to run something of a permanent campaign that, according to some, alters (or "politicizes") presidential and executive branch decision making during the first term.¹⁴⁸ A President and top executive branch officials who never have to think about the President's re-election would have far greater freedom to focus on the business of running a country without regard to short-term popular reactions or fundraising. This would advance the Framers' goal of a President who is able to resist any "sudden breeze," "transient impulse," or "temporary delusion" of the people in order to govern from a more detached perspective in the interests of the long-term public good.¹⁴⁹

Because any change to the presidential term in office would be dramatic, require extensive deliberation, and ultimately necessitate passage of a constitutional amendment, I would not expect it to happen anytime soon. There are downsides to the single six-year presidential term, perhaps most obviously the fact that a popular or effective President would be precluded from remaining in office for an additional two years. In addition, some might say that this would make the President a lame duck from day one, or reduce his accountability. As a logical matter, however, these objections would apply also to the Twenty-Second Amendment's existing prohibition on serving more than two elected terms in office.¹⁵⁰ Anyone who objects to my proposal on these grounds logically should object to the Twenty-Second Amendment as well.

The Framers of the Constitution established an amendment process and emphasized the importance of practical experience—"the guide that ought always to be followed whenever it

148. See PATTERSON, *supra* note 136, at 204–18.

149. THE FEDERALIST NO. 71, at 400 (Alexander Hamilton) (Clinton Rossiter ed., 1999).

150. U.S. CONST. amend. XXII, § 1.

can be found¹⁵¹ in constitutional design. That experience has prompted numerous structural amendments during our history—four of which directly involved the presidency: the Twelfth, Twentieth, Twenty-Second, and Twenty-Fifth.¹⁵² At this time in our history, experience shows that the status quo of two presidential terms since 1951 has not worked all that well. It may be time to consider again a single, six-year presidential term.¹⁵³

CONCLUSION

The challenges facing the forty-fourth President—like those facing presidents before him—are enormous and daunting. Separation of powers controversies like those that challenged his predecessors will recur. It is a good time to take stock of those lessons, to examine our foundational structures, and to develop creative solutions to address the structural challenges of the future. I hope these ideas help advance that discussion.

151. THE FEDERALIST NO. 52, at 295 (James Madison) (Clinton Rossiter ed., 1999).

152. See U.S. CONST. amends. XII, XX, XXII, and XXV. For a discussion of the relationship between these and other structural provisions in the Constitution, see Diane P. Wood, *Our 18th Century Constitution in the 21st Century World*, 80 N.Y.U. L. REV. 1079, 1082–83 (2005).

153. Any such proposal should of course take effect after the then-current President has had an opportunity to serve two terms.