References

Aldrich, John. 1995. *Why Parties? The Origin and Transformation of Political Parties in America.* Chicago: University of Chicago Press.

Binder, Sarah. 1999. "The Dynamics of Legislative Gridlock, 1947–96." *American Political Science Review* 93:519–533.

Bond, Jon and Richard Fleisher. 1990. *The President in the Legislative Arena.* Chicago: The University of Chicago Press.

Brady, David, and Craig Volden. 1998. *Revolving Gridlock.* Boulder, CO: Westview Press.

Coleman, John J. 1999. "Unified Government, Divided Government, and Party Responsiveness." *American Political Science Review* 93:821–835.

Cooper, Joseph, and David Brady. 1981. "Institutional Context and Leadership Style: The House from Cannon to Rayburn." *American Political Science Review* 75:411–425.

Cox, Gary, and Mathew McCubbins. 1993. *Legislative Leviathan: Party Government in the House.* Berkeley: University of California Press.

Cutler, Lloyd. 1988. "Some Reflections About Divided Government." *Presidential Studies Quarterly* 18:485–492.

Edwards, George C., Andrew Barrett, and Jeffrey Peake. 1997. "The Legislative Impact of Divided Government." *American Journal of Political Science* 41:545–563.

Epstein, David, and Sharyn O'Halloran. 1994. "Administrative Procedures, Information, and Agency Discretion." *American Journal of Political Science* 38:697–722.

———. 1999. *Delegating Powers.* Cambridge, UK: Cambridge University Press.

Howell, William, Scott Adler, Charles Cameron, and Charles Riemann. 2000. "Divided Government and the Legislative Productivity of Congress, 1945–94." *Legislative Studies Quarterly* 25:285–312.

Krehbiel, Keith. 1996. "Institutional and Partisan Sources of Gridlock: A Theory of Divided and Unified Government." *Journal of Theoretical Politics* 8:7–40.

———. 1998. *Pivotal Politics.* Chicago: University of Chicago Press.

Mayhew, David R. 1991. *Divided We Govern.* New Haven, CT: Yale University Press.

McCubbins, Mathew, Roger Noll, and Barry Weingast. 1987. "Administrative Procedures as Instruments of Political Control." *Journal of Law, Economics, & Organization* 3:243–277.

Poole, Keith, and Howard Rosenthal. 1991. "Patterns of Congressional Voting." *American Journal of Political Science* 35:228–278.

———. 1997. *Congress.* New York and Oxford: Oxford University Press.

Sundquist, James. 1988. "Needed: A Political Theory for the New Era of Coalition Government in the United States." *Political Science Quarterly* 103:613–635. ✦

Chapter 5

Power Without Persuasion

Identifying Executive Influence

William Howell and Douglas Kriner

In his classic work on the presidency, Richard Neustadt argues that presidents must bargain and compromise in order to achieve their goals. Yet, much has changed in the political environment since Neustadt wrote his seminal work in 1960. Washington politics, particularly involving the president and Congress, is now characterized by higher levels of polarization, with an increased propensity for divided government. Advocates of the polarization thesis note that gone are the days when legislators from both parties could work behind the scenes to craft compromise legislation. As a result, the leadership strategies that Neustadt recommends may be less amenable to the politics of the twenty-first century than they were almost a half century ago. If so, then new strategies of presidential leadership will be required.

In this chapter, William Howell and Douglas Kriner examine the idea of "power without persuasion" or the propensity of presidents of both political parties to use their *unilateral powers* to secure the policies they prefer. Presidents can employ executive orders, proclamations, and other tools of the unilateral presidency to advance their goals. Howell's (2003) own recent work demonstrates that presidents are more active in using executive orders to advance their policy goals, but the question remains, how successful are presidents in using this strategy? In this chapter, Howell and Kriner address this question by exploring four case studies from the presidency of George W. Bush. These case studies demonstrate both the potential and the limitations of the unilateral presidency approach. While there are limitations to the approach, importantly, these case studies reveal that in many situations presidents can employ their powers unilaterally to greatly increase their leverage over Congress, as well as to achieve their preferred policy outcomes. While presidents cannot ignore the need to bargain and work with Congress, it is no longer the only game in town for presidents.

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Modern presidents are put in a seemingly impossible position. On the one hand, they are saddled with enormous responsibilities, expected to respond at a moment's notice to everything from the latest terrorist attack to the "threat" that same-sex couples present to the institution of marriage. And on the other, the formal powers that the Constitution grants them are wholly insufficient to meet the task. Wielding only the powers to propose and veto legislation in order to stave off mounting public expectations is a bit like brandishing a wooden sword in the face of a rapidly approaching cavalry. Presidents, plainly, stand little chance at holding their line.

Fortunately for them, presidents have more options, and more opportunities, than all of this supposes. Drawing from a "tool chest" that they themselves have fabricated, presidents unilaterally can set public policy and thereby place upon others the onus of coordinating a response (Cooper 1997, 546). With executive orders, executive agreements, national security directives, proclamations, and other kinds of directives, presidents can exert power and initiate change to an extent not possible in a strictly legislative setting. And because of this, they stand a considerably better chance of beating back the public claims made on them, while also redirecting the doings of government in ways that better reflect their own priorities.

From the very beginning, presidents have exercised their unilateral powers, the Neutrality Proclamation, Louisiana Purchase, and Emancipation Proclamation being early highlights. In the modern era, however, the practice has really taken hold. Almost all of the trend lines point upwards. During the first 150 years of the nation's history, treaties (foreign agreements that must be ratified by Congress) regularly outnumbered executive agreements (foreign agreements that automatically take effect); but during the last 50 years, presidents have signed roughly 10 executive agreements for every treaty submitted to Congress (Moe and Howell 1999; Margolis 1986). With rising frequency, presidents are issuing national security directives (policies that are not even released for public review) to institute aspects of their policy agenda (Cooper 1997, 2002). Though the total number of executive orders has declined, the number of "significant" orders has increased by roughly an order of three (Howell 2003, 83).[1] Using executive orders, department orders, and reorganizations plans, presidents have unilaterally created a majority of the administrative agencies listed in the United States Government Manual (Howell and Lewis 2002; Lewis 2003). What is more, these policy mechanisms hardly exhaust the totality of options available to presidents, who regularly invent new ones or redefine old ones in order to suit their own strategic interests.

A variety of factors have contributed to the rising use of unilateral directives: Supreme Court rulings in the 1930s and '40s upholding the constitutionality of executive orders and executive agreements;[2] the rise of the administrative state (Weko 1995; Arnold 1998); and, perhaps most consequentially, the well-documented weakening of parties, devolution of committee powers, and polarization of Democrats and Republicans within Congress since the 1970s (Kernell 1997; Mann and Ornstein 1981; Heclo 1978; Oppenheimer 1980; Bond and Fleisher 2000), all of which have made the legislative process a less attractive venue for presidents to advance their policy agendas.[3] The real question, though, is whether this arsenal of unilateral powers has done presidents much good, enhancing his ability to cope with the rising expectations laid before them.

Conventional wisdom, for the most part, presents a rather dim view of these powers, arguing that presidents rely upon them only when efforts to persuade—the purported key to presidential power—have faltered. The mere issuance of commands, as it were, is less a sign of strength than of failure to achieve one's policy goals "by softer means" (Neustadt 1990, 24). This chapter takes a different view. Through a series of case studies, it demonstrates two facts about the politics of unilateral action. First, because presidents can issue executive orders in lieu of laws and executive agreements in lieu of treaties, they are able to institute policies that materially alter the doings of government. Rather than working at the fringes of the policymaking process, or instituting policies preferred by supermajorities within Congress, presidents use their unilateral powers to considerable and independent effect—sometimes creating policies that look very different from those that members of Congress might prefer, and other times issuing orders that would never survive the legislative process. Second, and critically, these powers have limits, for which any theory of unilateral action must account. Though they need not construct or sustain coalitions in support of their policy initiatives, presidents must carefully monitor, and even consult with, members of Congress and judges to ensure the sanctity of their orders. Acting in policy domains in which they lack adequate constitutional or statutory authority or issuing policies that anger too many legislators, presidents risk being overturned. The challenge, as such, is to recognize opportunities when they arise and to push policy as far as Congress and the courts will permit.

Straight out of the Gates

From the moment he took office, President George W. Bush began issuing executive orders, proclamations, and national security directives that would dramatically reshape the domestic and foreign policy landscapes.[4] In the spring of 2001, he issued an executive order that instituted a ban on all federal project labor contracts, temporarily setting in flux Boston's $14 billion dollar "Big Dig" and dealing a major

blow to labor unions. He later required federal contractors to post notices advising employees that they have a right to withhold the portion of union dues that are used for political purposes. He created the White House Office of Faith-Based and Community Initiatives, which was charged with "identify[ing] and remov[ing] needless barriers that thwart the heroic work of faith-based groups."[5] He has used the Office of Management and Budget to scrutinize the scientific basis for regulating businesses and, in some instances, whole industries. He set new guidelines on federal funding of fetal tissue research. In order to block the release of presidential papers, he claimed the power for presidents and their kin to invoke executive privilege years after leaving office. By including salmon raised in fish hatcheries in counts for the Endangered Species Act, Bush managed to take salmon off the list of endangered species and thereby lifted federal regulations that applied to the rivers and streams where they spawn. Without securing congressional authorization, Bush withdrew from the Kyoto Protocols, the International Criminal Court, and the Antiballistic Missile Treaty. And just as Truman used a 1950 national security directive to identify the doctrine of containment, which guided foreign policy during the Cold War, Bush issued a national security strategy endorsing the principle of preemptive war, which may guide foreign policy efforts to confront terrorism in the twenty-first century.

For Bush, scaling back environmental and industry regulations has been a major priority. "Stymied in [their] efforts to pass major domestic initiatives in Congress," a recent *New York Times* feature story revealed, "officials have turned to regulatory change." Under Bush's watch,

> Health rules, environmental regulations, energy initiatives, worker-safety standards and product-safety disclosure policies have been modified in ways that often please business and industry leaders while dismaying interest groups representing consumers, workers, drivers, medical patients, the elderly and many others. And most of it was done through regulation, not law—lowering the profile of the actions. The administration can write or revise regulations largely on its own, while Congress must pass laws. For that reason, most modern-day presidents have pursued much of their agendas through regulation.[6]

The Bush administration has issued rules that alter the amount of allowable diesel-engine exhaust, that extend the number of hours that truck drivers can remain on the road without resting, and that permit Forest Service managers to approve logging in federal forests without standard environmental reviews. These rule changes, moreover, represent but a fraction of the total.

Considerable activity has centered around the president's war on terrorism. In the aftermath of September 11, Bush created a series of agencies—the Office of Homeland Security, the Office of Global Communications, and the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction—to collect and disseminate new intelligence while coordinating the activities of existing bureaus. He issued a national security directive lifting a ban (which Ford originally instituted via executive order 11905) on the CIA's ability to "engage in, or conspire to engage in, political assassination"—in this instance, the target being Osama bin Laden and his lieutenants within Al Qaeda. He signed executive orders that froze all financial assets in U.S. banks that were linked to bin Laden and other terrorist networks. And perhaps most controversially, Bush signed an order allowing special military tribunals to try any noncitizen suspected of plotting terrorist acts, committing terrorism, or harboring known terrorists.

The most visible of Bush's unilateral actions consisted of military strikes in Afghanistan and Iraq. Having secured congressional authorizations to respond to the mounting crises as he saw fit,[7] in the fall of 2001 Bush directed the Air Force to begin a bombing campaign against Taliban strongholds, while Special Forces conducted stealth missions on the ground; and in the spring of 2003, he launched a massive air and ground war against Iraq, involving the United States in the most protracted military conflict since the Vietnam War. Though not packaged as traditional policy directives, these commands nonetheless instigated some of the most potent expressions of executive power. Within a year Bush's orders resulted in the collapse of the Taliban and Baathist regimes; the flight of tens of thousands of refugees into Pakistan, Iran, and Turkey; the destruction of Afghanistan's and Iraq's social and economic infrastructures; and the introduction of new governing regimes.

Bush hardly invented these powers, nor was he the first president to utilize them with such frequency and consequence. During his tenure, Clinton also "perfected the art of go-alone governing."[8] Though Republicans quashed his 1993 healthcare initiative, Clinton subsequently managed to issue directives that established a patient's bill of rights for federal employees, reformed healthcare programs' appeals processes, and set new penalties for companies that deny health coverage to the poor and people with preexisting medical conditions. During the summer of 1998, just days after the Senate abandoned major tobacco legislation, Clinton imposed smoking limits on buildings owned or leased by the executive branch and ordered agencies to monitor the smoking habits of teenagers, a move that helped generate data needed to prosecute the tobacco industry. While his efforts to enact gun-control legislation met mixed success, Clinton issued executive orders that banned numerous assault weapons and required trigger safety locks on new guns bought for federal law enforcement officials. Nor did this activity decline in the waning years of his administration. Instead, Clinton "engaged in a burst of activity at a

point when other presidents might have coasted. . . . Executive orders have flown off Clinton's desk, mandating government action on issues from mental health to food safety."[9] Even as a lame duck president, Clinton drew upon his unilateral powers to turn literally millions of acres of land in Nevada, California, Utah, Hawaii, and Arizona into national monuments. Though Republicans in Congress condemned the president for "usurping the power of state legislatures and local officials" and vainly attempting to "salvage a presidential legacy," in the end they had little choice but to accept the executive orders as law.[10] Rather than wait on Congress, Clinton simply acted, daring his Republican opponents and the courts to try to overturn him. With a few notable exceptions, neither did.[11]

Nor are Clinton and Bush aberrations. Throughout the twentieth century, presidents have used their powers of unilateral action to intervene into a whole host of policy arenas. Examples abound: by creating the Fair Employment Practices Committee (and its subsequent incarnations) and desegregating the military in the 1940s and '50s, presidents defined the federal government's involvement in civil rights decades before the 1964 and 1965 Civil Rights Acts; from the Peace Corps to the Environmental Protection Agency to the Bureau of Alcohol, Tobacco, and Firearms to the National Security Agency to the Federal Emergency Management Agency, presidents unilaterally have created some of the most important administrative agencies in the modern era; with Reagan's executive order 12291 being the most striking example, presidents have issued a string of directives aimed at improving their oversight of the federal bureaucracy; without any prior congressional authorization of support, recent presidents have launched military strikes against Grenada, Libya, Panama, Bosnia, Sudan, and Kosovo. These, moreover, are just a small sampling of the policies issued and actions taken, via executive orders, proclamations, reorganization plans, and other kinds of directives.[12]

A defining feature of presidential power during the modern era, it seems fair to say, is a propensity, and a capacity, to go it alone. As Peter Shane and Harold Bruff (1988) argue in their casebook on the presidency, "presidents [now] use executive orders to implement many of their most important policy initiatives, basing them on any combination of constitutional and statutory powers that is thought to be available." Kenneth Mayer (2001, 4–5) echoes their assessment in his comprehensive survey of executive orders, which documents how presidents have used their unilateral powers to "make momentous policy choices, creating and abolishing executive branch agencies, reorganizing administrative and regulatory processes, determining how legislation is implemented, and taking whatever action is permitted within the boundaries of their constitutional or statutory authority." And according to Phillip Cooper (2002, 8–9), "Many presidents have felt the need to reach out with executive orders and proclamations,

creating some of the most important debates over executive action and some of the most important policy moves in our history. . . . These tools of presidential direct action have been at the heart of the good, the bad, and the ugly of the presidency." Through executive orders, executive agreements, proclamations, and their ilk, presidents have managed to stem the rising tide of public demands and expectations placed upon them in the modern era, and to effect change in ways simply not possible in a strictly legislative setting.

The Demonstration of Influence

That presidents are using their unilateral powers with rising frequency does not necessarily indicate that they are getting more of what they want. Richard Neustadt fairly warns that one must distinguish the exercise of powers (plural) from the demonstration of power (singular) (1990, see note on p. 7), for one hardly guarantees the other. As *powers*, Neustadt would surely concede that unilateral directives are an integral part of the president's arsenal. His skepticism lies in whether these powers yield *power*; and he outright rejects the notion that commands enable presidents to meaningfully address the awesome tide of responsibilities laid before their feet (pp. 10–28). For Neustadt (p. 24), the exercise of these unilateral powers, as with virtually all formal powers, represents a "painful last resort, a forced response to the exhaustion of other remedies, suggestive less of mastery than of failure—the failure of attempts to gain an end by softer means." If anything, unilateral directives signal weakness, for when presidents issue them, they admit to having lost sway over other political actors, and, by extension, the political system more generally.

For a variety of reasons, Neustadt's claim that the mere issuance of orders demonstrates weakness greatly overstates matters (Howell 2005a). Still, his distinction between powers and power is a useful one. Obviously, presidents do not gain power simply by producing more executive orders, any more than they do so by issuing additional vetoes or proposing more legislation. The frequency with which formal powers are asserted says little, if anything, about the power that presidents wield (Cameron and McCarty 2004, 414), especially in a system of governance where numerous other political actors have their own independent authority and means to resist. If presidents and their staffs are merely acting on behalf of other political actors and issuing orders that otherwise would be printed as laws, or if the domain of delegated and constitutional authority in which presidents can act independently is highly restricted,[13] then unilateral powers hardly augment executive power.

To identify power, the president's actions must leave a unique imprint on the law and, ultimately, on the doings of government.[14]

Among social scientists, there is considerable confusion on this matter, and so it is worth drawing out at some length. To measure the influence that a president (or anyone else for that matter) has made, the proper comparison is not between the world that is and the world that he might prefer; nor is it between the worlds that exist before and after an action has been taken. Presidents can use their unilateral powers to considerable effect even though they do not achieve everything they might like, and even when the operations of government appear stable over time. *The right comparison, instead, is between the state of the world that exists in the aftermath of a presidential order and the one that would exist had the president not acted at all.* If the president is merely doing things that other political actors would have done themselves, then no difference between this observed and this imagined world will appear. Similarly, if members of Congress immediately undo every presidential order that does not perfectly reflect their own independent interests, then again these two worlds probably will look much alike. But if the president uses his unilateral powers to institute policies that otherwise would not survive the legislative process, or to issue policies that look substantially different from those that members of Congress might prefer, then genuine influence is revealed.

When will presidents exercise their unilateral powers, and how much influence do they gain from doing so? In two circumstances (derived formally in Howell 2003), presidents have strong incentives to issue unilateral policy directives; and in both, they create policies that differ markedly from those that other branches of government would produce, were they left to their own devices. First, when Congress is poised to enact sweeping policy changes that the president opposes, the president occasionally can preempt the legislative process with more moderate policy shifts. Recall, by way of example, the weakling Occupational Safety and Health Administration created under Nixon, the modest sanctions levied by Reagan against South Africa's Apartheid regime, and the narrow focus and minimal powers that Bush originally assigned to the independent commission investigating intelligence failures on Iraq and weapons proliferation. In each of these cases, Congress stood poised to create either a stronger agency or more robust public policy, and the president lacked the support required to kill these initiatives with a veto. And so in each, executive influence was measured by the president's ability to unilaterally impose portions of the proposed legislation, and thereby derail the support of moderates within Congress who were considering stronger and more sweeping policy change.

Presidents also use their unilateral powers to shift existing policies over which Congress remains gridlocked. Here, the signature of power is not an altered policy, but the creation of one that otherwise would not exist at all. As Congress failed to deal in any substantive way with civil rights issues during the 1940s and '50s, the classification of intelligence during much of the post-War era, or terrorism in the aftermath of September 11th, presidents stepped in and unilaterally defined the government's involvement in these policy arenas (Mayer 2001; Cooper 2002). As Justice Robert Jackson recognized in his famous concurring opinion to *Youngstown Sheet & Tube Co. v. Sawyer,* "Congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[15] Incapable of effecting policy change legislatively, presidents may step in, grab the reins of government, and issue policy changes that members of Congress, left to their own devices, would not enact. Doing so, they do not always get everything that they want, for should they push too far, their actions may galvanize a congressional or judicial response. And in some instances, presidents might well prefer to have their policy inscribed in law rather than in a unilateral directive, if only to guard them against the meddling of future presidents. But a window of opportunity nonetheless presents itself when members of Congress remain mired in gridlock—one that presidents can take without ever convincing a single member of Congress that they share the same interests or serve the same goals.

In both of these scenarios, the contours of executive influence are readily discernible. In the first, the counterfactual to a unilateral directive is a more radical policy shift by Congress—were it not for the president's actions, Congress would retain the votes of its more moderate members in support of sweeping legislative change. And in the second, the mark of presidential influence is not a public policy that is weaker (or stronger) than what Congress prefers—rather, it is the unilateral creation of a policy that otherwise would not exist at all. Absent the president's ability to change public policy unilaterally, the federal government would appear incapable of moving policy in either a liberal or conservative direction.

Unilateral Actions Taken: Four Recent Cases of Command

The rest of this chapter considers four case studies, each involving actions taken by Bush during the past several years. The studies are meant to serve two overarching objectives, the first of which concerns the identification of presidential power. For a variety of reasons, this can be a tricky business, and one ideally suited to case-study research. First, in our system of separated and federated powers, most every branch of government has its hands on policy—members of Congress, bureaucrats, judges, and White House staff all, and always, are leaning against the status quo, hoping to nudge it in

their preferred ideological direction. Trying to gauge the contribution of each can be a bit like predicting what will happen to a bunch of pick-up sticks when one, and one alone, is removed from the pile. Second, clear winners are rarely declared. Though conflict is constant, and politicians remain engaged in a continual contest of will and strength, rarely do we witness two branches of government in a clear showdown, one rising up and exerting its powers and the other relenting. And finally, as previously established, power is properly assessed by reference to conditions that would exist had powers not been exercised; and because we do not observe realities that might have been, it can be extremely difficult to measure the magnitude, or even existence, of executive influence.[16]

The second objective served by these case studies is to highlight the institutional constraints on the president's unilateral powers. Plainly, presidents cannot institute every aspect of their policy agenda by decree. The checks and balances that define our system of governance are alive, though not always well, when presidents contemplate unilateral action. Should the president proceed without statutory or constitutional authority, the courts stand to overturn his actions, just as Congress can amend them, cut funding for their operations, or eliminate them outright.[17] When exercising unilateral powers, presidential power is defined in the negative—it is as big or small as Congress and the courts are weak or strong. Any account of a president's unilateral powers must take these institutional constraints seriously, identifying how they operate, when presidential power is checked, and what opportunities presidents have to strike out on their own.

Salmon and the Endangered Species Act

Since the enactment of the Endangered Species Act (ESA) in 1973, the federal government has devoted more resources to protecting the great salmon runs of the west coast than it has spent on any other species.[18] In the 1990s, President Clinton continued and strengthened this massive effort to preserve 26 species of salmon classified as endangered and to protect their expansive natural habitats ranging from southern California to Washington. Beginning in 2001, however, all of this would change, as the Bush administration made a clean break with precedent and began to systematically curtail protections for wild salmon.

For 30 years, in its counts for determining whether a species was endangered, the federal government only considered wild salmon and excluded populations raised in hatcheries. In September 2001, however, Oregon Federal Judge Michael Hogan demanded scientific justification for this policy. The District Court gave no explicit instructions for how stocks from hatcheries should factor into the determination of a species' endangered status. Instead, the court merely directed the National Marine Fisheries Service to "consider the best available scientific evidence" when constructing its standard rather than summarily excluding hatchery-bred fish from its determinations.[19]

To meet the court's mandate, the Fisheries Service hired a panel of outside experts to evaluate the nation's salmon stocks, while also commissioning its own internal review. Citing the genetic inferiority of man-raised stocks and the continued decline in the wild salmon population, the board of scientists rejected outright arguments that salmon from fisheries could stabilize natural populations. The Fisheries Service's internal review bolstered these conclusions, stating that production in hatcheries provided a poor gauge of the health of natural populations and that the determination of each species' status should be based only "on whether they are likely to be self-sustaining in their native ecosystem."[20]

The Bush administration, however, did not welcome these determinations. In search of a new regulatory policy that would ease restrictions on development, Bush turned to Mark Rutczik, who just three years prior as a timber lobbyist had proposed giving equal weight to hatchery-raised and wild salmon in federal endangered species determinations. As a newly appointed legal advisor to the Fisheries Service, Rutczik redrafted his earlier recommendations as an official proposed regulatory change, which promptly was published for public comment in the *Federal Register* on June 3, 2004. The proposed change pleased the Building Industry Association's Timothy Harris, who lauded the administration efforts: "It's about time. . . . I'm hoping this will finally result in de-listing some of these salmon populations."[21] A mere 11 days after the formal introduction of the proposed new counting procedures, the Fisheries Service proposed another new rule that would strip 23 of 27 species of their endangered status after reevaluating their populations in light of hatchery stocks.[22]

The response from the scientific and environmental community was swift and unambiguous. Upon learning that their conclusions about the viability of restoring natural salmon stocks with hatchery fish were "inappropriate for official government reports," the scientists who drafted the Fisheries' report made their findings public in *Science* and openly derided the proposed regulatory change in the press.[23] Dr. Ransom Myers of Dalhousie University charged, "this is a direct political decision, made by political people to go against the science." When asked to comment on the administration's arguments that the use of hatchery fish would be the swiftest solution to restoring natural stocks, Myers replied, "no credible scientist believes this."[24] Environmentalists were no less harsh in their criticism of the Bush administration's proposal. The National Wildlife Federation's Jan Hasselman summed up their views: "Rather than address the problems of habitat degraded by logging, dams and urban sprawl,

this policy will purposefully mask the precarious condition of wild salmon behind fish raised by humans in concrete pools."[25]

Despite the outcry, the Bush administration hardly wavered in its support of the controversial proposals; and recently, it has only intensified its attacks on federal salmon protections. On November 30, 2004, the administration released a new draft proposal that would remove from federal protection 80 to 90 percent of the "critical habitat" for salmon currently protected by the Fisheries Service from logging and human development.[26] And in its latest movement against the old regime, the Bush administration seized on a 2003 District Court ruling to propose barring altogether the removal of four federal dams blocking salmon access to upstream spawning grounds.[27] Judge Redden, who issued the ruling that purportedly supported Bush's actions, announced his disapproval and warned that the Bush policy could be headed toward a veritable "train wreck."[28] Nevertheless, in stark contrast to the will of the District Court and 30 years of policy precedent, the Bush regulations remain unaltered and on course to becoming the law of the land.

As Bush has acted unilaterally to reverse long held tenets of federal environmental policy protecting wild salmon, Congress has been remarkably silent. A few members, particularly Western Democrats such as Maria Cantwell and Jim McDermott of Washington, have levied intense public criticism against the president and his regulatory attacks; however, no member has brought legislation challenging any of the proposed changes to the floor of either chamber.[29] What little action there has been on the Hill has attempted to write into law some of Bush's objectives pursued through regulatory change. In the fall of 2004, the House Committee on Resources reported to the floor HR 2933, which would amend the ESA to mirror the Bush policy of excluding from federal protection salmon habitats already governed by state or municipal environmental management policies. The legislative clock ran out on the bill, however, when Congress adjourned in December. Still, this amendment to the ESA did not go nearly as far as the Bush regulatory proposal of November 30, which would also exclude from federal protection vast tracts of land not deemed critically important to salmon survival by the new population survey and mapping techniques.

Rather than build the supermajorities required to enact new legislation in Congress, Bush has sought change through the regulatory process. Doing so, he has achieved reductions in federally protected salmon habitats much more drastic than those even contemplated by members of the House or Senate. Indeed, absent any legislative changes in the ESA that might justify the about face in policy, administratively Bush has orchestrated policy proposals that have revised one of the most important environmental policies enacted in the last

half century. After a period for public comment, Bush's proposals took effect on June 28, 2005.[30]

Military Tribunals

Throughout our nation's history, presidential power has expanded most during times of war. In moments of crisis, Congress and the courts regularly defer to their Commander in Chief—and perhaps for good reason as, according to Alexander Hamilton in the 74th *Federalist,* national emergencies demand all the energy and dispatch that a unitary executive can muster: "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of executive authority." Examples of presidential wartime authority abutting and occasionally breaching constitutional limits include Abraham Lincoln's suspension of the writ of *habeas corpus,* Woodrow Wilson's assertion of unprecedented control over the national economy during World War I through measures such as the temporary suspensions of civil service hiring rules and eight-hour workday laws,[31] and Franklin Roosevelt's repeated efforts before and after the Lend Lease Act to supply arms and other war materiel to Great Britain, not to mention his now infamous internment of 110,000 Japanese Americans during World War II.

The contemporary "war on terror" and occupation of Iraq have proved no lesser catalysts for the aggrandizement of presidential power. Among the most visible assumptions of unilateral executive authority stemming from the current conflict is President George W. Bush's decision to deny Geneva Convention rights to militants captured in Iraq. From a purely constitutional perspective, however, President Bush's military order of November 13, 2001, creating military tribunals to try enemy combatants stands alone for the directness of its attack on the separation of powers and its unambiguous incursion into the domain of another branch of government, in this case the federal judiciary.

In the immediate aftermath of September 11, 2001, members of Congress reacted at lightning speed to grant the president new authority and tools to protect the nation's security. On September 14, both the House and Senate approved a joint resolution authorizing the president to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist strike, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organi-

zations or persons."[32] Similarly, to aid in the identification and tracking of suspected terrorists already within the United States, Congress bowed to administration pressure and passed the USA Patriot Act,[33] which granted federal law enforcement agencies unprecedented powers to spy on citizens and noncitizens alike, taking advantage of roving wiretaps, secret "sneak and peak" warrants, and access to information ranging from voicemail messages to library records.

Not content with these specific delegations of power, and wagering that he still had enough partisan and public support to ward off any congressional challenge, the president unilaterally claimed even greater authority over the conduct of the war on terror. A mere 18 days after signing the Patriot Act into law, President Bush issued a military order granting himself and the Secretary of Defense sole authority over the detention, trial, and punishment of suspected terrorists.[34] Citing his constitutional powers as Commander in Chief and those granted him by the recently enacted use of force resolution, President Bush proclaimed his authority to detain any noncitizen he had "reason to believe" was a member of Al Qaeda, had engaged, aided or abetted, or conspired to commit acts of terrorism, or had harbored such individuals. If ever charged and brought to trial, such persons, regardless of whether they were captured on a foreign battlefield or in downtown Detroit, would face a military tribunal in which only a two-thirds vote was needed for conviction. Possible sentences included death.

Bush left no doubt that any person charged under the military order would be beyond the reach of the civilian judicial system: "The individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal." The only authority overseeing the process was the president himself, as the order required "submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose."[35] In a congressional hearing on December 6, 2001, Senator John Edwards (D-NC) argued that this clause was so vague that it even allowed the president to overturn an acquittal. By this reading, the order essentially granted Bush sole power over the fate of the accused, leaving Congress and the judiciary with nothing but the administration's assurances that individual rights would receive due consideration.[36] Such was heretofore only the power of kings and Caesars.

Not surprisingly, the order provoked fervent denunciations from some of the more outspoken members of Congress. Bob Barr, a conservative Republican and civil libertarian from Georgia, lamented,

"the scope of this executive order takes your breath away."[37] At the opposite end of the ideological spectrum, Dennis Kucinich of Ohio warned, "the creation of military tribunals would permit secret arrests, secret charges using secret evidence, secret prosecutions, secret witnesses, secret convictions, secret sentencing, and even secret executions . . . it is therefore a matter of protecting our constitutional rights that defendants in terrorism cases receive full due process under the law."[38]

Other members expressed unease that Bush, without Congress's consultation or approval, had effectively supplanted the traditional justice system. New York Democrat Jerrold Nadler quipped, "for the administration to do this without coming to Congress is a tremendous arrogation of power. If they had suggested military tribunals, they would have been laughed out of Congress. So instead they do it by executive order . . . to avoid the Congress."[39] And Illinois Senator Richard Durbin expressed the frustration of many Democrats who had supported the president on the Patriot Act, but now felt blindsided by the administration:

> Because it seemed to us that this is a rather significant departure from what we considered to be the open statement here of our cooperation between the legislative and executive branch in dealing with terrorism. We felt we had been asked for and had given to the administration the tools they needed to fight terrorism. And then to the surprise of many of us came this new request for—perhaps not a request but an announcement about military tribunals and commissions.[40]

Wisconsin Democrat Russ Feingold went further, accusing the administration of not only doing unilaterally what it could not accomplish legislatively but even of timing the announcement of the order to the anthrax scare that gripped the capital in late fall 2001: "From a strategic point of view I guess it was pretty clever to throw the kitchen sink at us [then] . . . every day you'd pick up the paper—first it was detainees. Then, gee, they're going to start listening in on attorney-client conversations."[41]

Though congressional Democrats challenged the order, none of their efforts materialized in legislation. In the House, Dennis Kucinich threatened to introduce an amendment to the Defense Appropriations bill (H.R. 3338) that would bar the use of federal funds to administer the tribunals. Although publicly supported by 38 other representatives, Kucinich yielded to pressure from others who wished to avoid a vote on the issue.[42] California Democrats Zoe Lofgren and Jane Harman then introduced a softer measure, H.R. 3468, that would sanction the tribunals, while still guaranteeing the accused *habeas corpus* rights. And in the Senate, Patrick Leahy of Vermont offered S. 1941 to provide for the judicial review of any

convictions resulting from a military tribunal. Both bills, however, stalled in committee.

Lacking an effective legislative retort, Democrats and moderate Republicans turned to public hearings to air their grievances with the goal of influencing the final shape of the tribunals, whose *modus operandi* was still being determined by the Secretary of Defense. Republican Senator Arlen Specter of Pennsylvania hoped that such hearings would reestablish the central role of congressional oversight:

> Simply declaring that applying traditional principles of law or rules of evidence is not practicable is hardly sufficient. The usual test is whether our national security interests outweigh our due-process rights, and the administration has not yet made this case. . . . Even in war, Congress and the courts have critical roles in establishing the appropriate balance between national security and civil rights. . . . Vigorous Congressional oversight is the indispensable first step in determining what is "practicable" in finding that balance.[43]

Leahy brought a parade of civil rights groups and constitutional law scholars before the Senate Judiciary Committee who denounced both the military order's content and the president's gall in announcing it unilaterally. The ACLU decried the order as "unjustified and dangerous" and admonished, "while the order applies in terms only to noncitizens, the precedents on which the president relies makes no such distinction, thereby permitting the order to be extended to cover United States citizens at the stroke of a pen."[44] From the libertarian camp, Timothy Lynch, director of the criminal justice project at the Cato Institute, chided, "nobody is above the law, not even a president who enjoys very, very high approval ratings."[45] Harvard Law School's Phillip Heymann exhorted Congress to defend its institutional prerogatives and check the administration's seizure of power: "It should be a proud and patriotic responsibility of the Congress to protect the people of the United States against the unnecessarily dangerous path of recourse to military tribunals and detention without trial which the president has taken us in response to public fears."[46]

Renowned constitutional law scholar Laurence Tribe offered perhaps the most scathing critique of Bush's action: "The structure of the November 13 Order is so constitutionally flawed at its base that it cannot be saved by nimble TV spin [referring to Rumsfeld's 12/2/2001 *Meet the Press* interview] or by altering a detail here and a detail there." Tribe emphasized its potential for wanton abuse and the threat it posed to millions of legal aliens residing in the United States who paid taxes and steadfastly abided by the law. To illustrate his point, Tribe described how a hypothetical Irish national, who had lived in the United States for decades but contributed funds to the IRA before its disarmament, could be handed over to a military tribunal for trial and execution should the president, and the president alone, certify the action. Tribe concluded:

> Of course, as Secretary Rumsfeld must have recognized, any such threat, made in a manner that necessarily hangs like a sword of Damocles over millions of lawful residents of this nation, cannot possibly be defended under our Constitution. As Justice Marshall once wisely observed, such a sword does its work by the mere fact that it "hangs—not that it drops." . . . The Secretary's attempt to wish the sword away—to persuade us all that, until we feel the edge of the blade upon our necks, we need not worry—is no substitute for replacing the sword with a solid framework for the judicious use of executive force in bringing terrorists to justice.[47]

The administration, however, resisted this onslaught of objections.[48] While criticisms from Democrats and moderate Republicans would have killed any effort to create the tribunals legislatively, sufficient Republican support for the president remained to ensure that his opponents in Congress could not muster the two-thirds majority necessary to overturn his unilateral directive. Emboldened by Republican support and buoyed by high public approval ratings, President Bush defended the need for military tribunals to try suspected terrorists: "I need to have that extraordinary option at my fingertips. . . . It's our national interests [*sic*], it's our national security interest [*sic*] that we have a military tribunal available." Vice President Cheney dismissed concerns about the violation of suspects' rights, asserting that foreign terrorists "don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process."[49] At a December 6 hearing before the Senate Judiciary Committee, the Attorney General John Ashcroft signaled the administration's intransigence by branding those who questioned the president's authority agents of the terrorists:

> To those who pit Americans against immigrants, and citizens against non-citizens, to those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends. They encourage people of good will to remain silent in the face of evil.[50]

On March 21, 2002, the Defense Department finally announced its "refinement" of the military order, fleshing out details of how the tribunals would operate and what standards of proof would be required for convictions. In several respects, the administration gave ground: death sentences would require a unanimous vote; the proceedings, except portions relating to national security, would be public; defendants and their counsel would have the right to see the evidence against them; and the standard for conviction would be proof beyond a reasonable doubt. Yet, on other key elements, the administration re-

mained adamant: hearsay evidence would be admissible; the process would remain insulated from any civilian review; and some defendants might be held even after an acquittal.[51]

Although the legislative branch initially failed to grapple with the president's effort to construct a new, parallel judicial system, challenges to the tribunals and the administration's tactics for dealing with suspected terrorists slowly percolated through the federal courts—and all of the previous outcries against the tribunals, not to mention the president's low approval ratings and a languishing occupation of Iraq, augmented the chances of a reversal. On June 28, 2004, the Supreme Court released three decisions regarding individuals deemed enemy combatants and held in military custody. The first two cases, *Rumsfeld v. Padilla* and *Hamdi v. Rumsfeld,* concerned the indefinite detention of American citizens, who by virtue of their citizenship were not subject to the military order of November 13.[52] However, the third case, *Rasul v. Bush,* bore directly on the right of the federal government to hold indefinitely noncitizens at Guantanamo Bay, Cuba. Writing for the majority, Justice John Paul Stevens struck down the military order's provision that detainees had no recourse to civilian courts, ruling that the U.S. District Court did have jurisdictional authority to hear petitions of *habeas corpus* because the United States "exercises plenary and exclusive jurisdiction" if not "ultimate sovereignty" over Guantanamo Bay.[53] Though it allowed detainees to challenge the legality of their detention, the decision remained silent on how such challenges should be decided and exclusively concerned those detainees incarcerated at Guantanamo Bay. Other detainees, including those sent to foreign countries for interrogation, remained beyond the purview of the Court ruling.

Although the *Rasul* case dealt a glancing blow to the administration's policies for dealing with Guantanamo detainees, its ambiguity over how civilian courts should handle detainees' petitions for redress raised altogether new questions. Less than two weeks after the *Rasul* decision, Bush directed Deputy Secretary of Defense Paul Wolfowitz to create a new military tribunal, the Combatant Status Review Tribunal (CSRT), which would grant all detainees a hearing and pass judgment on their status as enemy combatants. When the CSRTs upheld the continued detention of many at Guantanamo, new legal actions were filed in federal court. In one such case, *Hamdan v. Rumsfeld,* the U.S. District Court initially found in November of 2004 for the plaintiff, ruling that the CSRTs failed to comply with the Uniform Code of Military Justice and were therefore invalid.[54] The government appealed the decision, and on July 15, 2005, the Circuit Court of Appeals reversed. In a sweeping ruling, the D.C. Circuit refuted the petitioner's claim that the president lacked constitutional authority to create military tribunals; instead, the court ruled that Congress granted him that power *de facto* through its authorization

to use all means necessary to prosecute the war on terror. The court then upheld CSRT's determination that Hamdan was an enemy combatant and denied him any legal grounds in U.S. or international law for a hearing in a civilian court.[55]

Given the dramatic conflict between the District and Circuit court rulings, the chances were high that *Hamdan* would soon reach the Supreme Court, and on November 7, 2005, the Court granted *Hamdan* certiorari. With Chief Justice Roberts recusing himself because he had previously participated (and found for the government) in the Appeals Court decision, the Court by a 5–3 ruling struck down the president's tribunal system as in breach of both the congressionally enacted Uniform Code of Military Justice (UCMJ) and the Geneva Conventions. In striking down the tribunals, the Court rejected the administration's arguments that the Authorization for Use of Military Force implicitly granted the president power to create a military tribunal system.[56] Absent explicit authorization for new tribunals, the Court ruled that § 836 and § 821 of UCMJ establishing guidelines for the creation of military tribunals were controlling, and that the president's military tribunals as constituted—specifically, the provisions refusing the accused the right to hear and contest all evidence presented against him and the admission of hearsay testimony—violated the requisite basic safeguards and protections. Moreover, because § 821 made all military tribunals subject to the laws of war, the majority insisted the Geneva Conventions, particularly Common Article 3, were also operable and violated by the Military Order procedures.[57]

Though the Court ruling struck down the Military Order *in toto,* the majority did not close the door on the use of military tribunals completely. In his concurring opinion, Justice Breyer responded to the dissenters' charge that the Court's ruling would "sorely hamper the President's ability to confront and defeat a new and deadly enemy" by emphasizing that the Court's ruling did not strike down the use of military tribunals in principle, but only the Bush administration's legal justification for not seeking congressional authorization for their creation. "The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check' [Cf. *Hamdi v. Rumsfeld,* 542 U.S. 507, 536 (2004)]. Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here." Perhaps presciently, Breyer concluded, "nothing prevents the President from returning to Congress to seek the authority he believes necessary."

Indeed, in a press conference immediately after the decision's announcement, Bush proclaimed his willingness to work with Congress on drafting legislation to create a new system of military tribunals. Shortly thereafter, Senate Majority Leader Frist disclosed his intention to introduce new legislation authorizing tribunals after the 4th of July recess.[58] Judiciary Committee Members Lindsay Graham

(R-SC) and John Kyl (R-AZ) seconded Frist, announcing: "We intend to pursue legislation in the Senate granting the executive branch the authority to ensure that terrorists can be tried by competent military commissions. Working together, Congress and the administration can draft a fair, suitable, and constitutionally permissible tribunal statute."[59] Despite this newfound spirit of cooperation between the White House and the Republican congressional leadership, as of this writing we have yet to see how many concessions the administration will have to make to allay the considerable unease expressed within Congress over the president's original tribunal system and thereby garner the supermajorities required for legislative passage.

Liberia

Particularly since the Korean War, which Truman deemed a "police action" in order to circumvent the constitutional requirement that Congress declare all wars, presidents have seized a degree of control over the military that would have horrified the Framers. From Article II's Commander in Chief clause, modern presidents have assumed, and Congress and the courts have recognized, the unilateral power to deploy military forces abroad to pursue foreign policy goals ranging from bolstering allies in ongoing conflicts, to effecting regime change in a target state, to staging humanitarian interventions across the globe.[60] The exponential growth of presidents' war powers has led scholars to decry the advent of an "imperial presidency" and lament Congress's "abdication" of its constitutional prerogatives (Fisher 2000; Schlesinger 1973, 2004).

Presidents, however, do not heed every foreign crisis calling for military action—and domestic politics can be an important reason why (Howell and Pevehouse 2005; Auerswald and Cowhey 1997; Clark 2000; Howell and Pevehouse 2007). To see how domestic political institutions generally, and Congress in particular, can influence presidential decisionmaking in matters of war, consider Bush's dealings with Liberia during the third year of his first term. In this instance, the president achieved his policy goals by dispatching, without congressional authorization, a limited number of U.S. forces to stem the humanitarian crisis and project American power into Africa, and by simultaneously avoiding a commitment so large that it would detract from ongoing military operations in the Middle East. That Bush was the driving force behind the American response to the Liberian crisis is clear. Nonetheless, the timing of the intervention, its modest size, and the brevity of its duration all underscore the importance of domestic politics.

In June of 2003, the Liberian government announced its intention to seek a cease-fire in the 14-year civil war that had already claimed 200,000 lives in the small West African nation. Because of its historical ties to the United States, the contribution of freed American slaves to its foundation, and its alliance with America during both World Wars and the Cold War, Liberia, along with its neighbors and the United Nations, looked to American leadership to resolve the conflict. On June 28, United Nations Secretary General Kofi Annan called for an international peacekeeping force to end hostilities in Liberia, and on July 3 Liberian president Charles Taylor, who had already been indicted for war crimes perpetrated in Sierra Leone's civil war, agreed to step down and go into exile if international peacekeepers were dispatched to Liberia. Members of the Economic Community of West African States (ECOWAS), most notably Nigeria, also agreed to send troops. But all involved parties expressed their desire for American participation.

It is impossible to discern from the written record Bush's precise policy preferences for intervention in Liberia. A preponderance of evidence, however, suggests that he was genuinely disturbed by the situation in the small West African nation and favored a limited show of American military might to bolster African and UN peacekeeping efforts there. The president's words reveal a willingness and even desire to intervene in a limited capacity, but also indicate his sensitivity to calls across levels of government for any new American military intervention to be constrained in scope and duration. Meeting with Kofi Annan and reporters, Mr. Bush publicly stated: "I assured him that our government's position is a strong position. We want to enable ECOWAS to get in and help create the conditions necessary for the ceasefire to hold, that Mr. Taylor must leave, that we'll participate with the troops. We're in the process, still, of determining what is necessary, what ECOWAS can bring to the table, when they can bring it to the table, what is the timetable, and be able to match the necessary U.S. help to expediting the ECOWAS' participation."[61] If Bush had preferred inaction, he could have easily deferred to strong opposition among congressional Republicans, and he certainly could have compelled his Secretary of State to keep private his counsel urging intervention.

Instead, opening a five-day African tour in Senegal on July 8, President Bush demanded that Charles Taylor leave Liberia as a precursor to any American involvement, while assuring African leaders that the United States was "in the process of determining what is necessary to maintain the ceasefire and to allow for a peaceful transfer of power."[62] Although he refrained from promising to send American marines, the president did order 32 military experts to Monrovia to investigate the situation, and several thousand American marines moved into position off the Liberian coast. No immediate intervention, however, was forthcoming. On July 19, the ceasefire collapsed as violence erupted in the capital. The president's delay earned repeated condemnations in the press and a scathing critique from a former As-

sistant Secretary of State for African Affairs in the Clinton administration; "the dithering and delaying, particularly after raising expectations in Liberia and throughout Africa and in the international community, is bordering on the criminally responsible. I don't understand what they're waiting for."[63]

This hesitancy reflected both concerns about the stability of the situation on the ground in Liberia and, domestically, the deep divisions within the administration itself, in the military's ranks, and within the halls of Congress. Somewhat ironically, the chief advocate of military intervention within the administration was Secretary of State Colin Powell, the progenitor of the "Powell doctrine," which advocated using force only when clearly in the interests of national security and then only with overwhelming force to ensure expeditious victory. Powell acknowledged, "in Liberia, if you ask the question, 'What is our strategic, vital interest?' it would be hard to define in that way." Nonetheless, he insisted that "we do have an interest in making sure that West Africa doesn't simply come apart. We do have an interest in showing the people of Africa that we can support efforts to stabilize a tragic situation as we work with others to bring relief to people—people who are desperately in need."[64]

The Pentagon and Joint Chiefs, meanwhile, were more wary of committing American troops to a potentially perilous situation in Liberia, particularly with more than 150,000 American servicemen already deployed overseas in Iraq and Afghanistan.[65] General Richard Myers, the Chairman of the Joint Chiefs, warned, "It's not a pretty situation . . . whatever the fix is going to be is going to have to be a long-term fix." Testifying before Congress at his reconfirmation hearing, Marine General Peter Pace, who previously served in the operation to secure and then withdraw U.S. troops from Somalia in 1993–1994, alluded to the disaster in Mogadishu and warned that while the situation in Liberia was undeniably "very tragic," in his judgment, "it is a situation that poses great personal risk to forces, such as our forces, that could be injected into that very fast-moving and volatile situation there in Monrovia and in the greater Liberia."[66]

Congress, too, was strangely split on the question of military action.[67] Many Democrats who had staunchly opposed the administration's push to war in Iraq supported a humanitarian military intervention in Liberia, while erstwhile Republican hawks were wary of entangling American troops in a situation that did not clearly advance the nation's interests. The Congressional Black Caucus implored the president to act in late July. Acknowledging the contrast between her stance on Iraq and calls for action in Liberia, Representative Sheila Jackson-Lee (D-TX) argued that the two cases were not comparable and advocated forceful American intervention:

> I too want to ensure that the young men and women who serve in the United States military are not put in harm's way. My position on the war in Iraq is well known, but this is a different set of circumstances. The people of Liberia are begging for our assistance, and our assistance is being asked for truly and only as peacekeepers and humanitarians.[68]

Similarly, while falling short of explicitly calling for armed intervention, the Iraq war's chief opponent Senator Robert Byrd (D-WV) chastised the president's inaction:

> The questions are tough, but procrastination is not an acceptable response. Hundreds of innocent civilians are suffering and dying as a result of the conflict in Liberia. Monrovia is in shambles. . . . Indecisive, half-hearted gestures [the stationing of U.S. marines off the Liberian coast] serve no purpose. . . . The President needs to determine a course of action, he needs to consult with Congress and the United Nations on pursuing that course, and he needs to explain his reasoning and his strategy to the American people.[69]

As a symbol of support for military action, Tom Lantos (D-CA), Corrine Brown (D-FL), Donald Payne (D-NJ), and others introduced House Concurrent Resolution 240 calling on the administration and the Secretary of Defense to take a "leading role in creating and deploying an international stabilization force to Liberia."[70]

Still, most of the president's copartisans in Congress, even the stalwart supporter of the war in Iraq and Senate Armed Services Committee Chairman John Warner, had grave misgivings about any military action in West Africa. When the Pentagon abruptly canceled a scheduled briefing to the committee on Liberia (prompting ranking Democrat Carl Levin to lament: "the checks and balance in the Constitution must have been designed with this administration in mind"), John Warner took to the floor to express his dismay and his unease over military intervention in West Africa.[71] While Warner took great pains to assure the chamber that he did not question the Commander in Chief's authority to order unilaterally American troops into combat—"But for simplicity, clarity, and brevity today, I simply say the Constitution gives that right to the President and should not be ever in question"—he criticized the briefing cancellation and strongly questioned the merits of action in Liberia. With respect to the briefing, Warner admonished, "I will say in my 25 years in the Senate, it is most unusual to conduct our affairs in that way between the Senate and the Department of Defense." With respect to the merits of intervention, Warner called upon the Powell Doctrine and asked: "Is this situation following the doctrine in our national security interests? I have even seen the word 'vital' national security interests used. It has not been answered to my satisfaction."[72]

House Republicans expressed similar and even stronger sentiments against the use of force in Liberia. In stark contrast to the proposed Democratic resolution, Ron Paul (R-TX) and several cosponsors introduced House Concurrent Resolution 255 expressing the sense of Congress that the United States should not become involved. Noting the Army's existing heavy overseas deployments in Iraq, Afghanistan, and South Korea, Paul warned of its overextension and concluded: "Mr. Speaker, there is no U.S. interest in the conflict and U.S. military involvement could well lead to resentment and more violence against U.S. troops as we saw in Somalia. We must ponder this possibility before yet again putting our men and women in uniform in harm's way."[73]

However, the problems Congress posed to the White House diminished considerably when it adjourned for its summer recess shortly after Warner's speech on August 1. The next day the United Nations Security Council voted to authorize a multinational peacekeeping force for Liberia and on August 4 the first Nigerian troops arrived as part of the ECOWAS mission. Seven marines went ashore on August 6 to bolster the small U.S. contingent already in and around the American Embassy, and 20 more followed two days later. Then, on August 11, Liberian President Charles Taylor resigned and voluntarily went into exile in Nigeria. With the last condition for U.S. involvement met, on August 14, five weeks after signaling in Senegal America's willingness to intervene and stop the killing, Bush finally ordered 200 marines from the flotilla anchored offshore into Monrovia and informed Congress of the deployment "consistent with the War Powers Resolution."[74] Though small, Jacques Klein, Kofi Annan's special envoy in Liberia, echoed the sentiments of many when he said, "These few Americans on the ground—it makes all the difference." Unfortunately, thousands of Liberians already had died in the interim between the dispatch of American military investigators during Bush's visit to Africa in mid-July and the larger deployment on August 14.[75]

On September 2, the same day that the Senate reconvened following its August recess, American military officials speculated publicly that the approximately 150 remaining American personnel in Monrovia could be withdrawn within a matter of weeks.[76] By the end of the month, the Department of Defense announced that one battle group including the USS Carter Hall and USS Nashville had already left the region and that all U.S. peacekeepers, save a token force of 55 marines for embassy security, were pulling out of Liberia.[77] By limiting the scope of the military venture and carefully crafting the mission's timing and duration, Bush managed to accommodate congressional Republicans and members of his own administration, and thereby forestall potentially embarrassing congressional efforts to speed the withdrawal of troops from the region.[78]

Ultimately, the decision on how to deal with Liberia fell upon Bush's shoulders, and Bush's shoulders alone. Under the president's orders, a small contingent of American marines entered Liberia, bolstered the ECOWAS forces already on the ground, and helped restore order and stability to the country. And well it was that way, at least from the president's perspective, for if Bush had had to first obtain a congressional authorization, the marines probably would never have left their ships. Still, in this instance, the institutional checks that constrain the president's unilateral powers are also on display. Vocal opposition from Congress, coupled with resistance from the Pentagon and among the Joint Chiefs, slowed the administration's response to the Liberian crisis. And the resulting delay had a serious human toll, as thousands perished in the intervening period between the United Nation's call for action and Bush's eventual reply.

The Arsenic Rule

Typically, newly elected presidents enjoy considerable discretion to revise or overturn their predecessor's executive orders, proclamations, and rules. And not surprisingly, the first actions of modern presidents typically consist of unilateral directives overturning past presidential policies.[79] Occasionally, though, past unilateral actions remake contemporary politics in ways that are effectively irreversible, tying a new administration to a status quo not of its own choosing. In such instances, unilateral powers grant presidents precious little influence over public policy. Bush's effort to undo a Clinton order on arsenic and drinking water represents a case in point.

By ordering the Environmental Protection Agency (EPA) to delay and review a Clinton rule lowering the existing standard for allowable levels of arsenic in drinking water, Bush hoped to unilaterally reverse a policy that otherwise could only have been changed either by enacting new legislation (an unlikely event given the 50–50 partisan split in the Senate) or by restarting the protracted rule-making process, which would require the presentation of scientific evidence justifying the change.[80] In this instance, though, Bush's unilateral powers faltered. A confluence of factors, from the transfer of Senate power to the Democrats in May 2001 to intense opposition from environmental and citizens groups, stacked the political deck against the president. The most formidable obstacle in Bush's path, however, turned out to be President Clinton's transformation of public debate in his favor, which Clinton achieved by virtue of having the advantage of acting first. According to one study, Clinton's midnight action created a "new reversion point [that] fundamentally altered the debate, which was no longer about whether it made sense to lower the permissible levels of arsenic. Instead, the question became why the Bush administration wanted to *raise* the permissible level" (Howell and Mayer

2005). Bush would quickly discover that by advocating on behalf of adding carcinogens to citizens' drinking water, he was inviting nothing less than a public drubbing from his political opponents.

For over a half century, a 1942 rule governed federal standards on arsenic in drinking water, setting the allowable limit at 50 parts per billion (ppb).[81] In amendments to the 1996 Safe Drinking Water Act,[82] however, Congress directed the Clinton administration to commence new scientific studies of the public health threat posed by arsenic.[83] A 1999 National Academy of Sciences study found that the existing requirement "could easily" cause a 1 in 100 chance of bladder or lung cancer and encouraged the administration to lower the levels immediately.[84] In response, the EPA initially proposed decreasing the tolerable limit ten fold to 5 ppb;[85] however, bowing to pressure from utility, mining, and lumber lobbies, as well as some of the affected communities that would bear the brunt of the costs of compliance, the administration settled on a 10 ppb rule, the same standard embraced by the World Health Organization.[86] Promulgated in the waning days of Clinton's administration, the rule was slated to be finalized in early 2001 and went into effect in 2006.

Almost immediately upon assuming office, Bush attempted to put a stop to all of this. New EPA Director Christie Whitman suspended the rule, awaiting further scientific research determining that the health benefits of the new standard justified the costs of implementation. "It is clear that arsenic, while naturally occurring, is something that needs to be regulated," said Whitman. "Certainly the standard should be less than 50, but the scientific indicators are unclear as to whether the standard needs to go as low as 10."[87]

The decision to halt the implementation of the arsenic standards was only one element of a larger campaign to roll back last minute Clinton orders. Invoking an infrequently used provision of the 1996 Congressional Review Act,[88] congressional Republicans passed S J Res 6, which the new president signed on March 20, 2001, to quash midnight Clinton rules on ergonomic safety in the workplace.[89] The president unilaterally suspended a Clinton rule to protect 58.5 million acres of national forests as "roadless" regions, a move that would have shut them off from logging. And on March 27, Bush announced plans to withdraw from the Kyoto Protocols on global warming.[90]

In Bush's environmental reversals, many Democrats saw an opportunity to score political points. James Jordan of the Democratic Senatorial Campaign Committee expressed his hope that while "Republicans did make some progress in the last cycle in talking like Democrats [specifically, on education]," the environmental issue would allow Democratic candidates "to get some clear, obvious, verifiable separation from the Republicans." While they objected to all of Bush's actions, Democrats harnessed their resources to publicize the image of an administration allowing more arsenic into drinking

water. New Jersey Representative Rush Holt explained: "Arsenic—that hit a nerve because arsenic sounds like poison."[91] Holt and fellow Representative Frank Pallone Jr. capitalized on the issue, even traveling to an arsenic-laced well in Hopewell Burrough, New Jersey to dramatize their critique of administration policy. By late April, the party launched an ad campaign featuring a young girl asking, "May I please have some more arsenic in my water, Mommy?"[92]

Former executive branch members promptly entered the debate. Clinton EPA official Chuck Fox, who had served as the agency's assistant administrator for water, told reporters the day of Whitman's announcement: "I'm stunned . . . this action will jeopardize the health of millions of Americans, and it compromises literally a decade's worth of work on behalf of developing a public health standard."[93] The following day, Fox chastised the Bush administration in a *New York Times* op-ed. While emphasizing that the new standard "is widely supported by drinking water utilities, states, scientists, public health officials and environmentalists," Fox noted the continued opposition of the mining industry and several Western states that were firmly in the Bush column in 2000. The former EPA official concluded, "We answered those questions with a commitment to public health protection. I certainly hope that the new administration will approach this issue in the same manner." Editorials from papers across the country added to the barrage of criticisms leveled against the Bush administration.[94]

The reaction from Capitol Hill was equally swift. Representative Henry Waxman (D-CA) minced no words when condemning Bush's action as "another example of a special interest payback to industries that gave millions of dollars in campaign contributions."[95] Referring to the arsenic and ergonomic roll backs, among others, House Minority Leader Richard Gephardt (D-MO) derided the new president: "what people are really beginning to see is that this administration is of, by and for the special interest."[96] Several weeks later, when assessing the first 100 days of the Bush presidency, Gephardt returned to the arsenic issue and charged that the president's reckless move endangered the health and safety of America's children and families. "Ladies and Gentlemen," Gephardt concluded, "this is not compassionate conservatism, this is not reforming with results; this is leaving no special interest behind, and it must not stand."[97] Yet, perhaps the most trenchant critique was that of Senate Minority Leader Tom Daschle (D-SD) immediately after the announcement:

> What is not helpful is what the administration decided to do yesterday on arsenic in water. . . . The level of arsenic that the administration now will tolerate is 10,000 times the amount that is tolerated in food. And the National Academy of Sciences has said that the likelihood of cancer at that level is 1 in 100. I can't imagine that any legitimate re-

> view of the analysis of the facts, of the information available, would possibly provide a motivation to anybody in the administration to accept this rule. It is—it is baffling, just baffling. We're going to have to put warning labels on water bottles if this goes through. So you haven't heard the end of this. We're going to come back at it in some way in the not too distant future. But we will not allow this to stand. This is just not acceptable.[98]

The negative publicity and popular outrage prompted a series of public backtrackings by Christie Whitman and the administration. When announcing the decision on March 20, Whitman acknowledged that the current standard of 50 ppb was "certainly" too high, but expressed doubts as to "whether the standard needs to go as low as 10 ppb."[99] But with repeated polls showing a strong majority of Americans opposing the Bush administration policy, on April 18 Whitman raised the possibility that the administration might seek an even stricter standard than Clinton.[100] In an abrupt about-face, she directed the National Academy of Sciences to study standards ranging from 3 to 20 parts per billion a year.[101]

Early efforts by congressional Democrats to pressure the Bush administration legislatively were hampered by the ominous roadblock of the GOP-controlled Senate.[102] But the defection of James Jeffords (IN-VT) from the GOP and the resulting transfer of power in the Senate to the Democrats breathed new life into legislative efforts to force the administration's hand. Democrats considered attaching riders on arsenic to the Veterans Affairs, Housing and Urban Development, and Independent Agencies appropriations bill (H.R. 2620). During consideration of the bill, Senator Barbara Mikulski (D-MD) appeared before the committee and chastised the Bush administration for clinging to an antiquated 1942 standard despite recent scientific evidence of the danger posed by arsenic.[103] A month later, House Minority Whip David Bonior (D-MI) succeeded in amending the appropriations bill to prohibit the use of funds in the following year's EPA budget to implement an arsenic standard higher than 10 ppb (H. Amndt. 261 to H.R. 2620).[104]

Faced with the defection of 19 Republicans in the House and mounting opposition within the Senate, the White House eventually caved.[105] On October 31, 2001, a full three months before the EPA initially claimed that it would announce its final decision, Director Christie Whitman reported the agency's intention to implement the Clinton standard of 10 ppb.[106] As early as August, the Bush administration seemed to have known the game was lost. The president himself acknowledged in an *ABC News* interview, "I think we could have handled the environmental issue a little better. . . . [Whitman] pulled back a rushed piece of legislation [*sic*] to look at it, to make sure the science was sound, and therefore we got labeled for being for arsenic in water." Whitman concurred, telling the *USA Today*, "Politically, if

I'd been smart, I would have never changed it. . . . I would have let the courts decide. We were going to be sued anyway by the Western states and a bunch of water companies, and I should have just left it there."[107]

In June of 2003, the U.S. Circuit Court of Appeals upheld the Clinton standard of 10 ppb, dismissing a suit filed by the state of Nebraska.[108] The new standard went into effect in 2006, right on schedule with the original Clinton order.

Concluding Thoughts

Power is properly assessed by reference to conditions that would exist had power not been exercised. In at least two of the four prior case studies, the mark of Bush's influence is readily discernible. If regulations governing the counting of salmon populations and the protection of their habitats could only be modified by amending the Endangered Species Act, the endangered status of 23 species and federal protections for thousands of acres of streams and watersheds would almost certainly remain intact. Similarly, if the ultimate decision to send troops into Liberia had rested in Congress's 1,070 hands, rather than Bush's two, the United States probably would not have made even a modest contribution to diffusing the nation's civil unrest. Even in the military tribunals case, in which the Supreme Court's ability to check presidential power appeared on full display, the precedent created by Bush's 2001 Military Order may yet pave the way for legislative authorization of new tribunals closer in design to the president's true preferences than the administration could have achieved before through legislation alone. Moreover, all of the individuals who the administration intends to prosecute through military tribunals remain, as they have for the past four years, under the direct control of the president. Through executive orders, military orders, and rules, President Bush, along with all modern presidents, has managed to materially redirect public policy in ways not possible in a strictly legislative setting, using only those powers enumerated in the Constitution.

That the president's unilateral powers yield genuine influence over public policy, however, does not mean that the president necessarily gets everything he might want. Even in the cases of the Liberian interventions, limits to presidential power are readily apparent. Though Bush may have preferred to respond immediately and, perhaps, with greater force to the mounting African crisis, he instead bowed to congressional and Department of Defense pressures and ordered a relatively small and short-lived military Liberian intervention.

Less ambiguously, the military tribunal and arsenic cases dramatically underscore the limits of unilateral powers. As Yale Law School

Dean Harold Koh has noted, "[the *Hamdan*] opinion is a stunning rebuke to the extreme theory of executive power that has been put forward for the last five years. It is a reminder that checks and balances continue to be a necessary and vibrant principle, even in the war on terror."[109] Similarly, if less dramatically, the arsenic case also illustrates the institutional constraints on presidential unilateral action. Bush clearly wanted to raise the allowable levels of arsenic in drinking water, but facing widespread public and congressional opposition to this move, he prudently abstained from altering Clinton's order. And so it is with all presidents. Unilaterally, they do as much as they think they can get away with. In those instances when a unilateral directive can be expected to spark some kind of congressional or judicial reprisal, presidents may hedge their bets; and knowing that their orders will promptly be overturned, presidents may not act at all. Hence, when trying to account for these constraints, it will not do to simply inventory those instances when Congress or the courts actually overturn a presidential order. Scholars must stay attuned to the ways in which presidents anticipate congressional and judicial reactions and adjust their actions accordingly.

Still, we would do well to keep the limitations to presidential power in proper perspective. In the arsenic case, influence lost to Bush redounded to the benefit of Clinton. For Clinton had previously relied upon his own unilateral powers to strike first, lowering the allowable levels of arsenic in drinking water and thereby reshaping the politics that surrounded the issue. Bush's failure to reverse the Clinton rule demonstrates that while unilateral actions by one president are always in jeopardy of being reversed by another, under some conditions they can continue to have lasting influence on public policy. When a president's order or regulatory action recasts the terms of debate and mobilizes organized interests to defend it against subsequent incursions, even unilateral actions that can technically be reversed with the stroke of a pen prove remarkably resilient. In the military tribunals case, meanwhile, the president's defeat at first blush would appear absolute. Still, the administration may yet succeed in gaining congressional authorization for much of its agenda, and it retains considerable discretion over the detention of the hundreds of individuals who continue to await trial.

The burden of checking presidential power ultimately lies with Congress and the courts. And if recent political history is any indication of future trends, presidents will have continued reason to rely upon unilateral directives to advance their policy agenda. As majority parties retain control of the House and Senate by the slimmest of margins, as multiple veto points and collective action problems litter the legislative process with opportunities for failure, and as members of Congress and judges remain reticent to take on the president during times of war, abundant opportunities and incentives for presidents to exercise their unilateral powers remain. To be sure, presidents must proceed with caution, scaling back some initiatives and abandoning others altogether, especially when political opposition is strong and mobilized. Directives that immediately affect the electoral prospects of key members of Congress, or that deeply offend basic constitutional provisions, are likely to provoke some kind of legislative or judicial response, which may in turn redefine the boundaries of presidential power. But in an era where political gridlock is commonplace and judicial deference the norm, presidents can be expected to regularly strike out on their own. And if Bush's presidency teaches us anything at all, it reveals the extent to which unilateral powers can influence the production of foreign and domestic policy.

Notes

1. See also Mayer and Price (2002).
2. See *United States v. Curtiss-Wright,* 299 U.S. 304 (1936); *United States v. Belmont,* 301 U.S. 324 (1937); and *United States v. Pink,* 315 U.S. 203 (1942). Schubert (1973) contains a useful summary of these cases.
3. In addition to making administrative strategies more attractive, these forces also have changed the tactics presidents employ when they do attempt to guide policy proposals through Congress. See, for example, Kernell (1997) and Canes-Wrone (2005).
4. This section draws from Howell (2003, 2005a, 2005b).
5. For the full history on Bush's order to support faith-based organizations, see Farris, Nathan, and Wright (2004).
6. Brinkley, David. "Out of Spotlight, Bush Overhauls U.S. Regulations," *New York Times,* August 14, 2004, A1.
7. In many policy arenas, presidents find the authority they need to act unilaterally in some vague statute or broad delegation of power. And when doing so, it is difficult to make the case that the president is merely fulfilling the expressed wishes of Congress (more on this below). In this instance, it is worth noting that Congress refused to formally declare war against Afghanistan or Iraq. Rather, it passed authorizations in the falls of 2001 and 2002 that gave the president broad discretion to use the military as he deemed appropriate in the nation's campaign against terrorism.
8. Kiefer, Francine. "Clinton Perfects the Art of Go-Alone Governing," *Christian Science Monitor,* July 24, 1998, 3.
9. Ross, Sonya. "Searching for a Way to Make History Forget Impeachment," December 20, 1999, posted on CNN.com.
10. Quotes in *CQ Weekly.* "Clinton's Lands Designation Refuels Efforts to Narrow Monuments Law," January 15, 2000, 86. In 1999, the House

passed HR 1487 that would have restricted the president's authority to designate national parks, but the bill died in the Senate.

11. One of the more visible repudiations of an executive order issued by Clinton concerned the permanent replacement of striking workers. *Chamber of Commerce of the United States v. Reich* (D.C. Cir. 1996). For more discussion on the institutional constraints of presidential power, see below.
12. See Cooper (2002) for many more.
13. Much of the "congressional dominance" literature, which emphasizes the ways in which Congress controls the bureaucracy and president through delegation and carefully crafted statutes, also suggests as much (see, for example, Kiewiet and McCubbins 1991; Kernell and McDonald 1999). For critiques of this perspective, see Whittington and Carpenter (2004) and Moe (1987, 1999).
14. In one critique of this view, Matthew Dickinson insists that unilateral directives "must be evaluated in the context of their overall impact on [presidents'] bargaining power" (2004, 103). But this suggestion confuses power's means and ends. Presidents do not issue directives and commands in order to augment their bargaining stature. Rather, they do so in order to materially change the world around them; and to the extent that these unilateral powers accomplish as much, presidents are well advised to continue issuing them. In his contribution to this volume, Dickinson also points out that unilateral directives must be implemented, forcing presidents to "bargain" with members of the executive branch, just as Neustadt argued all along. While a useful reminder, this claim overstates the extent to which presidents must rely upon persuasion to have their way (Howell 2005a). When dealing with the bureaucracy, as opposed to a co-equal branch of government such as Congress, presidents have at their disposal all kinds of additional powers to ensure compliance, not least of which is the ability to hire and fire them (Waterman 1989; Moe 1999; Nathan 1983). Moreover, presidents regularly issue all kinds of unilateral directives that are designed to ensure that their policy orders are faithfully implemented. For one recent case study, see Farris, Nathan, and Wright (2004).
15. 343 U.S. 579 (1952), 637.
16. This, according to Paul Holland, is the "fundamental problem of causal inference" (1986).
17. Future presidents, too, can overturn the unilateral directives of their predecessors. Incoming presidents regularly relax, or altogether undo, the regulations and orders of past presidents, and in this respect, the influence sitting presidents wield is limited by the anticipated actions of their forebears. As Richard Waterman correctly notes, "subsequent presidents can and often do . . . reverse executive orders. . . . This is not a constraint if we think only within administrations, but for presidents who wish to leave a long-term political legacy, the fact that the next president may reverse their policies may force them, at least on occasion, to move to the legislative arena" (2004, 245). Because of these dynamics, should we downwardly adjust our assessments of presidential power? Probably not, and two points help explain why. First, just as future presidents may subsequently overturn, or amend, his actions, a sitting president is not forced to abide by every standing order that he inherits from past presidents. And second, the transfer and exchange of unilateral directives across administrations is not always as seamless as all this supposes. Often, presidents cannot alter orders set by their predecessors without paying a considerable political price, undermining the nation's credibility, or confronting serious, often insurmountable, legal obstacles (Howell and Mayer 2005).
18. Jessica Kowal, "As Flow of Salmon Surges, U.S. Moves to Cut Protections; Critics Say Federal Plans Favor Dams," *Boston Globe,* September 19, 2004, A21.
19. *Alsea Valley Alliance v. Evans,* 143 F. Supp. 2d 1214 (2001).
20. Timothy Egan, "Shift on Salmon Re-ignites Fight on Species Law," *New York Times,* May 8, 2004, A1.
21. Craig Welch, "U.S. Shift on Salmon Could Cut Protection; Hatchery Fish Would Count as Part of State's Wild Runs," *Seattle Times,* April 30, 2004, A1.
22. "In proposed listing determinations described in this proposed rule, artificial propagation has been considered in (1) determining what constitutes an ESU, and (2) when evaluating the extinction risk of an entire ESU. . . . The consideration of artificial propagation in the subject proposed listing determinations is based on the proposed Hatchery Listing Policy (see second citation)." National Marine Fisheries Service, "Endangered and Threatened Species: Proposed Listing Determinations for 27 ESUs of West Coast Salmonids," June 14, 2004, 69, *Federal Register,* 33102. National Marine Fisheries Service, "Endangered and Threatened Species: Proposed Policy on the Consideration of Hatchery-Origin Fish in Endangered Species Act Listing Determinations for Pacific Salmon and Steelhead," June 3, 2004, 69, *Federal Register,* 31354. Note: 26 species were classified as endangered when the review began and an additional species was considered a candidate for the status, thus increasing the total to 27.
23. Ransom A. Myers, Simon A. Levin, Russell Lande, Frances C. James, William W. Murdoch, and Robert T. Paine, "Hatcheries and Endangered Salmon," *Science,* March 26, 2004, 303.
24. Egan, "Shift on Salmon."
25. Blaine Harden, "Hatchery Salmon to Count as Wildlife," *Washington Post,* May 10, 2004, A1.
26. Kenneth Weiss, "Salmon and Steelhead May Lose Protections," *Los Angeles Times,* December 1, 2004. National Marine Fisheries Service, "Endangered and Threatened Species; Designation of Critical Habitat for 13 ESUs of Pacific Salmon and Steelhead in Washington, Oregon and Idaho," December 14, 2004, 69, *Federal Register,* 74572.
27. The District Court struck down a Clinton policy that allowed for the removal of the federal dams, but only as a last resort. The Court deemed this language too vague and insufficient in its protections. *National*

Wildlife Federation v. National Marine Fisheries Service, 254 F. Supp. 2d 1196 (2003).

28. Felicity Barringer, "Government Rejects Removal of Dams to Protect Salmon," *New York Times,* November 30, 2004, A1.
29. Blaine Harden, "Pollsters Doubt Fish Rules Will Move Votes," *Washington Post,* May 6, 2004, A4. James McDermott, *Congressional Record,* June 16, 2004, H4268.
30. National Marine Fisheries Service, "Policy on the Consideration of Hatchery-Origin Fish in Endangered Species Act Listing Determinations for Pacific Salmon and Steelhead," June 28, 2005, 70, *Federal Register,* 37204–37216.
31. See, e.g., executive Orders 2570, 2572, 2605, 2617, 2705, and 2718.
32. SJ Res. 23 (PL 107-40), Section 2 (a).
33. PL 107-56.
34. Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," *Federal Register,* 66:57833. The military order is not an executive order per se and hence not found in executive order disposition tables. In choosing a military order, Bush followed the precedent of Franklin Roosevelt whose July 2, 1942, military order provided for the trial by military commission of eight suspected German saboteurs pursuant to his authority under the 38th Article of War (U.S.C. Title 10, Sec. 1509).
35. Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," *Federal Register,* 66:57833.
36. John Edwards and John Ashcroft, Senate Judiciary Committee, December 6, 2001.
37. Jennifer Dlouhy and Elizabeth Palmer, "New Assertions of Executive Power Anger, Frustrate Some on Hill," *Congressional Quarterly Weekly,* November 24, 2001, 2784.
38. Dennis Kucinich, *Congressional Record,* November 28, 2001, E2162.
39. Jennifer Dlouhy and Elizabeth Palmer, "New Assertions of Executive Power Anger, Frustrate Some on Hill," *Congressional Quarterly Weekly,* November 24, 2001, 2784.
40. Richard Durbin, Senate Judiciary Committee hearing, November 28, 2001.
41. Elizabeth Palmer and Adriel Bettelheim, "War and Civil Liberties: Congress Gropes for a Role," *Congressional Quarterly Weekly,* December 1, 2001, 2820. The attorney-client eavesdropping was the result of a Department of Justice rule, "National Security: Prevention of Acts of Violence and Terrorism," *Federal Register,* 66:55062.
42. Elizabeth Palmer and Adriel Bettelheim, "War and Civil Liberties: Congress Gropes for a Role," *Congressional Quarterly Weekly,* December 1, 2001, 2820.

43. Arlen Specter, "Questioning the President's Authority," *New York Times,* November 24, 2001, A25.
44. American Civil Liberties Union, Senate Judiciary Committee hearing, November 28, 2001.
45. Elisabeth Bumiller and Katharine Seelye, "Bush Defends Wartime Call for Tribunals," *New York Times,* December 5, 2001, A1.
46. Phillip Heymann, Senate Judiciary Committee hearing, November 28, 2001.
47. Laurence Tribe, Senate Judiciary Committee hearing, December 4, 2001.
48. For denunciations of the order in the press see: "Justice Deformed: War and the Constitution," *New York Times,* December 5, 2001, 4:14; William Safire, "Voices of Negativism," *New York Times,* December 6, 2001, A35; "A Tribunal Too Far," *Washington Times,* November 19, 2001, A16; "Ashcroft Overreaches," *St. Louis Post-Dispatch,* November 27, 2001, B6; "A Perilous Course on Civil Liberties," *Seattle Times,* November 19, 2001, B4; "Not Democratic Enough," *San Francisco Chronicle,* November 28, 2001, A20; "Rule of Law Needn't be Suspended in Wartime," *Houston Chronicle,* November 24, 2001, A40.
49. Jennifer Dlouhy and Elizabeth Palmer, "New Assertions of Executive Power Anger, Frustrate Some on Hill," *Congressional Quarterly Weekly,* November 24, 2001, 2784.
50. Adriel Bettelheim, "Hill Treads Carefully in Challenging Ashcroft Over Expansion of Anti-Terrorism Powers," *Congressional Quarterly Weekly,* December 8, 2001, 2903.
51. Katharine Seelye, "Government Sets Rules for Military on War Tribunals," *New York Times,* March 21, 2002, A1; William Safire, "Military Tribunals Modified," *New York Times,* March 21, 2002, A37; Katharine Seelye, "Rumsfeld Backs Plan to Hold Captives Even if Acquitted," *New York Times,* March 29, 2002, A18.
52. *Rumsfeld v. Padilla,* 124 S. Ct. 2711 (2004); *Hamdi v. Rumsfeld,* 124 S. Ct. 2633 (2004).
53. This assertion of American jurisdiction is one (of several) ways the Court claims it differs from the *Eisentrager* precedent, which ruled that "aliens detained outside the sovereign territory of the United States [may not] invoke a petition for a writ of habeas corpus." *Johnson v. Eisentrager,* 70 S. Ct. 936 (1950).
54. This judgment was echoed by D.C. District Court Judge Joyce Hens Green, *In Re: Guantanamo Detainees,* Civil Action No. 2002-0299, January 31, 2005.
55. *Hamdan v. Rumsfeld,* U.S. App. 14315 (2005).
56. *Hamdan v. Rumsfeld,* U.S. LEXIS 5185 (2006).
57. Common Article 3 requires all tribunals be conducted by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." A plurality of the Court (not joined by Justice Kennedy) also argued that the conspiracy charge

levied against Hamdan was not an "offense that by . . . the law of war may be tried by military commissions," 10 U.S.C. § 821, and therefore beyond the purview of the administration's tribunals, regardless of whether they were legally created.

58. CNN.com. 2006. "Bush Says He'll Work With Congress on Tribunal Plan." Available at http://www.cnn.com/2006/POLITICS/06/29/hamdan.reax/index.html.
59. Charlie Savage, "Justices Deal Bush Setback on Tribunals; High Court Says Guantanamo Action Illegal," *Boston Globe,* A1.
60. For trenchant critiques of this perspective, see Adler and George (1998) and Ely (1993).
61. Office of the Press Secretary, "President Reaffirms Strong Position on Liberia," July 14, 2003.
62. Office of the Press Secretary, "President Bush Discusses Liberia," July 8, 2003.
63. Richard Stevenson and Christopher Marquis, "Bush Team Faces Widespread Pressure to Act on Liberia," *New York Times,* July 23, 2003. See also, "America's Role in Liberia," *New York Times,* July 24, 2003; "Liberia Calls," *Washington Post,* July 1, 2003.
64. "Powell Backs U.S. Role to Aid Liberia," *New York Times,* July 24, 2003.
65. Bill Sammon, "Bush Won't 'Overextend' U.S. Troops; Downplays Liberia Mission," *Washington Times,* July 10, 2003; Rowan Scarborough, "U.S. Eyes Small Force for Liberia Duty; Unit Would Augment West Africans," *Washington Times,* July 24, 2003.
66. Christopher Marquis and Thom Shanker, "Pentagon Leaders Warn of Dangers For U.S. in Liberia," *New York Times,* July 24, 2003.
67. Typically, members of the president's party support a planned military venture, while members of the opposition party are the one to raise objections and roadblocks. For more on the partisan dynamics that fuel congressional reactions to the use of force, see Howell and Pevehouse (2005, 2007) and Kriner (2006).
68. Sheila Jackson-Lee, United States House of Representatives, *Congressional Record,* H7198, July 21, 2003.
69. Robert Byrd, United States Senate, *Congressional Record,* August 1, 2003.
70. H. Con. Res. 240, introduced in the House of Representatives, July 8, 2003.
71. Eric Schmitt, "G.O.P. Senator Criticizes Bush on Liberia Case," *New York Times,* August 2, 2003.
72. John Warner, *Congressional Record,* S10893, August 1, 2003.
73. Ron Paul, United States House of Representatives, *Congressional Record,* E1602, July 24, 2003.
74. Bradley Graham, "U.S. to Send 200 Troops To Liberia; Addition Follows Concerns About Pace of Peacekeeping," *Washington Post,* August 14, 2003. Office of the Press Secretary, "Presidential Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate," August 13, 2003.
75. Tim Weiner, "200 U.S. Marines Land in Liberia to Aid African Force," *New York Times,* August 15, 2003.
76. Eric Schmitt, "U.S. General Optimistic on Liberia Mission," *New York Times,* September 3, 2003.
77. Jim Garamone, "Liberia Mission Winds Down," *Armed Forces Press Service,* Release #1022-03-1041, September 30, 2003.
78. For example, not a single member of Congress was quoted objecting to the deployment in either the *Washington Post* or the *New York Times* in the two weeks following the action while both chambers were in recess.
79. Recall, for instance, the back and forth between Bush 41, Clinton, and Bush 43 over the so-called Mexico City policy, which granted federal aid to family planning clinics abroad that counseled clients on abortion.
80. For example, the Bush administration's proposed regulatory change that would lower standards for tuna to be labeled "dolphin safe" was recently struck down by the federal courts as based on unsatisfactory scientific evidence to justify the change. " 'Dolphin-Safe' Labeling Upheld," *Pittsburgh Post-Gazette,* August 12, 2004, A7.
81. U.S. Public Health Service. 1943. Public Health Service Drinking Water Standards. Approved Revisions to the 1925 Drinking Water Standards on December 3, 1942. *Public Health Reports.* 58(3):69–82. January 15, 1943.
82. Public Law 104-182.
83. Rebecca Adams, "Bush Attack on Regulations for Arsenic, Surface Mining Has Democrats Vowing Action," *Congressional Quarterly Weekly,* March 24, 2001, 670.
84. Subcommittee on Arsenic in Drinking Water, National Research Council of the National Academy of Sciences, *Arsenic in Drinking Water* 3 (1999).
85. National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring; Notice of Proposed Rulemaking," 65 *Federal Register,* 38888, (2000).
86. John Cushman, "E.P.A. Proposes New Rule to Lower Arsenic in Tap Water," *New York Times,* May 25, 2004. For the rule itself, see: E.P.A., "National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring; Final Rule," 66 *Federal Register,* January 22, 2001, 6976.
87. Christie Whitman quoted in Robert Schlesinger, "Drinking Water Rule Put on Hold; Effort Seen to Gut Arsenic Standard," *Boston Globe,* March 21, 2001.
88. Public law 104-121.
89. "Ergonomics Program; Final Rule," 65 *Federal Register* 68262, (2000).

90. "Special Areas; Roadless Areas Conservation; Final Rule," 66 *Federal Register* 3244, (2001).
91. Alison Mitchell, "Democrats See Gold in Environment," *New York Times,* April 21, 2001.
92. Rebecca Adams, "GOP, Business, Rewrite the Regulatory Playbook," *Congressional Quarterly Weekly,* May 5, 2001, 990.
93. Chuck Fox, "Arsenic and Old Laws," *New York Times,* March 22, 2001.
94. "A Sensible Arsenic Limit," *Boston Globe,* March 27, 2001; "Bush Going Backward With Ruthless Efficiency," *Atlanta Journal-Constitution,* March 26, 2001; "Poisonous Politics," St. Louis Post-Dispatch, March 22, 2004; "A Hostile Environment," *San Francisco Chronicle,* April 2, 2001.
95. See Douglas Jiehl, "E.P.A. To Abandon New Arsenic Limits for Water Supply," *New York Times,* March 21, 2001.
96. Richard Gephardt, Press Conference from Capitol H-206, March 22, 2001.
97. Richard Gephardt, Press Conference from the Capitol East-front, April 26, 2001.
98. Tom Daschle, Press Conference from S-224, March 21, 2001.
99. Helen Kennedy, "Christie is Laced on Arsenic Stand," *New York Daily News,* March 21, 2001.
100. A Princeton Survey Research Associates Poll, April 22, 2001, showed 57 percent of respondents disapproved of Bush's decision to halt Clinton rule. Similarly, *LA Times Poll,* April 21, 2001, showed 56 percent of Americans opposed Bush's decision to overturn the Clinton regulations.
101. Douglas Jehl, "E.P.A. Delays Its Decision on Arsenic," *New York Times,* April 19, 2001.
102. Immediately after the Bush decision of March 21, 2001, House Democrats introduced several measures to combat the action. On April 4, Henry Waxman introduced H.R. 1413, colloquially known as the "Get Arsenic Out of Our Drinking Water Act," which garnered 173 cosponsors before stalling in committee. An even more restrictive measure that would implement the Clinton standard by 2003 and then further reduce the tolerable level of arsenic in water to 3 ppb by 2006 drew 77 cosponsors before similarly dying in committee. Comparable measures calling for a restoration of the Clinton standard were also introduced in the Senate but garnered little support. See, for example, S. 632 and S. 635.
103. Barbara Mikulski, testimony before the Senate Appropriations Committee, June 13, 2001.
104. Adriel Bettelheim, "VA-HUD Spending Bill's Progress Slowed by Partisan Sparring in House," *Congressional Quarterly Weekly,* July 28, 2001, 1851. Douglas Jehl, "House Demanding Strict Guidelines on Arsenic Level," *New York Times,* July 28, 2001.

105. See U.S. National Resource Council, Subcommittee on Arsenic in Drinking Water. 2001. *Arsenic in Drinking Water: 2001 Update.* Washington: National Academy Press; see also the National Drinking Water Advisory Council's *Report of the Arsenic Cost Working Group to the National Drinking Water Advisory Council,* August 14, 2001; and the E.P.A. Science Advisory Board's own review, *Arsenic Rule Benefit Analysis: An SAB Review,* August 2001.
106. Katharine Seelye, "E.P.A. to Adopt Clinton Standard," *New York Times,* November 1, 2001.
107. Katharine Seelye, "Arsenic Standard for Water Is too Lax, Study Concludes," *New York Times,* September 11, 2001.
108. *State of Nebraska v. Environmental Protection Agency,* 356 U.S. App. D.C. 410.
109. Charlie Savage, "Justices Deal Bush Setback on Tribunals; High Court Says Guantanamo Action Illegal," *Boston Globe,* June 30, 2006, A1.

References

Adler, David, and Larry George. 1998. *The Constitution and the Conduct of American Foreign Policy.* Lawrence: University Press of Kansas.

Arnold, Peri E. 1998. *Making the Managerial Presidency: Comprehensive Reorganization Planning, 1905–1996.* Lawrence: University Press of Kansas.

Auerswald, David, and Peter Cowhey. 1997. "Ballotbox Diplomacy: The War Powers Resolution and the Use of Force." *International Studies Quarterly* 41(3):505–528.

Bond, Jon, and Richard Fleisher. 2000. *Polarized Politics: Congress and the President in a Partisan Era.* Washington, DC: Congressional Quarterly Press.

Cameron, Charles, and Nolan M. McCarty. 2004. "Models of Vetoes and Veto Bargaining." *Annual Review of Political Science* 7:409–435.

Canes-Wrone, Brandice. 2005. *Who's Leading Whom?* Chicago: University of Chicago Press.

Clark, David. 2000. "Agreeing to Disagree: Domestic Institutional Congruence and U.S. Dispute Behavior." *Political Research Quarterly* 53(2):375–400.

Cooper, Phillip. 1997. "Power Tools for an Effective and Responsible Presidency." *Administration & Society* 29(5):529–556.

———. 2002. *By Order of the President: The Use and Abuse of Executive Direct Action.* Lawrence: University Press of Kansas.

Dickinson, Matthew. 2004. "Agendas, Agencies and Unilateral Action: New Insights on Presidential Power?" *Congress & the Presidency* 31(1):99–109.

Ely, John Hart. 1993. *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath.* Princeton, NJ: Princeton University Press.

Farris, Anne, Richard P. Nathan, and David J. Wright. 2004. *The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative.* Washington, DC: The Roundtable on Religion and Social Policy.

Fisher, Louis. 2000. *Congressional Abdication on War and Spending.* College Station, TX: Texas A&M University Press.

Heclo, Hugh. 1978. Issue Networks and the Executive Establishment. In *The New American Political System,* edited by A. King. Washington, DC: American Enterprise Institute.

Holland, Paul. 1986. "Statistics and Causal Inference." *Journal of the American Statistical Association* 81:945–960.

Howell, William G. 2003. *Power Without Persuasion: The Politics of Direct Presidential Action.* Princeton, NJ: Princeton University Press.

———. 2005a. "Power Without Persuasion: Rethinking Foundations of Executive Influence." In *Presidential Politics,* edited by G. Edwards. Belmont, CA: Wadsworth.

———. 2005b. "Unilateral Powers: A Brief Overview." *Presidential Studies Quarterly* 35 (3):417–439.
Howell, William G., and David Lewis. 2002. "Agencies by Presidential Design." *Journal of Politics* 64 (4):1095–1114.
Howell, William G., and Kenneth Mayer. 2005. "The Last 100 Days." *Presidential Studies Quarterly* 35(3):533–553.
Howell, William G., and Jon Pevehouse. 2005. "Presidents, Congress, and the Use of Force." *International Organization* 59 (1):209–232.
———. 2007. *While Dangers Gather: Congressional Checks on Presidential War Powers.* Princeton: Princeton University Press.
Kernell, Samuel. 1997. *Going Public: New Strategies of Presidential Leadership.* Washington, DC: Congressional Quarterly Press.
Kernell, Samuel, and Michael McDonald. 1999. "Congress and America's Political Development: The Transformation of the Post Office from Patronage to Service." *American Journal of Political Science* 43 (3):792–811.
Kiewiet, Roderick, and Mathew McCubbins. 1991. *The Logic of Delegation.* Chicago: University of Chicago Press.
Kriner, Douglas. 2006. *Taming the Imperial Presidency: Congress, Presidents, and the Conduct of Military Action.* Cambridge, MA: Government Department, Harvard University.
Lewis, David E. 2003. *Presidents and the Politics of Agency Design.* Stanford, CA: Stanford University Press.
Mann, Thomas, and Norman Ornstein, eds. 1981. *The New Congress.* Washington, DC: American Enterprise Institute.
Margolis, Lawrence. 1986. *Executive Agreements and Presidential Power in Foreign Policy.* New York: Praeger.
Mayer, Kenneth. 2001. *With the Stroke of a Pen: Executive Orders and Presidential Power.* Princeton, NJ: Princeton University Press.
Mayer, Kenneth, and Kevin Price. 2002. "Unilateral Presidential Powers: Significant Executive Orders, 1949–99." *Presidential Studies Quarterly* 32(2):367–386.
Moe, Terry. 1987. "An Assessment of the Positive Theory of 'Congressional Dominance.'" *Legislative Studies Quarterly* 12(4):475–520.
———. 1999. "The Presidency and the Bureaucracy: The Presidential Advantage." In *The Presidency and the Political System,* edited by M. Nelson. Washington, DC: Congressional Quarterly Press.
Moe, Terry M., and William G. Howell. 1999. "The Presidential Power of Unilateral Action." *Journal of Law, Economics, and Organization* 15(1):132–179.
Nathan, Richard P. 1983. *The Administative Presidency.* New York: John Wiley.
Neustadt, Richard E. 1990. *Presidential Power and the Modern Presidents.* New York: Free Press.
Oppenheimer, Bruce. 1980. "Policy Effects of U.S. House Reform: Decentralization and the Capacity to Resolve Energy Issues." *Legislative Studies Quarterly* 5:5–30.
Schlesinger, Arthur. 1973. *The Imperial Presidency.* Boston: Houghton Mifflin.
———. 2004. *War and the American Presidency.* New York: W.W. Norton & Company.
Schubert, Glendon. 1973. *The Presidency in the Courts.* New York: Da Capo Press.
Shane, Peter, and Harold Bruff. 1988. *The Law of Presidential Power.* Durham, NC: Carolina Academic Press.
Waterman, Richard W. 1989. *Presidential Influence and the Administrative State.* Knoxville: University of Tennessee Press.
———. 2004. "Unilateral Politics." *Public Administration Review* 64(2):243–245.
Weko, Thomas. 1995. *The Politicizing Presidency: The White House Personnel Office.* Lawrence: University Press of Kansas.
Whittington, Keith, and Daniel Carpenter. 2004. "Executive Power in American Institutional Development." *Perspectives on Politics* 1(3):495–513. ✦

Chapter 6

Impediments to Presidential Leadership

The Limitations of the Permanent Campaign and Going Public Strategies

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The first four chapters demonstrate that presidential leadership is conditional: it depends on a variety of factors, often beyond the president's individual skill level, for a president to be successful. When presidents have little political leverage, such as when gridlock in Congress exists, presidential leadership ability is greatly constrained. While presidents have the ability to act unilaterally, even in these cases they sometimes find themselves constrained (and ultimately unsuccessful in their attempts to change policy). In short, there are significant boundaries to presidential leadership. While we may expect presidents to be strong and effective leaders, it is not realistic for us to expect them to do so at all times, in all political circumstances. We need to also understand what are the impediments to presidential leadership and what approaches presidents have employed to overcome them.

In this chapter, Edwards describes important impediments to presidential leadership, as well as how recent presidents have tried to overcome them. For example, the constitutional system of checks and balances and separation of powers makes it difficult for presidents to build coalitions with likeminded members of Congress. Presidents cannot depend on the opposition party in Congress for support, a factor that has more deleterious consequences for presidents in periods of divided government. In addition, over the past decades the two parties have become more ideologically polarized, which further complicates the process of building coalitions or securing compromise and cooperation from members of Congress. Presidents also are losing some advantages they once possessed. For instance, the number of members of Congress who are elected because they ride the president's coattails into office has declined precipitously in recent decades.

Because of these impediments, presidents have developed new strategies designed to promote their presidential leadership ability. In particular, they now