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The Credible Executive

Eric A. Posner[*] & Adrian Vermeule[**]

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Abstract. Legal and constitutional theory has focused chiefly on the risk that voters and legislators will trust an ill-motivated executive. This paper addresses the risk that voters and legislators will fail to trust a well-motivated executive. Absent some credible signal of benign motivations, voters will be unable to distinguish good from bad executives and will thus withhold discretion that they would have preferred to grant, making all concerned worse off. We suggest several mechanisms with which a well-motivated executive can credibly signal his type, including independent commissions within the executive branch; bipartisanship in appointments to the executive branch, or more broadly the creation of domestic coalitions of the willing; the related tactic of counter-partisanship, or choosing policies that run against the preferences of the president's own party; commitments to multilateral action in foreign policy; increasing the transparency of the executive's decisionmaking processes; and a regime of strict liability for executive abuses. We explain the conditions under which these mechanisms succeed or fail, with historical examples.

Introduction: Discretion and Distrust

The modern executive enjoys enormous discretion to make policy, in the United States and elsewhere. In normal times, voters and legislatures grant the executive legal discretion because delegation is a sensible strategy, given the executive's advantages in expertise and the legislature's constricted agenda. Statutory delegations, both broad and vague, accumulate. Legislatures also grant the executive effective discretion through inaction and sheer passivity; where legislative gridlock vitiates any real threat that executive action will be overridden, the executive has discretion to take unilateral action.[1] In emergencies, and in the areas of foreign policy and national security, even more discretion flows to the executive because its institutional advantages in speed, decisiveness, force and secrecy become pronounced, and because power must be concentrated to meet threats.

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[1] Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 146-48 (1999).

With discretion comes distrust.[2] Voters and legislators grant the executive discretion, through action or inaction, and increase executive discretion during emergencies, because they believe that the benefits of doing so outweigh the risks of executive abuse.[3] By the same token, political actors will attempt to constrain the executive, or will simply fail to grant powers they otherwise would have preferred to grant, where they believe that the risks and harms of abuses outweigh any benefits in security or other goods. The fear of executive abuse arises from many sources, but the basic problem is uncertainty about the executive's motivations. The executive may, for example, be a power-maximizer, intent on using legal or factual discretion to harm political opponents and cement his political position, or that of his political party; or he may be an empire-builder, interested in expanding his turf at the expense of other institutions.

Where the executive is indeed ill-motivated in any of these ways, constraining its discretion (more than the voters would otherwise choose) may be sensible. But the executive may not be ill-motivated at all. Where the executive would in fact be a faithful agent, using his increased discretion to promote the public good according to whatever conception of the public good voters hold, then constraints on executive discretion are all cost and no benefit. Voters, legislators, and judges know that different executive officials have different motivations. Not all presidents are power-maximizers or empire-builders.[4] Of course, the executive need not be pure of heart; his devotion to the public interest may in turn be based on concern for the judgment of history. But so long as that motivation makes him a faithful agent of the principal(s), he counts as well-motivated.

The problem, however, is that the public has no simple way to know which type of executive it is dealing with. An ill-motivated executive will just mimic the statements of a well-motivated one, saying the right things and offering plausible rationales for policies that outsiders, lacking crucial information, find difficult to evaluate—policies that turn out not to be in the public interest. The ability of the ill-motivated executive to mimic the public-spirited executive's statements gives rise to the executive's dilemma of credibility: the well-motivated executive has no simple way to identify himself as such. Distrust causes voters (and the legislators they elect) to withhold discretion that they would like to grant and that the well-motivated executive would like to receive. Of course the ill-motivated executive might also want discretion; the problem is that voters who would want to give discretion (only) to the well-motivated executive may choose not to do so, because they are not sure what type he actually is. The risk that the public and legislators will fail to trust a well-motivated president is just as serious as the risk that

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[2] We use "trust" and "credibility" as synonyms. In other words, we adopt a rationalist account of trust rather than a nonrational or affective account, and thus follow the lead of Russell Hardin. RUSSELL HARDIN, TRUST AND TRUSTWORTHINESS, 13-21 (2d ed. 2004). However, as will become apparent, we do not subscribe to Hardin's pessimism about the ability of institutions to successfully generate credibility in modern mass democracies. *See id.*, at 151-172. For an overview of competing accounts of political trust, see Mark E. Warren, *Democratic Theory and Trust*, *in* DEMOCRACY AND TRUST, 310-45 (Mark E. Warren ed., 1999).

[3] Philippe Aghion, et al. *Endogenous Political Institutions*, 119 Q.J. ECON. 565 (2004).

[4] Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 919-20 (2005).

they will trust an ill-motivated president, yet legal scholars have felled forests on the second topic while largely neglecting the first.[5]

Our aim in this paper is to identify this dilemma of credibility that afflicts the well-motivated executive and to propose mechanisms for ameliorating it; we focus on emergencies and national security, but cast the analysis within a broader framework. Our basic claim is that the credibility dilemma can be addressed by *executive signaling*. Without any new constitutional amendments, statutes, or legislative action, law and executive practice already contains resources sufficient to allow a well-motivated executive to send a credible signal of his motivations, committing to use increased discretion in public-spirited ways. By tying policies to institutional mechanisms that impose heavier costs on ill-motivated actors than on well-motivated ones, the well-motivated executive can credibly signal his good intentions and thus persuade voters that his policies are those that voters would want if fully informed. We focus particularly on mechanisms of *executive self-binding* that send a signal of credibility by committing presidents to actions or policies that only a well-motivated president would adopt.

The discussion is structured as follows. Part I lays out examples of the credibility dilemma, both historical and recent. Part II analyzes the credibility dilemma through the lens of principal-agent theory. Part III examines the attempted Madisonian solution to the credibility dilemma, and explains why it is a failure, for the most part. Part IV suggests a series of mechanisms for credibly demonstrating the executive's good intentions. These mechanisms include *independent commissions* within the executive branch; *bipartisanship* in appointments to the executive branch, or more broadly the creation of *domestic coalitions of the willing*; the related tactic of *counter-partisanship*, or choosing policies that run against the preferences of the president's own party; commitments to *multilateral action* in foreign policy; increasing the *transparency* of the executive's decisionmaking processes; and a regime of *strict liability* for executive abuses. Not all of these mechanisms succeed, and all of them succeed under some conditions but fail under others. We attempt to identify the conditions under which one or the other mechanism can improve executive credibility.

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[5] In legal scholarship, the closest precedent for our work is Michael Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L REV 827, 878-91 (1996). However, Fitts does not use a rational choice approach, as we do, but focuses on matters of public psychology—for example, that the public wants powerful presidents to resolve disputes but then feels resentful when the dispute is not resolved in the desired manner. *Id*. at 839, 864-68. We abstract from such issues. There is also a related literature in administrative law that implicitly argues that the president can be trusted but does not address the dilemma of executive credibility that is our focus. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-mortem*, 70 U. CHI. L. REV. 1331, 1344 (2003); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 95-97 (2005). Matthew Stephenson also discusses problems of reliability of courts and members of Congress. *See* Matthew C. Stephenson, *Court of Public Opinion: Government Accountability and Judicial Independence*, 20 J.L. ECON. & ORG. 379, 380-81(2004). Overall, the strand of political science literature that has had most influence on the legal academia has focused on the problem of executive overreaching. See, e.g., CLINTON ROSSITER, THE AMERICAN PRESIDENCY, 44-73 (1956); EDWARD CORWIN, THE PRESIDENT: OFFICE AND POWER, 1787–1984, 303-45 (4th ed. 1957). Other work in political science, especially its rational choice analysis of institutions, is more directly relevant; we cite this work as appropriate in the body of the discussion.

I. Examples

Presidents always have some credibility, at least at the start of their term. People do not vote for candidates whom they do not believe, and so the winning candidate brings to the office some amount of credibility, which he may further enhance over time by keeping his promises or making predictions that are proven correct by events. Having built up capital, some presidents find it useful to engage in deception, and some have gotten away with it, at least in the short term. Prominent examples include FDR's claim during the 1940 election that he had no intention of bringing the United States into war;[6] Eisenhower's denial that U-2 spy planes overflew the Soviet Union;[7] (probably) Johnson's description of the Gulf of Tonkin incident;[8] Nixon's statements about military incursions in Cambodia;[9] (probably) Reagan's claim that he was unaware of the arms-for-hostages scheme;[10] and Clinton's denial that he had had a "sexual relationship" with Monica Lewinsky.[11] But deception is potentially a costly strategy, because revelation of the deception damages the president's credibility, making it more difficult for him achieve his next set of goals.

For this reason, we focus on historical cases where the president avoids deception, where in fact he makes a true or roughly true statement about circumstances that the public cannot directly evaluate, but has trouble persuading the public to believe him. In these cases, the president needs to use mechanisms that enhance his credibility or, if he cannot, finds himself unable to act. We offer examples to illustrate the credibility dilemma, to illustrate a range of solutions to the dilemma – some successful, some otherwise – and to show that the mechanisms we will propose in Part IV have historical analogues or precedents.

A. FDR: The Nazi Threat

Franklin Delano Roosevelt understood the threat posed by Nazi Germany to the United States' long-term interests long before the U.S. public did. The public was preoccupied with the Great Depression and had powerful isolationist representatives in Congress. Because of popular sentiment, FDR could not commit U.S. military assistance to Britain and France even after Germany invaded France and began bombing London.[12] Marginal economic and military assistance could take place only through complicated subterfuges and was in any event of minimal value.

Even after Japan bombed Pearl Harbor and Nazi Germany declared war on the United States, FDR had to move cautiously. The public supported war, but sought war primarily with Japan, while FDR correctly believed that Germany posed a greater threat to the United States than Japan did – for, in FDR's view, Japan could be, and should be, dealt with after the Atlantic alliance against Germany was solidified. Thus, although FDR had popular support on one level, he needed to devise ways to ensure support for his

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[6] WAYNE S. COLE, ROOSEVELT & THE ISOLATIONISTS 1932-45 397 (1987).
[7] STEPHEN AMBROSE, EISENHOWER, THE PRESIDENT, VOLUME TWO 513-15 (1984).
[8] Walter LaFeber, *Johnson, Vietnam, and Tocqueville*, *in* LYNDON JOHNSON CONFRONTS THE WORLD: AMERICAN FOREIGN POLICY 1963-1968 49 (Warren I. Cohen & Nancy Bernkopf Tucker eds., 1994).
[9] STEPHEN AMBROSE , NIXON, VOLUME THREE: RUIN AND RECOVERY 1973-1990 178, 182, 198 (1991),
[10] LAWRENCE E. WALSH, FIREWEALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP 231-32 (1997).
[11] HAYNES JOHNSON, THE BEST OF TIMES, 227 (2001).
[12] COLE, *supra* n. 6 at 239.

particular war aims and strategies, whose particular justifications would always remain at least partially obscure to the public. One of FDR's tactics for generating support was to invite prominent Republicans into his cabinet. Henry Stimson was given the post of Secretary of War, and Frank Knox was made the Secretary of the Navy.[13] Provided with inside information, they would be able to blow the whistle if U.S. war strategy departed too much from what they believed was the public interest.

B. Truman: Scaring the Hell out of the Country

The Soviet Union had been the United States' ally during World War II, and many people, including FDR, expected or hoped that it would cooperate with the United States after the war as well. That the Soviet Union would have aggressive rather than pacific designs only gradually dawned on U.S. elites. By 1946, skepticism about Soviet motives was widespread in the U.S. government, but the U.S. public still labored under more genial impressions fostered by wartime propaganda. To counter the growing Soviet threat, President Harry S. Truman resolved to expend U.S. treasure to rebuild the economies of France, West Germany, Britain, and other potential allies, and to bind them together in a military defense pact. The former would require a lot of money; the latter would require the stationing of U.S. troops abroad. The U.S. public, however, was traditionally isolationist, and wished to enjoy the victory and the peace.[14] How could Truman persuade the public that further sacrifice and foreign entanglements would be necessary to defend U.S. interests against a former ally?

Truman apparently could not simply explain to the public that the Soviet threat justified the Marshall Plan and North Atlantic Treaty Organization, the United States' first permanent foreign military alliance. The problem is that the public had no way to evaluate the Soviet threat. The U.S.S.R. had not actually used military force against U.S. troops, as the Japanese had five years earlier at Pearl Harbor. The Soviet Union was instead supporting communist insurgencies in Greece and Turkey, interfering in politics in Italy, violating its promise to respect democratic processes in Poland, engaging in espionage, and so forth. Experienced and perceptive observers saw a threat, but, generally speaking, the public was in no position to do so.

To enhance the credibility of his claims about the Soviet threat, Truman did two things. First, he recast the threat as an ideological challenge. Truman gave the threat an ideological dimension so that any expression of skepticism could be construed as treachery rather than honest disagreement.[15] Second, he made an alliance with a powerful Republican senator, Arthur Vandenberg, who could assure Truman that the Republicans would not object to his policies as long as he consulted them and allowed them some influence. As a former isolationist, Vandenberg's endorsement of Truman's

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[13] Id. at 367-69.

[14] Stanley R. Sloan, *Negotiating Article 5*, NATO REV. (Summer 2006), http://www.nato.int/docu/review/2006/issue2/english/art4.html.

[15] *See* Truman Presidential Museum & Library, *Ideological Foundations of the Cold War*, http://www.trumanlibrary.org/whistlestop/study_collections/coldwar/; *see also* U.S. Department of State's Bureau of International Information Programs, Chapter 12: Postwar America *in* OUTLINE OF U.S. HISTORY, *available at* http://usinfo.state.gov/products/pubs/histryotln/postwar.htm.

policy of engagement must have enhanced the credibility of Truman's claims about the Soviet threat.[16]

Both of these strategies succeeded, but neither was costless. Truman's characterization of the Soviet threat as an ideological challenge may have led to the McCarthy era and suppressed public debate about foreign policy. Truman's alliance with the Republicans meant, of course, that he would have less freedom of action.[17]

C. Bush I versus Bush II: The Iraqi Threat

George H. W. Bush and George W. Bush both went to war with Iraq, but they faced different threats and chose different responses. George H. W. Bush sought to drive Iraqi military forces out of Kuwait. His problem was persuading the U.S. public that a U.S. military response was justified. In retrospect it might seem that he was clearly right, but at the time the common estimation was that tens of thousands of U.S. troops would be killed.[18] This was the expected cost of a military response. On the benefit side, Bush could appeal to the sanctity of sovereign borders, but public sympathy for the rich Kuwaitis was limited. The United States' real concern was that Iraq would, with Kuwait's oil fields, become wealthy and powerful enough to expand its control over the region, threaten Saudi Arabia, dominate the Persian Gulf's oil reserves, and pose a long-term threat to the western economies and the United States' influence in the Middle East. But all of these concerns are rather abstract, and it was never obvious that the public would accept this case. Indeed, the congressional authorization to use military force was far from unanimous in the House of Representatives.[19]

The credibility of Bush's claims, however, was greatly aided by international support. The public support of nations with divergent interests showed that Bush's claim about the internationally destabilizing effects of Saddam Hussein's invasion were real and not imagined. Thus any claim that a U.S. military invasion was solely in Bush's partisan political interests, or in the interests of oil companies, was seriously weakened. Formal United Nations approval and the military assistance of foreign states—which was of mainly political, not military significance—further solidified Bush's credibility.[20]

Surface similarities aside, George W. Bush faced a different kind of threat. He feared that Saddam Hussein had weapons of mass destruction, which he would give or sell to terrorist groups like al Qaeda. It was more difficult for George W. Bush to prove that Saddam had WMDs than for his father to prove that Saddam was a threat to the region, because any WMDs were hidden on Saddam's territory while the invasion of Kuwait could be observed by all. George W. Bush followed the same strategy that his father did, albeit somewhat less enthusiastically: to enlist international support in order to bolster the credibility of his claim that Saddam continued to pose a major threat to U.S. and western interests. But George W. Bush failed to persuade foreign countries that

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[16] *See* RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP, 40-49 (1990); ARTHUR M. SCHLESINGER JR., THE IMPERIAL PRESIDENCY, 128 (1973).
[17] SCHLESINGER, *supra* n.16, at 129-130.
[18] STEPHEN R. GRAUBARD, MR. BUSH'S WAR: ADVENTURES IN THE POLITICS OF ILLUSION 9, 122 (1992).
[19] The House vote on Authorization for Use of Military Force Against Iraq Resolution, Pub. L. 120-1, 105 Stat. 3 (1991) passed by fewer than 70 votes (250-183). The Senate vote was unanimous.
[20] GRAUBARD, *supra*, n. 18, at 177-18.

Saddam posed a great enough threat to justify a military invasion (although they largely agreed that he either had or probably had WMDs), and he did not obtain significant international support.[21] Ironically, George W. Bush, unlike his father, had strong congressional support, in part because opposition to the first war turned out to be a political liability, and the costs of the first war (unlike the second war) turned out to be so low.

D. Clinton: Wag the Dog

Long before the attacks of September 11, 2001, the U.S. government understood that al Qaeda posed a threat to U.S. interests. The CIA had established a bin Laden office in 1996, and the Clinton administration was trying to develop an effective counterterrorism strategy.[22] In 1998 al Qaeda blew up U.S. embassies in Kenya and Tanzania, whereupon Clinton ordered cruise missile strikes on targets in Afghanistan and Sudan. Just three days earlier, however, Clinton had announced on national television that he had had an affair with Monica Lewinsky. Opponents charged that he ordered the strikes in order to distract the public from his domestic problems.[23] This came to be known as the *Wag the Dog* strategy after a movie that featured a similar subterfuge.[24]

Clinton's credibility problem was more acute than that of earlier presidents. FDR, Truman, and George H. W. Bush (as well as, later, George W. Bush) might embark on foreign adventures in order to enhance their prestige or to pay off interest groups or to distract the public from domestic problems. George W. Bush, for example, has been repeatedly accused of manipulating terrorism warnings in order to improve poll results or electoral outcomes.[25] But only in Clinton's case was it necessary for him to make an important and visible decision about foreign policy in the midst of a personal scandal in which he admitted that he engaged in deceit, with the result that his ability to conduct an effective terrorism defense was hampered by doubts about his credibility.[26] An aggressive response to al Qaeda would have to wait until after September 11, 2001.

II. Theory

A. The Problem

The examples we have discussed have a common structure. A nation or group like Nazi Germany, the Soviet Union, Iraq, or al Qaeda poses a threat to U.S. interests.

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[21] *See* Alan Beattie, *US may present new resolution this week; White House Determined to Disarm Saddam Even if Widespread International Support Withheld*, FIN. TIMES, Feb. 19, 2003, at 6.

[22] *Counterterrorism Policy: Eighth public hearing of the National Commission on Terrorist Attacks Upon the United States*, March 24, 2004 3-7 (Testimony of Samuel L. Berger, Former Asst. to President for Nat'l Security Aff.), *available at* http://www.9-11commission.gov/hearings/hearing8/berger_statement.pdf.

[23] JAMES PATTERSON, RESTLESS GIANT, 380-83 & 392-93 (2005); HAYNES JOHNSON, *supra* n. at 406.

[24] *Id*.

[25] *See* Rob Willer, *The Effect of Government-Issued Terror Warnings on Presidential Approval Ratings*, 10 CURRENT RESEARCH SOC. PO.'Y 1, 5, 10 (2004).

[26] Richard Clarke, Clinton's counterterrorism chief, suggests that Clinton was not affected by politics, at least for the initial decision to strike. *See* RICHARD A. CLARKE, AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR, 186 (2004). But then he says: "Our response to two deadly terrorist attacks was an attempt to wipe out al Qaeda leadership, yet it quickly became grist for the right-wing talk radio mill and part of the Get Clinton campaign. That reaction made it more difficult to get approval for follow-up attacks on al Qaeda, such as my later attempts to persuade the Principals to forget about finding bin Laden and just bomb training camps." *Id*. at 189.

The threat is widely understood at a general level but the public does not understand important details: why the threat exists, its magnitude, what programs will best address it. The president believes that a particular program—NSA surveillance, unlimited detention, military preparation—is necessary and desirable for countering the threat, and let us assume that he is correct. At the same time, the program could be misused in various ways. It could be used to enhance the power of the president at the expense of legitimate political opponents; to pay off the president's supporters at the expense of the general public; or to spark an emotional but short-lived surge of patriotism that benefits the president during an important election but does not enhance security. The president can announce the program and justify it in general terms, but he cannot design the program in such a way that its dangers to legitimate political opposition can be eliminated.[27] As a result, his claim that the program will be used only for national security, and not to enhance his power at the expense of political opponents, or to benefit allies, may not be believed.

Consider, for example, the policy of detaining suspected members of al Qaeda without charging them and providing them with a trial. The public understands that al Qaeda poses a threat to national security but lacks the information necessary to evaluate the detention policy. The public does not know the magnitude of the continuing threat from al Qaeda: it might be the case that the group has focused its attention on foreign targets, that it no longer has the capacity to launch attacks on U.S. soil, that greater international cooperation and intelligence sharing has significantly reduce the threat, and so forth. The public also does not know whether the detainees are important members of al Qaeda or foot soldiers or unconnected to al Qaeda; whether the dangerous detainees could be adequately incapacitated or deterred through regular criminal processes; whether the Bush administration obtains valuable intelligence from the detainees, as it claims, or not; whether the detainees are treated well or harshly; and numerous other relevant factors. Some of the relevant variables are public, but most are not; those that are public are nonetheless extremely difficult to evaluate. Consider the ambiguity over whether the suicides at Guantánamo Bay in June 2006 were driven by despair and harsh treatment, or were the result of a calculated effort by martyr-seeking Jihadists to score a propaganda coup.[28] As a general matter, the public does not even know whether the absence of major terrorist attacks on U.S. soil since September 11, 2001 resulted from the Bush administration's detention policy, at least partly resulted from this policy, occurred for reasons entirely independent of this policy such as (say) the military attack on Afghanistan, or occurred *despite* the detention policy, which, by alienating potential allies, perversely made a further attack more likely than it would otherwise have been.

Described in this manner, the president's credibility problem is the result of an agency relationship, where the president is an agent and the public is the principal. In agency models, the agent has the power to engage in an action that benefits or harms a principal. In a typical version of these models, the principal first hires the agent and instructs the agent to engage in high effort rather than shirk. The agent then chooses

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[27] Often, as in the case of surveillance of terrorist communications by the National Security Agency, the president cannot even announce the program, for to do so would reduce or eliminate its value, but must anticipate that the secret will eventually come out, in which case he will have to defend it.

[28] Jonathan Mahler, *Terms of Imprisonment*, N.Y. TIMES, July 30, 2006, at 6..

whether to engage in high effort or shirk. High effort by the agent increases the probability that the principal will receive a high payoff, but some randomness is involved, so that the link between the agent's effort and the principal's payoff is stochastic rather than certain. If the agent's behavior can be observed and proven before a court, then the simple solution is for the two parties to enter a contract requiring the agent to engage in high effort. If the agent's behavior cannot be observed, then a contract requiring high effort is unenforceable, and instead the principal and agent might enter a contract that makes the agent's compensation a function of the principal's payoff. This gives the agent an incentive to use the high level of effort, though depending on various conditions, this incentive might be weak.[29]

Less important than the details of the agency model, and its various solutions, is the way that it clarifies the basic problem. The president is the agent and the public is the principal (sometimes we will think of the legislature as the principal, bracketing questions of agency slack between voters and legislators). The public cares about national security but also cares about civil liberties and the well-being of potential targets of the war on terror; its optimal policy trades off these factors. However, the public cannot directly choose the policy; instead, it delegates that power to the government and, in particular, the president. The president knows the range of options available, their likely effects, their expected costs and benefits—thanks to the resources and expertise of the executive branch—and so, if he is well-motivated, he will choose the best measures available.

Thus a well-motivated executive, in our sense, is an executive who chooses the policies that voters would choose if they knew what the executive knows.[30] This definition does not require that the president's deeper motives be pure; for our purposes, a well-motivated president may be concerned with his historical reputation in the long run, as many presidents are. Because presidents know that in the long run most or all of their currently private information will be revealed,[31] a concern with the judgment of history pushes presidents to make the decisions that future generations, knowing what the president knows now, will approve. To be sure, the concern with historical reputation is not perfectly congruent with doing what the current generation would approve of (with full information), because different generations have different values, as in the case of civil rights. The convergence is substantial, however, compared to far more harmful motivations a president might have, such as short-term empire-building or partisan advantage. Presidents with a concern for long-run reputation may not be disinterested

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[29] For a textbook treatment *see* PATRICK BOLTON & MATHIAS DEWATRIPONT, CONTRACT THEORY, 14-20, 129-170 (2005).

[30] On some views, "what the voters would choose" is what the median voter would choose. *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 115-122 (1957). Our argument does not depend on this particular theory; it depends only on the assumption that there is some coherent criterion of public preference based on some aggregation of citizens' values and interests. We are agnostic about, and for present purposes need not take a stand on, the content of that criterion.

[31] By statute, even classified presidential papers are unsealed after 12 years. Presidential Records Act of 1978, 44 U.S.C. § 2204 (Supp. 2 2000). However, President George W. Bush's recent executive order may qualify this. *See* Exec. Order No. 13,333, 3 C.F.R. 815 (2001), *reprinted in* 44 U.S.C.A. §2204 (2001); Marcy Lynn Karin, *Note: Out of Sight, but Not Out of Mind: How Executive Order 13,233 Expands Executive Privilege While Simultaneously Preventing Access to Presidential Records*, 55 STAN. L. REV. 529, 548-52 (2002).

leaders, but they approach the ideal of faithful agency more closely than do presidents with no such concern.

We also assume that the voters' ultimate preferences are fixed, so we put aside the possibility of presidential leadership that changes bedrock public values. However, voters' derived preferences may change as their information changes, and this further blurs the significance of changing public values over time. On this view there is still scope for leadership, in the sense that a well-motivated president might choose a policy inconsistent with voters' current ill-informed preferences, but consistent with the new preferences voters will form as their information changes, perhaps as a result of the policy itself. FDR's behavior just before World War II is the model for presidential leadership in this sense.

As this discussion suggests, the well-motivated executive may or may not keep campaign promises, or adopt popular policies. All depends on circumstances – on what the public would approve, if it knew what the president knows. A public that would condemn the president's policy P might, if it knew more, approve of P. The well-motivated president will want to adopt P in such circumstances, and will then face the problem of credibly signaling to the public that he favors the policy for good reasons that he cannot directly convey. Furthermore, we assume that the well-motivated executive will collect an optimal amount of information – up to the point where the marginal benefits of further information-gathering equal the marginal costs.[32] This does not mean that the well-motivated executive always gets the facts right; he may turn out to be wrong. But it does mean that greater accuracy would not have been cost-justified.

Against this benchmark of faithful agency, the problem is that a given president's motivations might or might not be faithful, and the public knows this. The public fears that, for various reasons, the president might choose policies that diverge from the public's optimal policies. These include:

1. The president cares more about national security (or more about civil liberties, but we will, for simplicity, assume the former) than the public does. His "preferences" are different from those of the public.

2. The president cares very little about national security and civil liberties; he mainly cares about maximizing his political power and, more broadly, political success—success for himself, his party, or his chosen successor. With a view to political power and success, the president might maximize the probability of electoral success by favoring particular interest groups, voting blocs, or institutions at the expense of the public, or by adopting policies that are popular in the short-term, as far as the next election cycle, but that are harmful in the long-term, along with rhetoric that confuses and misleads.

The public knows that the president might have these or other harmful motivations, so when the president claims, for example, that a detention policy is

[32] This is a standard rationalist assumption. We will ignore a well-known problem of infinite regress that afflicts the economic theory of information: knowing the marginal benefit of the next bit of information itself requires information. *See* Jon Elster, *Introduction*, *in* RATIONAL CHOICE 1, 25 (Jon Elster ed., 1986).

essential to the war on terror but at the same time is not excessively harsh given its benefits, the public simply does not know whether to believe him.

Crucially, *the risk that the public will fail to trust a well-motivated president is just as serious as the risk that it will trust an ill-motivated one*. Imagine that a well-motivated president chooses the optimal policies. No terrorist attack occurs before the next election, but the public does not know whether this is because the president chose the optimal policies, the president chose bad policies and was merely lucky (as the terrorists for internal reasons chose to focus on foreign targets), or the president chose effective but excessively harsh policies. In the election, the public therefore has no particular reason to vote for this president and could easily vote him out of office and replace him with a worse president. A president who cares about electoral success might therefore not choose the optimal policies, and even a well-motivated president might be reluctant to choose the optimal policies because of the risk that the public will misinterpret them and replace him with an ill-motivated president. Presidents need public support even when they do not face reelection; they need the public to prod Congress to provide the president with funds for his programs and statutory authorization when necessary. A well-motivated president will abandon optimal policies if he cannot persuade the public that they are warranted.

As we noted earlier, legal scholars rarely note the problem of executive credibility, preferring to dwell on the problem of aggrandizement by ill-motivated presidents. Ironically, this assumption that presidents seek to maximize power has obscured one of the greatest constraints on aggrandizement, namely, the president's own interest in maintaining his credibility. Neither a well-motivated nor ill-motivated president can accomplish his goals if the public does not trust him.[33] This concern with reputation may put a far greater check on the president's actions than do the reactions of the other branches of the government.

B. Solutions

The literature on agency models and optimal contracting provides clues for solving the problem of executive credibility. This literature gives two basic pieces of advice.[34] The first piece of advice is to *align preferences*. An employer will do better if her employees obtain utility from doing whatever actions benefit the employer. Suppose, for example, an employer seeks to hire someone to build furniture in a factory. The pay is good enough to attract job candidates who do not enjoy building furniture, but clearly the employer does better by hiring people who like working with their hands, and take pleasure in constructing a high-quality product, than by hiring people who do not like working with their hands. We say that the first type of person has a preference for building high-quality furniture; this person is less likely to shirk than the other type of person.

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[33] *See* Marc J. Hetherington, *The Political Relevance of Public Trust*, 92 AM. POL. SCI. REV. 791 (1998).

[34] For a general comparison of these two methods, *see* James Fearon, *Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance*, in DEMOCRACY, ACCOUNTABILITY AND REPRESENTATION, 55, 70-84 (Adam Przeworski & Susan C. Stokes eds., 1999).

In order to align preferences, employers can use various types of *screening mechanisms* or *selection mechanisms* that separate the good types and the bad types.[35] An old idea is that job candidates who completed a training program—here, in carpentry—are more likely good types than job candidates who did not complete such a program. The reason is not that the training program improves skills, though it might; but that a person who enjoys carpentry is more likely to enter and complete such a program than a person who does not—the program, in terms of time and effort, is less burdensome for the former type of person. The employer could use other mechanisms as well, of course. She could ask for evidence that the job candidate pursues wood working as a hobby in his free time, or, simply, that he has held other jobs in similar factories, or jobs that involve carpentry or furniture construction. Another important screening mechanism is to compensate employees partly through in-kind components or earmarked funds that are worth more to good types than to bad types. In university settings, academic salaries are partly composed of research budgets that cannot be spent on personal goods and that are worth more to good types (researchers) than to bad types (shirkers).[36]

The second piece of advice is to *reward and sanction*. This is not as simple as giving the employee a bonus if she constructs good furniture and firing her if she does not; recall that we assume that the employer does not directly observe the quality of the agent's action. Consider the following version of our example. The employees both design and construct furniture; "high-quality" furniture is both made well and pleasing to the public, so that it sells well. The employer cannot tell by looking at a piece of furniture whether it is high-quality because she does not know the tastes of the public. An employee who uses a high level of effort is more likely to produce furniture that sells well, but an employee can in good faith misestimate the public taste and produce furniture that sells poorly. Similarly, an employee who uses a low level of effort is less likely to produce furniture that sells well but nonetheless may succeed at times. Since the employer cannot observe the quality of the furniture, she cannot make the wage a function of its quality; if she pays a flat wage, then the employee does not have an incentive to engage in a high level of effort, because that involves more personal cost without producing any reward.

The main solution is to make the employee's pay a function, in part, of the quantity of the sales of the goods that the employee produces. The quantity of sales, unlike the quality of the furniture, is observable. If the pay is properly determined, then the employer will engage in a high level of effort because the expected gains from high sales exceed the cost of high effort. How closely pay should be correlated with sales depends on how risk averse the employee is, and it may be necessary, for ordinary people who are generally risk averse, to pay them at least a little even if sales are low, and somewhat more if sales are high.

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[35] The enormous literature on this topic begins with A. Michael Spence, *Job-Market Signaling*, 87 Q. J. ECON. 355 (1973).

[36] Geoffrey Brennan, *Selection and the Currency of Reward*, *in* THE THEORY OF INSTITUTIONAL DESIGN, 257, 262-72 (Robert E. Goodin ed.,1996).

An enormous literature develops and qualifies these results, and we will refer to relevant parts of it later as necessary rather than try to summarize it here.[37] For now, we want to briefly point out the relevance of these solutions to our problem of executive credibility.

The preference-alignment solution has clear applicability to the problem of executive credibility. To be sure, elections and other democratic institutions help ensure that the president's preferences are not too distant from those of the public, but they are clearly not sufficient to solve the executive credibility problem. Elections will never create perfect preference alignment, for well-known reasons, and in any event the well-motivated executive will do what the public would want were it fully informed, not what maximizes the chances of electoral success in the short run. Furthermore, we do not consider credibility-generating mechanisms that would require new constitutional or statutory provisions; of course the president has little or no power to redesign electoral rules in order to enhance his credibility. We will instead focus, in Part IV, on how the president might use the existing electoral system to enhance his credibility in indirect ways—by appointing subordinates, advisors, and commission members, and by supporting certain types of candidacies for electoral office.

The reward-and-sanction solution also is applicable to the problem of executive credibility, but we think it is of less importance and we will not address it in any detail. The problem that most concerns us—threats to national security—typically does not produce a clear outcome while the president is still in office. As noted above, Bush's war-on-terror policies might be optimal, insufficient, or excessive; we will not know for many years. And the public cannot enter a contract with the president that provides that the president will receive a bonus if national security is enhanced and will be sanctioned if it is not enhanced. Consequently, Bush cannot enter a contract with the public that rewards him if his policies are good and punishes him if they are bad.

However, some signaling mechanisms have a reward-or-sanction component. A good job applicant can distinguish herself from a bad job applicant by agreeing to a compensation scheme that good types value and bad types disvalue. For example, if a good type of employee discounts future payoffs less than bad types, then good types will accept deferred compensation (such as pension contributions) that bad types reject.[38] Similarly, a well-motivated president can distinguish himself from an ill-motivated president by binding himself to a policy position that an ill-motivated president would reject. However, a president, unlike an ordinary employee, cannot bind himself by a judicially-enforceable contract; therefore, this mechanism can work only if the president can engage in self-binding through informal means, as we will discuss below.[39]

Note that either a well-motivated actor or an ill-motivated actor might use strategic devices to enhance her credibility. A bad actor might, for example, take actions to enhance the credibility of his threats. In a standard illustration, the "chicken" game occurs when two drivers race toward each other and the loser is the one who swerves to avoid death. In that game, each driver is threatening to drive straight, and the winner will

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[37] *See* BOLTON, *supra* n. 29, at 169-70.
[38] Id., at 228-32. This is a model that combines adverse selection and moral hazard.
[39] *See* Part IV.A., *infra*.

be the one who can make his threat credible, because the other driver will then know that the only choice is to swerve or die. Credibility is a valuable adjunct to many different motivations, not just to socially beneficial ones.

But this is a different type of credibility problem than the one we are interested in. In the class of problems we address, the problem that faces the well-motivated actor is that others cannot distinguish or sort him at a glance from ill-motivated actors. "Bad types" can mimic "good types" through low-cost imitation and by saying all the right things. The good type needs some device whereby he can credibly signal that he is a good type. The answer, in general, is for the good type to undertake an action that imposes greater costs on bad types than on good types. If third parties understand the cost structure of the action, then this separates the two types, because the bad type's strategy of costlessly imitating the good type no longer works. In employment screening, for example, both the lazy worker and the hard worker will claim to be a hard worker. The employer might prefer candidates with good references, or an advanced degree, on the theory that obtaining those things will be easier for the good type than the bad type.

Let us provide a little more structure to our analysis before describing our preferred mechanisms. Suppose that some president or other must choose a policy that will affect national security and civil liberties; this might include asking Congress to authorize him to engage in conduct like wiretapping or the use of military force. He makes this choice at the start of his first term, and the actual effect of his choice—on national security and civil liberties—will not be revealed to the public until after the next election. Terrorist attacks during the first term do not necessarily prove that he chose the wrong policies; nor does the absence of terrorist attacks during the first term prove that he chose the right policies. Only later will it become clear whether the president chose the optimal policies, perhaps many decades later. Thus, the public must vote for or against the president on the basis of the policy choice itself, not on the basis of its effect on their well-being. For expository convenience, we will assume that the president actually does make the optimal policy choice and that his problem is one of convincing the public that he has done so. Presidents who, for whatever reason, knowingly choose policies that the public would reject (if fully informed) obviously do not want to convince the public that this is what they are doing.

Our focus, then, is how the president who chooses the optimal policy, given the information available to him and the relevant institutional constraints, might use some additional mechanism to enhance the credibility of his claim that he chose the best policy. In the next Part, we will address why our current Madisonian system does not already solve the problem of executive credibility. In Part IV, we will analyze some mechanisms by which presidents can bootstrap themselves into credibility.

III. Madisonian Monitoring

In the standard separation-of-powers theory attributed to Madison, the executive's credibility dilemma is ameliorated by the separation of powers and institutional competition, which produce monitoring or oversight of executive discretion. Although the Madisonian system is not usually justified as a means of enhancing the executive's credibility, that is a byproduct of the system: If checks and balances discourage ill-motivated persons from running for election or force them to adopt public-spirited

policies once in office, then the executive's claims about his policies will be credible. Congressional and judicial oversight of executive action, on this account, will ensure that the executive exercises discretion only as directed by voter-principals, acting through legislators who are simultaneously agents (of the voters) and principals (of the executive).

This account is no longer adequate, if it ever was. Legislators and judges are, for the most part, unable to effectively oversee or monitor the executive, especially in the domains of foreign policy and national security. As a result, they are forced to the Hobson's choice of granting discretion that an ill-motivated executive would abuse, or withholding discretion that a well-motivated executive would use for good.

We do not suggest that the Madisonian system has entirely failed, only that it has partly failed, and that to the extent it has failed the executive's credibility dilemma becomes more acute. We will examine some of the principal institutional problems, beginning with legislative oversight and then turning to the courts.

A. Congress

In the Madisonian vision, legislators are simultaneously principals of the president, who is supposed to execute the statutes that legislators enact, and are also institutional competitors of the president, who has freestanding constitutional powers beyond the execution of statutes. Voters elect legislators, who either transmit voters' exogenously-determined policy preferences to the executive through statutes, or else (in a deliberative conception of Madisonianism) refine public preferences through reasoned discussion and then instruct the executive accordingly.[40] We are agnostic on the question of whether the preference-based or deliberative version of the Madisonian vision is more persuasive, or exegetically more faithful to the Madison of the Federalist Papers. In either case, what matters here is that the combination of principal-agent relationships with institutional rivalry between legislators and the executive is supposed to produce valuable byproducts for the polity as whole. Legislators have an interest in monitoring the president not only to ensure that he faithfully executes the statutes they enact, but also to ensure that executive power does not swell beyond its constitutionally prescribed bounds and destroy the separation of legislative and executive powers.

Whether or not this picture was ever realistic, it is no longer so today. Many institutional factors hamper effective legislative monitoring of executive discretion. Consider the following problems.

Information asymmetries. Monitoring the executive requires expertise in the area being monitored. In many cases, Congress lacks the information necessary to monitor discretionary policy choices by the executive. Although the committee system has the effect, among others, of generating legislative information and expertise,[41] and although Congress has a large internal staff, there are domains in which no amount of legislative expertise suffices for effective oversight. Prime among these are areas of foreign policy

[40] JOSEPH M. BESSETTE, MILD VOICE OF REASON, 150-81, (1994); CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT, 152-54 (2d ed. 2005).
[41] KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION, 254-57 (1991).

and national security. Here legislative expertise is beside the point, because the legislature lacks the raw information that experts need to make assessments.

The problem would disappear if legislators could cheaply acquire information from the president, but they cannot. One obstacle is a suite of legal doctrines protecting executive secrecy and creating deliberative privileges[42] – doctrines which may or may not be justified from some higher-order systemic point of view as means for producing optimal deliberation within the executive branch. Although such privileges are waivable, the executive often fears to set a bad institutional precedent. Another obstacle is the standard executive claim that Congress leaks like a sieve, so that sharing secret information with legislators will result in public disclosure. The credibility dilemma becomes most acute when, as in the recent controversy over surveillance by the National Security Agency, the executive claims that the very scope or rationale of a program cannot be discussed with Congress, because to do so would vitiate the very secrecy that makes the program possible and beneficial. In any particular case the claim might be right or wrong; legislators have no real way to judge, and they know that the claim might be made either by a well-motivated executive or an ill-motivated executive, albeit for very different reasons.

Collective action problems. Executive officials worry that, with many legislators even on select intelligence committees, someone is bound to leak, and it will be difficult to pinpoint the source. Aware of the relative safety that the numbers give them, leakers are all the more bold. This is an example of a larger problem, arising from the fact that there are many more legislators than top-level executive officials. Compared to the executive branch, Congress finds it costlier to coordinate and to undertake collective action (such as the detection and punishment of leakers). To be sure, the executive too is a they, not an it. Much of what presidents do is to arbitrate internal conflicts among executive departments and to try to aggregate competing views into coherent policy over time. As a comparative matter, however, the contrast is striking: the executive can act with much greater unitariness, force and dispatch than can Congress, which is chronically hampered by the need for debate and consensus among large numbers. That comparative advantage is a principal reason why Congress enacts broad delegating statutes in the first place, especially in domains touching on foreign policy and national security. In these domains, and elsewhere, the very conditions that make delegation attractive also hamper congressional monitoring of executive discretion under the delegation.

There may or may not be offsetting advantages to Congress' large numbers; perhaps the very size and heterogeneity of Congress make it a superior deliberator, whereas the executive branch is prone to suffer from various forms of groupthink.[43] But there are clear disadvantages to large numbers insofar as monitoring executive discretion is at issue. From the standpoint of individual legislators, monitoring is a collective good. If rational and self-interested, each legislator will attempt to free-ride on the production of this good, and monitoring will be inefficiently underproduced.[44] More broadly, the

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[42] For an overview of the deliberative privilege doctrine, *see* Michael N. Kennedy, *Escaping the Fishbowl: A Proposal to Fortify the Deliberative Process Privilege*, 99 NW. U. L. REV. 1769 (2005).

[43] Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 69-82 (2004).

[44] *See generally,* Sean Gailmard, *Multiple Principals and Outside Information in Bureaucratic Policy Making*, (U. Chi. Harris Sch., Working Paper, Dec. 2002), *available at*

institutional prerogatives of Congress are also a collective good.[45] Individual legislators may or may not be interested in protecting the institution of Congress or the separation of legislative from executive power; much depends on legislators' time horizons or discount rate, the expected longevity of a legislative career, and so forth. But it is clear that protection of legislative prerogatives will be much less in an institution composed of hundreds of legislators coming and going than if Congress were a single person.

"Separation of parties, not powers."[46] Congress is, among other things, a partisan institution. Political scientists debate whether it is principally a partisan institution, or even exclusively so.[47] But Madison arguably did not envision partisanship in anything like its modern sense.[48] Partisanship undermines the separation of powers during periods of unified government.[49] Where the same party controls both the executive branch and Congress, real monitoring of executive discretion rarely occurs, at any rate far less than in an ideal Madisonian system. Partisanship may enhance monitoring during periods of divided government, as one House of Congress, say, investigates a president of the other party. However, monitoring is arguably most necessary during periods of unified government, because Congress is most likely to enact broad delegations when the President holds similar views;[50] and in such periods monitoring is least likely to occur.[51] The Congress of one period may partially compensate by creating institutions to ensure bipartisan oversight in future periods – consider the statute that gives a partisan *minority* of certain congressional committees power to subpoena documents from the executive, albeit only nonprivileged documents[52] – but these are palliatives. Under unified government, congressional leaders of the same party as the president have tremendous power to frustrate effective oversight by the minority party.

The limits of congressional organization. Congress as a collective body has attempted, in part, to overcome these problems through internal institutional arrangements. Committees and subcommittees specialize in a portion of the policy space, such as the armed forces or homeland security, thereby relieving members of the costs of acquiring and processing information (at least if the committee itself maintains a reputation for credibility).[53] Intelligence committees hold closed sessions and police their members to deter leaks (although the sanctions that members of congress can apply to one another are not as strong as the sanctions a president can apply to a leaker in the executive branch). Large staffs, both for committees and members, add expertise and

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http://harrisschool.uchicago.edu/About/publications/working-papers/pdf/wp_02_13.pdf (explaining that the high number of principals causes a suboptimal level joint utility from oversight).

[45] Levinson, *Empire-Building Government*, *supra* n. 4, at 928-32.

[46] Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers,* 119 HARV. L. REV. 2311, 2311 (2006).

[47] *See, e.g.*, GARY W. COX & MATTHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN REVISITED: RESPONSIBLE PARTY GOVERNMENT IN THE US HOUSE OF REPRESENTATIVES, (2005), *available at* http://www.iq.harvard.edu/NewsEvents/Conferences/EWA/Jan04/LLR--Harvard_final.pdf.

[48] BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS, 18, 24-25 (2005).

[49] Levinson & Pildes, *supra* n. 46 at 2342-47.

[50] DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS, 235 (2d ed. 1999).

[51] Levinson & Pildes, *supra* n. 46 at 2359-64,

[52] 5 U.S.C. 2954 (Supp. 2 2000).

[53] KREHBIEL, *supra* n. 41, at 68-69, 74-75.

monitoring capacity. And interest groups can sometimes be counted upon to sound an alarm when the executive harms their interests.[54]

Overall, however, these arrangements are not fully adequate, especially in domains of foreign policy and national security, where the scale of executive operations is orders of magnitude larger than the scale of congressional operations. Congress' whole staff, which must (with the help of interest groups) monitor *all* issues, runs to some 22,000 persons.[55] As of 2003, the executive branch had some 2.6 million civilian employees,[56] in addition to almost 1.2 million in the armed forces.[57] The sheer mismatch between the scale of executive operations and the congressional capacity for oversight, even aided by interest groups, is daunting. Probably Congress is already at or near the limits of its monitoring capacity at its current size and budget.

Congressional motivation and credibility. Like the executive, Congress has a credibility problem. Members of Congress may be well-motivated or ill-motivated; the public does not know. Thus, when Congress passes a resolution criticizing presidential action or refuses to delegate power that he seeks, observers do not know whether Congress or the president is right. Ill-motivated members of Congress will constrain public-spirited presidents; thus the Madisonian cure for the problem of executive credibility could be worse than the disease.

Even if members of Congress are generally well-motivated, Congress has a problem of institutional credibility that the president lacks. Although a voter might trust the member of Congress for whom she voted because she knows about his efforts on his district's behalf, she will usually know nothing about other members of Congress, so when her representative is outvoted, she might well believe that the other members are ill-motivated. And, with respect to her own representative, he will often lack credibility compared to the president because he has much less information. Further, the reputation of congressional leaders is only very loosely tied to the reputation of the institution, while there is a closer tie between the president's reputation and the presidency. As a result, Congress is likely to act less consistently than the presidency, further reducing its relative credibility. Congressional lack of credibility undermines its ability to constrain the presidency: Congress can monitor the president and tell the public that the president has acted properly or improperly, but if the public does not believe Congress, then Congress's power to check the president is limited.

We neither make nor need to make any general empirical claim that Congress has no control over executive discretion. That is surely not the case; there is a large debate, or set of related debates, about the extent of congressional dominance.[58] Our assertion is

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[54] Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 168-171 (1984).

[55] NORMAN J. ORNSTEIN ET AL., VITAL STATISTICS ON CONGRESS 2001-2002 126 (2002).

[56] United States Office of Personnel Management, Federal Civilian Employment by Branch, Selected Agency, Pay System and Area, December 2005 and January 2006, http://www.opm.gov/feddata/html/2006/january/table14.asp.

[57] United States Department of Labor, Bureau of Labor Statistics, Job Opportunities in the Armed Forces, http://www.bls.gov/oco/ocos249.htm.

[58] *See, e.g.*, Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Rgulatory Policymaking by the Federal Trade Commission,* 91 J. POL. ECON. 765 (1983); Terry Moe, *An Assessment of the Positive Theory of 'Congressional Dominance'*, 12 LEGIS. STUD. Q. 475 (1987); Jonathan

just that there is at least a real gap, and during emergencies and wars an even larger gap, between the extent of executive discretion and legislative capacity for monitoring. Within that gap, the dilemma of executive credibility arises. To the extent that legislators cannot monitor the executive's exercise of discretion, they must either withhold discretion from an executive who might be well-motivated, or grant discretion to an executive who might be ill-motivated.

B. Courts

Similar problems afflict judicial oversight of the executive.

Information asymmetries. The gap between executive and judiciary, in information and expertise, is even wider than between the executive and Congress. Whereas many legislators have a narrowly defined field of policy expertise, particularly in the House, federal judges are mostly generalists, barring a few specialized courts. Furthermore, the partial insulation from current politics that federal judges enjoy, by virtue of life tenure and salary protection, brings with it a kind of informational impoverishment.[59] Legislators, who must please other people at least some of the time, interact with the outside world far more systematically than generalist judges, whose main source of information is the briefs and arguments of litigants. The credibility dilemma thus appears quite acutely in judicial proceedings. When the executive says that resolving a plaintiff's claim would require disclosure of "state secrets,"[60] with dangerous consequences for national security, judges know that an either an ill-motivated or a well-motivated executive might be making the claim and know that they have no easy means to assess whether the claim is credible.

Collective action problems and decentralization. If congressional monitoring of executive discretion is hampered by collective action problems, judicial monitoring is hampered by a similar condition, the decentralized character of the federal judiciary. The judiciary really is a they, not an it, and is decentralized along mainly geographic lines. Different judges on different courts will have different prior estimates of the executive's credibility, and hence different views of the costs and benefits of oversight and of the appropriate level of monitoring. The Supreme Court is incapable of fully resolving these structural conflicts. Because the Court presides over a large institutional system and lacks the capacity to review more than a fraction of cases submitted to it, its role is restricted by necessity to the declaration of general principles of law and episodic, ad hoc intervention in the system.[61]

The legitimacy deficit. In the federal system, appointed judges are not overtly partisan, though they are sometimes covertly so.[62] The very condition that enables this relative lack of overt politicization – that federal judges are, at least in one familiar conception, legal technocrats appointed for their expertise rather than elected on a

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Bendor & Terry Moe, *Agenda Control, Committee Capture, and the Dynamics of Institutional Politics*, 80 AM. POL. SCI. REV. 1187 (1986).

[59] NEIL K. KOMESAR, IMPERFECT ALTERNATIVES 141 (1997).

[60] *See, e.g.*, Tenet v. Doe, 544 U.S. 1, 8-11 (2005), Sterling v. Tenet, 416 F.3d 338, 347 (4th Cir. 2005), McDonnell Douglas Corp. v. U.S., 323 F.3d 1006, 1020-23 (C.A. Fed. 2003).

[61] For more extensive treatment of these points, *see* Adrian Vermeule, *The Judiciary is a They, Not an It,* 14 J. CONTEMP. LEGAL ISSUES 549, 564-66 (2005).

[62] Bush v. Gore, 531 U.S. 98, 105-10 (2000).

partisan basis – also creates a serious legitimacy deficit for the judiciary, understanding legitimacy in a strictly sociological sense.[63] Aroused publics concerned about issues such as national security sometimes have little tolerance for robust judicial oversight of executive discretion, which can always be condemned as "activism" by "unelected judges." This charge sometimes succeeds and sometimes fails, but for the judges it is always a concern that acts as a drag on attempts to monitor executive behavior.

Judicial credibility. Judges rely on executive officials to carry out their orders and Congress to fund them, and thus ultimately on the public imposing sanctions on the political branches when the political branches do not obey a court order. But the public will support the judiciary only if the public believes that the judiciary is well-motivated rather than ill-motivated. Such is often the case,[64] but the credibility of judges is not infinite. Lingering public suspicion of elite decisionmaking places a cap on judicial credibility, and indeed the evidence suggests that judges are often motivated by ideology, at least when it comes to opinion assignment.[65] Thus, as we have mentioned before, as between a presidential determination that an emergency requires a course of action and a judge's claim to the contrary, the public might well believe the president.[66]

Here too, we do not claim that judicial oversight is a total failure. Doctrinal lawyers focus, sometimes to excess, on a handful of great cases in which judges have checked or constrained discretionary executive action, even in domains involving foreign policy or national security. Cases such as *Youngstown*,[67] the Pentagon Papers case,[68] and recently *Hamdan*[69] head this list. Undoubtedly, however, there is a large gap between executive discretion and judicial capacities, or even between executive discretion and the sum of congressional and judicial capacities working in tandem. In times of emergency, especially, both Congress and the judiciary defer to the executive.[70] Legislators and judges understand that the executive's comparative institutional advantages in secrecy,

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[63] Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005).

[64] This is exemplified by the public reaction to FDR's court-packing plan. *See* Adrian Vermeule, *Introductory Essay: Political Constraints on Supreme Court Reform,* 90 MINN. L. REV. 1154, 1163-66 (2006). The Gallup Organization reports generally increasing numbers of people reporting that they had a "great deal" of trust in the Supreme Court from the time of Watergate (17% had "great deal of trust") to just before Bush v. Gore (29% in 1999 and 23% in 2000). Since Bush v. Gore, that number has dropped, staying at or below immediate post-Watergate trust ratings (averaging just under 15% since 2001). Gallup Brain, Supreme Court (2006), http://brain.gallup.com/content/?ci=4732 (subscription required; last accessed Sept. 14, 2006).

[65] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 372-381 (2002), Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. (forthcoming 2006), *available at* http://ssrn.com/abstract=906658.

[66] Lincoln's successful repudiation of Justice Taney's habeas order is the supreme example. *See* Harold M. Hyman, *Lincoln, Abraham* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (2005). Another possible example is President Jackson's disavowal of a Supreme Court decision concerning the treatment of the Cherokees. Kermit L. Hall, *Jackson, Andrew*, THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (2005).

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

[68] N.Y.Times Co. v U.S., 403 U.S. 713, 719-20 (1971) (Black, J. concurring).

[69] Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2773-74 (2006).

[70] For an extended treatment of this claim, *see generally* ERIC POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS (forthcoming 2006).

force, and unitariness are all the more useful during emergencies, so that it is worthwhile transferring more discretion to the executive even if it results in an increased risk of executive abuse. The result is that cases such as the ones we have listed are the exception, not the rule, at least during the heat of the emergency.

C. The Madisonian System and the Well-Motivated Executive

The Madisonian system of oversight has not totally failed. Sometimes it works. Sometimes legislators throw off the temptation to free-ride; sometimes they invest in protecting the separation of powers or legislative prerogatives. Sometimes judges review exercises of executive discretion, even during emergencies. But often enough, legislators and judges have no real alternative to letting executive officials exercise discretion unchecked. The Madisonian system is a partial failure; compensating mechanisms must be adopted to fill the area of slack, the institutional gap between executive discretion and the oversight capacities of other institutions.

It is often assumed that this partial failure of the Madisonian system unshackles and therefore benefits ill-motivated executives. This is far too crude and also incomplete. The failure of the Madisonian system harms the well-motivated executive as much as it benefits the ill-motivated one. Where Madisonian oversight fails, the well-motivated executive is a victim of his own power. Voters, legislators, and judges will be wary of granting further discretion to an executive whose motivations are uncertain and possibly nefarious. The partial failure of Madisonian oversight thus threatens a form of inefficiency, a kind of contracting failure that makes potentially everyone – including the voters – worse off.

Our central question, then, is what the well-motivated executive can do to solve or at least ameliorate the problem. The solution is for the executive to complement his (well-motivated) first-order policy goals with second-order mechanisms for demonstrating credibility to other actors. We thus do not address the different question of what voters, legislators, judges and other actors should do about an executive who is ill-motivated and known to be so. That project involves shoring up or replacing the Madisonian system to block executive dictatorship. Our more modest project involves finding new mechanisms to help the well-motivated executive credibly distinguish himself as such.

IV. Executive Signaling: Law and Mechanisms

We suggest that the executive's credibility problem can be solved by second-order mechanisms of *executive signaling*. In the general case, well-motivated executives send credible signals by taking actions that are more costly for ill-motivated actors than for well-motivated ones, thus distinguishing themselves from their ill-motivated mimics. Among the specific mechanisms we discuss, an important subset involve *executive self-binding*, whereby executives commit themselves to a course of action that would impose higher costs on ill-motivated actors. Commitments themselves have value as signals of benign motivations.

This departs from the usual approach in legal scholarship. Legal theory has often discussed self-binding by "government" or government officials. In constitutional theory, it is often suggested that constitutions represent an attempt by "the people" to

bind "themselves" against their own future decisionmaking pathologies, or relatedly that constitutional prohibitions represent mechanisms by which governments commit themselves not to expropriate investments or to exploit their populations.[71] Whether or not this picture is coherent,[72] it is not the question we examine here, although some of the relevant considerations are similar.[73] We are not concerned with binding the president so that he cannot abuse his powers, but with how he might bind himself or take other actions that enhance his credibility, so that he can generate support from the public and other members of the government.

Furthermore, our question is subconstitutional; it is whether a well-motivated executive, acting within an established set of constitutional and statutory rules, can use signaling to generate public trust. Accordingly we proceed by assuming that no constitutional amendments or new statutes will be enacted. Within these constraints, what can a well-motivated executive do to bootstrap himself to credibility? The problem for the well-motivated executive is to credibly signal his benign motivations; in general, the solution is to engage in actions that are less costly for good types than for bad types.

We begin with some relevant law; then examine a set of possible mechanisms, emphasizing both the conditions under which they might succeed and the conditions under which they might not; and then examine the costs of credibility.

A. A Preliminary Note on Law and Self-Binding

Many of our mechanisms are unproblematic from a legal perspective, as they involve presidential actions that are clearly lawful. But a few raise legal questions; in particular, those that involve self-binding.[74] Can a president bind himself to respect particular first-order policies? With qualifications, the answer is "yes, at least to the same extent that a legislature can." Formally, a duly promulgated executive rule or order binds even the executive unless and until it is validly abrogated, thereby establishing a new legal status quo.[75] The legal authority to establish a new status quo allows a president to create inertia or political constraints that will affect his own future choices. In a practical

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[71] JON ELSTER, ULYSSES AND THE SIRENS, 36-47, 99-103 (1979).

[72] For criticisms, *see* JON ELSTER, ULYSSES UNBOUND, 156-74 (2000); Jeremy Waldron, *Precommitment and Disagreement*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS, 271, 185-95 (Larry Alexander ed., 1998).

[73] A somewhat analogous argument can be found in Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83 (2002). Farber argues that governments (not presidents) adopt judicially enforceable constitutional rights in order to signal that they value payoffs in the future, and thus will not drive off foreign investment in the long run by expropriating in the short run. *Id.* at 88-91.

[74] Many of them might involve self-binding, depending on circumstances. For example, compare a president who appoints a commission, waits for its recommendation, and then acts, with a president who promises to appoint a commission, acts, and then receives its evaluation of his action. The first president does not engage in self-binding; he simply gains credibility prior to action (assuming that the commission supports him). The second president does engage in self-binding, and thus the mechanism works only if the president can be sanctioned if the commission criticizes his action. We will not belabor these details, except to note that the strict liability mechanism (infra) depends heavily on successful self-binding.

[75] United States v. Nixon, 418 U.S. 683, 695-96 (1974), Arizona Grocery v. Achtison, 284 U.S. 370, 385-89 (1932). However, the Court has also said that for purposes of enforcing the constitutional "nondelegation doctrine," it is unimportant that an administrative agency has promulgated rules that channel its own discretion, even though such rules are binding on the agency unless and until changed. Whitman v. American Trucking, 531 U.S. 457, 472-76 (2001).

sense, presidents, like legislatures, have great de facto power to adopt policies that shape the legal landscape for the future. A president might commit himself to a long-term project of defense procurement or infrastructure or foreign policy, narrowing his own future choices and generating new political coalitions that will act to defend the new rules or policies.

More schematically, we may speak of formal and informal means of self-binding:

(1) The president might use formal means to bind himself. This is possible in the sense that an executive order, if otherwise valid, legally binds the president while it is in effect and may be enforced by the courts. It is not possible in the sense that the president can always repeal the executive order if he can bear the political and reputational costs of doing so.

(2) The president might use informal means to bind himself. This is not only possible but frequent and important. Issuing an executive rule providing for the appointment of special prosecutors, as Nixon did, is not a formal self-binding.[76] However, there may be large political costs to repealing the order. This effect does not depend on the courts' willingness to enforce the order, even against Nixon himself. Court enforcement makes the order legally binding while it is in place, but only political and reputational enforcement can protect it from repeal. Just as a dessert addict might announce to his friends that he is going on a no-dessert diet in order to raise the reputational costs of backsliding and thus commit himself, so too the repeal of an executive order may be seen as a breach of faith even if no other institution ever enforces it.

In what follows, we will invoke both formal and informal mechanisms. For our purposes, the distinction between the authority to engage in *de jure* self-binding (legally limited and well-defined) and the power to engage in *de facto* self-binding (broad and amorphous) is secondary. So long as policies are deliberately chosen with a view to generating credibility, and do so by constraining the president's own future choices in ways that impose greater costs on ill-motivated presidents than on well-motivated ones, it does not matter whether the constraint is formal or informal.

B. Mechanisms

What signaling mechanisms might a well-motivated executive adopt to credibly assure voters, legislators and judges that his policies rest on judgments about the public interest, rather than on power-maximization, partisanship or other nefarious motives?

Intrabranch separation of powers. In an interesting treatment of related problems, Neal Katyal suggests that the failure of the Madisonian system counsels "internal separation of powers" within the executive branch.[77] Abdication by Congress

[76] In fact, the independent counsels who investigated Nixon were appointed under Department of Justice regulations that Nixon did not overturn; the regulations emerged from complicated background negotiations among Nixon, Attorney General Elliott Richardson, Chief of Staff Alexander Haig, and various Senators. *See* K.A. McNeely-Johnson, *United States v. Nixon, Twenty Years After: The Good, The Bad and The Ugly –An Exploration of Executive Privilege*, 14 N. ILL. U. L. REV. 251, 265-66 (1993). We offer a stylized version of the case to illustrate the point more cleanly.

[77] Neal Katyal, *Separating from Within: Internal Checks on Today's Most Dangerous Branch*, 116 Yale L. J. (forthcoming fall 2006), abstract available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=888526.

means that there are few effective checks on executive power; second-best substitutes are necessary. Katyal proposes some mechanisms that would be adopted by Congress, such as oversight hearings by the minority party, but his most creative proposals are for arrangements internal to the executive branch, such as redundancy and competition among agencies, stronger civil-service protections and internal adjudication of executive controversies by insulated "executive" decisionmakers who resemble judges in many ways.[78]

Katyal's argument is relevant because the mechanisms he discusses might be understood as signaling devices, but his overall approach is conceptually flawed, on two grounds. First, the assumption that second-best constraints on the executive should reproduce the Madisonian separation of powers *within* the executive branch is never defended. The idea seems to be that this is as close as we can get to the first-best, while holding constant everything else in our constitutional order. But the general theory of second-best states that approaching as closely as possible to the first-best will not necessarily be the preferred strategy;[79] the best approach may be to adjust matters on other margins as well, in potentially unpredictable ways. If the Madisonian system has failed in the ways Katyal suggests, the best compensating adjustment might be, for all we know, to switch to a parliamentary system. (We assume that no large-scale changes of this sort are possible, whereas Katyal seemingly assumes that they are, or at least does not make clear his assumptions in this regard). Overall, Katyal's view has a kind of fractal quality – each branch should reproduce within itself the very same separation of powers structure that also describes the whole system – but it is not explained why the constitutional order should be fractal.

Second, Katyal's proposals for internal separation of powers are self-defeating: the motivations that Katyal ascribes to the executive are inconsistent with the executive adopting or respecting the prescriptions Katyal recommends.[80] Katyal never quite says so explicitly, but he clearly envisions the executive as a power-maximizing actor, in the sense that the president seeks to remove all constraints on his current choices.[81] Such an executive would not adopt or enforce the internal separation of powers to check himself. Executive signaling is not, even in principle, a solution to the lack of constraints on a power-maximizing executive in the sense Katyal implicitly intends. Although an ill-motivated executive might bind himself to enhance his strategic credibility, as explained above, he would not do so in order to restore the balance of powers. Nor is it possible, given Katyal's premise of legislative passivity or abdication, that Congress would force the internal separation of powers on the executive. In what follows, we limit ourselves to proposals that are consistent with the motivations, beliefs, and political opportunities that we ascribe to the well-motivated executive, to whom the proposals are addressed. This limitation ensures that the proposals are not self-defeating, whatever their costs.

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[78] Id. at --.

[79] R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second-Best*, 24 REV. ECON. STUD. 11, 12 (1956).

[80] For an introduction to this class of problems, s*ee* Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, FORDHAM L. REV. (forthcoming 2006), manuscript at 6-9, *available at* http://ssrn.com/abstract=890651.

[81] *See* Katyal, supra n. 77, at ---.

The contrast here must not be drawn too simply. A well-motivated executive, in our sense, might well attempt to increase his power. The very point of demonstrating credibility is to encourage voters and legislators to increase the discretionary authority of the executive, where all will be made better off by doing so. Scholars such as Katyal who implicitly distrust the executive, however, do not subscribe to this picture of executive motivations. Rather, they see the executive as an unfaithful agent of the voters; the executive attempts to maximize his power even where fully-informed voters would prefer otherwise. An actor of that sort will have no incentive to adopt proposals intended to constrain that sort of actor.

Independent commissions. We now turn to some conceptually coherent mechanisms of executive signaling. Somewhat analogously to Katyal's idea of the internal separation of powers, a well-motivated executive might establish independent commissions to review policy decisions, either before or after the fact. Presidents do this routinely, especially after a policy has had disastrous outcomes, but sometimes beforehand as well. Independent commissions are typically blue-ribbon and bipartisan.[82]

We add to this familiar process the idea that the President might gain credibility by publicly committing or binding himself to give the commission authority on some dimension. The president might publicly promise to follow the recommendations of such a commission, or to allow the commission to exercise *de facto* veto power over a policy decision before it is made, or might promise before the policy is chosen that the commission will be given power to review its success after the fact. To be sure, there will always be some wiggle room in the terms of the promise, but that is true of almost all commitments, which raise the costs of wiggling out even if they do not completely prevent it.

Consider whether George W. Bush's credibility would have been enhanced had he appointed a blue-ribbon commission to examine the evidence for weapons of mass destruction in Iraq *before* the 2003 invasion, and publicly promised not to invade unless the commission found substantial evidence of their existence. Bush would have retained his preexisting legal authority to order the invasion even if the commission found the evidence inadequate, but the political costs of doing so would have been large. Knowing this, and knowing that Bush shared that knowledge, the public could have inferred that Bush's professed motive – elimination of weapons of mass destruction – was also his real motive. Public promises that inflict reputational costs on badly motivated behavior help the well-motivated executive to credibly distinguish himself from the ill-motivated one.

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[82] Other prominent commissions include the President's Commission on the Assassination of President. Kennedy (the Warren Commission) and the President Johnson's National Advisory Commission on Civil Disorder (the Kerner Commission), which reported on urban riots. For analysis of recent independent commissions, and for a sample of the diversity of issues covered by independent commissions, *see, e.g.*, Victoria S. Shabo *"We Are Pleased to Report that the Commission has Reached Agreement with the White House": The 9/11 Commission and Implications for Legislative-Executive Information Sharing,* 83 N. C. L. REV., 1037, 1037-50 (2005); Ken Gish & Eric Laschever, *The President's Ocean Commission: Progress Toward a New Ocean Policy*, 19 NAT. RESOURCES & ENV'T 17, (Summer 2004); Nkechi Taifa *Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 HOWARD L. J. 641, 660-64 (1997) (criticizing the 1995 United States Sentencing Commission).

The more common version of this tactic is to appoint commissions after the relevant event, as George W. Bush did to investigate the faulty reports by intelligence agencies that Iraq possessed weapons of mass destruction.[83] If the president appoints after-the-fact commissions, the commissions can enhance his credibility for the next event—by showing that he will be willing, after *that* event, to subject his statements to scrutiny by public experts. Here, however, the demonstration of credibility is weaker, because there is no commitment to appoint any after-the-fact commissions in the future – merely a plausible inference that the president's future behavior will track his past behavior.

Bipartisan appointments. In examples of the sort just mentioned, the signaling arises from public position-taking. The well-motivated executive might produce similar effects through appointments to office.[84] A number of statutes require partisan balance on multimember commissions; although these statutes are outside the scope of our discussion, we note that presidents might approve them because they allow the president to commit to a policy that legislators favor, thus encouraging legislators to increase the scope of the delegation in the first place.[85] For similar reasons, presidents may consent to restrictions on the removal of agency officials, because the restriction enables the president to commit to giving the agency some autonomy from the president's preferences.[86]

Similar mechanisms can work even where no statutes are in the picture. As previously mentioned, during World War II, FDR appointed Republicans to important cabinet positions, making Stimson his Secretary of War. Clinton appointed William Cohen, a moderate Republican, as Secretary of Defense in order to shore up his credibility on security issues. Bipartisanship of this sort might improve the deliberation that precedes decisions, by impeding various forms of herding, cascades and groupthink;[87] however, we focus on its credibility-generating effects. By (1) expanding the circle of those who share the president's privileged access to information, (2) ensuring that policy is partly controlled by officials with preferences that differ from the president's, and (3) inviting a potential whistleblower into the tent, bipartisanship helps to dispel the suspicion that policy decisions rest on partisan motives or extreme preferences, which in turn encourages broader delegations of discretion from the public and Congress.

A commitment to bipartisanship is only one way in which appointments can generate credibility. Presidents might simply appoint a person with a reputation for

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[83] COMMISSION ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT, MARCH 31, 2005 (2005), *available at* http://www.wmd.gov/report/index.html.

[84] For models suggesting that a president can make credible commitments to the future direction of agency policy by appointing officials whose preferences are known to differ from the president's, see Daniel F. Spulber & David Besanko, *Delegation, Commitment and the Regulatory Mandate*, 8 J.L. ECON. & ORG. 126, 127 (1992); Nolan McCarty, *The Appointments Dilemma*, 48 AM. J. POL. SCI. 412, 421 (2004).

[85] McCarty, *supra* n. 84, at 422.

[86] *Id.* at 423. The implication is that "the agencies that should be the most insulated from presidential control are those whose activities the president supports more than does Congress." Id. For an empirical overview of independent agencies, *see generally,* DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN (2003).

[87] SUNSTEIN, DISSENT, *supra* n. 40, at 54-73.

integrity, as when President Nixon appointed Archibald Cox as special prosecutor (although plausibly Nixon did so because he was forced to do so by political constraints, rather than as a tactic for generating credibility). A person with well-known preferences on a particular issue, even if not of the other party or widely respected for impartiality, can serve as a credible whistleblower on that issue. Thus presidents routinely award cabinet posts to leaders of subsets of the president's own party, leaders whose preferences are known to diverge from the president's on the subject; one point of this is to credibly assure the relevant interest groups that the president will not deviate (too far) from their preferences.

The Independent Counsel Statute institutionalized the special prosecutor and strengthened it. But the statute proved unpopular and was allowed to lapse in 1999.[88] This experience raises two interesting questions. First, why have presidents confined themselves to appointing lawyers to investigate allegations of wrongdoing; why have they not appointed, say, independent policy experts to investigate allegations of policy failure? Second, why did the Independent Counsel Statute fail? Briefly, the statute failed because it was too difficult to control the behavior of the prosecutor, who was not given any incentive to keep his investigation within reasonable bounds.[89] Not surprisingly, policy investigators would be even less constrained since they would not be confined by the law, and at the same time, without legal powers they would probably be ignored on partisan grounds. A commission composed of members with diverse viewpoints is harder to ignore, if the members agree with each other.

More generally, the decision by presidents to bring into their administrations members of other parties, or persons with a reputation for bipartisanship and integrity, illustrates the formation of *domestic coalitions of the willing*. Presidents can informally bargain around the formal separation of powers[90] by employing subsets of Congress, or of the opposing party, to generate credibility while maintaining a measure of institutional control. FDR was willing to appoint Knox and Stimson, but not to give the Republicans in Congress a veto. Truman was willing to ally with Arthur Vandenbergh but not with all the Republicans; Clinton was willing to appoint William Cohen but not Newt Gingrich. George W. Bush likewise made a gesture towards credibility by briefing members of the Senate Intelligence Committee – including Democrats – on the administration's secret surveillance program(s), which provided a useful talking point when the existence of the program(s) was revealed to the public.

Counter-partisanship. Related to bipartisanship is what might be called counter-partisanship: presidents have greater credibility when they choose policies that cut against the grain of their party's platform or their own presumed preferences.[91] Only Nixon could go to China, and only Clinton could engineer welfare reform. Voters and

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[88] 28 U.S.C. § 591.

[89] Julie O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 483-92 (1996).

[90] Cf. DONALD WITTMAN, *The Constitution as an Optimal Social Contract*, in Bernard Grofman & Donald Wittman, eds., THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM 73-84 (1989) (where transaction costs are low, political actors can bargain around the separation of powers).

[91] *See* Alex Cukierman & Mariano Tommasi, *When Does it Take a Nixon to Go to China?*, 88 AM. ECON. REV. 180, 190-92 (1998); Robert Goodin, *Voting Through the Looking Glass*, 77 AM. POL. SCI. REV. 420, 426-28 (1983).

publics rationally employ a political heuristic: the relevant policy, which voters are incapable of directly assessing, must be highly beneficial if it is chosen by a president who is predisposed against it by convictions or partisan loyalty.[92] Accordingly, those who wish to move U.S. terrorism policy towards greater security and less liberty might do well to support the election of a Democrat.[93] By the same logic, George W. Bush is widely suspected of nefarious motives when he rounds up alleged enemy combatants, but not when he creates a massive prescription drug benefit.

Counter-partisanship can powerfully enhance the president's credibility, but it depends heavily on a lucky alignment of political stars. A peace-loving president has credibility when he declares a military emergency but not when he appeases; a belligerent president has credibility when he offers peace but not when he advocates military solutions. A lucky nation has a well-motivated president with a belligerent reputation when international tensions diminish (Ronald Reagan) and a president with a pacific reputation when they grow (Abraham Lincoln, who opposed the Mexican War). But a nation is not always lucky.

Transparency. The well-motivated executive might commit to transparency, as a way to reduce the costs to outsiders of monitoring his actions.[94] The FDR strategy of inviting potential whistleblowers from the opposite party into government is a special case of this; the implicit threat is that the whistleblower will make public any evidence of partisan motivations. The more ambitious case involves actually exposing the executive's decisionmaking processes to observation. To the extent that an ill-motivated executive cannot publicly acknowledge his motivations or publicly instruct subordinates to take them into account in decisionmaking, transparency will exclude those motivations from the decisionmaking process. The public will know that only a well-motivated executive would promise transparency in the first place, and the public can therefore draw an inference to credibility.

Credibility is especially enhanced when transparency is effected through journalists with reputations for integrity or with political preferences opposite to those of the president. Thus George W. Bush gave Bob Woodward unprecedented access to White House decisionmaking, and perhaps even to classified intelligence,[95] with the expectation that the material would be published. This sort of disclosure to journalists is

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[92] For a rigorous analysis of this phenomenon in the context of cheap-talk games, *see, e.g.*, Joseph Farrell & Robert Gibbons, *Cheap Talk with Two Audiences*, 79 AMER. ECON. REV. 1214 (1989); David Austen-Smith, *Strategic models of talk in political decision making*, 13 INTER'L POL. SCI. REV. 45 (1992).

[93] However, there is a puzzling finding that the counter-partisanship effect is asymmetrical: in experiments, hawkish "voters" approved of dovish policies chosen by a hawkish "president," but dovish voters did not approve of hawkish policies chosen by a dovish president. *See* Lee Sigelman & Carol K. Sigelman, *Shattered Expectations: Public Responses to "Out-of-Character" Presidential Actions*, 8 POL. BEHAVIOR 262, 274-76 (1986).

[94] John Ferejohn suggests, with a model, that agents might compete by offering their principals transparency, which lowers the costs to the principals of monitoring the agents, and thereby induces the principals to offer the agents greater discretion. *See* John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, *in* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION, 131 (Adam Przeworski et al. eds, 1999). Empirically, the evidence offers only mixed support for this model. *See* James Alt et al., The Causes of Fiscal Transparency: Evidence from the American States 25-30 (Feb. 2006), *available at* http://ideas.repec.org/p/kud/epruwp/06-02.html.

[95] Murray Waas, *Libby Says Bush Authorized Leaks*, NAT'L J., Apr. 6, 2006.

not real-time transparency – no one expects meetings of the National Security Council to appear on C-SPAN – but the anticipation of future disclosure can have a disciplining effect in the present. By inviting this disciplining effect, the administration engages in signaling in the present through (the threat of) future transparency.

There are complex tradeoffs here, because transparency can have a range of harmful effects. As far as process is concerned, decisionmakers under public scrutiny may posture for the audience, may freeze their views or positions prematurely, and may hesitate to offer proposals or reasons for which they can later be blamed if things go wrong.[96] As for substance, transparency can frustrate the achievement of programmatic or policy goals themselves. Where security policy is at stake, secrecy is sometimes necessary to surprise enemies or to keep them guessing. Finally, one must take account of the incentives of the actors who expose the facts—especially journalists who might reward presidents who give them access by portraying their decisionmaking in a favorable light.[97]

We will take up the costs of credibility shortly.[98] In general, however, the existence of costs does not mean that the credibility-generating mechanisms are useless. Quite the contrary: where the executive uses such mechanisms, voters and legislators can draw an inference that the executive is well-motivated, precisely because the existence of costs would have given an ill-motivated executive an excuse not to use those mechanisms.

Multilateralism. Another credibility-generating mechanism for the executive is to enter into alliances or international institutions that subject foreign policy decisions to multilateral oversight. Because the information gap between voters and legislators, on the one hand, and the executive on the other is especially wide in foreign affairs, there is also wide scope for suspicion and conspiracy theories. If the president undertakes a unilateral foreign policy, some sectors of the domestic public will be suspicious of his motives. All recent presidents have faced this problem. In the case of George W. Bush, as we suggested, many have questioned whether the invasion of Iraq was undertaken to eliminate weapons of mass destruction, or to protect human rights, or instead to safeguard the oil supply, or because the president has (it is alleged) always wanted to invade Iraq because Saddam Hussein ordered the assassination of his father. In the case of Bill Clinton, some said that the cruise missile attack on Osama bin Laden's training camp in Afghanistan was a "wag the dog" tactic intended to distract attention from Clinton's impeachment.

A public commitment to multilateralism can close or narrow the credibility gap. Suppose that a group of nations have common interests on one dimension – say, security from terrorism or from proliferation of nuclear weapons – but disparate interests on other dimensions – say, conflicting commercial or political interests. Multilateralism can be

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[96] Simone Chambers, *Behind Closed Doors, Publicity, Secrecy, and the Quality of Deliberation*, 12 J. POL. PHIL. 389, 390-98 (2004); Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345 (2000).

[97] Compare Woodward (blaming Tenet) and Suskind (blaming Bush) for the Iraq intelligence failure. Tenet was Suskind's main source; Bush, among others, was Woodward's. See Bob Woodword, Plan of Attack (2004); Ron Suskind, The One Percent Doctrine (2006).

[98] See infra ---.

understood as a policy that in effect requires a supermajority vote, or even unanimity, among the group to license intervention. The supermajority requirement ensures that only interventions promoting the security interest common to the group will be approved, while interventions that promote some political agenda not shared by the requisite supermajority will be rejected. Knowing this, domestic audiences can infer that interventions that gain multilateral approval do not rest on disreputable motives.

It follows that multilateralism can be either formal or informal. Action by the United Nations Security Council can be taken only under formal voting rules that require unanimity. Informally, in the face of increasing tensions with Iran, George W. Bush's policy has been extensive multilateral consultations and a quasi-commitment not to intervene unilaterally. Knowing that his credibility is thin after Iraq, Bush has presumably adopted this course in part to reassure domestic audiences that there is no nefarious motive behind an intervention, should one occur.

It also follows that multilateralism and bipartisan congressional authorization may be substitutes, in terms of generating credibility. In both cases the public knows that the cooperators – partisan opponents or other nations, as the case may be – are unlikely to share any secret agenda the president may have. The substitution is only partial, however; as we suggested in Part III, the Madisonian emphasis on bipartisan authorization has proven insufficient. The interests of parties within Congress diverge less than do the interests of different nations, which makes the credibility gain greater under multilateralism. In eras of unified government, the ability of the president's party to put a policy through Congress without the co-operation of the other party (ignoring the threat of a Senate filibuster, a weapon that the minority party often hesitates to wield) often undermines the policy's credibility even if members of the minority go along; after all, the minority members may be going along precisely because they anticipate that opposition is fruitless, in which case no inference about the policy's merits should be drawn from their approval. Moreover, even a well-motivated president may prefer, all else equal, to generate credibility through mechanisms that do not involve Congress, if concerned about delay, leaks, or obstruction by small legislative minorities. Thus Truman relied on a resolution of the United Nations Security Council rather than congressional authorization to prosecute the Korean War.[99]

The costs of multilateralism are straightforward. Multilateralism increases the costs of reaching decisions, because a larger group must coordinate its actions, and increases the risks of false negatives – failure to undertake justified interventions. A president who declines to bind himself through multilateralism may thus be either ill-motivated and desirous of pursuing an agenda not based on genuine security goals, or well-motivated and worried about the genuine costs of multilateralism. As usual, however, the credibility-generating inference holds asymmetrically: precisely because an ill-motivated president may use the costs of multilateralism as a plausible pretext, a president who does pursue multilateralism is more likely to be well-motivated.

Strict liability. For completeness, we mention that the well-motivated executive might in principle subject himself to strict liability for actions or outcomes that only an ill-motivated executive would undertake. Consider the controversy surrounding George

[99] S.C. Res. 82, U.N. Doc. S/1501 (June 25, 1950), S. C. Res. 83, U.N. Doc S/1511 (June 27, 1950).

W. Bush's telecommunications surveillance program, which the president has claimed covers only communications in which one of the parties is overseas; domestic-to-domestic calls are excluded.[100] There is widespread suspicion that this claim is false.[101] In a recent poll, 26% of respondents believed that the National Security Agency listens to their calls.[102] The credibility gap arises because it is difficult in the extreme to know what exactly the Agency is doing, and what the costs and benefits of the alternatives are.

Here the credibility gap might be narrowed by creating a cause of action, for damages, on behalf of anyone who can show that domestic-to-domestic calls were examined.[103] Liability would be strict, because a negligence rule – did the Agency exert reasonable efforts to avoid examining the communication? – requires too much information for judges, jurors, and voters to evaluate, and would just reproduce the monitoring problems that gave rise to the credibility gap in the first place. Strict liability, by contrast, would require a much narrower factual inquiry. Crucially, a commitment to strict liability would only be made by an executive who intended to minimize the incidence of (even unintentional and non-negligent) surveillance of purely domestic communications.

However, there are legal and practical problems here, perhaps insuperable ones. Legally, it is hardly clear that the president could, on his own authority, create a cause of action against himself or his agents to be brought in federal court. It is well within presidential authority to create executive commissions for hearing claims against the United States, for disbursing funds under benefit programs, and so on; but the problem here is that there might be no pot of money from which to fund damages. The so-called Judgment Fund, out of which damages against the executive are usually paid, is restricted to statutorily-specified lawsuits. If so, statutory authorization for the president to create the strict liability cause of action would be necessary, as we discuss shortly.[104] Practically, it is unclear whether government agents can be forced to "internalize costs" through money damages in the way that private parties can, at least if the treasury is paying those damages.[105] And if it is, voters may not perceive the connection between governmental action and subsequent payouts in any event.

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[100] Eugene Robinson, *An Easy Call: Lying*, N.Y. TIMES, May 12, 2006, at A21.

[101] *Id*.

[102] CNN, Poll: 26% Suspect They've Been Wiretapped, (May 18, 2006), http://www.cnn.com/2006/POLITICS/05/18/nsa.poll/index.html.

[103] The claim might not have to be based on their own calls. The damages would create a form of qui tam standing. There are complex questions about whether this would suffice as "injury in fact" for purposes of Article III. *See* Vt. Agency of Nat. Resources v. United States ex rel. Stevens, 529 U.S. 765, 771-78 (2000).

[104] Even statutory authorization might not solve the problem, as courts are unwilling to force Congress to appropriate money for judgments. However, Congress seems to have been able to bind itself, as a practical matter. See , e.g., Civil Liberties Act of 1988, 50 U.S.C.A. Appx. §§ 1989b et seq., providing for individual payments of $20,000 for each survivor of Japanese Internment Camps and a $1.25 billion education fund. On October 9, 1990, the first nine payments were made. Children of the Camps, *WWII Internment Timeline*, available at http://www.children-of-the-camps.org/default.htm.

[105] *See, e.g.*, Daryl Levinson, *Making Governments Pay Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 354-357 (2000); Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 129-32 (1992).

The news conference. Presidents use news conferences to demonstrate their mastery of the details of policy. Many successful presidents, like FDR, conducted numerous such conferences.[106] Ill-motivated presidents will not care about policy if their interest is just holding power for its own sake; thus, they would regard news conferences as burdensome and risky chores. The problem is that a well-motivated president does not necessarily care about details of policy, as opposed to its broad direction, and journalists might benefit by tripping up a president in order to score points. Reagan, for example, did not care about policy details, but is generally regarded as a successful president.[107] To make Reagan look good, his handlers devoted considerable resources trying to prepare him for news conferences, resources that might have been better used in other ways.[108]

"Precommitment politics."[109] We have been surveying mechanisms that the well-motivated executive can employ once in office. However, in every case the analysis can be driven back one stage to the electoral campaign for executive office. During electoral campaigns, candidates for the presidency take public positions that partially commit them to subsequent policies, by raising the reputational costs of subsequent policy changes. Under current law, campaign promises are very difficult to enforce in the courts.[110] But even without legal enforcement, position-taking helps to separate the well-motivated from the ill-motivated candidate, because the costs to the former of making promises of this sort are higher. To be sure, many such promises are vacuous, meaning that voters will not sanction a president who violates them, but some turn out to have real force, as George H.W. Bush discovered when he broke his clear pledge not to raise taxes.

The possibility of statutory commitments. So far, we have proceeded on the austere assumption that no constitutional or statutory changes are allowed. We have confined ourselves to credibility-generating mechanisms that arise by executive signaling – commitments that the executive could initiate by legal order or by public position-taking, without the permission of other institutions.

However, this restriction may stack the deck too heavily against the solutions we suggest. A central example of the credibility problem, after all, arises when voters and legislators want to enact statutes transferring further discretion to a well-motivated executive, but are not sure that that is the sort of executive they are dealing with. In such cases, there is no reason to exclude the possibility that the executive might ask Congress to provide him with signaling mechanisms that he would otherwise lack. In the

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[106] *See* COLE, *supra* n. 6, at 478, *See also* Neustadt's discussion of Eisenhower's use of the news conference to enhance his reputation. Neustadt emphasizes rhetorical consistency and force, but this is another way of saying that people will not trust a president who takes questions but cannot answer them. NEUSTADT, *supra* n. 16, at 68-72.

[107] Lou Cannon, *Actor, Governor, President, Icon*, WASH. POST, June 6, 2004, at A01.

[108] Coates Lear & James Bennet, *The Flack Pack: How Press Conferences Turn Serious Journalists into Shills*, WASH. MONTHLY, Nov. 1991, at 18.

[109] Saul Levmore, *Precommitment Politics* 82 VA. L. REV. 567, 570 (1996). For related work, *see* Susan Stokes, *What do Policy Switches Tell Us about Democracy?*, in DEMOCRACY, ACCOUNTABILITY AND REPRESENTATION 98 (Adam Przeworski et al. eds., 1999).

[110] Levmore, *supra* n. 109, at 575-584. The basic problem is that rules of contract law do not permit enforcement of such promises. Levmore offers ingenious suggestions for circumventing or finessing the problem, but to date those suggestions have not been adopted.

surveillance example, Congress is currently considering amendments to relevant statutes; many proposals are on the table.[111] It is easy to imagine a well-motivated executive proposing that Congress explicitly ratify his authority to examine overseas communications, while also proposing – as a demonstration of credibility – that the ratification be bundled with a statutory cause of action imposing strict liability for prohibited forms of surveillance.

C. The Costs of Credibility

The mechanisms we have discussed generate credibility, which is a benefit for voters and legislators who would like to increase the discretion of the well-motivated executive. What of the cost side? In each case, there are costs to generating credibility, although the character and magnitude of the costs differ across mechanisms.

Signaling is by definition costly; the presence of a cost is what distinguishes ill-motivated mimics, who are unwilling to incur the cost, from genuine good types. In this context, the inherent costliness of signaling means that the president must use time or resources to establish credibility with the public when, if voters were perfectly informed, that time and those resources could be expended directly on determining and implementing policy. But costs can be reflected in more subtle ways as well. Many of these mechanisms rely on the participation of agents who themselves may be ill-motivated. Whistleblowers can cry wolf when there is no partisanship, merely substantive disagreement; journalists might offer not transparency but translucency, images distorted by their own biases and strategies. Miscellaneous costs arise in other ways as well. Multilateralism raises decision costs; transparency can harm deliberation; and so on.[112]

Often the basic tradeoff facing presidents is that credibility is gained at the expense of control. Mechanisms such as creating independent commissions and pursuing multilateralism illustrate that to gain credibility, presidents must surrender part of their control over policy choices, partially constraining executive discretion in the present in return for more trust, which will then translate into more discretion in the future. The loss of control is a cost, even to the well-motivated executive. To be sure, the well-motivated executive may be more willing than the ill-motivated one to trade some loss of present control for increased future discretion, if the ill-motivated executive tends to be myopic or to discount the future more heavily; but it is not clear that is so – many terrifying dictators have been quite far-sighted – and in any event everything depends upon the particular tradeoff inherent in the particular case.

Presidents are sometimes willing to pay the costs of credibility; often they are not.[113] However, there is no general reason to assume that they will always do so when it is optimal to do so, and not otherwise. Presidents, like others, sometimes make mistakes,

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[111] *The Real Agenda*, N.Y. TIMES, July 16, 2006, §4, at 11.

[112] On the point that the president might distort policies from the optimum so that the public can evaluate them, *see* Susanne Lohmann, *Electoral Incentives, Inforamtional Asymmetries, and the Policy Bias Toward Special Interests*, 33 (U. S. Cal. L. Center, Working Paper No. 96-7 1995) and Ethan Bueno de Mesquita, *Politics and the Suboptimal Provision of Counterterror*, 61 INT'L ORG. (forthcoming 2007) (manuscript at 22-25, available at http://bdm.wustl.edu/PDF/public_private.pdf).

[113] LEWIS, *supra* n. 86 at 71, 126 , finds that (1) presidents generally oppose insulation of agencies from presidential control (p.71) and (2) agencies created by executive order are less likely to be insulated than agencies created by Congress (p. 126).

or overlook useful political tactics, or fail to choose the best means to serve their ends; that is what makes advice about policy mechanisms potentially useful. We do not urge that presidents should use credibility-generating mechanisms in every case, nor do we claim that the mechanisms we have offered are good for all times and places. Rather we have tried to indicate, at least in a general way, the conditions under which the benefits will outweigh the costs, from the standpoint of the well-motivated executive and of the voters and legislators who wish to confer authority upon him.

A general objection to our approach might emphasize the cost side, as follows. Whether the benefits outweigh the costs under particular circumstances is very hard for voters and legislators to judge. The ill-motivated executive can always claim that he has not adopted the credibility-generating mechanisms because of these costs; in that respect he can mimic a well-motivated executive who does genuinely believe that the costs exceed the benefits in the case at hand. Because of this second-order information gap, voters and legislators will still be unable to distinguish the good executive from the bad.

This critique is overblown. For one thing, the very availability of these mechanisms, once generally known, indirectly provides the public with information even if they are not used, and indeed because they are not used. The failure to invite members of the other political party, or foreign nations, to participate in a crucial decision of foreign policy might cause voters to increase their skepticism about executive motivations. Relatedly, there is an asymmetry we have emphasized above: where the benefits really do exceed the costs, the well-motivated executive will employ the mechanisms, whereas the ill-motivated executive is less likely to do so, depending on whether use of the mechanisms happens to coincide with his strategic interests. Use of these mechanisms thus provides some evidence from which voters can infer that the executive is well-motivated. If the executive does not adopt (any of) the mechanisms, he might or might not be ill-motivated, but if he does adopt (some of) them, he is more likely to be well-motivated, so the mechanisms help voters and legislators to sort the bad from the good. The inference is evidential, not a logical necessity, but it is useful nonetheless.

More generally, we do not deny that there will always be difficult cases in which the well-motivated executive should adopt a particular policy but has no way to persuade people that his motivations are public-spirited, because the costs of generating credibility really do exceed the benefits. But all we claim is that there is a substantial range of cases in which use of the mechanisms make all concerned better off. So long as voters have some information, then the well-motivated executive has the right incentives. The credibility mechanisms lie on a sliding scale: their value is lower the less voters can understand them, higher the more voters can understand them.

Overall, it is sensible to think that there is a middle range in which voters' information and competence is high enough that the credibility mechanisms are useful, but not so high that voters can just directly assess whether the executive has good motivations and is adopting optimal policies. Plausibly, the median of the electorate in the United States, and in other advanced democracies, falls in this middle range, most of the time. To be sure, it is hard to demonstrate, for each of the mechanisms we have surveyed, that the benefits exceed the costs under a significant range of circumstances. On the other hand, it is hard to demonstrate the contrary as well. Presidents and others

have used them, or near relatives, at many points in the past, which gives some grounds for optimism that these mechanisms have real-world resonance.

Conclusion

For presidents, credibility is power. With credibility, the formal rules of the separation of powers system can be bargained around or even defied, as Lincoln and FDR demonstrated. Without credibility, a nominally powerful president is a helpless giant. Even if legal and institutional constraints are loose and give the president broad powers, those powers cannot effectively be exercised if the public believes that the president lies or has nefarious motives.

But presidential credibility can benefit all relevant actors, not just presidents. The decline of congressional and judicial oversight has not merely increased the power of ill-motivated executives – the typical worry of civil libertarians. It also threatens to diminish the power of well-motivated presidents, with indirect harms to the public. Such presidents would, if credibly identified, receive even broader legal delegations and greater informal trust – from legislators, judges, and the public – than presidents as a class actually have. Absent other credibility-generating mechanisms, such as effective congressional oversight, presidents must bootstrap themselves into credibility through the use of signaling mechanisms. We suggest a range of such mechanisms, and suggest that under the conditions we have tried to identify, those mechanisms can make all concerned better off.