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Presidential Authority And The War On Terror

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PRESIDENTIAL AUTHORITY AND THE WAR ON TERROR

Joseph W. Dellapenna*

> [I]t is an established fact that documents justifying and authorizing the abusive treatment of detainees during interrogation were approved and distributed…. [T]his policy demonstrates that this war has tested more than our nation's ability to defend itself. It has tested our response to our fears and the measure of our courage. It has tested our commitment to our most fundamental values and our constitutional values.[1]

I. INTRODUCTION

Immediately after the attacks on the United States of September 11, 2001, President George W. Bush authorized the National Security Agency to undertake electronic surveillance in violation of the *Foreign Intelligence Surveillance Act.*[2] This was only the first step of an expansive set of claims for the President to act on his own authority to respond to the "war on terror," without regard to whether Congress or the courts would approve or support these decisions. The President claimed, among other powers, the power to launch preemptive wars on his own authority[3] (although in actuality he sought and obtained authorization to use military force from the Con-

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[1] Alberto J. Mora, *An Affront to American Values,* WASH. POST, May 27, 2006, at A25. Mr. Mora retired as Navy General Counsel in 2005.

[2] American Civil Liberties Un. v. National Security Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006); 50 U.S.C. §§ 1801 to 1811 (electronic surveillance), 1821 to 1829 (physical searches), 1841 to 1846 (pen registers and similar devices), 1861, 1862 (access to business records), 1871 (annual reports to Congress) (2000). For the President's authorization of surveillance, see James Risen &. Eric Lichtblau, *Bush Lets U.S. Spy on Callers without Courts,* N.Y. TIMES, Dec. 16, 2005, at A1. *See also* James Bamford, *Private Lives: The Agency That Could Be Big Brother,* N.Y. TIMES, Dec. 25, 2005, § 4, at 1; Dan Eggan, *Bush Authorized Domestic Spying: Post-9/11 Order Bypassed Special Court,* WASH. POST, Dec. 16, 2005, at A1; Eric Lichtblau & James Risen, *Domestic Surveillance: Spy Agency Mined a Vast Data Trove, Officials Report,* N.Y. TIMES, Dec. 24, 2005, at A1.

[3] NATIONAL SECURITY COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), *available at* http://www.whitehouse.gov/nsc/nss.html. *See also* George W. Bush, *Commencement Speech at the U.S. Military Academy,* 38 WEEKLY COMP. PRES. DOCS. 944, 946 (June 10, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/06/print/200206010-3. For a recent reaffirmation of this policy, see Peter Baker, *Bush to Restate Terror Strategy: 2002 Doctrine of Preemptive War to Be Reaffirmed,* WASH. POST, Mar. 16, 2006, at A1; David E. Sanger, *Report Backs Iraq Strike and Cites Iran Peril,* N.Y. TIMES, Mar. 16, 2006, at A6. *See also* Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations against Terrorist Organizations and the Nations that Harbor or Support Them,* 25 HARV. J.L. & PUB. POL'Y 487 (2002); Sean D. Murphy, *The Doctrine of Preemptive Self-Defense,* 50 VILL. L. REV. 685 (2005).

gress[4]); the power to disregard the laws of war pertaining to occupied lands;[5] and the power to define the status and treatment of persons detained as "enemy combatants" in the war on terror.[6]

These claims were not an accident. Vice-President Cheney stated publicly, more than once, that these steps were part of a plan to restore the Presidency to "the proper scope" of its powers even more than means to defend the nation.[7] Michael Ramsey has delineated the extent to which the lawyers in the Office of Legal Counsel of the Department Justice claimed unilateral authority on behalf of the President when the claims were unnecessary for the specific policies for which they were invoked[8]—a pattern suggestive of a goal of aggrandizing Presidential authority beyond defense of the nation. This pattern disregards the fact that the President's duty is to enforce the law, not to break it.[9]

Questions of Presidential authority are important. The framers of the Constitution expected the separation of powers to be the primary protection for liberty.[10] They therefore set about to structure each branch's power in ways that allow each to block the other. The framers expected

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[4] *Authorization for the Use of Military Force,* 107th Congress, Public Law 107-40, 115 Stat. 224 (2001) ("*Authorization I*"); *Authorization of the Use of Military Force against Iraq,* Pub. L. No. 107-243, 116 Stat. 1498 (2002) ("*Authorization II*").

[5] *See U.S.-U.K. Letter to the Security Council,* UN Doc. S/2003/538 (May 8, 2003) (indicating that the two nations "will strictly abide by their obligations under international law including those relating to the essential humanitarian needs of the people of Iraq"). *See* David Glazier, *Ignorance Is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq,* 58 RUTGERS L. REV. 121, 189-90 (2005); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?,* 90 CORNELL L. REV. 97, 154-63 (2004).

[6] George W. Bush, *Military Order No. 1: Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism,* 66 FED. REG. 57,833 (Nov. 13, 2001). *See also* Jay S. Bybee (Assistant Att'y Gen.), *Memorandum to Alberto R. Gonzales, Counsel to the President* (Aug. 1, 2002) ("Bybee Memorandum"), *available at* http://washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf; Jay S. Bybee, *Memorandum to Alberto Gonzales, Counsel to the President, and to William J. Haynes, General Counsel, Dep't of Def.* (Jan. 22, 2002), *available at* http://wasingtonpost.com/wp-srv/nation/documents/012202bybee.pdf; Donald Rumsfeld, *Memorandum of the Secretary of Defense to the Joint Chiefs of Staff on the Status of Taliban and al-Qaeda,* Jan. 19, 2002, *available at* http://news.findlaw.com/hdocs/dod/t2204index.html; John Yoo (Deputy Ass't Att'y Gen.) & Robert J. Delahunty (Special Counsel), *Memorandum to William J. Haynes, II, General Counsel, Dep't of Def.* (Jan. 9, 2002), *available at* http://msnbc/msn.com/id.5032094/sitenewsweek.

[7] Peter Baker & Jim VandeHei, *Clash Is Latest Chapter in Bush Effort to Widen Executive Power,* WASH. POST, Dec. 21, 2005, at A1; David E. Sanger & Eric Schmitt, *Cheney's Power No Longer Goes Unquestioned,* N.Y. TIMES, Sept. 10, 2006, § 1, at 1; Richard W. Stevenson & Adam Liptak, *Cheney Defends Eavesdropping without Warrants,* N.Y. TIMES, Dec. 21, 2005, at A36; Jim VandeHei, *Cheney Says NSA Spying Should Be an Election Issue,* WASH. POST, Feb. 10, 2006, at A7.

[8] *See* Michael D. Ramsey, *Torturing Executive Power,* 93 GEO. L.J. 1213, 1225-36 (2005).

[9] Jinks & Sloss, *supra* note 5, at 123-24.

[10] James Madison, *No. 51,* in THE FEDERALIST 267 (1788, reprinted in the Gideon ed. 1818) (George W. Carey & James McLellan eds. 2001) ("THE FEDERALIST PAPERS"). *See also* Buckley v. Valeo, 424 U.S. 1, 122-23 (1976).

the three branches to contend with each other, and in contending to prevent any single branch from dominating.[11] The framers were prescient—the three branches have contended with each other in shifting balances throughout our history. Yet the recent Presidential claims of unilateral authority in effect would smother the other two branches.[12] Space does not allow a full analysis of the powers of the several branches. This article considers wh[13]ether the claims of unilateral Presidential authority can be sustained in light of constitutional text and tradition.

I. THE POWERS GRANTED THE PRESIDENT

The grant of powers to the President in Article II of Constitution is short but impressive. First, Article II vests "the executive Power" in the President.[14] Article II then provides that the President: serves as commander-in-chief of the armed forces;[15] supervises the executive branch, with the obligation to see that the laws are faithfully executed;[16] has the power to grant pardons for offenses against the United States;[17] has the power to make treaties;[18] appoints ambassadors, judges, and officers of the United States;[19] has the power, on occasion, to control the meeting times of Congress;[20] and is to receive ambassadors.[21] These powers, if granted fully and exclusively to the President would vest in him nearly complete control over the government.

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[11] Alexander Hamilton, *No. 78,* in THE FEDERALIST PAPERS, *supra* note 10, at 401; James Madison, *No. 47,* in THE FEDERALIST PAPERS, *supra,* at 249. *See also* Mistretta v. United States, 488 U.S. 361, 380 (1989).

[12] Sanger & Schmitt, *supra* note 7 (quoting Senator Lindsey Graham, R-SC).

[13] Editorial, *Bush's "Signing" Bonus: He Issues Himself an Out on Torture,* NEWSDAY (Nassau Cty., NY), Jan. 8, 2006, at A32; David Sarasohn, *Presidential Powers: Congress Writes a Law, Then President Rereads It,* THE OREGONIAN (Portland, OR), Jan. 4, 2006, at B8; *Tortured Language: President Bush Signs a Statement that Indicates Prisoner Abuse Might Well Continue,* ALB. TIMES UN., Jan. 16, 2006, at A6. On signing statements generally, see AMERICAN BAR ASSOCIATION, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS, RECOMMENDATION (2006), *available at* http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.

[14] U.S. CONSTITUTION, art. II, § 1.

[15] *Id.,* art. II, § 2 (1).

[16] *Id.,* art. II, §§ 2(1), 3.

[17] *Id.,* art. II, § 2.

[18] *Id.,* art. II, § 2(2).

[19] *Id.,* art. II, § 2(2), (3).

[20] *Id.,* art. III.

[21] *Id.*

Yet none of the specific powers, except perhaps the power to pardon and the limited power over the meetings of the Congress, are vested exclusively in the President. Congress has the power to provide for the common defense,[22] to declare war,[23] and to provide for and regulate the military.[24] Congress even was given the power to grant letters of marque and reprisal[25]—which arguably gives Congress responsibility for undeclared as well as declared wars.[26] Moreover, Congress has the power to make, and the courts to construe, the laws the President is faithfully to execute.[27] Three Presidential powers establish his authority over the conduct of foreign relations, but two of those (the power to appoint ambassadors and to make treaties) require the advice and consent of the Senate (and for treaties, consent must be by a two-thirds majority).[28] Thus the description of the President as the "sole organ" in the conduct of foreign affairs is something of an exaggeration.[29] Presidential authority to make other appointments also requires the advice and consent of the Senate.[30] As for the powers to pardon and to control emergency meetings of Congress, while not expressly limited in the text of the Constitution, there is the "necessary and proper clause": "The Congress shall have Power … To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."[31]

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[22] *Id.,* art. I, § 8(1).
[23] *Id.,* art. I, § 8(11).
[24] *Id.,* art. I, § 8(11)-(16).
[25] *Id.,* art. I, § 8(11).
[26] Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801); Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800). *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terror,* 118 HARV. L. REV. 2047, 2072-78 (2005).
[27] U.S. CONSTITUTION, art. I, § 7; art. III, § 2(1).
[28] *Id.,* art. II, § 2(2).
[29] United States v. Curtis-Wright Export Corp., 229 U.S. 304, 320 (1936). *See* H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION (2002); ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS (1976); Louis Fisher, *A Constitutional Structure for Foreign Affairs,* 19 GA. ST. U.L. REV. 1059 (2003).
[30] U.S. CONSTITUTION, art. II, § 2(2).
[31] *Id.,* art. I, § 8(18). *See, e.g.,* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). Some refer to the "necessary and proper" clause as the "Sweeping Clause" because it sweeps a broad and undefined power into the hands of Congress. *See* Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause,* 6 U. PA. J. CONST. L. 183 (2003); Gary Lawson &

Today we are confronted by arguments about a "unitary executive" that, in its more extreme manifestations, claims that the powers vested in the President by the Constitution are exclusive and plenary—without limitation by the other branches of the government, at least during wars or similar crises.[32] Such arguments fly in the face the text of the Constitution.[33] Some supporters of the strong executive power argue that the specific grants of powers to the President are illustrative of an unrestrained grant of "executive Power," rather than as an exhaustive listing of what the "executive Power" comprises.[34] This argument is not credible. Why would the Framers have bothered to list specific powers, including "some trifling ones,"[35] if the "vesting clause" swept everything conceivable within its purview? Nor does this theory find support in the history of the various clauses.[36] The *Federalist Papers,* for example, viewed the commander-in-chief power as simply the power to command troops in the field[37] and to repel sudden attacks[38]—not "as the

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Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause,* 43 DUKE L.J. 267 (1993).

[32] *See, e.g.,* Hamdi v. Rumsfeld, 542 U.S. 507, 580-83 (2004) (Thomas, J., dissenting); JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005); Norman C. Bay, *Executive Power and the War on Terror,* 83 U. DENV. L. REV. 335 (2005); Saikrishna B. Prakash, *Foreign Affairs and the Jeffersonian Executive: A Defense,* 89 MINN. L. REV. 1591 (2005). A narrower view of the theory of a "unitary executive" simply asserts that all executive officers and agencies are answerable to the President for the discharge of their duties, without regard to the power of the President apart from his control the executive branch. *See, e.g.,* Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive,* 91 CORNELL L. REV. 67 (2005); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive,* 51 DUKE L.J. 953 (2001).

[33] Reid Skibell, *Separation-of-Powers and the Commander in Chief: Congress's Authority to Override Presidential Decisions,* 13 GEO. MASON L. REV. 183, 201-02 (2004).

[34] *Compare* Steven G. Calabresi & Siakrishna B. Prakash *The President's Power to Execute the Laws,* 104 YALE L.J. 541 (1994) (arguing that the "vesting clause" vests a broad executive power beyond the specific grants delineated in Article II); *with* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration,* 94 COLUM. L. REV. 1 (1994) (arguing that the "executive Power" must be read as referring to the specific powers granted in Article II).

[35] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

[36] Skibell, *supra* note 33, at 197-205, 208-18; Jeremy Telman, *A Truism That Isn't True? The Tenth Amendment and Executive Power,* 51 CATH. U.L. REV. 135, 153-78 (2001).

[37] Alexander Hamilton, *No. 69,* THE FEDERALIST PAPERS, *supra* note 10, at 355.

[38] 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (Max Farrand ed. 1937). *See* Jeffrey D. Jackson, Note, *The Dog of War as a Puppy: The Constitutional Power to Initiate Hostilities as Answered by the Framing,* 1 GEO. J.L. & PUB. POL'Y 361, 368 (2003); Telman, *supra* note 36, at 149-53.

power to do whatever it takes to win the war."[39] And consider the federalism concerns if the "inherent power" of the President derives from sources outside the Constitution.[40]

II. THE POWERS TAKEN BY THE PRESIDENT

Supporters of the "unitary executive" base their claims both on their perception of the necessities of the modern situation and on an extravagant reading of the history of the Presidential powers.[41] I do not argue whether an enlarged executive power is necessary as a matter of policy. My concern is narrower and more technical: Is the President authorized to implement the far-reaching powers he has decided upon on his own authority, or must he seek Congressional authorization, at least except as a temporary reaction to an emergency? Much of this debate turns upon an examination of the historical practice of the office of the President as undertaken by successive Presidents and as Congress and the courts have responded those practices. While persistent institutional impropriety cannot make an unconstitutional practice constitutional,[42] institutional practices can inform us what authoritative interpreters of the Constitution regarded as its meaning, particularly closer to the drafting of the language in question.[43]

Over time there has been an accretion of power in the White House, albeit with conflicts and setbacks along the way. Struggle over the powers of the three branches began with the Constitutional Convention in 1787 and has continued ever since. The problem arises because the framers

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[39] *Oral Argument of Paul D. Clement on Behalf of Petitioner,* Rumsfeld v. Padilla, 2004 WL 1066129, at *22 (U.S. Apr. 22, 2004) (comment by Scalia, J.).

[40] Would this mean that the Tenth Amendment—with its admonition that powers not delegated to the federal government in the Constitution are reserved to the states or to the people—is a dead letter? Telman, *supra* note 36, at 140-46. Does the Tenth Amendment, in order to protect the prerogatives of the States and the people, necessarily protect the prerogatives of the Congress and the courts *vis-à-vis* the executive branch? *Id.* at 146-79.

[41] *See* YOO, *supra* note 32; John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of the War Powers,* 84 CAL. L. REV. 167 (1996); John C. Yoo, *War and the Constitutional Text,* 69 U. CHI. L. REV. 1639 (2002).

[42] INS v. Chadha, 462 U.S. 919 (1983).

[43] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Jackson, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.").

did not clearly indicate where Presidential authority stopped and the authority of the other branches began. Given their theory that the protection of liberty arose from the clash of the three branches, [44] the framers apparently created this confusion on purpose. The first serious controversy over the President's authority to conduct foreign relations arose with President Washington's *Proclamation of Neutrality*[45] calling upon Americans to refrain from taking sides in the conflicts arising from the French Revolution. The proclamation led to an unsuccessful prosecution of an American merchant seaman for cooperating with a French privateer[46] and sparked a debate between Alexander Hamilton (writing as "Pacificus") and James Madison (writing as "Helvidius") over Presidential authority.[47] Hamilton argued that the Constitution vested in the President an inherent executive authority that included every aspect of traditional executive (royal) authority not expressly granted to Congress.[48] Yet if the "vesting clause" granting the executive power to the President were so broad, the further listing of specific powers conferred on the President was superfluous. The argument also ignores the "necessary and proper" clause.[49] The debate was too indecisive to resolve the scope of the President's power.[50]

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[44] Madison, *supra* note 10. *See also* Buckley v. Valeo, 424 U.S. 1, 122-23 (1976).

[45] *Proclamation of Neutrality* (Apr. 22, 1793), reprinted in 32 THE WRITINGS OF GEORGE WASHINGTON 430-31 (John C. Fitzpatrick ed., 1939).

[46] J. KENDALL FEW, TRIAL BY JURY 289-97 (1993) (recounting the course of the trial and the jury's refusal to convict despite a charge from the court that virtually directed a verdict of guilty).

[47] The "Pacificus/Helividius" essays are reprinted in 4 THE FOUNDERS' CONSTITUTION 63-78 (Philip B. Kurland & Ralph Lerner eds. 1987).

[48] For modern arguments in favor of this reading of Article II, see YOO, *supra* note 32; John Yoo, *Review Essay: Politics as Law? The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation,* 89 CAL. L. REV. 851, 896-901 (2001). For a careful refutation of Hamilton's claims, see Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs,* 102 MICH. L. REV. 545 (2004).

[49] U.S. CONST. art. 1, § 8, cl. 18, quoted in the text *supra* at note 31. For an argument against such a broad reading of the necessary and proper clause, see Saikrishna Prakash, *Regulation of Presidential Powers,* 91 CORNELL L. REV. 215, 225-57 (2005). *See generally* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause,* 43 DUKE L.J. 267 (1993).

[50] Bradley & Flaherty, *supra* note 48, at 679-87.

For truly broad assertions of Presidential powers independently of, or even in defiance of, Congress or the courts, we must turn to the Civil War.[51] President Lincoln undertook to exercise the broadest range of "prerogative power" ever claimed by a President.[52] Faced with attacks on federal facilities in the South and with the newly elected Congress not yet convened, he undertook dramatic action to suppress the rebellion,[53] calling the militias of the loyal states into federal service and for 75,000 volunteers, suspending *habeas corpus* (first in Maryland and gradually throughout the country), proclaiming a blockade of the Southern ports, directing the Treasury Department to expend $2,000,000 through New York financiers in support of the war effort, and ordering civilians to be tried by military commissions for crimes in support of the Confederacy. None of these actions were authorized by statute, yet it was in Congress, not the President, that the Constitution vested authority to take such decisions.[54] If Lincoln had waited for Congress to convene to vote the necessary measures, however, the war might have been lost before it began.[55] When Congress finally convened, Lincoln reported his actions to Congress and asked it to approve his actions.[56] While he argued for the legality of his actions, he also requested Congress to

[51] David Currie has concluded that at least before 1840, every President acted consistently with the terms of the *War Powers Resolution* of 1973: "The President may introduce troops into hostilities only pursuant to a congressional declaration of war or other legislative authorization, or in response to an attack on the United States." David P. Currie, *Rumors of War: Presidential and Congressional War Powers, 1809-1829,* 67 U. CHI. L. REV. 1, 1 (2000). *See also* Telman, *supra* note 36, at 159-65. Washington himself declined to commit troops against Indian tribes without Congressional authorization. SOFAER, *supra* note 29, at 120-27.

[52] MARK J. ROZELL, EXECUTIVE PRIVILEGE, PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 36 (2003). Rozell defines "prerogative power" as an executive power "to act according to discretion for the public good, without the prescription of the law and sometimes even against it."

[53] *See generally* DANIEL FARBER, LINCOLN'S CONSTITUTION 13-17, 115-95 (2003); HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875, at 214-15, 238-41 (1982); MARK E. NEELY, THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 3-18, 32, 51-53 (1991); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERROR 79-134 (2004).

[54] U.S. CONST., art. 1, § 8(11) ("Congress shall have Power … To declare War"); § 8(15) ("Congress shall have Power … To provide for calling forth the Militia to execute the laws of the Union."); § 9(2) ("The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it."); § 9(7) ("No Money shall be drawn from the Treasury, but in consequence of Appropriations made by law.").

[55] WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 15-25 (1998).

[56] Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861) ("*Lincoln's Special Message*"), in 4 COLLECTED WORKS OF ABRAHAM LINCOLN 430 (Roy P. Basler ed. 1953). *See* FARBER, *supra* note 53, at 132-43.

ratify the decisions, with at least an implicit admission that the decisions could not stand after Congress was in session unless Congress did approve them—as Congress eventually did.[57]

The suspension of *habeas corpus* was the trickiest problem because Chief Justice Roger Taney issued two writs directing the release of persons imprisoned in Fort McHenry in Baltimore on suspicion of sabotaging telegraph lines and bridges.[58] The state courts in Maryland were open and operating but President Lincoln was unwilling to trust Maryland juries and declined to comply with Taney's order.[59] Lincoln's message to Congress came close to conceding the illegality of his defiance.[60] Lincoln argued that he had to choose between his general obligation to see that the laws are faithfully enforced and the specific obligation to respect *habeas corpus*. He also argued that because of the emergency, his claim of authority to act pending the meeting of Congress was a small implication from the constitutional design.[61] Lincoln's argued,

> The whole of the laws which were required to be faithfully executed were … failing of execution, in nearly one-third of the states. Must they be allowed to finally fail of execution, even had it been perfectly clear that by the use of the means necessary to their execution some single law, made in such extreme tenderness of the citizen's liberty, that, practically, it relieves more of the guilty than the innocent, should, to a very limited extent, be violated? To state the question more directly: are all the laws, but one, to go unexecuted, and the government to go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown when it was believed that disregarding the single law would tend to preserve it?[62]

The problem with arguments based on necessity is that claims of necessity can mask a host of sins, and what might seem necessary in the heat of the moment can be embarrassing or worse

[57] *See* The Prize Cases, 67 U.S. 635 (1863). *See* FARBER, *supra* note 53, at 138-43.
[58] *Ex Parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). *See also* FARBER, *supra* note 53, at 188-92; HYMAN & WIECEK, *supra* note 53, at 239-41; NEELY, *supra* note 53, at 8-10; Norman Spaulding, *The Discourse of Law in the Time of War: Politics and Professionalism during the Civil War and Reconstruction,* 46 WM. & MARY L. REV. 2001, 2061-67 (2005).
[59] HYMAN & WIECEK, *supra* note 53, at 241; REHNQUIST, *supra* note 55, at 33-35.
[60] *Lincoln's Special Message*, *supra* note 56.
[61] *Id. See* FARBER, *supra* note 53, at 160-63.
[62] *Lincoln's Special Message*, *supra* note 56.

in hindsight.[63] The rule of law is supposed to prevent such embarrassments. Perhaps this is why Lincoln followed the argument from necessity with a claim that he was not violating the law—leaving the Attorney General to fill in the details.[64] And it is why the Supreme Court, in calmer times, reminded us that: "Emergency does not create power. Emergency does not increase granted power, or diminish the restrictions imposed upon power granted…"[65]

After Lincoln's defiance of Chief Justice Taney, the courts backed away from confronting the President.[66] Lincoln's most famous action solely on the basis of his authority as commander-in-chief was the Emancipation Proclamation, an executive order issued on September 22, 1862,[67] which was ratified by an amendment to the Constitution.[68] After the war, the Supreme Court decided that suspension of *habeas corpus* when civilian courts are open and operating is unconstitutional,[69] only to see Congress promptly revoke the Court's authority to hear appeals in *habeas corpus* cases.[70] But the precedent stands.

Legal conclusions about the inherent powers of the President from Lincoln's actions are less than clear. Congress, for the most part in fairly short order, ratified his actions. In the two instances in which the judiciary challenged the legality of the President's actions, Congress supported the President against the Supreme Court. Congressional ratification of the President's actions was enough to end the matter.

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[63] Consider the later congressional apology for the internment of Japanese Americans during World War II. *The Civil Liberties Act of 1988,* Pub. L. No. 100-383, 102 Stat. 903 (1988), *codified at* 50 U.S.C. §§ 1989 to 1989d (2000). *See also* Peter Green, *The King Is Dead* (book rev.), NEW REP., Dec. 20, 1997, at 36, 39. ("What stirs our blood may end up embarrassing our conscience.")

[64] *Lincoln's Special Message*, *supra* note 56. *See* 10 Op. Att'y Gen. 87 (1861).

[65] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 425 (1934).

[66] *See, e.g., Ex parte* Vallandigham, 68 U.S. 243 (1863). REHNQUIST, *supra* note 55, at 135-37; Spaulding, *supra* note 58, at 2004-11; Cass R. Sunstein, *Minimalism at War,* 2004 S. CT. REV. 47.

[67] Proclamation No. 17, 12 Stat. 1268 (1863).

[68] U.S. CONST., amend. 13.

[69] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 124-25 (1866).

[70] *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

Woodrow Wilson was the next President to assert broad powers, particularly after the United States entered World War I. He relied on a compliant Congress to authorize the extraordinary actions he considered necessary to the war effort.[71] He declined to issue an executive order authorizing military courts to try civilians interfering in the war effort.[72] Yet he took some actions entirely on his own authority. Rather dramatically, he issued an executive order seizing all railroads in the country, ordering them to be operated by a federal administrator,[73] also set up the Food Administration, the Grain Corporation, and the World Trade Board by executive order.[74]

Franklin Delano Roosevelt made extensive use of executive orders in fighting the Depression, some of which were highly controversial.[75] And during World War II, he issued numerous executive orders. The most notorious was *Executive Order no. 9066,*[76] authorizing the "exclusion" persons of Japanese ancestry from the west coast states—meaning their confinement in concentration camps.[77] Congress shortly thereafter ratified *Executive Order no. 9066* by enacting a law making it a felony to violate the order.[78] Because of this statute, the Supreme Court upheld *Executive Order no. 9066* repeatedly.[79] Forty-six years later, Congress enacted a formal apology

[71] *See, e.g., The Espionage Act of 1917,* ch. 30, 40 Stat. 217 (1918) (making it a crime to "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language" about the United States and excluding from the mails any material advocating "treason, insurrection or resistance to any law of the U.S."); *The Sedition Act of 1918,* ch. 75, 40 Stat. 553 (1918) (punishing criticism of the war or the government, including any form of language intended to cause contempt or scorn for our form of government, the Constitution, or the flag). *See generally* NEELY, *supra* note 53, at 181; REHNQUIST, *supra* note 55, at 178-83; STONE, *supra* note 53, at 135-234.

[72] SANFORD J. UNGER, FBI 41-42 (1976). Wilson deferred to the Supreme Court's decision in *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 124-25 (1866), holding that military courts could not try civilians when civilian courts are open and functioning.

[73] Northern Pac. Ry. Co. v. North Dakota, 250 U.S. 135 (1919) (upholding the seizure of the railroads).

[74] *See* John A. Sterling, *Above the Law: Evolution of Executive Orders (Part One),* 31 UWLA L. REV. 99, 103 (2000).

[75] *See generally* Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern Day America,* 28 J. LEGISLATION 1 (2002).

[76] *Exec. Order No. 9066,* 7 Fed. Reg. 1407 (Feb. 9, 1942).

[77] *See generally* REHNQUIST, *supra* note 55, at 186-91; STONE, *supra* note 53, at 255-310; ERIC K. YAMAMOTO *et al.,* RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001).

[78] Pub. L. No. 77-503, 56 Stat. 173 (1942).

[79] Korematsu v. United States, 323 U.S. 214 (1944); Yasui v. United States, 320 U.S. 115 (1943); Hirabayashi v. United States, 320 U.S. 81 (1943). All three convictions would be vacated some 40 years later because of prosecutorial misconduct. Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984). The Supreme Court also held, on the same day that it decided *Korematsu,* that detainees who could establish that they were loyal must be released. *Ex parte* Endo, 323 U.S. 283 (1944).

to the Japanese and Japanese-Americans who had been interned and provided a modest payment ($20,000 per person) as reparations for the wrong done to them.[80]

President Roosevelt also ordered military commissions to try persons arrested in the United States "for offenses against the laws of war and the Articles of War."[81] Eight Nazi saboteurs (including one American citizen) were arrested and brought before a military commission.[82] The Supreme Court reviewed the lower court's denial of the writ of *habeas corpus,*[83] but concluded that Congress had authorized trial by military commission for violations of the (international) laws of war and the Articles of War.[84] The Court insisted that it had no authority to review whether the defendants were guilty or innocent, but only whether their constitutional rights had been violated;[85] thereafter six of the eight defendants were executed, including the one American citizen. Yet only four years later, in reviewing a writ of *habeas corpus* for Japanese General Tomoyuki Yamashita who was tried before a U.S. military commission in the Philippines, the Court did in fact examine the guilt or innocence of the defendant.[86]

During the Korean War, President Truman ordered the seizure of the steel mills in 1951 to prevent a strike that would have impeded the manufacturing of military equipment and munitions.[87] The majority in *Youngstown Sheet & Tube Co. v. Sawyer*[88] held that the executive order

[80] *The Civil Liberties Act of 1988,* Pub. L. No. 100-383, 102 Stat. 903 (1988), *codified at* 50 U.S.C. §§ 1989 to 1989d (2000).
[81] *Proclamation No. 2561,* 7 Fed. Reg. 5101 (July 2, 1942). *See also Exec. Order No. 9185,* 7 Fed. Reg. 5103 (July 2, 1942) (appointment of a military commission).
[82] *Ex parte* Quirin, 317 U.S. 1 (1942). The would-be saboteurs were already in custody when the executive orders were issed, having been arrested by the FBI. *See* LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW 12 (2003). For an argument that these men, or at least the American among them, should have been tried in civilian courts as traitors, see Carlton F.W. Larson, *The Forgotten Constitutional Law Treason and the Enemy Combatant Problem,* 154 U. PA. L. REV. 863, 894-900 (2006).
[83] *Ex parte* Quirin, 317 U.S. 1, 25-26 (1942).
[84] *Id.* at 25-30.
[85] *Id.* at 25.
[86] *In re* Yamshita, 327 U.S. 1 (1946).
[87] *Exec. Order No. 10,340,* 17 Fed. Reg. 3139 (1952).
[88] 343 U.S. 579 (1952).

was not a military act and therefore not within the President's authority as commander-in-chief;[89] nor could the order be justified under the duty of the President to see that laws are faithfully executed, for he was not enforcing an act of Congress or a command of the Constitution but was making his own law.[90] The case is better known, however, for Justice Robert Jackson's concurring opinion—an opinion that has since been endorsed by a majority of the Court.[91] Jackson described an interpretive continuum according to which a President's actions must be judged. Jackson's analysis provides a template for analyzing the actions of the current President:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress….
>
> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said … to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only be disabling the

[89] *Id.* at 587.
[90] *Id.* at 587-89.
[91] Dames & Moore v. Reagan, 453 U.S. 668, 668-69 (1981).

> Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[92]

Presidential exercises of unilateral authority did not end with *Youngstown Sheet and Tube,* but Presidents thereafter tended to involve Congress in their more controversial actions. In Vietnam, the Presidents did claim sweeping authority independently of Congress, although they came to be accused of abusing the powers conferred by Congress[93] and of lying to Congress to obtain authorization for the war.[94] Unity between the political branches did not hold. Congress repealed the authorization in 1971[95] and took steps to bar continuation of the War.[96] Congress also enacted legislation to limit the exercise of presidential authority as commander-in-chief (the *War Powers Resolution* of 1973[97]) and to assure judicial and congressional oversight of intelligence gathering within and without the United States (the *Foreign Intelligence Surveillance Act* [98]). Presidents have never been happy with these restraints, consistently insisting that they are not bound by them,[99] yet Presidents have complied with them.[100] President Bush's report to Congress on the actions taken to respond to the 9/11 attacks exhibits the typical Presidential posture: compliance with the *War Powers Resolution's* procedures while insisting that he is not bound by it:

> In response to these attacks on our territory, our citizens, and our way of life, I, ordered the deployment of various combat-equipped and combat support forces to a number of foreign nations in the Central and Pacific Command areas of operations.... I have taken

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[92] *Youngstown,* 343 U.S. at 635-40, 653 (Jackson, J., concurring).
[93] *See generally* STONE, *supra* note 53, at 427-526.
[94] *Joint Resolution of Aug. 10, 1964,* Pub. L. No. 88-408, 78 Stat. 384 (1964) ("*The Gulf of Tonkin Resolution*"). *See* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 19-20 (1993).
[95] Pub. L. No. 91-672, 84 Stat. 2055 (1971).
[96] *See* THOMAS M. FRANCK & EDWARD WEISBAND, FOREIGN POLICY BY CONGRESS 13-33 (1979).
[97] 50 U.S.C. §§ 1541 to 1548 (2000).
[98] 50 U.S.C. §§ 1801 to 1871 (2000).
[99] *See* STEPHEN DYCUS *et al.,* NATIONAL SECURITY LAW 302-26 (3rd ed. 2002); ELY, *supra* note 94; LOUIS FISHER, PRESIDENTIAL WAR POWER 123-28 (2nd ed. 2004).
[100] *See* RICHARD F. GRIMMETT, THE WAR POWERS RESOLUTION: AFTER THIRTY YEARS (Cong. Research Serv., CRS Report for Congress Order Code RL 32267, Mar. 11, 2004), *available at* http://www.fas.org/man/crs/RL32267.html.

these actions pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander-in-Chief and Chief Executive.[101]

III. PRESIDENT BUSH REACTS TO 9/11

The scale and success of the attacks on September 11, as well as the evidence that it was a part of an ongoing, organized global campaign, perhaps made it inevitable that the Bush administration would treat the situation as a war rather than as individual criminal conduct.[102] President Bush the younger declared a "War on Terror"[103] and then proceeded in the name of that war to take a number of unprecedented steps to secure the nation. Congress endorsed the War by approving resolutions authorizing the use of force against terrorists and in Iraq,[104] by enacting the *USA PATRIOT Act,*[105] and by creating the Department of Homeland Security.[106] Yet, even with these broad powers in hand, the President claimed powers that no prior President had ever claimed: to launch preemptive wars; to establish rules contrary to the recognized laws of war; and to conduct surveillance in violation of the *Foreign Intelligence Surveillance Act.*[107]

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[101] *President's Letter to Congressional Leaders Reporting on the Deployment of Forces in Response to the Terrorist Attacks of September 11,* 2 PUB. PAPERS 1157, 1157 (Sept. 24, 2001).

[102] *See* Bay, *supra* note 32, at 353-71; Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror,* 153 U. PA. L. REV. 675, 715-25 (2004) Derek Jinks, *September 11 and the Laws of War,* 28 YALE J. INT'L L. 1 (2003).

[103] George W. Bush, *Address Before a Joint Session of the Congress on the United States in Response to the Terrorist Attacks of September 11* (Sept. 20, 2001), in 37 WKLY. COMPILATION OF PRES. DOCS. 1347, 1348, *available at* http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html.

[104] *Authorization for the Use of Military Force,* Pub. L. No. 107-40, 115 Stat. 224 (2001); *Authorization of the Use of Military Force against Iraq,* Pub. L. no. 107-243, 116 Stat. 1498 (2002). For analyses of these authorizations, see Bradley & Goldsmith, *supra* note 26; Curtis Bradley & Jack Goldsmith, *Rejoinder: The War on Terrorism: International Law, Clear Statement Requirements, and Constitutional Design,* 118 HARV. L. REV. 2683 (2005); Ryan Goodman & Derek Jinks, *Replies to Congressional Authorization: International Law, U.S. War Powers, and the Global War on Terrorism,* 118 HARV. L. REV. 2653 (2005).

[105] Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of U.S.C.). *See generally* AMITAI ETZIONI, HOW PATRIOTIC IS THE PATRIOT ACT? (2004); Thomas V. Burch, *"Doublethink"ing Privacy under the Multi-state Antiterrorism Information Exchange,* 29 SETON HALL LEGIS. J. 147 (2004); Robert N. Davis, *Striking the Balance: National Security vs. Civil Liberties,* 29 BROOK. J. INT'L L. 175 (2003); Jules Lobel, *The War on Terrorism and Civil Liberties,* 63 U. PITT. L. REV. 767 (2002); Steven A. Osher, *Privacy, Computers and the Patriot Act: The Fourth Amendment Isn't Dead, But No One Will Insure It,* 54 FLA. L. REV. 521 (2002); Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of Coinelpro and the Unlawful Repression of Political Dissent,* 81 OR. L. REV. 1051 (2002).

[106] *Homeland Security Act of 2002,* Pub. L. no. 107-296, 116 Stat. 2135 (2002), *codified at various sections of* 6 U.S.C.

[107] See the authorities collected *supra* at notes 2-6.

The President made these claims on the basis of his alleged authority under the Constitution, powers that allegedly were beyond the power of Congress to regulate, restrict, or control. Many of the decisions were taken in secret.[108] This may have been because the Bush administration engaged in systematic violations of the laws of war,[109] laws defined in a series of conventions signed and ratified by the United States.[110] Traditionally, the United States had taken the lead in creating and enforcing these laws,[111] in our national courts[112] as well as through international or-

[108] The Bush administration seemed to be obsessed with secrecy even when not related to the war on terror. *See, e.g.,* Cheney v. District Ct., 542 U.S. 367 (2004). *See also* Dan Eggan, *White House Trains Efforts on Media Leaks: Sources, Reporters Could Be Prosecuted,* WASH. POST, Mar. 5, 2006, at A1; Walter Pincus, *Press Can Be Prosecuted for Having Secret Files, U.S. Says,* WASH. POST, Feb. 22, 2006, at A3; Andrew C. Revkin, *Call for Openness at NASA Adds to Reports of Pressure,* N.Y. TIMES, Feb. 16, 2006, at A20; Scott Shane, *Universities Say New Rules Could Hurt U.S. Research,* N.Y. TIMES, Nov. 26, 2005, at A11; Ellen Smith, *Mining for Truth about Sago,* WASH. POST, Jan. 14, 2006, at A23. *See also* TORIE CLARKE, LIPSTICK ON A PIG: WINNING IN THE NO-SPIN ERA BY SOMEONE WHO KNOWS THE GAME (2006). The administration's obsession with secrecy reached its apogee with the efforts of several national security agencies to withdraw and reclassify documents in the National Archives—documents that in many cases had already been published, and therefore will remain public despite the reclassification project. *See* Christopher Lee, *Archives Pledges to End Secret Agreements,* WASH. POST, Apr. 18, 2006, at A4; Christopher Lee, *Archives Kept a Secrecy Secret: Agencies Remove Declassified Papers from Public Access,* WASH. POST, Apr. 12, 2006, at A6; Scott Shane, *National Archives Pact Let C.I.A. Withdraw Public Documents,* N.Y. TIMES, Apr. 18, 2006, at A16; Scott Shane, *National Archives Says Records Were Wrongly Classified,* N.Y. TIMES, Apr. 27, 2006, at A24.

[109] *See, e.g.,* Jordan J. Paust, *War and Enemy Status after 9/11: Attacks on the Laws of War,* 28 YALE J. INT'L L. 325 (2003); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the "War on Terror,"* 27 FLETCHER F. WORLD AFF. 55 (2003); William H. Taft IV, *The Law of Armed Conflict after 9/11: Some Salient Features,* 28 YALE J. INT'L L. 319 (2003). For less critical views of the Bush administration's actions, see Brooks, *supra* note 102; Derek Jinks, *The Changing Laws of War: Do We Need a New Legal Regime after September 11?,* 79 NOTRE DAME L. REV. 1493 (2004); Kenneth Roth, *The Law of War in the War on Terror,* 83 FOR. AFF., no. 1, at 2 (Jan.-Feb. 2004). *See generally* EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (2nd ed. 2004); INGRID DETTER, THE LAW OF WAR (2nd ed. 2002); LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT (2nd ed. 2000).

[110] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* opened for signature Aug. 12, 1949, 6 UST 3114, 75 UNTS 31 ("*First Geneva Convention*"); *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces at Sea,* opened for signature Aug. 12, 1949, 6 UST 3217, 75 UNTS 85 ("*Second Geneva Convention*"); *Geneva Convention Relative to the Treatment of Prisoners of War,* opened for signature Aug. 12, 1949, 6 UST 3316, 75 UNTS 135 ("*Third Geneva Convention*"); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War,* opened for signature Aug. 12, 1949, 6 UTS 3516, 75 UNTS 973 ("*Fourth Geneva Convention*"); *Hague Convention Respecting the Laws and Customs of War on Land,* opened for signature July 29, 1899, 32 Stat. 1803, 1 Bevans 247 ("*Second Hague Convention*"); *Hague Convention Respecting the Laws and Customs of War on Land,* signed Oct. 18, 1907, 36 Stat. 2277, TS No. 539, 1 Bevans 631 ("*Fourth Hague Convention*"). The *Hague Conventions* continue to apply except were superseded by the *Geneva Conventions* or other treaties. There are also two protocols to the *Geneva Conventions* adopted in 1977, which the United States has not signed or ratified. *Additional Protocol I Relating to the Protection of Victims of Armed Conflict,* opened for signature June 8, 1977, 1125 UNTS 3; *Additional Protocol II Relating to the Protection of Victims of Non-International Armed Conflict,* opened for signature June 8, 1977, 1125 UNTS 609. Arguably, the *Additional Protocols* are customary international law. *See* Advisory Op. on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 ICJ no. 131, ¶¶ 89, 124; Prosecutor v. Akayesu, No. ICTR-96-4-T, ¶¶ 610, 617 (Sept. 2, 1998); Prosecutor v. Tadic, Appeal on Jurisdiction, No. IT-94-1-AR72, ¶¶ 119, 127 (Oct. 2, 1995).

[111] The U.S. Army issued the first codification of the laws of war to achieve wide international influence. GENERAL ORDER NO. 100, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 16 (Apr. 24, 1863). The order was drafted by Francis Lieber, and therefore is referred to as the "Lieber Code." *See* David Glazier, *Ignorance Is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq,* 58 RUTGERS L. REV. 121, 128-48, 151-70 (2005).

ganizations[113] and tribunals.[114] While the United States is no longer a leader regarding these rules,[115] it did not withdraw its ratifications of the basic documents, nor has it altered its statutes pertaining to, the laws of war. On paper, at least, we are still fully committed to the laws of war.

Gradually the violations of the laws of war became public—particularly the abuse of prisoners. Only gradually did it become clear that these practices extended to the systematic cruel, inhumane, and degrading treatment of prisoners, culminating in some instances in outright torture.[116] Major General Geoffrey Miller was brought from Guantánamo to Iraq to instruct the prison guards in the "best" ways to interrogate prisoners.[117] And eventually, President Bush acknowledged that these practices—which he termed an "alternative set of procedures" for interrogation, were and would, if he had his way, remain government policy.[118] Yet the *Third Geneva Convention* expressly prohibits torture,[119] while all four *Geneva Conventions,* in common article 3, require that "persons taking no active part in hostilities, including members of the armed forces who have laid down their arms" to be treated "humanely," which is further defined as excluding "murder of all kinds, mutilation, cruel treatment and torture" as well as "outrages upon

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[112] *See, e.g.,* Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975), *cert. denied sub nom.* Calley v. Hoffman, 425 U.S. 911 (1976). *See also The War Crimes Act of 1996,* 18 U.S.C. § 2441 (2000).

[113] JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS 142-54 (2004).

[114] *Id.* at 312-16.

[115] *Id.* at 154-63, 317-18.

[116] *See* UN COMM'N ON HUM. RTS., REPORT OF THE WORKING GROUP ON ARBITRARY DETENTION, CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTION OF TORTURE AND DETENTION (59th Sess., Prov. Agenda Item 11(a)), UN Doc. E/CN.4/2003/8 (2002). *See also* Diane Marie Amann, *Guantanamo,* 42 COLUM. J. TRANSNAT'L L. 263, 319-23, 329-35 (2004); Dana Priest & Baron Gellman, *U.S. Decries Abuse but Defends Interrogations,* WASH. POST, Dec. 26, 2002, at A1; David Johnston, *At a Secret Interrogation, Dispute Flared over Tactics,* N.Y. TIMES, Sept. 10, 2006, at A1; Shannon Smiley & Craig Whitlock, *Turk Was Abused at Guantanamo, Lawyers Say,* WASH. POST, Aug. 26, 2006, at A11; Craig S. Smith & Souad Mekhennet, *Algerian Tells of Dark Term in U.S. Hands,* N.Y. TIMES, July 7, 2006, at A1.

[117] *See* Josh White, *Top Officer Ordered to Testify on Abuse: Use of Dogs to Scare Detainees at Issue,* WASH. POST, Apr. 19, 2006, at A14 ("White, *Top Officer*"). *See also* John Barry *et al., The Roots of Torture,* NEWSWEEK, May 24, 2004, at 16; Nathan A. Canestaro, *"Small Wars" and the Law: Options for Prosecuting the Insurgents in Iraq,* 43 COLUM. J. TRANSNAT'L L. 73 (2004); Josh White, *Memo Shows Officer's Shift on Use of Dogs: Abu Ghreib Commander Urged End to Tactic But No Punishment for Guards,* WASH. POST, Apr. 15, 2006, at A11 (describing the testimony of Colonel Thomas Pappas) ("White, *Shift on Use of Dogs*").

[118] R. Jeffrey Smith, *Bush Says Detainees Will Be Tried: He Confirms the Existence of CIA Prisons,* WASH. POST, Sept. 7, 2006, at A1. For the full text of the Presidents remarks, see *President Bush Delivers Remarks on Terrorism,* available at http://www.washingtonpost.com/wp-dyn/content/article/2006/09/06/AR2006090601425.html.

[119] *Third Geneva Convention, supra* note 110, arts. 13, 17, 130.

personal dignity, in particular humiliating and degrading treatment."[120] Common article 3 applies to conflicts "not of an international character." The Supreme Court resolved doubts about the meaning of this phrase in *Hamdan v. Rumsfeld,*[121] holding that the phrase encompasses all conflicts other than conflicts between nations.

The United States has also ratified the *International Covenant on Civil and Political Rights* ("*Civil Rights Covenant*"), which prohibits torture[122] and the *Convention against Torture.*[123] And the *Third Geneva Convention,* the *Civil Rights Covenant,* and the *Convention on Torture* forbid derogation from the prohibition of torture—unlike other provisions of the *Geneva Conventions,* there is no military necessity exception to the ban on torture.[124] The United States, in ratifying the *Civil Rights Covenant,* included a reservation that "The United States considers itself bound by article 7 to the extent that 'cruel, inhuman, and degrading treatment or punishment' means the cruel and unusual punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."[125] The UN Committee on Human Rights concluded that the reservation was incompatible with the terms of the *Civil Rights Covenant* and therefore is void, although the ratification is valid.[126] Even if that is not correct, can anyone contend that in-

[120] *Id.* art. 3. *See also First Geneva Convention, supra* note 110, art. 3; *Second Geneva Convention, supra* note 110, art. 3; *Fourth Geneva Convention, supra* note 110, art. 3.

[121] 126 S. Ct. 2749, 2794-96 (2006). For the underlying debate, see Derek Jinks, *The Applicability of the Geneva Conventions to the "Global War on Terrorism,"* 46 VA. J. INT'L L. 165 (2005). The case is discussed further *infra* at notes 142-57.

[122] *International Covenant on Civil and Political Rights,* art. 7, adopted Dec. 16, 1966, 999 UNTS 171 ("*Civil Rights Covenant*"). Arguably, the *Civil Rights Covenant* does not apply to actions by a state outside its territory. United States v. Duarte-Acero, 296 F.3d 1277, 1283 (11th Cir. 2002). The international institution responsible for interpreting the document reached the opposite conclusion. UN Human Rts. Comm., *General Comment no. 31,* adopted Mar. 29, 2004, UN Doc. A/59/40, 1:175, 177.

[123] *Convention against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment,* adopted Dec. 10, 1985, 1465 UNTS 65 ("*Convention against Torture*").

[124] *Civil Rights Covenant, supra* note 122, art. 4(2); *Convention against Torture, supra* note 123, art. 1(1), 2(2); *Third Geneva Convention, supra* note 110, arts. 13, 17, 130.

[125] *See* S. Exec. Rep. No. 101-30, at 29-31 (1990). *See also* S. Exec. Rep. No. 102-23, at 22 (1992) (reservation for the *Civil Rights Covenant*). *See generally* Sean Kevin Thompson, Note, *The Legality of the Use of Psychiatric Neuroimaging in Intelligence Interrogation,* 90 CORNELL L. REV. 1601 (2005).

[126] UN Doc. CCPR/C/21/Rev. 1/Add. 6, ¶ 18 (1994), *reprinted in* UN Human Rts. Comm., *Report,* UN Doc. A/50/40 (1996); UN Doc. CCPR/C/79/Add. 50, ¶ 14 (1995) The problem is considered at length in LOUIS HENKIN *et al.,* HUMAN RIGHTS 783-94 (1999).

tense and on-going mistreatment, even if it does not cause death or severe physical or mental injury, is not "cruel and unusual punishment" as prohibited by the United States Constitution?[127]

The Bybee Memorandum sought to evade these strictures by taking the position that if interrogation does not involve life-threatening techniques or serious permanent physical injury ("equivalent to organ failure," or mental suffering that lasts "months or years"), then there is no torture.[128] This was translated by U.S. soldiers guarding prisoners into the slogan, "No blood, no foul."[129] The practices that resulted from such an attitude range from relatively mild all the way up to death: deprivation of sleep, food, and water; covering detainee's heads with hoods; forcing of them to stand in physically stressful positions; the use of dogs to intimidate and abuse prisoners; "waterboarding"; and the beating or suffocating of prisoners to death.[130]

Apparently realizing that the argument about the meaning of torture was weak, the authors of the Bybee memorandum also claimed that the President has the power to authorize torture notwithstanding applicable conventions and federal statutes: "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."[131] This argument would make the *Uniform Code of Military Justice* unconstitutional, despite the Constitution's vesting in Congress of authority to

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[127] U.S. CONST. amend. 8. *See* Hudson v. McMillian, 503 U.S. 1 (1992) (the use of excessive physical force may constitute cruel and unusual punishment even if the prisoner does not suffer serious injury). *See generally* Seth F. Kreimer, *Too Close to the Rack and Screw: Constitutional Restraints on Torture in the War on Terror,* 6 U. PENN. J. CONST. L. 278 (2003).

[128] Bybee Memorandum, *supra* note 6, at 6. *See also* Eric Posner & Adrian Vermeule, *A Torture Memo and Its Tortuous Critics,* WALL ST. J., July 6, 2004, at A22; John Yoo, *A Critical Look at Torture Law,* L.A. TIMES, July 6, 2004, at B11. *Cf.* Cathy Young, *Torturing Logic: Is Pulling Fingernails Really Just an Aggressive Manicure?,* REASON, Mar. 1, 2006, at 20.

[129] Eric Schmitt & Carolyn Marshall, *Task Force 6-26: Inside Camp Nama; In Secret Unit's Black Room, a Grim Portrait of U.S. Abuse,* N.Y. TIMES, Mar. 19, 2006, § 1, at 1.

[130] *See* MARK DANNER, TORTURE & TRUTH: AMERICA, ABU GHREIB, AND THE WAR ON TERROR (2004); HUMAN RTS. WATCH, AFGHANISTAN: IMPUNITY FOR SYSTEMATIC ABUSE (2004), *available at* http://hrw.org/reports/2004/usa0604/4.htm; Mark Bowden, *The Dark Art of Interrogation: A Survey of the Landscape of Persuasion,* ATLANTIC MONTHLY, Oct. 1, 2003, at 56; Douglas Jehl, *Questions Left by C.I.A. Chief on Torture Use,* N.Y. TIMES, Mar. 18, 2005, at A1; Mahvish Khan, *My Guantanamo Diary: Face to Face with the War on Terrorism,* WASH. POST, Apr. 30, 2006, at B1; Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantánamo,* N.Y. TIMES, Jan. 1, 2005, at A11; Miles Moffeit, *Brutal Interrogations in Iraq: Five Detainee's Deaths Probed,* DENV. POST, May 19, 2004, at A1; Schmitt & Marshall, *supra* note 129; Adam Zagorin & Michael Duffy, *Inside the Interrogation of Detainee 063,* TIME, June 20, 2005, at 26.

"make Rules for the Government and Regulation of the land and naval Forces."[132] Why the authors of the Bybee Memorandum chose to do all of this on the authority of the President without involving Congress and the courts, and over the objections of the lawyers in the military services and other operational branches of the government,[133] is clear—these other institutions could not be relied upon to approve the torture or near torture that the administration wanted to use.

The highly dubious constitutional argument that the President, as chief executive and commander-in-chief, cannot be restrained in his decisions about the conduct of military operations has been deployed in defense of indefensible conduct. As Jeremy Waldron put it, "This is not just tinkering with the details of positive law: It amounts to a comprehensive assault on our traditional understanding of the whole legal regime relating to torture."[134] And no legal legerdemain can explain how the President can order such torture when Congress has expressly prohibited torture and the nation has ratified treaties forbidding it.[135] Even if, somehow, one believes these practices are not torture,[136] Congress has now enacted the *Detainee Treatment Act* to ban cruel, inhuman, and degrading treatment.[137] Since January 1, 2006, there really is no room for argument that the international standards do not apply in full. Yet President Bush responded with a "sign-

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[131] Bybee Memorandum, *supra* note 6, at 39.

[132] U.S. CONST., art. I, § 8, cl. 14.

[133] *See* Tim Golden, *Senior Lawyer at Pentagon Broke Ranks on Detainees,* N.Y. TIMES, Feb. 20, 2006, at A8; Carol Rosenberg, *Miami Lawyer Fought against Detainee Abuse: A Once-Secret Memo Shows How a Top Navy Lawyer Fought to Rescind Defense Department Interrogation Techniques at Guantánamo,* MIAMI HERALD, Feb. 21, 2006, at A3; Josh White, *FBI Interrogators in Cuba Opposed Aggressive Tactics,* WASH. POST, Feb. 24, 2006, at A16; Josh White, *Military Lawyers Say Tactics Broke Rules,* WASH. POST, Mar. 16, 2006, at A13Josh White, *Tough Interrogation Tactics Were Opposed: Pentagon Task Force Was Told Not to Use Techniques Approved in 2002, Records Show,* WASH. POST, Jan. 13, 2006, at A16.

[134] Waldron, *supra* note 6, at 1709.

[135] Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit,* 73 GEO. WASH. L. REV. 693, 696-704 (2005). *See also* Jinks & Sloss, *supra* note 5.

[136] *See, e.g.,* John C. Yoo, *With All Necessary Force*, L.A. TIMES, June 11, 2004, at 13 ("the U.S. is not required to treat captured terrorists as if they were guests at a hotel or suspects held at an American police station").

[137] *Detainee Treatment Act,* Pub. L. No. 109-148, 119 Stat. 2739 (2005), *codified at* 42 U.S.C. § 2000dd (2006 Supp.).

ing statement" in signing the bill in which he insisted that nothing in this law impaired his powers as commander-in-chief to do whatever is necessary to protect the country.[138]

IV. THE DENOUEMENT, PERHAPS

The other branches of government long deferred to the Presidential assertions of authority, contrary to the expectations of the framers of the Constitution.[139] But, just as lawyers played key roles in preparing documents purporting to justify the various policies instituted on the sole authority of the President,[140] lawyers challenged the various policies instituted from the beginning—often acting as *pro bono* (unpaid) volunteers in defense of the rule of law. Eventually, several of their cases reached the Supreme Court of the United States.[141] While the Court consistently ruled against the government in these cases, the Court ruled on narrow grounds that did not address the questions of whether the President was exceeding his constitutional powers until the Court decided the case of *Hamdan v. Rumsfeld*[142] in 2006.

Hamdan involved the prosecution of a former chauffeur for Osama bin Laden for various war crimes. The prosecution was to be before a military commission created by executive order consistent neither with normal civilian ("Article III") courts nor with normal military courts ("Courts Martial").[143] The Court divided 5-3 (with the Chief Justice, who had voted in favor the

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[138] Editorial, *Bush's "Signing" Bonus: He Issues Himself an Out on Torture,* NEWSDAY (Nassau Cty., NY), Jan. 8, 2006, at A32; David Sarasohn, *Presidential Powers: Congress Writes a Law, Then President Rereads It,* THE OREGONIAN (Portland, OR), Jan. 4, 2006, at B8; *Tortured Language: President Bush Signs a Statement that Indicates Prisoner Abuse Might Well Continue,* ALB. TIMES UN., Jan. 16, 2006, at A6. On signing statements generally, see AMERICAN BAR ASSOCIATION, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS, RECOMMENDATION (2006), *available at* http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.

[139] See the text *supra* at notes 10-12.

[140] See the authorities collected *supra* at note 6.

[141] Hamdan v. Rumsfeld; Padilla v. Hanft, 126 S. Ct. 1649 (2006) (*cert. denied,* with opinion & dissent); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Rumsfeld v. Padilla , 542 U.S. 426 (2004).

[142] 126 S. Ct. 2749 (2006).

[143] George W. Bush, *Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism,,* Nov. 13, 2001, 66 FED. REG. 222 (Nov. 26, 2001), *codified at* 3 CFR 918 (2002). *See generally* Bradley & Goldsmith, *supra* note 26, at 2127-33.

government in the case at the Court of Appeals level,[144] recusing himself) held that the President lacks authority to create such a tribunal in the face of valid statutes limiting the types of courts and procedures to be used in such trials.[145] The Court, in an opinion by Justice John Paul Stevens, held that mere emergency ("exigency alone") does not justify the creation of "penal tribunals" that are not authorized by Act of Congress or the Constitution itself[146] and went on to reaffirm the most central holding of Ex parte *Milligan*:[147] the President's job is to enforce the law, not to make whatever laws he likes in disregard of binding Acts of Congress or valid treaties.[148] The Court then carefully examined the procedures provided for the proposed military commissions and found that those procedures violated both the *Uniform Code of Military Justice* and the four *Geneva Conventions.*[149] Justice Anthony Kennedy declined to join some other parts of the majority opinion, but concurred in all of the points just discussed.[150] Justices Samuel Alito, Antonin Scalia, and Clarence Thomas dissented on a range of points in opinions written by Scalia and Thomas. Justice Scalia focused primarily on whether the Court had the authority to review Hamdan's appeal at all,[151] while Justice Thomas wrote an impassioned defense of the President's power to command the military without let or hindrance from the court.[152]

Justice Stevens' opinion was long, technical, and narrow, perhaps in order to avoid the risks of appearing to be too "activist" in a case where the future safety or even survival of the nation

[144] 415 F.3d 33 (D.C. Cir. 2005).
[145] 126 S. Ct. at 2772-75.
[146] *Id.* at 2773.
[147] 71 U.S. (4 Wall.) 2, 139-40 (1866).
[148] 126 S. Ct. at 2773-74.
[149] *Id.* at 2786-96. *See Uniform Code of Military Justice,* 10 U.S.C. §§ 801 to 946 (2000). The four *Geneva Conventions* are collected *supra* at note 110. The Court focused particularly on 10 U.S.C. §§ 821, 836.
[150] 126 S. Ct. at 2799-2809.
[151] *Id.* at 2809-22 (Scalia, J., dissenting).
[152] *Id.* at 2823-55 (Thomas, J., dissenting).

might be at risk.[153] Still Justice Stevens' opinion made the point that the President could not proceed without Congressional authorization.[154] The opinion also confined itself to the question of the use of the Presidentially created military commissions to try persons accused of crimes, and did not mention, even in passing, the numerous other Presidential assertions of unilateral authority to defend the nation. While the implications of the decision for these other assertions of authority seemed clear enough, the Bush administration insists that it applies only to the military commission question.[155]

Has the President learned anything from his errors? It seems not. As of this writing, the President and a newly aroused Senate are locked in disagreement over whether to enact a statute authorizing the procedures disapproved in *Hamdan*[156]—secret trials, denying a defendant access to some of the evidence, with hearsay entered into evidence, and without confrontation of the witnesses.[157] The President is even more adamant about modifying other unilateral policies that at the least intrude upon the responsibilities of Congress, some of which are arguably illegal.[158]

V. CONCLUSIONS

[153] *Cf.* Sunstein, *supra* note 66 (arguing that the American legal tradition of deciding cases on non-constitutional grounds when possible allows courts a ready excuse for not confronting the executive branch in such cases).

[154] 126 S. Ct. at 2772-75.

[155] Sheryl Gay Stolberg, *Justices Tacitly Backed the Use of Guantanamo, Bush Says,* N.Y. TIMES, July 8, 2006, at A14.

[156] 126 S. Ct. at 2785-92.

[157] Charles Babington & Jonathan Weisman, *Senators Defy Bush on Terror Measure: Panel Backs Rival Bill on Interrogations,* WASH. POST, Sept. 15, 2006, at A1; Charles Babington & R. Jeffrey Smith, *Bush's Detainee Plan Is Criticized: Military Laywers and Senators Say Proposed Rules for Evidence Are Unfair,* WASH. POST, Sept. 8, 2006, at A9; David S. Cloud & Sheryl Gay Stolberg, *White House Bill Provides System to Try Detainees,* N.Y. TIMES, July 26, 2006, at A1; David E. Sanger, *For Congress, 2 Votes Loom,* N.Y. TIMES, Sept. 7, 2006, at A1; Kate Zernike, *Lawyers and G.O.P. Chiefs Resist Proposal on Tribunal,* N.Y. TIMES, Sept. 8, 2006, at A1; Kate Zernike, *Rebuff for Bush on Terror Trials in a Senate Test,* N.Y. TIMES, Sept. 15, 2006, at A1; Kate Zernike & Neil A. Lewis, *Proposal for New Tribunals for Terror Suspects Would Hew to the First Series,* N.Y. TIMES, Sept. 7, 2006, at A27.

[158] American Civil Liberties Un. v. National Security Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006). *See also* Nina Bernstein, *Court Orders U.S. to Allay 9/11 Spy Fears,* N.Y. TIMES, Mar. 8, 2006, at B5; Anna Johnson, *Bar Association Attacks Bush over Surveillance,* BUFF. NEWS, Feb. 14, 2006, at A5; Carol D. Leonnig & Dafna Linzer, *Judge Quits Spying Court in Protest over President's Policy,* WASH. POST, Dec. 21, 2005, at A1; Eric Lichtblau, *Judges on Secretive Panel Speak out on Spy Program,* N.Y. TIMES, Mar. 29, 2006, at A19; Hope Yen, *Specter: Spying Program Broke Law,* PHILA. INQUIRER, Feb. 6, 2006, at A1. On the present state of proposed legislation, see Sanger, *supra* note 157.

Disclosure of these practices had disastrous effects for the global image of the United States. From the near unanimous support for the United States after the September 11th attacks.[159] In barely three years, the Bush Administration managed to make the United States an international pariah.[160] And the image of the United States—one of our more important assets during the Cold War—has only gotten worse since.[161] And we pay a predictable price, as when the Chinese officials dismiss criticism of their violations of human rights with the response that "they have no lessons to learn from an administration that produced the abuses at Abu Ghreib prison in Iraq and detainment centers in Guantánamo Bay, Cuba, Afghanistan, and elsewhere."[162]

The domestic consequences these asserted powers are no less momentous. The various actions constitution a pattern—a plan even[163]—of asserting Presidential authority to act unilaterally, regardless of the authority or decisions of the other branches of government. The Pentagon, moreover, has announced plans for a "long war"—one that would last decades.[164] And the nature of the war made by terrorists makes it difficult to sort combatants from civilians, to identify "en-

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[159] Most famously expressed on the front page of France's most influential newspaper: "Nous sommes tous americains." *LE MONDE,* Sept. 12, 2001, at 1. *See generally* MURPHY, *supra* note 113, at 167-68; Jack M. Beard, *America's New War on Terror: The Case for Self-Defense under International Law,* 25 HARV. J.L. & PUB. POL'Y 669, 568-73 (2002); Berta E. Hernandez-Truyol, *Globalizing Terror,* 81 OR. L. REV. 941, 945-50 (2002).

[160] *See* MURPHY, *supra* note 113, at 169-77; Madeleine K. Albright, *Endangered Friendships: Bush's Policies and Practices Drive a Wedge between the U.S. and Key Allies in Europe,* BALT. SUN, Jan. 4, 2004, at 1C; Ben Barber, *May a Good Year Be Sealed,* 19 THE WORLD & I, at 158 (2004); Marcus Noland, *Why Bush Is on Course to Lose Both Koreas,* FINANCIAL TIMES (UK), Jan. 23, 2004, at 23; John Vinocur, *Criticism of U.S. Obscures Growing Disunity on the Continent: What Does Europe Want?/Rhetoric and Reality,* INT'L HERALD TRIB., Jan. 20, 2004, at 2.

[161] *See, e.g.,* Raymond Bonner & Donald Greenlees, *Australians View U.S. as Threat to Peace: America Lags behind Japan and China in Popularity, Poll Finds,* INT'L HERALD TRIB., Mar. 29, 2005, at 1; Alan Cowell, *A New Survey Suggests that Britons Take a Dim View of the U.S.,* N.Y. TIMES, July 3, 2006, at A5; Ian Fisher, *Pope Condemns Both Terror and Violations of Geneva Pact,* N.Y. TIMES, Dec. 14, 2005, at A8; Warren Hoge, *Annan Defends U.N. Official Who Chided U.S.,* N.Y. TIMES, Dec. 9, 2005, at A6; Edith Lederer, *Close Terror Camp: Annan,* THE ADVERTISER (Austral.), Feb. 18, 2006, at 73; Colum Lynch, *U.N. Official Faults U.S. Detention: Terrorism Fight Hurts Torture Ban, Human Rights Chief Says,* WASH. POST, Dec. 8, 2005, at A27; Monte Reel & Michael A. Fletcher, *Anti-U.S. Protests Flare at Summit: As Bush Meets Allies in Argentina, Rally Led by Chavez Turns Violent,* WASH. POST, Nov. 5, 2005, at A1; Larry Rohter & Elisabeth Bumiller, *Hemisphere Summit Marred by Violent Anti-Bush Protests,* N.Y. TIMES, Nov. 5, 2005, at A1.

[162] Edward Cody, *Chinese Leader Coming to U.S. Well Prepared: Planning Reflects Priority on Relations,* WASH. POST, Apr. 18, 2006, at A14.

[163] See the authorities collected *supra* at notes 7, 8.

[164] Ann Scott Tyson, *Ability to Wage "Long War" Is Key to Pentagon Plan: Conventional Tactics De-Emphasized,* WASH. POST, Feb. 4, 2006, at A1; Ann Scott Tyson, *New Plans Foresee Fighting Terrorism beyond War Zones: Pentagon to Rely on Special Operations,* WASH. POST, Apr. 23, 2006, at A1. *See generally* Bradley & Goldsmith, *supra* note 26, at 2123-27; Brooks, *supra* note 102, at 725-28.

emy aliens," to determine whether someone is captured on a battlefield or elsewhere, or even to determine whether the enemy has been defeated and the war is at an end.[165] All this makes arguments about the need to set aside the usual rules for the duration of the emergency alarming.[166]

This pattern of arrogation of power should alarm any unbiased observer. As Bill Keller, Executive Editor of the New York Times, stated recently, "I don't know how far action will follow rhetoric, but some days it sounds like the administration is declaring war at home on the values it professes to be promoting abroad."[167] Justice David Souter, in his concurring opinion in *Hamdi v. Rumsfeld,* expressed what ought to be the national attitude:

> In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or in war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance on striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.[168]

Justice Souter's analysis might be considered prudential, yet his analysis points to something more basic, as Justice Robert Jackson pointed out more than 50 years ago in *Youngstown Sheet and Tube*:[169] the President's power to act unilaterally is strictly limited by the Constitution and by valid treaties and acts of Congress. Constraints on the unilateral authority of the President are among the most central safeguards of our liberties. Have the terrorists succeeded in making it impossible for us to uphold those limitations? Or are we just afraid to take reasonable risks in order to uphold our ideals?

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[165] *See* Bradley & Goldsmith, *supra* note 26, at 2048-49.
[166] *See* Lobel, *supra* note 105.
[167] Quoted in Dan Eggan, *Administration Targets Journalists, Government Sources*, WASH. POST, Mar. 4, 2006, at A1. *See also* Eugene Robinson, *"Values" We Have to Hide Abroad,* WASH. POST, Sept. 8, 2006, at A17.
[168] Hamdi v. Rumsfeld, 542 U.S. 507, 545 (2004) (Souter, J., concurring).
[169] 343 U.S. 579 635-40, 653 (1952) (Jackson, J., concurring).