

*The Constitution in Crisis:*  
*From Bush v. Gore to the War on Terrorism*

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## INTRODUCTION

As this manuscript goes to press, the United States is once again at war with Iraq. This war, unlike the “war on drugs” or the now (already seemingly perpetual) “war on terrorism,” is war in the most traditional sense—it involves an air campaign, a ground invasion by U.S. troops, and the media blitz to which Americans have become accustomed since the birth of modern warfare. In this “war of choice,”<sup>1</sup> Americans have come to expect military casualties, a heavy toll in civilian life and limb, restrictions of uncertain scope on the freedom of the press, and a daily barrage of dazzling images ranging from the pyrotechnic to the gruesome that, in any other context, would be palatable only if packaged in Hollywood glitz.

The war has also brought with it the conventional pleas for national unity at times of great national peril. That should come as no surprise. Even while incanting the obligatory concession that dissenters of course have the legal right to voice their misgivings, the critics’ critics are quick to suggest that the time to close ranks has arrived. When American troops are under fire in remote and dangerous lands, there are few who wish to be seen as rocking the boat. In the resulting dissent-vacuum, it becomes increasingly difficult to maintain a sense of perspective about issues that, when stacked up against the progress of a search for evil leaders and their supposed weapons of mass destruction, seem to many to be too theoretical and beside the point to warrant urgent attention.

This essay is an edited version of the Tanner Lectures delivered at Brasenose College, Oxford, in May 2002. I have attempted to preserve in this text much of the style and substance of those lectures as originally given. Certain geopolitical and domestic developments of the past year have required that I update and rethink parts of what I originally said, although I have changed none of my fundamental conclusions and, not having delivered the lectures from a manuscript created in advance, I can truthfully report that I have changed not a word of my prepared script (there having been none). To avoid the obvious problem of a perpetually receding horizon, I have somewhat arbitrarily treated April 2003 as the cutoff date after which I would disregard the flow of events in the substance of what follows. I am grateful to the Tanner Committee and to Oxford University for inviting me to deliver these lectures and for giving them a hearing at once both appreciative and challenging and to Michael J. Gottlieb for his fine work as my research assistance in their preparation. Errors and infelicities are my own responsibility.

<sup>1</sup> I owe this phrase to Thomas J. Friedman’s numerous *New York Times* columns over the past six months that have described the Iraq campaign as such.

Our history of constitutional negligence during war demands otherwise. Although some have exaggerated the toll war has taken on civil liberties, it is undoubtedly the case that war and warlike crises have been unkind to written constitutions—and to the spirit of constitutionalism—throughout the course of the relatively brief time during which such documents have governed any of the world’s most powerful nations. The United States has certainly played host to its share of wartime restrictions on basic constitutional rights. This history is widely known and, especially recently, has been exhaustively cited as a lesson for the future. And so, in the aftermath of September 11, 2001, we did not send SWAT teams into mosques. We did not make it a crime either to speak the cause of radical Islam—a tactic that might have been suggested by one that our government employed in World War I and our Supreme Court upheld in *Gitlow v. New York*<sup>2</sup>—or to join groups perceived as sympathetic to radical causes, the crime for which the petitioners in the famous case of *Dennis v. United States* had been convicted.<sup>3</sup> Nor did we establish detention camps to imprison individuals solely on the basis of their racial or ethnic identity, as we did during World War II when the Supreme Court in *Korematsu v. United States* upheld the forcible exclusion of American citizens of Japanese ancestry from their homes and their communities.<sup>4</sup>

That we have avoided repeating the worst of our constitutional errors does not mean, by any stretch of the imagination, that we have clean hands. The eloquent voices of Justice Oliver Wendell Holmes, dissenting in *Gitlow*;<sup>5</sup> of Justice Louis Brandeis, concurring in *Whitney v. California*;<sup>6</sup> of Justice Robert Jackson, dissenting in *Korematsu*;<sup>7</sup> and of Justice Hugo Black, dissenting in *Dennis*,<sup>8</sup> remain too fresh in memory to forget entirely. Yet it now seems plain that many of the old constitu-

<sup>2</sup> 268 U.S. 652 (1925).

<sup>3</sup> 341 U.S. 494 (1951).

<sup>4</sup> 323 U.S. 214 (1944). One nearly forgotten aspect of that dark episode is that *Korematsu*’s companion case, *Ex parte Endo*, 323 U.S. 283 (1944), decided on the same day but long missing from the constitutional law canon, closed down the internment camps that *Korematsu* had made possible by holding unlawful the continued operation of those detention facilities. The legal community owes a debt of gratitude to Professor Patrick Gudridge for resurrecting *Endo* from its constitutional dustbin. See Patrick O. Gudridge, “Remember Endo?” 116 *Harvard Law Review* 116 (2003): 1933.

<sup>5</sup> 268 U.S. at 672.

<sup>6</sup> 274 U.S. 357 (1927).

<sup>7</sup> 323 U.S. at 242.

<sup>8</sup> 341 U.S. at 579.

tional battles waged during times of war have reemerged—old wine in new bottles. The Executive Branch has reached for seemingly legislative powers in the name of wartime exigency, just as it had during the Korean War in the seminal *Steel Seizure Case*.<sup>9</sup> Congress, just as it has in almost every other wartime period, has acquiesced reflexively in executive requests for ever more power not only to wage war abroad and defend our borders at home but also to mix domestic and foreign intelligence capabilities, enlarge domestic surveillance powers, and deny fundamental legal protections to aliens and U.S. citizens alike—all in the name of smoking out terrorist plots by groups we are unable or unwilling to identify. As David Cole has argued, we may have avoided rereading the specific missteps of yesteryear, but in so doing we have simply “adapted the mistakes of the past, substituting new forms of political repression for old ones.”<sup>10</sup>

History appears to be repeating itself in other ways as well. The Judiciary’s habit of deferring to the Executive Branch, and especially to the military, during times of “crisis” has been well documented.<sup>11</sup> In the period since September 11, courts have generally been unwilling to examine too closely, much less override, the operations of an Executive Branch apparatus seemingly determined to pursue terrorists, including individuals suspected of having close ties to terrorist organizations or of supporting those who might be plotting terrorist attacks—whatever the cost to personal liberty and the rule of law. As we shall later see, some courts have managed to steer a middle course between a deference so complete as to amount to virtually total abdication and an inappropriate degree of judicial second-guessing and downright meddling,<sup>12</sup> while other courts have merely fallen into line with the Judiciary’s tradition of passive compliance.<sup>13</sup>

<sup>9</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>10</sup> David Cole, “The New McCarthyism: Repeating History in the War on Terrorism,” *Harvard Civil Rights–Civil Liberties Law Review* 38 (2003): 1.

<sup>11</sup> See, e.g., William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Vintage Books, 1998), pp. 218–22. Chief Justice Rehnquist notes “the reluctance of courts to decide a case against the government on an issue of national security during a war” and concludes that such reluctance probably makes good sense: “The laws will...not be silent in a time of war, but they will speak with a somewhat different voice.” *Ibid.* at 221, 225.

<sup>12</sup> See, e.g., *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

<sup>13</sup> See, e.g., *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002); *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

The irony of this recent reversion is that, before September 11, the specter of a supinely passive Judiciary would probably have been the furthest thing from anyone's mind. Quite to the contrary, on the eve of September 11 the legal academy was awash in theories of troublesome judicial hegemony. The Supreme Court's increasing willingness, even eagerness, to hold acts of Congress unconstitutional had reached beyond traditional areas of judicial concern—the First Amendment, the Due Process and Equal Protection Clauses, and the like—into previously pristine regions; over the course of little more than a decade, the Rehnquist Court had cut back dramatically on Congress's power to enact legislation under the Commerce Clause, the Necessary and Proper Clause, and Section Five of the Fourteenth Amendment.<sup>14</sup> And the Court had become increasingly assertive in protecting its institutional turf—it had struck down every attempt by Congress to play any role whatsoever in interpreting constitutional provisions or to enforce any substantive vision of constitutional rights that did not track, word-for-word, the precise view of those rights articulated by the Supreme Court. Hence the Court's refusal in *City of Boerne v. Flores*<sup>15</sup> and *United States v. Morrison*<sup>16</sup> to permit Congress to articulate and enforce a broader conception of religious liberty or of equal protection than that accepted by the Court. Hence, too, the Court's utter disdain, in the judicial tour de force of *Dickerson v. United States*,<sup>17</sup> for the attempt by Congress to revisit the prophylactic regime of *Miranda v. Arizona*,<sup>18</sup> a regime whose constitutional correctness the Rehnquist Court saw no need even to *address* once it was satisfied that the *Miranda* Court had *understood* itself to be speaking in a constitutional voice and that Congress was accordingly trespassing on sacrosanct judicial terrain when it so much as dared to dissent from the Court's pronouncement.

This line of cases culminated in *Bush v. Gore*<sup>19</sup>—a decision that, perhaps better than any other from the Rehnquist Era, illustrates the Court's dismissive attitude toward the participation of other actors in the multi-institutional dialogue that should seem second-nature in a

<sup>14</sup> See John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* (Berkeley: University of California Press, 2002).

<sup>15</sup> 521 U.S. 507 (1997).

<sup>16</sup> 529 U.S. 598 (2000).

<sup>17</sup> 530 U.S. 428 (2000).

<sup>18</sup> 384 U.S. 436 (1966).

<sup>19</sup> 531 U.S. 98 (2000).

constitutional democracy. The things the Court said in *Bush v. Gore*, and the things it didn't say, are revealing indeed of the pattern of judicial arrogance that had begun to take shape in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>20</sup> with the plurality's pronouncement in that case that "[i]f the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible."

My purpose in these lectures is not to provide an exhaustive analysis of *Bush v. Gore* or of the legal underpinnings of the Bush administration's "war on terrorism," each of which represents a distinct response—one by the U.S. Federal Judiciary, headed by the Supreme Court; the other by the U.S. Federal Executive, headed by the president—to obviously very different but equally unforeseen events: one of them, a cliffhanger of an election, essentially a national farce; the other, an act of terrorist aggression, surely an international tragedy. Rather, my purpose is to explore what those two responses had in common and what both might teach about the interpretation and operation of the U.S. Constitution, in times of crises and in times of calm, by all three branches of the United States government.

My plan is to explore two related lessons that seem to emerge from *Bush v. Gore* and the current war on terrorism—first, the importance of a considerable degree of constitutional self-doubt and institutional humility to the proper functioning of a democratic government comprising shared and separated powers; and second, the need for candor and realism in identifying genuine crises and in discerning what measures are both truly necessary and likely to be effective in coping with those crises, so that our Constitution is not contorted and reshaped by the extreme, limiting cases that arise in a succession of real and imagined emergencies. These lessons represent two sides of the same coin of the constitutional realm: neither the Executive nor the Judiciary should too readily regard the problems besetting the nation as crises that justify extraordinary interventions; nor should either branch, when it does intervene on the basis that a crisis is at hand, equate the belief that its intervention satisfies a crude "law" of necessity with a conclusion that the intervention complies with the law of the Constitution.

In exploring these two lessons, I will highlight three trends that

<sup>20</sup> 505 U.S. 833, 868 (1992).

extend beyond the specific circumstances of the 2000 election and recent counterterrorism efforts:

- First is our Supreme Court's discomfort with, and even hostility toward, the unruly give-and-take of participatory democracy, illustrated most starkly by our Court's distrust of Congress in constitutional matters;
- Second is Congress's passive acquiescence in our Supreme Court's assertion of a unilateral prerogative, even where the Constitution appears to assign to *Congress* special responsibilities for carrying out constitutional functions. In particular, I'm interested in Congress's willingness to tolerate our Supreme Court's usurpation whenever the result spares members of the House and Senate the burdens of having to make painful choices that are bound to alienate some of their constituents, enabling these legislators quite happily to pass the buck to the other two branches of government.
- Third is the Executive's self-confident assertions of unilateral presidential power, often claiming some emergency or crisis as a justification for acting without the congressional consultation and authorization that appears to be required by the Constitution—and with an obstructionist posture toward judicial review. Typically, the assertion is that things will return to “normal” when the crisis passes. Even those who protest continuing encroachments do so in the hope that calmer heads will soon prevail.<sup>21</sup> This is, however, an often empty promise, because the baseline of what counts as “normal” shifts in times of perceived crisis toward ever-greater government power even when the crisis is episodic, as in economic depression or in a traditional war with a clearly delineated beginning and end. The expansion of governmental power is particularly troublesome when the crisis seems to have no clear end in sight, as in the current “war” on global terrorism. And it is more troublesome still when met by a Congress and a Judiciary all too eager to defer to the Executive in the name of national unity.

<sup>21</sup> This sentiment was the essence of Justice Black's dissent in *Dennis v. United States*, 341 U.S. 494, 579 (1951) (Black, J., dissenting). Black wrote: “Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.” *Ibid.* at 581.



Along the way, we will examine *Bush v. Gore* and what it reveals about the Rehnquist Court's jurisprudence on the eve of September 11. We'll then turn to the Bush administration's war on terrorism and the response from Congress and the Judiciary to that war. As we progress, I will take note of the various uses of the "crisis" concept—including legal, political, and military-security "crisis" claims—that have emerged as the Court and legal commentators have attempted to navigate these ordinary and extraordinary times. Finally, I will examine a few of the theories that seek to grapple with the challenge of fitting "crisis response" into the discourse of a constitutional democracy.

## I. THE MONOPOLIZATION OF LEGAL POWER— JUDICIAL ARROGANCE AND CONGRESSIONAL ACQUIESCENCE IN THE FACE OF POLITICAL CRISES

It must seem to most people by now that not much remains to be said about the case that appears destined to remain the signature of the Supreme Court under the stewardship of Chief Justice William Rehnquist: *Bush v. Gore*. The American media, public, and legal academy went on a *Bush v. Gore* binge in the weeks and months immediately following the decision. The next year witnessed raging debates on law school campuses across the nation, along with countless others in journals, newspapers, and books.<sup>22</sup> Yet, in spite of all the ink spilled on unlocking its mysteries, the case remains badly misunderstood. And it continues to reward study with seemingly new insights into the Rehnquist Court's approach to the Constitution and its travails. As long as there are thoughtful observers who react to the Supreme Court's decision and to its articulated rationale either with quiet ambivalence or with animated approval, and as long as dissecting the process of

<sup>22</sup> Although there are far too many contributions to list, several noteworthy examples include Bruce Ackerman, ed., *Bush v. Gore: The Question of Legitimacy* (New Haven: Yale University Press, 2002); Alan M. Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (Oxford: Oxford University Press, 2001); Ronald M. Dworkin, ed., *A Badly Flawed Election: Debating Bush v. Gore, the Supreme Court, and American Democracy* (New York: New Press, 2002); and Richard A. Posner, *Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts* (Princeton: Princeton University Press, 2001). Much of my own initial thinking on the subject can be found in Laurence H. Tribe, "eroG .v hsuB and Its Disguises: Freeing *Bush v. Gore* from Its Hall of Mirrors," *Harvard Law Review* 115 (2001): 170.

rationalization in which the decision's defenders engage continues to reveal still further twists and turns, discussing *Bush v. Gore* will remain a worthwhile exercise.

I hope this renewed encounter with the saga of *Bush v. Gore* will dispel the altogether forgivable assumption that my choice of that decision as the central case study for this pair of lectures reflects a “can’t-let-go” obsession with the case. There is no escaping the fact that I played a large role—although it was David Boies, not I, who argued the second, climactic *Bush v. Gore* case itself<sup>23</sup>—in defending against the federal lawsuits filed against Vice President Al Gore’s quest for a more complete ballot count in Election 2000. Yet after two years of unpressured thought about the case, of continued research into its central legal puzzles, of ongoing writing about the issues it posed, and of teaching its nuances to hundreds of law students, I think I have come to a set of conclusions that have grown both deeper and more detached with time. I certainly do not approach *Bush v. Gore* from either of the impassioned perspectives that have become associated with a number of my academic colleagues. I’m plainly not going to join those who shout three cheers for *Bush v. Gore* (or two-and-a-half cheers or even two).<sup>24</sup> But neither can I join those who denounce the decision as an altogether lawless and ultimately corrupt attempt to steal the Oval Office that forever cast a cloud of illegitimacy over George W. Bush’s presidency.<sup>25</sup> Even those who saw such a cloud looming in the months following the 2000 election should have some appreciation for the cleansing power of the megaphone George W. Bush wielded as he stood at Ground Zero in lower Manhattan shortly after 9/11, breaking through the shadows that had haunted the first 233 days of his presidency as he called out, “I can hear you,” to a weary but determined group of New York relief workers, within earshot of a profoundly shaken nation.

<sup>23</sup> I argued both the initial federal district court case that succeeded in rebuffing the attempt by then Governor Bush to halt the counting of ballots in Florida before mid-November, *Touchston v. McDermott*, 120 F. Supp. 2d 1055, 1055–56 (M.D. Fla. 2000), and the first of the two Bush challenges in the U.S. Supreme Court to the Florida Supreme Court’s pair of attempts to count all the lawfully cast ballots, *Bush v. Palm Beach County*, 531 U.S. 70 (2000), and was the counsel of record for then Vice President Gore in all three cases.

<sup>24</sup> For an example of the “three-cheers” approach, see Nelson Lund, “The Unbearable Rightness of *Bush v. Gore*,” *Cardozo Law Review* 23 (2002): 1219, to which I replied in “The Unbearable Wrongness of *Bush v. Gore*,” *Constitutional Commentary* 19 (2003): 571. For a different take, see Michael W. McConnell, “Two-and-a-Half Cheers for *Bush v. Gore*,” *University of Chicago Law Review* 68 (2001): 657.

<sup>25</sup> For a recent example, see Jack M. Balkin, “A Great Gamble by a Man Many Don’t Trust,” *Hartford Courant*, March 18, 2003, p. A15.

Rather than restirring tired disputes or rehashing stale arguments, I hope to connect *Bush v. Gore*, and the insights it has to offer into the constitutional jurisprudence of the Rehnquist Court, with several of the deeply troubling constitutional developments that have arisen in the aftermath of 9/11. To unearth that connection will require some digging. Getting there will necessitate first laying down a solid foundation, and that in turn requires correcting at the outset some common misconceptions surrounding the *Bush v. Gore* ruling itself.

Unfortunately, those misconceptions abound. Listening to people talk about *Bush v. Gore* sometimes reminds me of a *New Yorker* cartoon I once read in which a man says to a woman standing next to him at a cocktail party, “No, I can’t say I *know* the preamble to the Constitution. But I know *of* it.” My hunch is that this approximates where most people, lawyers included, stand in relation to *Bush v. Gore*. I have tried quizzing any number of law professors who claim at least to have *read* the case, and I can report that the overwhelming majority of them, regardless of whether they agree or disagree with the Court’s decision, are surprisingly ill-informed about what the U.S. Supreme Court actually did; about how it purported to justify its actions; and about whether the much-maligned Supreme Court of Florida was skating on thin legal ice or was instead standing on a solid foundation of Florida law.

I start with a thumbnail sketch of the relevant history. As every American schoolchild supposedly learns, the U.S. Constitution, as an essential part of the great compromise between the large and small states that made possible the formation of a federal union, adopted a peculiar method for selecting a president. Under Article II of our Constitution, each state selects, *in the manner directed by its legislature*, a number of “electors” equal to the number of representatives of that state in Congress plus two—the number two, of course, representing the number of senators per state. Every state, through its legislature, has chosen a popular vote as the method for selecting electors, but the states are not compelled to choose popular voting. Other methods are, in theory, available. All but two states have a “winner take all” system, so that if someone wins narrowly, he (or someday she) gets all of the electoral votes from that state. Two states have chosen a proportional system.<sup>26</sup>

Any electoral vote deadlock in the race for president is resolved by

<sup>26</sup> These are Maine and Nebraska, both of which assign electors to represent each congressional district, with two statewide “at large” electors to round out the total.

the House of Representatives, by the unusual procedure of each state casting just one vote. In 1787 George Mason opined to the Constitutional Convention that nineteen out of twenty elections would be decided in this manner.<sup>27</sup> In 1800 Thomas Jefferson became president that way, defeating his own running mate, Aaron Burr, on the thirty-sixth ballot in the House of Representatives.<sup>28</sup> In an attempt to avoid fulfilling Mason's prediction, Congress proposed and the states ratified the Twelfth Amendment to the Constitution in 1804, making a repeat of the Jefferson-Burr standoff less likely by having the electors cast separate ballots for president and for vice president. The Twelfth Amendment, however, left in place the mechanism for resolving any electoral tie—namely, a one vote-per state showdown in the House of Representatives. The House stepped in one more time—when John Quincy Adams became president by defeating Andrew Jackson in that body in 1825. Never since has a presidential election been thrown into the House of Representatives for resolution.

The Twelfth Amendment also left unchanged Article II's method for counting electoral votes, stating simply (and with tantalizing sketchiness) that the electoral votes are to be "counted" when the outgoing vice president "open[s]...the certificates" submitted by each of the electors (more precisely, the "ballots" that the electors have "sign[ed] and certifi[ed], and transmit[ed] sealed to the seat of the government") "in the presence of the House of Representatives" on a date set by Congress.<sup>29</sup> This "no-frills" counting system came under intense scrutiny in the extremely close presidential race of 1876 between Samuel Tilden and Rutherford B. Hayes. Instead of creating a tie in the Electoral College, which would have sent the question to the House of Representatives, that election produced two competing slates of electors from three southern states, such that either Hayes (a Republican) or Tilden (a Democrat) would win the presidency if either one won all the electoral

<sup>27</sup> For a brief historical account, see Laurence H. Tribe and Thomas M. Rollins, "Deadlock: What Happens If Nobody Wins," *Atlantic Monthly*, October 1980, at 49.

<sup>28</sup> The tie in 1800 resulted from a design defect in Article II that awarded the office of president to the candidate with the most electoral votes, with the runner-up being designated vice president. With the emergence of political parties and unified "tickets," the natural result was that the two candidates from the winning party would routinely end up in a "tie" for the top post.

<sup>29</sup> The date is now set by statute as January 6. See 3 U.S.C. § 15 (amending the Electoral Count Act of 1887, ch. 90, § 4, 24 Stat. 373).

votes from the three disputed states.<sup>30</sup> The Twelfth Amendment instructed that the “ballots” cast by the “electors” chosen by “their respective states” “nam[ing]...the person voted for as President...shall in the presence of the Senate and House...be counted”—but it offered no guidance as to how to determine *which* electors’ ballots to count. So Congress did what befuddled legislatures often do: it appointed a commission. And that fifteen-member commission, which included five Justices of the U.S. Supreme Court, awarded all of the disputed electors to Hayes—only to have the full House revisit the issue in a contentious, all-night-long filibuster that lasted until 4:10 A.M. two mornings before the scheduled inauguration. The “stormiest [session] ever witnessed in any House of Representatives” eventually produced a one-vote margin of victory for Hayes.<sup>31</sup> The final tabulation was hardly the result of dispassionate and objective “counting.” Rather, the result was the product of an ugly political compromise, in which the Republican Hayes was awarded the critical electoral votes—and thus the presidency—in exchange for a promise to southern Democrats that the former slave states would be permitted, under the guise of “states’ rights,” to keep black people in a subordinate position for what proved to be nearly a century. Some think of this as the “Great Compromise of 1876” that prevented a second Civil War; others think of it as the “Great Sellout” that abandoned African Americans to a fate of segregation and disenfranchisement whose ugly legacy is felt in our national life to this day.

Bitter recriminations and mutual accusations of vote-buying and electoral fraud dominated American politics for much of the following decade, but in 1887 Congress finally produced legislation aimed at avoiding a repeat of the Hayes-Tilden debacle. This Electoral Count Act of 1887 contains detailed procedures for deciding which electoral votes to “count” from a given state when that state certifies two or more rival slates of electors to Congress. These procedures remain intact, though untested, to this day.

This is how the law stood as of the electoral contest between then Texas governor George W. Bush and then vice president Al Gore on November 7, 2000. That election was, of course, *very* close indeed. Al Gore narrowly but indisputably won the nationwide popular vote (by a

<sup>30</sup> Fittingly enough, one of the contested states was Florida.

<sup>31</sup> Tribe and Rollins, “Deadlock: What Happens If Nobody Wins,” p. 52.

margin of 540,520: the vote was 50,996,582 to 50,456,062); but with the result in Florida still undetermined, Gore had 266 electoral votes and needed 4 more to reach or exceed the magic number of 270 out of the 538 electoral votes to be cast in total (which constitutes a “majority of the whole number of electors appointed” as required for election by the Twelfth Amendment), while Bush, with 246 electoral votes, needed 24 more electoral votes to win.<sup>32</sup> So whoever won Florida’s 25 electoral votes would become president. But the popular election in Florida was so close that the statistical margin of error in merely counting the ballots, assuming highly accurate counting procedures, was greater than the apparent margin of victory. On the morning of November 8, Bush appeared to lead Gore by 980 votes out of 5.8 million cast in Florida—a margin of less than 1/100th of 1%.

It is important to place the results of the 2000 election in some historical perspective. The closeness of the election was remarkable but not unprecedented. In the 1876 election just discussed, for instance, Tilden would have defeated Hayes if he had been able to pick up only 116 more popular votes in South Carolina. A mere 575 more votes in New York would have shifted the outcome of the 1884 election from Grover Cleveland to James G. Blaine. And Charles Evans Hughes would have defeated Woodrow Wilson in the 1916 election with only 2,000 more votes in California.<sup>33</sup> Contrary to popular belief, breathtakingly close elections have in fact been a significant, even if not common, part of our electoral history. What made the 2000 election so remarkable was not the fact that the outcome turned on a miniscule number of ballots in Florida. What ensured that election’s place in history was the postelection legal donnybrook and the amplification of that melee through the technological power and psychological impact of an almost unprecedented media blitz.

How did it happen? First, recall that Article II of the Constitution authorizes the legislature of each state to determine how its presidential electors will be chosen. The Florida legislature had enacted a general election code that applied without distinction to all electoral contests,

<sup>32</sup> Note that Gore should have had 267 electoral college votes, but ultimately received only 266 because District of Columbia elector Barbara Lett-Simmons cast a blank ballot instead of voting for Gore in protest against what she called the District of Columbia’s “colonial status.” See “General Election, Tuesday, November 7, 2000,” available at <http://www.thegreenpapers.com/G00/G00.html>.

<sup>33</sup> See *ibid.*

from Miami dog-catcher to the U.S. president. That code mandated a recount in any of the state's sixty-seven counties whenever sufficient evidence of incorrect counting existed and a candidate filed a protest. The statutory conditions having been met, Gore asked for a recount in the counties where he had evidence of significant undercounting of votes that should have been tallied in his favor but were not counted at all by the punch-card machinery used by those counties. By November 26, with the recount complete in several counties, Bush was still 537 votes ahead. The Florida secretary of state, Katherine Harris—who had also served as co-chair of the Bush campaign in Florida—denied Palm Beach County's request for an extra few hours to complete its recount and proceeded to certify the 537-vote margin of victory, pronouncing George W. Bush the winner of Florida's 25 electoral votes and thus the next president of the United States.<sup>34</sup>

The Bush legal team demanded a concession. But Gore believed that thousands of legal votes remained uncounted. The Florida election code contained a provision that allowed either candidate to contest an entire election result and to challenge the resulting certification of a winner if enough "legal votes" had gone uncounted to cast "doubt" on the result. In such a case, the election code enacted by the Florida Legislature gave the state's courts broad discretion to frame a remedy. On December 8, the Florida Supreme Court agreed with Gore that there were enough uncounted, but legal, votes for president to trigger its remedial power, and it exercised that power by initiating a statewide manual recount of all the ballots that the voting machines had recorded as having cast *no* vote for president—the so-called undervotes—to determine which of them nonetheless contained a clear indication of the voter's intent.<sup>35</sup>

There were obvious problems with that remedy. First, it did nothing about the "overvotes"—ballots not counted either way for president because the machines had found more than a single vote—for instance, ballots marked with *both* an apparent vote for Bush *and* an apparent vote for Gore, but on which the voter had sought to correct his or her mistake

<sup>34</sup> Palm Beach County officials had estimated that they were only two hours away from completing a canvassing of thousands of questionable ballots when Secretary Harris pulled the plug.

<sup>35</sup> Examples of such "clear" undervotes included optical-scan ballots on which the voter had failed to make the proper machine-readable mark but had legibly written in the margin "I'm for Bush," or, most famously, punch-card ballots on which the voter had failed to punch cleanly through the ballot card, leaving a tiny piece of paper (now widely known as "chad") hanging by a cardboard fiber from the back of the ballot.

by writing out in full the name of that voter's true preference in the margin; or ballots properly marked with a vote for just one of the two principal candidates but then spoiled, as far as the machines were concerned, because the voter, in an abundance of caution, had spelled out the preferred candidate's name next to the hole the voter had punched out or the circle the voter had marked with an "X." The manual recount remedy also introduced an obvious element of subjectivity in the sense that two identical-looking ballots could get tallied differently in two different counties, or even in the same county at two different times, by two different panels of ballot counters. The Bush lawyers, aided by nonstop television coverage, portrayed this process—with ballots being held up to the light by squinting county officials trying to discern the meaning of ballot after ballot—as a "three-ring circus" and argued that such a flawed process was unconstitutional under the Equal Protection and Due Processes Clauses of the Fourteenth Amendment, an argument to which I will return shortly. But the main thrust of the Bush lawyers' argument from the start was that the Florida Supreme Court had "changed the rules of the game" and had thereby deviated from what the Florida Legislature had specified in the state election code.<sup>36</sup> While disagreements over the application of state law do not usually give rise to a "federal case," the requirement of Article II of the Constitution—that electors be chosen in the manner prescribed by the state *legislature*—lifted this dispute to the level of a federal question.

Many political pundits and legal commentators seemed confident that this novel Article II argument was the better of the two. The distinguished and prolific Judge Richard Posner, for one, has described the Article II argument, as adopted in the end by Chief Justice Rehnquist's concurring opinion in *Bush v. Gore*, as the most persuasive legal rationale offered by any of the Justices.<sup>37</sup> It certainly looked "clean" and even elegant in its simplicity; whatever the disadvantages of writing on a

<sup>36</sup> The claim was essentially that, under the state's election code properly construed, the machine count prevailed over all. Hand counts were permitted under the Florida Code, the Bush legal team argued, only in situations where the counting machine was seriously malfunctioning, not simply where idiosyncrasies in the ballots caused the machine to misread or ignore some votes.

<sup>37</sup> Judge Posner's main defense of the decision, however, is the avowedly "pragmatic" (rather than legal) argument that the Supreme Court's intervention was required to restore order and civility to an electoral process run amok. See Richard A. Posner, "*Bush v. Gore* as Pragmatic Adjudication," in *A Badly Flawed Election: Debating Bush v. Gore, the Supreme Court, and American Democracy*, ed. Dworkin.



clean slate unguided by a path of precedent, the novel Article II argument had the virtue of its vices in that it averted the complexities of thick clouds of precedent that confronted the Fourteenth Amendment path to decision; and it resonated with the basic, common-sense idea that no state should be able to make up and apply new election rules after the votes have been cast—that “rules” made up after a race has been run but before its winner has been authoritatively declared do not deserve to be called “rules” at all.

There was just one problem with the Article II argument: it was plainly wrong. There had in fact been no mid-election or postelection change in Florida’s legislatively prescribed rules. The Florida Election Code, as amended in 1999, had unmistakably granted to the state’s courts broad discretion to design whatever remedy they concluded would best approximate the “true” result in any sufficiently close contest, defined as one where the result could be thrown in either direction by tallying ballots that clearly expressed the voters’ intentions but that had been rejected by the counting machines, whether because of mechanical malfunction or because of minor voter error. The worst one could say about Florida’s Election Code was that its language was ambiguous on the question of what a court should do in the face of large numbers of ballots with marks that had failed to be registered as votes. And Florida’s Supreme Court did nothing novel when it reasoned that any residual ambiguity should be resolved by recourse to the overriding purpose of that state’s election code: to reflect and record, whenever possible, the intent of each and every voter who had labored to cast a legal ballot. It inexcusably ignores the language, history, and purpose of that code to say—as many critics of the Florida court did—that Florida’s law had been written to elevate finality, and fidelity to rigidly fixed deadlines, over a good-faith effort to discern the “intent of the voter” for every ballot lawfully cast. It is telling that, in the end, only two other Justices of the U.S. Supreme Court joined Chief Justice Rehnquist’s endorsement of the Article II argument that necessarily rested on this strained reading of Florida law.<sup>38</sup> The Supreme Court’s ultimate decision in *Bush v. Gore* was destined to come from a different constitutional source.

<sup>38</sup> Justices Antonin Scalia and Clarence Thomas joined Chief Justice Rehnquist’s concurring opinion. For those interested in a more detailed discussion of the Article II argument, see Tribe, “*eroG .v bsuB* and Its Disguises,” pp. 194–216.

Three days before it issued its final opinion in *Bush v. Gore*, and only a day after the Florida Supreme Court had issued its December 8 order, the U.S. Supreme Court summarily halted Florida's statewide manual recount by a 5–4 vote.<sup>39</sup> What followed was rapid-fire, almost dizzying litigation. In a sharply telescoped version of a process that normally lasts several months, the briefs were due from both sides in *one day*.<sup>40</sup> Oral argument followed the next morning, December 11. On the day after that, at 10 P.M. on December 12, the Court issued its opinion. While breathless reporters and legal experts struggled to make sense of the freshly printed pages on live television throughout the night, one fact became indisputably clear: the 2000 election had finally come to a dramatic and definitive end.

Given the circus atmosphere in which *Bush v. Gore* was argued, decided, and disseminated to the public, it can hardly be a huge surprise that so few people even now understand just what the Court actually said. The unsigned *per curiam* opinion for five Justices did *not* hold that the manual recount violated Article II of the Constitution; nor did it hold that the Florida Supreme Court had somehow misconstrued that state's own election code. Instead, the *per curiam* ended the dispute by holding that the imperfections in the Florida court's recount remedy rendered it unconstitutional under an odd-looking hybrid of the Constitution's Equal Protection and Due Process Clauses. But that by itself wasn't enough to end the matter, for the standard judicial remedy for an equal protection violation of that sort would have been to remand the case to the Florida Supreme Court to fashion a recount that complied with the Court's conception of equal and fair treatment.<sup>41</sup> To end the dispute once and for all, the majority relied on a truly remarkable and ironic claim of deference to what it saw as a confession of impossibility by Florida's highest court—a supposed concession that the Florida Supreme Court could not possibly craft and carry out an acceptable remedy in time to meet what the U.S. Supreme Court called the “deadline” of midnight on December 12. It was the Supreme Court's ostensible deference to that imagined confession by the court below that alone supported the Court's crucial secondary holding that the entire recount process had to be abandoned, freezing in place the results certified on

<sup>39</sup> *Bush v. Gore*, 531 U.S. 1046 (2000).

<sup>40</sup> See *ibid.*

<sup>41</sup> See Pamela S. Karlan, “Nothing Personal: The Evolution of the Newest Equal Protection from *Shaw v. Reno* to *Bush v. Gore*,” *North Carolina Law Review* 79 (2001): 1363.

November 26 and thus awarding Florida's twenty-five electoral votes, and the presidency, to George W. Bush.

We will return momentarily to the Supreme Court's decision to halt the recount once and for all. But first, a few words about the equal protection/due process theory.

Most legal observers, both lay and legal, responded to the *rationale* announced in *Bush v. Gore* with head-scratching incredulity. How could *this* Supreme Court—a Court that had construed the Equal Protection Clause so narrowly in other settings—have found here the type of intentional and invidious discrimination that it had declined to find in so many other cases? How could Justices notorious for their celebration of the “rights” of the fifty sovereign states be willing to invalidate a state high court's interpretation of its own laws in the name of equal protection? Some of the shock was based upon a misunderstanding of the precise holding of *Bush v. Gore*: the Court did not, contrary to what many a casual reader imagined, invalidate the Florida Supreme Court's interpretation of Florida statutes, but instead took the Florida court at its word and went on to hold that the constitutional demands of equal protection trumped the counting priorities of the state's election code. Nor did the U.S. Supreme Court say, as some accused it of saying, that manual recounts were so inherently unreliable, subjective, and vulnerable to political manipulation and chicanery that they were per se unconstitutional. To have said that, the Court would have had to condemn the very process that produced Bush's 537-vote margin of victory—itsself a product of hand-counts in a number of Florida counties—as well as every national election conducted before the advent of counting machines in the 1950s.<sup>42</sup>

Much of the stunned disbelief that greeted the decision can be explained by the fact that the Court's equal protection theory seemed to many to be made up for the occasion—unprincipled and, it seemed, blatantly political. It would have been unrealistic to expect the public to accept a ruling “good for this day and train only” from Justices who have said that the “Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and

<sup>42</sup> Such a holding also would have found itself in irresolvable tension with *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972) (finding that a manual recount is “an integral part of the . . . electoral process . . . within the ambit of the broad powers delegated to the States by” the Constitution).

political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.”<sup>43</sup>

What, then, was it about the Court’s theory that made it seem so unprincipled? Stripped to its essential elements, the argument offered by the unsigned *per curiam* opinion was that equal protection of the laws required the application of uniform counting rules to any and all ballots that were subjected to a manual recount so that ballots that looked the same would not have the potential to be counted differently. Under the Florida Supreme Court’s approach, uniform rules were not enforced. Instead, there was only the indeterminate “intent of the voter” standard, under which the manual recount could be expected to treat some voters differently from other depending upon when and where those voters cast their ballots.<sup>44</sup> True enough. But if that sufficed to create an equal protection problem, then what about the much *larger* differences among precincts using dramatically different ballot designs or different counting machines and methods altogether? Or, come to think of it, what about the difference between those voters who had their ballots counted and those whose identical-looking ballots had never been counted *at all*—those whose disenfranchisement the Florida Supreme Court was simply trying to repair? Those seemingly *more* troubling differences for some reason didn’t matter to the five majority Justices; those differences were pushed backstage—to be dealt with, if at all, only in some future election. Why? Because they supposedly presented problems of a different sort, problems that simply had to be ignored in December 2000 so that Florida could comply with the so-called safe harbor deadline of December 12—a “deadline” to which we shall soon return. The Court therefore fixed its attention solely on the differences in treatment among voters that were made possible by the state court’s use of the Florida Election Code’s “intent of the voter” standard to repair the undeniable problem that some votes cast on November 7 still had not been counted as of December 8. And the Court concluded that to apply such a standard, rather than more specific rule-like instructions, was unconstitutionally arbitrary.

The Court’s rationale is difficult to unpack—to say the least. It is

<sup>43</sup> *Planned Parenthood of Penn. v. Casey*, 505 U.S. 833, 865 (1992) (plurality opinion of Justices Sandra Day O’Connor, Anthony Kennedy, and David Souter).

<sup>44</sup> See *Bush v. Gore*, 531 U.S. 98, 106 (2000) (noting that “the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another”).

hard to locate the doctrinal origin of *Bush v. Gore*; the opinion cites only a handful of cases, none of them terribly helpful. It appears from the citations that did make it into the opinion that the majority's theory was based on a crude extension of the one-person, one-vote line of cases that began with *Reynolds v. Sims*.<sup>45</sup> That case involved a legal challenge to a legislative apportionment scheme using districts of roughly equal size but with population deviations of up to 41 to 1 between some districts and others. In other words, going into the election, each voter in the state's most densely populated legislative district knew that, in determining that district's one representative, her vote would be aggregated with 41 times as many voters as would a hypothetical voter in the state's least populous district, which also sent a single representative to the same legislative body. The Court found the resulting "vote dilution" of those casting their votes in all but the least densely populated district unconstitutional on the basis of the principle that some groups of voters cannot be given a smaller opportunity than others to elect candidates of their choice solely because of where those voters happen (or choose) to live.

If the connection between that principle and the holding in *Bush v. Gore* seems attenuated to you, the reason isn't that you lack sufficient background in constitutional law. Indeed, to call the link between *Bush v. Gore* and the line of one-person, one-vote cases "attenuated" may be far too generous. Consider at least four separate problems with the Court's rationale.

1. First of all, in *Bush v. Gore* there wasn't any identifiable voter or group of voters who could be said to have been injured or harmed by exclusion or dilution—harmed, that is, with respect to the franchise. Bush certainly made no claim—nor would the evidence have supported one—that variations in the way physically indistinguishable ballots were treated in different places within the state or at different times reflected any sort of bias or tilt against any group of voters. That observation by itself immediately distinguishes this case from *Reynolds* and from the classic one-person, one-vote cases where the equality principle was invoked to challenge, and then to correct, electoral tilts against specific and identifiable blocks of voters—like those in urban, densely populated areas—through the drawing of lines defining legislative districts so that districts of significantly different population size each

<sup>45</sup> 377 U.S. 533 (1964).

elected the same number of representatives (usually one) to the same legislation body.<sup>46</sup> Nor was it claimed that the counting process, even if not stacked against any “class” of voters *ex ante*, was systematically tilted against *Bush himself* by discriminating against those who had intended to vote for him—a bias that would have been difficult indeed for Democrats to act on in front of the Republican officials who were sitting at every counting station, under the intense gaze of around-the-clock television coverage, in a state where the Republican candidate’s brother was governor and where the co-chair of the Bush campaign was secretary of state.

It is true that the Florida Supreme Court failed to order the election canvassing board to recount so-called overvotes along with the undervotes. But the *per curiam* opinion suggested no reason to imagine that this failing cut systematically either *for* or *against* the supporters of either candidate. There was no claim—not even a hint—that Bush voters were more likely than Gore voters to have spoiled their ballots by marking them once for Bush and then in addition for somebody else (say, Pat Buchanan or Ralph Nader) as a kind of electoral insurance policy. Nor could Bush claim to be championing the rights of some discrete group of “overvoters”—a group of people who would predictably take too literally the famous injunction to “vote early and vote often,” whose ballots would thus have been disregarded but whose intentions a visual inspection would nonetheless have made clear, and who constituted some sort of disenfranchised minority against whom the Florida Supreme Court’s recount system would predictably have discriminated. Worse still, and utterly devastating to the entire “what, no overvotes?” objection, treating the Florida Supreme Court’s failure to mandate a statewide recount of “overvotes” as a fatal objection to the recount it *did* order, and as a reason to order the previously certified 537 vote margin for Bush inscribed in the history books, would require one arbitrarily to overlook an awkward little fact. In the original machine recount, thirty-four of Florida’s sixty-seven counties had *examined* “overvotes” to detect the voter’s likely intent while thirty-three hadn’t, so the final tally underlying the Harris certification of the 537-vote Bush “victory” of November 26 *itself* used a formula that gave some “overvoters” infinitely more “weight” (one vote per person in the counties that *had* examined

<sup>46</sup> See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962); *Gray v. Sanders*, 372 U.S. 368 (1963).

overvoters in the original machine recount) than it gave others (zero votes per person in the counties that had *not*)!<sup>47</sup>

2. The second major problem with the Court's equal protection analysis stems from the fact that *ballots* are not *voters*. *Bush v. Gore* obviously did not involve anything akin to the classic violation of the one person-one vote principle, which entails apportioning voters among districts of disparate population sizes so as to value or weigh the votes of some voters more than the votes of others; nor did it involve *deliberately diluting* voters of a given race, religion, or political party by drawing district boundaries so as either to pack lots of those voters into a few districts—where they might be expected to elect a small number of representatives by (irrelevantly) overwhelming margins—or to disperse such voters among so many districts as to deprive them of any representation at all. *Bush v. Gore* in fact involved no discriminatory or otherwise unfair treatment of any voter or category of voters but only the potentially different treatment of similar-appearing *ballots* as evidence of what the voters who cast those ballots intended. This might be objectionable under a hypothetical constitutional regime of one-*ballot*, one-vote—but the Fourteenth Amendment protects persons, not ballots, and the (by now well-settled) one-*person*, one-vote doctrine suggests no constitutional defect in a regime that merely adds an additional dimension along which the probability of a voter's ballot being counted might vary.

In short, the Florida Supreme Court's December 8 statewide recount order did nothing to alter the legal criteria governing what counted as a valid vote in Florida or how any given ballot was to be counted in the state's overall scheme for choosing presidential electors. At most, the order added another possibility to the many that already existed (as the "fourth problem," discussed shortly, explains) to the circumstances under which different approaches would be used in deciding whether a ballot marked in a given way counted as a vote for a particular candidate. In the eyes of the *Bush v. Gore* majority, an equal protection violation evidently arose when the recount proceeded in a manner that unacceptably *increased* the probability that some voters or groups of voters would have their ballots counted in accord with the voter's intent while leaving that probability unchanged for other voters, and while

<sup>47</sup> See McConnell, "Two-and-a-Half Cheers for *Bush v. Gore*," p. 658 n. 8.

increasing the probability of their ballot's being counted for the *wrong* candidate for still other voters. But no one doubted that the state's altogether conventional "intent of the voter" standard on its face treated all voters equally, just as a "reasonable doubt" standard in criminal law, or a "reasonable care" standard in tort law, treats all defendants equally. And merely pointing to an increased possibility that a facially neutral standard or method will end up treating some people differently from others has never been enough, without more, to invalidate laws or even to create a presumption of their invalidity under the Fourteenth Amendment. The Rehnquist Court has, for instance, rejected attempts to find fault, on equal protection *or* due process grounds, with state criminal laws and procedures that not only create a significant risk that similarly situated defendants will receive different sentences depending upon where in the state or when or by whom they are prosecuted but even make that difference, including a difference as stark as one between life imprisonment and death, turn, in a murder case, on the race of the defendant and/or the victim.<sup>48</sup> It has only been in the demonstrably discriminatory *application* of laws and procedures to particular defendants that equal protection or due process violations have ever previously been deemed possible where, as in this instance, the rules were *facially* neutral.

3. The third major problem is that the Court said nothing about the possibility of correcting, within the recount process itself, the differential evaluation of similarly situated ballots. The five Justices in the majority took a snapshot of the process the Florida Supreme Court had set in motion on December 8 and closed the shutter on the lens prematurely, arbitrarily excluding from view the mechanism that Florida's judiciary had installed, within the four corners of the process it had put in place on December 8, to address *the very problem* those five Justices purported to find so troubling. It would have been impossible for the Florida Supreme Court to anticipate, and to create precise counting rules to address, every conceivable way in which a ballot might have been "spoiled" and rendered unreadable by machines. For that reason, Florida's highest court had, in fact, designated one state judge to harmonize and supervise the entire process, in order to correct for any dis-

<sup>48</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 312–13 (holding that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system" and that "constitutional guarantees are met" whenever the method of determining guilt and/or punishment is "surrounded with safeguards to make it as fair as possible").



cernible bias or tilt in any direction, so as to make sure the inevitable variations in counting approaches from precinct to precinct and from time to time would not give rise to any systemic unfairness or any avoidable individual injustice. There was no claim, let alone any showing, that this state court judge could not or would not have resolved fairly whatever discrepancies might have arisen.

The fact that ballots punched or marked by human voters are inanimate physical objects and thus might in the abstract seem susceptible of being interpreted and then tallied by some purely mechanical set of rules—a fact that seemed terribly significant to Justice Kennedy at oral argument and that even found its way into the Court’s *per curiam* opinion—seems plainly insufficient to establish the proposition that *only* rules so mechanical and automatic in their application as to leave no room for subjective human judgment, regardless of the potential costs to the *accuracy* of the interpretive process in the individual case, can meet the Constitution’s requirements of equal protection and due process.<sup>49</sup> Signed documents, after all, and paintings said to have been the work of a given artist are inanimate physical objects too, but it certainly doesn’t follow that purely machine-like rules for comparing handwriting samples or painting styles, leaving no room for more intuitive modes of assessment, are constitutionally required in prosecutions for buying something of value with a forged check or for fraudulently selling an expertly copied work by Paul Cézanne or by Camille Pissarro as though it were an authentic original. And if that is the case even with respect to something as theoretically reducible to objective, mechanistic criteria as determining the *identity* of an author or artist, surely it must be the case with respect to something far more elusive—such as the author’s *intent*, including the intent of a *ballot’s* “author”! The preferences of many Justices for mechanical rules over more touchy-feely standards and for bright-line, objective tests over more fuzzy, subjective criteria are well known<sup>50</sup> and might help explain an initial discomfort with the Florida Election Code’s refusal to reduce the vote-tallying

<sup>49</sup> See *Bush v. Gore*, 531 U.S. 98, 106 (2000) (*per curiam*). For a refreshingly succinct and persuasive assessment of this argument, see Mary Anne Case, “Are Plain Hamburgers Now Unconstitutional? The Equal Protection Component of *Bush v. Gore* as a Chapter in the History of Ideas about Law,” *University of Chicago Law Review* 70 (2003): 55.

<sup>50</sup> See generally Kathleen M. Sullivan, “The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards,” *Harvard Law Review* 106 (1992): 22; Laurence H. Tribe, *American Constitutional Law* §§ 17-1, 17-2, 17-3 (2d ed., New York: Foundation Press, 1988).

process to one involving only algorithms capable of being applied by machines without any need for subjective judgment calls. No such preference for the mechanical, however, seems capable of *justifying* a holding to the effect that nothing but specific, “objective” rules for translating ballot marks or configurations into official votes can suffice as a constitutional matter just because it is always possible to state such rules.<sup>51</sup> The most that equal protection and due process can plausibly demand is an even-handed process for reducing to some tolerable level the risks of discriminatory or otherwise unfair decision-making. And, as Justice John Paul Stevens argued in dissent, in this case the concerns of equal protection were “alleviated—if not eliminated—by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process.”<sup>52</sup> The U.S. Supreme Court conspicuously said nothing at all about whether this state judge could be relied upon adequately to oversee and correct the process; it certainly seems premature for the Court to have predicted that he couldn’t or wouldn’t do so and headstrong at the very least for the Court to proceed as though the safeguard put in place by Florida’s highest court wasn’t even worthy of mention.

4. Fourth, and perhaps most importantly, whatever residual discrepancies in ballot treatment may have been present in the December 8 scheme and may have escaped correction by the supervising magistrate were insignificant when compared to the gross inequalities that were built into the system that the state had in place on election day and that were frozen into the final vote count certified by Katherine Harris on November 26. That count of necessity depended on the inherently unequal voting and counting practices present among Florida’s sixty-seven counties in the actual voting procedures in use on November 7, 2000. These underlying inequalities were certainly worse as a quantitative matter—and far worse, qualitatively speaking—than the alleged recount inequalities. For, unlike the randomly distributed discrepancies in the treatment of “undervote” or “overvote” ballots, these *underlying* differences were systematically skewed toward generating a more reli-

<sup>51</sup> When a government official is empowered to decide whether a given speech or speaker may be heard, such objective rules have been required as a means of avoiding hard-to-detect discrimination or censorship based on the content or viewpoint being expressed, but the Florida Supreme Court’s recount order was not, and could not have been, charged with creating some distinctive risk that ballots would be rejected or miscounted if the counting official was displeased with what the ballot said.

<sup>52</sup> *Bush v. Gore*, 531 U.S. 98, 126 (2000) (Stevens, J., dissenting).

able count in wealthier counties that could afford machines better equipped both to record votes accurately and to reduce voter error by rejecting incorrectly filled-out ballots on the spot and giving the voter involved an opportunity to cast a correctly executed ballot instead. To some degree, in fact, disparities in how rigidly or permissively the criteria for identifying voter intent were applied from county to county may simply have served to offset the underlying disparities in voting technology. So, for example, a permissive “intent of the voter” standard—one that counted even a merely “dimpled” or “pregnant” or “hanging” chad in a county with antiquated punch-card machines—might have operated not as a *source* of inequality but rather as a *remedy* for inequality, a remedy that could provide voters in less affluent counties with a closer approximation to *truly* “equal protection” in relation to voters in counties with better voting equipment.

Any party challenging the December 8 recount procedure and asking that the counting be halted altogether should at the very least have had to bear the burden of showing that simply throwing out the undervotes that remained uncounted as of the Harris certification, and sticking with the vote tally reflected in that certification, created *fewer* constitutionally troublesome differences in how similarly situated voters were being treated than would have been the case under the Florida court’s recount. Yet neither the Bush lawyers nor the *per curiam* opinion could deny the Florida Supreme Court’s conclusion that hundreds upon hundreds of ballots had been lawfully cast under Florida law—as evinced via partial and completed recounts—yet were simply not tallied in Katherine Harris’s certified count.<sup>53</sup> Throwing out these ballots, even if done to satisfy the alleged December 12 deadline, had the effect of systematically and arbitrarily “diluting” *to zero* the weight of hundreds of votes for no reason other than the inadequacy of the vote-counting machines in the voters’ home counties.

For all these reasons, the equal protection argument appears to be not just a bit rough around the edges but so riddled with holes that crediting it as a serious legal analysis, much less accepting it as a sufficient explanation for the Supreme Court’s intervention, seems very difficult indeed. Perhaps more remarkably, the ultimate outcome of the dispute was determined on grounds even flimsier than this gap-riddled, Swiss cheese Fourteenth Amendment claim. Five Justices drove home

<sup>53</sup> See *Gore v. Harris*, 772 So. 2d 1243, 1248, 1258–62 (Fla. 2000).

the decisive nail in Gore's electoral coffin when they decided, at 10 P.M. on December 12, that the deadline for arriving at a final result in the state's electoral count was a mere two hours away. But this December 12 deadline was pure fiction! Congress would not be counting Florida's electoral votes until January 6, and the successor statute to the Electoral Count Act of 1887 set the ceremonial date for the electors to meet and cast their votes in their respective states as December 18.<sup>54</sup> The Electoral Count Act did, to be sure, include a "safe harbor" provision, under which Congress promised to honor the legitimacy of a state's certified slate of electors so long as any controversy within the state over who had won the election was settled at least six days before the date set for the electors to meet and was resolved under rules put in place before election day.<sup>55</sup> December 12 was the cutoff for that "safe harbor." Of course, states that want to avoid any challenge to their slate of electors try to take advantage of the safe harbor—just as Florida tried to do here—but they haven't always succeeded.<sup>56</sup>

How did this "safe harbor" all of a sudden morph into a hard-and-fast *deadline*? Florida Supreme Court Justice Leander Shaw, who had ruled in favor of Bush by *dissenting* from the state high court's decision to order a manual recount, wrote in the final opinion cast in this saga that the five-Justice *per curiam* opinion had simply misread the Florida Supreme Court's earlier opinions. Those opinions merely noted the December 12 safe harbor date in explaining "the Florida Secretary of State's authority to reject late returns arising from a *pre-certification protest* action, not... a court's obligation to stop a recount in a *post-certification contest* action. To mix these two actions is to confuse apples and oranges."<sup>57</sup> Indeed, as Justice Shaw explained, "December 12 was [never] a 'drop-dead' date under Florida law" but "was simply a *permissive* 'safe-harbor' date to which the states could aspire. It certainly was not a *man-*

<sup>54</sup> 3 U.S.C. § 7 (amending the Electoral Count Act of 1887, ch. 90, § 1, 24 Stat. 373).

<sup>55</sup> 3 U.S.C. § 5 (amending the Electoral Count Act of 1887, ch. 90, § 2, 24 Stat. 373).

<sup>56</sup> A famous example from the 1960 Kennedy-Nixon contest, where the electoral votes from Hawaii were finally settled on December 28, and Congress had to select one of the two conflicting slates of purported Hawaii electors when meeting to tally the votes on January 6. With then Vice President Richard Nixon presiding, the joint session of Congress decided to count the Democratic slate, which had been certified last and had been endorsed as the "correct" slate by Hawaii's Republican governor.

<sup>57</sup> *Gore v. Harris*, 773 So. 2d 524, 529 n. 12 (Fla. Dec. 22, 2000) (Shaw, J., concurring) (internal citations omitted).

*datory* contest deadline under the plain language of the Florida Election Code (i.e., it is not mentioned there) or this Court's prior rulings."<sup>58</sup> Thus, the U.S. Supreme Court arrived at its deadline only by distorting the Florida court's precedents and ignoring the permissive nature of the applicable federal law.

But that's not all. The Florida Supreme Court in fact *could not* have inferred from the Florida Election Code a "safe harbor or die" rule that would require all contests over the outcomes of presidential elections to be concluded by December 12. No such provision even arguably existed in the Florida Election Code, which made no mention whatsoever of safe harbor deadlines—exactly as one would expect from a statute that was meant to apply uniformly to all elections in Florida. For the Florida court to infer or interpolate such a deadline would in fact have been *unconstitutional* under the Article II theory of legislative supremacy accepted by the three concurring Justices. Indeed, the "Rehnquist Three" should have refused to give deference to the Florida Supreme Court if it *had* in fact grafted a "safe harbor or die" provision onto the Florida Election Code! If, as they insisted, the selection of presidential electors had to proceed in strict adherence to the state legislature's literal instructions, then the Florida state courts had no business creating a December 12 deadline out of whole cloth, when the Florida Legislature had been completely silent on the matter.

To spin out the fiction one final step, even if the Florida *Legislature* had passed a special presidential election code explicitly creating a "safe harbor or die" rule under which a recount of legal votes not completed by midnight on December 12 would simply have to be tossed out, such a rule would have violated the very equal protection theory propounded by the *Bush v. Gore* majority and would, in truth, have represented a far more *obvious* violation of any norm calling for ballots that look the same to be treated alike. The Court seems to have been oblivious to the glaring contradiction in its ruling—holding, on one hand, that any two Florida voters are constitutionally entitled to have their votes for presidential

<sup>58</sup> *Ibid.* at 528–29. Even many supporters of the *Bush v. Gore* decision have echoed Justice Shaw's criticism. See, e.g., John C. Yoo, "In Defense of the Court's Legitimacy," *University of Chicago Law Review* 68 (2001): 790 ("Indeed, the per curiam's sudden introduction of the December 12 cutoff date for a remedy—based on the assumption that the Florida legislature intended to adopt the safe harbor date for the selection of presidential electors provided for by 3 U.S.C. § 5—makes almost no sense at all unless read in light of the concurrence's structural analysis").

electors counted in the same way, while on the other hand holding that, in order to avoid the uncertainty and messiness of congressional wrangling over competing slates of Florida electors, it was acceptable for the Florida Legislature simply to disenfranchise every voter whose ballot markings indicated a preference clearly enough to be understood by a human but not clearly enough to be deciphered in the first instance by a voting machine or, under a machine-like recount process meeting the Court's standards, to be recounted by a date set arbitrarily in advance of the congressional date for each state to cast its electoral votes.

In sum, the December 12 "deadline" that the majority insisted had forced its hand was based on a *mythical* Florida court endorsement of a statement the Florida Legislature *never made*—a statement that, if the legislature *had* made it, would have been unconstitutional under the majority's own equal protection theory.

Have I been too harsh on the *Bush v. Gore* majority? I think not. True, tackling the inequalities of an entire electoral system would have presented a monumental task. Yet, rather than recognizing the inherently intractable nature of the task that confronted the state's highest court as well as the Court itself, the Justices in the majority pled helplessness only with respect to the underlying inequalities—and only to excuse their *own* inability to effect complete justice. Ruling on the validity of the as-yet-incomplete Florida recount effort somehow struck those five Justices as altogether straightforward. To justify their decision to focus on the recount procedures put in place by the state judiciary on December 8 while leaving untouched the fundamental intercounty disparities in the quality of voting equipment and ballot spoilage rates in the statewide system in place on November 7, the Supreme Court majority simply asserted that tackling the system as a whole was a large and difficult task best left for another day.<sup>59</sup> The only question before the Court, in its view, was the validity of the Florida Supreme Court's specific recount order. As we have repeatedly been told by its defenders and apologists, this was a Court that prefers to act cau-

<sup>59</sup> Never mind that the large and unwieldy issues about fair administration of the actual voting that the Court preferred to postpone for another day were inextricably intertwined with the supposed equal protection issues surrounding the recount. Fairness in a recount is meaningful, after all, only when the recount could determine the outcome of an election that is fair overall. Given the majority's clumsy willingness to amputate essential issues from the case, it is perhaps no surprise that the reasoning in the *per curiam* opinion displays all the deftness of surgery performed not with a scalpel but with a meat cleaver.

tiously and gradually, not one that legislates crudely from the bench. Self-servingly professing their unmatched admiration for democratic government *of, by, and for* the people, the majority Justices lamented the heavy burden of their “unsought responsibility” to decide the controversial case of *Bush v. Gore*.<sup>60</sup>

Could anyone truly have been convinced by such crocodile tears? To me, the remedial path taken by the Court was and remains embarrassingly indefensible. Although I do not believe its decision was consciously an exercise in raw partisan politics, it should come as no surprise that a great many observers, including many to whom such a conclusion did not come easily, believed that the Court’s majority had simply handed the presidency to its favored candidate. Given the very considerable likelihood that Bush would have won a statewide recount under the December 8 process anyway,<sup>61</sup> the Court could at least have minimized the widespread perception that it was engaging in judicial politics if it had let the political process determine the final result when Congress met to count the electoral votes on January 6, 2001.

The Supreme Court had insisted on just such an approach when it considered the closest Senate election in Indiana history. In *Roudebush v. Hartke*, the Court forbade a federal district court from shutting down a state manual recount process (on federal constitutional grounds) once a challenger had properly invoked the state’s laws to contest the certification of his opponent.<sup>62</sup> Recognizing that a contested election certification was but a midpoint in an ongoing electoral process, the Court in *Roudebush* chose to allow that process to run its course: “A recount is an integral part of the...electoral process and is within the ambit of the broad powers delegated to the States.”<sup>63</sup>

The *Bush v. Gore* Court might have taken a similar path by denying *certiorari*—or by granting review but then denying relief based on the

<sup>60</sup> 531 U.S. 98, 111 (2000) (*per curiam*).

<sup>61</sup> After-the-fact studies have now confirmed what many people suspected at the time: even under the recount specifically ordered by the Florida Supreme Court, it is quite likely that Bush would have in any event “won” by almost 500 votes. See Ford Fessenden and John M. Broder, “Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote,” *New York Times*, November 12, 2001, at A1. But see Martin Merzer, *The Miami Herald Report: Democracy Held Hostage* (New York: St. Martin’s Press, 2001) (arguing that Gore would have won a statewide recount under the Florida Supreme Court’s “intent of the voter” standard but that Bush would have won under more detailed substandards).

<sup>62</sup> 405 U.S. 15, 25 (1972).

<sup>63</sup> *Ibid.*

political question doctrine.<sup>64</sup> After all, the Twelfth Amendment,<sup>65</sup> supported by the 1887 Electoral Count Act, is most naturally read as textually committing to Congress the power to resolve disputes over the validity of state electoral slates in presidential elections. This textual commitment should at the very least have cautioned the Court against any heavy-handed judicial resolution, especially a resolution that cut short an ongoing political process whose constitutional defects, if any, were hardly self-evident. The Twelfth Amendment's delegation to Congress was the last stop in the Constitution's deliberately contemplated electoral process that, rather than being derailed by the Supreme Court at the first sign of potential trouble, should instead have caused the Court to give Congress the "respect due coordinate branches of government."<sup>66</sup>

It's not as though the Justices in the majority were unaware that they were effectively bypassing Congress. Justice Stephen Breyer's dissent, for example, called attention to the fact that the Constitution explicitly left to Congress disputes over the legitimacy of competing slates of electoral votes.<sup>67</sup> This deliberate choice was anticipated by James Madison, who, addressing the Constitutional Convention in 1787, dismissed the possibility that the Federal Judiciary would play any role at all in the selection of the president as simply "out of the question."<sup>68</sup> But neither the Court's *per curiam* opinion nor the Chief Justice's concurrence addressed the issue.

Of course, the political question doctrine does not exclude the Court from *all* disputes arising from impending, ongoing, or recently concluded presidential elections.<sup>69</sup> It's easy in hindsight to hypothesize

<sup>64</sup> For background on the political question doctrine, see Laurence H. Tribe, *American Constitutional Law*, vol. 1, § 3-13, 3d ed. (New York: Foundation Press, 2000).

<sup>65</sup> *U.S. Const.* amend. XII ("The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted...").

<sup>66</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>67</sup> 531 U.S. at 153-54.

<sup>68</sup> James Madison, speech at the Federal Convention (July 25, 1787), in *Five Debates on the Adoption of the Federal Constitution*, ed. Jonathan Elliot (Salem, N.H.: Ayer Publishing Co., 1987), pp. 363-65.

<sup>69</sup> Compare *McPherson v. Blacker* 146 U.S. 1 (1892), where the Court concluded that a *pre-election* challenge to Michigan's proposed congressional-district-based system for choosing presidential electors did not present a "political question" and was therefore justiciable. It's especially worth noting that no congressional mechanism existed for resolving, in advance of a particular election, generic questions about the constitutionality of a state legislature's choice of method for selecting presidential electors—the judiciary was the only branch that *could* settle the *McPherson* dispute in a timely way.



facts under which no plausible “political question” argument could be marshaled against the Court’s intervention in *Bush v. Gore*. For instance, had the Florida Supreme Court on December 8 decreed that “under-votes shall be counted only in precincts where whites constitute at least 75% of all registered voters,” then waiting hopefully for the political process in Congress to correct the error later on would undoubtedly have been wrong.<sup>70</sup> Or, if the Florida court had said, “It’s clear that the electoral process put in place by our state legislature prior to the election has resulted in a victory for Governor Bush, but we don’t much like Texans, so we hereby declare the Gore slate to have been duly selected on November 7,” then it would have been obvious that the Florida court’s decision violated Article II of the Constitution, and the Court would no doubt have perceived no “political question” obstacle to so holding.

The reason the Florida Supreme Court action under review in the U.S. Supreme Court in *Bush v. Gore* was in no way analogous to either of these outlandish hypothetical rulings is that those rulings would have fallen so far outside any recognizable range of constitutionally plausible actions that none of the traditional concerns presented by the political question doctrine would have counseled tolerating judicial abstention, and there would have been a compelling case in each of the imagined pair of instances for the most expeditious possible action to set aside the undeniable offense to the Constitution. But nothing about the recount actually ordered by the Florida Supreme Court on December 8 even came *close* to either of those instances of facial discrimination based on race or political identity—especially when one took into account the massive inequalities in voting methods and machinery from county to county that constituted part of the backdrop in *Bush v. Gore*.

If the recount procedure initiated by the Florida court was constitutionally flawed, it was not by virtue of any disregard for or dilution of any discrete set of votes, and hence not by virtue of anything remotely resembling a violation of any *individual’s* rights to one rather than another decision process. In terms of *Marbury v. Madison’s* classic if imperfect dichotomy between (1) matters that are deemed justiciable because they revolve around the legally cognizable rights and entitlements of persons and (2) matters that are deemed nonjusticiably political because

<sup>70</sup> The “textual commitment” and “judicially manageable standards” branches of the classic *Baker v. Carr* formulation blend in such cases: the Fourteenth Amendment’s prohibition of discrimination undercuts the political branches’ claim to plenary authority over electoral procedures, while firmly established equal protection doctrine provides clear standards against which courts can measure state conduct said to be racially discriminatory.

they do not implicate such rights,<sup>71</sup> *Bush v. Gore* seems to fit far more comfortably on the political side of that divide than would either of the hypothetical cases posited here. In addition, treating the question presented by *Bush v. Gore* as justiciable—at least given the Court’s holding that December 12 was a deadline rather than just a safe harbor and that no further ballot-counting would be allowed—meant bringing the political process to a *halt*, whereas treating either of the hypothesized rulings as posing a justiciable question would have meant nothing of the kind, a difference that ought also to have cut against a holding of justiciability in *Bush v. Gore*.

Some have speculated that the *Bush v. Gore* Court’s apparent lack of interest in the obstacle that the political question doctrine posed to the Court’s intervention in the election of 2000 can be explained—and perhaps even defended—on the basis that the Justices in the majority sincerely, if misguidedly, found themselves persuaded by the equal protection argument that the Florida Supreme Court’s remedy violated the well-established principle of one-person, one-vote.<sup>72</sup> And, given *Baker v. Carr*’s holding that one-person, one-vote claims are generally justiciable, *Bush v. Gore* arguably presented just the sort of equal protection claim that the Court has so often found resolvable by “judicially manageable standards.” But this rationale for judicial intervention leaves the political question doctrine with too little bite, making it defensible for the courts to step in any time they fervently believe a litigant has made a plausible claim that a state actor’s behavior is constitutionally irregular in some judicially measurable and remediable way. While the manner in which the litigant has chosen to frame a constitutional issue is surely relevant to deciding whether or not a court may properly intervene, simply looking at the structure and rhetoric of the arguments appearing in the briefs risks perpetuating legal categorization as Kabuki and confusing litigation strategy with statecraft.

The analysis I would apply in finding the claim pressed in *Bush v. Gore* to be nonjusticiably political, or at the very least not ripe for federal judicial intervention, draws support in part from the approach advocated by Justice Souter in his concurrence in *Nixon v. United States*.<sup>73</sup> In

<sup>71</sup> *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 169–70 (1803).

<sup>72</sup> See Sanford Levinson and Earnest A. Young, “The Law of Presidential Elections: Issues in the Wake of Florida 2000: Who’s Afraid of the Twelfth Amendment?” *Florida State University Law Review* 29 (2001): 963–64.

<sup>73</sup> 506 U.S. 224, 252–54 (1993) (Souter, J. concurring).

*Nixon*, Chief Justice Rehnquist's opinion for the Court held that the Senate had the sole and unreviewable authority to define appropriate procedures for impeachment trials of federal judges. Although the Court spoke as though it could never review the meaning given by the Senate to the word "trial" in the context of impeachment,<sup>74</sup> it seems unlikely to me that the Court really meant to go quite that far, and quite certain that it ought not to have done so. I would hope the Court meant only that the Senate had not strayed beyond the broad but nonetheless bounded range of constitutional interpretations that could be considered acceptable, given the Constitution's textual commitment to the Senate of the sole power to try impeachments and given the threat to its own legitimacy that would inhere in the Court's taking an actively supervisory role in overseeing the impeachment of federal judges (including Supreme Court Justices). After all, the question whether the Senate has accorded an impeached judge the benefit of a procedure that deserves to be considered a "trial" (as the Constitution's Impeachment Trial Clause uses the term "try") seems closer to the "implicating-the-rights-of-individuals" end of the spectrum than to the "involving-only-structural-arrangements" end. The intrusion of a layer of judicial review into the impeachment process—even a quite thin layer, one not capable of being activated except in extraordinary cases—would necessarily affect the balance of power between the Article III branch and the Article I branch (especially, but not exclusively, when the impeached official is a judge). It is worth stressing, however, that such judicial review would be triggered only by the concrete need to defend the rights of a specific impeached individual from an alleged abuse of power in attacking that individual's public office, livelihood, reputation, and future opportunities—not by the far more abstract virtue (if it is a virtue at all) of ensuring that the Court's reading of the Constitution trumps that of every other branch. The Senate's "sole" power to decide what constitutes an impeachment "trial" differs in this important respect from, say, the president's power to decide whether to veto a particular bill passed by Congress, whether on constitutional grounds or otherwise. If that is so, then—as Justice Souter suggested in *Nixon*—a federal court might properly intervene if the Senate were about to conduct what no one could even plausibly call a "trial" (e.g., determining guilt by flipping a coin), or if the "trial" it were about to hold would offend some clearly

<sup>74</sup> "The Senate shall have the sole Power to try all Impeachments," Art. I § 3, cl. 6.

applicable constitutional norm (e.g., if the Senate were to announce in advance that it would convict any impeached judge who happened to be Hispanic or Jewish).<sup>75</sup> So long as the Senate's procedures were at least arguably a "trial," however, they wouldn't clearly offend any such norm.

In effect, I would use the political question doctrine to denote the existence of a perhaps unusually wide range of choices—for the Senate in "trying" cases of impeachment, just as for the states and, ultimately, for Congress in creating procedures to settle presidential election contests—so that a strong but not irrebuttable presumption of constitutionality (and, thus, of judicial noninvolvement) would attach to actions within that wide range taken by the constitutionally proper political branch, particularly when such actions are merely intermediate steps in an ongoing political process—steps that cannot plausibly be said to effectuate a sacrifice of anyone's constitutional rights incapable of being corrected within the process itself. Admittedly, whether a particular government action is both so beyond the pale and so irreparable as to trigger judicial intervention under the test entails at least a threshold decision on the merits and invariably requires a judgment call or two. But they are not judgment calls without structure: the judicial reticence I favor is akin to the latitude that the Marshall Court in *McCulloch v. Maryland*<sup>76</sup> accorded Congress in determining the necessity and propriety of measures rationally related to its delegated functions and, not incidentally, the very opposite of the strict scrutiny the Rehnquist Court has applied to Congress in the exercise of its affirmative powers, especially under Section 5 of the Fourteenth Amendment, an area of constitutional doctrine to which we shall turn momentarily.

This conception of the political question doctrine bears little direct resemblance to the seemingly absolutist version too literalistically<sup>77</sup> extrapolated by some from the early formulation by Chief Justice John Marshall in *Marbury v. Madison*.<sup>78</sup> It rests on a more contextual under-

<sup>75</sup> *Nixon*, 506 U.S. at 253–54 (Souter, J., concurring in the judgment) ("If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was simply 'a bad guy,' judicial interference might well be appropriate"; internal citation omitted).

<sup>76</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>77</sup> See, for example, Nelson Lund, "Equal Protection, My Ass!?" *Bush v. Gore* and Laurence Tribe's Hall of Mirrors," *Constitutional Commentary* 19 (2003): 543.

<sup>78</sup> See *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 170 (1803) ("Questions in their nature political... can never be made in this court").

standing of political nonjusticiability that, in an important class of instances—those in which invoking the “political question” label operates not as a *de facto* ruling on the merits against the claimant but as a remand of the matter to an ongoing or impending political process<sup>79</sup>—is akin to nonjusticiability for want of ripeness or for failure to exhaust available remedies. This view obviously places central emphasis on the existence of a relevantly functioning political process and on the strength of whatever claims that process may make to be given first crack at correcting whatever constitutional objection has been raised. Indeed, what I have been referring to as the political question doctrine might more aptly be called the political *process* doctrine.<sup>80</sup>

To understand why I find the political question cases to be more about *protecting political processes* than about *avoiding political questions*, consider the historical development of the doctrine: it wasn't until *Baker v. Carr* that the Court treated as justiciable the question whether equal protection norms governed the ground rules under which an election for members of a representative legislative chamber was about to take place.<sup>81</sup> The Court later extended *Baker's* reasoning to reach primary elections, as well as claims of racial and political gerrymandering.<sup>82</sup> Two characteristics were present in most of these cases: first, the challenged state actor seems always to have violated some relatively clear constitutional command; and second, none of the cases involved an ongoing political process that was recognized in the Constitution's institutional design and that was capable of reviewing and resolving disputes so as to vindicate the constitutional values at stake. When the constitutional violation has been less clear, and when there has been a process in place fully capable of resolving the dispute in question and vindicating the right at stake in a timely manner, what I am calling the political process doctrine has properly operated to deny, or at least postpone, judicial review.

<sup>79</sup> *Nixon v. United States*, 506 U.S. 224 (1993), of course, is not such a case.

<sup>80</sup> I first thought of this formulation in Tribe, “The Unbearable Wrongness of *Bush v. Gore*.”

<sup>81</sup> *Baker v. Carr*, 369 U.S. 186, 226–28 (1962).

<sup>82</sup> See *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (exercising judicial review over an Ohio statute regulating the presidential primary process); *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) (finding justiciable equal protection claims based on “purely political” gerrymandering allegations but holding that “bipartisan” gerrymandering did not run afoul of the Fourteenth Amendment); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (finding redistricting that harms the voting strength of racial groups presented a justiciable question).

Consider, for example, the Court's unanimous decision in *Grove v. Emison*.<sup>83</sup> There two challenges to the redistricting of Minnesota's state legislative and federal congressional districts were proceeding simultaneously in state and in federal court. Redistricting plans emerged from both the federal and state suits, and the federal district court sought to enjoin enforcement of the state-initiated plan. The Court, speaking through Justice Scalia, held that the federal courts should have abstained while the state process ran its course.<sup>84</sup> His opinion explained that, "[i]n the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself."<sup>85</sup> The Court concluded that, "[a]bsent evidence that these state branches will fail timely to perform [their] duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it."<sup>86</sup> The case for federal judicial abstention would obviously have been even stronger if the Constitution had assigned to Congress a backup role in deciding which of several competing districting schemes to accept for a state's legislature or for its congressional districts.

Contrast Justice Scalia's opinion in *Grove*, where no such role for Congress existed,<sup>87</sup> with the concurring opinion he wrote to explain the *Bush v. Gore* Court's grant of a stay halting the recounting of votes on December 9, 2000, and one will find it hard to believe that the two opinions were penned by the same hand. To "[c]ount first, and rule upon legality afterwards," Justice Scalia wrote without so much as a bow to the fact that the counting was to be done by state and federal bodies also sworn to uphold the Constitution, "is not a recipe for producing election results that have the public acceptance democratic stability requires."<sup>88</sup>

<sup>83</sup> 507 U.S. 25 (1993).

<sup>84</sup> *Ibid.* at 32 (citing *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 501 n. 1 [1941]).

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.* at 34.

<sup>87</sup> See *Powell v. McCormack*, 395 U.S. 486 (1969) holding that the U.S. House of Representatives of the 90th Congress had no constitutional authority to exclude a congressional election winner from taking his seat because the House has no authority to deny membership to any person lawfully elected by his or her district).

<sup>88</sup> *Bush v. Gore*, 531 U.S. 1046, 1046–47 (2000) (Scalia, J., concurring).

“Public acceptance”? Evidently it was no longer enough that the relevant branches both of state government and of the federal government were poised “timely to perform [their] duty” under the Constitution;<sup>89</sup> it was required as well that the Court be able confidently to project a level of “public acceptance” that it deemed sufficient for the matter at hand. Where, one is bound to wonder, do doubts about the wisdom of judicial displacement of democratic processes for vindicating constitutional norms—and about the bearing of such displacement on “the public acceptance democratic stability” and legitimacy that both require—enter into the Court’s calculus? When, a skeptic might go on to ask, did the Court’s willingness to intervene in constitutional matters come to depend upon its intuition about the public’s comfort level with the lawful operation of statutes passed by a democratically elected branch of government, backed up by a constitutionally specified safeguard in Congress for instances of malfunction? And since when, the same skeptic might wonder, has the Supreme Court made it its business to determine that a still-running state process was simply *bound* to run afoul—or to be *perceived* to run afoul—of constitutional guarantees that it had not yet had time to violate, let alone correct?

These are not merely rhetorical questions. On the contrary, the reasoning in cases like *Grove* and *Roudebush* seems to apply perfectly to a dispute over which ballots to count in the midst of a presidential election. Once Florida’s election machinery had begun to grind away—a particular moment in time specified by the state’s election code—a process had been put in motion that was not set to conclude until all the requirements of state and federal law had been exhausted. Usually, once the political switch has been flipped to the “on” position in a given election, it is that political machinery to which the process of micro-management in accord with constitutional standards is and should be entrusted. Unless it is demonstrable that the process itself is structured, or is predictably set to operate, in such a way that the political branches cannot be trusted to abide by applicable constitutional norms, so that some impermissible form of exclusion or dilution in an identifiable individual’s or group’s rights of political participation is likely to take place without adequate opportunity for timely correction within the process itself, the case for intervention by the federal judiciary is weak indeed.

<sup>89</sup> *Grove v. Emison*, 507 U.S. 25, 34 (1993).

Yet, as we all know, the *Bush v. Gore* majority did not trust the political process to “self-correct”—even though it was a process that empowered a neutral magistrate to address allegedly unjustifiable disparities among the various approaches in play for visually translating ballots into votes; a process that would have allowed the Florida Legislature to certify its own slate of electors had the count plainly gone awry; and a process that, had all else gone wrong, ensured that Congress would determine the legitimate winner of the election within a matter of months, presumably on January 6.

As we shall see in the second of these lectures, the Supreme Court has been quite willing to trust the political process when the underlying substantive issue has involved such matters as the detention of individuals deemed by government to be “security threats” or the validity of legislation that broadly delegates to the president the functional equivalent of the congressional power to declare war. Why, when the structure and operation of a purely political process was at issue with fundamentally *no* individual “rights” at stake, was the Court so distrustful and thus dismissive both of the state judicial and legislative processes underway and of the prospective deliberations of Congress? Why were the Justices so obviously distraught by the prospect of officeholders from the local to the national level, from state voting officials and state court judges to state legislators to members of the U.S. House and Senate, actually *looking* at the ballots, interpreting them, and recording the resulting votes, all in accord with a state process that had been in place since well before the election?

One has to suppose that, as the Justices watched the predictably inconclusive eyeball-to-ballot mind-reading exercise entailed in manually counting the undervotes, they imagined more of the same for days on end and then an ensuing melee in the halls of Congress—and simply recoiled in horror. This wasn’t some inconsequential dispute over the lines to be drawn around the suburbs of Athens, Georgia, or Minneapolis/St. Paul; this was about the selection of the next president of the United States, the most powerful person on the planet. And for this Court, subjectivity, intuition, and the heated give and take of politics were sources of unwanted and unseemly discord in the solemn and orderly process that they thought befitted the selection of the nation’s president. Justice Scalia’s opinion concurring in the Court’s December 9 decision to stay the recount was indeed quite candid about what might otherwise have been the Court’s unspoken fear: The whole distasteful process, he as



much as said, would cast a cloud over the inauguration of the next president, and perhaps on his entire presidency.<sup>90</sup> The opinion expressing that concern was signed only by Justice Scalia, but it is difficult not to read it as voicing the principal worry that drove the other four Justices in the December 12 *Bush v. Gore* majority as well.<sup>91</sup>

I see this underlying aversion to unruly political process as the larger meaning of the Court's seemingly irresistible urge to intervene—to stop the music that threatened to muffle or garble the familiar, comforting strains of “Hail to the Chief,” overriding the cadenced majesty of its ruffles and flourishes with the cacophony of the Sex Pistols or the Rolling Stones. Or, to change the medium, the Court was saying that under our Constitution the presidency calls for something by Jan Vermeer or possibly Piet Mondrian, not by Vincent Van Gogh or Joan Miró. But, if one might gently ask, just who are these (or any) five Justices to tell “We the People of the United States”<sup>92</sup> that the grass-roots, ground-level workings of representative democracy are too messy, too unruly to tolerate—despite the language of the Twelfth Amendment and the evidence of our constitutional tradition, eloquently captured in James Madison's speech before the Constitutional Convention? Why, they are the Justices of the *Supreme Court of the United States*, that's who—the Justices whose word on all things constitutional is *infallible* because it is *final*.<sup>93</sup> I can't resist quoting Carl Dennis, the 2001 Pulitzer Prize winner for poetry, who wonders:

Is this America, land of one man, one vote,  
I want to ask, or the China of one-man rule,  
Of emperors who believe they're gods?<sup>94</sup>

I'm afraid the answer, on issues that our Supreme Court is able to address, is closer to the latter than it is to the former, although it's more properly described not as “one-man” rule but as “four-man-and-one-woman rule.” And these mortals rule, to borrow from Carl Dennis again,

<sup>90</sup> See *Bush v. Gore*, 531 U.S. 1046, 1046–47 (2000) (Scalia, J., concurring) (“Count first, and rule upon legality afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires”).

<sup>91</sup> Those four were Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas.

<sup>92</sup> Oh, all right: “*Us* the people of the United States.” But see Preamble, U.S. Const.

<sup>93</sup> Cf. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) (“We are not final because we are infallible, but we are infallible only because we are final”).

<sup>94</sup> Carl Dennis, *Practical Gods* (New York: Penguin Poets, 2001), p. 38 (“Numbers”).

...on the basis of a cool appearance,  
 Good form, good show, and neglect[] the soul...<sup>95</sup>

Sadly, *Bush v. Gore* is not unique, or even altogether distinctive, in displaying that mix of self-assured, even self-important imperiousness and self-congratulatory disdain for the roles and views of all others in the constitutional firmament. It may help to think of the five-member majority as a fastidious, five-headed T. S. Eliot—not the Eliot of J. Alfred Prufrock’s “Love Song” who has “heard the mermaids singing, each to each,” but the T. S. Eliot of *The Four Quartets*.

The *First Quartet*—call it “irregula-phobia”—represents aversion to even the *appearance* of discord or disorder. Its mirror image is an obsession with surface regularity, to be contrasted with the presence of ripples or waves in the phenomena entering the Court’s frame of reference. This is a syndrome that doesn’t take very well to the rough and tumble of democracy—a system of governance that often tends to be sloppy and inefficient.<sup>96</sup> It’s also a syndrome that helps explain the Supreme Court’s predilection for preserving the two-party system as well as the Court’s sensitivities to the geometry of electoral district boundaries. With respect to the former, the Court has repeatedly upheld state laws restricting the associational autonomy of minority political groups, and the free speech rights of individual voters, in the name of two-party “stability.”<sup>97</sup> The hegemony of the two dominant political parties, the Court has supposed, is a central element of preserving order and preventing chaos in an otherwise unruly political system. Meanwhile, when reviewing congressional districts drawn to achieve representation of racial minorities, the Court has made the conspicuous irregularity of any given district’s shape a key factor in finding the district’s boundaries unconstitutional and in effect forcing the drafters to use better computer modeling software.<sup>98</sup> Although the Court has moved away from the idea that

<sup>95</sup> Ibid. at 34 (“Audience”).

<sup>96</sup> Professor Richard H. Pildes has elsewhere noted this trend. See Richard H. Pildes, “Democracy and Disorder,” *University of Chicago Law Review* 68 (2001): 704.

<sup>97</sup> See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 369–70 (1997) (upholding a state law banning “fusion” candidacies—through which two smaller parties could aggregate voting power by nominating the same candidate—on the argument that such laws were reasonably deemed necessary to preserve the stability of the two-party system and “temper the destabilizing effects of party-splintering and excessive factionalism”); *Burdick v. Takushi*, 504 U.S. 428 (1992) (upholding against a First Amendment challenge a state prohibition on write-in voting in order to prevent “chaos” and instability in the political process).

<sup>98</sup> See *Shaw v. Reno*, 509 U.S. 630 (1993).

an uncouth district shape is dispositive evidence of unconstitutionality, it seems obvious that the obsession with an appearance of neatness and order remains central to this Court's conception of a properly functioning democracy.<sup>99</sup>

The *Second Quartet*—call it “structuraphobia” or “structural myopia”—is an inability (or a studied unwillingness) to see very far behind or beneath the surface of complex political phenomena. To wit: If two similar-looking ballots might get counted in two different ways, something is presumptively amiss. Never mind that a dimple on the ballot's line for president next to two punched-through holes on the same ballot's lines for senator and representative in Congress may indicate something altogether different from a dimple next to one other dimpled chad; that many far more significant differences in the way voters register their preferences from one county to the next lie beneath the surface; or that differences in how two ballots get counted might simply reflect crude but not wholly unreasonable attempts to offset such background differences in voting machinery. None of that matters to the current Court. A ballot is a ballot. And, as we have seen, the Constitution apparently commands: “one-ballot, one-vote.”

This is hardly a new phenomenon. In the redistricting cases to which I referred a moment earlier, this structural myopia has led to a doctrine under which legislators drawing district lines may compose districts based on “political considerations” that take advantage of the generally understood contemporary correlation between race and party affiliation, or race and class, even if this has the effect of generating districts with a decidedly racial feel. What legislators may *not* do is use the *r* word (for “race”) when drawing these districts—race cannot be the “predominant” factor in districting plans, as if the attempt to dissect and quantitatively apportion motive were a coherent exercise.<sup>100</sup> Structural myopia of a sort seems likewise to explain the Supreme Court's inability to perceive a fundamental flaw inhering in the death penalty in America, despite the overwhelming evidence that blacks who kill whites are seven

<sup>99</sup> See, e.g., *Hunt v. Cromartie*, 526 U.S. 541, 548 n. 3 (1999) (reaffirming *Shaw's* holding that the bizarre shape of a district can sometimes be so irregular as to create a presumption that the district was drawn in an effort to segregate voters illegally).

<sup>100</sup> See *Easley v. Cromartie*, 532 U.S. 234, 249 (2001) (“After all, the Constitution does not place an affirmative obligation upon the legislature to avoid creating districts that turn out to be heavily, even majority, minority. It simply imposes an obligation not to create such districts for predominantly racial, as opposed to political or traditional, districting motivations”).

to ten times more likely to be put to death than are whites who kill blacks.<sup>101</sup> It was also this syndrome that led the Court to find no state responsibility in a case where a father beat his infant son into a coma under the close periodic supervision of state social workers, who meticulously recorded every bruise on the child but did nothing to stop the father's brutality.<sup>102</sup>

The *Third Quartet* is what I would call "asymmetriphobia" or a tropism toward "remedial symmetry"—a simplistic, one-dimensional sense of how remedies are to correspond to rights. In the context of the Florida election, if voting machines had malfunctioned, the "symmetrical" solution would be simply to fix the machines; if voters were unable to adapt to the voting machines' idiosyncrasies, it would be fine simply to disregard the "spoiled" votes that they insisted on casting. The solution more sensitive to the asymmetrical character of human behavior and its infinite variability, its stubborn resistance to systematization—actually *looking* at the ballots—is evidently too creative, too complex, too vulnerable to all the ills that flesh is heir to, to fit the Court's reigning remedial paradigm.

Most recently, evidence of this obsession with tidy, symmetrical remedies emerged in *State Farm Mutual Automobile Ins. Co. v. Campbell*.<sup>103</sup> Despite the lack of any textual, structural, or historical hook on which to hang its hat, the *Campbell* Court invented a presumptively maximum threshold "ratio" (of punitive damages measured against compensatory damages) that state courts must use when assessing the constitutionality of punitive damage awards. What ratio did the Court suggest was appropriate? A ratio of no greater than 9:1 absent bodily harm, or 1:1 if

<sup>101</sup> *McCleskey v. Kemp*, 481 U.S. 279 (1987). The Court found no demonstrable discriminatory intent driving the death penalty system and concluded that it was, therefore, sufficiently neutral to escape heightened scrutiny. The *McCleskey* majority effectively treated the system as a black box that just happened to produce an unfortunate result; it was unwilling to investigate what structural causes might drive that outcome.

<sup>102</sup> Then-Justice Rehnquist's opinion for the majority included the awkward aside that "judges, . . . like other humans," feel pity and sympathy for "poor Joshua," but insisted that the state had played no part in actually beating the child and thus could not be held responsible. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 202 (1989). Literally true though that observation was, its logic blinked at the reality that the state's laws and institutions had, in effect, curved the legal space around Joshua by regulating the relevant custody arrangements and by channeling child-abuse reporting to state agencies so that, when the state failed in its responsibilities to protect him, Joshua was to some degree isolated from private aid that, absent the state's involvement, might otherwise have come to him. See Laurence H. Tribe, "The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics," *Harvard Law Review* 103 (1989): 9–13.

<sup>103</sup> No. 01-1289 (U.S. April 7, 2003).

substantial compensatory damages are awarded. Why prefer that nearly numerological lodestar to a purposive inquiry into the level of punitive damages reasonably thought necessary to deter the wrongful conduct at issue, given the wrongdoer's expected gain from that conduct in the event it succeeds in its mission, discounted by the probability of getting caught and successfully sued for compensatory damages? Why not, in other words, match the ratio to the desired incentive effect? Why, perfect symmetry, of course—the great appeal of 1:1!<sup>104</sup>

Why, then, hasn't this symmetry-centered Court tackled the problem of police obtaining involuntary confessions, for instance, by simply ruling coerced confessions inadmissible at trial? Can there be any justification, in a symmetrical world, for requiring the prophylactic *Miranda* warnings and excluding from the evidence admissible at trial potentially *voluntary* confessions obtained without such warnings or a suitable waiver?<sup>105</sup> The answer lies with the *Fourth Quartet*—which one might call “contradictiphobia” or “interpretive exclusivity.” This brings us back to the fact that the current Court takes its finality literally, believing that it deserves to have the last word in any argument relating to the Constitution and treating views contradicting its own as bordering on gross insubordination. Thus, Chief Justice Rehnquist's opinion for the Court in *Dickerson v. United States*<sup>106</sup> struck down a congressional statute passed in 1968<sup>107</sup> not because its endorsement of a simple voluntariness test for the admissibility of all confessions necessarily violated the Constitution as the Rehnquist Court understood it, but simply because the statute contradicted *what the Court had said* in a voice it meant to be *taken* as the voice of the Constitution. Right or wrong, Chief Justice Rehnquist insisted for the Court, Chief Justice Earl Warren and his

<sup>104</sup> Why not, for instance, uphold a ratio of just over 50:1 where the conduct causing a compensable injury of \$X is predicted to yield the wrongdoer a profit of at least \$10.2X each time it succeeds (for a net gain of \$9.2X after compensatory damages are paid), and where the expected frequency of being detected and sued successfully would be predicted *ex ante* at around 1/5 (so that the wrongdoer would anticipate netting at least \$10.2X on each of the four times he was *not* successfully sued—for a net gain of \$40.8X in the aggregate—plus \$9.2X on the one time he *was* successfully sued, for a total expected gain of \$50X or more, which the punitive damages award should be calibrated to more than offset)? Candor compels me to confess that I argued *State Farm v. Campbell* for the losing side, that of the respondents.

<sup>105</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966) (ruling inadmissible any statements made by the accused in response to custodial interrogation unless the police first give the accused specific warnings informing the suspect of his or her constitutional rights).

<sup>106</sup> 530 U.S. 428 (2000).

<sup>107</sup> 18 U.S.C. § 3501.

colleagues in the *Miranda* majority had spoken *ex cathedra*, in a special, *constitutional voice* that Congress dare not question or contradict. Thus Chief Justice Rehnquist's opinion variously asserted that *Miranda* was a "constitutional decision," that the Warren Court "thought it was announcing a constitutional rule," and that the "conclusion in *Miranda* is constitutionally based."<sup>108</sup> So the Court struck down § 3501 on the authority of *Miranda* itself, not on the authority of the Constitution. Only after having thus dispatched Congress's dissenting voice was the Court prepared to ask whether *it* should revisit *Miranda*'s correctness as an original matter—something the Court declined to do, treating *Miranda* as both too nearly harmless (given earlier decisions cutting it down to size) and too much a part of the "national culture" to warrant reexamination.<sup>109</sup>

Though I'd long hoped that the *Miranda* warnings would be upheld, I could not bring myself to be happy with *Dickerson* as I made my way through the opinion. The constitutionality of the congressional statute purporting to overrule *Miranda* was an issue of critical importance—both in terms of the meaning of the Fifth Amendment and in terms of the relationship between Congress and the Court with respect to judicially created prophylactic rules. There were strong arguments both in favor of upholding<sup>110</sup> and in favor of overruling<sup>111</sup> *Miranda*. That the

<sup>108</sup> *Dickerson*, 530 U.S. at 438, 439, 440.

<sup>109</sup> 530 U.S. at 442, 443–44.

<sup>110</sup> Michael Dorf and Barry Friedman suggest that *Dickerson* was an easy case because § 3501 flouted the Fifth Amendment doctrine developed by the *Miranda* Court. Because Congress had resurrected the pre-*Miranda* "voluntariness" standard in a way that would not guarantee that the government would "inform suspects of their right to remain silent and to safeguard that right throughout the interrogation," § 3501 could not measure up to the *Miranda* Court's "invitation to other constitutional actors to fashion equally effective safeguards for Fifth Amendment rights." Michael C. Dorf and Barry Friedman, "Shared Constitutional Interpretation," *Supreme Court Review* 2000 (2000): 62. And while they recognize *Dickerson* as an example of the Court's "frequent resort to ipse dixit," they apparently see no problem with the Court's impatience with "tampering by other actors with *what the Court views* as constitutional bedrock," in part because the Court continued to hold forth the option for other political actors to develop measures that guarantee the same protection afforded by the original *Miranda* warnings. *Ibid.* at 70, 63 (emphasis added). See also *Dickerson*, 530 U.S. at 442. My discomfort with *Dickerson*, however, does not arise from doubts about the appropriateness of "prophylactic" protections for constitutional rights, which I regard as entirely appropriate, *contra* 530 U.S. at 457–60 (Scalia, J., dissenting). The problem with *Dickerson* is, as I explain below, that the majority did not make a serious argument based on the Constitution for requiring the warnings in the face of Congress's legislatively expressed conclusion that the Court had been wrong in *Miranda* to hold as it did.

<sup>111</sup> Justice Scalia's heated dissent, joined by Justice Thomas, argued that the Court was presented with a binary choice: either the precise holding of *Miranda* was required by the Fifth Amendment—a conclusion that would invalidate most of the Court's subsequent ju-

Court settled on Chief Justice Rehnquist's opinion in *Dickerson* was thus particularly troubling. Having given the back of its hand to an allegedly co-equal, coordinate branch of the national government, the *Dickerson* majority considered the constitutional underpinnings for the *Miranda* rule itself only as an apparent afterthought, ultimately deciding not to re-examine that landmark decision of the Warren Court for the underwhelming reason that we Americans have grown accustomed to seeing the routine warnings every night on television. At bottom, it seemed more important to the majority of the Rehnquist Court that it not be *contradicted* than that the constitutional question be *correctly* answered. That the Court's less conservative members (Justices Stevens, Souter, Ruth Bader Ginsburg, and Breyer) joined the Chief Justice's opinion in full suggests *either* that they favored retaining the *Miranda* rule more than they opposed the majority opinion's embrace of a tone more in keeping with the Oracle at Delphi or perhaps the Wizard of Oz than with the tribunal co-equal with Congress and that the Chief Justice made his vote dependent on the four moderates going along with his opinion as written *or* that they needed no arm-twisting because they found the Chief's premise of interpretive exclusivity entirely unremarkable.

I fear the latter was the more likely reason, and I take as my "Exhibit A" the irritatingly self-important tone of the otherwise altogether praiseworthy opinion of the Court's plurality (Justices O'Connor, Kennedy, and Souter) in *Planned Parenthood of Pennsylvania v. Casey*,<sup>112</sup> reaffirming a woman's right to choose whether or not to have an abortion. The Justices announced that, the Court's special voice having already called the nation together in *Roe v. Wade*<sup>113</sup> to resolve a deep national dispute, the nation simply could not afford the spectacle of a Supreme Court visibly retreating "under pressure" from so truly momentous a precedent twenty years later, lest the Court's credibility to speak for the Constitution be jeopardized, leaving the rule of law itself in tatters.<sup>114</sup> If

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risprudence limiting *Miranda*'s reach—or, as most post-*Miranda* cases had argued, the warning requirement was but a prophylactic measure designed to overprotect the accused's Fifth Amendment rights—a measure that served but was not required by the Constitution, and one that accordingly could be overruled by Congress. Justice Scalia insisted that constitutional prophylaxis was not a legitimate technique for exercising judicial power, and he showed particular disdain for the majority's reliance on *stare decisis* to uphold a decision in whose reasoning the majority apparently no longer believed. See *Dickerson*, 530 U.S. at 445–65 (Scalia, J., dissenting).

<sup>112</sup> 505 U.S. 833 (1992).

<sup>113</sup> 410 U.S. 113 (1973).

<sup>114</sup> 505 U.S. at 866–69.

even the mild-mannered, modest, nearly self-effacing Justice Souter was willing to pen (or join) those words, one can readily imagine Justices Stevens, Ginsburg, and Breyer being in accord as well—which could help explain their position in *Dickerson*. It takes a remarkably un-self-conscious assumption of primacy and exclusivity to equate one’s particular institution—or even one’s branch of the national government—with “the rule of law.”<sup>115</sup> Even when I agree with the result reached by an institution with such pretensions, as I did in *Casey* as well as in *Dickerson*, that posture and the premise it embodies disturb me deeply.

The alternative I would propose certainly is not to overrule John Marshall’s declaration in *Marbury v. Madison*<sup>116</sup> that the Court has to “say what the law is in the course of deciding a case before it, and that this duty sometimes entails holding that an Act of Congress, of the Chief Executive, or of a state, violates the Constitution as the Court understands it.”<sup>117</sup> My alternative is a more genuine and extended dialogue, in which the Court says “what the law is” but does so in a manner that leaves room for a range of other plausible interpretations by other constitutional actors, taking into account, among other things, the differing institutional roles, capacities, and limitations each such actor brings to the enterprise of construing and enforcing the Constitution. Thus, the holding I would adopt in *Dickerson* would *not* say that the *Miranda* warnings became a constitutional requirement by virtue of the Court simply saying so; nor did they become so merely as a result of being around for a long while. In my view, *Miranda* deserved to be defended by reasoning from the purpose and structure of the Fifth Amendment’s protections, not merely allowed to survive because “the warnings have become part of our national culture.”<sup>118</sup> And both Congress and the course of constitutional conversation itself deserved to have the Court engage its sister branch on the plane of a dialogue among equals rather than on the plane of “dicemus, ergo est.”

Rather than engaging in such a polycentric dialogue with the politi-

<sup>115</sup> Justice Scalia’s impassioned dissent decried the Court’s self-image as the head of an “Imperial Judiciary.” *Casey*, 505 U.S. at 996. But Justice Scalia has hardly been a consistent opponent of the Court’s pretensions to supreme and unchallengeable constitutional authority—witness his role in *Bush v. Gore* and his agreement with the majority opinions in the recent decisions discussed below, which rejected Congress’s power to interpret the Constitution for itself in the course of enforcing the Fourteenth Amendment under Section 5.

<sup>116</sup> 1 Cranch (5 U.S.) 137, 170 (1803).

<sup>117</sup> 5 U.S. 137, 177 (1803).

<sup>118</sup> 530 U.S. at 443.



cal branches of government, the Court has chosen a hegemonic path. Held in the sway of its own sense of importance, too confident of its own unfailing wisdom, and lacking in any real respect for congressional interpretations of the Constitution, the current Court has struck down important (and, in my view, entirely constitutional) pieces of congressional legislation reasonably designed to enforce the Fourteenth Amendment—Section 5 legislation aimed at protecting the elderly,<sup>119</sup> the disabled,<sup>120</sup> and battered women,<sup>121</sup> and legislation giving a broader meaning to religious liberty than the Court had recently given.<sup>122</sup> The Court has taken up this crusade, it seems, mostly in an effort to strike down any congressional effort to broaden the scope of protection accorded to substantive constitutional rights. Justice Kennedy's opinion striking down the 1993 Religious Freedom Restoration Act (RFRA) was emphatic in its pronouncement of the Supreme Court's exclusive role as the primary, secondary, and final arbiter of constitutional meaning:

The design of the [Fourteenth] Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.<sup>123</sup>

<sup>119</sup> *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (holding that the Age Discrimination and Employment Act [ADEA] did not abrogate state sovereign immunity inasmuch as the statute was not authorized by § 5 of the Fourteenth Amendment).

<sup>120</sup> *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (ruling that the Americans with Disabilities Act [ADA] did not abrogate state sovereign immunity since the statute was not authorized by § 5 of the Fourteenth Amendment).

<sup>121</sup> *U.S. v. Morrison*, 529 U.S. 598 (2000) (invalidating portions of the Violence against Women Act as beyond congressional power under the Commerce Clause and § 5 of the Fourteenth Amendment).

<sup>122</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act as unconstitutional because Congress lacked authority to define the scope of Fourteenth Amendment protections differently from the Supreme Court). A study by the Congressional Research Service classified several occasions on which Congress had given more expansive protections to religious liberty than what the Court had decided was required by the Constitution. This appears to present an interesting counterexample to the general assumption that the only truly important task of the judiciary is to protect individuals from oppression at the hands of legislative majorities. See Louis Fisher, "Congressional Checks on the Judiciary," *Congressional Research Service*, April 29, 1997, at 17, 25, 26 (discussing *Goldman v. Weinberger*, 475 U.S. 503 [1986], *Employment Division v. Smith*, 494 U.S. 872 [1990], RFRA, and *Boerne*).

<sup>123</sup> *Boerne*, 521 U.S. at 519.

There is another way the Court might have approached what Congress did in the RFRA. Recall that the dispute in *Boerne* concerned the limits of Congress's power to enforce the substance of the Fourteenth Amendment through the amendment's enforcement clause, Section 5, which empowers Congress to effectuate the guarantees of the amendment through "appropriate legislation."<sup>124</sup> The Court's holding in *Boerne* denied any role for Congress in determining *what* it could enforce; legislation would be an appropriate exercise of congressional power only if it responded in a "congruent and proportional" manner to patterns of state action recognized *by the Court* as constitutional violations. This interpretation baldly asserts judicial exclusivity where it is neither constitutionally required nor pragmatically justified. As then-professor Michael McConnell argued before his appointment to the federal judiciary, Congress is not bound by the same institutional constraints—primarily the constraints of federalism and those imposed by the dilemma of countermajoritarianism—that the Court faces when interpreting a substantive constitutional command.<sup>125</sup> To put it another way, the Court's reluctance to intrude upon the political judgments of democratically accountable institutions has no relevance when Congress, itself the quintessentially representative political body, makes political decisions about the best way to go about legislatively protecting various constitutional rights. It seems perverse to invoke the Court's most common response to requests that it adopt prophylactic remedies or protections that move beyond the minimum floor guaranteed by the Constitution—to wit, that adopting such protections would usurp the uniquely legislative policymaking function—as an argument to invalidate, rather than to defer to, duly enacted congressional legislation. Even if one believes that only the Court can legitimately purport to *define* the content of a substantive right—a proposition I would not accept—there is nothing in the Fourteenth Amendment to suggest that Congress "was expected to be limited to *enforcing* judicially decreed conceptions of those rights."<sup>126</sup>

Beyond this institutional point, it seems bizarre that anyone at this late date should continue to insist upon the existence of one, and *only* one, acceptable understanding of each constitutional provision. I have

<sup>124</sup> U.S. Const. amend. XIV § 5.

<sup>125</sup> See Michael W. McConnell, "Comment: Institutions and Interpretation: A Critique of *City of Boerne v. Flores*," *Harvard Law Review* 111 (1997): 156, 177.

<sup>126</sup> *Ibid.*, at 181 (emphasis added).

long thought that it makes no “sense to speak of *the* meaning of a given constitutional provision; one may instead have to talk of a *set of plausible meanings*, with a different subset corresponding to each of the key legal institutions empowered to ascribe meaning to the provision for purposes peculiar to that legal institution’s work.”<sup>127</sup> Thus “free exercise of religion” may have one meaning when the concept is being interpreted by the courts as applied to particular state action without the benefit of Section 5 legislation on point—in such a case, one analyzes the Free Clause Exercise (and, in a case involving state rather than federal action, the Due Process Clause) in order to confirm or deny that the challenged state action runs afoul of those provisions. But when Congress is enacting legislation aimed at protecting a nationwide aggregation of free exercise rights, the view of the constitutional provisions at issue must come from a bit farther away—much more like viewing a constellation through a hovering telescope than like peering at a DNA cluster through an electron microscope. That two coordinate branches do not share exactly the same vision of what a constitutional provision or cluster of provisions means need not dangerously destabilize the Constitution; such dissensus may in fact aid in the deliberative process that strengthens our comprehension of constitutional text, history, and structure.<sup>128</sup> Given the scope of Congress’s view, it makes perfect sense for “appropriate legislation” to err on the side of overinclusion, just as it might equally make sense for such legislation to opt for underinclusion, depending upon the priorities and perspectives of a given legislature.

This approach leaves ample room for judicial review of congressional interpretations of substantive constitutional rights: What I have said does not imply that *all* legislation purporting to “enforce” various Fourteenth Amendment rights would be constitutional. Some congressional

<sup>127</sup> Laurence H. Tribe, *American Constitutional Law*, 3d ed. (N.Y.: Foundation Press, 2000), § 5–16, p. 961 (emphasis added).

<sup>128</sup> See Jack Balkin, “The Proliferation of Legal Truth,” Yale Law School Public Law & Legal Theory Research Paper Series, No. 38, available at <http://papers.ssrn.com/abstract=383400> (forthcoming *Harvard Journal of Law & Public Policy* 2003). Balkin argues that the proliferation of legal truth

exists easily alongside legal disagreement and legal dissensus. Legal truth persists through historical changes in legal conventions and legal structures. Legal indeterminacy does not attenuate law’s conquest of the imagination. If anything, it may enhance it, by encouraging discussion about the meaning of laws and about the right answers to legal questions. Legal indeterminacy can actually proliferate law’s power by spurring people to think, talk, contest, and argue using legal frameworks, legal concepts, and legal terms.

interpretations of substantive rights would be so outlandish, or in such obvious conflict with other provisions of the Constitution, that they could not be considered “appropriate” under Section 5. But much legislation will fall within the permissible range of constitutional interpretations reasonably open to Congress as a representative branch of government. I believe that RFRA, for instance, did just that and, because it also did not violate any of the constraints imposed by the Bill of Rights or elsewhere in the Constitution,<sup>129</sup> it should have been upheld.

My vision of the Court’s appropriate role in a democracy is one that emphasizes pluralism and respect for coordinate branches of government. It is one “in which the order the [*Bush v. Gore*] Court sought by *avoiding* politics is instead the *work* of politics, in which order is earned rather than decreed.”<sup>130</sup> And it is one that regards the long, windy, and messy political process—put in motion by Florida’s election law and set to be concluded by the Twelfth Amendment and the Electoral Count Act—as a desirable, albeit imperfect, form of democratic decisionmaking rather than as evidence of a fatal oversight by the Framers.

It should be clear by now that I see *Bush v. Gore* as a revealing (and, in that sense, a valuable) symptom of deep flaws in the current Court’s entire outlook, not as a partisan maneuver designed simply to install the Court’s favored candidate in the White House. The Court’s decision was not lawless; it was just deeply misguided. Some of its most articulate defenders concede that the Court’s analysis was weak and that, from a standard legal perspective, it failed. But they argue that the Court’s actions were nonetheless defensible—even laudable—from a pragmatic perspective.<sup>131</sup> “Look at the man-hours we saved,” they say, “of peering at ballots in an election where the margin of error was greater than the margin of victory, and where the ‘truth’ about who won will always elude us. The most important priority was simply to get it over with.”

That approach rings false to me. It flies in the face of what all of the opinions, and thus all nine Justices, said in *Bush v. Gore*—that each vote counts. It contradicts what the United States and the United Kingdom have long said around the world about free and fair elections. And it fails to consider the incalculably high costs of alienating and disaffect-

<sup>129</sup> But see Jed Rubenfeld, “Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional,” *Michigan Law Review* 95 (1997): 2347.

<sup>130</sup> Tribe, “*eroG .v hsuB*,” at 291 (emphasis added).

<sup>131</sup> Here I have in mind, in particular, Judge Richard Posner of the 7th Circuit Court of Appeals, who defended the Court’s decision in his 2001 book, *Breaking the Deadlock*.

ing present and future citizens rather than encouraging their engagement and participation in the project of self-government. The utilitarian argument certainly doesn't explain why deciding *Bush v. Gore* the way the Court did was any better than, say, flipping a coin—an option that might at least have spared the Constitution the injury of a strained and ultimately untenable construction and saved the Court from whatever shame was cast by a legal opinion that doesn't parse.

Another variant of the argument borrows the melody of a romantic idealism. To sing that tune, one works up to the unexpected conclusion that it was the very prospect of such disgrace in the court of history that gave *Bush v. Gore* its saving note of grace. According to this offbeat little song, the Court “took a bullet” to save the country, to avert the deep constitutional crisis that awaited the nation unless some voice of apparent reason were to intervene to halt the chaos into which the Florida Supreme Court's supposedly partisan machinations were plunging us. By offsetting the Florida court's ostensibly unprincipled venture into the political thicket with an admittedly unprincipled but bravely decisive move of its own, the *Bush v. Gore* majority did what the nation's highest interests, if not its Constitution, demanded. And by expressly limiting their holding to “the present circumstances,” the Justices in the majority—while drawing still more fire from academics who insist that everything the Court does must be “principled”—managed to limit the precedential effects of this extraordinary rescue mission and thereby stalled our perilous slide down this slippery slope. By rising *above* and moving *outside* the Constitution, a heroic romantic would say, the Court performed its high-wire act within a constitutional “black hole” so that, when it returned to *terra firma* bloodied but unbowed, it bore the badge of one who has committed a heroic act of civil disobedience.

But acts of civil disobedience—from Socrates to Martin Luther King, Jr., to those who trespassed at military installations during the Vietnam War—are heroic because those who commit them are willing to take their punishment for having violated just laws in the pursuit of a greater good. They get themselves arrested and they get convicted. The five members of the *per curiam* opinion, in contrast, received no punishment at all. The Court's overall reputation, although taking a temporary hit, has probably survived pretty much intact<sup>132</sup> despite the outrage

<sup>132</sup> See Levinson and Young, “The Law of Presidential Elections,” at 965 n. 162 (discussing polling results showing that public perception of the Court has almost returned to its pre-*Bush v. Gore* status).

on the left, among many moderates, and across the legal profession. The Court took no bullet; the gun was never even loaded.

Perhaps more importantly, *Bush v. Gore* involved no genuine crisis. The Twelfth Amendment and the 1887 Electoral Count Act created a workable system for Congress to resolve the impasse. Florida's legislature stood by, ready to act if the Florida Supreme Court could not clean things up itself. Literally thousands of party activists, lawyers, and concerned citizens stood by to monitor the process. Unlike the political processes it trusted in *Grove v. Emison* and in *Roudebush v. Hartke*, this process evidently seemed too messy for the *Bush v. Gore* Court. But, as we have seen, the Florida Supreme Court was not off on a lawless rampage. What it did was in entirely plausible accord with the statutes passed by the Florida Legislature. On this last point in particular, *Bush v. Gore*'s defenders employ a transparent double standard. Commentators like Richard Posner and Robert Bork defend the legally questionable actions of the U.S. Supreme Court on pragmatic grounds, but they refuse to apply the same pragmatism to the Florida courts.<sup>133</sup> If pragmatism and heroism are relevant here, they should be knives that cut both ways.

In the end, it seems to me that *Bush v. Gore* was therefore an utterly indefensible decision—not just legally speaking but at every level—and not an aberration, sadly, but a dramatic demonstration of the heroic pretension with which the Court too often acts these days and of the Court's disdain for Congress and for the untidy workings of democracy. And yet, as obvious as much of this criticism seemed in the months after *Bush v. Gore*, the transparent flimsiness of the rationale cast in terms of ostensibly selfless, crisis-motivated intervention was not fully visible until almost a year later—when nineteen hijackers, armed first with box-cutters and then with screaming commercial airliners, showed all of us the true meaning of crisis. Endowed with the enriched perspective that only tragedy can bring, surely all of us ought to be able to see now that *Bush v. Gore* involved no real exigency; no national call-to-arms; indeed, no crisis at all. And two years after *Bush v. Gore*, we're left to wonder where our heroic Judiciary, committed to do what it thinks right even at the cost of doctrinally unsatisfying and much-criticized inter-

<sup>133</sup> I should note that I do not believe the Florida court's actions need to be defended by resorting to any extralegal pragmatism—it seems to me that the Florida court did exactly the right thing *legally*. Since only three Justices found fault with how the Florida Supreme Court interpreted Florida law, it appears that six Justices of the U.S. Supreme Court in the end agreed.

vention, has gone. For in the face of a *genuine* crisis that threatens the lives of our people and the fundamental security of our nation—and in the face of responses by the political branches that threaten the most central of our cherished constitutional protections—the Federal Judiciary has, for the most part, fallen silent. To listen to the sounds of that silence—and to explore both what it means in conjunction with the judicial hubris exposed most starkly by *Bush v. Gore* and how, if at all, that silence should be broken—is the aim of the second of these lectures.

## II. THE IMPERIAL EXECUTIVE?: ABDICATION OF REVIEW BY CONGRESS AND THE JUDICIARY IN TIMES OF “WAR”

In the weeks following the tragic events of September 11, 2001, more than a few otherwise sober, thoughtful people became accustomed to saying in one form or another: “This changes everything. Nothing will ever be the same again.” Indeed, 9/11 was no ordinary Jerusalem bus bomb or IRA-sponsored London car bombing. September 11 was this generation’s Pearl Harbor. But it was worse, because it was magnified, amplified, repackaged, and reproduced through the most potent channels of our modern media. The bone-chilling images of screaming jets crashing into the two great towers have been burned into our memories—seared into our senses along with the feeling of abject terror and utter helplessness that overtook nearly all who watched that day’s horror unfold. And the conspicuous ease with which the terrorists used crude, low-technology box-cutters to bring down an unmistakable symbol of Western influence and prosperity revealed a haunting, asymmetrical inversion of power that no one can soon forget. In the weeks after 9/11, our government issued a number of warnings and continued to reveal more hidden threats; day by day, we learned just how close the terrorists had come to leveling some of our most cherished symbols of government power as well. It was only then that we began to understand just how vulnerable we truly were.

For many, the brute force of September 11 shoved aside any memory they may have had of *Bush v. Gore*—a decision whose painfully clear legal flaws many of those same people had initially regarded as bearing importantly on the very legitimacy of the entire Bush presidency. For most of those (not all, of course, but most) to whom a “president”

installed by a legally indefensible 5–4 vote of a judicial tribunal was a mere pretender to the throne of executive power, September 11 seemed to bury the question of legitimacy beneath the smoldering ruins that were once the twin towers of the World Trade Center. For many such observers, it wasn't the votes counted by the Congress on January 6, 2001, or the swearing-in of George W. Bush as the forty-third president on January 21 of that year, that gave legitimacy to his leadership of the nation. For them, his presidency was legitimated the moment he stood at the wreckage of the towers speaking through a bullhorn and yelled: "I can hear *you!*"

Yet some people still cling to the notion that George W. Bush is an illegitimate, even illegal, president. On the eve of the second Iraq War, days after the Ides of March, Professor Jack Balkin of Yale Law School wrote that this "is a war of choice...made by George W. Bush and his advisers. All this might be bearable if a president clearly and legitimately elected had taken us into war. But many Americans, myself included, do not believe that Bush legitimately won the election. We believe, and continue to believe, that the election that brought him to power was stolen."<sup>34</sup> I sympathize but disagree. Before turning to the policies initiated by the Bush administration in response to 9/11, I want first to speak, therefore, to those who think that Bush was *not* legitimately the president of the United States when he was sworn into office after literally, as specified by both Article II and the Twelfth Amendment, becoming president upon receiving 271 electoral votes when Congress counted those votes on January 6. The point may be insultingly obvious, but it bears recalling that the only other candidate for president remaining in contention on that date was Vice President Al Gore, who formally conceded defeat on December 13, 2000. And even if one thinks that Gore's concession, being tainted by the Supreme Court decision that alone precipitated it, failed to legitimate Bush's presidency, a number of reasons remain to reject the claim that *Bush v. Gore* made George W. Bush an "illegal" president.

First, if the *Bush v. Gore* Court had concluded that the equal protection problems with the recount procedure put in place by the Florida Supreme Court might yet be cured in a timely way by a revised procedure crafted and implemented by that court and that there was no

<sup>34</sup> Jack M. Balkin, "A Great Gamble by a Man Many Don't Trust," *Hartford Courant*, March 18, 2003, p. A15.



December 12 “deadline” in place to prevent that process from going forward,<sup>135</sup> the Court would in essence have allowed the political process, albeit slightly edited, to run its course. Vice President Gore would then have had to entertain objections to the slate of Bush electors presented by Florida’s secretary of state when he presided over the joint session of Congress to count the electoral votes on January 6. Assuming Gore had pursued that path, it seems almost certain that the House, then in Republican hands, would have voted for the slate of twenty-five Bush electors certified from Florida on November 26 even if the recount process had yielded a competing slate of twenty-five Gore electors—itsself anything but a certainty. Assuming straight party-line voting, the Senate would have probably split down the middle. In such a case, Gore, exercising the vice president’s only constitutionally delegated power—that of breaking the tie when the Senate is “equally divided”<sup>136</sup>—would presumably (although again by no means certainly) have voted for the slate of twenty-five Gore electors. In that circumstance, however, the Electoral Count Act of 1887 specifies that the slate of electors certified by the chief executive of the state in dispute shall prevail. Conveniently enough, that would have been the slate certified by Florida’s Governor Jeb Bush, whose brother George W. would then have become president.<sup>137</sup>

Indeed, if the Supreme Court *had decided not to intervene at all*—either by declining to review the Florida court’s December 8 decision ordering a statewide manual recount of the “undervotes” or by taking the case up but then holding *either* that the equal protection and Article II claims were without merit *or* that none of the alleged problems with Florida’s methods for selecting presidential electors was of such a constitutional character as to render the challenge justiciably nonpolitical—we would have been led back to the same result. For, again assuming that further counting (this time, under the initial December 8 Florida Supreme Court decision) would have produced a slate of twenty-five electors for Gore, the 1887 rules governing the process in Congress would still have given the presidency to Bush.

<sup>135</sup> That position was espoused by the two dissenting Justices who argued that equal protection concerns counseled such a revision, Justices Souter and Breyer. See *Bush v. Gore*, 531 U.S. 98, 129–30 (Souter, J., dissenting); *ibid.* at 155–57 (Breyer, J., dissenting).

<sup>136</sup> U.S. Const. Art. I, § 3, cl. 3.

<sup>137</sup> I am assuming for present purposes that the Electoral Count Act itself was constitutional, or at least that neither Bush nor Gore would have been disposed to launch a constitutional challenge to the practice of adhering to its criteria.

Some who press the argument that Bush is not lawfully president deny that Congress would have been forced to choose between slates for Gore and Bush had the Florida Supreme Court's recount gone through and produced a Gore victory. If Gore had won the Florida vote after that recount, he could have asked the very same Florida court that had ordered the recount to issue injunctions against the governor of Florida to prevent him from signing a prematurely designated slate of electors and against Florida's Secretary of State Katherine Harris to prevent her from submitting the November 26 Bush certificates to Congress. But at *that* point, it seems clear that the U.S. Supreme Court would have had ample constitutional authority to set aside any such state court injunction. Ironically, the more strongly one holds to the view that the Supreme Court's actual decision in *Bush v. Gore* was a misguided resolution of a "political question" entrusted to Congress by the Twelfth Amendment, the clearer it becomes that, in the case just hypothesized, the U.S. Supreme Court would have had jurisdiction to prevent any state judge or other official from obstructing Congress's ability to decide that "political question" for itself. Whether Bush's 537-vote lead or the hypothetical Gore lead produced by a manual recount was real was a question for *Congress* to decide. Again, the scenario would end with a House/Senate split, with the rules of the 1887 Electoral Count Act breaking the deadlock in favor of Bush.

Finally, for one who may not find arguments predicated on any of these counterfactual scenarios particularly persuasive, it is worth pausing to recognize that *every* claim to the effect that Bush's presidency is illegal or illegitimate depends upon the existence of some world in which Vice President Gore would have won the popular vote in Florida. But it is by no means clear that any such world existed or would have been brought into being even without intervention from the Supreme Court. A consortium of leading news organizations, including the *New York Times*, was scheduled to release, during the third week of September 2001, the results of the meticulous nine-month study these organizations had undertaken to recount all of Florida's uncounted presidential ballots. After 9/11, the *Times* announced that the question suddenly seemed "utterly irrelevant" and was "on hold indefinitely."<sup>138</sup> Although many Americans seemed to agree, the results of the study ultimately

<sup>138</sup> Richard L. Berke, "Aftermath: It's Not a Time for Party, But for How Long?" *New York Times*, September 23, 2001, § 4, p. 3.

were released—and, as almost anybody could have guessed several million dollars earlier, they proved inconclusive. The best guess seems to be that, if the recount were conducted with the relaxed standards advocated by Gore, *Bush* would have won, while under the stricter standard sought by Bush, *Gore* would have won!<sup>139</sup>

In a deep sense, it seems to me that the consortium results *were* irrelevant, but not because September 11 had intervened. If anything, the events of September 11 make the constitutional functioning of representative government more “relevant” than ever. What was, and remains, at stake is not who “really won” in Florida. That question is perhaps as close to unanswerable in ordinary life—for those of us who don’t dabble daily in quantum mechanics—as what the Heisenberg Uncertainty Principle puts permanently beyond our ken if we seek to measure phenomena like location and velocity simultaneously. Exactly how many people should be counted as having “intended” to mark their ballots for Gore depends, of course, on how we define an “intended mark.” Not only is there unlikely to be any single definition that can encompass all the potential variations in the observable marks we might find on millions of ballots, but the very act of inspecting and handling those ballots could well alter their appearance, thus retroactively changing the voter’s apparent expression of “intent.” So we might well end up changing the very thing we are studying merely by trying to observe it. That is why I’ve framed the key question to ask now *not* as the question of who truly “won” the election in Florida, much less as the question of who “should” have become president, but rather as the question of what to infer from the role the U.S. Supreme Court chose to play in that contest—what to infer about that Court and its relation to, and view of, the Constitution. And whether we think of the lessons of *Bush v. Gore* in terms of *Four Quartets* or—perhaps more appropriately—as a four-faceted prism that defines the current Court’s constitutional window on the world, we owe a debt of gratitude to the Court for having, however inadvertently, opened that window wide enough for all of us to see what lies within.

A good bit of what that window has exposed to view has been a dismissive, nearly contemptuous, attitude toward Congress in particular—an attitude that seems almost contagious, if the responses of the Executive Branch to the terrorist attacks of September 11 are taken as

<sup>139</sup> See Fessenden and Broder, “Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote,” p. A1. See also note 61 above.

indicative. To make matters worse, this shared judicial and executive disregard for Congress is joined by a Herculean pretension—a belief in one’s own unique and heroic role in history coupled with an absence of constitutional self-doubt. This pretension, in times of military or quasi-military crisis, seems to be transferred or projected, either intentionally or subconsciously, from those who wear gold stripes to adorn the sleeves of their judicial robes to those who display gold stars on their military lapels. It is this phenomenon to which we now turn.

The wheels of American retribution began churning just hours after the terrorist attacks of September 11, 2001. Speaking to Vice President Dick Cheney, President Bush is reported to have said: “We’re going to find out who did this and kick their asses.”<sup>140</sup> Give the president an “A” for effort—there is no question that the Bush presidency has, since 9/11, been engaged in an all-encompassing butt-kicking crusade against terror. The administration unleashed the lethal force of the American military first in Afghanistan and then in Iraq; it has consolidated and enhanced the surveillance and information analysis powers of several government agencies; it has detained thousands of named and unnamed suspects—some as prisoners of war, some on charges ranging from immigration violations to conspiracy to commit acts of terror, some on no charges at all—and has restricted dramatically the scope of legal protections traditionally available to such detainees.<sup>141</sup> And, complicating all efforts to document and study the Bush administration’s war on terrorism, almost all of these actions have been planned, initiated, and implemented from behind a wall of secrecy not seen since the Cold War.

Targets of the president’s “war” on terror have flocked to the courts hoping to receive protection under a variety of constitutional provisions. There has been a diverse array of both claims and claimants in these suits. Viewing these claims alongside the unilateral actions of the Executive Branch reveals several disturbing trends. First among these is the willingness of the Executive Branch to restrict, and the reluctance of the Federal Judiciary to resist the restriction of, the jurisdiction of Article III courts to hear claims challenging the executive detention of individuals labeled as suspected terrorists or terrorist collaborators. Related

<sup>140</sup> See Roy Denman, “Blair Fails to Bond Britain to Europe or the U.S.,” *International Herald Tribune*, March 28, 2003, p. 9.

<sup>141</sup> For an excellent overview of the post-September 11 activities of the Bush administration, see Stephen J. Schulhofer, *The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties in the Wake of September 11* (New York: Century Foundation Press, 2002).

to this jurisdictional assertion is the Executive's substantive claim of lawful (even if unreviewable) power to detain indefinitely all suspected terrorists, without any of the legal protections traditionally afforded to all detainees, under the theory (to be discussed shortly) that the suspects, being "unlawful combatants," fall between the stools of criminal justice and military justice and, as a result, aren't eligible for protection under either domestic or international law.

Second, Congress and the Judiciary have all but rubber-stamped the Executive's consolidation and expansion of domestic and international surveillance powers and (for the most part) have uncritically accepted the government's power to erect a wall of secrecy around its terrorism-related actions—a wall that shields the entire branch from external criticism.

Third, whether by inaction or by habitual practice, the Executive has been ceded the power to define the beginning, duration, and end of our current state of "war." This power has allowed the Executive to place our nation in a perpetual state of crisis—justifying all of the incursions on civil liberties and rights that we normally associate with a formal declaration of war by Congress—without any well-defined or objectively identifiable set of enemies, any definitive or measurable goals, or even so much as a rough timetable for completion. I will address each of these concerns in turn.

### I. EXECUTIVE DETENTIONS AND THE CLOSING OF THE ARTICLE III COURTS

A week after September 11, the president signed a law containing almost precisely the terms he had proposed to Congress, authorizing "the President...to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the [September 11, 2001] terrorist attacks..., or harbored such organizations or persons, in order to prevent any future facts of international terrorism against the United States by such nations, organizations, or persons."<sup>142</sup> This resolution was considerably more restrictive than the resolution the president had originally sought.

<sup>142</sup> Authorization for Use of Military Force, Pub. L. 107-40 (S.J. Res. 23), 107th Cong., 115 Stat. 224, § 2 (a) (2001).

That original resolution would have authorized the use of force to respond to any parties responsible for September 11, but it also would have permitted the president “to deter and pre-empt any future acts of terrorism against the United States.”<sup>143</sup> Many members of Congress balked at anything close to a declaration of war, and at that time Congress simply refused to give the president a blank check to pursue the Al Qaeda Brigades, Hezbollah, Saddam Hussein, and any nation, group, or individual that the president might see as a terrorist threat. Had Congress acquiesced in the president’s original request, “the President might never again have had to seek congressional authorization for the use of force to combat terrorism”<sup>144</sup>

Undeterred by this minor setback, the president used the scaled-back resolution as a springboard to promulgate and implement a variety of measures designed to track down, capture, and imprison or execute every member or supporter of terrorist networks around the world. The Bush administration has defended each of its chosen measures by citing sweeping claims of executive authority deriving from the president’s power as commander-in-chief of the armed forces. Issued under a military decree of November 2001, the first measure states that any non-U.S. citizen whom the president deems to be a terrorist or to have aided and abetted terrorists will be a candidate for trial before a system of military tribunals, created *not* by congressional legislation but by a single executive order issued by the president.<sup>145</sup> The Bush administration complemented its military tribunal order with its decision to hold U.S. citizens in indefinite military incarceration whenever the Executive Branch asserts that those citizens are “enemy combatants”—an elastic category evidently encompassing both those actively warring against

<sup>143</sup> Draft Joint Resolution Authorizing the Use of Force, cited in David Abramowitz, “The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force against International Terrorism,” *Harvard International Law Journal* 43 (Winter 2002): 73 and n. 7.

<sup>144</sup> Abramowitz, “The President, the Congress, and Use of Force,” at 73. The president eventually won congressional approval of a specific authorization of the use of force against Iraq. See Authorization for Use of Military Force against Iraq Resolution of 2002, Pub. L. No. 107-243 (H.J. Res. 114), 107th Cong., 116 Stat. 1498, § 3, authorizing the president to use the “Armed Forces of the United States as he determines necessary and appropriate in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.”

<sup>145</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism §§ 2(a), 3(a), 4(b), 66 Fed. Reg. 57,833 (November 13, 2001) (hereinafter Military Order).

American troops on foreign battlefields<sup>146</sup> and those apprehended on peaceful U.S. territory and suspected of secretly plotting with terrorist groups to attack U.S. civilians without ever displaying their military colors.<sup>147</sup> Tightening its grip even further, the administration has attempted to deny to those it incarcerates any right to consult counsel or to challenge in any court the veracity of the allegations identifying their enemy status.<sup>148</sup>

The Bush administration has packaged these responses to 9/11 in a way that situates U.S. policy in a twilight zone somewhere between criminal law and the law of war. The administration plainly believes that the United States is in a state of war despite the absence of a congressional declaration to that effect.<sup>149</sup> This belief has led the government to embrace an *inter arma silent leges* (in war the laws are silent)

<sup>146</sup> One example of this type of detention was the government's holding of Yasser Esam Hamdi. See *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003). Allied military forces seized Hamdi, an American citizen, in Afghanistan during the military campaign against the Taliban. The secretary of defense designated Hamdi an "enemy combatant" and shipped him to a detention facility in Guantanamo Bay, Cuba. When it was discovered that Hamdi was an American citizen, he was transferred to the Norfolk Naval Brig for detention. *Ibid.* at 461. I will discuss below the implications of the 4th Circuit's holding in *Hamdi* that such detentions are both constitutionally permissible and statutorily authorized by the Congressional Use of Force Resolution because, in the court's words, "capturing and detaining enemy combatants is an inherent part of warfare; the 'necessary and appropriate force' referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops." *Ibid.* at 467.

<sup>147</sup> The most obvious example to date of this type of detention is the government's decision to hold Jose Padilla, an American citizen captured in the United States and detained for allegedly plotting with al-Qaeda to detonate a "dirty bomb" of radioactive materials on American soil. See *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

<sup>148</sup> See, e.g., *Padilla v. Rumsfeld*, 2003 U.S. Dist. LEXIS 3471 (S.D.N.Y. March 11, 2003), at \*14–18. The government's arguments against granting Padilla access to counsel were particularly revealing of our current interrogation strategy. Noting that Padilla had been detained without counsel for over seven months, the government feared that "[p]roviding him access to counsel now would create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process. This would break—possibly irreparably—the sense of dependency and trust that the interrogators are attempting to create." *Ibid.* at \*17. See also *Padilla v. Bush*, 233 F. Supp. 2d 564, 599 (S.D.N.Y. 2002) (articulating the government's argument against access to counsel). Most recently, the government has sought to block access to material witnesses in the civilian trial of the alleged twentieth hijacker, Zacarias Moussaoui, on the ground that giving Moussaoui access to witnesses it deems "sensitive" would disrupt military interrogations and other actions needed during a time of war. See Patricia Davis and Jerry Markon, "U.S. Secrecy Criticized by Moussaoui Judge," *Washington Post*, April 5, 2003, p. A09.

<sup>149</sup> For an argument that 9/11 triggered an immediate state of war that required no congressional resolution, see J. Gregory Sidak, "The Price of Experience: The Constitution after September 11, 2001," *Constitutional Commentary* 19 (Spring 2002): 53 (arguing that the attacks of 9/11 "immediately placed the United States at war, without any declaration of war by Congress being necessary for the President to exercise all available constitutional powers as Commander-in-Chief"). As I will explain later, I do not subscribe to this view.

rationale to justify military intervention, bombing campaigns, extraordinary budgetary measures, and the detention of thousands of prisoners of “war” absent any of the traditional protections afforded to domestic detainees under criminal law.<sup>150</sup> At the same time, this “war” is being fought against subnational groups of belligerents—groups lacking a recognized government and lacking a leader with whom we can negotiate terms capable of ending hostilities. Because our enemies don’t fit within the traditional framework of war among nation states recognized by international law—they don’t wear uniforms or dog tags, and they don’t serve in the type of military structure recognized by the Geneva Conventions—the government has declared these suspects “unlawful combatants,” thus stripping them of all the classical protections available to, say, captured enemy soldiers under the laws of war. The result is what David Luban has described as a “hybrid law-war approach,” an approach that “treat[s] terrorists as though they embody the most dangerous aspects of both warriors and criminals.”<sup>151</sup> The combination of this approach with an aggressive policy of preemptive military intervention has in turn entrenched “a kind of heads-I-win-tails-you-lose international morality in which whatever it takes to reduce American risk, no matter what the cost to others, turns out to be justified.”<sup>152</sup>

The administration’s law-war approach to terrorism is best revealed by the policies it has developed governing the detention and prosecution of those individuals thought to be connected in some way to September 11. The administration’s first step was to detain about 1,200 foreign nationals—some on immigration charges, some on criminal charges, and many on no specific charges at all—in a glorified fishing expedition that the government has since admitted “produced only a handful of charges on minor criminal violations.”<sup>153</sup> Citing entirely vague and facially implausible national security concerns, the government has refused to release the detainees’ names or the locations at which they are being held.<sup>154</sup> Adding to its immigration detainees, the

<sup>150</sup> See, e.g., Jerry Markon, “U.S. Tries to Block Access to Witness for Terror Trial,” *Washington Post*, April 2, 2003, p. A07.

<sup>151</sup> David Luban, “The War on Terrorism and the End of Human Rights,” *Philosophy & Public Policy Quarterly* 22 (Summer 2002): 12.

<sup>152</sup> *Ibid.*

<sup>153</sup> Edward Alden and Caroline Daniel, “Battle Lines Blurred as U.S. Searches for Enemies in the War on Terrorism,” *Financial Times*, January 2, 2003, p. 11.

<sup>154</sup> See Schulhofer, *The Enemy Within*, p. 11 (noting that 548 unnamed individuals remained in custody as of November 2001, 460 in January 2002, and over 100 as of July 2002).



government detained and transferred to Guantanamo Bay, Cuba, over 600 prisoners taken from the battlefields of Afghanistan. Because the Taliban and al-Qaeda soldiers wore no uniforms or traditional military insignia, the government refused to classify them as prisoners of war; it has instead insisted that these prisoners are “unlawful enemy combatants,” not subject to the laws of war or the U.S. Constitution. The government has refused to release, or grant judicial hearings to, any detainee it deems to pose a national security risk.<sup>155</sup>

To provide a no-risk fallback method of adjudicating the guilt of these detainees, the president issued an Executive Order establishing a system of military tribunals on November 13, 2001. The Department of Defense issued regulations clarifying and narrowing the scope of the order in March 2002.<sup>156</sup> Those regulations addressed some of the concerns critics initially voiced, but, for the most part, the core of the Executive Order has survived intact.<sup>157</sup> The tribunals remain empowered and indeed directed to detain indefinitely, and are given exclusive jurisdiction to try, any non-U.S. citizen “for violations of the laws of war and other applicable laws”<sup>158</sup> relevant to any past or future “acts of international terrorism”<sup>159</sup>—a vastly broader category than that reached by either of the congressional authorizations of the use of force. Not literally *any* non-U.S. citizen may be tried by these tribunals; the defendant must be a noncitizen as to whom the president asserts in writing that he possesses “reasonable grounds to suspect” some connection with “international terrorism”—a phrase so vague that it provides the president with almost complete flexibility to use military tribunals at will.<sup>160</sup> Although the president has yet to invoke his tribunals to try any of the

<sup>155</sup> The D.C. Circuit recently refused to interrupt the administration’s policy. See *Odab v. United States*, No. 02-5251, 2003 U.S. App. LEXIS 4250, at \*12 (D.C. Cir. March 11, 2003) (holding that no U.S. court has jurisdiction to grant habeas corpus relief to aliens captured abroad and detained in U.S. military custody in Guantanamo Bay, Cuba).

<sup>156</sup> Military Commission Order No. 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War against Terrorism, March 21, 2002 (hereinafter DOD Order).

<sup>157</sup> Indeed, the DOD Rules even provide that in “the event of any inconsistency between the President’s Military Order and this Order...the provisions of the President’s Military Order shall govern.” See DOD Order § 7(B). For an explanation and analysis of the DOD’s promulgated rules, see Jordan J. Paust, “Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure,” *Michigan Journal of International Law* 23 (Spring 2002): 677.

<sup>158</sup> See Military Order § 1(e). The DOD Regulations seem to expand this, granting the tribunals jurisdiction over “violations of the laws of war *and all other offenses triable by military commission.*” DOD Order, 3(B), note 156 above (emphasis added).

<sup>159</sup> *Id.* § 2(a)(1)(ii).

<sup>160</sup> See Military Order § 2(a).

9/11 and Afghanistan or Iraqi detainees, the existence of the tribunal system provides an ever-present safety net should litigation in the federal courts fail or should the pressure to provide detainees with some sort of hearing become too great.

Like our system of courts-martial for the trial of American military personnel accused of military offenses, this system of tribunals does not use juries of independent civilians but rather juries composed of military officers answerable to the same commander-in-chief whose subordinates in the Defense Department prosecute the charges against the accused. At least the verdicts of our courts-martial are reviewable for compliance with principles of fairness, and for evidentiary support, by an independent body whose judges serve for fixed terms of years rather than at the pleasure of the president. In contrast, the verdicts of President Bush's military tribunals are reviewable, in the end, only by the commander-in-chief himself, by an appointing authority (a designee of the defense secretary) for "administrative[] complete[ness],"<sup>161</sup> or by a DOD "Review Panel."<sup>162</sup> That panel, if invoked, would be made up of three military officers (still directly under the president's chain-of-command) who together would have the power only to make "recommendations" that could be unilaterally rejected either by the president or by the secretary of defense.<sup>163</sup> Ultimately, therefore, it is the president, in concert with defense secretary who serves at the president's pleasure, who decides whom to charge in these tribunals; what constitutes conduct triable there; whether someone was properly convicted by such a tribunal; whether the sentence (ranging up to life imprisonment or death) was justly imposed; and who may be detained indefinitely awaiting possible trial by tribunal. In short, the president has become lawgiver, trier of fact, judge, jury, appeals court of last resort, jailer, and executioner. Perhaps this lecture should have been titled "Requiem for the Separation of Powers."

Several core constitutional flaws plague the Bush Justice System, even with the addition of the DOD's putative procedural protections.

<sup>161</sup> DOD Order, § 6(H)(3) (authorizing the Appointing Authority to review the trial record to determine whether the proceedings were "administratively complete" and to "return the case for any necessary supplementary proceedings" if the case was not).

<sup>162</sup> See *ibid.*, § 6(H)(4).

<sup>163</sup> *Ibid.* § 6(H)(5) ("The Secretary of Defense shall review the record of trial and the recommendations of the Review Panel and either return the case for further proceedings or... forward it to the President with a recommendation as to disposition").

The gate into the Executive's system of detention and prosecution is wide open—the system lacks a constitutionally responsible gatekeeper. Admittedly, recent rules promulgated by the DOD have lessened the vagueness of the initial military tribunal order, which left open-ended the question: “Guilty of what?” The sweep of the president's original order was so amorphous that it could be construed as reaching a member of the Irish Republican Army who threatens an American citizen delivering the Tanner Lectures at Oxford or a Basque separatist who robs an American while at a travel agency in Manhattan buying an airline ticket to Baghdad—or to Madrid. Though the terms of what constitutes terrorism and especially aiding or abetting terrorism remain extremely broad, the Bush administration has at least made moves toward curing this vagueness problem—with respect to the trying of offenses—by defining the elements of each crime eligible for trial before military commissions.<sup>164</sup> For the time being, it at least appears that the Bush Military Commissions will not be used in lawless prosecutions of general and unspecified evildoing.

The standard for *detaining* suspected terrorists and their associates, however, remains so vague that it permits the president and the U.S. military to sweep in large numbers of “suspects” based upon definitions of crime—or of inchoate conspiracies to commit unlawful acts in the future—made up literally on the spot. There is almost no way to review the detention of individuals (including U.S. citizens) apprehended under this standard even on U.S. soil. Never charged with any terrorism-related offense, most of these individuals have been released or, in the case of aliens, deported on immigration violations. Others are being held and interrogated under “an unprecedented veil of secrecy.”<sup>165</sup> And there seems to be even less hope of reviewing, or even questioning, the military's detention of aliens suspected of being (or of giving aid to) terrorists apprehended on the battlefields of Afghanistan or Iraq. Even if it were possible as a practical matter to review secret arrests and detentions—how can one review arrests and imprisonments of which all are kept ignorant?—the Judiciary thus far has almost completely shut its doors to citizens and noncitizens alike detained as “unlawful

<sup>164</sup> See Draft Military Commission Instruction, February 28, 2003, available at <http://www.defenselink.mil/news/Feb2003/d20030228dmci.pdf> (hereinafter Instruction Draft).

<sup>165</sup> David Cole, “Their Liberties, Our Security: Democracy and Double Standards,” *Boston Review*, October/November 2002, pp. 4, 5.

combatants.”<sup>166</sup> Once such individuals are in U.S. custody, the Bush administration argues, only the grace of the Executive Branch can grant them release. Deputy Assistant Attorney General John Yoo posed the rhetorical question: “[d]oes it make sense to ever release them if you think they are going to continue to be dangerous even though you can’t convict them of a crime?”<sup>167</sup> Well, yes, it does—if “dangerous” is being used simply as a proxy for “general suspicion” and if “can’t convict” really means “we have no evidence on this person whatsoever.” Yoo’s formulation obviously begged the crucial question: *Quis custodiet ipsos custodios*—who will guard these guardians?

The answer of the Bush administration, it seems, is that the Executive Branch may be entrusted with the power to detain indefinitely anyone *it* considers dangerous.<sup>168</sup> And “may” here is just a polite word for “must.” Such unbridled discretion manifestly flies in the face of the type of notice and specificity generally required by the Constitution.<sup>169</sup> It is no answer to say that *this* president is too sensible and decent to apply his order in despotic and tyrannical ways. As Justice Thurgood Marshall once wisely observed, the evil done by a Sword of Damocles is done not only when it falls. Its evil is that it hangs.<sup>170</sup> A sword that overhangs so vast a territory, subject only to the president’s own discretion, is fundamentally inconsistent with the very idea of *law*, of government *under* law, and of due process of law.

That sword is sharpened by the Military Order’s failure to provide or

<sup>166</sup> See *Odab v. United States*, No. 02-5251, 2003 U.S. App. LEXIS 4250, at \*12 (D.C. Cir. March 11, 2003) (holding that no federal court has jurisdiction to review the detention of aliens captured during military operations and detained overseas); *Hamdi v. Rumsfeld*, 316 F.3d 450, 473–74 (4th Cir. 2003) (finding authorized under the president’s Article II war powers the executive detention of citizens deemed to be “enemy combatants” and denying Article III jurisdiction to review the “enemy combatant” designation).

<sup>167</sup> See Warren Richey, “How Long Can Guantanamo Prisoners Be Held?” *Christian Science Monitor*, April 9, 2002, p. 1.

<sup>168</sup> Some courts have argued that the power to detain flows naturally from the Congressional Statute Authorizing the Use of Force. See, e.g., *Padilla ex rel. Newman v. Bush*, 233 F. Supp.2d 564, 605–6 (S.D.N.Y. 2002). But even White House counsel Alberto Gonzales conceded that the original Military Order was in tension with congressional restrictions on, and Supreme Court precedent regarding, preventive detentions. See Kate Martin, “More Power for Bush: Alberto Gonzales Ordered Deference to the President,” *Legal Times*, December 23, 2002, available at <http://cnss/gwu.edu/%7Ecncs/commissions/kmlegaltimes.pdf>.

<sup>169</sup> See *City of Chicago v. Morales*, 527 U.S. 41 (1999) (holding unconstitutional legislation that allowed police to arrest and prosecute anyone who, loitering around a known gang member, did not disperse upon police command—such legislation delegates to law enforcement the power to make up law on the spot).

<sup>170</sup> *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

even to permit effective legal assistance to those brought before military tribunals. The DOD Rules took a step in the right direction by requiring the Office of the Chief Defense Counsel to represent each accused individual zealously.<sup>171</sup> Administration officials claim that the rules grant the accused a right to retain civilian attorneys. This is only partially true. The accused may retain only those civilian attorneys who have been given a security clearance granting “access to information classified at the level SECRET or higher.”<sup>172</sup> Moreover, civilian counsel can be denied access to all evidence deemed “protected information” and excluded from any proceeding that the commission determines should be “closed.”<sup>173</sup>

What’s more, through his Military Order, President Bush has unilaterally moved to restrict the jurisdiction of Article III courts. The order extends military jurisdiction over persons and in places where the civilian courts are open and fully functional, in violation of the Constitution as construed by the Supreme Court’s landmark ruling in *Ex parte Milligan*.<sup>174</sup> Holding that a U.S. citizen arrested for allegedly conspiring to aid the Confederacy is ordinarily entitled to trial by jury in a civilian court, *Milligan* established a general presumption against military trials of civilians even in times of war. The Bush order’s assertion of military jurisdiction defies the unmistakable prohibition of *Milligan* as casually as if *Milligan* were merely a journalistic opinion piece rather than a landmark Supreme Court decision. An Executive Order displacing civilian with military jurisdiction on American soil might be tolerable in situations of total war where the pace of hostilities outstrips opportunities for congressional action, but Congress showed itself capable of nearly instantaneous action when it authorized the president’s use of force just a week after September 11, 2001, and passed the USA-PATRIOT Act<sup>175</sup> shortly thereafter. The president’s blunt arrogation of broad lawmaking authority, to which the U.S. Congress has docilely

<sup>171</sup> See DOD Rules, § 4(C)(2).

<sup>172</sup> *Ibid.* § 6(C)(3)(b).

<sup>173</sup> *Ibid.* § 6 (D)(5); see also *ibid.* § 6(B)(3) (“A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof”).

<sup>174</sup> 71 U.S. 2 (1866).

<sup>175</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56 (H.R. 3162), 115 Stat. 272 (2001) (hereinafter PATRIOT Act).

acceded, belies the poignant declaration in *Milligan* that the “Constitution of the United States is the law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances”<sup>176</sup>

Another particularly striking example of the Executive’s campaign for judicial irrelevance can be seen in the order’s language that prohibits any court—foreign, international, or domestic—from providing any remedy to, or conducting any proceeding on behalf of, any noncitizen whom the president has seen fit to subject to a military tribunal’s jurisdiction. Shortly after the issuance of the original Order, White House counsel Alberto Gonzales insisted that this language was not meant to exclude habeas corpus proceedings brought to test whether a particular tribunal has jurisdiction over a given individual.<sup>177</sup> But he said nothing about permitting habeas corpus proceedings to test the constitutionality of the underlying order, whose text seems flatly to rule out such proceedings in both the state and federal courts.<sup>178</sup> And it does so in the face of the constitutional principle established by Chief Justice Roger Taney when, in the midst of the Civil War, he rebuked President Abraham Lincoln’s attempt without congressional authorization to suspend the “great writ”<sup>179</sup>—violating a separation of powers axiom that remains our legal system’s principal bulwark against the rise of an authoritarian regime that simply locks up or executes its enemies without ever having to answer in court for spiriting them to parts unknown.<sup>180</sup>

Perhaps the most disturbing aspect of President Bush’s detention-tribunal system is not *what* the substance of the order does, but rather *how* the Executive has gone about promulgating the order itself. Acting

<sup>176</sup> 71 U.S. at 127.

<sup>177</sup> See Alberto R. Gonzales, “Martial Justice, Full and Fair,” *New York Times*, November 30, 2001, p. A27. This assurance was all but meaningless, given the Court’s guarantee that such proceedings would be available in *Ex parte Quirin*, 317 U.S. 1, 24–25 (1942); see also *In re Yamashita*, 327 U.S. 1, 9 (1946). Indeed, the Supreme Court has found it an appropriate exercise of the Court’s “appellate” jurisdiction to entertain habeas corpus petitions challenging the legality of nonjudicial detentions even in the absence of congressional statutes authorizing such jurisdiction. See *Felker v. Turpin*, 518 U.S. 651 (1996); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).

<sup>178</sup> See Military Order, § 7(b) (granting military tribunals “exclusive jurisdiction” over the enumerated offenses and declaring that individuals charged by the tribunals “shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individuals’ behalf” in the courts of the United States or of any state).

<sup>179</sup> See *Ex parte Merryman*, 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861).

<sup>180</sup> See *I.N.S. v. St. Cyr*, 533 U.S. 289, 301–2 (2001).

entirely on its own, the Bush administration has significantly reorganized the federal government's adjudicatory apparatus—a step that is plainly, under our scheme of government, a task for the legislature, not for the Executive. If, as the U.S. Supreme Court held in the *Steel Seizure* case, a president cannot seize and operate a business without congressional authorization because such action is quintessentially legislative,<sup>181</sup> surely no less must obtain when the president undertakes to restructure and reallocate the jurisdiction of the federal and state courts over persons residing in the United States. In effect, just as *Bush v. Gore* unilaterally supplied a *judicial* deus ex machina to address a threatened electoral impasse, so the Bush Military Order unilaterally supplied an *executive* deus ex machina to address the threat of repeated terrorist attack. The cavalier assumption that Congress may constitutionally be left out of the loop ties these two exercises in unilateralism at the constitutional hip.

In support of his Military Order, the president and his defenders first turned to the 1942 precedent of *Ex parte Quirin*,<sup>182</sup> the case in which President Franklin D. Roosevelt ordered military trials for eight Nazi saboteurs who had landed on American soil early in World War II carrying explosives and wearing military uniforms that they promptly buried once ashore. One of the agents turned the others in to the FBI, and they were quickly tried, convicted, and executed for violating two federal criminal statutes against spying and aiding the enemy and for violating the laws of war, inasmuch as they were soldiers of the Nazi army who had deliberately abandoned their military garb so as to pass unnoticed among the civilian population in order to act as spies, or to kill innocent civilians, or both. Thus they became “unlawful belligerents” under the laws of war and were not entitled to the protections accorded to prisoners of war.<sup>183</sup>

But the circumstances of *Quirin* were so different from those faced by the Executive Branch today that the opinion hardly provides constitutional cover. As an initial matter, *Quirin* involved a total war, formally declared by Congress, with the heightened political accountability that

<sup>181</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

<sup>182</sup> 317 U.S. 1 (1942).

<sup>183</sup> The historical background of the *Quirin* case should give us pause in light of how President Roosevelt pressured the Supreme Court through back channels to approve the execution forthwith or be rendered irrelevant. See G. Edward White, “Felix Frankfurter’s ‘Soliloquy’ in *Ex parte Quirin*,” *Green Bag* 2d 5 (2002): 423.

entails. By contrast, the Bush Order and its accompanying DOD Regulations have all been issued in a “war” where that word is used in a sense that is elastic, malleable, and open-ended, Congress having explicitly discussed the possibility of *declaring* war even as it has authorized the use of military force and having consciously refused to make any such declaration. Even if one thought that the congressional authorizations of force functionally gave President Bush the constitutional equivalent of a war declaration—a dubious proposition—the tribunals established by the Bush order assert jurisdiction well beyond the individuals whom Congress authorized the president to use force to pursue.<sup>184</sup> And to maintain, as some have,<sup>185</sup> that September 11 immediately placed the United States in a functional state of war that made a congressional declaration unnecessary for the full exercise of “wartime” presidential powers would arm the president with the power to define the existence and duration of the very crisis that allegedly affords him such extraordinary powers. Given the frequency of the use of the U.S. military in armed conflict throughout American history, the argument for maintaining a clear and substantively meaningful distinction between congressionally declared wars and Executive-labeled crises is compelling.<sup>186</sup>

*Quirin* also involved unlawful belligerents identifiable as such by

<sup>184</sup> See 147 *Cong. Rec.* S9949 (daily ed. October 1, 2001) (statement of Senator Robert Byrd) (“[T]he use of force authority granted to the President extends only to the perpetrators of the September 11 attack. It was not the intent of Congress to give the President unbridled authority...to wage war against terrorism writ large...”). The proposed White House resolution would have authorized the president not only to use force against those countries and entities responsible for the September 11 attacks but also “to deter and preempt any future acts of terrorism or aggression against the United States.” 147 *Cong. Rec.* S9951 (daily ed. October 1, 2001) (reprinting the text of the proposed White House resolution). See also 147 *Cong. Rec.* H5638-04 (daily ed. September 14, 2001) (statement of Representative John Conyers) (“By not declaring war, the resolution preserves our precious civil liberties. This is important because declarations of war trigger broad statutes that not only criminalize interference with troops and recruitment but also authorize the President to apprehend ‘alien enemies’”).

<sup>185</sup> See, e.g., J. Gregory Sidak, “The Price of Experience: The Constitution after September 11, 2001,” *Constitutional Commentary* 19 (Spring 2002): 37.

<sup>186</sup> For an argument that military conflict has been constant since the founding of our republic, see Mark E. Brandon, “War and American Constitutional Order,” *Vanderbilt Law Review* 56 (2003). Brandon argues:

The United States is a regime founded on military conflict. To say this is more than that the U.S. relied on a war of secession to gain independence from Britain. It is to say also that the U.S. has resorted frequently in its history to military force. In research conducted under the auspices of the Congressional Research Service of the Library of Congress, Ellen C. Collier has catalogued “instances in which the United States has used its armed forces abroad in situations of conflict or potential conflict or for other than normal peacetime purposes” between 1798 and 1993. She reports that the United States used its military on 234 occasions.



virtue of their having been regular soldiers in the army of Nazi Germany, with whom we were engaged in a congressionally declared war, and who had deliberately donned civilian clothing so as to blend with the U.S. population—triable facts that conferred military jurisdiction in terms distinct from the ultimate question of the defendants' guilt or innocence of the criminal offenses with which they were charged, such as spying or aiding an enemy nation with whom the United States was at war. The question of the tribunal's *jurisdiction* over those tried by it was thus distinct from the question of the defendants' guilt of the offenses charged. In the case of today's suspected terrorists, the two inquiries collapse into one: whether the tribunal has jurisdiction over an accused individual seemingly depends on whether the accused is guilty of contributing to various terrorist attacks. The Bush order, then, creates a circumstance in which there appears to be no way to determine at the threshold whether someone is being lawfully held for trial—hardly a minor problem!

Beyond even that formidable difficulty, *Quirin* involved a trial on charges brought under acts of Congress that designated specific crimes for which the accused was subject to trial before a military tribunal, whereas the Bush order rests neither on an explicit congressional authorization to employ military tribunals nor on a statute specifically identifying a substantive crime that is triable by such tribunals. Some respond to this claim by pointing to *Quirin*'s arguably having construed a section of the United States Code now known as the Uniform Code of Military Justice (10 U.S.C. § 821) as a generalized "congressional authorization for the President to create military commissions."<sup>187</sup> But this argument infers congressional authorization of the tribunals from an ambiguous reading, in dubious circumstances, of a statute that, on its face, merely prevents the statutory conferral of jurisdiction upon courts-martial from negating by inference whatever jurisdiction military tribunals might otherwise possess.<sup>188</sup> In the absence of separate statutes calling for the use of military tribunals for particular crimes, the authorization of

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Ibid., citing Ellen C. Collier, "Instances of Use of United States Forces Abroad, 1798–1993" (Washington, D.C.: Congressional Research Service, Library of Congress, October 7, 1993), available at <http://www.history.navy.mil/wars/foabroad.htm>.

<sup>187</sup> Curtis A. Bradley and Jack L. Goldsmith, "The Constitutional Validity of Military Commissions," *Green Bag 2d* 5 (2002): 252–53.

<sup>188</sup> See 10 U.S.C. § 821 ("The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals").

§ 821—allowing military tribunals or commissions where the law of war says such military commissions are allowed—becomes effectively circular. Since there appears to be no consensus in the law of war on this jurisdictional question, § 821 and *Quirin* leave us adrift.

On a still more fundamental level, these linguistic and interpretive gymnastics miss the basic argument about allocation and separation of powers. If the law of war does not specify the kinds of offenses that are triable by military commission, we are left with a situation in which the proper reach of such military tribunals is whatever the president says it is. Judging from the broad jurisdiction claimed in the November 13 order, and the broad range of crimes over which the Executive has bestowed jurisdiction upon itself through the more recent DOD Military Commission Instruction,<sup>189</sup> the White House seems to agree. If so, it seems only prudent to insist that Congress, whether by enacting an ordinary law or by judiciously wielding the power of the purse, play an active role in limiting this broad executive power, either by requiring a formal declaration of war to trigger the presidential authority in question or by setting limits on the ability of the Executive Branch to create adjudicatory tribunals, define their jurisdiction (on a case by case basis, no less), choose the “applicable” substantive law, allow appeals only within the executive chain of command, and punish those convicted.<sup>190</sup> Focusing instead on the statutory twists and turns against the backdrop of *Ex parte Quirin* implicitly presents the question as one of “what can the president get away with?” rather than as one of “what is most faithful to the Constitution?” That the Executive seems to assume that the first question is functionally equivalent to the second displays a disturbing sense of institutional arrogance.

The Bush administration’s decision to incarcerate indefinitely two U.S. citizens—Yaser Esam Hamdi and Jose Padilla—as “enemy combatants” to be held for interrogation and for preventive purposes rather than for trial on any charged offense may well have been designed to test the nation’s willingness to trust unilateral executive power to deprive citizens along with noncitizens of the most basic rights and liberties in the elusive quest for security against alleged terrorist plots. If so, the

<sup>189</sup> See Instruction Draft, § 3(C) (nonexclusivity clause providing that the enumeration of specific crimes in the instruction is not exclusive and that the “absence of a particular offense from the corpus of those enumerated herein does not preclude trial for that offense”).

<sup>190</sup> I have elsewhere discussed the role that Congress might play. See generally Neal K. Katyal and Laurence H. Tribe, “Waging War, Deciding Guilt: Trying the Military Tribunals,” *Yale Law Journal* 111 (2002): 1259.

test will be praised by the administration for its production of a resounding vote of apathy from the public, of inaction by Congress, and of acquiescence by the Judiciary. Apart from the “usual suspects” in the form of various civil liberties organizations, there has been no noticeable public outcry over the indefinite detention of American citizens. Meanwhile, the struggles of individuals “representing” Hamdi (arrested in Afghanistan) and Padilla (arrested in Chicago) to convince federal courts to afford access to counsel (so that their “representation” might truly become representation) and, through such counsel, to obtain meaningful judicial review of the alleged bases for their military imprisonment as suspected terrorists vividly illustrate how far-reaching this kind of concentrated power can be.

The government got almost everything it could have hoped for from its trial balloon in the *Hamdi* decision. Though Hamdi is an American citizen, he was captured in Afghanistan, “a zone of active military operations,” allegedly serving “with the Taliban in the wake of September 11.”<sup>191</sup> The government classified him as an enemy combatant and transferred him to a military brig in Norfolk, Virginia. The U.S. Court of Appeals for the Fourth Circuit paid lip service to the importance of judicial review of executive detentions, saying that such review is essential in assuring that “restraint accords with the rule of law,” but the court ultimately embraced an extremely robust theory of deference to the Executive Branch: “The constitutional allocation of war powers affords the President *extraordinarily broad authority* as Commander in chief and compels courts to assume a deferential posture in reviewing exercises of this authority. And, while the Constitution assigns courts the duty generally to review executive detentions that are alleged to be illegal, [it] does not specifically contemplate *any role* for the courts in the conduct of war, or in foreign policy generally.”<sup>192</sup> The *Hamdi* court would entertain review only to determine whether the suspect was present in a “zone of active combat,” but given the grave risks to national security posed by in-depth factual inquiries into military decisionmaking, the Constitution simply cannot “entitle him to a searching review of the factual determinations underlying his seizure.”<sup>193</sup>

Padilla’s case resulted in a somewhat less deferential holding. This may be in part because Jose Padilla is an American citizen who was

<sup>191</sup> See *Hamdi v. Rumsfeld*, 316 F.3d 450, 461 (4th Cir. 2003).

<sup>192</sup> *Ibid.* at 474 (emphasis added).

<sup>193</sup> *Ibid.* at 475.

apprehended while on U.S. soil; it may be because the evidence that Jose Padilla had conspired with al-Qaeda and was planning to help devise and/or use a “dirty bomb” to kill Americans appeared far weaker to the impartial observer than the evidence that Yaser Hamdi fought with the Taliban and took up arms in combat against U.S. troops. Judge Michael Mukasey ordered the government to allow Padilla to consult with counsel “in aid of his petition,”<sup>194</sup> an order that the government first ignored and eventually moved to have reconsidered until the judge denied the motion and ordered the government to comply.<sup>195</sup> The judge also found that the court was required to engage in a limited inquiry into the factual circumstances qualifying Padilla for indefinite detention and trial by military commission—namely, “whether there is *some evidence* to support [the president’s] conclusion that Padilla was, like the German saboteurs in *Quirin*, engaged in a mission against the United States on behalf of an enemy with whom the United States is at war.”<sup>196</sup> But the inquiry approved by the court represents an extremely limited search, circumscribed by the government’s compelling interests in secrecy in matters of national security. In reaching its “some evidence” standard of review, the court rejected constitutional and statutory objections to the detention of American citizens captured on American soil.<sup>197</sup> In so doing, Judge Mukasey seemed to base his holding on some version of what we earlier identified as the political process doctrine: “The ‘political branches,’ when they make judgments on the exercise of war powers under Articles I and II, as both branches have here, need not submit those judgments to review by Article III courts. Rather, they are subject to the perhaps less didactic but nonetheless searching audit of the democratic process.”<sup>198</sup>

These two decisions were not the only court opinions to seize on the principle of judicial deference to the Executive Branch. The Court of Appeals for the D.C. Circuit made a similar argument in justifying the indefinite detention of aliens in Guantanamo Bay, Cuba, without the possibility of any judicial review whatsoever.<sup>199</sup> The First Circuit Court

<sup>194</sup> See *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 603 (S.D.N.Y. 2002).

<sup>195</sup> See *Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. March 11, 2003).

<sup>196</sup> 233 F. Supp. at 608 (emphasis added).

<sup>197</sup> See *ibid.* at 606 (“The President, for the reasons set forth above, has both constitutional and statutory authority to exercise the powers of Commander in Chief, including the power to detain unlawful combatants, and it matters not that Padilla is a United States citizen captured on United States soil”).

<sup>198</sup> *Ibid.* at 607.

<sup>199</sup> See *Odab v. United States*, No. 02-5251, 2003 U.S. App. LEXIS 4250, at \*8 (D.C. Cir. March 11, 2003).

of Appeals issued an opinion sounding the same themes in *Doe v. Bush*, a legal challenge to President Bush's initiation of the war against Iraq.<sup>200</sup> Rejecting the claim that Congress had impermissibly delegated the power to declare war to the president, the court argued for "judicial restraint" in the absence of an explicit head-on collision between Congress and the Executive when military matters are at stake. It seems that 9/11 has ushered in at least a temporary period of judicial acquiescence, far from the imperial Judiciary of *Dickerson*, *Casey*, *Boerne*, and *Bush v. Gore*.

Is this judicial passivity warranted? Does the Constitution truly permit our commander-in-chief to pluck American citizens off the streets and incarcerate them purely on his own unchecked say-so that the people thus forced to "disappear" constitute a grave danger to our safety? Are the harms threatened by groups aiming to detonate a "dirty" radiological bomb, or even a weapon of truly mass destruction, sufficiently catastrophic to justify the exercise of such extraordinary power, unconstrained by meaningful habeas corpus review through which the accused terrorist might, with the assistance of competent counsel, challenge the government's claim that it has good reason to believe it has in fact apprehended a person as to whom reliable sources of evidence establish a credible risk that, if released, he or she would attempt to kill or injure innocent civilians?

Absent such habeas review, no remedy exists even for a case of purely mistaken identity, in which the government, meaning to arrest and detain *X*, arrested and is detaining *Y* instead. During the Civil War, Abraham Lincoln eschewed waiting for congressional action and suspended the writ of habeas corpus on his own, even though Article I of the Constitution appears to vest that heavy responsibility solely in Congress.<sup>201</sup> Lincoln argued that allowing every captured Confederate soldier and every northern collaborator to "make a federal case" out of his arrest by using the writ of habeas corpus would drown the Union. "Are all the laws but one," he famously asked, "to go unexecuted, and the government itself go to pieces lest that one"—to wit, the law guaranteeing

<sup>200</sup> See *Doe v. Bush*, 322 F.3d 109 (1st Cir. 2003).

<sup>201</sup> U.S. Const. art. I, § 9, cl. 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"). The general argument in favor of limiting the power to suspend the writ of habeas corpus to Congress revolves around the placement of the Suspension Clause in Article I, the constitutional enumeration of legislative powers. Article II's enumeration of executive powers contains no similar clause. Indeed, "[n]owhere in the Bill of Rights is there a mention of the writ of *habeas corpus*. The assumption has been that the limitation on suspension of the writ contained in Article I implies a guarantee of its existence" (William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* [New York: Vintage Books, 1998], p. 37).

access to habeas corpus—“be violated?”<sup>202</sup> Lincoln’s answer was “no”; and to judge from its conduct, as well as from its rhetoric, the administration of President Bush regards our nation as immersed in a similarly mortal crisis, demanding similarly extreme unilateral measures.

The Executive’s detention and tribunal policies have thus created a system designed to operate completely outside the rule of law *and* the laws of war. The president has created this parallel “legal” universe by enhancing his own power to intercept and detain suspects, a traditional executive power, and by granting himself the authority to adjudicate and punish, traditionally a judicial function quite distinct from the power to wage war. The Executive Branch has done this without the express approval of Congress, the one branch of government that might legitimately make such a decision. The Constitution’s basic architecture forbids so sharp a departure from the baseline legal structures embedded in the document since the founding.<sup>203</sup> Mere exigency cannot be a justification for tossing these structural guarantees aside. To treat it as such would invite structural departures from the Constitution at the president’s convenience even in times of relative stability. Instead, the presumption against alterations by one branch of government to the basic legal framework governing liberty vis-à-vis the government as a whole and hence governing detentions and adjudications should be set aside only “where the President is manifestly unable to consult in a timely way with Congress before decisive action must be taken” and where the emergency “threatens truly irreparable damage to the nation or its Constitution.”<sup>204</sup>

<sup>202</sup> Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in *Complete Works of Abraham Lincoln*, ed. John G. Nicolay and John Hay (n.p.: Lincoln Memorial University, 1894), vol. 6, pp. 297, 309.

<sup>203</sup> The *Steel Seizure Case* forbids the type of Executive Branch lawmaking in which the Bush administration has engaged. “In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). Courts reviewing the Bush administration’s terrorism policies have seemed to situate them within the first category outlined by Justice Jackson’s *Steel Seizure* concurrence—areas where the president acts pursuant to an express or implied authorization by Congress. *Ibid.* at 642 (Jackson, J., concurring). I tend to view most of the Bush administration’s responses to terror as falling somewhere between Justice Jackson’s second and third categories—the second being situations where the president acts in the absence of congressional approval or disapproval, and the third being situations where the president takes actions that are incompatible with the express or implied will of the legislature. Like Justice Jackson, I worry that “[n]o penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.” *Ibid.* at 646 (Jackson, J., concurring).

<sup>204</sup> Katyal and Tribe, “Waging War, Deciding Guilt: Trying the Military Tribunals,” p. 1266. See also L. Tribe, *American Constitutional Law*, vol. 1, § 4–6, 3d ed. (New York:

I have no doubt that what happened on September 11, 2001, was a tragic outrage; nor do I doubt that there are countless terrorists (and even more would-be terrorists) around the world who have the desire and either have or might readily acquire the capacity to wreak terrible devastation in America or abroad—sabotaging nuclear power plants; using chemical, biological, radioactive, or even nuclear weapons either manufactured by international terrorist organizations or obtained by them on the black market from places like Pakistan, Kazakhstan, North Korea, or Belarus; or waging “cyberwar” against the internet-dependent systems that control our vital power generation and transmission facilities, transportation facilities, and communication networks. I do harbor doubt, however, that the constant recitation and magnification of this threat—with government announcements alternating our state of alert among danger codes of red, orange, and yellow; nonstop (and also non-time-bound) predictions of catastrophic and devastating damage; government instructions to keep supplies of duct tape and plastic sheeting around the house; or requests for citizens to be on the lookout for “suspicious behavior”—has any genuine, much less demonstrable, effect on our sense of “security” or on the *reality* of that security. And I find it nearly impossible to believe that the threat of terrorism can be erased or even greatly reduced by the kinds of steps that Lincoln felt he had (and Bush feels he has) to take in circumventing the Federal Judiciary. The potentially permanent threat of such terrorism cannot plausibly justify such a unilateral assertion of unchecked power without essentially conceding our form of government, and the freedoms it secures, as among the greatest casualties of the “war” on terror.

## 2. EXPANSION OF LAW ENFORCEMENT POWERS AND GOVERNMENT SECRECY

To complement its quasi-seizure of adjudicatory powers from the Judiciary, the Executive has sought and obtained congressional legislation to enhance a variety of its law enforcement powers. Following fast on the heels of the first Authorization for the Use of Military Force was the USA-PATRIOT Act, which contained a long list of legislative measures

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Foundation Press, 2000) (arguing that “the President should not be entitled to rely upon his augmented wartime powers when, without peculiar difficulty, he could have submitted his proposals to Congress for consideration as would have been required in peacetime”).

expanding the government's powers of surveillance over people, communications, and financial transactions—measures that, in my view, by and large comply with the Constitution. Alongside this legislative response came a more constitutionally controversial cascade of unilateral executive measures. I have already discussed some of these, such as the initiation of widespread investigative and preventive arrests and detentions of indefinite duration without criminal charges and accompanied by resistance to judicial oversight. The Executive, though, has taken other measures—some inextricably related to detentions, some related to the manner in which detainees are prosecuted, and some related to other government antiterrorism initiatives—all designed to enhance the secrecy of its war against terrorism. Taken together, these measures have merged government's foreign intelligence gathering and domestic law enforcement functions behind a wall of secrecy not seen since the height of the Cold War. The Executive's willingness to pursue such measures, especially when met by passive acceptance from Congress and the Judiciary, is by no means necessarily unconstitutional, but it is certainly troubling in a constitutional democracy committed to open deliberation and the rule of law.

The Bush administration moved quickly in the aftermath of 9/11 to obtain congressional legislation expanding federal law enforcement powers. The USA-PATRIOT Act gave the president almost everything he wanted. The provisions of the act have been analyzed in depth elsewhere,<sup>205</sup> and I don't want to delve into a line-by-line critique here. Some of the most notable components of enhanced government power in the PATRIOT Act include new authority to monitor the source and destination of internet browsing and e-mail—even of people who are not considered criminal suspects—without demonstrating probable cause of criminal activity or any responsibility to report the results of the searches to a judge;<sup>206</sup> the authorization of “sneak and peek” clandestine physical searches of homes, apartments, or offices—available for use in any criminal investigation—without a requirement of immediate (or even proximate) notification to the target;<sup>207</sup> extension of the time authorized for surveillance under the Foreign Intelligence Surveillance Act (FISA)<sup>208</sup> and under Title III and the removal of the old requirement that

<sup>205</sup> See generally Schulhofer, *The Enemy Within*.

<sup>206</sup> See PATRIOT Act, § 216(c)(3).

<sup>207</sup> See Schulhofer, *The Enemy Within*, pp. 42–43; see also PATRIOT Act § 213.

<sup>208</sup> 50 U.S.C. §§ 1801–62 (West 1991 & Supp. 2002).



FISA searches be authorized only when the search was primarily about foreign intelligence—now FISA searches will be authorized whenever the desire to obtain foreign intelligence information is a “significant purpose” of the searches;<sup>209</sup> and loosened restrictions on law enforcement agencies’ power to obtain private financial and personal records from individuals and businesses alike.<sup>210</sup> Passage of the PATRIOT Act—achieved quickly and without significant controversy during floor debate—brought severe criticism from civil liberties groups. Despite warnings that legislation like the PATRIOT Act could arm our government with the type of information-collecting freedom necessary to create a “Fortress America,”<sup>211</sup> most Americans remained unconcerned.

Recent outrage has been directed at a draft of new antiterrorism legislation circulated by the Department of Justice. After civil liberties groups obtained a copy of the bill, dubbed “Son of PATRIOT” by its detractors, a variety of vocal critiques surfaced just how far the Justice Department seemingly hoped to go in consolidating and enhancing its law enforcement powers. Although the Bush administration has since backed off of PATRIOT II (for public consumption, anyway), the sweep of the proposal is breathtaking. The draft legislation, if passed in its original form, would have further eased the process by which the government could initiate surveillance both under FISA and under a secret process bypassing the restrictions of FISA altogether;<sup>212</sup> created a

<sup>209</sup> See PATRIOT Act § 207(a)(2); *ibid.* § 218 (amending 50 U.S.C. § 1804(a)(7)(B)).

<sup>210</sup> See Schulhofer, *The Enemy Within*, pp. 50–53.

<sup>211</sup> Matthew Brzezinski, “Fortress America,” *New York Times Magazine*, February 23, 2003, p. 38.

<sup>212</sup> A recent decision by the Foreign Intelligence Surveillance Court of Review (FISCR) (the first decision ever rendered by that court, which hears appeals in which the government is the only party!) authorized the Executive Branch to circumvent traditional Fourth Amendment restrictions placed on wiretapping and other surveillance activities, even when the officers involved are law enforcement (not foreign intelligence) officers, so long as the Executive asserts that law enforcement officials are searching for “foreign intelligence crimes” that will facilitate information gathering. See *In re Sealed Case No. 002*, 310 F.3d 717 (U.S. FISA Ct. Rev. 2002). Elizabeth Parker, former general counsel for the National Security Agency, concludes that the decision “removes all barriers to the creation of an ill-defined category of national security crimes.... It is not beyond imagination that we may be on a course to repeat Watergate’s violations” (Elizabeth Rindskopf Parker, “September 11: Responses and Responsibilities,” *Judge’s Journal* [Winter 2002]: 5, 8–9). See also “A Green Light to Spy” (editorial), *New York Times*, November 19, 2002, at A30. Because the statutory scheme creating the FISCR at least arguably prevents its constitutional holdings from being binding in ordinary federal courts, and because the special Foreign Intelligence Surveillance Court whose actions the FISCR theoretically sits to review has jurisdiction only to rule on applications for electronic surveillance orders but no jurisdiction to rule on Fourth Amendment challenges, the FISCR’s decision on the novel Fourth Amendment issue before it may well have a considerably less dramatic impact on privacy than Parker and the *New*

category of “domestic security surveillance” permitting enhanced spying powers traditionally allowed only for foreign intelligence agencies; expanded the definition of terrorism to cover an even broader array of activities than encompassed within the expansive PATRIOT Act definition of terrorism; allowed for the sampling and cataloguing of Americans’ genetic information without court order or consent; terminated court-ordered limits on police spying put in place to prevent McCarthy-style persecution on the basis of political and/or religious group status; authorized secret arrests and indefinite detentions in immigration and terrorism cases; and expanded the definition of aiding and abetting terrorism to include any “support” of groups found to be connected with terrorism, even when the group hasn’t been labeled as terrorist by the government and even where the support is nonfinancial and is related only to legal activities of those groups.<sup>213</sup> As of now, the PATRIOT II bill has not been sent to Congress. And it will likely evolve considerably prior to its introduction.

Congress’s apparent willingness to grant the Executive Branch a virtual blank check to enhance surveillance power is particularly disturbing when coupled with the Executive’s move toward complete secrecy in its war on terrorism. The government has insisted upon secrecy at almost every turn in its interactions with suspects in the war on terror. One example is the government’s refusal to release to the press and the public the number and/or identities of its terrorism-related detainees. The Executive has sought to eliminate any public scrutiny of its detention and prosecution of 9/11 suspects, some via the use of indefinite detention (and in the future perhaps the use of military tribunals), others through immigration proceedings closed to the public and press.<sup>214</sup>

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*York Times* predict. For an analysis reaching that hopeful conclusion as to privacy but cogently arguing that, because the FISCR suggested that the separation of powers prevented it, as part of the Article III Judiciary, from reviewing the legality of “investigative procedures of the Department of Justice,” 310 F.3d at 731, this FISCR decision nonetheless has ominous implications for the independence of the Judiciary and for the self-aggrandizing power of the unchecked Executive, see “Recent Cases,” *Harvard Law Review* 116 (2003): 2250–53.

<sup>213</sup> See Timothy H. Edgar, “Section-by-Section Analysis of Justice Department Draft ‘Domestic Security Enhancement Act of 2003,’ also known as ‘Patriot Act II,’” *American Civil Liberties Union*, February 14, 2003.

<sup>214</sup> Apparently the majority of the original 9/11 detainees were charged with immigration violations or were being detained on the authority of “material witness” warrants issued by federal judges under the purported authority of 18 U.S.C. § 3144. The validity of the “material witness” detentions is in some doubt, following the ruling in the Southern District of New York that the material witnesses statute does not apply to the grand jury

Those detained on immigration charges were processed for removal in immigration hearings that were to be closed whenever immigration officials asserted in conclusory terms that closure was necessary, pursuant to a memo from Chief Immigration Judge Michael Creppy instructing immigration judges “to hold the hearings individually, to close the hearing to the public, and to avoid discussing the case or otherwise disclosing any information about the case to anyone outside the Immigration Court.”<sup>215</sup>

The government has justified its insistence on secrecy in a number of ways. First, the government has advanced the implausible argument that such secrecy is needed to protect the detainees’ right to privacy,<sup>216</sup> ignoring the obvious alternative of opt-out information release policies and the plain First Amendment rights implicated by such a rationale under *Richmond Newspapers Inc. v. Virginia*.<sup>217</sup> Second, the government has argued that disclosing the identities of detainees, and revealing even to them and their attorneys (if any) the evidence collected against them, will disrupt terrorism investigations by complicating investigators’ ability to coax suspects into cooperating. Third, the government has advanced the seemingly limitless theory that international terrorists might deduce or infer information properly kept secret (e.g., information about the sources or methods of our intelligence-gathering) from

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context, as the government has claimed, and that such a warrant can be used to hold a witness only until that witness’s testimony is taken in a deposition, not until the government sees fit to present the putative witness to a hypothetical grand jury. *U.S. v. Awadallah*, 202 F. Supp. 2d 55 (S.D.N.Y. 2002). *Awadallah* was met with disapproval in *In re Material Witness Warrant*, 213 F. Supp. 2d 287, 300 (S.D.N.Y. 2002) (“Given the broad language of the statute, its legislative history...to perceive a Congressional intention that grand jury witnesses be excluded from the reach of section 3144 is to perceive something that is not there. Accordingly, I respectfully decline to follow the reasoning and the holding of *Awadallah*”). As of this writing, the conflict has not been resolved by the Second Circuit Court of Appeals.

<sup>215</sup> See Creppy Memorandum, available at [http://archive.aclu.org/court/creppy\\_memo.pdf](http://archive.aclu.org/court/creppy_memo.pdf) (last accessed March 28, 2003). The Creppy Memorandum instructed judges not to confirm or deny whether a particular case was scheduled for a hearing. *Ibid.*

<sup>216</sup> In a case brought by the ACLU in New Jersey state court seeking the release of the identities of the detainees held in the Hudson County jails, the U.S. Justice Department argued that keeping the identities of the detainees secret served national security aims and also protected the privacy rights of the detained individuals. While the trial court held that New Jersey state law required the release of the detainees’ identifying information, an INS regulation adopted shortly thereafter forbade disclosure of the identities of anyone being detained at the behest of the INS. See 8 C.F.R. § 236.6 (2003). This regulation was subsequently upheld and found controlling by the New Jersey state appeals court in *American Civil Liberties Union of New Jersey, Inc. v. County of Hudson*, 799 A.2d 629 (N.J. Super. A.D. 2002).

<sup>217</sup> 448 U.S. 555 (1980) (holding that the First Amendment forbids the closing of criminal trials to the press and public).

the “mosaic” of data that would be made available by greater openness on our part.<sup>218</sup>

Two U.S. Circuit Courts of Appeal have recently addressed the question whether and under what circumstances the government may continue to order closed immigration proceedings. The Sixth Circuit, in *Detroit Free Press v. Ashcroft*,<sup>219</sup> found the Creppy Directive in violation of the First Amendment’s guarantees of free press and public access to judicial proceedings. The guarantees are applicable in the context of deportation hearings, the court reasoned, because of deportation hearings’ strong similarities to judicial trials, and because of the compelling arguments that openness aids the democratic legitimacy of the detention and deportation process.<sup>220</sup> The Sixth Circuit broke with the actions of many of its sister circuits by rejecting pleas for deference to a responsible, but secret, Executive Branch conducting the nation’s foreign affairs:

The Executive Branch seeks to uproot people’s lives, outside the public eye, and behind a closed door. Democracies die behind closed doors. The First Amendment, through a free press, protects the people’s right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment “did not trust any government to separate the true from the false for us.” They protected the people against secret government.<sup>221</sup>

The Sixth Circuit was troubled by the inherent boundlessness of the government’s mosaic theory. First, the court noted the dramatic over-inclusiveness of the theory as applied to ordinary immigration proceedings, most of which pose no risk of leaking intelligence information of any importance to antiterrorism efforts. Rank speculation about possible information leaks cannot “form the basis for such a drastic restric-

<sup>218</sup> See, e.g., *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 706 (6th Cir. 2002) (quoting one affidavit: “Bits and pieces of information that may appear innocuous in isolation, but used by terrorist groups to help form a bigger picture of the Government’s terrorism investigation, would be disclosed. The Government describes this type of intelligence gathering as akin to the construction of a mosaic, where an individual piece of information is not of obvious importance until pieced together with other pieces of information” [internal quotation marks omitted]).

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.* at 699, 700.

<sup>221</sup> *Ibid.* at 683 (internal citations omitted).

tion of the public's First Amendment rights."<sup>222</sup> Second, there would be no limit to the power of the Executive Branch if the mosaic theory could be used to close any proceeding that might contain relevant intelligence information. Given that virtually any immigration proceeding or criminal case could have *some* connection (even if only by a remote relationship) to national security, accepting the mosaic theory would allow the government to "designate certain classes of cases as 'special interest cases' and, behind closed doors, adjudicate the merits of these cases to deprive non-citizens of their fundamental liberty interests."<sup>223</sup>

Two months later, the Third Circuit addressed the same issue in *North Jersey Media Group, Inc. v. Ashcroft*.<sup>224</sup> Presented with the same arguments on both sides, the court reached a different conclusion. Deportation hearings, unlike normal criminal trials, have no long-standing history of openness under the First Amendment. Although deportation procedures have been codified via congressional statute for approximately a century, Congress has never once "explicitly guaranteed public access. Indeed, deportation cases involving abused alien children are mandatorily closed by statute, and hearings are often conducted in places generally inaccessible to the public."<sup>225</sup> Given the lack of an unbroken history of constitutional protection, the Third Circuit narrowly cabined its holding<sup>226</sup> and opted for deference to the political process. "In recognition of [the Attorney General's] experience (and our lack of experience) in [cases that present significant national security concerns], we will defer to his judgment. We note that although there may be no judicial remedy for these closures, there is, as always, the powerful check of political accountability on Executive discretion."<sup>227</sup>

My own view is more closely aligned with the decision of the Sixth Circuit. To give the government *carte blanche* to close normal deportation hearings, without requiring any narrow tailoring of restrictions to plausibly demonstrable security risks, threatens to sweep all administrative and ultimately even criminal proceedings behind a veil of

<sup>222</sup> Ibid. at 709.

<sup>223</sup> Ibid.

<sup>224</sup> 308 F.3d 198 (3rd Cir. 2002).

<sup>225</sup> Ibid. at 201.

<sup>226</sup> Ibid. at 220 ("We do not decide that there is no right to attend administrative proceedings, or even that there is no right to attend any immigration proceeding. Our judgment is confined to the extremely narrow class of deportation cases that are determined by the Attorney General to present significant national security concerns").

<sup>227</sup> Ibid.

government secrecy whenever “national security” is alleged to dictate executive opacity. Given the incumbent administration’s penchant for secrecy and distaste for democracy, a theory as broad-gauged as the mosaic theory seems too bitter a pill to ask constitutional democracy to swallow. As Justice Black wrote in his *Pentagon Papers* opinion, “[t]he word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.”<sup>228</sup> Especially when immigration judges are making decisions as fundamental as whether an individual may legally enjoy the benefits of continued residence in this country, and are authorizing remedies as harsh as deportation to potentially dangerous or hostile regimes, open access is essential to assure that our immigration laws reflect the will of “We, the People,” who give Congress its democratic legitimacy.

The government’s effort to obtain secrecy has reached beyond the closing of deportation hearings. The Ashcroft Justice Department has initiated monitoring of some detainees’ confidential conversations with their attorneys without prior judicial authorization—whenever the attorney general simply *asserts* that he has probable cause to believe the detainees might be plotting attacks and communicating to their co-conspirators through their lawyers.<sup>229</sup> The Department of Justice seeks to mollify critics of this policy by asserting that the detainees and their lawyers will have notice of the monitoring and by promising that government agents active in the investigation will not be given access to privileged information without judicial authorization. Even this last “take-our-word-for-it” safeguard, however, has an “imminent emergency” exception that, while sensible enough given the enormity of the dangers posed by large-scale terrorism, contains *no exclusionary rule* to prevent the agent monitoring the attorney-client conversations from abusing “emergency” discretion as a source of evidence rather than as a means of heading off an imminent attack.<sup>230</sup> At times, the government has sought to obviate the supposed need to spy on attorney-client com-

<sup>228</sup> *New York Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring).

<sup>229</sup> 28 C.F.R. § 501.3 (2003).

<sup>230</sup> *Ibid.* For a positive spin on the administration’s various new investigative powers, see Viet D. Dinh, “Law and the War on Terrorism: Forward—Freedom and Security after September 11,” *Harvard Journal of Law & Public Policy* 25 (2002): 399.

munications by simply denying the right to counsel altogether, as it attempted to do despite a court order to the contrary in the case of Jose Padilla.

Finally, the Bush administration has extended its “national security trumps all” rationale even into normal criminal proceedings in civilian courts, most recently arguing that Zacarias Moussaoui (charged in a normal criminal court with being the “20th hijacker” who just missed his plane on 9/11) should not have access to a key al-Qaeda detainee whose testimony makes him one of Moussaoui’s main accusers. As one supporter of the government’s request argued: “[i]n the middle of a war, when you have to not only punish but prevent another attack, you can’t have the same rules.”<sup>231</sup>

Even the administration’s less radical efforts to maintain secrecy and collect information ostensibly useful in finding and combating terrorists may well be of little real utility in light of the many revelations about the shocking lack of information-sharing and investigative coordination that might bear direct responsibility for our failure to prevent the September 11 attacks.<sup>232</sup> I’m reminded of a cartoon published shortly after 9/11 depicting detectives standing in a room full of “dots,” looking around in confusion for a way to connect them. The caption said: “You know what we really need? More dots!” While it is no doubt true that not all dots are created equal—some pieces of information can provide vital clues to how best to protect the public—when the data (or “dots”) come at a high cost to individuals’ constitutional liberties, the government should, at the very minimum, be required to show that its chosen course of action (as in collecting more “dots”) will more effectively protect the public than would the harder work of breaking down bureaucratic obstructions and petty fiefdoms in order to provide better connectors for the dots we already have available.<sup>233</sup> The Bush

<sup>231</sup> Jerry Markon, “U.S. Tries to Block Access to Witness for Terror Trial,” *Washington Post*, April 2, 2003, p. A07.

<sup>232</sup> See generally Schulhofer, *The Enemy Within*; see also Parker, “September 11: Responses and Responsibilities,” pp. 8–9 (criticizing law enforcement-oriented responses to 9/11 as ignoring the “most fundamental problem revealed by September 11: the almost total lack of analyst capabilities in law enforcement organizations and the inadequate national resources devoted to national security, foreign affairs, and language studies in our universities. Solutions to such problems are the missing component in our response to terrorism, and lie beyond court action”).

<sup>233</sup> Although accounts of bureaucratic ineptitude and in-fighting have been useful in highlighting the need for reform of our intelligence and antiterror systems, the drastic expansion of the role played by federal law enforcement in terrorism prevention efforts may prove to be a bright spot underneath the very public tarnish that has accumulated on the

administration's failure to make this basic showing—a showing that echoes the classic “narrow tailoring” requirement that marks much of our constitutional law—is of a piece with the Supreme Court's failure even to discuss the question whether invalidating the Florida Supreme Court's recount remedy was an effective and narrowly tailored means of providing Florida voters with equal protection of the laws in the face of the inequalities that the Court's remedy left in place, or whether allowing the process to proceed and leaving to Congress the task of coping with residual inequalities when deciding which electoral slate to count as Florida's would have vindicated the alleged right to count votes “equally” just as effectively but with a far less drastic displacement of constitutional democracy.

### 3. PERPETUAL WAR AND CRISIS CONSTITUTIONALISM

The administration has taken to emphasizing the seriousness of the current crisis by gravely intoning that it is a virtual certainty that there will be another massive terrorist attack on our nation—an attack of *some* kind, at *some* point in time, conducted by *some* terrorist group. This “warning,” offered as “news” and promulgated through varying levels of warning codes displayed prominently on the bottom of news broadcast screens and internet web pages of every major news source in the country, is of course an inherently nonfalsifiable proposition. If an attack doesn't take place by any given point in time, that does not prove that the prediction was wrong—it could still happen in the very next week, the next month, the next year...the next five years. And if it does, the government can grimly exclaim “We warned you!” and again justify calls for us “temporarily” to sacrifice even more of our rights in this time of peril. One wonders what the great logician Karl Popper would have said about that kind of “heads we win, tails you lose” prediction!

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FBI in particular. My colleague Professor William Stuntz discusses the major shift in law-enforcement and crime fighting duties from a situation in which local police handled the lion's share to one in which the FBI has now taken a leading role all around the country and concludes that, while the “federalization” of police work may decrease the accountability local populations can demand from law enforcement, the high-profile nature and sheer volume of the work confronting federal agents may help limit abusive conduct and frivolous investigations of a sort said to have plagued the FBI in the past. See William J. Stuntz, “Terrorism, Federalism, and Police Misconduct,” *Harvard Journal of Law & Public Policy* 25 (2002): 665.



Epistemological qualms aside, the prevalence of that form of argument underscores just how boundlessly expandable and awesomely open-ended this kind of “war” is: the reassuring predictions that the sacrifices of civil liberties and seeming perversions of constitutional process will last only as long as this war lasts—that, once we’ve “won,” we can go back to what used to be called the American way of life—are fundamentally empty.<sup>234</sup> Professor Eugene Volokh was considerably more realistic—and, I think, prescient—in a dialogue on an internet magazine just a week after the World Trade Center attacks:

This isn’t about civil liberties in wartime. The phrase suggests that we’re somehow in a temporary Wartime that calls for temporary measures, which will vanish when we return to Peacetime. Well, Peacetime isn’t going to happen.

In past wars, we could know when the war was over and peacetime rules could return. But say we kill Bin Laden; overthrow the Taliban, Saddam, and Qaddafi (just to pick some likely suspects); and blow up a bunch of terrorist training camps. Will this be the end of the war? Not by a long shot. There’ll always be terrorists. There’ll always be the risk of thousands of Americans being killed. We won’t even know for sure when the risk has greatly diminished; we’d be fools to ever think it’s been eliminated.

So the measures we adopt today . . . won’t be temporary. They won’t go away. This doesn’t mean these measures are wrong; they may be good permanent measures to have. But let’s not fool ourselves that we can have them just for a few months and then return to business as usual. *This is going to be business as usual.*<sup>235</sup>

Aided by the perspective of another year and a half, one can appreciate more fully just how right Professor Volokh was. We have already seen the current “war” on terrorism used to justify thousands of secret detentions and deportations, substantial civil liberty restrictions,

<sup>234</sup> One example is the ordinarily sensible Congressman John Dingell’s statement on CNN’s *Larry King Live* that he and others of like mind could be counted on to demand that any erosion of our civil liberties during this crisis would last no longer than “necessary to triumph in this very difficult undertaking” against global terrorism. CNN, *Larry King Live*, November 8, 2001; Jay Winik, “Security before Liberty,” *Wall Street Journal*, October 21, 2001 (arguing that even “drastic[]” curtailments in civil liberties in prior wartime periods have ended “when the crisis ended,” ushering in periods of “normalcy” along with a “return[] [of] civil liberties, invariably stronger than before”). It is hard to recognize the history of American civil liberties in that Panglossian account.

<sup>235</sup> Stewart Baker and Eugene Volokh, “Civil Liberties in Wartime,” *Slate Magazine*, September 18, 2001 (emphasis added).

enhanced security procedures in all public places, legislation granting new law enforcement powers to the government, and two military campaigns to overthrow foreign regimes. And all this from a president committed to reducing the size and power of government and putting an end to nation-building. Is this what the once-upon-a-time farsighted critic Ralph Nader meant when he insisted that his spoiler's run for the presidency was no mere ego trip because there wasn't a dime's worth of difference between Governor Bush and Vice President Gore?

Interestingly, and contrary to what some historians have grown accustomed to repeating, not every wartime American president has greatly curtailed civil liberties in the elusive search for security, as though faced with some kind of zero-sum game in which expanding our surveillance instead of pooling more effectively the information we already have and are able lawfully to gather and incarcerating more suspects without judicial review instead of working harder to identify more accurately the genuine sources of danger were the most effective way to become more secure. It is true that presidents John Adams, Abraham Lincoln, Woodrow Wilson, and Franklin Roosevelt all sacrificed what are ordinarily thought to be the rights of American citizens (as well, of course, as the rights of the resident noncitizens in our midst) in order to purchase an elusive and typically illusory security. But Roosevelt's attorney general, Francis Biddle, was wrong when he asserted that "the Constitution has not greatly bothered any wartime President."<sup>236</sup> James Madison, whose talents as a Constitution-writer are widely thought to dwarf his capacity as a presidential leader, had the courage, at a time of great national peril, while the British prepared to sack Washington in the War of 1812, to resist pressures to ignore the constitutional constraints on unilateral executive measures. As Garry Wills details in his biography of our fourth president, Madison even refused to importune Congress to enact emergency measures of doubtful constitutionality.<sup>237</sup>

When our presidents invoke military necessity, the language of crisis, and a tone of grave urgency, it is crucial to keep in mind that, unlike the constitutions of many liberal democracies,<sup>238</sup> the U.S. Constitution

<sup>236</sup> Francis Biddle, *In Brief Authority* (New York: Doubleday, 1962), p. 219.

<sup>237</sup> See generally Garry Wills, *James Madison* (New York: Holt & Company, 2002).

<sup>238</sup> This is no place for an exhaustive comparative survey of emergency constitutional provisions. For a few examples, see the constitutions of Bulgaria, see Bulgaria Const. Art. 57 ("Following a proclamation of war, martial law, or a state of emergency the exercise of individual civil rights may be temporarily curtailed by law" except for certain enumerated non-derogable rights); India, see India Const. Art. 352 (empowering the president to declare a national emergency, and thereby suspend the operation of Article 19's fundamental rights

contains no mechanism for suspending its normal operation temporarily—whether by proclamation of an emergency by one or more branches of the national government or otherwise. Ours is a Constitution for all seasons. As a result, there is also no clear “sunset provision” that automatically ends whatever informal or *de facto* suspension of the standard constitutional regime may have taken place.<sup>239</sup> Our Constitution—which contains several explicit references to “war,” “rebellion,” “insurrection,” and the like in connection with particular powers of Congress<sup>240</sup> or of the states,<sup>241</sup> and in connection with a few specific individual rights<sup>242</sup>—is conspicuous for its obviously deliberate choice *not*

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guarantees, when the nation is under threat of war, aggression, or rebellion); Israel, see Israel Basic Law: The Government, §§ 49, 50 (setting procedures for the parliamentary declaration of emergency and the scope of governmental powers under an emergency); the Netherlands, see Ned. Const. Art. 103 (authorizing declarations of emergency via Act of Parliament and defining specific rights and procedures that may be derogated during times of emergency); South Africa, see S. Afr. Const. Art. 37 (described in note 239 below); South Korea, S. Korea Const. Art. 76(2) (“In case of major hostilities affecting national security, the president may issue orders having the effect of law, only when it is required to preserve the integrity of the nation, and it is impossible to convene the National Assembly”), see *ibid.*, Art. 76(1) (granting the president the power, in times of internal turmoil, external menace, natural calamity, or a grave financial or economic crisis, to take the “minimum necessary financial and economic actions or issue orders having the effect of law, only when it is required to take urgent measures for the maintenance of national security or public peace and order, and there is no time to await the convocation of the National Assembly”); and Zambia, see Zambia Const. Arts. 25, 30, 31 (granting the president the power to declare a state of public emergency and take measures “reasonably required for the purpose of dealing with the situation in question”). For a survey of how these powers have developed in one region of the world, Eastern Europe, see Venelin I. Ganey, “Emergency Powers and the New East European Constitutions,” *American Journal of Comparative Law* 45 (1997): 585–600.

<sup>239</sup> In South Africa, which has the most elaborate such scheme currently in place, *only* Parliament may declare a state of emergency—that lasts for just twenty-one days, with a single ninety-day extension allowed if approved by a majority vote, and with further extensions permitted only by a 60 percent supermajority vote. S. Afr. Const. Art. 37 (2)(b). The South Africa Constitution even has an express provision for judicial review of every declaration or extension of a state of emergency, as well as judicial review of any government action taken pursuant to a declared state of emergency. *Ibid.*, Art. 37 (3). Beyond that, rights may be curtailed during such a declared state of emergency only to the degree “strictly required by the emergency,” and rights to “life,” “equality,” and “human dignity” are explicitly declared to be “non-derogable.” *Ibid.*, Art. 37 (5).

<sup>240</sup> See, e.g., U.S. Const. Art. I § 8 cl. 11 (vesting in Congress the power to declare war), cl. 12 (granting Congress the power to raise and support armies), cl. 13 (“To provide and maintain a Navy”), cl. 14 (“To make Rules for the Government and Regulation of the land and naval forces”), cl. 15 (granting the power to call forth the militia to suppress insurrections and repel invasions), cl. 16 (empowering Congress to provide for the organization, arming, and disciplining of the militia); Art. I, § 9, cl. 2 (habeas corpus shall not be suspended unless rebellion so requires).

<sup>241</sup> See U.S. Const. Art. I § 10, cl. 3 (prohibiting state-waged war except in cases of invasion or where imminent danger will not permit delay).

<sup>242</sup> See U.S. Const. amend. 3 (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be

to follow the time-honored model of “on again/off again” constitutionalism in which “law” generally is subject to suspension in extreme circumstances, a model also followed in many more recently drafted constitutions. As Professor Nancy Rosenblum has pointed out, Niccolò Machiavelli in his *Discourses on Livy*, and a number of Machiavelli’s intellectual heirs among republican theorists like the Baron de Montesquieu, conceptualized and praised the seeming contradiction of the “dictator with limited portfolio” that appeared in the Roman Republic.<sup>243</sup> These “dictators” were never self-appointed; rather, they were elected by the Senate to a post exercising unilateral and final powers, but only for specific (and relatively short) periods.

Classical Lockean liberalism imagined a closely parallel device. Clinton Rossiter argued in 1948 that modern democracies can survive national crises only if they make allowances for “constitutional dictatorships” that would shepherd society through times of peril and then return power to the normal organs of state once a given danger had passed.<sup>244</sup> In the 1950s, Carl Friedrich examined the same notion under the rubric of “constitutional *raison d’etat*,”<sup>245</sup> merging two seemingly opposed concepts—one saying “emergency knows no law, only necessity,” and the other saying “the Constitution must at all times constrain the state.”

Our Constitution has been understood, at least since the early twentieth century, definitively to reject that kind of phase-shift or (supposedly) temporary alteration. Indeed, some have argued that our Constitution has from the very start rejected the idea of Lockean prerogative.<sup>246</sup>

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prescribed by law”); amend. 5 (“No person shall be held to answer for a capital, or otherwise famous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger...”); Art. I § 9, cl. 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”).

<sup>243</sup> Nancy L. Rosenblum, “Constitutional Reason of State: The Fear Factor,” unpublished paper delivered as a commentary on Dean Kathleen M. Sullivan’s Tanner Lectures, given at Harvard University, November 2001 (May 20, 2002, draft, on file with author), pp. 4–6.

<sup>244</sup> Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948).

<sup>245</sup> Carl J. Friedrich, *Constitutional Reason of State: The Survival of the Constitutional Order* (Brown University Press, 1957).

<sup>246</sup> See David Gray Adler, “The Steel Seizure Case and Inherent Presidential Power,” *Constitutional Commentary* 19 (Spring 2002): 173 (“There is no evidence, moreover, that the Framers intended to incorporate the Lockean Prerogative in the Constitution. And lacking a textual statement or grant of power to that effect, such an intent is indispensable to the claim of a constitutional power. In fact... the evidence runs in the other direction”).

The Framers carefully enumerated the president's powers in Article II's Take Care Clause.<sup>247</sup> "[A]n undefined reservoir of discretionary power in the form of Locke's prerogative would have unraveled the carefully crafted design of Article II and repudiated the Framers' stated aim of corralling executive power."<sup>248</sup> Some have pointed to the procedure of retroactive indemnification—a process by which an official in the Executive Branch, in the face of an emergency, could act illegally and then ask ex post for immunity from the legislature—as the Framers' accepted practice for dealing with exigency.<sup>249</sup> This practice seems to have been widely supported by some of the Framers and by judges in a few early cases,<sup>250</sup> but it finds no support in either the text or structure of the Constitution or in the relevant debates surrounding its drafting and ratification.

As a result, our Constitution lacks both an emergency suspension clause and the corresponding limiting devices that are effectively "hard wired" into systems like South Africa's in order to prevent a "crisis state" from lasting indefinitely. If our system is less elastic at the *start* of a crisis, it is similarly less capable of springing back into its former shape as crises pass. To paraphrase Mark Twain, it seems that reports of the temporary character of our sacrifices on the altar of the war on terror are greatly exaggerated—or are at least wildly premature. This problem of lingering crisis, or at least of lingering crisis-inspired constitutional sacrifice, is exacerbated by the problem of an ever-shifting, ever-eroding

<sup>247</sup> U.S. Const. Art. II (the president "shall take care that the Laws be faithfully executed").

<sup>248</sup> Adler, "The Steel Seizure Case."

<sup>249</sup> In the wake of the *Steel Seizure* decision, one scholar catalogued numerous uses of this legislative immunity practice around the time of the Founding. See Lucius Wilmerding, Jr., "The President and the Law," *Political Science Quarterly* 67 (1952): 321.

<sup>250</sup> Jefferson believed that, while observing the written law was important, it paled in comparison with the priority of national self-preservation. "To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means" (letter from Thomas Jefferson to J. B. Colvin, September 20, 1810, in *The Writings of Thomas Jefferson*, vol. 12, ed. Andrew A. Lipscomb and Albert E. Bergh [Washington, D.C.: Thomas Jefferson Memorial Association, 1904]). Ex post ratification served as the means by which an official acting in derogation of the law could be exonerated; rather than flouting the law and claiming self-granted immunity from it, the responsible executive official must violate legal provisions "at his own peril and throw himself on the justice of his country." Ibid. Justice Joseph Story explained that executives must sometimes "act on a sudden emergency...to prevent an irreparable mischief, by summary measures which are not found in the text of the laws... [I]f the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity." *Apollon*, 22 U.S. (9 Wheat.) 362, 366–67 (1824).

“baseline” of what citizens take for granted as “normal.”<sup>251</sup> The often unarticulated web of expectations for personal privacy and liberty is prone to shift continuously, if imperceptibly, in light of changing practices and experiences. Thus, the initial announcement of some new security or surveillance measure typically engenders a strong immediate reaction,<sup>252</sup> but people eventually tend to “get over it.”<sup>253</sup> In fact, our Fourth Amendment doctrines prohibiting “unreasonable searches and seizures” are consciously designed to accommodate both a normative dimension and an experiential one so as to capture the typical person’s “reasonable and justifiable expectations of privacy,” so that, when those expectations downshift to diminish the zone of privacy that people take for granted, so too does the law.<sup>254</sup> Thus, once limits on individual rights become entrenched—as they well might over the course of a conflict for which no clear end is in sight—it would be unrealistic to expect the freedoms lost in the interim soon, or perhaps *ever*, to return in their original form.

In a 1987 speech, Justice William J. Brennan, Jr., pointed to a risk of a different, perhaps more sinister sort—not that American citizens’ expectations of liberty would “creep” ever lower over the course of a prolonged conflict, but that the *episodic* nature of most crises in American history and the good fortune we have had in finding leaders who did not seek to hold onto their extraordinary powers at the end of each such crisis have conditioned us in times of supposed peril to accept restraints on liberty that Brennan characterized as excessive when measured in the calm after the storm, an insight that retains a troubling core of truth even after we discount for the familiar perils of equating 20-20 hind-

<sup>251</sup> For an interesting and detailed discussion of how baselines like this might shift, see Eugene Volokh, “The Mechanisms of the Slippery Slope,” *Harvard Law Review* 116 (2003): 1026.

<sup>252</sup> Recall, for example, the controversy following the announcement that sophisticated face-recognition technology would scan the crowd at the Super Bowl in January 2002.

<sup>253</sup> See Linda Greenhouse, “War Zone: What Price Liberty?; The Clamor of a Free People,” *New York Times*, September 16, 2001, § 4 at 1 (quoting Professor Amitai Etzioni: “All these things raise our hair the first time, and then we get used to it”). This phenomenon has been described as an “attitude-altering slippery slope.” See Volokh, “Mechanisms of the Slippery Slope” (“Sometimes, people may reasonably consider a law’s existence... to be evidence that the law’s underlying assumptions are right...”).

<sup>254</sup> Justice Scalia, in his opinion for the Court in *Kyllo v. U.S.*, 533 U.S. 27 (2001), acknowledged this malleability when he held the use of thermal imaging technology to be a “search” within the meaning of the Fourth Amendment, in part because “the technology in question [wa]s not in general public use” and therefore was an *unanticipated* invasion of the defendant’s reasonable expectations of privacy. *Ibid.* at 34.

sight with what it would have been reasonable to suppose *ex ante*. Although the historical resiliency and indeed the growth of our freedoms is certainly encouraging in the face of all we have endured as a nation, Justice Brennan rightly lamented that we seem to learn little of enduring value as we move from one crisis to the next. Nearly every time the nation has faced some real or perceived threat—the War of 1812 stands out as the exception that proves the rule—government has reflexively limited freedom in the name of necessity. As Justice Brennan warned, “A jurisprudence that is capable of sustaining the supremacy of civil liberties over exaggerated claims of national security only in times of peace is, of course, useless at the moment that civil liberties are most in danger.”<sup>255</sup> And, as Brennan noted, the danger to our liberties is heightened by the reality that our nation might not always be blessed with “wise and humane rulers, sincerely attached to the principle of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; . . . [making] the dangers to liberty . . . frightful to contemplate.”<sup>256</sup>

In the face of an increasingly assertive, unilateralist, and even imperial Executive Branch, our national legislature has been sadly supine, with most of its members eager, as they sometimes put it, not to leave “any daylight” between themselves and a popular wartime president. It is true that Congress resisted the president’s request for a completely blank check to conduct a no-holds-barred war on terrorism by agreeing only to more limited forms of force-authorizing legislation than the

<sup>255</sup> William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*. Address before the Law School of Hebrew University (December 22, 1987), available at [http://www.brennancenter.org/resources/downloads/nation\\_security\\_brennan.pdf](http://www.brennancenter.org/resources/downloads/nation_security_brennan.pdf) (quoting Justice Davis’s opinion in *Ex parte Milligan*, 71 U.S. 2, 125 [1866] [internal quotations omitted]). Brennan’s warning nicely complements Justice Jackson’s in *Korematsu v. United States*, 323 U.S. 214, 245–46 (1944) (Jackson, J., dissenting):

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

<sup>256</sup> Brennan, *The Quest to Develop a Jurisprudence*.

president had originally sought. Still, I have come to a less optimistic conclusion than some who regard the negotiations that took place over that force-authorizing legislation “at the onset of the current crisis[ , as reflecting] well on the continuing vitality of the Founders’ vision of a government characterized by branches with separate and distinct powers.”<sup>257</sup> The first authorizing legislation gave the president considerable flexibility to conduct military and law enforcement activities against amorphous groups of individuals; the later resolution, targeted at Iraq, gave the president the power to use the military however and whenever he determined that step to be “necessary.”<sup>258</sup> The USA-PATRIOT Act, as we have seen, was an almost complete rubber-stamp of the Justice Department’s request for an unprecedented expansion of law enforcement powers. This Congress hardly exercises the sort of restraint-inducing oversight that one might envision in a constitutional democracy that allegedly thrives upon a lively exchange of ideas among three coordinate branches of government.

Congressional acquiescence in executive arrogance is doubly troubling, of course, by virtue of the understandable timidity of the Judiciary in times of perceived crisis, particularly in foreign and military affairs. Even when Congress hands over emergency powers to the president in seemingly blatant violation of structural constitutional principles, it is nearly certain that the Judiciary will quietly approve. As the First Circuit recently explained while dismissing (properly, in my view, although for what I will argue was the wrong reason) a legal challenge to Congress’s delegation of war-making power to the president via the Authorization of the Use of Force in Iraq Resolution, “the theory of collusion [between the Executive and Congress], by its nature, assumes no conflict between the political branches, but rather a willing abdication of congressional power to an emboldened and enlarged presidency.”<sup>259</sup>

<sup>257</sup> Abramowitz, “The President, the Congress, and Use of Force,” p. 79.

<sup>258</sup> Authorization for Use of Military Force against Iraq Resolution of 2002, § 3(a), Pub. L. No. 107-243, 116 Stat. 1498.

<sup>259</sup> *Doe v. Bush*, 322 F.3d 109, 2003 U.S. App. LEXIS 4477, at \*4–5 (1st Cir. March 13, 2003). The *Doe* court held that the dispute was not yet ripe and hence that it was nonjusticiable. It rejected the government’s argument that the case *inherently* presented a nonjusticiable “political question.” *Ibid.* Other circuit courts have also rejected the argument that courts have no role to play in evaluating legal challenges to military campaigns, choosing instead to exercise judicial restraint on other legal grounds. See, e.g., *Campbell v. Clinton*, 203 F.3d 19, 37–41 (D.C. Cir. 2000) (Tatel, J., concurring) (arguing that a challenge to the U.S. air campaign in Yugoslavia would *not* present a nonjusticiable political question); *Berk v. Laird*, 429 F. 2d 302, 306 (2d Cir. 1970) (holding that a challenge to the Vietnam War did not by definition require resolution of a nonjusticiable political question).



As a result, the controversy “is not suitable for judicial review, because there is not a ripe dispute concerning the President’s acts and the requirements of the [authorizing legislation].”<sup>260</sup> Justice Lewis Powell embraced a similar theory in his *Goldwater v. Carter* concurrence, when he concluded that the Judiciary should avoid “issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.”<sup>261</sup>

The difficulty with the First Circuit’s approach in *Doe v. Bush*, and of Justice Powell’s concurrence in *Goldwater v. Carter*, is that it begs the question of whether the individuals whose lives, liberty, or property are subjected to coercive governmental deprivation by virtue of the action they seek to challenge may claim a right not to have that action take place except by a constitutionally specified decision-making process. This is true whether that action is the conduct of a congressionally undeclared war into which the individuals have been conscripted or in which they are being forced to fight (as in *Doe v. Bush*) or the unilateral presidential termination of a treaty resulting in the alleged confiscation of preexisting contract and property entitlements held by various private parties and the alleged circumvention of the official role of senators in ending a treaty (as in *Goldwater v. Carter*). If they may claim such an individual right, and if that constitutionally specified process requires a certain kind of action by Congress (e.g., a formal declaration of war) or by the Senate (e.g., a ratification of the decision to terminate a treaty), then it is no answer to say that the parts or branches of the government that ought to have been given a role in that process, partly as a means of improving the quality of whatever decision might emerge and *partly as a means of protecting the rights of individuals from being too easily trampled*, are quite happy, thank you, to have been relieved of any responsibility in the premises!

On the First Circuit’s theory or Justice Powell’s, the steel companies in the *Steel Seizure Case*<sup>262</sup> would have been judicially rebuffed on the basis that Congress’s failure to challenge President Harry Truman’s takeover of the steel mills (by at least passing a prohibitory bill or resolution

<sup>260</sup> Ibid. See also *Massachusetts v. Laird*, 451 F. 2d 26, 34 (1st Cir. 1971) (dismissing a challenge to the constitutionality of the Vietnam War because “[t]he war... is a product of the jointly supportive actions of the two branches to whom the congeries of the war powers have been committed. Because the branches are not in opposition, there is no necessity of determining boundaries”).

<sup>261</sup> 444 U.S. 996, 997 (1979) (Powell, J., concurring).

<sup>262</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

that the president would presumably have vetoed) made that a case of “collusion” between the Executive Branch and Congress, which “by its nature, assumes no conflict between the political branches, but rather a willing abdication of congressional power to an emboldened and enlarged presidency”—the First Circuit’s very words, which fit like a glove the facts of *Steel Seizure*. Recall that, in the first of these lectures, I expressed my doubts that the question whether an impeached federal officeholder has been denied the sort of proceeding—a “trial,” however broadly defined—that the Impeachment Trial Clause guarantees is genuinely nonjusticiable, explaining my preference for Justice Souter’s approach in *Nixon v. United States*<sup>263</sup> to that of Chief Justice Rehnquist’s majority opinion, at least if taken literally. To generalize a bit, I prefer an approach under which the Senate would have been expressly accorded broad but not unbounded latitude in the kind of process it chose to conduct—an approach that would treat as justiciable the question whether a challenged action of the Executive Branch requires suitably formal congressional authorization or approval yet would grant broad but still bounded latitude to the Executive, at least when not squarely challenged in court by Congress, to great a particular congressional action as constituting the requisite authorization or approval.

One could, if one wished, describe in “political question” terms, or in terms of the sort of “political process” doctrine I sketched earlier, a holding that the requisite authorization does not demand a particular form or shape of congressional action. That is, one could say that there is no sufficient reason to distrust the political process, or at any rate to put greater trust in a process closely overseen by the Judiciary, where Congress has enacted various measures that could quite plausibly be read to constitute whatever authorization the Constitution requires for a given action, such as ordering troops into battle, and hence that a lawsuit challenging such an order on the basis that Congress has failed to authorize it in precisely the right way—as with a declaration of war, for instance—could be dismissed on either political question or political process grounds, or even on the merits. However it is denominated, such a dismissal is really a not very well disguised ruling on the merits that the precise form of authorization insisted upon by the challenger is not something to which individuals have any cognizable right in the first place. Justice Brennan was probably right in so describing the

<sup>263</sup> 506 U.S. 224 (1993).

Court's purported refusal to reach the merits of Senator Barry Goldwater's challenge to President Carter's termination of our treaty with Taiwan upon the recognition of the People's Republic of China as the legitimate government for China: although the Rehnquist plurality opinion, finding the Constitution silent on what was required to terminate a treaty, ostensibly rested on political question grounds, and although the Powell concurrence said it rested on ripeness grounds, in essence the Court was holding that senators have no constitutionally cognizable right to participate in treaty-termination decisions, and presumably also that private individuals have no constitutionally secured right to have a treaty under which they have acquired various interests remain in force until terminated by the president with the advice and consent of the Senate.

In my view, neither Congress as a body, nor its members as legislators, nor the private individuals whose liberties are curtailed by a wartime measure by the president have a constitutional right to insist on a formal declaration of war, so designated, by Congress as a precondition of the kinds of actions that President Bush took against Iraq. The resolutions that Congress enacted by overwhelming majorities, whatever might be said of their wisdom or of the wisdom of the executive actions taken under their auspices, or of the legality of either under international law, constituted authorization enough as a domestic constitutional matter. It is on that basis, and not on the basis that there was no sufficiently "ripe dispute concerning the President's acts," to quote the First Circuit, that I think the legal challenge to Congress's delegation of war-making power to the president through the Authorization of the Use of Force in Iraq Resolution was without merit.

But when the constitutional rules or principles said to have been violated, or said to be imminently threatened, by an ongoing or impending course of government action involving either the states or Congress or both are not rules designed in significant part to protect individual rights or the distinct prerogatives of some category of officeholders, then an attempt by aggrieved individuals or displaced officeholders to enlist the Federal Judiciary in their assault on that action is much more properly treated, it seems to me, as an illegitimate effort to inject the Article III Judicial Branch into political processes either within the states or within Congress—an injection that, by hypothesis, comes without the saving grace of a claimed necessity to protect individuals from machinations that derange the Constitution.

It was for that reason, remember, that I regarded the action of the *Bush v. Gore* majority as a violation of what I called the “political process” doctrine. Although the Court’s opinion is written in equal protection language, there turn out not to have been any individuals or groups of individuals who could claim with any plausibility to have been deprived of an equal right to vote and to have their ballots counted and weighed equally with those of others. The real complaint in that case was purely structural in character and perhaps ultimately more atmospheric than genuinely architectural. The questions at stake were: *first*, whether Justice Scalia was right in surmising that the public acceptance our system demands for the presidential selection process to “work” could not be attained through the political procedures in place on the ground and waiting in the wings (in the form of the single judicial magistrate and Congress itself) as of December 8, 2000; *second*, if so, whether the Justice was right in assuming as well that the Court’s intervention would ameliorate rather than exacerbate the problem; and *third*, even if he was right there as well, whether it therefore followed that the Constitution permitted that purely prudential sort of judicial intervention in an ongoing political process well designed to vindicate all the actual *rights* at stake. The first two of those questions seem to me quintessentially political in the old-fashioned sense that their meaningful appraisal entails wholesale judgments about the politics of the situation, judgments of the kind that our system understandably entrusts more to Congress than to the Court. This is in sharp contrast to judgments about whether certain individuals or groups are experiencing impermissible vote exclusion or dilution, judgments of the kind that the independent Judiciary seems ideally suited to address and judgments of a kind that the majority opinion in *Bush v. Gore* sought to make it *appear* were at stake in that case but that were not truly at stake there. The third question seems to me purely legal, and its answer, I have suggested, is no.

The *Bush v. Gore* majority, confronted with what its peculiar orientation toward the processes of democracy led it to perceive as a crisis of its own, would have been wise to proceed with restraint, not leaping into the political fray to truncate vote-counting processes that were the very lifeblood of democracy—processes that, if defective in any systemic way, were entirely amenable to correction by the mechanisms already in place in Florida and in Congress. Generally, restraint speaks to the frame of mind in which courts respect democratically accountable political

bodies empowered by the text and structure of the Constitution to make the decisions at hand; the reasons for such restraint give way when that democratic process malfunctions at the expense of politically vulnerable minorities or individuals. Thus, it seems perverse at best for a federal court to inject itself into the midst of ongoing state and congressional processes designed to resolve a complex electoral dispute—to shut down the wheels of the state system set in motion to vindicate the voting rights of individuals facing the prospect of disenfranchisement because of human incompetence and technological failure—without respect for the dignity of the individuals at the root of that state process.

No doubt, the arguments for restraint strike different chords in the context of national security disputes. As Justice Jackson noted in his famous *Steel Seizure* concurrence, the powers surrounding war and national defense occupy a “zone of twilight” where Congress and the president are likely to have “concurrent authority” or shared power whose “distribution is uncertain.”<sup>264</sup> In that twilight zone, where courts listen carefully for the sounds of congressional silence, the range of permissible actions by the Executive Branch will plainly be broader than it would be either in areas of exclusive congressional control or in areas where Congress has spoken clearly in a way that precludes the Executive Branch action at issue. But this does not mean that there is, or ought to be, no role for the Judiciary. “An extreme case might arise, for example, if Congress gave absolute discretion to the President to start a war at his or her will.”<sup>265</sup> As with the “political process” doctrine that I described earlier, the Judiciary’s role in reviewing acts implicating war powers and national security should encompass—and should, in the main, be limited to—policing the outer boundaries of permissible executive action. Inside the wide zone defined by those boundaries, it remains the task of Congress to act as a responsible steward for our cherished constitutional liberties, with little or no judicial oversight of how it discharges that responsibility.

Unfortunately, when members of Congress have begun to question the administration’s conduct of the “war” on terrorism, they have focused almost exclusively on the managerial or intelligence failures preceding the terrorist attacks, or on failures to take strong enough actions in the wake of those attacks, with little serious criticism of the casual

<sup>264</sup> *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

<sup>265</sup> *Doe*, 322 F.3d 109, at \*29.

way in which long-revered rights and liberties have been weakened or cast aside by the subsequent changes in law enforcement methods, intelligence-gathering actions, and prevention techniques. If Congress were to pull itself together more coherently, then conceivably neither the president nor the Supreme Court would be so easily dismissive of the Legislative Branch's considered collective judgments.

Conceivably...but I doubt it. I think that both the Bush presidency and the Rehnquist Judiciary perceive their constitutional roles in "lone-some cowboy" terms—not in terms of facilitating and participating in an ongoing constitutional conversation with anyone. Attorney General John Ashcroft expressed irritation during his testimony in the aftermath of September 11 before the Senate Judiciary Committee at anyone who—like me and several others who were testifying that same day—questioned the constitutionality of the president's November 13 Military Tribunal Order or of the attorney general's own detentions and attorney-client eavesdrops. The executive official who, on the federal government's organization chart, is most directly responsible for defending the United States Constitution proclaimed: "To those who pit Americans against immigrants and citizens against non-citizens; *to those who scare peace-loving people with phantoms of lost liberty*; my message is this: Your tactics only aid terrorists—for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends."<sup>266</sup>

In saying as much, the attorney general spoke from a sense of certitude about his own premises that I hasten to add is anything but the exclusive province of the Executive Branch, or of those whose vision of human liberty "liberals" like me would describe as unduly cramped. For his certitude was not so different from that displayed by the U.S. Supreme Court when it suggested, in *Casey*,<sup>267</sup> that those urging it to overrule *Roe v. Wade*<sup>268</sup> so as to return abortion questions to the states were, by the mere fact of their challenge to the Court's much-controverted resolution of the abortion issue, undermining badly needed (and much-

<sup>266</sup> Testimony of Attorney General John Ashcroft, *DOJ Oversight: Preserving Our Freedoms While Defending against Terrorism: Hearing before the Senate Comm. on the Judiciary*, 107th Cong. (2001) (emphasis added). Ashcroft's testimony was swiftly and widely criticized. See, e.g., Neil A. Lewis, "Ashcroft Defends Antiterror Plan; Says Criticism May Aid U.S. Foes," *New York Times*, December 7, 2001, p. A1; Frank Rich, "Confessions of a Traitor," *New York Times*, December 8, 2001, p. A23.

<sup>267</sup> *Planned Parenthood of Penn. v. Casey*, 505 U.S. 833 (1992).

<sup>268</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

deserved) public confidence in the impersonal majesty of the law as pronounced by none other than the Court itself.<sup>269</sup> As Professor Mark Tushnet put it in a recent article, “the Court’s self-understanding leads it to authoritarian efforts to shut off conversation by disparaging those who refuse to shut up after the Court has spoken.”<sup>270</sup> One could hardly improve on the title of Tushnet’s article: “Shut Up He Explained.”

In a series of articles that I published nearly thirty years ago—articles such as “Technology Assessment and the Fourth Discontinuity”<sup>271</sup> and “Ways Not to Think about Plastic Trees,”<sup>272</sup> whose titles I have always hoped would be more enticing than offputting—I sought to develop the constitutional counterpart of the basically Kantian notion that *real* freedom, as opposed to enslavement to one’s ever-changing and at least partly involuntary wants and preferences, is all about shaping one’s life, both as an individual and as part of a political community, in terms of the fundamental commitments one chooses to make—and then adhering to those commitments until one has genuinely rethought them and made a considered decision to edit or amend them. It’s rather like saying that Ulysses *may* untie himself from the mast after all—but only if he has forced himself to think really hard about it first. Such commitments do not—indeed, cannot—evolve, deepen, or mature in solitude. In solitude unreplenished by interchange—by the sharing of words, images, experiences—commitments stagnate; soliloquy is a poor medium for growth.

And the temptation to talk in an echo chamber mostly to oneself and then to emerge with *ex cathedra* pronouncements in the name of the Constitution—or, if enough of a crisis mentality has overtaken those who hold the reins of power and the elites that sustain them (as it overtook five of the nine Justices in *Bush v. Gore* and as it seems to have overtaken the Bush administration and its staunchest supporters), then in the name of the Constitution’s and even the nation’s very survival—is obviously greatest when one persuades oneself that one is called by destiny to perform a heroic mission in which trust is costly (“loose lips sink

<sup>269</sup> *Casey*, 505 U.S. at 868 (“If the Court’s legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court’s concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible”).

<sup>270</sup> Mark Tushnet, “Shut Up He Explained,” *Northwestern University Law Review* 95 (2001): 907.

<sup>271</sup> *Southern California Law Review* 46 (1973): 617.

<sup>272</sup> *Yale Law Journal* 83 (1974): 1315.

ships”), or that one stands at the precipice of a “constitutional moment” that others may fail to perceive clearly or be unable to seize wisely. Keeping the force of that temptation in mind, anyone mindful of the dangers likely to attend the entrenchment of an insular and arrogant (even if largely well-meaning) Executive Branch, and anyone fearful of the myopia and tenacity that together typify any unchecked authority’s enduring grip on power, should be alarmed at this administration’s penchant for casting nearly all its decisions in the form of indisputably noble acts of heroic patriotism, informed by destiny and propelled by the passion of a just crusade against evil. Anyone concerned with constitutional fidelity should be dismayed when the White House counsel, Alberto Gonzales, proclaims, without the slightest sense of irony, that it’s not the president’s job to worry about the Constitution; his *only* job is “to protect the country.”<sup>273</sup>

I should make clear that I am not minimizing the dangers we face from the proliferation of violent terrorist acts and of the global networks of fundamentalist indoctrination and training that sustain and encourage such acts as forms of opposition to secular regimes and perhaps to all of modernism and moderation itself at the turn of the millennium; I surely would not suggest that those dangers are the stuff of merely imagined crises. To be sure, a strong case can be made (although this is not the place to make it) for the proposition that much of what our nation has done in the quest for order and security against the ravages of international terrorism, including the military invasion of Iraq that we launched in the spring of 2003 ostensibly as a means of ridding that nation of a murderous and tyrannical regime believed to possess weapons of mass destruction (weapons not yet located as of this writing) and thought to be more than willing to share such weapons with transnational terrorist groups, has diverted attention from more focused and effective strategies for coping with terrorist threats, spawning a thousand potential terrorists for every one it has disarmed. And a powerful argument can be advanced that only a fully international rather than a stubbornly unilateral campaign of mass communication, grass-roots education, and authentic nation-building can hope in the long run to make a dent in the peril the world confronts from an escalating eruption of murderous and suicidal terrorism.

<sup>273</sup> Kate Martin, “More Power for Bush: Alberto Gonzales Ordered Deference to the President,” *Legal Times*, December 23, 2002.



But that peril is no fantasy, and to enjoy a long run we must also survive in the short run. Just so, we must attempt to head off or at least to limit the most threatening manifestations of the terrorist menace through measures that employ at times ruthless counterintelligence, smartly targeted surveillance, intensified border control, more thorough financial tracking, occasionally preventive as well as reactive arrests and detentions, and technologically sophisticated as well as culturally adapted forms of persistent pursuit, search, seizure, and incapacitation, both civilian and military, that in less perilous circumstances might well be condemned as unconstitutional or otherwise unacceptable. Yet—although the point is one made so often and so numbingly that we might perhaps be forgiven for all but forgetting its truth—the fact that aspects of our privacy and liberty and of other rights we hold dear may need to give way to some as yet impossible to predict degree in order to save innocent lives and achieve a decent measure of immunity from paralyzing dread does not imply that measures sacrificing such rights in the name of combating terrorism are, by virtue of that very sacrifice, somehow guaranteed to purchase any significant increment in safety or security in the bargain. Nor does it indicate that the particular tradeoffs implicit in any given measure are guaranteed to be ones that any (or at least many) of us would knowingly accept, with our eyes open, absent an almost childlike yearning to trust elected or appointed officials to make those difficult tradeoffs on our behalf. Cognitive dissonance may no doubt be minimized by accepting the notion that large sacrifices of privacy and freedom, at least when they are broadly shared rather than focused on readily marginalized minorities, when imposed pursuant to constitutionally sanctified processes of decision in a representative system of government, surely *must* be efficacious in enhancing our security—that so much of the intangible treasure of rights that we tell ourselves we value so highly surely cannot have been expended in vain—but that psychological reality should serve simply to warn us to be most on our guard when we hear that comforting melody.

Because it is obviously possible, in heeding this warning, to tie our own hands and those of our security forces too tightly rather than to unleash the power of the state in too unbridled a form, and because neither reason nor a recourse to our traditions and our founding documents can furnish a formula to circumvent the burdens of judgment, any plausible injunction for our Judiciary or for our Executive, the two branches that have each displayed distressing degrees of hubris and far too little

humility of late, must at least reflect the dual character of our peril by insisting not that those at the helm of either branch “act *less*,” but that they “act *more thoughtfully*.” And, lest such appeals to the ancient virtues of mindfulness and openness to the views of others be dismissed as too platitudinous and insufficiently institutional and hard-headed to be worth very much, it is worth recalling the observation of Learned Hand that “[l]iberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.”<sup>274</sup>

If our Scylla is a tendency to conjure nonexistent crises or to exaggerate real ones—and all too casually to overstep the lawful bounds of constitutionally allocated authority in the conviction that the sky is falling and that only “we” the Justices (or “we” the president) can save the day—then our Charybdis lurks in the comforting and altogether understandable tendency to deny the truly extraordinary, and yes, sometimes perhaps even the extraconstitutional, nature of the measures we may reluctantly conclude we must take in the face of a genuine crisis and to shoehorn extreme, limiting cases under the big tent of the “normal” Constitution. For the more we stretch the fabric of that big tent to accommodate another and yet another supposedly necessary step, the thinner and more frayed that constitutional fabric is bound to become. It is difficult, to say the least, to define, much less to achieve, an Aristotelean ideal of “moderation” in asserting government power in extraordinary times. But a tolerable approximation to that ideal, it seems to me, is much more easily struck when each coordinate branch goes about its business with a minimum of strutting, remaining constantly cognizant of the roles assigned to the other coequal branches and, above all, of the heightened risks of irreparable harm that actions taken unilaterally, whether by a single branch of government or by a nation acting in isolation, engender.

In the management of what appear to be crises, at times when the stakes suddenly escalate by orders of magnitude—from ersatz “crises” as comparatively tame as the virtually deadlocked election of November 7, 2000, to indisputably real crises like that of September 11, 2001, and like those that could well attend the even worse disasters that might lie ahead—the first—and possibly the last—thing to remember is that

<sup>274</sup> Learned Hand, *The Spirit of Liberty: Papers and Addresses of Learned Hand*, ed. Irving Dilliard (1959), pp. 189–90, cited in Oren Gross, “Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?” *Yale Law Journal* 112 (2003): 1014.

whatever actions we choose to take will unleash consequences we cannot hope to control, including consequences that flow from the manifold ways in which past becomes prologue.

That is the case even with crises that have well-defined beginnings, as with formal declarations of war, and well-delineated endings, as with treaties that end hostilities in formal armistice. That was Justice Robert Jackson's wise reminder when he dissented from the Supreme Court's infamous *Korematsu* decision upholding the World War II-era exclusion by military order of tens of thousands of American citizens of Japanese ancestry from their homes and their communities without any individualized determination of wrongdoing or even disloyalty.<sup>275</sup> Justice Jackson wrote that, even if the military exclusion order itself could be justified, or at least excused, on the theory that we *expect* and therefore *empower* our generals to save the nation—and that, unless it is understood to permit them to do just that, our Constitution would be just another piece of parchment—for the Court to *bless* that military order with its seal of constitutional approval, as the *Korematsu* majority plainly did, would forever remake the Constitution in that order's image, setting a legal precedent that would lie about forever, a loaded weapon that some future government, perhaps in less pressing circumstances, would be free to pick up and fire.<sup>276</sup>

September 11 was a crisis; Pearl Harbor was a crisis; the 2000 election was not. If I am wrong in that assessment, and if something that deserved to be called a real crisis was at hand, then I believe the Court should at least have been more candid about what it was doing and why. If the Court was adopting the view, recently articulated by Judge Richard Posner, that “legality must sometimes be sacrificed for other values,”<sup>277</sup> then it owed the country, at the very least, an explanation of the values it was enshrining, rather than expressing barely believable discomfort with its “unsought responsibility.”<sup>278</sup> One result of the Court's failure of candor was the production of a new and misshapen equal protection (pseudo-)“doctrine” that *either* established at most a precedent for a series of erratic one-night stands for the Court's own indulgence in this era of frequently too-close-to-call elections *or* is destined to sprout

<sup>275</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>276</sup> *Ibid.* at 245 (Jackson, J., dissenting). See note 255 above.

<sup>277</sup> Richard A. Posner, “The Truth about Our Liberties,” *Responsive Community* 12 (Summer 2002): 4, 6.

<sup>278</sup> 531 U.S. 98, 111 (2000) (*per curiam*).

legs that might carry us into one or another altogether unpredictable and perhaps intolerable doctrinal cul-de-sac.

So too with the spreading array of counterterrorism efforts now underway: We must squarely confront the fact that at least some of the Executive's chosen steps are truly extraordinary; seek as best we can to identify and to articulate the singularity of those measures; attempt to design institutionally and psychologically realistic ways to contain such measures through independent judicial review without affirmatively blessing as constitutional those measures that we either deem immune to such review or have decided to privilege with a form of review that is extraordinarily deferential; and undertake to reason collectively and candidly about the good or evil of these measures from a perspective that recognizes that they may in truth fail to "fit" within the normal confines of the Constitution—a perspective that asks, with brutal honesty, whether and when such concededly extraconstitutional steps are truly if lamentably warranted.

I certainly would not claim that all of the Bush administration's seemingly extraconstitutional actions are necessarily beyond the pale in the time of genuine terrorist danger we now confront, facing as we must a far-flung, determined, and frustratingly amorphous enemy fanatically committed to our destruction and perhaps that of our allies and eager or at least willing to martyr its own members in the process of killing helpless and unarmed civilians if that is what the enemy concludes is best calculated to destabilize our civilization. No sane society, and no tolerably self-preserving government committed to protect the lives and freedoms of its people, could afford to say (and to *mean*) that members of such an enemy force are constitutionally immune to the application of carefully designed preventive measures calculated to incapacitate the source of danger directly rather than to rely merely on some system of disincentives. Such incapacitation may at times need to rely on preventive detention—not as a way of inflicting punishment in advance of a crime's commission,<sup>279</sup> or as a species of incarceration for a "thought crime," but as a sadly necessary form of protection from wanton slaughter of the innocent. Indeed, those who would insist on stretching the

<sup>279</sup> I explored the ramifications of that form of preventive detention and concluded that it could not be justified in my first law review article, Laurence H. Tribe, "An Ounce of Detention: Preventive Justice in the World of John Mitchell," *University of Virginia Law Review* 56 (1970): 371.

web of criminal conspiracy law so far that it could be counted on to ensnare every individual who poses a demonstrably significant threat of mortal danger to the community must of necessity contemplate convicting, and sentencing to imprisonment (or worse), persons who have committed no overt acts unambiguously furthering any criminal conspiracy, and whose only “crimes” have taken the form of contemplating, and conversing with others about, terrorist acts. Much as a society committed to human rights under a republican form of government should not need to *criminalize* contagious disease in order to justify enforcing a *quarantine*, so such a society should not have to transmute other forms of dangerousness into crime in order to cope rationally with such dangers.<sup>280</sup>

Thus, if there exists sufficiently strong evidence that a particular individual, whether or not an American citizen, has the firm intention to build a “dirty” bomb that would release dangerously radioactive fallout (or a potentially even more lethal aerosolized chemical or biological agent) in a populated area and has a reasonable prospect of acquiring the means to do just that if left at liberty, it would not entail an abridgment of basic constitutional rights or even the creation of a constitutional discontinuity—a “black hole” in the law corresponding to what other systems would attempt to insulate from the normal legal order by decreeing a state of emergency or its equivalent<sup>281</sup>—to approve such an individual’s purely preventive incarceration in humane, nonpunitive conditions no more insulated from outside contact than considerations of public safety demonstrably necessitate, for a period lasting no longer than the danger allegedly warranting the person’s detention continues to justify. Critical to the acceptability of any such preventive detention, however, is its explicit authorization by duly enacted *law*. A well-functioning constitutional democracy must eschew creeping normalization through a series of executive steps, each having deceptively limited impact on a carefully chosen few, under a system whose criteria are either hidden from public view (and hence protected from full political accountability) or shielded from close scrutiny by courts independent of

<sup>280</sup> See *Robinson v. California*, 370 U.S. 660 (1962) (criminalizing any disease would constitute “cruel and unusual punishment” forbidden by the Eighth Amendment).

<sup>281</sup> For an exhaustive discussion of the various theories justifying departures from the Constitution in times of crisis, see Gross, “Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?” p. 1011

the incarcerating authority (and hence insulated from rigorous judicial review as well). Without such transparency, power to detain the would-be radioactive bomber itself becomes a radioactive tool—corrosive to the body politic and potentially lethal to all our liberties.

## CONCLUSION

What are we to make of the trends toward constitutional unilateralism and hubris that we have observed in these two lectures? Is there any cause for optimism—either for action by Congress or for a courageous pronouncement on high from the Supreme Court? Have we not watched the Judicial Branch, at least as currently constituted, indulge a readiness to dismiss out of hand the constitutional and even the empirical conclusions of Congress—a readiness that betrays a Judicial Branch largely uninterested in what Congress might have to say or in how it might choose to proceed even in matters seemingly entrusted to it by the Constitution's text, as with the determination of a state's presidential electors under Article II, Section 1, and the Twelfth Amendment, or with the decision, under Section 5 of the Fourteenth Amendment, of what measures are necessary and proper to enforce the rights secured against the states? Is not a Federal Judiciary so inclined unlikely to deem the absence of explicit congressional authorization and regularization fatal to executive actions that appear rationally calculated to protect the public from repeated terrorist attack? Is there any reason to think that the Supreme Court, confronted with cases like *Hamdi*, *Padilla*, or *Odab*, would be troubled by the unilateral nature of executive measures for military detention or military trial?

The cynic, or perhaps the realist, in me responds: We might hope such a Judiciary would be troubled—if only because it is by *legislative enactment alone* that the Executive's assertions of power can be brought under regularized *judicial* control, and because the very specter of detentions or convictions altogether beyond the reach of such judicial control would strike such a Judiciary as a terrible affront to its own special role in our system of government as judicially conceived and elaborated. It is not, in other words, that we can count on the Supreme Court suddenly to respect Congress or individual rights more; it is rather that we can,

perhaps, count on the Court to view a judicial insistence on congressionally enacted provisions for habeas corpus and other avenues of judicial review as the best available way to hold onto its own jealously guarded turf.

When the Rehnquist Court in the *Velazquez* case narrowly struck down, as a violation of the First Amendment, an attempt by Congress to limit the contents of the advocacy that could be provided by federally funded public interest lawyers litigating against the Executive Branch in welfare cases, it did so in no small part on the ground that such a limitation would undercut the Court's own jealously guarded role as ultimate arbitrator of "what the law is"—less, it would seem, to protect freedom of advocacy or speech as such than to prevent any atrophy of its own magisterial role.<sup>282</sup> So too, we might dare to hope, even a Court less than consistently zealous in its guardianship of and commitment to individual liberties might well balk at the absence of congressionally assured procedures for meaningful judicial review of military detentions and convictions—even if motivated largely by a concern, similar to that underlying *Velazquez*, to sacrifice not an inch of its hard-won hegemony over matters constitutional.

It would be wonderful, of course, if the Supreme Court were as jealous as I trust many of us are of the people's liberties and of the preconditions of a fully vibrant, if sometimes admittedly messy and a bit chaotic, representative and even participatory constitutional democracy. It would be marvelous if our Court's sense of democracy were more than

<sup>282</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001). The Court explained that "[i]nterpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy." *Ibid.* at 545 (citing *Marbury v. Madison*, 5 U.S. ([1 Cranch.] 137, 177 [1803] ["It is emphatically the province and the duty of the judicial department to say what the law is"])). The Court then noted:

By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. Congress cannot wrest the law from the Constitution which is its source. "Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law."

*Ibid.* (quoting *Marbury*, 5 U.S. [1 Cranch.] at 178). This turf-protecting rationale may help explain how the Court decided *Velazquez* without overruling the seemingly contrary opinion in *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding a congressional restriction on the provision of abortion counseling by any family-planning project receiving federal funds).

chad-deep.<sup>283</sup> And it would be cause for celebration indeed if the Court's tolerance, or even encouragement, of multiple centers of constitutional authority led it to respect Congress's co-equal role in managing excruciatingly close elections, coping with subtle threats to Fourteenth Amendment rights, and grappling with the truly frightening threats of global terrorism. But we cannot await the day when we may be blessed with a Supreme Court humble enough, and wise enough, to heed the counsel of Learned Hand when he wrote that "[t]he spirit of liberty is the spirit that is not too sure that it is right."<sup>284</sup> To such a Court, it might also seem axiomatic that the spirit of liberty is the spirit that is not too sure that those in *authority*—however many stars they wear on their shoulders *or* stripes on their sleeves—are right either.

We cannot afford to await the advent of a Court so minded when we have it within our grasp to make what use we can, within the moral constraints of intellectual honesty, of the Court's own institutional hubris, however misguided we may think it, as the engine with which to protect the rights of those whom an overzealous government would sacrifice on the altar of a fake security. To throw up our hands in defeat when we might still turn the judicial appetite for institutional power into an indirect shield for personal liberty would be inexcusable. Given the enormity of the threat to all our freedoms—a threat subtler but not less serious than the threat of terrorism itself—giving up so easily would far too readily reduce the promise of the American Constitution, the promise of liberty, to “a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will.”<sup>285</sup>

<sup>283</sup> I refer, of course, to the superficiality of the Court's insistence that recounting unrecorded ballots in a manner that risked treating a hanging or dimpled chad in one precinct differently from how a similar-looking ballot would be treated in another violated equal protection, while casting aside ballots with crude punch-card machinery in some counties but with costly optical scanners in others was constitutionally inoffensive.

<sup>284</sup> Learned Hand, “The Spirit of Liberty,” address at the “I Am an American Day” ceremony held in New York City's Central Park (May 21, 1944), in *The Spirit of Liberty: Papers and Addresses of Learned Hand*, 3d ed. (New York: Knopf, 1960), pp. 189–90.

<sup>285</sup> *Edwards v. People of State of California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).