



We the People

# Power Surge

The Constitutional Record of George W. Bush

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## Executive Summary

In recent judicial confirmation battles, President Bush has repeatedly—and correctly—stressed fidelity to the Constitution as the key qualification for service as a judge. It is also the key qualification for service as the nation’s chief executive. On January 20, 2005, for the second time, Mr. Bush took the presidential oath of office set out in the Constitution, swearing to “preserve, protect and defend the Constitution of the United States.” With five years of the Bush administration behind us, we have more than enough evidence to make an assessment about the president’s commitment to our fundamental legal charter.

Unfortunately, far from defending the Constitution, President Bush has repeatedly sought to strip out the limits the document places on federal power. In its official legal briefs and public actions, the Bush administration has advanced a view of federal power that is astonishingly broad, a view that includes

- a federal government empowered to regu-

late core political speech—and restrict it greatly when it counts the most: in the days before a federal election;

- a president who cannot be restrained, through validly enacted statutes, from pursuing any tactic he believes to be effective in the war on terror;
- a president who has the inherent constitutional authority to designate American citizens suspected of terrorist activity as “enemy combatants,” strip them of any constitutional protection, and lock them up without charges for the duration of the war on terror—in other words, perhaps forever; and
- a federal government with the power to supervise virtually every aspect of American life, from kindergarten, to marriage, to the grave.

President Bush’s constitutional vision is, in short, sharply at odds with the text, history, and structure of our Constitution, which authorizes a government of limited powers.

**Fidelity to the constitutional oath of office should be a central factor in judging presidents.**

## Introduction

On March 4, 1793, George Washington stood before the assembled worthies in the Senate chamber in Congress Hall in Philadelphia and delivered his second inaugural address, still the shortest inaugural speech on record:

Fellow citizens: I am again called upon by the voice of my country to execute the functions of its Chief Magistrate. When the occasion proper for it shall arrive, I shall endeavor to express the high sense I entertain of this distinguished honor, and of the confidence which has been reposed in me by the people of united America.

Previous to the execution of any official act of the President, the Constitution requires an oath of office. This oath I am now about to take, and in your presence: That if it shall be found during my administration of the Government I have in any instance violated willingly or knowingly the injunctions thereof, I may (besides incurring constitutional punishment) be subject to the upbraidings of all who are now witnesses of the present solemn ceremony.<sup>1</sup>

Washington's second inaugural is a model of presidential brevity, but it makes an important point. Fidelity to the constitutional oath of office should be a central factor in judging presidents; violation of that oath is just grounds for "upbraiding" them, and more. Unfortunately, our modern political culture treats the oath of office as little more than a ceremonial exercise.

For the founding generation, however, such oaths had deep significance. As Justice Joseph Story put it in his *Commentaries on the Constitution*, "Oaths have a solemn obligation upon the minds of all reflecting men," and if witnesses in even minor civil or criminal cases are required to swear an oath, then "surely like guards ought to be interposed in the administration of high public trusts, and especially in

such, as may concern the welfare and safety of the whole community."<sup>2</sup> Indeed, the Framers of the Constitution considered the presidential oath important enough to specify the exact words that the president must speak before his ascendancy to office, as they did for no other position.

Thus, on January 20, 2005, at the West Face of the Capitol, George W. Bush raised his right hand, put his left on the Bible, and took the same oath he had taken four years previously, the same oath Washington and 40 other presidents had taken:

I do solemnly swear that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.<sup>3</sup>

What does it mean to "preserve, protect, and defend the Constitution of the United States"? One thing it cannot mean is that the president can act without reflecting on the constitutionality of his actions, confident that the federal courts will step in to strike down any actions that breach constitutional boundaries. The text of the oath imposes an independent obligation on the president to "preserve" the Constitution, an obligation that cannot be fulfilled by an indifferent posture that seeks to shift that responsibility to the federal courts.

That the oath was not a mere formality—that it required independent constitutional judgment by the president—is clear from early historical practice. The leaders of the early Republic emphatically did not believe the judiciary held a monopoly on constitutional questions. As Thomas Jefferson said, explaining his decision to pardon those who had been convicted under the Sedition Act for exercising their right to free speech:

The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because the power was placed in their hands by the Constitution. But the Executive, believ-

ing the law to be unconstitutional, were bound to remit the execution of it; because that power has been confided to them by the Constitution. That instrument meant that its coordinate branches should be checks on each other.<sup>4</sup>

Essential to maintaining those checks was the presidential veto. Our early presidents believed their oath of office required them to veto unconstitutional legislation. Washington was the first president to veto a bill, and his first exercise of the Constitution's veto power was carried out explicitly on constitutional grounds. In 1792 Washington vetoed a bill apportioning representatives among the several states, noting that it violated two constitutional requirements for apportionment.<sup>5</sup> President James Madison vetoed, on Establishment Clause grounds, two bills giving special privileges to churches and an internal improvement bill, on the grounds that no enumerated constitutional power could justify the appropriation. In fact, when Andrew Jackson vetoed the reauthorization of the Bank of the United States on policy grounds as well as constitutional ones, his veto message caused a stir, given that many people at the time believed that constitutional objections were the sole legitimate grounds for a veto.<sup>6</sup>

Though the Framers believed the oath of office imposed a solemn obligation on the president to uphold the Constitution and defend it from potential violations by coordinate branches, they were under no illusions about the oath's inviolability. The oath was merely the first line of defense in a system of checks and balances designed to restrain abuses of power.

The fundamental defense against such abuses would always reside in the people. Nearly a hundred years after Washington's inauguration, Grover Cleveland, in his first inaugural address, described the vigilance on which our Republic depends:

He who takes the oath . . . to preserve, protect, and defend the Constitution

of the United States only assumes the solemn obligation which every patriotic citizen—on the farm, in the workshop, in the busy marts of trade, and everywhere—should share with him. The Constitution which prescribes his oath, my countrymen, is yours; the government you have chosen him to administer for a time is yours. . . . Every citizen owes to the country a vigilant watch and close scrutiny of its public servants and a fair and reasonable estimate of their fidelity and usefulness.<sup>7</sup>

It is in that spirit that this study will appraise the constitutional record of President Bush.<sup>8</sup>

In a sense, George W. Bush campaigned on the sanctity of the oath of office. His signature move on the campaign trail in 2000 was to end his stump speech by pantomiming the oath of office, raising his right hand in the air, his left positioned as if on an imaginary Bible, declaring that he would “swear to not only uphold the laws of the land, but I will also swear to uphold the honor and the dignity of the office to which I have been elected, so help me God.”<sup>9</sup> Has he lived up to that promise “to uphold the laws of the land”? From free speech and unreasonable searches to war powers, habeas corpus, and federalism, we will examine the president's words and actions in light of the constitutional duties imposed by the oath of office. The pattern that emerges is one of a ceaseless push for power, unchecked by either the courts or Congress, one, in short, of disdain for constitutional limits. That pattern should disturb people from across the political spectrum. The criticism expressed in this study is often harsh, but the evidence is there as a matter of public record for all fair-minded people to see—and it paints a disturbing picture of presidential indifference to constitutional safeguards and principles.

## The Free Speech Clause

The First Amendment's command, “Congress shall make no law . . . abridging the free-

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dom of speech,” enshrines the principle that “each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.”<sup>10</sup> That principle is a cornerstone of our political system. And it has given rise to a vibrant, dynamic, expressive culture—one that can, as Thomas Jefferson acknowledged in his first inaugural address, “[wear] an aspect which might impose on strangers unused to think freely and to speak and to write what they think.”<sup>11</sup>

The American constitutional tradition of free thought and free expression is nowhere more important than when it comes to criticizing those in power. For that reason, commentators from across the political spectrum have recognized that at the very core of the First Amendment lies the right to criticize elected officeholders. Unfortunately, President Bush has failed to protect that right.

### **Regulating and Rationing Political Speech**

President Bush’s decision to sign the McCain-Feingold campaign finance bill is as clear an example of willful violation of the constitutional oath of office as one is likely to find with this president or any other. That is because Bush first publicly acknowledged his constitutional duty to veto the proposed legislation because it violated the First Amendment—and then proceeded to sign it anyway.

In early 2000 Sen. John McCain (R-AZ), then-governor Bush’s principal challenger for the Republican nomination, was one of the driving forces behind a legislative push to eliminate unregulated “soft money” donations to political parties and to severely restrict the ability of independent groups to run political advertisements.<sup>12</sup> On ABC’s *This Week* program on the morning of January 23, 2000, George Will asked candidate Bush for his views on such restrictions (having told him, prior to the show, that the question was coming). Governor Bush (1) agreed with Will that the president has an independent duty to judge the constitutionality of the legislation he signs, (2) acknowledged that the McCain-Feingold bill was unconstitutional,

and (3) promised to veto it. Here is an excerpt from that morning’s show:

George Will: With regard to campaign finance, your opponent Senator McCain has made much of his pledge to ban soft money. You say that would be bad for the Republican party. I want to see if you agree with those who say it would be bad for the First Amendment. . . . do you think a president . . . has a duty to make an independent judgment of what is and is not constitutional, and veto bills that, in his judgment, he thinks are unconstitutional?

Gov. Bush: *I do.*

George Will: In which case, would you veto the McCain-Feingold bill, or the Shays-Meehan bill?

Gov. Bush: *That’s an interesting question. . . . yes I would. . . . I think it does . . . restrict free speech for individuals. . . . I think there’s been two versions of it, but as I understand the first version restricted individuals and/or groups from being able to express their opinion. I’ve always said that I think . . . corporate soft money and labor union soft money, which I don’t believe is individual free speech, this is collective free speech, ought to be banned. . . . And the other concern of mine is, I think we ought to make it easier for individuals to participate in the process. This needs to be a process of individuals.*<sup>13</sup>

In the exchange, then-governor Bush also expressed agreement with Justice Clarence Thomas’s statement (put on the television screen by a helpful George Will): “There is no constitutionally significant difference between campaign contributions and expenditures. Both forms of speech are central to the First Amendment.”<sup>14</sup>

Two years later, the McCain-Feingold bill, officially named the Bipartisan Campaign

Reform Act of 2002, had passed both houses of Congress. And President Bush had changed his mind—not about the constitutional defects of the bill, but about the political merits of signing it. Asked at a news conference whether he'd hesitate to sign the bill, he wisecracked: "I won't hesitate. It will probably take about three seconds to get to the W., I may hesitate on the period, and then rip through the 'Bush.'"<sup>15</sup>

One might find the president's mugging for the cameras cute or infuriating, depending on one's opinion of the bill, but President Bush betrayed quite a bit more hesitation at the official signing ceremony. Media coverage of the signing ceremony tended to focus on the fact that President Bush did not invite Senator McCain to the scene of his legislative triumph. More interesting, however, was that President Bush acknowledged and conceded the constitutional objections to the bill even as he signed it. In his official remarks at the ceremony, President Bush noted:

Certain provisions present serious constitutional concerns. In particular, H.R. 2356 goes farther than I originally proposed by preventing all individuals, not just unions and corporations, from making donations to political parties in connection with Federal elections.

I believe individual freedom to participate in elections should be expanded, not diminished; and when individual freedoms are restricted, questions arise under the First Amendment.

I also have reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election.

However, in President Bush's view, the ultimate responsibility lay with the judicial branch: "I expect that the courts will resolve these legitimate legal questions as appropriate under the law."<sup>16</sup> But as President Bush had acknowledged on *This Week* two years

earlier, judges are not the only officials who swear an oath to uphold the Constitution. They are merely the last line of defense against unconstitutional action. And when the president abdicates his constitutional responsibility, as President Bush did when he signed a bill he knew to be unconstitutional, there is no guarantee that the courts will act to uphold theirs.

In fact, the Supreme Court did not accept President Bush's invitation to strike down the offending portions of BCRA. In December 2003, in *McConnell v. Federal Election Commission*, the Court upheld all the major provisions of BCRA.<sup>17</sup> Among those provisions was the ban on individual, "soft money" contributions to political parties. That provision, as Justice Anthony Kennedy noted in his dissent, would have criminalized Ross Perot's efforts to build the Reform Party in the 1990s, sending him to jail for up to five years for giving over \$25,000 to a national party.<sup>18</sup> Such a provision can only have the effect of protecting the established duopoly of the Republican and Democratic parties.

And if, as candidate Bush agreed in January 2000, there is "no constitutionally significant difference between campaign contributions and expenditures" and both are "central to the First Amendment," one wonders why as president he signed a bill that restricts contributions to political parties. It's no coincidence that electoral challengers seeking to boost their name recognition through advertisements disproportionately benefit from soft money contributions flowing through national parties and that incumbents are better situated to fund their own speech by raising hard money donations.<sup>19</sup> As were other provisions of BCRA, the restrictions on donations to political parties were designed to make it more difficult to fund the sort of speech that incumbents find offensive—and threatening to their livelihoods.

Also upheld by the Court was what President Bush referred to in his signing statement as "the broad ban on issue advertising." Title II of BCRA is a constitutional abomination, creating a new legal category called "elec-

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tionering communications,” defined as “any broadcast, cable or satellite communication” that refers to a specific candidate for federal office, airs within 60 days of a general election (or 30 days of a primary), and is “targeted to the relevant electorate.” Prior to BCRA, those ads could be funded as their sponsors saw fit. Unions, corporations, and nonprofits could give any sum they wished to support such political speech. After BCRA, the funding for such advertising had to be done within the strictures of federal campaign finance law, including its prohibitions and contribution limits. Unions and corporations—even nonprofit corporations—are prohibited from funding such advertisements from their general treasuries. Astoundingly, the law makes it a felony for a nonprofit group like the National Rifle Association or the Sierra Club to broadcast an ad within 60 days of an election that criticizes an elected official by name. The only legal vehicle for that kind of speech is the heavily regulated Political Action Committee, which can only raise money in limited, “hard money” increments. BCRA thus made it more difficult to fund such advertising, which means there will be less of such speech—which is precisely the point.<sup>20</sup>

How can a regulatory scheme that complex—a scheme openly designed to restrict political speech that incumbents find offensive—be squared with the First Amendment’s clear command that “Congress shall make no law . . . abridging the freedom of speech”? It cannot. BCRA is, as Justice Antonin Scalia noted in dissent, “a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government.”<sup>21</sup> The travesty here is that President Bush knew that all along. He signed the bill into law nonetheless. And in doing so, he deliberately broke his oath to defend the Constitution.

**“Free-Speech Zones”**

The Bush administration has also allowed restrictions on the rights of Americans to criticize the government on the streets of our cities and towns. In case after case, when President

Bush makes a public appearance, nonviolent protesters have been harassed by law enforcement—either Secret Service agents or local police operating at their request—and forced out of the president’s line of sight, to a designated protest area known as the “free-speech zone.” The free-speech zones are often behind fences or obstructions such as “Greyhound-sized buses” and far out of sight of the media covering the affair.<sup>22</sup> In one case, the 2004 G-8 summit on Sea Island, Georgia, protesters were kept 10 miles away.<sup>23</sup> If protesters fail to comply with the order to move, they are subject to arrest and prosecution.

“What the Secret Service does,” according to Paul Wolf, an Allegheny County, Pennsylvania, police supervisor involved in planning a presidential visit to Pittsburgh in 2002, “is they come in and do a site survey, and say, here’s a place where the people can be, and we’d like to have any protesters be put in a place that is able to be secured.”<sup>24</sup> During that presidential visit, retired steelworker Bill Neel was arrested and charged with disorderly conduct for refusing an order to move. In an open public area, amidst a crowd of Bush supporters, Neel unfurled a homemade sign reading “The Bush family must surely love the poor, they made so many of us.” When he refused to move to a free-speech zone in a fenced-in baseball field a third of a mile away, he was handcuffed and arrested by local police acting at the behest of the Secret Service. The arresting officer testified that he was instructed by the Secret Service to corral “people that were there making a statement pretty much against the president and his views.”<sup>25</sup> In St. Charles, Missouri, on November 4, 2002, activist Bill Ramsey was arrested by local police when he tried to unfurl an anti-Bush sign and refused to leave a crowd of Bush supporters while Bush was visiting a local airport. The police “said they’d been ordered to [arrest them] by the Secret Service.” In January 2003, on a public street, St. Louis police arrested IT worker Andrew Wimmer for refusing to move his “Instead of war, invest in people” sign to a free-speech zone three blocks away from the presidential motorcade route. A woman with a sign reading “Mr. President, we love you”



was allowed to remain. According to Wimmer, the police told him that “the Secret Service wanted protesters in the protest area.”<sup>26</sup>

Such actions against protestors violate settled constitutional principles governing free speech and public protest. As the Supreme Court explained in *United States v. Grace* (1983), a case involving two plaintiffs threatened with arrest for leafleting and picketing on the sidewalk in front of the Supreme Court building, “[P]ublic places’ historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered . . . to be ‘public forums.’ In such places, the government’s ability to permissibly restrict expressive conduct is very limited.” Any restrictions on the time, place, or manner of the speech must be “content-neutral [and] narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”<sup>27</sup>

When the government action in question discriminates on the basis of viewpoint, it is even less likely to survive a First Amendment challenge. That can be seen in *Mahoney v. Babbitt*, a 1997 case in which the D.C. Circuit Court of Appeals prevented a Clinton administration attempt to bar anti-abortion protestors from the parade route at President Clinton’s second inaugural. Though the National Park Service had granted permits to the Presidential Inaugural Committee that would allow them to display banners supportive of the president along the sidewalks of Pennsylvania Avenue, the Park Service denied a permit to a group protesting partial-birth abortion and threatened group members with arrest if they displayed signs criticizing the president. Since the government was “attempting to ban, on a viewpoint-determined basis, First Amendment activity from a quintessential public forum,” its action could not stand. As Judge David Sentelle noted, “[T]he government has no authority to license one side to fight freestyle, while forbidding the other to fight at all.”<sup>28</sup>

The Secret Service’s pattern and practice of herding protestors out of sight, while leaving the president’s supporters unmolested, violates that principle and establishes a worri-

some precedent. Time and again, Secret Service agents or those operating at their behest have threatened to arrest citizens who are peacefully protesting on public streets and sidewalks, unless they move to a designated, fenced-in area. That is viewpoint-based discrimination against citizens exercising their rights in public forums—and the governmental interest in protecting the president does not come close to justifying that discrimination. It cannot be seriously maintained that persons determined to do the president harm are likely to draw attention to themselves by waving placards criticizing him. Thus, in such cases, the Secret Service is protecting the president from political criticism, not physical harm.

As the *Mahoney* case shows, the Bush administration is not the first to attempt to insulate the president from public protest.<sup>29</sup> But that is no excuse for trampling free speech rights. There is no indication that President Bush has personally ordered the Secret Service to ensure that protestors are treated differently than supporters. But he has failed to put a stop to the practice. The president is in daily, direct contact with the Secret Service, and is more than capable of rectifying an unconstitutional practice that has received wide public attention. Indeed, that is what his oath requires of him. By allowing this practice to continue, President Bush has failed in his duty to ensure that those protecting him also respect the constitutional rights of citizens.

## Executive Power

The Framers sought an energetic executive, but a law-governed one. The Constitution instructs the president to “take Care that the Laws be faithfully executed.”<sup>30</sup> And as Justice Hugo Black noted, that clause “refutes the idea that he is to be a lawmaker.”<sup>31</sup> Perhaps most important, they left the decision about whether to go to war to the legislature. James Madison described the rationale for that allocation of power:

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In no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department. . . . [T]he trust and the temptation would be too great for any one man. . . . In war, a physical force is to be created; and it is the executive will, which is to direct it. In war, the public treasuries are to be unlocked; and it is the executive hand which is to dispense them. In war, the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed; and it is the executive brow they are to encircle. . . . Hence it has grown into an axiom that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm the propensity of its influence.<sup>32</sup>

True, the Constitution makes the president “Commander in Chief” of our armed forces, but as Alexander Hamilton noted in Federalist 69, that clause was no source of war-making authority:

The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy.<sup>33</sup>

Generals and admirals have considerable power, but they do not have the power to decide which countries we go to war with, and they certainly do not have authority to lock up American citizens on American soil far from the battlefield.

The Bush administration’s view of executive power is quite different. It amounts to

the view that, in time of war, the president is the law, and no treaty, no statute, no coordinate branch of the U.S. government can stand in the president’s way when, by his lights, he is acting to preserve national security. That is apparent in a series of startling claims the administration has made in official documents and public papers, which include the following:

- presidential power to ignore federal statutes governing treatment of enemy prisoners—as well as other federal laws that impinge on practices the president believes to be useful in fighting the war on terror;
- unilateral executive authority over questions of war and peace; and
- the power to designate American citizens “enemy combatants” and lock them up without charges for the duration of the war on terror—in other words, perhaps forever.

In a 1977 interview with David Frost, Richard Nixon described his view of the president’s national security authority, “Well, when the President does it, that means it is not illegal.”<sup>34</sup> In the arguments it has advanced, both publicly and privately, for untrammelled executive power, the Bush administration comes perilously close to that view.

### **The Torture Memos**

The Bush administration’s view that the president, in time of war, is unrestrained by law is on display in a series of internal Justice and Defense Department memoranda written in 2002 and 2003 and publicly revealed in 2004. In those memos, Bush administration lawyers argued that Congress is powerless to interfere with the president’s authority to order torture of enemy prisoners if the president decides such action will be useful in prosecuting the war on terror.

Much of the public discussion about the “torture memos” has focused on the narrowness of their definition of torture and the question of whether the Geneva Convention covers Al

Qaeda and Taliban prisoners. Reasonable people can debate those issues, but what's perhaps most disturbing about the memos is their assertion that the president cannot be restrained by validly enacted laws.

In 1988 the United States signed the United Nations Convention against Torture; in 1994 the Senate ratified that agreement. Later that year, Congress passed legislation implementing the agreement, making acts of torture committed under color of law outside the United States a federal crime. (Acts of torture committed within the United States were already prohibited by federal law.)<sup>35</sup> But according to the Bush administration's Justice Department, that statute is without effect, should the president decide it impedes his ability to wage war on terror.

According to the memos, prohibiting torture infringes on the president's constitutional power as commander in chief. As an August 1, 2002, memo puts it, "Congress can no more interfere with the president's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield."<sup>36</sup> The legal reasoning employed in the August 2002 memo resurfaces in a March 2003 Pentagon memo prepared for Secretary of Defense Donald Rumsfeld, which holds that "[a]ny effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the commander-in-chief authority in the President."<sup>37</sup> Of the Pentagon memo, law professor Michael Fromkin says: "The Constitution does not make the President a king. This memo does."<sup>38</sup>

The Constitution's text will not support anything like the doctrine of presidential absolutism the administration flirts with in the torture memos. It gives Congress powers that bear directly on the issue of military conduct and war crimes, including the power "To make Rules for the Government and Regulation of the land and naval Forces"<sup>39</sup> and the power "To define and punish . . . Offences against the Law of Nations"<sup>40</sup>—such as violations of international covenants against torture. And the president, in addition to his oath to uphold the Constitution,

is commanded by that document to "take Care that the Laws be faithfully executed."<sup>41</sup>

It's hard to divine anything in the administration's legal reasoning that would prohibit the seizure and torture of an American citizen on American soil, if the president concluded such action would be useful in fighting the War on Terror. After all, administration officials have argued repeatedly that the United States is as much a combat zone in that war as are the hills of Afghanistan. During oral argument in the *Padilla* case, Judge Luttig told Deputy Solicitor General Paul Clement that accusations that Padilla was an enemy combatant "don't get you very far, unless you're prepared to boldly say the United States is a battlefield in the war on terror." Clement replied, "I can say that, and I can say it boldly."<sup>42</sup>

In response to public pressure, on December 30, 2004, the Justice Department's Office of Legal Counsel issued a memorandum superseding the August 2002 memo that generated much of the controversy. While repudiating the practice of torture, OLC did not recant its broad assertion of executive authority.<sup>43</sup> Indeed, given the president's actions with regard to the recent congressional effort to prohibit "cruel, inhuman, and degrading" treatment of U.S. detainees, that theory of executive power appears to be alive and well. In December 2005, after long threatening to veto the measure, President Bush, faced with veto-proof majorities in the House and Senate, decided to sign. Yet, in his signing statement, he declared, "The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power."<sup>44</sup> Given the president's capacious view of his own authority, that could well signal the intent to ignore the law when he believes it necessary.<sup>45</sup>

Moreover, instead of penalizing any of the figures responsible for the torture memos, the president has promoted them. Jay S. Bybee, coauthor of the August 2002 memo, is

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now a federal judge on the Ninth Circuit Court of Appeals. Alberto Gonzales, who ran the Office of Legal Counsel during its elaborate effort to bypass inconvenient laws passed by Congress, is now the nation's chief law enforcement officer, as attorney general of the United States.

### **Presidential War Powers**

As revealed by the torture memos, then, in the administration's theory, Congress is powerless to prevent the president from doing whatever he believes to be necessary to win a war. And, as it turns out, Congress is also powerless to prevent the president from starting a war, if he believes that war is in the national interest. Administration officials have repeatedly advanced the claim that the president's powers include the power to decide, unilaterally, the question of war or peace.

In official Justice Department testimony given before the Senate Subcommittee on the Constitution in April 2002, John Yoo of the Office of Legal Counsel expressed the administration's view: "The President has the constitutional authority to introduce the U.S. Armed Forces into hostilities when appropriate, with or without specific congressional authorization."<sup>46</sup> In an internal memorandum prepared shortly after September 11, 2001, Yoo put it even more starkly: "In the exercise of his plenary power to use military force, the President's decisions are for him alone and are unreviewable."<sup>47</sup> That is consistent with Vice President Cheney's long-held view of the president's powers and consistent with what administration figures were telling the press in the run-up to the congressional debate over war with Iraq.<sup>48</sup>

But the administration also had a fallback theory: the president didn't need congressional authorization for *this* war with Iraq, because a previous president (George W. Bush's father) had secured authorization for the *previous* war with Iraq 11 years earlier. Then-White House counsel Alberto Gonzales argued that the 1991 congressional resolution for the Persian Gulf War, drafted to authorize expulsion of Iraqi forces from Kuwait, still had enough life

left in it to authorize a new war aimed at regime change in Iraq.<sup>49</sup>

In fairness, the administration did eventually secure a use-of-force resolution from Congress, all the while denying any authorization was needed. But taken in conjunction with the theory of presidential power articulated in the torture memos, the administration's legal position can be summed up starkly: When we're at war, anything goes, and the president gets to decide when we're at war.

The administration has argued repeatedly that Congress authorized a host of new powers for the president when it passed the Authorization for Use of Military Force in Response to the 9/11 Attacks in September 2001.<sup>50</sup> Among those powers, as discussed below, are the ability to detain American citizens without charges or trial and the ability to wiretap American citizens outside the statutory framework set up by Congress. But the argument from congressional authorization appears disingenuous when viewed in the light of the administration's broad view of its own war powers. If, in the administration's legal theory, the new powers claimed are incidents of war, and if the president can unilaterally take the nation into war, what can congressional authorization possibly add to the vast powers the president already has?

### **Unreasonable Searches and Seizures**

The Fourth Amendment to the Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Bush administration has repeatedly sought to weaken the Fourth Amendment's limits on the government's power to arrest and search persons. Bush and his lawyers profess to adhere to the Constitution, but their actions belie their words.

### Expanding the Power to Arrest

The arrest of a person is the quintessential “seizure” under the Fourth Amendment. In many countries around the world, police agents can arrest people whenever they choose, but in America the Fourth Amendment shields the people from overzealous government agents by placing some limits on the powers of the police. The primary “check” is the warrant application process. That process requires police to apply for arrest warrants, allowing for impartial judges to exercise some independent judgment with respect to whether sufficient evidence has been gathered to meet the “probable cause” standard set forth in the Fourth Amendment.<sup>51</sup> When officers take a person into custody without an arrest warrant, the prisoner must be brought before a magistrate within 48 hours so that an impartial judicial officer can scrutinize the conduct of the police agent and release anyone who was illegally deprived of his or her liberty.<sup>52</sup>

President Bush and his subordinates have undermined the Fourth Amendment’s protections in three distinct ways. First, President Bush has asserted the authority to exclude the judiciary from the warrant application process by issuing his own arrest warrants. According to the controversial “military order” that Bush issued in November 2001, once the president determines that there is “reason to believe” that a noncitizen is connected to terrorist activity and that his or her detention is “in the interest of the United States,” federal police agents “shall” detain that person “at an appropriate location designated by the secretary of defense outside or within the United States.”<sup>53</sup> According to the order, the person arrested cannot get into a court of law to challenge the legality of the arrest.<sup>54</sup> The prisoner can only file appeals with the official who ordered his arrest in the first instance, namely, the president. The U.S. military can take prisoners into custody in a war zone, but this order is not limited to persons in overseas war zones. The president’s attempt to assert such authority over persons on American soil is astonishing because the whole purpose of the Fourth

Amendment is to make such a procedure impossible in America.

Some observers have defended the constitutionality of that presidential order because it applies only to noncitizens. Although that argument may have some surface appeal, it cannot withstand scrutiny. It should be noted that while some provisions of the Constitution employ the term “citizens,” other provisions employ the term “persons.” Thus, it is safe to say that when the Framers of the Constitution wanted to use the narrow or broad classification, they did so. The Supreme Court has always affirmed this plain reading of the constitutional text.<sup>55</sup>

Second, President Bush and the FBI have tried to dilute the “probable cause” standard for citizens and noncitizens alike. The Supreme Court has noted time and again that a person cannot be hauled out of his home on the mere suspicion of police agents—since that would put the liberty of every individual in the hands of any petty official.<sup>56</sup> But in the days and weeks following September 11, the FBI arrested hundreds of people and euphemistically referred to the group as “detainees.”<sup>57</sup>

Many of those arrests were perfectly lawful, but it is also clear that many were not. The FBI has tried to justify dozens of arrests with the following argument:

The business of counterterrorism intelligence gathering in the United States is akin to the construction of a mosaic. At this stage of the investigation, the FBI is gathering and processing thousands of bits and pieces of information that may seem innocuous at first glance. We must analyze all that information, however, to see if it can be fit into a picture that will reveal how the unseen whole operates. . . . What may seem trivial to some may appear of great moment to those within the FBI or the intelligence community who have a broader context.<sup>58</sup>

At bottom, this is an attempt to effect what Judge Richard Posner, in another context,

**President Bush has asserted the authority to exclude the judiciary from the warrant application process by issuing his own arrest warrants.**

**Federal Judge  
Victor Maerrero  
ruled that  
national security  
letters violated  
both the Fourth  
Amendment and  
the First  
Amendment.**

has aptly called “imprisonment on suspicion while the police look for evidence to confirm their suspicion.”<sup>59</sup>

Third, federal agents misused an obscure federal statute, the material witness law, to detain suspects without having to charge them with a crime.<sup>60</sup> The material witness law is designed to secure a potential witness’s testimony so that it will not be lost in situations where the individual witness seems likely to ignore a summons and flee the jurisdiction.<sup>61</sup> In the months following the September 11 attacks, federal agents used the law to incarcerate suspects, not witnesses. By “evading the requirement of probable cause of criminal conduct, the government bypassed checks on the reasonableness of its suspicion.”<sup>62</sup>

The Supreme Court has repeatedly rebuffed police and prosecutorial attempts to dilute the constitutional standard of probable cause, but President Bush and his lawyers keep trying to expand the power of executive agents.<sup>63</sup>

**Expanding the Power to Seize Private Property**

The Fourth Amendment does not ban all governmental efforts to search and seize private property, but it does limit the power of the police to seize whatever they want, whenever they want. The warrant application process is the primary check on the power of the executive branch to intrude into people’s homes and to seize property. If the police can persuade an impartial judge to issue a search warrant, the warrant will be executed. However, if the judge is unpersuaded, he will reject the application and no search will take place. In the event of a rejection, the police can either drop the case or continue the investigation, bolster their application with additional evidence, and reapply for a warrant. The Bush administration has tried to expand the power of the executive branch by undermining and bypassing this constitutional framework.<sup>64</sup>

Section 215 of the Patriot Act created a new subpoena-like power that enables the police to seize private property. Bush admin-

istration officials said that provision was no cause for concern because (a) it was only about “business records,” (b) a federal judge had to approve everything, and (c) grand jury subpoenas basically perform the same purpose already. Those claims were very misleading. First, section 215 is titled “business records,” but it actually covers any “tangible” thing. Thus, section 215 can be used to seize medical records from doctors, educational records from schools, and records from libraries and bookstores. Indeed, section 215 can be used to seize personal belongings from someone’s home. Second, there is only a façade of judicial review. Unlike the search warrant application process, the Patriot Act is written in such a way as to mandate approval by the judiciary. So long as the FBI certifies that it is engaged in a terrorism investigation, the judge must grant or modify the order.<sup>65</sup> Third, citizens can exercise their free speech rights concerning grand jury subpoenas and can challenge those subpoenas in court. But the Patriot Act makes it a crime for anyone to disclose the existence of the section 215 order.<sup>66</sup> In testimony before the Senate Judiciary Committee, former representative Bob Barr (R-GA) observed, “Critics of this section [215] rightly charge that its open-ended scope and lack of meaningful judicial review open the door to abuses, and I agree.”<sup>67</sup>

The Bush administration has also championed the use of “national security letters” (NSLs). An NSL is another subpoena-like device that empowers federal agents to demand certain records from businesspeople. Unlike search warrants, executive branch agents do not need to apply to judges for these devices. These letters also threaten citizens with jail should they tell anyone about the government’s demand. When a constitutional challenge was brought against NSLs, Bush’s lawyers argued that they were fully consistent with the Bill of Rights. The federal court was not persuaded. Federal Judge Victor Maerrero ruled that NSLs violated both the Fourth Amendment and the First Amendment.<sup>68</sup> NSLs violate the Fourth Amendment because they are written “in tones sounding virtually as

biblical commandments,” thus making it “highly unlikely that an NSL recipient reasonably would know that he may have a right to contest the NSL, and that a process to do so may exist through a judicial proceeding.”<sup>69</sup> NSLs violate the First Amendment because they “operate as an unconstitutional prior restraint on speech.”<sup>70</sup>

### **Expanding the Power to Eavesdrop**

The Supreme Court has recognized that electronic surveillance, such as wiretapping and eavesdropping, impinges on the privacy rights of individuals and organizations and is therefore subject to the Fourth Amendment’s warrant clause.<sup>71</sup> President Bush claims that he can bypass the warrant application process and surveil the e-mail and phone conversations of Americans because he is the commander in chief of the U.S. military.<sup>72</sup>

In December 2005 the *New York Times* broke a story about an eavesdropping program conducted by the National Security Agency.<sup>73</sup> Shortly after the September 11 terrorist attacks, President Bush ordered the NSA to eavesdrop on Americans inside the United States to search for terrorist activity. Trying to detect the presence of terrorists inside the United States is, of course, a valid and important objective, but President Bush authorized the NSA to eavesdrop on Americans without the court-approved warrants that are ordinarily required for domestic spying. After the existence of this program was revealed, Bush made it plain that he would decide for himself whether to follow the Foreign Intelligence Surveillance Act and seek a warrant—or not.<sup>74</sup>

President Bush’s claim that he has the “inherent” power as commander in chief to order the secret surveillance of international e-mail and telephone conversations of persons within the United States raises a host of disturbing questions. For example, if the president can surveil international calls without a warrant, can he (or his successor) issue a secret executive order to intercept purely domestic communications as well? Can the president order secret warrantless searches of American homes whenever he deems it appro-

priate? Attorney General Alberto Gonzales has indicated that the president can order secret searches of American homes because President Bill Clinton deemed such break-ins “legal,” as if that would bolster the validity of his claim.<sup>75</sup>

Indeed, the president’s lawyers have already informed the federal judiciary that they regard the entire world, including every inch of U.S. territory, a “battlefield.”<sup>76</sup> That outlandish claim has profound implications for the Bill of Rights because there are *no* legal rights whatsoever on the battlefield. President Bush has delivered many speeches in which he has told audiences that he wants to use every “legal” means at his disposal so that he can “protect the country.” That is what most Americans want to hear and believe. Unfortunately, the president appears to believe that he is the ultimate arbiter of what is legal and what is illegal—at least in matters relating to national security. By twisting and redefining the term “battlefield,” the president seems prepared to override any law that hinders federal police agents, federal intelligence agents, or military personnel. Bush trusts himself to do the right thing, but he does not seem to appreciate the fact that the precedents he is attempting to establish will not expire when he leaves the White House. Those precedents will open the door to abuses by future presidents in the years to come. Instead of fortifying the legal safeguards that protect the liberties of the American people, President Bush has weakened those safeguards considerably. Despite his protestations to the contrary, the president’s actions exhibit a profound disrespect for the Constitution and the rule of law.

## **The “Great Writ” of Habeas Corpus**

The most important constitutional issue that has arisen since the September 11 terrorist attacks has been President Bush’s claim that he can arrest any person in the world and hold that person incommunicado indefinitely.

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ly. According to the legal papers that Bush's attorneys have filed in the courts, so long as he has issued an "enemy combatant" order to his secretary of defense instead of the attorney general, it does not matter if the prisoner is a foreign national or an American citizen.<sup>77</sup> And it does not matter if the prisoner was apprehended in Afghanistan or in some sleepy town in the American heartland. Under this sweeping theory of executive power, the liberty of every American rests on nothing more than the grace of the White House.<sup>78</sup>

To fully appreciate the implications of the administration's "enemy combatant" argument, one must first consider the constitutional procedure of habeas corpus. The Constitution provides: "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." Since that provision appears in Article I of the Constitution, which sets forth the powers of the legislature, the implication is clear: Congress has the responsibility to decide whether or not the writ ought to be suspended. Notably, the Bush administration has not urged the Congress to suspend habeas corpus. Nor has President Bush asserted the claim that he can suspend the writ unilaterally. Bush's lawyers have instead tried to alter the way in which the writ operates when it is *not* suspended.

By way of background, the writ of habeas corpus is a venerable legal procedure that allows a prisoner to get a hearing before an impartial judge. If the jailor is able to supply a valid basis for the arrest and imprisonment at the hearing, the judge will simply order the prisoner to be returned to jail. But if the judge discovers that the imprisonment is illegal, he has the power to set the prisoner free. For that reason, the Founders routinely referred to this legal device as the "Great Writ" because it was considered one of the great safeguards of individual liberty.<sup>79</sup>

The Bush administration's assault on the Great Writ was indirect but very real. It arose when a man challenged the legality of his imprisonment. Yaser Hamdi was initially

captured in Afghanistan and was then transferred to the prison facility at Guantanamo Bay in Cuba. When the military authorities discovered that Hamdi was an American citizen, he was moved to a military brig in South Carolina. Because Hamdi was denied access to family and legal counsel, his father filed a writ of habeas corpus on his behalf in federal court. The Bush administration could have simply explained to the court its reasons for jailing Hamdi—that Hamdi was captured on an overseas battlefield—but it chose to respond to that petition by urging the district court to summarily dismiss the petition because, it argued, the court could not "second-guess" the president's "enemy combatant" determination.<sup>80</sup> That assertion struck at the heart of habeas corpus. If the judiciary could not "second-guess" the executive's initial decision to imprison a citizen, the writ never would have acquired its longstanding reputation in the law as the Great Writ.<sup>81</sup>

If Congress has not suspended the writ of habeas corpus, the law is clear. The prisoner must be able to meet with his attorney in order to adequately prepare for their "day in court."<sup>82</sup> That day is significant because it may be the prisoner's only opportunity to persuade a judge that a mistake has been made or that an abuse has occurred. President Bush's attorneys tried to advance the astonishing notion that habeas corpus petitions could be filed—as long as they were all immediately thrown out of court. Bush's attorneys failed to persuade the Supreme Court that his "enemy combatant" policy was lawful.<sup>83</sup> Writing for the Court, Justice Sandra Day O'Connor noted, "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."<sup>84</sup> Justice Antonin Scalia recognized that even though the president and his lawyers were well-intentioned, their legal arguments were profoundly misguided: "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."<sup>85</sup>



Some conservative writers tried to downplay the significance of the president's stance by arguing that "only" a few Americans have been imprisoned on the "enemy combatant" theory.<sup>86</sup> That argument misses the point completely. The American legal system is based on precedent. If the Bush administration is successful in claiming that it can imprison just one American citizen and deprive that person of habeas corpus protection, that precedent could be used against scores of citizens thereafter, whether by the present president or his successors.<sup>87</sup> It is for that reason that Bush's attempt to undermine "the very core of our liberty" may be his most egregious failure to protect and defend our Constitution.

## Trial by Jury

Article III, section 2, of the Constitution provides, "The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury." The Sixth Amendment to the Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." To limit the awesome powers of government, the Framers of the Constitution designed a system in which citizen juries stand between the apparatus of the state and the accused. If the government prosecutor can convince a jury that the accused has committed a crime and belongs in prison, the accused will lose his liberty and perhaps his life. If the government cannot convince the jury with its evidence, the prisoner will go free. In America, an acquittal by a jury is final and is not reviewable by state functionaries.<sup>88</sup>

President Bush has tried to deny the benefit of trial by jury to noncitizens accused of terrorist activities on U.S. soil. The president's November 2001 Military Order proclaimed his authority to decide who can be tried before a jury and who can be tried before a military commission.<sup>89</sup> Some conservative legal scholars have argued that Bush's military order did not go far enough. They have urged him to revise

and extend his military order to American citizens as well.<sup>90</sup>

The federal government did try people before military commissions during the Civil War. To facilitate that process, President Lincoln suspended the writ of habeas corpus—so that the prisoners could not challenge the legality of their arrest or conviction in a civilian court.<sup>91</sup> The one case that did reach the Supreme Court, *Ex Parte Milligan* (1866), deserves careful attention.<sup>92</sup>

In *Milligan*, the attorney general of the United States, James Speed, maintained that the legal guarantees set forth in the Bill of Rights were "peace provisions." During wartime, he argued, the federal government can suspend the Bill of Rights and impose martial law. If the government chooses to exercise that option, the commanding military officer becomes "the supreme legislator, supreme judge, and supreme executive."<sup>93</sup> Under that legal theory, many American citizens were arrested, imprisoned, and executed without the benefit of the legal mode of procedure set forth in the Constitution—trial by jury.

The Supreme Court ultimately rejected the legal position advanced by Attorney General Speed. Here is a key passage from the *Milligan* ruling:

The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right to trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to speedy and public trial by an impartial jury,"

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language broad enough to embrace all persons and cases.<sup>94</sup>

The *Milligan* ruling is sound. Although the Constitution empowers Congress “To make Rules for the Government and Regulation of the land and naval Forces” and “To provide for organizing, arming, and disciplining, the Militia,” the Supreme Court ruled that the jurisdiction of the military courts could not extend beyond those people who were actually serving in the army, navy, and militia. That is an eminently sensible reading of the constitutional text.<sup>95</sup>

President Bush and his lawyers say that terrorists are “enemy combatants” and that enemy combatants are not entitled to the protections of the Bill of Rights. The defect in the president’s claim is circularity. A primary function of the trial process is to sort through conflicting evidence in order to find the truth. Anyone who *assumes* that a person who has merely been accused of being an unlawful combatant is, in fact, an enemy combatant, can understandably maintain that such a person is not entitled to the protection of our constitutional safeguards. The flaw, however, is that that argument begs the very question under consideration.

To take a concrete example, suppose that the president accuses a lawful permanent resident of the United States of aiding and abetting terrorism. The person accused responds by denying the charge and by insisting on a trial by jury so that he can establish his innocence. The president responds by saying that “terrorists are unlawful combatants and unlawful combatants are not entitled to jury trials.” The president also says that the prisoner is not entitled to any access to the civilian court system to allege any violations of his constitutional rights.<sup>96</sup> With the writ of habeas corpus denied, the prisoner and his attorney can only file legal appeals with the president—the very person who ordered the prisoner’s arrest in the first instance.

The Constitution’s jury trial clause is not a “peace provision” that can be overridden during wartime.<sup>97</sup> Reasonable people can argue

about how to prosecute war criminals who are captured overseas in a theater of war, but the president cannot make himself the policeman, prosecutor, and judge over people on U.S. soil. In America, the president’s power is checked by the judiciary and by citizen juries.<sup>98</sup>

When considering the legal changes the administration has sought to impose in the name of the war on terror, it is vitally important to consider the nature of that war. The administration has taken to calling it “The Long War.” Unlike other wars, this one will not end with a peace treaty signed at a diplomat’s table. It will take decades, and when victory is achieved, we may not know with any certainty that we’ve won. Thus, the extraconstitutional powers we tolerate now will be available for all future presidents, scrupulous or otherwise. And our entire constitutional system repudiates the notion that electing good men is a sufficient check on abuse of power.

## **Constitutional Federalism**

The “first principle” of American constitutionalism, as noted by the Supreme Court in the landmark case of *United States v. Lopez* (1995), is that the federal government is one of enumerated, and thus limited, powers.<sup>99</sup> The Constitution does not confer on the U.S. government a general police power, allowing it to legislate on all matters affecting the health, safety, and welfare of the American people. Instead, as James Madison noted in *Federalist* no. 45: “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”<sup>100</sup> Most of the federal government’s delegated powers are specifically set forth in Article I, section 8, of the Constitution. And the Tenth Amendment underscores the principle of limited, enumerated powers, making it clear that the powers not delegated to the federal government “are reserved to the States respectively, or to the people.”

The genius of American federalism—in its original design, at least—is dual sovereignty.

The states and the federal government are each supreme in their respective spheres, with the states retaining broad control over their internal affairs. As Alexander Hamilton put it in Federalist no. 17, the “one transcendent advantage belonging to the province of the State governments” was that “the ordinary administration of criminal and civil justice” remained with the states.<sup>101</sup>

At its best, this system of dual sovereignty is neither conservative nor liberal; it allows for enormous diversity and choice. It allows the states, in Justice Louis D. Brandeis’s phrase, to serve as “laboratories of democracy,” while also allowing those who object to particular experiments an easier path of escape, through the ability to exit. It enhances the political power of individual citizens by allowing important decisions of governance to be settled closest to where Americans live and work. And it avoids making politics a centralized war of all against all, where each contested moral issue is settled in a one-size-fits-all fashion at the level furthest from the people.

Early on in his administration, President Bush professed to recognize the virtues of our federalist system, and to celebrate them. In a speech before the National Governors’ Association in February 2001, he declared:

Let me make this pledge to you all. I’m going to make respect for federalism a priority in this administration. Respect for federalism begins with an understanding of its philosophy. The framers of the Constitution did not believe in an all-knowing, all-powerful federal government. They believed that our freedom is best preserved when power is dispersed. That is why they limited and enumerated the federal government’s powers, and reserved the remaining functions of government to the states.<sup>102</sup>

Yet far from making “respect for federalism a priority” in his administration, President Bush has broken that pledge repeatedly. Six years into his tenure in office, the president’s record on federalism is depressingly clear. It is

one of consistent disdain for the constitutional role of the states and for limits on federal power.

### **Limitless Federal Power**

President Bush took office at a key moment in the history of American federalism. In May 2000 the Supreme Court had decided *United States v. Morrison*, striking down provisions of the Violence Against Women Act that allowed victims of gender-motivated violence to bring suit in federal court.<sup>103</sup> The Court held that VAWA was improperly directed toward intra-state crime and beyond the scope of Congress’s power to “regulate Commerce . . . among the several States.”

*Morrison* continued what the Rehnquist Court had started in 1995’s *United States v. Lopez*, where the Court, for the first time in 60 years, struck down a federal law on the grounds that it was beyond the scope of Congress’s commerce power. *Lopez* involved a 12th-grade student in San Antonio, Texas, Alphonso Lopez, who was discovered carrying a handgun at school. He was arrested under a Texas law prohibiting the possession of firearms on school premises, but federal agents soon took over the case, charging Lopez with violating the federal Gun-Free School Zones Act of 1990. Although the act made no reference to any enumerated power of Congress, the Clinton administration defended the law on Commerce Clause grounds, arguing that gun possession in schools could lead to violent crime and disrupt the learning process, which could in turn impact the interstate economy. At oral argument, Solicitor General Drew Days forthrightly admitted that, under this rationale, there were no limits to Congress’s power to pass criminal laws under the Commerce power. The justices pressed him on this point: “[So] there is no question that Congress has the power, in effect, to take over crime, because I . . . presume there’s no limitation on your rationale, or on Congress’ rationale, that would preclude it from reaching any traditional criminal activity?” Days responded, “That’s correct.”<sup>104</sup>

The Court recoiled from that sweeping claim and, in a majority opinion by Chief

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Justice Rehnquist, noted:

To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. . . . To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.<sup>105</sup>

After *Lopez*, and with the election of George W. Bush, long-suffering constitutionalists had reason to hope that the distinction between what is truly national and what is truly local would be preserved and extended under a president who had named Clarence Thomas as one of his favorite justices. But it was not to be. Instead, the Bush administration seems determined to stop the “federalism revolution” begun by the Rehnquist Court.

Nowhere is that clearer than in the case of *Gonzales v. Raich*.<sup>106</sup> The *Raich* case involved two women suffering great physical pain, who had decided to ingest medicinal marijuana on the advice of their doctors and with the approval of their state government, under California’s Compassionate Use Act, passed by ballot initiative in 1996. After federal agents destroyed California resident Diana Monson’s cannabis plants in August 2002 (despite being informed by local police that the plants were legal under the Compassionate Use Act), Monson and Angel Raich, a California woman suffering from an inoperable brain tumor, brought suit.<sup>107</sup> Citing *Lopez* and *Morrison*, Raich and Monson argued that the federal Controlled Substances Act could not constitutionally be applied to them because their activity, ingestion of home-grown medical marijuana, was not interstate commerce and had no substantial effect on interstate commerce.

Whatever one’s view of the War on Drugs, a ruling for Raich and Monson would have presented no serious threat to the federal government’s ability to proscribe interstate commerce in narcotics. Nothing remotely resembling a commercial transaction was at issue here. No cannabis crossed state lines. None was sold. The behavior at issue was entirely legal under state law, under the careful licensing scheme set out in the Compassionate Use Act. Nonetheless, the Bush administration fought hard to retain the right to prosecute medical marijuana patients and providers—all in the name of interstate commerce. And it succeeded. On June 6, 2005, the Court held that the federal power to regulate interstate commerce was broad enough to prohibit noncommercial cultivation and use of marijuana entirely within one state. As Justice Thomas noted in dissent, “If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.”<sup>108</sup>

**Disrespect for the States**

The administration wasted little time putting the *Raich* precedent to use. Less than three weeks after the decision was handed down, federal agents carried out one of the largest Bay Area drug enforcement actions in years, raiding three San Francisco medical marijuana dispensaries and arresting 15 people for drug trafficking. Javier Pena, head agent at the U.S. Drug Enforcement Administration’s San Francisco office, declared: “The Supreme Court reiterates that we have the power to enforce the federal drug laws—even if they are not popular. We’re going to continue to do that.”<sup>109</sup>

In so doing, the Bush administration is at odds with 11 states that have decided, through the democratic process, to license the use of marijuana for medicinal purposes. That behavior is of a piece with the administration’s actions with regard to Oregon’s Death with Dignity Act.

In 1994 Oregon voters passed that act via ballot initiative, voting to allow doctors to

prescribe lethal doses of medication to terminally ill patients who choose to hasten the inevitable. The Death with Dignity Act took effect in 1997, after it survived several legal challenges, and the voters of Oregon reaffirmed the law, by rejecting a ballot initiative to repeal it. Members of Congress, including then-senator John Ashcroft, called on then-attorney general Janet Reno to declare that the act violated federal drug laws, but she refused. On November 9, 2001, newly appointed attorney general John Ashcroft reversed that decision, with a directive declaring that physician-assisted suicide served no “legitimate medical purpose” and violated the federal Controlled Substances Act, and that physicians participating in the system the Oregon act sets up would face revocation of their federal registration permitting them to prescribe medication.

On January 17, 2006, the Supreme Court held that Attorney General Ashcroft had exceeded his authority under the Controlled Substances Act. Writing for the Court, Justice Anthony Kennedy chastised the administration for its overbroad interpretation of its own authority:

The Government, in the end, maintains that the prescription requirement delegates to a single Executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality. The text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it.<sup>110</sup>

As George Mason University law professor Nelson Lund noted, one need not agree with the decision of the people of Oregon to allow physician-assisted suicide to recognize that the ends do not justify means that override federalism: “Although I support the goal of discouraging physician-assisted suicide, I also believe that Ashcroft is pursuing that

goal in a way that may undermine a fundamental constitutional principle.”<sup>111</sup>

When it comes to end-of-life issues, though, President Bush is unwilling to show that principle any deference. In the Oregon case, the Bush administration reversed the decision of the Oregon electorate to allow doctors to assist terminally ill patients who wish to end their lives. In the Terri Schiavo case, the president and his party overruled the considered judgment of the Florida courts, after seven years of exhaustive litigation, that a severely brain-damaged woman would have wanted her feeding tube removed. In February 2000, the Florida trial court ruled that Schiavo had expressed her wishes not to be kept alive in a severely diminished state, and that determination had been reviewed and allowed to stand by a Florida appellate court and the Florida Supreme Court. By mid-March 2005, some five years after the first Florida court order to withdraw life support, more than 20 federal and state court rulings had sided with Terri Schiavo’s legal guardian, her husband Michael.

When Schiavo’s feeding tube was removed on March 18, 2005, Congress went into emergency session and drafted a law aimed at overturning those decisions and reopening the case for de novo review in the federal courts. On March 21, President Bush signed the law—a law that in bill-of-attainder fashion was aimed at a single party and arguably interfered with that party’s constitutional right to refuse unwanted medical treatment.<sup>112</sup> The bill showed utter disrespect for state legal processes and the competence of state courts to handle matters with which the Constitution entrusts them. Douglas Kmiec, law professor at Pepperdine University and an ardent opponent of abortion, rightly called the Schiavo law “a constitutional abomination.”<sup>113</sup>

### **Is *Anything* to Be “Reserved to the States . . . or to the People”?**

The Schiavo case was no anomaly. Throughout his tenure, President Bush has repeatedly intruded into areas constitutionally reserved to the states. Rejecting the limitless theory of federal power offered by Clinton administration lawyers

**Douglas Kmiec, law professor at Pepperdine University and an ardent opponent of abortion, rightly called the Schiavo law “a constitutional abomination.”**

## President Bush has dramatically enhanced federal involvement in education.

in *United States v. Lopez*, Chief Justice Rehnquist offered a reductio ad absurdum: if the federal government could directly regulate any activity related to the productivity of U.S. citizens, then what could stop it from meddling in areas “where States historically have been sovereign,” such as criminal law, education, and family law?<sup>114</sup> And yet, with a series of projects ranging from small-bore, Clintonian microinitiatives to large-scale federal programs, President Bush has expanded federal involvement in each of those areas, sometimes dramatically.

**Criminal Law.** *Lopez* and *Morrison* emphatically rejected the idea of a federal police power; the Bush administration, in contrast, has embraced that extraconstitutional notion. The centerpiece of the Bush agenda in federal criminal law is a program called Project Safe Neighborhoods, a billion-dollar initiative designed to federalize the prosecution of gun law violations. Under Project Safe Neighborhoods, gun crimes that would ordinarily be prosecuted at the state level—such as possession of a handgun by a felon or drug user—are channeled into the federal system. Like the statute invalidated in *Lopez*, the federal laws targeted by PSN are based on an overbroad interpretation of the Commerce power and aim at behaviors squarely within the states’ traditional authority over criminal law. In fact, a related Bush administration program, Project Sentry, aims directly at enhancing prosecution of “school-related gun violence,” including the successor statute to the Gun-Free School Zones Act struck down by the Rehnquist Court in 1995.<sup>115</sup> A more brazen affront to the spirit of *Lopez* could hardly be imagined.<sup>116</sup>

Further evidence of the president’s endorsement of an extraconstitutional, plenary federal power in the area of criminal law can be found in his approach to “pro-life” issues such as cloning and abortion. The president has enthusiastically endorsed a bill criminalizing all attempts to achieve human cloning, a bill that was drafted as if the Constitution grants the federal government a general police power.<sup>117</sup> And on November 6, 2003, the president signed the Partial-Birth Abortion Ban Act, whose putative constitutional authority rests, once again,

on Congress’s power to regulate interstate commerce. Despite *Lopez*’s and *Morrison*’s emphasis on the necessity of congressional findings of fact that show an effect on interstate commerce, the Partial Birth Abortion Ban Act makes no attempt to demonstrate that partial-birth abortion has a substantial effect on interstate commerce. Nor is it limited to cases in which someone crossed state lines to have an abortion. Instead, the operative clause declares, “Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both.”<sup>118</sup> What one thinks of the practice proscribed here is immaterial: call it a “medical procedure” or call it “murder,” but either way an abortion performed in a single state is not “interstate commerce.” If Congress can ban the practice merely by asserting that it “affect[s] interstate commerce,” then it’s difficult to see why it cannot pass any generally applicable criminal statute, from a federal law against murder to one banning simple assault.

In 1999, former attorney general Edwin Meese headed an American Bar Association task force that examined the harmful consequences associated with the federalization of crime. Meese noted that the most compelling reason to oppose the federalization of crime was because it “contradicted constitutional principles.” By signing a ban on partial-birth abortion, President Bush endorsed the very thing that the Framers of the Constitution took pains to deny to the central government: a general grant of power to enact legislation on any subject.<sup>119</sup>

**Education and the Family.** Also constitutionally reserved to the states is control over education policy, yet President Bush has dramatically enhanced federal involvement in education, raising federal spending on education faster than any president since Lyndon Johnson.<sup>120</sup> In *Lopez*, Chief Justice Rehnquist raised the spectre of Congress “mandat[ing] a federal curriculum for local elementary and secondary schools.”<sup>121</sup> At President Bush’s behest, Con-

gress has gone a long way down that road with the No Child Left Behind Act. That statute, a 670-page monstrosity signed by the president on January 8, 2002, imposes a number of requirements on states taking federal education money (which is to say, all states). Among those requirements are that each state implement a “single state-wide accountability system,” that all students be tested in reading and math annually from grades 3 through 8 and tested once in grades 10 through 12, and that all students be proficient in reading and math by 2014. States not making “adequate yearly progress” toward the accountability standards are subject to an escalating series of expensive penalties.<sup>122</sup> Reviewing those requirements, former representative Bill Frenzel (R-MN), a scholar at the Brookings Institution, commented, “George Bush has gone further than any president in terms of federalizing education.”<sup>123</sup>

NCLB’s emphasis on standardized testing is already influencing local school curricula. Across the country, many school districts are cutting summer vacation short, in large part to comply with the new testing requirements imposed by NCLB.<sup>124</sup>

Of course, Congress has attached strings to federal education grants before. But what’s different about NCLB is that, for the first time, all of a state’s Title I education funding is dependent on compliance with the NCLB regimen. Title I funding, federal money for the education of low-income children, is the largest portion of the federal education budget, \$12.3 billion in 2004. Thus, the stakes for failing to comply with federal requirements are higher than ever before. Education Secretary Margaret Spellings has made it clear that states that do not comply with NCLB face the loss of all federal Title I dollars and has suggested that recalcitrant state officials are “un-American” for standing athwart federal attempts to close the racial achievement gap.<sup>125</sup>

Spellings has lately taken a “kinder, gentler” approach to compliance. But the leverage that NCLB gives federal regulators could spell trouble for local control of schools in the future.

NCLB already includes little-noticed provisions on school prayer and abstinence education.<sup>126</sup> A provision that was sponsored by then-senator Jesse Helms (R-NC) and Rep. Van Hilleary (R-TN) will now deny federal funds to school districts that exclude the Boy Scouts from meeting on school property.<sup>127</sup> To be sure, neither provision represents a substantial incursion on school independence beyond what was already required by federal law, but both point to the possibility of greater interference in educational decisions that ought to be made by local school boards. When the federal government seeks to use federal funds to regulate the states in ways that it could not do directly through any other enumerated power, federalism is in jeopardy.<sup>128</sup> That problem will only be exacerbated by regulatory statutes like No Child Left Behind. With a greater willingness on the part of both parties to use federal educational funds for regulatory purposes, we may begin to see controversies over “intelligent design” or sexual preference curricula fought out on the federal level.

As recently as 1996, the Republican Party platform recognized that “the Federal government has no constitutional authority to be involved in school curricula.” When the Republicans took control of Congress in 1995, they considered abolishing several cabinet-level agencies, including the Department of Education. In testimony before the newly Republican-controlled Education Committee, former education secretary William Bennett urged members of Congress to abolish the Education Department because “education in America is the constitutional responsibility of the states.”<sup>129</sup> Under the leadership of George W. Bush, the party has retreated from that principle and embarked on a project of centralized control of the nation’s schools. That project’s implications for education and constitutional government are only beginning to be felt.

Even in the area of marriage—a matter constitutionally reserved to the states if ever there was one—President Bush sees a compelling need for federal involvement. On February 24, 2004, the president announced his support for a constitutional amendment “protecting the institu-

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tion of marriage” by defining the institution as the legal union between one man and one woman, and forbidding “activist judges” from interpreting the federal or state constitutions otherwise.<sup>130</sup> Shortly before the 2004 State of the Union address, in which the president declared his support for the Federal Marriage Amendment, his administration announced a \$1.5 billion federal initiative to help couples build the relationship skills that lead to healthy marriages. The Department of Health and Human Services has begun implementing some of the “marriage-education” programs. Run out of HHS’s Administration for Children and Families, the programs include the African American Healthy Marriage Initiative<sup>131</sup> and the Hispanic Healthy Marriage Initiative, designed to “address the unique cultural, linguistic, demographic, and socio-economic needs of children and families in Hispanic communities.”<sup>132</sup> Bush appointee Wade F. Horn, assistant secretary for children and families at HHS, has actually defended the administration’s foray into marriage counseling as “an exercise in *limited government*.”<sup>133</sup>

In his speech before the National Governors’ Association at the beginning of his first term, the president noted that “the framers of the Constitution did not believe in an all-knowing, all-powerful federal government.”<sup>134</sup> But President Bush clearly does not share the Framers’ view. His record appears to reflect the belief that the federal government is far wiser, far more capable than the states and the people. It can determine, contrary to the advice of physicians and the considered judgment of the people of 11 states, that marijuana has no beneficial medical use. It can cut through the theorizing of 10,000 ethicists and theologians and summarily decide the question of when life begins and ends. It can even teach people how to have a stable marriage and raise happy and productive children. Indeed, the Bush record on federalism raises the question of whether there is *any* area of American life that this president believes, as a matter of principle, should be left to the states.

President Bush assumed office at a watershed moment in American constitutional his-

tory. Had Bush lived up to his pledge—had he honored his oath to uphold the Constitution—he might have presided over a renaissance of American federalism. He might have helped restore the distinction between what is properly national and what is properly local. He might, in the process, have achieved his professed goal of becoming “a uniter, not a divider” by leading us toward a less contentious politics and a government closer to the people. He took a far different path, choosing to repudiate constitutional limits and enhance federal involvement in matters that the Constitution leaves to the states and the people. And we are all the poorer for it.

## Conclusion

One searches for bright spots in the Bush constitutional record. And there were at least two. Early on in the president’s first term, Attorney General John Ashcroft made clear that it was the Bush administration’s position that the Second Amendment guarantees a personal, individual right to bear arms.<sup>135</sup> In two federal cases, the Bush administration argued in formal court papers that the “Second Amendment . . . protects the rights of individuals, including persons who are not members of any militia . . . to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or . . . firearms that are particularly suited to criminal misuse.”<sup>136</sup> That was a significant, if symbolic, victory for those who believe that the Second Amendment means what it says, that “the right of the people” means an individual, personal right, just as it does in the First, Fourth, Fifth, and Ninth Amendments. The president has also appointed a number of federal judges who appear to take constitutional limits seriously and may be expected to look skeptically at broad claims of legislative power. However, whether the same judges will look skeptically at broad claims of executive power remains very much in doubt.<sup>137</sup>

But those acts are not enough to redeem the Bush constitutional record, which is, over-



whelmingly, one of contempt for constitutional limits. In its official papers and public actions, the Bush administration has endorsed a vision of federal power that is astonishingly broad, a vision that includes

- a federal government empowered to regulate core political speech—and restrict it greatly when it counts the most: in the days before a federal election;
- a president who can launch wars at will, and who cannot be restrained from ordering the commission of war crimes, should he choose to do so;
- a president who can lock up American citizens at will and forever—without any meaningful oversight by the judiciary; and
- a federal government with the power to supervise all areas of American life, from education to marriage and through the end of life.

It is a vision, in short, unimagined by our Constitution’s Framers.

On the campaign trail in 2000, then-governor Bush typically ended his stump speech with a dramatic flourish: he pantomimed the oath of office. But the oath is more than a political gimmick; for the founding generation it was a solemn pledge, designed to bind the officeholder to the country and the Constitution he serves. Throughout his tenure, President Bush has repeatedly dishonored that pledge. And because of that, he has weakened the constitutional order on which the American way of life depends.

## Notes

1. George Washington, “Second Inaugural Address,” March 4, 1793, Avalon Project at Yale Law School, [www.yale.edu/lawweb/avalon/presiden/inaug/wash2.htm](http://www.yale.edu/lawweb/avalon/presiden/inaug/wash2.htm).
2. Joseph Story, “Commentaries on the Constitution, 3:§§ 1838–43,” in *The Founders’ Constitution*, [http://press-pubs.uchicago.edu/founders/documents/a6\\_3s27.html](http://press-pubs.uchicago.edu/founders/documents/a6_3s27.html).
3. U.S. Constitution, Article II, section 1, clause 8.
4. Thomas Jefferson, letter to Abigail Adams, September 11, 1804, in David N. Mayer, *The Constitutional Thought of Thomas Jefferson* (Charlottesville: University Press of Virginia, 1994), p. 269.
5. Specifically, the Constitution’s requirements that representatives be apportioned according to population and that the number of representatives could not exceed 1 per 30,000. David P. Currie, *The Constitution in Congress: The Federalist Period* (Chicago: University of Chicago Press, 1997), p. 133.
6. Frank Easterbrook, “Presidential Review,” *Case Western Reserve Law Review* 40 (1990): 907–8.
7. Grover Cleveland, “First Inaugural Address,” March 4, 1885, in *The Inaugural Addresses of the Presidents*, ed. John Gabriel Hunt (New York: Gramercy Books, 1995), p. 245.
8. This is not the first time that the Cato Institute has appraised the constitutional record of an American president. See Timothy Lynch, “Derelection of Duty: The Constitutional Record of President Clinton,” Cato Institute Policy Analysis no. 271 (March 31, 1997).
9. “His closer is a crowd-pleaser designed to remind audiences subtly of the Clinton scandals without piling it on.” William Goldschlag et al., “Getting Personal: Candidates Share Favorite Tales,” *Akron (Ohio) Beacon Journal*, January 22, 2000.
10. *Turner Broadcasting, Inc. v. FCC*, 512 U.S. 622, 641 (1994).
11. Thomas Jefferson, “First Inaugural Address,” March 4, 1801, Avalon Project at Yale Law School, [www.yale.edu/lawweb/avalon/presiden/inaug/jefinau1.htm](http://www.yale.edu/lawweb/avalon/presiden/inaug/jefinau1.htm).
12. For background, see Douglas Johnson and Mike Beard, “Campaign Reform: Let’s Not Give Politicians the Power to Decide What We Can Say about Them,” Cato Institute Briefing Paper no. 31, July 4, 1997.
13. Quoted in “Roundtable on Confederate Flag and Iowa Caucuses: Interview with George W. Bush,” *This Week*, ABC, January 23, 2000. Emphasis added.
14. *Ibid.*
15. “Red Hot Rhetoric,” *The Hill*, March 27, 2002, p. 6.
16. White House, “President Signs Campaign Finance Reform Act,” news release, March 27, 2002, [www.whitehouse.gov/news/releases/2002/03/20020327.html](http://www.whitehouse.gov/news/releases/2002/03/20020327.html).
17. 540 U.S. 93 (2003).

18. *Ibid.* at 287 (Kennedy, J., dissenting).
19. *Ibid.* at 249 (Scalia, J., dissenting).
20. *Ibid.* at 287 (Kennedy, J., dissenting).
21. *Ibid.* at 248 (Scalia, J., dissenting).
22. “Your Right to Say It . . . but over There,” *Chicago Tribune*, September 28, 2003; see also G. Jeffrey MacDonald, “A Close Eye—and Tight Grip—on Campaign Protesters,” *Christian Science Monitor*, September 27, 2004; Jonathan M. Katz, “Thou Dost Protest Too Much: An Old Law Turns Protesters into Threats against the President,” *Slate.com*, September 21, 2004, [www.slate.com/Default.aspx?id=2107012&MSID=14BD4DDB6851480595BAB1B3934BF5EA](http://www.slate.com/Default.aspx?id=2107012&MSID=14BD4DDB6851480595BAB1B3934BF5EA).
23. Emanuel Margolis, “Penning the First Amendment against Free Speech Rights,” *Connecticut Law Tribune*, August 23, 2004.
24. Quoted in Dave Lindorff, “Keeping Dissent Invisible: How the Secret Service and the White House Keep Protesters Safely out of Bush’s Sight—and off TV,” *Salon.com*, October 16, 2003, [www.salon.com/news/feature/2003/10/16/secret\\_service/](http://www.salon.com/news/feature/2003/10/16/secret_service/).
25. Magistrate Judge Shirley R. Trkula dismissed the charge of disorderly conduct on October 31, 2002, stating that “this is America, and that’s why our forefathers came here, for freedom of speech.” *Pennsylvania v. Neel*, [www.aclu.org/FreeSpeech/FreeSpeech.cfm?ID=13778&c=86](http://www.aclu.org/FreeSpeech/FreeSpeech.cfm?ID=13778&c=86).
26. Quoted in Lindorff. For a list of “free speech zone” incidents across the country, see “Free Speech under Fire: The ACLU Challenge to ‘Protest Zones,’” September 23, 2003, [www.aclu.org/free\\_speech/protest/11419res20030923.html](http://www.aclu.org/free_speech/protest/11419res20030923.html).
27. *United States v. Grace*, 461 U.S. 171, 177 (1983).
28. *Mahoney v. Babbitt*, 105 F.3d 1452, 1454 (D.C. Cir. 1997).
29. The Nixon administration was also guilty of using the Secret Service to harass demonstrators at presidential appearances. See *Sparrow v. Goodman*, 361 F. Supp. 566 (W.D.N.C. 1973), *aff’d*, 502 F.2d 1326 (4th Cir. 1979).
30. U.S. Constitution, Article II, section 3.
31. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).
32. James Madison, “Letters of Helvidius, No. II,” in *The Letters of Pacificus and Helvidius (1845) with the Letters of Americanus: A Facsimile Reproduction with an Introduction by Richard Loss* (Delmar, NY: Scholars’ Facsimiles & Reprints, 1976).
33. Alexander Hamilton, Federalist no. 69, in *The Federalist*, ed. George W. Carey and James McClellan (Dubuque, IA: Kendall-Hunt, 1990), pp. 357–58.
34. Quoted in John Herbers, “The 37th President; In Three Decades, Nixon Tasted Crisis and Defeat, Victory, Ruin and Revival,” *New York Times*, April 24, 1994.
35. See Michael John Garcia, “U.N. Convention against Torture (CAT): Overview and Application to Interrogation Techniques,” CRS Report for Congress RL32438, February 10, 2005.
36. U.S. Department of Justice, “Memorandum for Alberto R. Gonzales Counsel to the President Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A,” August 1, 2002, p. 39, [www.washingtonpost.com/wpshr/nation/documents/dojinterrogationmemo20020801.pdf](http://www.washingtonpost.com/wpshr/nation/documents/dojinterrogationmemo20020801.pdf).
37. “Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations,” *Wall Street Journal*, online edition, March 6, 2003, [http://online.wsj.com/public/resources/documents/military\\_0604.pdf](http://online.wsj.com/public/resources/documents/military_0604.pdf).
38. Michael Froomkin, “Apologia Pro Tormento: Analyzing the First 56 Pages of the Walker Working Group Report (aka the Torture Memo),” *Discourse.net*, June 9, 2004, [www.discourse.net/archives/2004/06/apologia\\_pro\\_tormento\\_analyzing\\_the\\_first\\_56\\_pages\\_of\\_the\\_walker\\_working\\_group\\_report\\_aka\\_the\\_torture\\_memo.html](http://www.discourse.net/archives/2004/06/apologia_pro_tormento_analyzing_the_first_56_pages_of_the_walker_working_group_report_aka_the_torture_memo.html).
39. U.S. Constitution, Article I, section 8, clause 14.
40. *Ibid.*, Article I, section 8, clause 10.
41. *Ibid.*, Article II, section 3.
42. Quoted in Tom Jackman, “‘U.S. a Battlefield,’ Solicitor General Tells Judges,” *Washington Post*, July 20, 2005, p. A9.
43. “Because the discussion in that memorandum concerning the President’s Commander-in-Chief power and the potential defenses to liability was—and remains—unnecessary, it has been eliminated from the analysis that follows. Consideration of the bounds of any such authority would be inconsistent with the President’s unequivocal directive that United States personnel not engage in torture.” U.S. Department of Justice, “Memorandum for James B. Comey, Deputy Attorney General Re: Legal Standards Applicable under 18 U.S.C. §§ 2340-2340A,” December 30, 2004, [www.usdoj.gov/olc/dagmemo.pdf](http://www.usdoj.gov/olc/dagmemo.pdf).

44. White House, "President's Statement on Signing of H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006," news release, [www.whitehouse.gov/news/releases/2005/12/20051230-8.html](http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html).
45. See Phillip J. Cooper, "George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements," *Presidential Studies Quarterly* 35 (September 2005). See also Josh White and Carol D. Leonnig, "U.S. Cites Exception in Torture Ban," *Washington Post*, March 3, 2006, p. A4.
46. John C. Yoo, deputy assistant attorney general, Office of Legal Counsel, "Application of War Powers Act to War on Terrorism," Testimony before the Senate Subcommittee on the Constitution, Federalism and Property Rights of the Senate Judiciary Committee, 107th Cong., 2d sess., April 17, 2002. <http://judiciary.senate.gov/hearing.cfm?id=225>.
47. John C. Yoo, "The President's Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them," memorandum opinion for the deputy counsel to the president, September 25, 2001, <http://www.usdoj.gov/olc/warpowers925.htm>.
48. "We don't want to be in the legal position of asking Congress to authorize the use of force when the president already has that full authority," said a senior administration official involved in setting the strategy. "We don't want, in getting a resolution, to have conceded that one was constitutionally necessary." Mike Allen and Juliet Eilperin, "Bush Aides Say Iraq War Needs No Hill Vote," *Washington Post*, August 26, 2002, p. A1.
49. *Ibid.*
50. Pub. L. No. 107-40, 115 Stat. 224 (September 18, 2001).
51. See *McDonald v. United States*, 335 U.S. 451, 455-56 (1948).
52. See *County of Riverside v. McLaughlin*, 500 U.S. 654 (1988).
53. George W. Bush, "Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism," *Federal Register* 66 (November 13, 2001): 833 (hereinafter Bush Military Order), sections 2(a)(1), 2(a)(2), and 3(a).
54. Section 7(b)(2) of the Bush Military Order provides that "the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof."
55. See *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Wong Wing v. United States*, 163 U.S. 228 (1896). Noncitizens have always benefited from the safeguards of the Fourth Amendment. See *Au Yi Lau v. INS*, 445 F.2d 217 (1971); *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (1976).
56. See *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).
57. See Elizabeth Neuffer, "Judge Says N.J. Can't Hide ID's of People in Custody," *Boston Globe*, March 27, 2002; and Russ Feingold, "Name the Detainees," *Washington Post*, December 23, 2001.
58. Quoted in Amy Goldstein, "A Deliberate Strategy of Disruption," *Washington Post*, November 4, 2001.
59. *Llaguno v. Mingey*, 763 F.2d 1560, 1568 (1985).
60. Steve Fainaru and Margot Williams, "Material Witness Law Has Many in Limbo," *Washington Post*, November 24, 2002, p. A1.
61. Stacey M. Studnicki and John P. Apol, "Witness Detention and Intimidation: The History and Future of Material Witness Law," *St. John's Law Review* 76 (2002): 483.
62. "Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11," *Human Rights Watch* 17, no. 2 (June 2005).
63. See *Beck v. Ohio*, 379 U.S. 89 (1964); *Wong Sun v. United States*, 371 U.S. 471 (1963).
64. In addition to Patriot Act 215 orders and national security letters, President Bush has championed other dubious proposals, such as "sneak and peek" search warrants and "administrative" subpoenas for federal agents. For a critique, see Stephen J. Schulhofer, *Rethinking the Patriot Act* (New York: Century Foundation Press, 2005).
65. "Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section." If the FBI can remember to include boilerplate language about "terrorism investigations" in its requests, the applications will easily meet "the requirements" of section 215. See Schulhofer, pp. 55-78.
66. Dan Eggen, "Secret Court Poses Challenges: Non-Government Litigants Lack Access, Ways to Influence Cases," *Washington Post*, August 30, 2004.

67. Bob Barr, chairman, Patriots to Restore Checks and Balances, Testimony on the USA Patriot Act before the Senate Judiciary Committee, 109th Cong., 1st sess., May 10, 2005, [http://judiciary.senate.gov/testimony.cfm?id=1493&wit\\_id=4256](http://judiciary.senate.gov/testimony.cfm?id=1493&wit_id=4256). See also Bob Barr, "Clearing the Air on the Patriot Act," *Washington Times*, May 17, 2005, <http://judiciary.house.gov/media/pdfs/barr050305.pdf>.
68. See *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (2004).
69. *Ibid.* at 501.
70. *Ibid.* at 475.
71. The Supreme Court has not ruled directly on the question of warrantless domestic surveillance of American citizens who are agents of foreign powers, but the separation of powers rationale outlined in the *Keith* opinion applies directly to the current controversy over the NSA program: "Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. . . . [T]hose charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks." *Katz v. United States*, 389 U.S. 347 (1967); *United States v. United States District Court*, 407 U.S. 297, 316–17 (1972) (the *Keith* case).
72. The Bush administration also relies on a congressional resolution that was passed shortly after the September 11 attacks, which authorized the use of military force. See Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (September 18, 2001). However, Bush's lawyers have made it clear that even if that resolution had not been enacted, the president could have proceeded with his controversial eavesdropping program. According to a white paper released by the Department of Justice, "The NSA activities are supported by the President's well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States." U.S. Department of Justice, "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," January 19, 2006.
73. James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers without Courts," *New York Times*, December 16, 2005.
74. Charlie Savage, "Bush Launches a Bid to Justify Domestic Spying," *Boston Globe*, January 24, 2006.
75. In defense of the NSA program, Bush's top law enforcement official stated, "The Justice Department during the Clinton Administration testified in 1994 that the President has inherent authority under the Constitution to conduct foreign intelligence searches of the private homes of U.S. citizens in the United States without a warrant." Prepared Remarks for Attorney General Alberto R. Gonzales at the Georgetown University Law Center, January 24, 2006. Turning to Bill Clinton's constitutional claims for guidance is a mark of how low the Bush administration has sunk. For a critique of Clinton's record, see Timothy Lynch, "Dereliction of Duty." See also *The Rule of Law in the Wake of Clinton*, ed. Roger Pilon (Washington: Cato Institute, 2000); James Bovard, "Feeling Your Pain." *The Explosion and Abuse of Government Power in the Clinton-Gore Years* (New York: St. Martin's, 2000).
76. Jackman. See also George F. Will, "Why Didn't He Ask Congress?" *Washington Post*, December 20, 2005, p. A31; Richard A. Epstein, "Executive Power on Steroids," *Wall Street Journal*, February 13, 2006, p. A16; Robert A. Levy, "Wartime Executive Power and the NSA's Surveillance Authority," Testimony before the Senate Judiciary Committee, February 28, 2006.
77. See Brief for United States, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). See also Brief for United States, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).
78. See Timothy Lynch, "Affront to Civil Liberties," *National Law Journal*, October 3, 2005.
79. For example, Alexander Hamilton wrote that the habeas corpus provision was a "great security to liberty and republicanism." Federalist no. 84, in *The Federalist*, p. 442.
80. Brief for Respondents-Appellants at 12, *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002).
81. See Timothy Lynch, "Hamdi and Habeas Corpus," *Wall Street Journal*, April 23, 2004.
82. Brief for Cato Institute, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
83. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).
84. *Ibid.* at 536.
85. *Ibid.* at 554–55 (Scalia, J., dissenting).
86. For example, Rich Lowry, editor of *National Review*, dismissed the alarm expressed by civil libertarians about Bush's actions in this case as an example of overheated rhetoric. Lowry sarcastical-

ly mocked those concerned about the constitutional issue: “The other dire threat to our liberties is that two American citizens—count them: one, two—are being held as enemy combatants.” Rich Lowry, “The Price of Life without a Shield,” *Washington Times*, October 29, 2002.

87. Interestingly, it appears that then-attorney general John Ashcroft had to wage a behind-the-scenes battle to stop Vice President Dick Cheney and Defense Secretary Donald Rumsfeld from locking up more Americans in military prisons. See Michael Isikoff and Daniel Klaidman, “White House and Justice Officials Had Fierce Debates over How to Treat Americans with Suspected Al Qaeda Ties: Either Lock up Indefinitely As ‘Enemy Combatants’ or Let System Work,” *Newsweek*, April 26, 2004.

88. See Timothy Lynch, “We All Lose When Judges Overreach,” *Los Angeles Times*, January 24, 2000.

89. Bush Military Order. See also William Safire, “Kangaroo Courts,” *New York Times*, November 26, 2001.

90. Robert H. Bork, “Having Their Day in (a Military) Court,” *National Review*, December 17, 2001; Douglas W. Kmiec, “This Is War, and Military Justice Is Appropriate,” *Los Angeles Times*, June 14, 2002. But see Robert A. Levy, “Don’t Shred the Constitution to Fight Terror,” *Wall Street Journal*, November 20, 2001; and Robert A. Levy, “Misreading *Quirin*,” *National Law Journal*, January 14, 2002.

91. See William H. Rehnquist, *All the Laws but One* (New York: Knopf, 1998), pp. 11–25.

92. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

93. *Ibid.*

94. *Ibid.* at 122–23. Emphasis in original.

95. See Timothy Lynch, “Power and Liberty in Wartime,” *Cato Supreme Court Review 2003–2004*, <http://www.cato.org/pubs/scr/2004/powerandliberty.pdf>.

96. Because the president’s military order immediately became mired in controversy, his lawyers have backed away from what that order actually says. For example, the Justice Department denies any attempt to suspend habeas corpus. However, that denial is not persuasive. See Bush Military Order, Section 7(b)(2).

97. Supporters of the president’s enemy combatant and military tribunal policies place great emphasis on *Ex Parte Quirin*, 317 U.S. 1 (1942), in which the Supreme Court upheld a military tribunal’s jurisdiction over several Nazi saboteurs, including one

naturalized American citizen. That decision cannot bear the weight the administration’s supporters put on it, for several reasons, not least of which is that the petitioners in *Quirin* admitted their guilt and did not challenge their status as enemy belligerents. See also Levy, “Misreading ‘*Quirin*.’”

98. See Timothy Lynch, director, Project on Criminal Justice, Cato Institute, Statement on Executive Branch Arrests and Trials (Military Tribunals) before the Senate Judiciary Committee, 107th Cong., 1st sess., December 4, 2001, [www.cato.org/testimony/ct-tl120401.html](http://www.cato.org/testimony/ct-tl120401.html); and Brief for Cato Institute, *Hamdan v. Rumsfeld*, 415 F.3d 33 (2005), cert. granted on November 7, 2005 (no. 05-184).

99. *United States v. Lopez*, 514 U.S. 549, 552 (1995).

100. Federalist no. 45, in *The Federalist*, p. 238.

101. Federalist no. 17, in *The Federalist*, p. 85.

102. White House, “Remarks by the President at National Governors’ Association Meeting,” news release, February 26, 2001, [www.whitehouse.gov/news/releases/2001/02/20010226-8.html](http://www.whitehouse.gov/news/releases/2001/02/20010226-8.html).

103. *United States v. Morrison*, 529 U.S. 598 (2000).

104. Proceedings before the Supreme Court of the United States, *United States v. Lopez*, Case no. 93-1260, Tuesday, November 8, 1994, official transcript, pp. 10–13.

105. *Lopez*, 514 U.S. at 567–68 (1995).

106. *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

107. “Declaration of Diane Monson in Support of Motion for Preliminary Injunction,” *Raich v. Ashcroft*, Case No. C 02 4872 EMC (N.D. Calif.) October 29, 2002, [www.angeljustice.org/downloads/raichashdiane.pdf](http://www.angeljustice.org/downloads/raichashdiane.pdf).

108. *Raich*, 125 S. Ct. at 2229 (Thomas, J., dissenting).

109. Quoted in Stacy Finz, “Nineteen Named in Medicinal Pot Indictment; More Than 9,300 Marijuana Plants Were Seized in Raids,” *San Francisco Chronicle*, June 24, 2005, p. B4.

110. *Gonzales v. Oregon*, No. 04-623, 2006 LEXIS 767 (2006).

111. Nelson Lund, “Why Ashcroft Is Wrong on Assisted Suicide,” *Commentary*, February 2002.

112. Pub. L. No. 109-3, An Act for the Relief of the Parents of Theresa Marie Schiavo, March 21, 2005. See also *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

113. Quoted in Jan Crawford Greenburg, "Schiavo Debate Grips Nation," *Chicago Tribune*, March 22, 2005.
114. *Lopez*, 514 U.S. at 564.
115. See Seth J. Safra, "The Amended Gun-Free School Zones Act: Doubts as to Its Constitutionality Remain," *Duke Law Journal* 50 (November 2000): 637.
116. See Gene Healy, "There Goes the Neighborhood: The Bush-Ashcroft Plan to 'Help' Localities Fight Gun Crime," Cato Institute Policy Analysis no. 440, May 28, 2002.
117. Human Cloning Prohibition Act of 2001, S. 1899. See "President Bush on Cloning" *PBS Online News Hour*, April 10, 2002; [www.pbs.org/news/hour/updates/april02/bush-cloning\\_4-10.html](http://www.pbs.org/news/hour/updates/april02/bush-cloning_4-10.html).
118. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 1531 (a).
119. See American Bar Association Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law*, 1998; Edwin Meese, "The Dangerous Federalization of Crime," *Wall Street Journal*, February 22, 1999. See also David Rivkin and Lee A. Casey, "Let the States Regulate Partial-Birth Abortion," *Wall Street Journal*, April 9, 1997, p. A15.
120. Stephen Slivinski, "The Grand Old Spending Party: How Republicans Became Big Spenders," Cato Institute Policy Analysis no. 543, May 3, 2005, p. 15.
121. *Lopez*, 514 U.S. at 565.
122. No Child Left Behind Act of 2001, Pub. L. N. 107-110. See also Lawrence A. Uzzell, "No Child Left Behind: The Dangers of Centralized Education Policy," Cato Institute Policy Analysis no. 544, May 31, 2005.
123. Quoted in Steven Thomma, "Bush's Vision Redefines the Conservative Tradition," *Philadelphia Inquirer*, February 15, 2005.
124. Michael Janofsky, "As More Schools Open Earlier, Parents Seek to Reclaim Summer," *New York Times*, August 6, 2005.
125. Steve Goldstein, "Education Secretary Is a Lightning Rod over No Child Left Behind," *Philadelphia Inquirer*, May 29, 2005.
126. Pub. L. No. 107-110, §§ 9524, 9526.
127. *Ibid.*, §9525.
128. See Lynn A. Baker, "Conditional Federal Spending after *Lopez*," *Columbia Law Review* 95 (December 1995): 1911.
129. Prepared Joint Statement by Former Secretaries of Education Lamar Alexander and William J. Bennett, "Abolishing the Department of Education to Liberate Parents and Schools," delivered before the House Economic and Educational Opportunities Committee, Subcommittee on Oversight and Investigation, January 26, 1995.
130. White House, "President Calls for Constitutional Amendment Protecting Marriage," news release, February 24, 2004, [www.whitehouse.gov/news/releases/2004/02/20040224-2.html](http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html). The president's fear that the federal courts might strike down the Defense of Marriage Act and nationalize same-sex marriage is speculative, to put it charitably. If President Bush were truly concerned about state prerogatives, he could have proposed an amendment that would have constitutionalized DOMA. Instead, he's trampled on state prerogatives by proposing an amendment that compels every state to adopt a uniform federal rule. For a critique, see Dale Carpenter, "The Federal Marriage Amendment: Unnecessary, Anti-federalist, and Anti-democratic," Cato White Paper, September 23, 2004, [http://www.cato.org/pub\\_display.php?pub\\_id=5076](http://www.cato.org/pub_display.php?pub_id=5076).
131. U.S. Department of Health and Human Services, "What Is the African American Healthy Marriage Initiative (AAHMI)?" [www.acf.hhs.gov/healthymarriage/aa\\_hmi/AAHMI.html](http://www.acf.hhs.gov/healthymarriage/aa_hmi/AAHMI.html).
132. U.S. Department of Health and Human Services, "Hispanic Healthy Marriage Initiative (HHMI)," [www.acf.hhs.gov/healthymarriage/about/hispanic\\_hm\\_initiative.html#mission](http://www.acf.hhs.gov/healthymarriage/about/hispanic_hm_initiative.html#mission).
133. Wade F. Horn, "Wedded to Marriage," *National Review*, August 9, 2005, [www.nationalreview.com/comment/horn200508090806.asp](http://www.nationalreview.com/comment/horn200508090806.asp). Emphasis in original.
134. White House, "Remarks by the President at National Governors' Association Meeting."
135. In a November 9, 2001, memo to all the U.S. attorneys, Ashcroft endorsed the individual right to bear arms and reminded the prosecutors "to respect the constitutional rights guaranteed to Americans," [www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf](http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf).
136. See Robert A. Levy, "Bearing Arms in D.C.," *Legal Times*, July 24, 2002.
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