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VOLUME 1 DECEMBER 2013 ISSUE 1

SYMPOSIUM: NAVIGATING THE POLITICAL DIVIDE: LESSONS FROM LINCOLN

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DEDICATION

This Symposium Issue is dedicated to the memory of Sandra Ruffin, a founding member of the faculty at the Lincoln Memorial University - Duncan School of Law. As the inaugural faculty advisor to the LMU Law Review, Professor Ruffin was instrumental in conceptualizing and organizing the Law Review's inaugural symposium in April 2012. Professor Ruffin's untimely death in 2013 shocked and saddened her colleagues and former students at the Duncan School of Law, who are forever grateful for her instrumental role in the formative years of this institution and its flagship publication.

LINCOLN MEMORIAL UNIVERSITY
LAW REVIEW

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FOREWORD
NAVIGATING THE POLITICAL DIVIDE: LESSONS FROM LINCOLN

*Matthew R. Lyon**
and
*William Evans***

On a brilliantly sunny but frigid February day in 2007, Senator Barack Obama stood on the steps of the Old State Capitol Building in Springfield, Illinois to announce his candidacy for the Democratic nomination for President of the United States. The location of Senator Obama's announcement was a nod to the eight years the candidate had served in the Illinois State Senate representing neighborhoods on Chicago's South Side. However, the choice of the Old State Capitol Building as the location for the kick-off of the Obama for President campaign was undoubtedly also designed to invoke the memory of the man who was, until Senator Obama twenty-one months later, the only Illinoisan ever to win the presidency[1]—our sixteenth President, Abraham Lincoln. It was Lincoln who, nearly 150 years earlier, having just received the nomination of his fellow Illinois Republicans

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1 Paul Finkleman & Ali A. Chaudhry, *Introduction to Lincoln's Legacy: Enduring Lessons of Executive Power*, 3 ALB. GOV'T L. REV. ix, ix (2010).

for the United States Senate, gave the most famous speech ever uttered in the building: his "House-Divided" Speech. The symbolism and rhetoric of Senator Obama's announcement in February 2007 recalled both that speech and the man who gave it and framed Senator Obama as the heir to the legacy of President Lincoln.

Even without the purposeful, even forced imagery of the setting for Senator Obama's announcement, there were indisputable parallels between the candidate and the Abraham Lincoln who delivered the "House-Divided" Speech in June 1858. Both men were born in states other than Illinois (Lincoln in Kentucky and Obama in Hawaii), grew up in very modest single-parent homes (Lincoln was raised by his father and Obama by his mother), and were attorneys by training (in Lincoln's case, self-training) who practiced in Illinois.[2] Senator Obama had emphasized these similarities before, openly comparing President Lincoln's "humble beginnings" with his own in a 2005 essay for TIME Magazine:

> [W]hen I, a black man with a funny name, born in Hawaii of a father from Kenya and a mother from Kansas, announced my candidacy for the U.S. Senate, it was hard to imagine a less likely scenario than that I would win—except, perhaps, for the one that allowed a child born in the backwoods of Kentucky with less than a year of formal education to end up as Illinois' greatest citizen and our nation's greatest President.[3]

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[2] *Id.*; *see also* Edward H. Pappas, *Lawyers, Leadership, and Hope*, 88-FEB MICH. B.J. 8 (2009); Phil Hirschkorn, *The Obama-Lincoln Parallel: A Closer Look*, CBS NEWS (Feb. 11, 2009), *available at* http://www.cbsnews.com/2100-250_162-4731552.html.

[3] Barack Obama, *What I See in Lincoln's Eyes*, TIME (July 4, 2005), *available at* http://content.time.com/time/magazine/article/0,9171,1077287,00.html. Eyebrows were raised at the comparison. In particular, Peggy Noonan, former speechwriter for President Reagan and a columnist for the *Wall Street Journal*, wrote that Sen. Obama was "'flapping his wings in Time Magazine and explaining that he's a lot like Abraham Lincoln, only sort of better.'" BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM 123 (2006); *see also* Susan Schulten, *Barack Obama, Abraham Lincoln, and John Dewey*, 86 DENV. U. L. REV. 807, 808 (2008-2009).

Another item that made the Old State Capitol Building an appropriate choice for Senator Obama's announcement was the ready comparison, at least superficially, between the speeches that sprung the two relatively inexperienced politicians from obscure Illinois U.S. Senate candidates to nationally relevant voices in their parties.[4] For Abraham Lincoln, that speech was the 1858 "House-Divided" Speech, so named for the Scriptural reference[5] he used in the first few passages of the speech to drive home the point that the Union could not "endure, permanently half slave and half free. . . . It will become *all* one thing or *all* the other."[6]

Due to this language, Lincoln's "House-Divided" Speech has, on occasion, been interpreted as a call for national unity in turbulent times. Indeed, in the very sentence in which he announced his candidacy for the presidency, Senator Obama's explicit reference to Lincoln could certainly be construed as such: "And that is why, in the shadow of the Old State Capitol, where Lincoln once called on a divided house to stand together, where common hopes and common dreams still, I stand before you today to announce my candidacy for President of the United States."[7]

Senator Obama must have known that invoking Lincoln in this manner would remind those present of his own "coming-out

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[4] One other similarity between the two men, as candidates and as presidents, is the importance of language and oratory skills to their effectiveness as politicians. "Lincoln was by far our most eloquent President, a craftsman of language who we still quote and read with awe. Obama is an orator of unusual ability . . . his eloquence and skill are part of his trademark." Finkelman and Chaudhry, *supra* note 3, at ix.

[5] *Mark* 3:24-26 (King James) ("And if a kingdom be divided against itself, that kingdom cannot stand. And if a house be divided against itself, that house cannot stand. And if Satan rise up against himself, and be divided, he cannot stand, but hath an end."); *see also Matthew* 12:25-26; *Luke* 11:17-18.

[6] Abraham Lincoln, "A House Divided," Speech at Springfield, Illinois (June 16, 1858), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461, 461 (Roy P. Basler ed., 1953).

[7] Associated Press, *Illinois Senator Barack Obama's Announcement Speech*, WASHINGTONPOST.COM (Feb. 10, 2007), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/02/10/AR2007021000879.html.

party": the July 27, 2004 keynote address at the Democratic National Convention in Boston. That speech, given when Obama was a candidate for the U.S. Senate, presented a vision of a post-partisan America that had moved beyond the "red state" and "blue state" distinctions that had only hardened since the bitterly disputed 2000 presidential election. In the speech's most famous passage, Obama thundered against

> those who are preparing to divide us, the spin doctors and negative ad peddlers who embrace the politics of anything goes. Well, I say to them tonight, there's not a liberal America and a conservative America; there's the United States of America. There's not a black America and white America and Latino America and Asian America; there's the United States of America.[8]

True, Obama also played the standard keynote role of criticizing the incumbent president, George W. Bush, and providing a full-throated endorsement of his party's presidential candidate, John Kerry. However, his speech struck such a chord because it was so anomalous—and refreshing—in an election cycle notable for the candidates' emphasis on their differences and efforts to bring their own partisans out in large numbers to the polls.[9]

The memory of the 2004 convention speech notwithstanding, if the Obama for President campaign was using the "House-Divided" speech to propagate the image of their candidate as a grand unifier, then that analogy was misplaced. Indeed, those famous words that Lincoln uttered in June 1858 were intended to draw a sharp line between him and the Republicans to whom he was speaking, on one side, and the Democrats and their Senate candidate, the incumbent Stephen Douglas, on the other. The house-divided metaphor was the

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[8] FDCH E-Media, *Transcript: Illinois Senate Candidate Barack Obama*, WASHINGTONPOST.COM (July 27, 2004), *available at* http://www.washingtonpost.com/wp-dyn/articles/A19751-2004Jul27.html.

[9] *See, e.g.*, *2004: The Base Strategy*, http://www.pbs.org/wgbh/pages/frontline/shows/architect/rove/2004.html(last visited Nov. 14, 2013) (quoting key Republican strategists regarding the "base strategy" employed by the "architect" of President Bush's re-election campaign, Karl Rove).

antithesis of a call for togetherness. "Many of Lincoln's friends considered it more eloquent than wise" and disapproved of its use in the speech.[10] At the time Illinois, like the rest of the nation, was divided into a Republican north and a Democratic south, and it was feared that Lincoln's words would alienate the bloc of influential voters in a belt of "swing counties" in the middle of the state[11] (not unlike the ten or so "purple" swing states that have so influenced the last several U.S. presidential elections). Lincoln, however, was determined to take an aggressive stand against both President James Buchanan and Senator Douglas.

Senator Douglas had authored the 1854 Kansas-Nebraska Act and its concept of popular sovereignty allowing residents of each new state to decide for themselves whether their territory would be free or slaveholding. The Kansas-Nebraska Act had not only helped create the Republican party and torn Kansas apart, it also had, in Lincoln's view, "betrayed the Founders' intent that slavery die naturally in a Union that—since the 1790s—had tolerated its existence but inhibited its growth."[12] Douglas's responsibility for that Act, combined with the U.S. Supreme Court's decision in *Dred Scott v. Sandford*[13] and Douglas's indifference to it,[14] allowed Lincoln to paint Douglas as an enemy of equality and the principles to which the fledgling Republican Party held firm.

The house-divided metaphor was so crucial to Lincoln's acceptance speech that William H. Herndon, Lincoln's law partner and biographer, recalled Lincoln declaring: "I would rather be

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[10] Don E. Fehrenbacher, *The Origins and Purpose of Lincoln's 'House-Divided' Speech*, 46 MISSISSIPPI VALLEY HISTORICAL REVIEW 615, 618 (1960).
[11] *Id.* at 619.
[12] Schulten, *supra* note 3, at 810.
[13] 60 U.S. (19 How.) 393 (1856).
[14] "The reputed author of the Nebraska bill finds an early occasion to make a speech at this capital indorsing the Dred Scott decision, and vehemently denouncing all opposition to it. . . . The several points of the Dred Scott decision, in connection with Senator Douglas's 'care-not' policy, constitute the piece of machinery [advancing slavery into the territories]." Lincoln, "A House Divided," *supra* note 6.

defeated with this expression in the speech, and uphold and discuss it before the people, than be victorious without it."[15] Whether in spite of the "House-Divided" Speech or, in part, because of it,[16] Lincoln was defeated by Douglas in the 1858 Senate campaign, only to be elected to the presidency two years later.

Are we, therefore, simply left with the possibility that a modern candidate stretched a historical reference well beyond its original meaning for political ends? This, in and of itself, would be nothing remarkable. However, the comparison between Lincoln and Obama becomes more complex when considering the path that President Obama took from that cold morning in February 2007 to the spring of 2012, when he faced his second general election campaign. Senator Obama, in *The Audacity of Hope*, had this to say about President Lincoln's governing style:

> We remember [Lincoln] for the firmness and depth of his convictions – his unyielding opposition to slavery and his determination that a house divided could not stand. But his presidency was guided by a practicality that led him to test various bargains with the South in order to maintain the Union without war; to appoint and discard general after general, strategy after strategy, once war broke out; to stretch the Constitution to the breaking point in order to see the war through to a successful conclusion. I like to believe that for Lincoln, it was never a matter of abandoning conviction for the sake of expediency. Rather, it was a matter of maintaining within himself the balance between two contradictory ideas—that we must talk and reach for common understandings . . .

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[15] Fehrenbacher, *supra* note 10, at 619. Fehrenbacher doubted the authenticity of this recollection, arguing that "[t]his pretentious talk does not sound at all like the flesh-and-blood Lincoln of 1858, but rather like the legendary figure subsequently evoked from the ashes of martyrdom by Herndon and others. The real Lincoln was a man of flexibility and discretion as well as conviction." *Id.* at 620.

[16] During the campaign, Douglas had denounced the house-divided doctrine "as a 'revolutionary' effort to incite 'warfare between the North and the South." *Id.* at 619.

> and yet at times we must act nonetheless, as if we are certain . . . .[17]

Viewed from the perspective of the man writing it—a freshman United States Senator, undoubtedly considering a future run for President—this passage is mildly critical, yet understanding. One must wonder how President Obama views that same passage now, taking into account his subsequent election and the myriad challenges of his first term. President Obama was elected in no small part due to his promises to end the hyper-partisan discord that marked the Bill Clinton and George W. Bush presidencies. However, by the spring of 2012, the partisan divide in Washington had only widened, and President Obama found himself criticized from both sides of that divide.

Republicans and members of the nascent Tea Party argued that, far too often, on issues such as the 2009 economic stimulus plan, the Affordable Care and Patient Protection Act, and the Dodd-Frank Wall Street Reform and Consumer Protection Act, President Obama and members of his party acted unilaterally, "as if they were certain," without input from the opposition party and against the will of the American people. Conversely, constituencies in President Obama's own party who had worked so hard to elect him were frustrated by the lack of measurable progress on issues such as climate change and immigration and viewed his legislative achievements as watered-down products of unnecessary compromise—in their view, the president had essentially "abandoned conviction for the sake of expediency." The truth likely lay somewhere in between these two views.

It was in this environment that the Lincoln Memorial University Law Review held its inaugural Symposium, entitled "Navigating the Political Divide: Lessons from Lincoln," on April 20,

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[17] THE AUDACITY OF HOPE, *supra* note 3, at 97-98; *see also* Schulten, *supra* note 3, at 809 (observing that, in this passage, "Obama recognizes [a] fundamental ambiguity of history"; that it "is complicated, and rarely gives us the moral clarity we would like").

2012. The subject matter was chosen as an obvious tribute to the man in whose honor the University was established in 1897, and whose professional ideals the School of Law had sought to instill in its students since its founding in 2009. The goal was to bring together a diverse group of scholars, political analysts, and advocates to discuss the state of our body politic entering the 2012 general election and consider whether there were any lessons from Lincoln that could inform the debate and help provide a roadmap for the man and parties who would be chosen by the people to govern in November 2012. This inaugural issue of the Law Review, a combination of articles and transcripts of the speakers from that day, has been assembled in the spirit of, and in order to memorialize, the event.

M. Akram Faizer and Dr. Charles Hubbard, both professors at Lincoln Memorial University, have contributed articles to the issue. Professor Faizer's article concerns an issue that has divided America, and in fact the world, throughout the Bush and Obama presidencies—the War on Terror. America's success in the War on Terror has been hindered, Faizer posits, by the declining world public opinion of America's actions in that conflict. According to Faizer, the global disdain for American military action derives largely from America's excessive focus on unilateral action and ignorance of foreign civilian casualties and legal norms. He reminds us of the world-wide support America enjoyed in the wake of the attacks of September 11, 2001, and how, since then, issues such as Guantanamo Bay, torture, the Iraq war, civilian casualties, and predator drones have all contributed to the decline of America in the eyes of the world. In his article, Faizer offers insightful lessons from Lincoln that can be applied today to America's prosecution of the War on Terror, thus allowing the U.S. to better focus on its domestic concerns.

Dr. Hubbard, a long-devoted Lincoln historian, set the tone for the Symposium by providing an enlightening examination into the State of our Union in 1858, when Lincoln gave his "House-Divided" Speech. Dr. Hubbard demonstrates the role that the *Dred Scott* decision and the famous Lincoln-Douglas debates of 1858 played in the run-up to the Civil War. He also highlights the threat that the

Civil War posed to our democracy, as well as Lincoln's pragmatism—namely, his judicious and sometimes controversial handling of the rebellion by virtue of the Commander-in-Chief powers. Although not facing a Civil War, the Union today remains divided over many political and economic issues, and as Dr. Hubbard writes: "Americans are looking for political leaders to implement the changes required to meet the challenges of the twenty-first century."

The issue also includes annotated transcriptions of several of the remarks given at the Symposium. Political analyst and *Game Change* co-author Mark Halperin remarked that America's divisions have taken on different characteristics from the days of President Lincoln. Although obviously not as intense as Civil War, Americans are constantly bombarded with political extremists, through the 24-hour media cycle and social media, who serve to further divide our nation. According to Halperin, this "freak show" prevents us from solving, or even addressing, the divisive political issues of the day. Halperin traces this polarization back to the Clinton administration and observes that it has only worsened with each successive president. He criticizes President Obama for his failure to bring the country together and urges the public not to take politics personally but to listen and promote unbiased sources of political news and analysis whose reports are derived from facts. Only then will the "freak show" end and the political discourse be raised in America.[18]

Helen Lee, "Making Prisoners Visible: How Literature Can Illuminate the Crisis of Mass Incarceration," focused on the faces of

[18] Two other speakers at the Symposium, conservative radio personality Steve Gill and political analyst Goldie Taylor, also addressed the current state of American politics. Gill observed several issues that serve to divide the American public and decried the lack of any meaningful debate to address them. He believed the 2012 presidential election would be one of the most divisive in history. Taylor noted the historic election of President Obama, the first African-American president, but expressed dismay at the "Uncivil War" that has emerged between competing, agenda-driven news organizations supported by the public. Although the viewing and listening public are, to some extent, enablers, she expressed hope that things might change after the 2012 election. Neither Gill nor Taylor approved of the inclusion of their remarks in this volume.

America's isolated prison population: an issue that divides America but receives little attention as many Americans decide to simply "look away." Lee recited a series of alarming statistics showing the increase in the American prison population, highlighting the discriminatory impact the justice system has upon African-Americans. Inspired by her father's career as a criminal defense attorney, Lee then endeavored to move beyond the numbers and humanize the prison population. Her experience teaching storytelling and creative writing to male prisoners through the PEN New England Prison Creative Writing Program, which she established, have equipped her to "speak for those who live behind the walls of American prisons." Through the lives of characters in her novel, *Life Without*, Lee personalized the harsh realities of prison life, including its fears, helplessness, and isolation. Lee opined that the growing prison population is a product of the tendency of the American public and politicians to look away from the glaring problem. She closed by reading a portion of her novel warning the audience: "So, don't you look away."

Michael Steele, the former Lieutenant Governor of Maryland and Chair of the Republican National Committee, emphasized the important role that lawyers play in our public discourse, referring to the legal profession as a calling "to defend our civil liberties under the law, to ensure our freedoms granted by the Constitution, to protect the rights of every citizen, and to enforce the rule of law." Steele discusses the separation of powers in the federal government, specifically the executive branch's encroachment upon the legislative branch and the judicial branch's duty to prevent such expansion. Steele presents numerous examples of the expansion of the executive branch under President Obama, including recent military actions, presidential recess appointments, the No Child Left Behind Act, the Affordable Care Act, and the Dodd-Frank Act. Steele also analogizes Lincoln's use of the Commander-in-Chief powers to suspend the writ of habeas corpus with infringement on civil liberties under the PATRIOT Act. He also touches on the controversial decision by Obama Administration to decline to enforce the Defense of Marriage Act. Steele believes that we need a strong judicial response—a

"Madison 2.0"—to "put the genie back in the bottle" and recalibrate the balance of powers between the three branches of government.

Professor Siegfried Wiessner of the St. Thomas University School of Law built on the concepts discussed by Steele, examining the tension between the strong use of executive power, and the other two branches of government. The value of the doctrine of separation of powers is often only appreciated after a President wields his executive power in such a way as to overstep his boundaries. Two contrasting perspectives on the breadth of executive power were exemplified by Presidents Theodore Roosevelt and William Howard Taft, with the former believing it best to use his executive power to the fullest extent available in order to serve the people, and the latter cautioning that any exercise of executive power must be explicitly authorized by the Constitution. Wiessner uses extensive case law to analyze the scope of the executive's duties, including removal powers, executive privilege, and emergency powers. Wiessner reminds us to consider how that power we give one president "can be used by the president of the other political color." This "architecture for freedom," federalism, and the separation of powers is what makes our American democracy so unique.

As we now know, President Obama maintained "the balance between two contradictory ideas" of conviction and expedience effectively enough to win re-election in 2012. In the first year of the President's second term, we can only wait and see whether his re-election will lead to four more years of retrenchment in Washington or, alternatively, "break the fever"[19] and allow President Obama the opportunity to work with a bi-partisan Congress to achieve

[19] Byron Tau, *Republican 'Fever' Will Break After the Election*, POLITICO (June 1, 2012) (quoting President Obama as telling supporters: "I believe that . . . when we're successful in this election, . . . the fever may break, because there's a tradition in the Republican Party of more common sense than that. My hope, my expectation, is that after the election, now that it turns out that the goal of beating Obama doesn't make much sense because I'm not running again, . . . we can start getting some cooperation again.").

thoughtful solutions on pressing national issues that are worthy of "the better angels of our nature."[20]

[20] Abraham Lincoln Online, The Gettysburg Address (Nov. 19, 1863), *available at* http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm; *see* THE AUDACITY OF HOPE, *supra* note 3, at 98 (positing that Lincoln's "self-awareness" and "humility" led him "to advance his principles through the framework of our democracy, through speeches and debate, through the reasoned arguments that might appeal to the better angels of our nature").

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WAR ON TERROR – LESSONS FROM LINCOLN

M. Akram Faizer *

INTRODUCTION

On May 1, 2012, President Obama announced that U.S. forces would continue their phased withdrawal from Afghanistan such that by the end of 2014, Afghan security forces will have full responsibility for their country's security.[1] Of particular note, the President's speech was directed solely at an American audience with very little attention paid to either Afghan sentiment or the Afghan people's needs. The unidirectional nature of the President's focus was inadvertently evidenced when, on Afghan soil, he closed the speech by stating:

* Assistant Professor of Law, Lincoln Memorial University-Duncan School of Law. The author would like to dedicate this piece to his darling Melanie.

[1] *See* Mark Landler, *Obama Signs Pact in Kabul, Turning Page in Afghan War*, N.Y. TIMES, May 2, 2012, http://www.nytimes.com/2012/05/02/world/asia/obama-lands-in-kabul-on-unannounced-visit.html?pagewanted=all&_r=0; *see also* David E. Sanger, *Charting Obama's Journey to a Shift on Afghanistan*, N.Y. TIMES, May 20, 2012, http://www.nytimes.com/2012/05/20/us/obamas-journey-to-reshape-afghanistan-war.html?hp.

"May God bless our troops and may God bless the United States of America."[2] The President's words did not evidence any acknowledgement that an expression of American solicitude for Afghan well-being might equally be in the American people's interests. Indeed, throughout the War on Terror, American policy objectives have been hamstrung by an almost exclusive focus on domestic American public opinion and a complete failure to address the international community's perception of U.S policies.[3] The international community's suspicions as to American good faith was exacerbated by the February 2012 accidental incineration of Korans at the U.S. Air Force Base in Bagram, Afghanistan[4] and the March 2012 killing of sixteen Afghan civilians, allegedly by U.S. Army Sergeant Robert Bales.[5]

Both the President's May 1, 2012 speech and the preceding tragic events highlight the precarious position of U.S. forces in Afghanistan. Though U.S. forces are necessary to protect President Hamid Karzai's government from the Taliban insurgency, the United States' continued presence in the country has led to widespread anger by Afghans and members of the global community who perceive that U.S. forces show insufficient concern for civilian welfare.[6] On May 18,

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[2] Address to the Nation on Military Operations in Afghanistan from Bagram Air Base, Afghanistan, 2012 DAILY COMP. PRES. DOC. 336 (May 2, 2012).
[3] *See* Dr. Steven Kull, Dir., Program on Int'l Policy Attitudes (PIPA), and Editor, WorldPublicOpinion.org, America's Image in the World, Address Before House Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight (Mar. 6, 2007) (*transcript available at* http://www.worldpublicopinion.org/pipa/articles/views_on_countriesregions_bt/326.php?nid=&id=&pnt=326).
[4] *See* Babrak Miakhel, *Six Dead in Afghanistan Koran Burning Protests*, BBC NEWS (Feb. 22, 2012, 10:39 ET), http://www.bbc.co.uk/news/world-asia-17123464.
[5] *See* James Dao, *U.S. Identifies Army Sergeant in Killing of 16 in Afghanistan*, N.Y. TIMES, Mar. 17, 2012, http://www.nytimes.com/2012/03/17/world/asia/afghan-shooting-suspect-identified-as-army-staff-sgt-robert-bales.html?pagewanted=all.
[6] *See* Ahmad Nadem & Ahmad Haroon, *Afghans Urge U.S. Exit After Killings; U.S. Says Timetable Unchanged*, REUTERS, Mar. 12, 2012, *available at* http://www.reuters.com/article/2012/03/12/us-afghanistan-civilians-idUSBRE82A02V20120312.

2012, the newly elected French President, Francois Hollande, informed President Obama that France would be withdrawing the majority of its 3,400 forces stationed in Afghanistan by the year's end.[7] The French withdrawal and reluctance by other NATO allies to contribute to the Afghan anti-insurgency campaign is largely attributable to the international community's view that U.S. policy is based on domestic politics alone with insufficient solicitude shown for either Afghan civilian well-being or the concerns of world public opinion.[8] These perceptions will make it more difficult for the Obama administration and its successor to effectively disengage from the Middle East and South Asia, share the costs of international security with its allies, and address long-neglected domestic problems.[9]

The United States' national interest has traditionally been international stability, free markets, and democratization. During much of the twentieth century, the United States was the indispensable nation that intervened at critical moments to assure the modern, increasingly democratic, and globalized world. Although these priorities remain, the United States has a further interest in seeing a shift in the global paradigm from a unipolar world, in which it bears nearly all the diplomatic and military costs of ensuring continued globalization, to a multi-polar world, in which it is, if anything, first among equals.[10] This process, however, is crippled by the United States' continued military presence in both South Asia and

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[7] Dan Robinson, *Hollande Meets Obama, Reaffirms Early Afghanistan Withdrawal*, VOICE OF AMERICA (May 18, 2012), http://www.voanews.com/content/article/727271.html.

[8] *See* Sanger, *supra* note 1; *see also* Tom Engelhardt, *Predator Drone Nation*, THE NATION (May 14, 2012), http://www.thenation.com/article/167868/predator-drone-nation.

[9] *See* Jane Kelly, *Australian Ambassador Lauds U.S. Strategic Shift*, UVA TODAY (Mar. 28, 2012), http://www.virginia.edu/uvatoday/newsRelease.php?id=17888; *see also* James Kitfield, *Geopolitical Shift: Old Europe to New Asia?*, NAT'L J. NAT'L SEC. EXPERTS BLOG (Nov. 8, 2010, 10:19 AM), http://security.nationaljournal.com/2010/11/geopolitical-shift-old-europe.php.

[10] *See* DAVID E. SANGER, THE INHERITANCE: THE WORLD OBAMA CONFRONTS AND THE CHALLENGES TO AMERICAN POWER p. 471 (Three Rivers Press 2009).

the Middle East and the United States' excessive focus on the War on Terror.[11] Although the United States has sincerely sought to engender both democracy and pluralism in these regions, spending billions of dollars to develop civilian infrastructure in both Iraq and Afghanistan and never seeking to acquire territory for itself, its perceived rejection of world public opinion and international legal norms has harmed both its international reputation and its ability to "turn the page" and effectively disengage.[12] President Abraham Lincoln engaged in a civil war with a wholly different purpose and context from today's circumstances. However, Lincoln did have similar hurdles to overcome, including massive military resistance and opposition to his goal of preserving the Union. Although his handling of the Civil War was not without error or controversy, there are lessons to be learned from Lincoln in terms of both his actions and his mistakes, given to us in hindsight. As set forth below, U.S. policy makers can look to Lincoln's legacy to improve its image - and thus its credibility - on the international scene.

I. THE SEPTEMBER 11, 2001 TERRORIST ATTACKS

The Al Qaeda terrorist organization, based at the time in Afghanistan, tragically attacked United States civilian infrastructure on September 11, 2001. Nineteen Al Qaeda terrorists hijacked four passenger jets, crashed two of them into the twin towers of the World Trade Center in New York City, one into the Pentagon in Arlington, Virginia and a fourth into a field near Shanksville, Pennsylvania, after

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[11] *See* Anne Applebaum, *The Worst Mistake America Made After 9/11: How Focusing Too Much on the War on Terror Undermined Our Economy and Global Power*, SLATE (Sept. 4, 2011, 7:13 AM), http://www.slate.com/articles/news_and_politics/foreigners/2011/09/the_worst_mistake_america_made_after_911.html.

[12] David Cole, *After September 11: What We Still Don't Know*, N.Y. REV. OF BOOKS, (Sept. 29, 2011), http://www.nybooks.com/articles/archives/2011/sep/29/after-september-11-what-we-still-dont-know/?pagination=false.

passengers attempted to take control before the plane could reach the terrorists' intended target in Washington, D.C. The 9/11 attacks led to the killing of nearly 3,000 civilians on American soil[13] and caused trillions of dollars in damage to the United States economy.[14] Indeed, in the first days after the terrorist attacks, the perception was that up many more innocent civilians had been killed in the attacks than was actually the case.[15]

In the immediate aftermath, the international community rallied around the United States and its people. Of note, the United Nations Security Council unanimously passed Resolution 1368 that unequivocally condemned the terrorist attacks and expressed the Security Council's readiness "to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations."[16] Perhaps the world's most prestigious non-English language newspaper, the French daily "Le Monde" published a September 12, 2001 cover article titled "Nous sommes tous Américains" in support of the American people.[17] Indeed, public manifestations of sympathy with the American people arose immediately and spontaneously not only in industrialized and

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[13] *9/11 Investigation (PENTTBOM),* FBI, http://www.fbi.gov/about-us/history/famous-cases/9-11-investigation (last visited Nov. 18, 2012).
[14] *See* Shan Carter & Amanda Cox, *One 9/11 Talley: $3.3 Trillion*, N.Y. TIMES, Sept. 8, 2011, http://www.nytimes.com/interactive/2011/09/08/us/sept-11-reckoning/cost-graphic.html?_r=0.
[15] NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 292 (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf.
[16] S.C. Res. 1368, ¶ 5, U.N. Doc. S/RES/1368 (Sept. 12, 2001); *see also* Press Release, Security Council, Security Council Condemns, 'In Strongest Terms,' Terrorist Attacks on United States, U.N. Press Release SC/7143 (Sept. 12, 2001), *available at* http://www.un.org/News/Press/docs/2001/SC7143.doc.htm.
[17] *See* Jean-Marie Colombani, *Nous Sommes Tous Américains* [*We are all Americans*], LE MONDE, May 23, 2007, http://www.lemonde.fr/idees/article/2007/05/23/nous-sommes-tous-americains_913706_3232.html (Fr.).

mature democracies, but also in Russia, China, Iran, Kuwait and India.[18]

With strong evidence that Al Qaeda was responsible, President George W. Bush, on September 20, 2001, demanded the Taliban government in Afghanistan turn over Al Qaeda leaders, including its head, Osama bin Laden, to avoid a United States invasion of Afghanistan.[19] President Bush's ultimatum was issued based on Congress' September 14, 2001 Authorization for Military Force against Terrorists that was signed into law by President Bush on September 18, 2001. The invasion of Afghanistan, which commenced on October 7, 2001 and followed the Taliban's refusal to turn bin Laden directly over to the United States,[20] was most likely legal under international law as an act of self-defense authorized by Article 51 of the United Nations Charter.[21]

II. THE AFGHANISTAN WAR

With the help of the Northern Alliance, the United States easily defeated the Taliban government of Mullah Omar and created

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[18] *See* Haley Sweetland Edwards, *We Are All Americans: The World's Response to 9/11*, MENTAL_FLOSS (Sept. 9, 2011, 4:04 PM), http://www.mentalfloss.com/blogs/archives/99665.

[19] *See* Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 Weekly Comp. Pres. Doc. 1347 (Sept. 20, 2001); *see also Bush Delivers Ultimatum*, CNN (Sept. 20, 2001), http://articles.cnn.com/2001-09-20/world/ret.afghan.bush_1_senior-taliban-official-terrorist-ringleader-osama-bin-mullah-mohammed-omar?_s=PM:asiapcf.

[20] *See Taliban Won't Turn Over Bin Laden*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/stories/2001/09/11/world/main310852.shtml.

[21] *See* U.N. Charter art. 51, *available at* http://www.un.org/en/documents/charter/chapter7.shtml; *see also* Ben Smith & Arabella Thorp, *The Legal Basis for the Invasion of Afghanistan* (House of Commons Library Standard Note SN/IA/5340, Feb. 26, 2010), *available at* www.parliament.uk/briefing-papers/SN05340.pdf.

an Afghan Interim Authority, which in turn led to the establishment of a government under the Presidency of Hamid Karzai.[22]

Since the invasion and subsequent transfer of power to the Karzai Government, the United States and its NATO allies shifted focus and relocated troops to Iraq. This arguably facilitated the Taliban's ability to reconstitute itself and launch a vicious war against both NATO and Afghan forces for control of the country.

The Obama administration maintains that this deliberate move away from Afghanistan was a mistake, both because it was the base of Al-Qaeda's operations and because of the country's proximity to Pakistan.[23] While the troop surge of 2010 likely stabilized the predicament of the Karzai government, it has been accompanied by increased wariness about the rise in civilian casualties. The effectiveness of United States forces in Afghanistan is limited by the perception they operate at the expense of the Afghan people's well-being and safety.[24] This concern is exacerbated by the Obama administration's expanded use of Predator Drones within the Afghanistan-Pakistan border region to kill suspected terrorists, regardless of the effects of such policies on innocent lives. As Professor Samuel Vincent Jones writes:

> The high number of civilian casualties has severely undermined support for U.S. counterinsurgency programs and the Afghan government itself. Protection of the Afghan civilian populace is critically necessary to regaining their active and continued support for the Afghan government,

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[22] *See* Britannica.com, *Hamid Karzai,* http://www.britannica.com/EBchecked/topic/761104/Hamid-Karzai (last vistied Dec. 2, 2013).

[23] Sanger, *supra* note 1; *see also* U.S. DEP'T OF STATE, BUREAU OF SOUTH AND CENTRAL ASIAN AFFAIRS, *U.S. Relations with Afghanistan* (Sept. 6, 2012), http://www.state.gov/r/pa/ei/bgn/5380.htm.

[24] *See* Laura King, *U.S.-Afghan Divide Seen in Perceptions of Village Massacre*, L.A. TIMES, Mar. 17, 2012, http://articles.latimes.com/2012/mar/17/world/la-fg-afghanistan-killings-20120318.

> and it is essential to depriving the Taliban of its authority and appeal.[25]

Reversing the continued erosion of support among Afghans for the Karzai government has proved elusive, largely due to the Karzai government's inability to protect the Afghan people from either Taliban insurgents or U.S. forces.

III. USE OF GUANTANAMO BAY AS A DETENTION FACILITY

During the Afghanistan invasion, U.S. forces took custody of hundreds of individuals on Afghan soil and transferred many of these detainees to the Camp X-Ray (and subsequently Camp Delta) detention facility situated within the United States' Guantanamo Bay Naval Station in Cuba.[26] The reason why "GITMO" was chosen as the detention facility is largely because the Bush administration believed prisoners held on Cuban soil would not have habeas corpus rights under the United States Constitution to challenge the legality of their detention as enemy combatants in U.S. federal court. These controversial detentions engendered further international enmity when the Bush administration asserted the detainees, as "enemy combatants," need not be afforded the protections of the Geneva Conventions because such protections only apply to uniformed soldiers.[27]

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[25] Samuel Vincent Jones, *The Ethics of Letting Civilians Die in Afghanistan: The False Dichotomy Between Hobbesian and Kantian Rescue Paradigms*, 59 DEPAUL L. REV. 899, 901-02 (2010).

[26] *See* Briannica.com, *Guantanamo Bay Detention Camp*, http://www.britannica.com/EBchecked/topic/1503067/Guantanmo-Bay-detention-camp (last visited Dec. 2, 2013).

[27] Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, THE NEW YORKER, Feb. 14, 2005, *available at* http://www.newyorker.com/archive/2005/02/14/050214fa_fact6.

The detentions were further delegitimized by allegations of systematic torture against detainees by U.S. forces.[28] Indeed, a leaked International Committee of the Red Cross report of July 2004 cited the United States for forcing prisoners to suffer "humiliating acts, solitary confinement, temperature extremes, [and] use of forced positions."[29] Many released prisoners complained of having suffered beatings, sleep deprivation, prolonged constraint in uncomfortable positions, prolonged hooding, sexual and cultural humiliation, and other physical and psychological mistreatment during their detention.[30]

A May 2007 United Nations Human Rights Council Report stated the United States violated international law, particularly the International Covenant on Civil and Political Rights, and disputed the Bush Administration's authority to try Guantanamo Bay prisoners as enemy combatants in military tribunals. As stated by the International Committee for the Red Cross, the body charged with monitoring compliance with the Geneva Conventions:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.[31]

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[28] Giles Tremlett, *Spanish Court Opens Investigation of Guantánamo Torture Allegations*, THE GUARDIAN, Apr. 29, 2009, http://www.guardian.co.uk/world/2009/apr/29/spain-court-guantanamo-detainees-torture.

[29] Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, http://www.nytimes.com/2004/11/30/politics/30gitmo.html.

[30] *Id.*

[31] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

Notwithstanding the United States Government's claims to the contrary, the Supreme Court, in three cases decided on June 28, 2004, determined the Guantanamo Bay detainees should have access to federal courts. In *Hamdi v. Rumsfeld*, the Court held that an American citizen apprehended in Afghanistan and held as an enemy combatant must be accorded due process and a meaningful factual hearing as to his enemy combatant status.[32] In *Rumsfeld v. Padilla*,[33] although the Court held the lower court lacked jurisdiction to consider petitioner's *habeas corpus* petition, it signaled the government has no authority to detain an American citizen arrested on United States soil as an enemy combatant.[34] Finally, in *Rasul v. Bush,* the Court held that those being detained in Guantanamo Bay can have their habeas corpus petitions heard in United States federal courts.[35] These decisions, the Supreme Court's first rulings about the government's actions in the war on terrorism since the 9/11 attacks, were a political intervention by the judicial branch intended to remediate concerns the Bush Administration acted outside the requirements of both American and international jurisprudence.[36] Four years later, in *Boumediene v. Bush*,[37] the Court concluded the United States' denial of *habeas corpus* rights to non-citizens held as enemy combatants in Guantanamo Bay violated the Constitution's suspension clause because Congress had not suspended this right under its Article 1 authority.

Further undermining support for Bush's War on Terror was the administration's use of "enhanced interrogation," or torture, to obtain probative information needed to both apprehend existing terrorists and prevent further terrorist attacks.[38] Merits aside,

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[32] Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004).
[33] Rumsfeld v. Padilla, 542 U.S. 426 (2004).
[34] Nancy Morawetz, *Detention Decisions and Access to Habeas Corpus for Immigrants Facing Deportation*, 25 B.C. THIRD WORLD L.J. 13, 14 (2005).
[35] Rasul v. Bush, 542 U.S. 466, 484 (2004).
[36] Cole, *supra* note 12; Linda Greenhouse, *Goodbye Gitmo*, OPINIONATOR (May 16, 2012, *9:00 PM),* http://opinionator.blogs.nytimes.com/2012/05/16/goodbye-to-gitmo/?hp.
[37] Boumediene v. Bush, 553 U.S. 723, 798 (2008).
[38] *See generally* JOSE A. RODRIGUEZ , JR. WITH BILL HARLOW, HARD MEASURES: HOW AGGRESSIVE CIA ACTIONS AFTER 9/11 SAVED AMERICAN LIVES 263

American government officials failed to anticipate domestic and international resistance to its interrogation methods.[39]

Recognizing the worldwide negative reaction to continued use of Guantanamo Bay as a detention facility for alleged enemy combatants, President Obama sought to close the facility. Attorney General Eric Holder announced that the accused co-conspirators of the terrorist attacks would be tried in civilian federal district court, while other alleged offenders would be tried by military commission. In the face of strong domestic opposition to both proposals, the Obama administration has since backtracked.[40] Although this might have been necessitated by domestic politics, it can be argued the decision has worsened the United States' standing within the international community, which sees the use of military justice as both illegitimate and predetermined.[41]

IV. THE IRAQI INVASION AND PROBLEMS RELATED TO THE IRAQI OCCUPATION

Shortly after the Iraq occupation, and notwithstanding the fact that neither the United States nor its allies had captured any senior members of Al Qaeda, the Bush administration shifted its focus to

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(Threshold Editions 2012) (discussing enhanced interrogation techniques in the wake of the attacks on 9/11); http://www.nytimes.com/2010/11/10/world/10tapes.html?_r=0

[39] *See 9/11 and the War on Terror: Polls Show What People Think 10 Years Later*, WASHINGTON'S BLOG (Sept. 10, 2011), http://www.washingtonsblog.com/2011/09/911-and-the-war-on-terror-polls-show-what-people-really-believe-10-years-later.html.

[40] Evan Perez, *U.S. Reverses on 9/11 Trials,* WALL ST. J., Apr. 5, 2011, http://online.wsj.com/article/SB10001424052748703806304576242763782267924.html.

[41] Sara Sorcher, *Insiders: Military Justice Capable of Fair Trial for Suspect in of Afghan Shooting*, NATIONAL JOURNAL, Mar. 27, 2012, *available at* http://www.nationaljournal.com/nationalsecurity/insiders-military-justice-system-capable-of-fair-trial-for-suspect-of-afghan-shooting-20120326.

"regime change" in Iraq, defined as the forcible removal of the murderous totalitarian regime of then-President Saddam Hussein.[42]

The Bush Administration's reasons for the invasion were based on a claim that Iraq possessed weapons of mass destruction and was, therefore, in violation of existing United Nations Security Council Resolutions.[43] In the process, President Bush and his administration threatened the United Nations Security Council to prove its relevance by authorizing the use of force against Iraq, all the while letting it be known the United States was prepared to use military force without United Nations approval to do so.[44] This position was contrary to international law, as Iraq posed no direct threat to the United States and, therefore, did not provide the United States with authority to undertake a unilateral invasion of Iraq based on Article 51 of the United Nations Charter.[45] Indeed, the United States, after going to the United Nations Security Council to request authorization to invade Iraq on the grounds of Iraq's failure to disarm itself of Weapons of Mass Destruction, chose to bypass the intergovernmental body when it became clear that its request for such authority would be voted down by both the Security's Council's Permanent Members and the body as a whole after the United Nations Chief Weapons Inspector, Hans Blix, presented the Council with a February 14, 2003 report contradicting many United States' claims.[46] Indeed, when the United States invasion of Iraq began on

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[42] Joseph Cirincione, *Origins of Regime Change in Iraq*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Mar. 19, 2003), http://www.carnegieendowment.org/ 2003/03/19/origins-of-regime-change-in-iraq/4pr.

[43] Seymour M. Hersh, *Selective Intelligence: Donald Rumsfeld Has His Own Special Sources. Are They Reliable?*, THE NEW YORKER, May 12, 2003, *available at* http://www.newyorker.com/archive/2003/05/12/030512fa_fact.

[44] Agence France Presse, *Bush Threatened Nations That Did Not Back Iraq War: Report*, GOOGLE NEWS (Sept. 26, 2007), http://afp.google.com/article/ALeqM5g3bV2LfRcSgbK7btDtgfbe2NGt8Q (last visited Apr. 16, 2013).

[45] Rachel S. Taylor, *The United Nations, International Law, and the War in Iraq*, WORLD PRESS REVIEW, http://worldpress.org/specials/iraq/ (last visited Apr. 16, 2013).

[46] Dr. Hans Blix, Executive Chairman of UNMOVIC, Briefing of the Security Council, 14 February 2003: An Update on Inspections, UNITED NATIONS

March 19, 2003, nearly the entire international political community was opposed to the endeavor.[47] The United States' strongest ally in the invasion, the United Kingdom, did pursue a policy of strategic cooperation with the United States, but U.K. public opinion was heavily lopsided against United States policy, with a large majority of Britons opposed to the war from the start. A January 2007 BBC World Service Poll evidenced that seventy three percent of the world's population in twenty five countries disapproved of U.S. policy in Iraq.

Lack of global public support greatly harmed the ability of the United States to democratize Iraq in a peaceful manner, and the United States was seen by key elements of Iraqi society as an invader and an occupier as opposed to a liberating force.[48] Moreover, mistakes made by the United States-led Coalition Provisional Authority that eventually handed over control of Iraq to the Iraqi government, led to both anarchy and communal violence throughout the country that was propitiated by insufficient U.S. occupation forces.[49] The consequences of these mistakes, arguably violations of the Fourth Geneva Convention, continue to persist as Iraq remains prone to high levels of communal violence.[50]

MONITORING, VERIFICATION AND INSPECTION COMMISSION (Feb. 14, 2003), *available at* http://www.un.org/Depts/unmovic/new/pages/security_council_briefings.asp#6; *see also* Ronan Bennett, *Ten Days to War*, THE GUARDIAN, Mar. 7, 2008, http://www.guardian.co.uk/world/2008/mar/08/iraq.unitednations; *Hans Blix's Briefing to the Security Council*, THE GUARDIAN, Feb. 14, 2003, http://www.guardian.co.uk/world/2003/feb/14/iraq.unitednations1.

[47] *See* Britannica.com, *Iraq War*, http://www.britannica.com/EBchecked/topic/870845/Iraq-War (last visited Dec. 2, 2013).

[48] Cesar G. Soriano & Steven Komarow, *Poll: Iraqis Out of Patience*, USA TODAY, Apr. 30, 2004, http://www.usatoday.com/news/world/iraq/2004-04-28-poll-cover_x.htm.

[49] Anthony H. Cordesman, *American Strategic, Tactical, and Other Mistakes in Iraq: A Litany of Errors*, CENTER FOR STRATEGIC AND INT'L STUD (Apr. 19, 2006), *available at* http://csis.org/files/media/csis/pubs/060419_iraqlitany.pdf.

[50] *UN: Attacks Killed 613 Civilians in Iraq in January-March 2012*, TREND (Apr. 10, 2012), http://en.trend.az/regions/met/iraq/2012895.html.

V. AMERICAN ACCOMPLISHMENTS IN IRAQ

The United States did accomplish a great deal in Iraq. It removed the murderous Ba'athist Government of President Saddam Hussein from power. It also commenced a process of democratization that could, for the first time, see a genuine democracy emerge in an area that was once the Abbasid Caliphate's capital.[51] The Arab Spring of 2011 manifested that democratization does have great resonance within the Arab world, despite the flawed predictions of the war's strongest proponents.[52] To the Bush administration's credit, the United States disregarded the bipartisan Iraq Study Group's recommendation and implemented a "surge" of American forces to provide much-needed protection to Iraqis against insurgents in both Baghdad and Al-Anbar province in 2007.[53] It is important to recognize these actions as achievements and also as tacit recognition that mistakes were made. Unfortunately, they may have been too little too late. The Administration's unilateral and extra-legal invasion alienated world public opinion and will most likely prevent the international community and Iraqi civil society from closer rapprochement with the United States for the foreseeable future. Indeed, by most accounts, the current Iraqi Government of Prime Minister Nouri al-Maliki's closest bilateral relationship is with the Islamic Republic of Iran, a country that is vehemently opposed to U.S. interests.[54]

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[51] David Frum, *Will Iraq's Democracy Vindicate Bush?*, CNN OPINION (Mar. 8, 2010), http://articles.cnn.com/2010-03-08/opinion/frum.iraq.election_1_polling-stations-elections-voting-procedure?_s=PM:OPINION.

[52] Sarina A. Beges, *Stanford Scholars Reflect on Arab Spring*, STANFORD NEWS SERVICE (Jan. 25, 2012), http://news.stanford.edu/news/2012/january/arab-spring-anniversary-012512.html.

[53] Bob Woodward, *Why Did Violence Plummet? It Wasn't Just the Surge*, WASH. POST, Sept. 8, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/09/07/AR2008090701847.html.

[54] David S. Cloud, *As U.S. Prepares to Leave Iraq, Iran's Shadow Looms Large*, L.A. TIMES, Nov. 14, 2011, http://articles.latimes.com/2011/nov/14/world/la-fg-1114-us-iran-20111114.

Although Iraq may, in time, turn into a functioning and prosperous democracy, it must be recognized that between March 2003 and July 2007, violence stemming from United States combat operations in Iraq caused the death of an estimated 125,000 to 600,000 Iraqi civilians.[55] Approximately 2.7 million Iraqis have been internally displaced by violence that followed the U.S. invasion and occupation and a further 1.7 million Iraqis have fled the conflict in Iraq, with the majority taking refuge in Syria and Jordan, and lesser numbers to Egypt, Lebanon, Iran, and Turkey.[56] In all, well over 4 million Iraqis sought refuge in other Middle Eastern countries or were internally displaced.[57] These figures are either unknown or irrelevant to United States political culture, which instead focuses almost exclusively on American casualties in considering the War's legitimacy. The relative American disregard for Iraqi civilian suffering has both delegitimized its claim to have been acting in the Iraqi people's best interest and placed it at odds with its obligations under the Fourth Geneva Conventions. This, as set forth more fully below, distinguishes American actions in Iraq from its actions during the Civil War.

VI. PROBLEMS RELATED TO THE PLANNED WITHDRAWAL FROM IRAQ AND AFGHANISTAN

The Obama administration has sought to reengage with the international community to engender assistance with a planned disengagement from the Middle East and South Asia. Both domestic and international policies, however, have made a reversal of public

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[55] *See* Les Roberts et al., *Mortality Before and After the 2003 Invasion of Iraq: Cluster Sample Survey*, 364 THE LANCET 1857 (Nov. 2004), *available at* http://www.cs.princeton.edu/~chazelle/politics/bib/lancet.pdf; *see also* Jones, *supra* note 25, at 900. See also http://www.iraqbodycount.org/

[56] THE UN REFUGEE AGENCY, 2013 UNHCR COUNTRY OPERATIONS PROFILE – IRAQ, *available at* http://www.unhcr.org/pages/49e486426.html (last visited Nov. 12, 2013).

[57] Jones, *supra* note 25, at 900 and

opinion difficult to attain. At home, political constraints have prevented the Administration from both closing the detention facility at Guantanamo Bay and from trying suspected terrorists in United States civilian courts.[58] Overseas, the United States has increased its use of Predator Drones to kill suspected terrorists, notwithstanding the consequent deaths of South Asian civilians and a further perception the United States is a party to indiscriminate killings.[59] The use of Drones in warfare is problematic under international law. Professor Heinz Klug writes:

> While "collateral damage" is acknowledged as an inevitable consequence of military action, a unique feature of "smart" weapons, and particularly the Predator UAV, is that the individual target is identified and hit in real time with a degree of certainty rare in the history of modern warfare. Outside of a theater of combat—defined by time and place—the targeting of individuals for elimination, particularly if they are not openly armed or engaged in a certain level of hostilities at the time, without an attempt to apprehend them or to give them a chance to surrender, could be considered murder under the Geneva Conventions.[60]

Most recently, the United States has been involved in "regime change" in Libya, and has mooted an invasion of the Islamic Republic of Iran, largely at the Israeli government of Prime Minister Binyamin Netanyahu and the United States pro-Israel lobby's behest.[61] The

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[58] Scott Shane & Mark Landler, *Obama Clears Way for Guantánamo Trials*, N.Y. TIMES, Mar. 7, 2011, http://www.nytimes.com/2011/03/08/world/americas/08guantanamo.html.

[59] Jane Mayer, *Jane Mayer: Predator Versus International Law*, THE NEW YORKER (Oct. 29, 2009), http://www.newyorker.com/online/blogs/newsdesk/2009/10/jane-mayer-predator-versus-international-law.html.

[60] Heinz Klug, *The Rule of Law, War, or Terror*, 2003 WIS. L. REV. 365, 381-82 (2003).

[61] Steve Kingstone, *Netanyahu Talks Tough in Obama Iran Meeting*, BBC NEWS (Mar. 6, 2012, 2:23 ET), http://www.bbc.co.uk/news/world-us-canada-17260083; Dana Milbank, *AIPAC Beats the Drums of War*, WASH. POST, Mar. 5, 2012, http://www.washingtonpost.com/opinions/aipac-beats-the-drums-of-war/2012/03/05/gIQASVMZtR_story.html.

American policy of forcing the Islamic Republic to completely renounce its nuclear program is delegitimized by the fate of the Gaddafi regime in Libya, which previously gave up its nuclear weapons program, and by the relatively restrained United States policy towards Pakistan and North Korea, both of which possess substantial nuclear weapon arsenals.[62] All of this must be seen through the prism of the world following the financial crisis, in which much of the international community blames the United States government's loose regulatory paradigm for plunging the world into a near-depression and for acting as a predatory, as opposed to benevolent, hegemon that is incapable of addressing its pronounced domestic problems. In short, the United States has ceased to be the focus of global aspirations, well symbolized in the early 1990s, when Filipino demonstrators carried signs reading "Yankee Go Home — and take me with you."[63]

Where did things go wrong? What caused the United States to go from the leading liberal democracy whose hard and soft power enabled it to lead the Western world in its confrontation with the Axis Powers, Soviet Communism and beyond, to a country viewed globally with skepticism and distrust?

VII. AMERICAN CONSERVATIVE PERSPECTIVE

Many on the political right justifiably posit that much of this skepticism is nothing more than parochial anti-Americanism, brought about by worldwide envy at American wealth and power. Indeed, many conservatives, including the neoconservative scholar Robert Kagan, claim this anti-Americanism is a concomitant of the United

[62] Fredrik Dahl, *Analysis: Libya Conflict May Strengthen Iran Nuclear Defiance*, REUTERS, Mar. 24, 2011, *available at* http://www.reuters.com/article/2011/03/24/us-iran-libya-nuclear-idUSTRE72N4WH20110324.

[63] Edwin Kiester, Jr. & Sally Valente Kiester, *Yankee Go Home — And Take Me With You!*, SMITHSONIAN MAG., May 1999, *available at* http://www.smithsonianmag.com/travel/philips-abstract.html.

States being the only first-world nation that uses hard or military power to police the international system.[64] This is a position worthy of further discussion and elaboration beyond the scope of this paper.

VIII. PROBLEMS RELATED TO ASYMMETRIC WARFARE

In reality, there is more at work here than mere parochial envy. The problem stems from an almost pathological obsession with domestic politics in formulating U.S foreign policy, in conjunction with the United States being confronted, for the first time, with a form of asymmetric warfare against terrorist adversaries, who profit from and take shelter in failed states such as Afghanistan, portions of Pakistan, Somalia, Yemen and beyond. As a result, the U.S.'s success in this endeavor is not only based on its military successes, but on engendering international cooperation and good will in an effort to both isolate and defeat anti-civilizational terrorist networks and their allies. This, of course, requires the United States to prevent these organizations from replenishing their membership via recruitment. This was well-enunciated by former Defense Secretary Donald Rumsfeld, who, in an internal October 16, 2003 memorandum to General Richard Myers, Paul Wolfowitz, and Douglas Feith, wrote the following:

> Today, we lack metrics to know if we are winning or losing the global war on terror. Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training and deploying against us?
>
> Does the US need to fashion a broad, integrated plan to stop the next generation of terrorists? The US is putting relatively little effort into a long-range plan,

[64] Robert Kagan, *Power and Weakness*, 113 POL'Y REV. (June 2002), *available at* http://www.hoover.org/publications/policy-review/article/7107.

> but we are putting a great deal of effort into trying to stop terrorists. The cost-benefit ratio is against us! Our cost is billions against the terrorists' costs of millions.[65]

The United States, however, has approached the "War on Terror" solely through the prism of domestic politics and has needlessly alienated large segments of the international community by its failure to address the concerns of global public opinion. Its decision to both threaten and then bypass the United Nations Security Council, its use of Camp X-Ray and Guantanamo Bay to detain enemy combatants, its use of enhanced interrogation measures, "rendition" and Predator Drones[66] are all actions that have had significant domestic support, but which have alienated key international constituencies. A year 2010 University of Maryland Poll of Arab public opinion, conducted by Zogby International, evidences continued antipathy towards the U.S.[67]

To borrow the title of the Russian novelist Nikolai Chernyshevsky's nineteenth century novel, "What is to be done?" Certainly the 9/11 terrorist attacks were shockingly destructive to both American life and property. Moreover, it is unequivocally true that Al-Qaeda would certainly have attacked the United States again were the United States not to have actively disrupted and destroyed this anti-civilizational international terror network. Should the violation of international human rights and warfare norms delegitimize an undertaking that was designed solely to protect the

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[65] Memorandum from Donald Rumsfeld, Secretary of Def., to Gen. Richard Myers et al. (Oct. 16, 2003), *available at* http://www.usatoday.com/news/washington/executive/rumsfeld-memo.htm.

[66] Both of which are proscribed by the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and signed by President Reagan on April 18, 1988 and ratified by the United States Senate on October 27, 1990. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, at 197 (June 26, 1987).

[67] Eyder Peralta, *New Poll Finds U.S. Viewed Less Favorably in Arab World*, NPR (Jul. 13, 2011, 2:11 PM), http://www.npr.org/blogs/thetwo-way/2011/07/18/137821453/new-poll-finds-u-s-viewed-less-favorably-in-arab-world.

United States and the international system from terror networks like Al-Qaeda? After all, aren't the first victims of Islamic extremists innocent women, girls and moderate Muslims who seek to integrate their countries within the international system? And didn't Lincoln countenance far worse during the American Civil War in order to fulfill the far more pressing imperative of preserving the Union?

IX. LESSONS FROM LINCOLN

Lincoln's conduct as Commander-in-Chief was premised on the sole objective of preserving the Union.[68] Indeed, during the Civil War, the "'predominant purpose' of all federal operations was the political goal of reestablishing U.S. government authority over the states that had seceded from the Union."[69] With that goal in place, the Lincoln administration countenanced the use of harsh and illegal measures in the process of defeating the Confederacy. This included President Lincoln's implementation of an illegal suspension of the writ of habeas corpus notwithstanding Chief Justice Taney's opinion in *Ex Parte Merryman*, which confirmed the text of the United States Constitution Article I's Suspension Clause and held the President has no authority to unilaterally suspend habeas corpus rights.[70] In total, Lincoln's suspension of the writ resulted in 38,000 civilians being arrested and held by the military without trial and judicial review.[71] Among those arrested were prominent members of American society,

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[68] *See* BURRUS M. CARNAHAN, LINCOLN ON TRIAL: SOUTHERN CIVILIANS AND THE LAW OF WAR 9 (The University Press of Kentucky 2010); *see also* Robert Fabrikant, *Lincoln, Emancipation, and "Military Necessity": Review of Burrus M. Carnahan's Act of Justice, Lincoln's Emancipation Proclamation and the Law of War*, 52 HOW. L.J. 375, 377 (2009).

[69] Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of the Military Necessity*, 92 AM. J. INT'L L. 213, 222 (1998).

[70] Joseph Margulies, *Evaluating Crisis Government*, 40 No. 6 CRIM. L. BULL., art. 5, 5-8 (2004).

[71] Aaron L. Jackson, *Habeas Corpus in the Global War on Terror: An American Drama*, 65 A.F. L. REV. 263, 266 (2010).

including a newspaper editor who publicly criticized the actions of President Lincoln when he took office.[72] Professor Scott Sullivan writes:

> Lincoln's execution of the Civil War demonstrated little patience with legal niceties that could potentially impede his prosecution of the war effort. Some of Lincoln's most controversial acts include unilaterally suspending habeas corpus rights in parts of the Confederacy, engaging in military action that was unsanctioned by Congress, embracing the concept of total war that led to the burning of Atlanta by General Sherman's troops, and ordering a military blockade in the absence of congressional authorization.[73]

The Lincoln Administration, moreover, countenanced both the retaliatory killing of innocent civilians and destruction of civilian property within the Confederate States.[74] Sullivan writes:

> The rights-restricting actions imposed during the ongoing war on terror have been much more restrained than that of the Civil War. Unlike Lincoln's broad grants of power to military commanders to suspend habeas corpus as they saw fit, there has been no suspension of the right of habeas corpus. The detention facilities at the U.S. Naval Station at Guantanamo Bay compare quite favorably to the harsh treatment and occasional summary execution suffered during the Civil War. Similarly, President Bush has received Congressional authorization for each major military operation in which his administration engaged, despite his clear belief that such assent is Constitutionally unnecessary.[75]

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[72] *Id.*

[73] Scott Sullivan, *International Law and Domestic Legitimacy: Remarks Prepared for Lincoln's Constitutionalism in Time of War: Lessons for the Current War on Terror?* 12 CHAP. L. REV. 489, 490 (2009); *see also* CARNAHAN, *supra* note 67, at 109.

[74] CARNAHAN, *supra* note 68, at 60-62.

[75] Sullivan, *supra* note 73, at 491.

The political paradigm faced by Lincoln, however, differs markedly from that which was presented to Presidents Bush and Obama. Lincoln prosecuted an unequivocal war of necessity to preserve the Union and did so at a time when both international law and the laws of war were in their infancy. Robert Fabrikant writes:

> Prior to the Civil War there were no international conventions laying out the law of war. To say that international law was in its infancy at that point would be an understatement. There was no accepted legal code that embodied international law, including the law of war. European countries had a loose, and entirely unenforceable, set of understandings extending back millennia to which they resorted in the context of resolving commercial, not military, disputes. These understandings were referred to as customs and usages, but there was no universal agreement as to their content or meaning.
>
> The international law of war was even less undeveloped than its commercial counterpart. The legal thinking which existed in this realm came largely, perhaps exclusively, in the form of scholarly writings. Naturally, these writings conflicted with one another, and they had no binding effect.[76]

Unlike the Civil War, where international public opinion counted for very little, the War on Terror, set in a very different media age, was subjected to heightened public scrutiny. By way of example, Congress' bipartisan 9-11 Commission concluded allegations that the United States abused prisoners in its custody "make it harder to build the diplomatic, political, and military alliances the government will need [for] a successful counterterrorism strategy."[77] According to a report by the United States Senate Armed Services Committee, "[t]he

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[76] Fabrikant, *supra* note 68, at 388-89 (2009); *see also* Sullivan, *supra* note 73, at 494-95.

[77] Keith A. Petty, *Beyond the Court of Public Opinion: Military Commissions and the Reputational Pull of Compliance Theory*, 42 GEO. J. INT'L L. 303, 319 (2011) (quoting 9-11 COMMISSION REPORT 379 (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf).

fact that America is seen in a negative light by so many complicates our ability to attract allies to our side, strengthens the hand of our enemies, and reduces our ability to collect intelligence that can save lives."[78] In short, United States policymakers have failed to place the country "in front" of its international obligations to its overall detriment. This is in marked contrast to the United States government's behavior in Lincoln's time.

First, Lincoln successfully rebutted Confederate claims to self-determination by spearheading a war effort to delegitimize slaveholding as an aspect of Southern identity worthy of self-determination. Second, it was Lincoln himself who first codified Dr. Francis Lieber's Instruction for the Government of Armies of the United States on the Field, originally published as General Orders No. 100, War Department, Adjutant General's office - the first ever codification of the Laws of War- commonly known as the Lieber Code, named after its drafter.[79] The Lieber Code was the foundation for similar law of war codifications in Prussia, the Netherlands, France, Russia, Spain and Great Britain.[80] "It was also an important influence at the conferences of Brussels in 1874 and at the Hague in 1899 and 1907" and led to the eventual formulation and adoption of the Hague Conventions in 1907, which formalized and circumscribed the behavior of belligerents.[81] How important was the Lieber Code? A half century after the Civil War, in his opening address as President of the American Society of International Law, former Secretary of State and Nobel Laureate Elihu Root said the following:

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[78] U.S. SENATE ARMED SERVS. COMM., Senate Armed Services Inquiry into the Treatment of Detainees in U.S. Custody, at xxv (Nov. 20, 2008), *available at* http://www.armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf.

[79] Carnahan, *supra* note 69, at 213; *see also* Theodor Meron, *Francis Lieber's Code and Principles of Humanity*, 36 COLUM. J. TRANSNAT'L L. 269, 270 (1997).

[80] Gideon M. Hart, *Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions*, 203 MIL. L. REV. 1, 4 (2010).

[81] *Id.*; *see also* Heinz Klug, *The Rule of Law, War, or Terror*, 2003 WIS. L. REV. 365, 369-70 (2003).

> [W]hile the instrument was a practical presentation of what the laws and usages of war were, and not a technical discussion of what the writer thought they ought to be, in all its parts may be discerned an instinctive selection of the best and most humane practice and an assertion of the control of morals to the limit permitted by the dreadful business in which the rules were to be applied.[82]

The foremost scholar on Lincoln's actions as Commander-in-Chief, Burrus M. Carnahan, writes:

> Drafted by an academic intent on drawing general principles of human morality from empirical evidence, and issued by a President determined to found his policies on human reason, the Lieber Code may be considered the final product of the eighteenth-century movement to humanize war through the application of reason. From this standpoint, the Lieber Code's greatest theoretical contribution to the modern law of war was its identification of military necessity as a general legal principle to limit violence, in the absence of any other rule.[83]

Because it was signed and approved by President Lincoln, the Lieber Code enabled the United States Army to present itself as the world leader in respect of army conduct. No other western army had previously limited the conduct of its soldiers on the battlefield like the U.S. Army ostensibly did while conducting a war for the nation's very survival.[84]

It would be going too far to say that President Lincoln's adoption of the Lieber Code hamstrung the effectiveness of United States armies. Indeed, it has been demonstrated that Civil War combatants paid little attention to the Code's requirements.[85]

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[82] Meron, *supra* note 79, at 271 (quoting Elihu Root, Opening Address at the Seven Annual Meeting of the American Society of International Law (Apr. 24, 1913), *reprinted in* 7 AM. J. INT'L L. 453, 456 (1913)).
[83] Carnahan, *supra* note 69, at 213.
[84] *Id*.
[85] Hart, *supra* note 80, at 46.

Moreover, to the extent it was followed, Article 15 of the Code set forth that Union forces were to be guided by the Military Necessity Doctrine, which, left broad authority to military commanders to pursue their objective to preserve the Union.[86] The Military Necessity Doctrine grants considerable latitude to the military in the face of its enemy and even civilians. It even allows for a quarantining of a civilian population and, at times, the collective punishment of civilian non-combatants.[87] Indeed, its very expansiveness led many to see it as little more than a means for providing an ethical justification for a Carthaginian-style destruction of the States comprising the Confederacy.[88]

However, as Professor Carnahan writes, "recognition of military necessity as a legal precondition for destruction represented an enlightened advance in the laws of war in the nineteenth century."[89] This is because "the law of nations permitted the capture or destruction of any and all property belonging to any person owing allegiance to an enemy government, whether or not these measures were linked to military needs."[90] Indeed, even with respect to the overall parlous civilian treatment by Union Armies, Carnahan writes:

> There is a continuing debate over whether the Civil War was the first "modern war" or "total war," the precursor of the world wars of the twentieth century. Most historians agree, however, that in one crucial respect the Civil War differed from total wars of the last century. Except in retaliation for unlawful acts of the enemy, the organized armies on both sides did not target civilians for deliberate killing. Inhabitants of the Warsaw Ghetto, Nanking, or Tokyo in World War II, or Rwanda and the former Yugoslavia in the 1990s, surely would gladly have exchanged places with

[86] *See Id.*
[87] *See Id.*
[88] Hart, *supra* note 80, at 47.
[89] Carnahan, *supra* note 69, at 217.
[90] *Id.*

> Southern civilians in the path of Hunter, Sherman, or Sheridan in 1864.[91]

To Lincoln, the most fundamental limitation on military necessity was that it could be invoked only to attain a particular military objective and never solely a political one.[92] Notwithstanding today's legal suppositions as to self-determination, he was guided solely by his goal of preserving the Union in a manner that evidenced, to a degree, solicitude and respect for the rule of law under the United States Constitution.[93] Lincoln, however, was governed by objectives outside of mere military necessity and the "fundamental distinction between combatants and noncombatants was maintained throughout the war."[94] By way of example, by proposing that special consideration be given to private homes, Lincoln adumbrated the 1907 Hague Regulations on land warfare, the 1907 Convention on naval bombardment, and Protocol Additional I to the Geneva Conventions that all prohibit any attack on undefended dwellings. Included within the doctrine of military necessity was the need to take measures to ensure public order and safety.[95] This foreshadowed Article 43 of the Hague Regulations that "declared the obligation of an occupying commander to 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'"[96]

Lincoln's prosecution of the war was enhanced not only by the necessity of prosecuting what clearly was a civil war for the nation's survival, but by his placing the U.S. out front of its international obligations by promulgation of the Emancipation Proclamation, which effectively rebutted the Southern claim of self-determination and his adoption of the Lieber Code. This careful positioning of the

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[91] CARNAHAN, *supra* note 68, at 109.
[92] Carnahan, *supra* note 69, at 219.
[93] *Id.*
[94] *Id.* at 228.
[95] *See id.* (recognizing that President Lincoln insisted on refraining from destroying property to harass members of the opposition).
[96] *Id.* at 224.

U.S. with respect to international law and international public opinion is a lesson that has largely been lost by today's U.S.leaders.

X. THE CURRENT WAR ON TERROR AND LINCOLN

Unlike Lincoln who if anything, waged a war of absolute necessity to insure the continued survival of the Union, the Bush Administration chose to wage an absolute "war of choice" against Saddam Hussein's Iraq. Not only was the Iraq War an unjustifiable response to the 9/11 Al Qaeda terrorist attacks, but it was carelessly and illegally executed after its supposed justification was rejected by the United Nations Security Council.[97] This diverted resources from the then-nascent Afghanistan occupation, cost thousands of lives, much treasure and complicated Iraq's eventual transition to a stable democracy.

Although the Obama Administration was warmly received by the international community – to the point where the forty-fourth President was prematurely and embarrassingly awarded the Nobel Peace Prize during his first year in office – its continued use of Predator Drones to kill suspected terrorists, regardless of civilian casualties, and its failure to close the detention facility in Guantanamo Bay has compromised the effectiveness of its strategy in Afghanistan and worsened already problematic relations with a nuclear armed and unstable Pakistan. These failures have harmed the Obama Administration's strategic imperative, which is to engender international cooperation from our allies to share the costs of ensuring international peace and relocate the focus of American foreign and security policy from the Middle East and Afghanistan/Pakistan

[97] Peter Slevin & Dana Priest, *Wolfowitz Concedes Iraq Errors*, WASH. POST, Jul. 24, 2003, http://www.washingtonpost.com/wp-dyn/articles/A37468-2003Jul23.html.

region toward the dynamic Asia Pacific Region.[98] This is necessitated by a decline in relative American power, the need to engage an increasingly powerful and assertive China and ensure an established American presence in the world's fastest growing economic region. Due largely to the perception of American unilateralism and lawlessness though, both the Bush and Obama Administrations have been unable to fully engage the international community to deal with matters of obvious global concern.[99] Sullivan writes:

> In the war on terror, international law, and especially international humanitarian law, has played a crucial role in providing the previously established standards in the most fevered debates over detention policy and accepted means of interrogation. The primacy of international law in these realms is somewhat surprising given the American predisposition to dismiss the importance of international law generally. In spite of this general attitude to such law, I believe that international law has acted as a cornerstone here in gauging the legitimacy of state action as a general matter. This is due to the greater incorporation into a rights-oriented regime affecting traditionally domestic concerns combined with (1) its place as an external benchmark of executive action; and (2) the absence of domestically embedded

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[98] *See* Robert Burns & Julie Pace, *Obama to Talk Afghanistan Drawdown, Announce Return of 34,000 Troops in a Year*, HUFFINGTON POST, Feb. 12, 2013, http://www.huffingtonpost.com/2013/02/12/obama-afghanistan_n_2669267.html; *see also* Ed Kiernan, *Huge Military Exercise Highlights "Rebalancing of U.S. Policy Toward Asia,"* NBC NEWS (Feb. 15, 2013), http://worldnews.nbcnews.com/_news/2013/02/15/16973088-huge-military-exercise-highlights-rebalancing-of-us-policy-toward-asia?lite.

[99] *See* GEIR LUNDESTAD, JUST ANOTHER MAJOR CRISIS?: THE UNITED STATES AND EUROPE SINCE 2000, 177, 256 (Oxford University Press 2008) ("The aggressive unilateralism of U.S. policy, the rejection of international rules and multilateral institutions that has characterized the response to 9/11, and the anti-European undertones of American officials and commentators have weakened American prestige and legitimacy.").

> rules and standards acting contrary to the thrust of international law.[100]

The consequences of United States policymakers' failure to recognize this as well as the importance of global public opinion have been severe. By way of example, the Obama Administration has been unable to obtain United Nations Security Council's cooperation to deal with the present humanitarian catastrophe in the Syrian Arab Republic.[101] The Administration's proposed sanctions against Bashar al-Assad's Alawite regime were vetoed by two Security Council Permanent Members, the Russian Federation and the People's Republic of China.[102] Recognizing these states have interests completely separate from those of the United States, including a strategic interest in reasserting a non-interventionist paradigm, both countries were able to veto the proposed measure with a impunity due to the international community's increased skepticism as to American motives. This, of course, provides no comfort to the Syrian people and their advocates, who must turn increasingly to an assertive Republic of Turkey to potentially fulfill the United Nations' Responsibility to Protect.[103]

Similarly, the United States, by any international standard, was entitled to protect itself by killing the Al-Qaeda leadership, including Osama bin Laden, who was killed by a United States Navy

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[100] Sullivan, *supra* note 73, at 494 (footnote omitted).

[101] Press release, U.S. Mission to the United Nations No. 2012/081, Explanation of Vote by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, at the Adoption of UN Security Council Resolution 2042 (Apr. 14, 2012), *available at* http://usun.state.gov/briefing/statements/187914.htm.

[102] Paul Harris et al., *Syria Resolution Vetoed by Russia and China at United Nations*, THE GUARDIAN, Feb. 4, 2012, http://www.guardian.co.uk/world/2012/feb/04/assad-obama-resign-un-resolution.

[103] *Syria Unrest: Turkey Says UN "Supports" Repression*, BBC NEWS (Apr. 3, 2012, 3:39 PM), http://www.bbc.co.uk/news/world-middle-east-17602136 *Conditions for Ceasefire Appear Unstable Amid Expanding Violence*, INT'L COALITION FOR THE RESP. TO PROTECT (Apr. 11, 2012), http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/4103-crisis-update-on-syria-conditions-for-ceasefire-appear-unstable-amid-expanding-violence-.

Seal Team on May 2, 2011, while at his compound in Abbottabad, Pakistan, situated close to the Pakistan Military Academy. Although the Obama Administration deserves credit for risking its prestige to kill him, the fact Bin Laden was comfortably housed in Pakistan near a prominent military academy raises the very troubling question of how Pakistani political culture views its United States backer and aid donor.[104]

The Eurozone Debt Crisis is another case in point. To date, the United States has spent at least $2 trillion on the wars in Iraq and Afghanistan.[105] This expense stands in marked contrast with United States Treasury Secretary Timothy Geithner's April 2012 refusal to donate any money to the International Monetary Fund's request for emergency funds to deal with the Eurozone debt crisis. It is, to this writer, evidence of the United States government's failure that it continues to spend large sums in an area that is tangentially related to American prosperity and security, while at the same time refusing to spend any money on a problem that is central to this objective. As the Financial Times' Chief Foreign Affairs Correspondent Gideon Rachman recently wrote, the United States' unwillingness to address the Eurozone debt crisis is due to a lack of available resources and a collapse in American prestige and influence. He writes:

> So what has changed? A lack of money is a large part of the problem. America spent the equivalent of 5 per cent of its gross domestic product on the Marshall Plan. That is not feasible now. Tim Geithner, the US Treasury secretary, frequently urges his European colleagues to do much more to solve the

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[104] *Troubling Questions on Bin Laden*, TIMES FREE PRESS, May 8, 2011, http://timesfreepress.com/news/2011/may/08/troubling-questions-bin-laden/; *see also* Benjy Sarlin, *Pakistan Under Harsh Scrutiny in Wake of Raid on Bin Laden Compound*, TALKING POINTS MEMO (May 3, 2011, 10:12 AM), http://tpmdc.talkingpointsmemo.com/2011/05/pakistan-under-harsh-scrutiny-in-wake-of-raid-on-bin-laden-compound.php.

[105] Alan Zarembo, *Cost of Iraq, Afghanistan Wars Will Keep Mounting*, L.A. TIMES, Mar. 29, 2013, http://articles.latimes.com/2013/mar/29/nation/la-na-0329-war-costs-20130329.

> debt crisis. But, while he can speak softly, he is not carrying a big cheque book.
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> However, American leadership has not always relied on cash. The "committee to save the world" did not spend a huge amount of money. But it was operating in a different period. Less than a decade after the collapse of the Soviet Union – and with the American economy booming – US policymakers had the credibility and the confidence to lead. In large part, that is lacking today. The financial crisis has taken its toll on America's ability to persuade, as well as on its finances.[106]

To this, I would add the War on Terror.

The current United States predicament is well-stated by Associate Justice Stephen G. Breyer, who, in an address to the Association of the Bar of the City of New York, said the following:

> The Constitution always matters, perhaps particularly so in times of emergency. . . . Security needs may well matter, playing a major role in determining just where the proper constitutional balance lies. It is this proper constitutional balance of both civil liberties and national security that our three co-equal branches of government have worked rigorously to attain amidst the current wartime climate.[107]

Breyer, however, fails to take account of the international perspective. Like it or not, America's War on Terror requires a broad level of international legitimacy and support that cannot succeed if based on domestic concerns alone. Accordingly, although use of military commissions to try alleged terrorists is constitutional and

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[106] Gideon Rachman, *America, Greece and a World on Fire*, FIN. TIMES, Jan. 16, 2012, http://www.ft.com/intl/cms/s/0/0ec863ec-3e30-11e1-ac9b-00144feabdc0.html#axzz2QNbkB7Rj.

[107] Frank J. Williams et al., *Still a Frightening Unknown: Achieving a Constitutional Balance Between Civil Liberties and National Security During the War on Terror*, 12 ROGER WILLIAMS U. L. REV. 675, 678 (2007) (footnotes omitted).

may be the only option available to the Obama administration in view of domestic politics, it works against the United States' interest in engendering global cooperation and assistance in the War on Terror.

The Honorable Frank Williams, Chief Justice of the Rhode Island Supreme Court states the following, the facts of which are incontrovertible:

> Criticism surrounding the Bush administration's decisions about how to safeguard the United States seems to these writers to be particularly ill-founded when one considers that the President's actions pale in comparison to actions taken by prior presidents, such as Abraham Lincoln, who, despite his widespread suspension of habeas corpus, is still ranked among the nation's greatest leaders. Lincoln's actions, although radical, were necessary during the Civil War, as now, when grave national security problems were pandemic.
>
> Almost 150 years later, the Bush administration, like Lincoln, is faced with yet another grave national emergency that requires unpopular decisions.[108]

Correct as Judge Williams may be, his analysis partly misses the point. President Lincoln's war against the Confederacy was not only a war of necessity, but one that involved solely domestic actors. It was, after all, a civil war. Second, the war was conducted before the development of international jurisprudence regarding the conduct of armies on the battlefield and, to the extent that such requirements were extant, President Lincoln placed the United States Army "in front" of the issue by his adoption of the Lieber Code and its military necessity doctrine. None of these factors apply to the Bush and Obama administrations. Although the Bush administration had strong international support for the initial invasion of Afghanistan, the support for United States presence in Afghanistan has dissipated due to both the length of the endeavor and a perception that the United States public, its politicians and military pay insufficient

[108] *Id.* at 680-81 (footnotes omitted).

attention to both the needs and safety of Afghan civilians, who are increasingly caught between the corruption and incompetence of the Karzai government and the brutality and viciousness of the Taliban insurgents. Perhaps equally important, United States legitimacy in the "War on Terror" was undermined by the largely unilateral invasion of Iraq against the will of the international community. Although the Saddam Hussein regime was almost unique in its barbarity, the United States claim of pre-emption was viewed as incredible by both United States allies and the international community. The United States' subsequent failure to ensure the safety of Iraqi civilians after the invasion cost it further international legitimacy and support. Perhaps most significantly, the Bush and Obama administrations' focus in waging the "War on Terror" has been based solely on domestic political legitimacy when the endeavor's success requires greater international support and cooperation.

Andrew Kent writes, "the clear trend in the Court and legal academy is globalist—viewing the reach of the Constitution's protection of individuals as unaffected by geography, citizenship or hostility to the United States and construing the document as if it were an international human rights instrument."[109] Indeed, these are requirements of an increasingly active global political culture and civil society. This heightened scrutiny did not restrict the U.S. Army during Lincoln's time, but it does today. The United States' failure to recognize this fact accounts in large measure for the decline in its geopolitical position.

XI. CAUTIONARY ASPECTS TO LINCOLN'S LEGACY

This is not to say that Lincoln's legacy is unblemished. Far from it. Lincoln as Commander-in-Chief needlessly countenanced

[109] Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1844 (2010) (footnotes omitted).

actions by Union troops that delegitimized the Union war effort and made his eventual goal of reintegrating the Confederacy into the Union more difficult. By way of example, Lincoln's unauthorized suspension of the writ of habeas corpus greatly and perhaps needlessly delegitimized the Union war effort.

Although Lincoln adopted the Lieber Code and required the U.S. Army to abide by the military necessity doctrine, this still left ample room for abuse of Southern civilians to the overall detriment of both Southerners and the United States government, which sought to subsequently reintegrate the Confederate States into the Union. The Lieber Code's military necessity doctrine countenanced the starving of the enemy, whether armed or unarmed, in order to effectuate its speedier subjugation.[110] It also allowed Union forces to both drive civilians back into a besieged city that is short of provisions, so as to hasten surrender and, if necessary, deny quarter when one's "salvation makes it impossible to cumber" oneself with prisoners.[111] Notwithstanding the Lieber Code's application, the U.S. Army ensured that Southern civilians and infrastructure paid a heavy price for the Confederate rebellion against the Union. Southern cities were besieged and burned, and civilian life and property were often disregarded.[112]

Moreover, Lincoln's critics note that his claim to have acted to free the slaves is belied by his failure to enunciate the Emancipation Proclamation until this was necessitated by Congressional radical Republicans and only after the continued support of Union slaveholding States became less critical.[113] As William Klingaman points out, the President's decision to issue the emancipation proclamation "was a gamble born of desperation and frustration from repeated military failures."[114] Indeed, at the outset of his presidency,

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[110] Meron, *supra* note 79, at 272.
[111] *Id.* at 273.
[112] CARNAHAN, *supra* note 68, at 60-62.
[113] Fabrikant, *supra* note 68, at 377.
[114] WILLIAM K. KLINGAMAN, ABRAHAM LINCOLN AND THE ROAD TO EMANCIPATION, 1861-1865, 28 (Penguin Group 2002).

"Lincoln supported a constitutional amendment barring the federal government from touching slavery in states where it already existed."[115] Perhaps this was little more than acknowledgment of both a political and strategic reality. That said, the fact Lincoln countenanced slavery in Border States such as Kentucky, Delaware, Missouri and Maryland and refused to emancipate slaves in certain conquered portions of the Confederacy, contrary to the requirements of the Lieber Code, has propitiated the claim, heard in the South to this day, that the Civil War had more to do with "northern aggression" than slavery. This has permitted a siege mentality to thrive as part of Southern identity that has hindered a more complete integration of African Americans with Southern Whites. These problematic aspects to Lincoln's legacy evidence how difficult the United States' current predicament is, especially since its eventual success will require winning not only the battle for global public opinion, but sufficient "hearts and minds" within the Islamic world to delegitimize and neuter anti-civilizational Muslim radicals such as Al-Qaeda.

CONCLUSION

The United States' national interest in this globalized, post-financial crisis world is to remediate many long-neglected domestic problems, including a faltering education system, unemployment, stagnant wages, income inequality, and falling international competitiveness. To a degree, these challenges cannot feasibly be addressed so long as the United States continues to bear almost the entire cost of maintaining international peace and security. Its allies will be less likely to share these costs if the United States is seen as unilateral, aggressive and indifferent to ensuring international human rights. American actions in both Iraq and Afghanistan largely perceived as negligent and without regard for civilian welfare, have

[115] Fabrikant, *supra* note 68, at 377.

harmed its international reputation and hindered cooperation from United States allies and strategic partners. As a consequence, the United States now finds it more difficult to obtain international assistance in its goal of peaceable disengagement from the Middle East and South Asia. Although the brutality of the Civil War has been unsurpassed in United States history, Lincoln's actions as Commander-in-Chief were undertaken to fulfill the compelling interest of preserving the Union before either global public opinion or international law became relevant to the war's legitimacy. Indeed, to the extent international standards were relevant, President Lincoln shrewdly placed the United States ahead of the curve by taking a strong stand against slavery and by his adoption of the Lieber Code to govern the conduct of U.S. armies in the field. That said, the viciousness of the war effort, while it facilitated the United States' immediate goal of restoring the Union, worked against the long-term goal of ensuring a stable rapprochement between North and South.

It is a complicated predicament. While the United States must protect its citizens and territory from terrorist attacks, it cannot do so in a manner that alienates world public opinion and engenders antipathy. These were lessons well understood by United States leaders from both major political parties during the twentieth century, when United States actions corresponded with an interest in ensuring international stability, free markets and democratization. Examples include the United States' actions as the leading democracy against the Axis Powers during World War II, aid to Greece and Turkey and the Marshall Plan in the immediate post-war aftermath, its key support for the nascent European Coal and Steel Community that developed into today's European Union, its support for democratization and open markets in South Korea and Japan, the opening to China that led to several hundred million Chinese being freed from poverty, its actions as the leading democracy in opposition to the Soviet Union during the Cold War and its critical intervention on behalf of German unification at the Cold War's end. The key to United States success in the twentieth century was not only the country's unmatched economic and military might, but the preponderant international perception that United States interests

corresponded with a more open and prosperous world. It remains in the United States' interest to see a more stable and prosperous world, albeit one in which the costs of global security are shared more equitably by emerging and mature powers that have a stake in world stability. The challenge for United States policymakers is to ensure United States policies reflect these interests.

LINCOLN MEMORIAL UNIVERSITY
LAW REVIEW

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INTRODUCTION
LINCOLN'S DIVIDED HOUSE: THE CONSTITUTION AND THE UNION

*Charles M. Hubbard**

In 1858, Abraham Lincoln accepted the nomination of the Republican Party in Illinois to run for the Senate. In his acceptance speech, commonly referred to as his "House Divided" speech, Lincoln addressed the slavery issue that was dividing the country. He said:

> In *my* opinion, it *will* not cease, until a *crisis* shall have been reached, and passed. "A house divided against itself cannot stand." I believe this government cannot endure, permanently half *slave* and half *free*. I do not expect the Union to be *dissolved* – I do not expect the house to *fall* – but I *do* expect it will cease to be divided. It will become *all* one thing, or *all* the other.[1]

* Professor of History and Lincoln historian, Lincoln Memorial University. Thank you to my fellow participants in the Symposium for their comments and questions during the Lincoln Memorial University Duncan School of Law's inaugural Symposium *Navigating the Political Divide: Lessons from Lincoln*. I would also like to express my appreciation to Sydney A. Beckman, Vice President, Dean and Professor of Law, and the *Law Review* for hosting such an event.

[1] Abraham Lincoln, "A House Divided," Speech at Springfield, Illinois (June 16, 1858), *in* 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461, 461 (Roy P. Basler ed., 1953) [hereinafter COLLECTED WORKS].

This was certainly a radical statement in the context of the political environment that existed in the 1850s. Some Lincoln scholars have suggested that because the audience was a friendly Republican group, Lincoln wanted to see how his fellow Republicans would respond to his position on slavery and its expansion into the territories.

Lincoln's remarks were a response, at least in part, to the 1856 decision by the Supreme Court in *Dred Scott v. Sanford*, more commonly known as the *Dred Scott* case.[2] Chief Justice Roger Taney, in his majority opinion, went beyond the basic question for the Court and determined that Dred Scott was a slave and therefore a non-citizen, not entitled to the protection of the law.[3] Slaves were property according to Taney's ruling and could be transported anywhere in the country, including the territories.[4] Further, slaves were considered property for which their owners were entitled to the protection of the law.[5] The Court's decision effectively negated the Missouri Compromise of 1820 and most of the provisions of the Compromise of 1850.[6] As a result, slavery was constitutional and legal throughout the country. Lincoln disagreed with the Supreme Court ruling, but he respected the Court's authority and believed the appropriate response was to bring another case to the Supreme Court that would reverse the *Dred Scott* decision.[7]

The *Dred Scott* case was fraught with political implications dating back to 1852 when the Missouri Supreme Court first rendered its decision.[8] President James Buchanan went so far as to pressure a Democratic Chief Justice Taney to delay issuing his opinion until after

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[2] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).
[3] *Id.* at 404-05.
[4] *Id.* at 451.
[5] *Id.* at 451-52.
[6] *Id.* at 452.
[7] *See* ALLEN C. GUELZO, LINCOLN'S EMANCIPATION PROCLAMATION: THE END OF SLAVERY IN AMERICA 200 (Simon & Schuster 2004).
[8] *See* Scott v. Emerson, 15 Mo. 576 (1852).

the 1856 election.[9] This case and similar other cases in the Court's politicized judicial system focused national attention on the slavery issue that would ultimately divide the nation as Lincoln predicted in his "House Divided" speech.[10]

After securing the Republican nomination to run for the Senate, Lincoln expected to place the question of the expansion of slavery into the territories squarely in front of the people of Illinois in the forthcoming political debate with his opponent, Stephen Douglas. Lincoln had repeatedly acknowledged his hatred of the institution of slavery, but his commitment to the rule of law prevented him from any formal association with the radical abolitionist movement. Lincoln wanted to project the image of a moderate opposed to the expansion of slavery but allowing it to continue where it already existed.

The country was indeed divided, and it was slavery that called attention to the larger fundamental problems associated with democracy in a federal republic. In a federal system, the power to govern is defused and divided between local governments and the central government. Could the branches of government, as provided by the Constitution, resolve the question of slavery through compromise? Further, was it a local matter or one to be decided at the national level? Throughout the history of the Republic, numerous compromises on slavery had been suggested and tried. However, none of the compromises that were put in place completely resolved the problem.

Most Americans on both sides of the divide were indifferent or at least tolerant of slavery in the states where it existed. During the antebellum period, each state decided for itself whether slavery was legal in that particular state. But what about the territories that

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[9] *See* Sarah Schultz, Note, *Misconduct or Judicial Discretion: A Question of Judicial Ethics in the Connecticut Supreme Court*, 40 CONN. L. REV. 549, 567 n.130 (2007).

[10] See JAMES F. SIMON, LINCOLN AND CHIEF JUSTICE TANEY: SLAVERY, SECESSION, AND THE PRESIDENT'S WAR POWERS 98-132 (Simon & Schuster 2006), for a detailed analysis of the *Dred Scott* case.

expected at some point to become states? Was it the responsibility of the federal government to regulate and govern the territories before they were admitted as states to the Union? If so, should the federal government allow slavery within its jurisdiction? The Supreme Court in the *Dred Scott* case effectively ruled that slavery was legal throughout the country, including the territories. The issue was vigorously debated during the campaign for the Senate between Abraham Lincoln and Stephen Douglas. Lincoln's position and that of Douglas identified the issue that defined the presidential election campaign of 1860.

The American people and their political parties struggled to identify and select candidates that represented their position. The 1860 presidential election provided an opportunity for the people to express their opinion on the slavery issue. In the northern free states, there was an enthusiastic and vocal abolitionist minority. In the slave states of the Deep South, a radical minority inflamed the passions of both the slaveholders and non-slaveholders. Both the Democratic and Republican parties were further divided into factions. The newly formed Republican Party included German immigrants, former Whig protectionists, moderates with strong nationalistic tendencies, and, of course, the abolitionists. The Democratic Party separated along geographical lines into northern and southern wings. As the election grew closer, the southern wing split into three separate factions. Eventually, the Democrats would splinter up and run three candidates for President. The Republicans managed to remain a united but sectional party with little or no support in the slave states.

This very fragile coalition of Republicans managed to elect Abraham Lincoln as President. Lincoln was the consummate politician and strongly believed in party unity. For Lincoln, it was political parties that provided opportunities for the people to voice their opinions on the great issues of the day. As President, he used political patronage and some controversial cabinet appointments to unite the Republican Party. It was Lincoln's hope, at the start of his presidency, that the people's elected officials could hold the country together.

Almost immediately after Lincoln was elected President, the southern slave states, led by South Carolina, chose to secede from the Union and create a slaveholders republic called the Confederate States of America. The secession of the southern states created the greatest constitutional crisis in American history. Southerners believed that the future of slavery and much of their cultural and economic identity was threatened by President Lincoln and the so-called "Black Republicans." It was Lincoln's election and the perceived threat he posed to slavery that provoked Southerners to withdraw from the Union. However, for Lincoln, the breakup of the Union identified a larger threat not only for Americans but for all mankind. That threat was whether a government of the people, by the people, and for the people, could endure. Secession in Lincoln's view was a clear and fundamental threat to democracy.

Paradoxically, the potential threat to democracy lies within the strength of the system. Majority control of the system is both its strength and major weakness. Democracy's strength is found in the unity of the majority. The problem for democracy develops when the majority refuses to accommodate and protect the rights of the minority. The problem is further exacerbated when the minority refuses to accept the will of the majority.

This frustrating dilemma and potential flaw continues to plague advocates for self-determination grounded in the democratic system of majority rule. The concept of tyranny by the majority is generally associated with Alexis de Tocqueville, the French political philosopher and historian of the early nineteenth century.[11] However, the problems associated with democratic rule were not lost on those who drafted the Constitution of the United States. In the late eighteenth century, John Adams identified the problem and pointed out several ways that the Founders of the United States sought to address and eliminate the potential breakdown of democratic rule.[12]

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[11] *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1835).

[12] *See* 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (Philadelphia, William Cobbett 1797).

This issue was also discussed by James Madison in *The Federalist No. 10* in which Madison recognized that "the superior force of an interested and overbearing majority" might encroach on the personal liberties and freedoms of the minority.[13] Just before the presidential election of 1860, the British political thinker John Stuart Mill argued for a limited representative government instead of pure democracy in his book, *On Liberty*.[14]

As John Adams pointed out during the early development, the Constitution provided a number of mechanisms to avoid the potential pitfalls of tyrannical rule by the majority; for example, constitutional limits on the branches of government such as the separation of powers, supermajority rules of the legislature, and the Bill of Rights, to name a few. All these, argued Adams and other supporters of American constitutional government, would enable the United States of America to have democracy with adequate protection for personal liberty and freedom for all citizens, including dissenting minorities.

Despite these protections, in 1860, a large and determined minority felt threatened by the majority and decided to break up the union of states. The secession crisis that confronted Lincoln was not only a threat to the country, but it signaled potentially the end of American democracy. To solve this crisis, Lincoln first needed to effectively persuade Americans that secession was a threat to democracy and, second, to convince the people that the system was sufficient to address the problem.

Abraham Lincoln certainly possessed the persuasive skills to motivate the people to save the Union and democracy without resorting to violence. No President, except possibly Thomas Jefferson, was such an acknowledged literary genius and communicator. Lincoln is arguably the finest of wordsmiths, and his words, as much as anything about him, justified Edwin Stanton's

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[13] THE FEDERALIST NO. 10, at 77 (James Madison) (Willmoore Kendall & George W. Carey eds., 1966).

[14] *See* JOHN STUART MILL, ON LIBERTY (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

comment upon Lincoln's death that "[n]ow he belongs to the ages."[15] With this lamentation, Stanton made Lincoln's words an integral part of American political rhetoric for the ages. Among America's most famous speeches, Lincoln's Gettysburg Address is considered by most historians and political philosophers as the supreme statement of the meaning of American democracy and civil society. Despite the tragedy of the Civil War, Lincoln never lost faith in democracy and the American people.

From the start of his presidency, Lincoln had "a patient confidence in the ultimate justice of the people."[16] With this statement, Lincoln was referring to a government by the people and was certain "that truth, and that justice, will surely prevail, by the judgment of this great tribunal, the American people."[17] With these and numerous other statements, Lincoln must be assured his place as the most eloquent spokesman for American democracy.

Lincoln wanted to maintain the Union and convince the American people to support the political system and the institution provided by the Constitution, but he could not allow secession. The bitterness caused by the American Civil War with all its hatred and deprivation, while not lost on Lincoln, did not prevent him from seeking the reconciliation and unification of all Americans. It is difficult to imagine that any American would not be moved by Lincoln's words in his Second Inaugural Address when he said:

> With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation's wounds; to care for him who shall have borne the battle, and for his widow, and his orphan—

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[15] DAVID HERBERT DONALD, LINCOLN 599 (Simon & Schuster 1995).
[16] Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 4 COLLECTED WORKS, *supra* note 1, at 262, 270, *quoted in* DAVID DONALD, LINCOLN RECONSIDERED: ESSAYS ON THE CIVIL WAR ERA 142 (Alfred A. Knopf 2d ed. 1966).
[17] *See id.*

> to do all which may achieve and cherish a just, and a lasting peace, among ourselves, and with all nations.[18]

More than a century later, these words continue to illuminate our lives and our commitment to Lincoln's vision of forgiveness, reconciliation, and empathetic understanding for our fellow countrymen. Generations of Americans have accepted Lincoln's vision, and that shared commitment has sustained American democratic principles.

Ultimately, the secession of the southern slave states threatened the existence of constitutional democracy. Lincoln was correct when he predicted that a country could not endure permanently divided against itself. Despite the efforts of members of Congress and leading politicians to reach a compromise on the slavery issue, the house divided, and the war came in April of 1861. Lincoln believed that secession was unconstitutional. As President he had taken a solemn and sacred oath to uphold and defend the Constitution, and, with that commitment, he was prepared to defend the democratic principles of a government that vested political power in the electorate.

This is not to say that Lincoln was intolerant of dissent. He expected, and even appreciated, different positions and points of view. Lincoln believed in, and was committed to, political party activism and saw politics and politicians as the best means to implement the will of the majority of the people.[19] In Lincoln's view, it was the responsibility of those seeking to represent the people to understand and be informed about the issues that confronted the people. Lincoln wanted to persuade and convince the people that his ideas and solutions to the problems they confronted were the best available. If he was successful in persuading them to agree with his

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[18] Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), *in* 8 COLLECTED WORKS, *supra* note 1, at 332, 333.

[19] See Abraham Lincoln, Circular from Whig Committee (Mar. 4, 1843), in 1 COMPLETE WORKS OF ABRAHAM LINCOLN 72 (John G. Nicolay & John Hay eds., 1920), where Lincoln explains in some detail his position on party loyalty.

position, the people would vote for him, and he could present and argue for their political agenda. Politicians in the mid-nineteenth century and even today frequently seek to tell the electorate what they want to hear without attempting to persuade voters to accept different points of view. Lincoln managed to persuade the people to agree with him and, therefore, vote for him rather than simply telling them what they wanted to hear. This position may seem a bit simplistic but it was remarkably sophisticated in its application in the nineteenth century and may be too sophisticated for modern politicians who tend to rely on polling data to determine what they should say to their constituents. Lincoln was a politician, and politics was his lifelong passion. He wanted to use the political system to make a difference for the greater good.

Lincoln was unable, despite his remarkable persuasive skills, to convince the secessionist in the South to remain loyal to the Union. In 1860, the experiment in popular republican government that began in Philadelphia was now confronted with the prospect of complete failure. As much as anything, the election of Abraham Lincoln in November triggered the potential breakup of the Union. The question before Lincoln and the country after his inauguration was whether a democracy could exist with a strong and militant minority that refused to submit to the will of the majority. Therein was the threat to democracy and popular government.

Lincoln rejected the Southern argument that they were fighting for self-government. The Southern position was based on the refined positions taken by John C. Calhoun and, before him, Jefferson and Madison. The Southern position was that the states had voluntarily entered the Union and temporarily surrendered part of their sovereign authority to the central government. Based on that premise, each state could withdraw from the Union when its local interest was threatened by continued participation in the union of states. The secessionist referred to the revolutionary responsibility of the people to overthrow an oppressive government. Americans, including Southerners, relied on the philosophy of John Locke to legitimize the American Revolution and separate from the oppressive

government of Great Britain. For Southerners, similar oppressions existed and it was their moral obligation to conduct a legitimate revolution to obtain independence and form a new government.[20]

Lincoln argued that the purpose of secession was first to create a government that protected the institution of slavery. He said in his First Inaugural Address:

> If, by the mere force of numbers, a majority should deprive a minority of any clearly written constitutional right, it might, in a moral point of view, justify revolution—certainly would, if such right were a vital one. But such is not our case. All the vital rights of minorities, and of individuals, are so plainly assured to them . . . in the Constitution, that controversies never arise concerning them.[21]

With this statement, Lincoln was simply saying that no constitutional right of any citizen or group of citizens had been encroached upon. Thus, there was no legitimate justification for revolution and secession was nothing more than a violent rebellion.

Lincoln concluded that secession was unconstitutional and therefore unlawful. The President was convinced that if the country was allowed to break up, the world would lose "the last best, hope of earth."[22] This hope was popular government; one that was responsible to the people. Lincoln expressed this view in his December 1862 message to Congress and the American people when he said, "fellow-citizens, *we* cannot escape history. . . . The fiery trial through which we pass, will light us down, in honor or dishonor, to the latest generation. . . . In *giving* freedom to the *slave*, we *assure*

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[20] *See* EMORY M. THOMAS, THE CONFEDERATE NATION:1861-1865, at 62 (Henry Steele Commager & Richard B. Morris eds., 1979).

[21] Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 4 COLLECTED WORKS, *supra* note 1, at 262, 267.

[22] Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), in 5 COLLECTED WORKS, *supra* note 1, at 518, 537.

freedom to the *free*. . . . We shall nobly save, or meanly lose, the last best, hope of earth."[23]

The fundamental question that still confronts a democracy is one of balance. It is appropriate and necessary in a democracy to protect the rights of a dissenting minority, but it is also necessary to prevent the dissenting minority from destroying the governing institutions established to maintain majority rule. The lofty and idealistic principles set forth in the Declaration of Independence can only be sustained by the practical application of the rule of law as defined in the Constitution. Stated another way, Lincoln saw the Declaration of Independence as an expression of the inalienable rights of every man, while the Constitution provided the governing mechanisms and institutions for sustaining and protecting those fundamental freedoms. The Constitution is the rulebook that governs the country; at the heart of Lincoln's argument that secession was unconstitutional was the sovereignty of the Union.

Lincoln's constitutional arguments were unsuccessful in convincing Southerners that the doctrine of states' rights, as set forward by Jefferson and Madison and expanded by John C. Calhoun, did not legitimize secession. It was Appomattox that completely discredited Calhoun's argument once and for all. Nationalism triumphed and with it a strong centralized government. Although the debate continues between the strong advocates for local government and those desiring more centralized governmental control, ultimately it is the federal government that is sovereign. The defeat of the secessionist and the reconstruction that followed settled the major issue of sovereignty and the Union survived.

The expansion and centralization of federal power during the Civil War is closely associated with the expansion of executive or presidential power. Lincoln believed that the power needed to meet the secession crisis was provided by the Constitution and was vested primarily in the President. Obviously, the rebellion was an emergency sufficient to justify the use of these extraordinary powers.

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[23] *Id.*

Lincoln's critics have argued that Lincoln went beyond the necessary powers to suppress the rebellion. However, the extent of the power needed as defined in the Constitution is determined by the magnitude of the emergency. Moreover, that determination is a presidential responsibility and therefore determined by the President, in this case, Lincoln.

The expansion and consolidation of presidential power began with Lincoln's response to the Sumter crisis. After the failed attempt to resupply and reinforce Sumter, Lincoln took extraordinary and extra-constitutional action. He did not call Congress back into session, proclaimed the blockade of Southern ports, called for volunteers without authorization, directed the Secretary of Treasury to spend unauthorized government funds, and ultimately suspended the writ of habeas corpus in certain areas. Later on, as the war progressed, he introduced conscription, authorized military tribunals of civilians, condoned arbitrary arrest and imprisonment, suppressed newspapers, and ultimately emancipated the slaves. Lincoln justified these actions under his authority as Commander-in-Chief and through the use of his emergency war powers.

Lincoln believed that the power needed to meet the secession crisis was provided by the Constitution and was vested primarily in the President. He frequently cited the Commander-in-Chief Clause of the Constitution that required him to "take Care that the Laws be faithfully executed."[24] Furthermore, he took his oath of office seriously and declared that the oath of the President was "registered in Heaven."[25] The presidential oath of office that Lincoln took also included the clause, "preserve, protect and defend the Constitution of the United States."[26] Obviously, the rebellion was an emergency sufficient to justify the use of these extraordinary powers. Lincoln's critics have argued that Lincoln went beyond the necessary powers to suppress the rebellion.

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[24] U.S. CONST. art. II, § 3; *see* 4 COLLECTED WORKS, *supra* note 1, at 262, 265.
[25] Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 4 COLLECTED WORKS, *supra* note 1, at 262, 271.
[26] U.S. CONST. art. II, § 1, cl. 8.

It is worth noting that the Constitution Lincoln swore to protect and defend is not the Constitution of today's Americans. Lincoln's actions, and ultimately the outcome of the Civil War, set in motion a series of legislative events and amendments to the Constitution that allowed dramatic new interpretations of that remarkable document. The Reconstruction Amendments: the Thirteenth, Fourteenth, and Fifteenth Amendments, required the federal government to protect the individual rights and freedoms of all Americans. The central government after the Civil War was charged with ensuring equal treatment under the law for all American citizens. The original drafters of the Constitution saw the central government as a potential threat to individual liberty and sought to protect Americans from the encroachment of centralized power. The post-Civil War Amendments reflected the changed expectations of the people and signaled a new relationship between the government and the governed in the United States.

In the final analysis, Lincoln believed the Constitution was essentially an extraordinary arrangement for the sharing of authority within a structure of popular government. In ordinary times, that meant that the legislative body, representing the diverse attitudes and interests of the people, would be the most influential of the three branches of government. However, the Civil War and secession was no ordinary time. The power Lincoln assumed as the Chief Executive began a process that was referred to by Arthur Schlesinger, Jr. as the road to an "Imperial Presidency."[27] Modern communication and technology have forced recent Presidents to become less imperial but nonetheless powerful. Moreover, if Schlesinger meant the arbitrary use of presidential power to manipulate the system, the Imperial surge continues.

The constitutional crisis of 1860 and the war that followed demanded a great leader to persuade the American people to preserve the Union and constitutional democracy for all mankind. Lincoln was that visionary political leader. Throughout American

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[27] *See* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (Houghton Mifflin Co. 1973).

history, the country has called forth great leaders in times of crisis. In this presidential election year, Americans are looking for political leaders to implement the changes required to meet the challenges of the twenty-first century.

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THE ROAD TO 2012 AND *GAME CHANGE*[*]

Mark Halperin[**]

These are momentous times. Maybe not as momentous as the Civil War in the era of Lincoln, but these are pretty momentous times. Just in the period President Obama has been in office, we've seen overseas: the crisis in Japan, nuclear showdowns with North Korea and Iran, the movements for liberation in Northern Africa and the Middle East, wars in Afghanistan and Iraq, and the War on Terror. There's a lot going on overseas, and there's a lot going on here at home as well. We've seen a period of intense polarization and conflict in Washington, which I'll talk a fair amount about. We've seen the passage of a healthcare law, one of the biggest pieces of legislation any of us have ever seen. And we've seen a crisis in this country of a pretty extreme nature regarding jobs—what I think is the biggest issue facing the country now, affecting not just the country and the world, but the communities, families and individuals in a way that is pretty important. All of this is happening in an environment of pretty intense change.

There have been two movements just in the last three years that are quite unusual in the modern era in terms of their intensity . . .

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[*] Lecture given by Mr. Halperin at Lincoln Memorial University Duncan School of Law's symposium "Navigating the Political Divide: Lesson from Lincoln," held April 20, 2012 in Knoxville, TN.

[**] Mark Halperin is the senior political analyst for Time magazine, Time.com, and MSNBC.

and in terms of the impact on politics. The Tea Party movement, which helped Republicans do real well in the mid-term elections in 2010, is, I think, a moral movement in many ways. It is a movement that says we shouldn't be passing on to future generations debt and deficits that are unsustainable. While the Tea Party has become polarizing, in part because of the national mood that I will talk about today, again, I think it is great to see people go out into the streets and participate in democracy about something they feel strongly about. . . . I think another moral argument being made by people is the Occupy Movement. Income inequality in this country is unsustainable as a practical matter, but it is also, I think, a matter of morality to say that in a country like this we shouldn't have systems, to not only propagate but in some ways reinforce the income inequality, where so few have so much and so many have so little and there is a declining middle class. So, those are two movements of intense change, and they are part of understanding the political divide that we now have.

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First and foremost, this country has had great periods of division in the past, and it has had great periods throughout our history of pretty tough partisan politics of the kind of negative rhetoric aimed at our political leaders that is so pervasive now. I think there are two ways that it is different now than it has ever been, and those things really do matter quite a bit. They really do make this a crisis for the country and, something again, I think is interesting and important. One is, it is 24/7. It has never been that way before—Twitter, cable TV, talk radio, and internet. If you are someone who doesn't like Karl Rove on the right or Michael Moore on the left, you can go home or go wireless right in this room, and you can read about them and listen to negative things about them all day long. There is an ability to publish negative things through Twitter, and Facebook. Everyone can be someone who engages in negative attacks, and, if you want to be a consumer of that information, you can do it around the clock.

The other way that it is different than it has ever been is that those extreme voices on the left and the right are now at the center of our politics. In the old days, they were part of the fringe. There was a center of responsible voices of civil discourse. Now, the town square is dominated by propagandists and activists on the left and the right in a way that it has never been before. I call it the "freak show" of American politics, where Michael Moore on the left and Ann Coulter on the right have more influence about what citizens learn about what is going on in the country than most United States Senators.

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I think division matters, first and foremost, not because I don't like partisanship and not because I think we should squelch voices, but the "freak show" keeps us from solving our problems. It forces politicians and other people involved in our national life into tribal camps. It forces them to worry more about what people in their camp think of them, to worry more about, if you're a Democrat, attacks from the left, and, if you're a Republican, from the right, than in trying to find national consensus. While I'm an optimist about the country's future, even in the short term and certainly in the medium and long, we have a lot of challenges right now. As a practical matter, in Washington and in our state capitals [these challenges] are not being addressed because "freak show" politics dominate everything that is going on in America in terms of trying to meet those challenges. We face a lot of big issues—maybe none by itself as big as slavery—but we face a lot of big issues and challenges that need to be met, and I would suggest to you that we are not going to meet them, as we have seen over the course of the last three presidencies, until we can figure out how to become a less divided nation.

* * * *

So where did the "freak show" come from? Where did this current division that we are saddled with start? I think it started pretty much at the beginning of the Clinton era. President Clinton came in, and, for some reason, he is a polarizing figure.

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I think, for a time at least, we lost the imperial presidency.

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He would literally run into the Oval Office in his running shorts after workouts. He would show up at McDonald's. He had a casual way about him that is his natural self, but it served to, I think, diminish the majesty of the office in a way. He talked about this in an interview I did with him for an earlier book; he acknowledged that this was the case. In some ways, he reduced his power, his influence, and the influence of the office by behaving in a more casual way than his predecessors had done. The other thing that happened at that period that was extraordinarily important for creating the "freak show" was the rise in "new media." Again, it isn't a clean break. There was some "new media" before President Clinton took office and some of it has only developed since he has left office. It was the beginning of the internet, the beginning of more cable news, the beginning of the use of email, and it was the beginning of an electronic age where talk radio became a bigger deal, where the "freak show" had more outlets, more places to go, and lower barriers to entry for participation in the national conversation in a way that we had never seen before—a lot of which was directed towards going after the President.

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He was replaced by George W. Bush. I never thought I would cover a president more polarizing than President Clinton. By almost every metric academics use to measure polarization, President Bush was, but he was also president during 9/11, and 9/11 changed things just a little bit on these issues, at least for a time, because the country was so united. President Bush did a good job in the wake of 9/11, I think most people would agree, in trying to bring the country together. . . . National security and the role of the president protecting us came back, and I think has led to something that is under-

commented on, which is a pretty broad area of consensus in foreign policy.

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Again, I never thought I would see a president more polarizing than President Bush was; President Obama is even more polarizing. And there is an irony to that given that he ran, first and foremost along with trying to stop the war in Iraq, saying he would be different, he would be post-partisan, and he knew how to bring the country together. He's achieved a lot of his campaign promises, which is something he talks about regularly, and he's right about. He has not achieved the promise of bringing the country together. We are more divided now than we were under his predecessors. That is a real problem for him and for the country because if you cannot unite the country, at least for a period, then you cannot meet the challenges that are currently unmet across the board, like dealing with the healthcare law and energy, on immigration, on the tax code, on debt and the deficit, and on education.

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Now, what has the President done to try to deal with the "freak show," to try to bring us together, and to try to make us not a house divided? Not very much, as I said before. He's failed. First of all, he has failed because it is hard to do. These forces are as big and as powerful as the presidency is, although weakened from the Cold War period. It is hard to do and you have to spend a lot of time on it. It is not easy. It is not human nature for someone, even someone like Barack Obama, who has got a pretty thick skin, to want to reach out there to people who are attacking him every day, 24-hours-a-day, on Fox, Twitter, cable news, and talk radio. It is hard to do.

The second thing is he has become personally polarizing, just like his two predecessors. He is not the candidate of hope and change of just a few years ago, where a lot of Republicans I knew voted for him, raised money for him, talked about his promise of bringing the country together, talked about him being a post-partisan figure. . . .

He made a big mistake his first month in office; it is what I call the original political sin of his administration on this score. He wanted to pass the stimulus law in a big hurry. . . As you'll recall, [the Democrats] controlled the Congress at that point, both the House and the Senate. He dared Republicans to vote against it. His attitude was I'm popular, this needs to be done, if Republicans vote against this in mass, they will be punished politically because it will pass anyway with Democratic votes, the economy will get better and we'll get all the credit. Or he thought it was possible that the Republicans would be split; some of them would vote for it, and the Republican Party, very weak at that time, would become even weaker. They almost all voted against it. It passed, but the economy didn't get much better right away. The public didn't credit that law and the expense of spending $800 billion with improving the economy, and it set in motion an attitude by the Republican Party of we should oppose this president because if we hang together we will succeed politically.

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So what can we do? First of all, we can lobby for good behavior.

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Second thing you can do is to remember the adage of "the personal is the political." If you are sitting around in one of your tribes – again we've got a mixed group here, but I suspect a lot of you spend more time in your tribe than cross-pollinating . . . While we can disagree—and we should—and have political debates, even partisan debates, it shouldn't be personal, and it shouldn't be done in a way that only reinforces people being in their own tribes rather than try to work together.

The final thing is being consumers because, while the politicians clearly play a big part in this, if you are smart consumers about media, you can really affect things. Just as politicians will go where the votes are and where public attitudes are, people in my business will go where the readers, viewers, and eyeballs are.

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What we need are neutral voices, voices that aren't liberally biased or conservatively biased, voices that actually give you facts. There is an extraordinary amount of skepticism from people on the left and the right who are hard-core "freak show" members about people in my business. There are people who will say that everything in *Time Magazine* is too liberal, everything in *Time Magazine* is too conservative. We need—any democracy needs—voices in the media that hold powerful interests accountable to the public interests without fear of favor; that aren't partisan, that are fact-based; that are well-funded; that can stand up to the government, the labor unions, and the corporations; and that file Freedom of Information Act requests with foreign bureaus. So as consumers of news, don't reward only partisan organizations. Don't reward only places that are only based on invective. Reward places that do serious work. We have only a few of these left in America right now, and if there aren't consumers that support them, they are going to disappear, and we'll be left only with "freak show" groups.

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MAKING PRISONERS VISIBLE: HOW LITERATURE CAN ILLUMINATE THE CRISIS OF MASS INCARCERATION[*]

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Staggering rates of incarceration, especially for African Americans, make the examination of the lives of prisoners in the United States a matter of urgency. For many of us, especially academics and researchers, the topic of mass incarceration is often seen in terms of numbers and statistics, while the realities of the daily lives of people touched directly by the criminal justice system seldom come into focus.

While in 1978 there were roughly 450,000 people imprisoned in the United States, there are now more than 2.3 million people behind bars, more than one in a hundred American adults, and more than in any other nation. The United States has less than five percent of the world's population, but it has almost a quarter of the world's prisoners. Non-violent offenders comprise about half of the prison population, and a quarter of those who are locked up are incarcerated for drug-related offenses. Despite the fact that studies show that people of all colors use and sell illegal drugs at similar rates, for

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America's poor, and especially for its poor black men, prison is a destination and a fact of ordinary life. More than half of all black men without a high school diploma go to prison at some point in their lives. As a recent *New Yorker* article stated, there are more black men in the criminal justice system that are in prison, on probation, or on parole than were in slavery in 1850.[1] Currently, a black male in the United States has a one in three chance of going to prison in his lifetime and a greater chance of going to prison than of going to college. For a Hispanic male it's one in six, and for a white male it's one in seventeen. In 2009, non-Hispanic blacks accounted for 39.4 percent of the total prison and jail population, and blacks, including Hispanic blacks, comprised only 12.6 percent of the United States population.

Black women make up 30 percent of all incarcerated women, although they represent only 13 percent of the nation's female population. The rate of incarceration for women has increased at nearly double the rate of men since 1985, and the impact of the absence of these primary caregivers on families is devastating. Women comprise seven percent of the state and federal prison population, expanding 4.6 percent annually between 1995 and 2005. There are more than eight times as many women in prisons and jails now than in 1980. Approximately 75 percent of incarcerated women are mothers, and almost one in three women in prison is serving time for drug-related crimes. The PEW Center reported in 2008 that while one in 355 white women between the ages of 35 and 39 were behind bars, for black women the rate was one in 100.[2]

These are hard truths. We are warehousing human beings in this society. However, perhaps the greatest outrage is the fact that more money is spent on corrections than education. In

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[1] Adam Gopnik, *The Caging of America*, THE NEW YORKER, Jan. 30, 2012, http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik.

[2] The PEW Charitable Trust, *One in 100: Behind Bars in America 2008*, 6 (2008), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pdf.

Massachusetts, my home state, for example, it cost an average of $45,917.05 per year to lock one person up. Yet, we avoid looking directly at prisons by looking away—both political parties do this.

Art, however, has the power to transcend rhetoric and transcend the intellectual distance which often characterizes sociological and legal work on prisons to convey the human consequences for the imprisoned and the wrongfully convicted as well as for their families, their communities, and our society.

Determined to raise my voice about this crisis, I have spoken out through fiction about the lives of the incarcerated, who are exiled to invisibility, reduced to stereotypes in the media, and used as pawns in electoral politics. In my fiction, I have sought to reveal the experience of incarceration, the social forces which lead there, and the possibility of survival and transformation. I have tried to illuminate how and why we place our faith in a criminal justice system that does not operate fairly, equally, or reliably. The seed of these projects was my father's lifelong work as a criminal defense attorney. I understood his work as his way of agitating by serving as an advocate for people who did not have access, recognized voices, or a full set of choices and means to participate in American society. Because the circumstances of my father's clients, as well as related social and political issues, were part of the daily life and dialogue of my family, prisoners have never been invisible to me. They were not "other," they were part of our lives, our community, our people. When I decided to write about some of the people who were behind bars, I knew I needed to spend time with people who were locked up and people who worked with them. I knew I needed to earn the story I wanted to try to tell.

Twelve years ago, I began volunteering by teaching storytelling and creative writing to men who were locked up at a county house of corrections and a medium security prison. At first, I went because of the novel I was trying to write, but I was astonished by what went on in the workshop sessions I led. I was overwhelmed by the things people had endured. By the survival of dignity, by the

laughter that was inspired by good memories, I was struck by the self-interrogation as well as the generosity and gentleness that I often witnessed. Through sharing and hearing their stories, these men were able to bring forward their best selves. Through words they had a different conception of power, not derived from domination or material things, but power from within. They raised their voices instead of their fist. In these workshops, their words, which were spoken into the stale and recycled air, were soil in which something besides bitterness, fear, and violence might grow.

After volunteering for five years through several different organizations and programs and conducting interviews with ex-offenders and people who worked with prisoners, I helped to establish the PEN New England Prison Creative Writing Program, which serves two prisons in Massachusetts. I currently direct the program, and I continue to teach as a volunteer. I have rendered what I have observed and learned throughout this experience into fiction so I can begin to speak for those who live behind the walls of American prisons.

Every few weeks I read news stories about the plight of prisoners, the failures of the prison system, the struggle to get out and stay out. There are glimmers of insight and shifts in the public conversations about incarceration. Growing numbers of DNA exonerees have led to a shift of public opinion about the death penalty, and more and more questions are being raised about incarceration's effect on entire families. There is a growing consciousness and increasing debate about the absurdity of expecting prisoners to become straight world citizens when they receive neither education nor treatment when they are locked up, despite the fact that overwhelming numbers of them have a history of addiction and abuse. Although prison-based education is the single most effective tool for lowering recidivism, in 1994 Congress abolished Pell Grants, the means of financial aid for higher education, for prisoners.

There is some sense of a conversation taking shape about some of these issues. Once prisoners are released though, the fact of

incarceration prevents them from obtaining employment, public housing, education grants, and even food stamps. More than 5.3 million prisoners or former prisoners are denied the right to vote, and in 11 states the ban is for life for those convicted of certain crimes. Most of these people who are temporarily invisible will return. Those serving out life sentences comprise a little less than 10 percent of state and federal prisoners. Because most of those locked up will eventually be released and many who are sentenced under mandatory minimum laws are already getting out and returning to their old territories and ways of life, there is a growing movement to rethink the obstacles to reentry. There is growing public attention, and little government action, on the prevalence of rape and suicide rates in prisons. There is a national debate and some action on reforming offender reporting laws, also known as CORI laws (Criminal Offender Record Information Laws), disenfranchisement laws, mandatory minimum sentences, and treatment access. Increasingly, people are questioning the dismantling of programs, which could support the education and rehabilitations of prisoners, and are criticizing the American prison system which has become a punitive, revolving door.

There's also a building conversation fueled in part by Michelle Alexander's book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*[3], in which she argues that as the United States celebrates the nation's "triumph over race" with the election of Barack Obama, the United States criminal justice system functions as a contemporary system of racial control by locking up the majority of young black men in major American cities, and labeling them felons for life, thereby permanently foreclosing their participation in American society. Alexander cites racial disparities at every stage of the criminal justice process and argues that the legal rules which structure the system guarantee discriminatory results, so that the criminal justice system functions as a gateway into a larger system of racial stigmatization and permanent marginalization, creating what

[3] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (The New Press, 2010).

she calls "an undercaste." I know from my father's life work that each person who is incarcerated has a story of the forces which have led him or her to incarceration and the path toward survival and change.

The prison environment of extreme deprivation, confinement, and existence, grounded only in the past and present tenses, is fertile ground for the exploration of the themes which continue to preoccupy me and my work: the role of narrative and memory in our lives, and the challenges of making art from loss. By telling some of these human stories, I add my voice to these urgent debates about a crisis, which we ignore at societal peril.

And yet our politicians turn away from it, talking around it, or offer simplistic sound bites with broad public appeal, lest they seem soft on crime, less than upright, in league with or unapologetic for the wrongdoers. Alexander points out in her book, for example, that even the Congressional Black Caucus failed to include incarceration within the 35 topics listed on its agenda in 2009. Incarceration is an easy response to crime, especially if the money to fund it is available. Indeed, faced with budgetary crises, many states are rethinking their lockup strategies. And because of money, rather than because of destructive social impact, as the prison population ages, the question of how to fund the medical cost of keeping people locked up begins to surface. It seems that the complex and nuanced conversation on any topic occurs less and less in the media; instead, a constant stream of rants and shallow coverage have replaced dialogue, commentary, and analysis, and we are left with the edited, decontextualized, recycled clips which come at us in every direction and live eternally on YouTube. The "dumbing down" of coverage on every issue, from deficit reduction to the causes of economic inequality, to the consequences of war, is rife. Our emotional reactions and personal experiences with crime and criminal justice are perhaps even more tangled, subterranean, and uninterrogated than other issues. We look away. And some of the political mechanisms which allow this are appealing to the racism and vulnerability of lower class whites, stoking the narrative that anyone with the proper discipline and drive

has the ability to rise to a higher class of America, narratives of black exceptionalism, and most devastating of all, the acceptability of indifference.

President Obama's 2013 budget supports the continued incarceration of people at the federal level through the activation or opening of new prisons. While spending for juvenile justice programs and initiatives that keep youth from becoming involved in the justice system are slated for federal budget cuts, "[r]esearch shows that the most cost-effective ways to increase public safety, reduce prison populations, and save money are to invest in proven community-based programs that positively impact youth."[4] "According to the National Drug Court Institute, non-incarceration programs for non-violent drug offenders consisting of treatment, education, rigorous supervision and accountability result in a 70 percent success rate with only 17 percent of participants re-offending. Contrast that with the rate that 66 percent of people coming out of prison return within three years."[5]

Law and order and tough on crime just play too well to be abandoned as modes of response. The relationship between incarceration and poverty; substandard, underfunded and neglected schools; addiction; and the lack of opportunity are virtually ignored. While Romney said flat out that he did not care about the poor because there were programs to deal with them, apparently he does not have to care. And it was a matter of fierce argument that in President Obama's 2011 State of the Union speech, he failed to even

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[4] Justice Policy Institute, *Behind the Times: President Obama's FY 2012 budget focuses on prison and policing when prison populations have fallen for the first time in 40 years*, 1 (Feb. 16, 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/fy2013presbudgetfactsheet_final.pdf.

[5] James P. Bond, *Non-violent Offenders Clogging State Prisons*, THE TIMES-TRIBUNE, Apr. 11, 2010, http://thetimes-tribune.com/opinion/editorials-columns/guest-columnists/non-violent-offenders-clogging-state-prisons-1.725104.

mention the poor.[6] We look away and yet we know the poor are getting poorer and there are more of them. The gap between the "haves" and the "have-nots" is growing. Upward class mobility is increasingly out of reach.

On January 4 of this year, the *New York Times* reported on how the depth of American poverty entrenches people. Despite the myth of class mobility, "about 62 percent of Americans (male and female) raised in the top fifth of incomes stay in the top of two-fifths, according to research by the Economic Mobility Project of the Pew Charitable Trusts. Similarly, 65 percent born in the bottom fifth stay in the bottom two-fifths."[7] The United States has become less mobile than comparable nations, according to at least five large studies in recent years. As it becomes harder and harder for anyone at the bottom to rise, the effect of mass incarceration on families and communities is devastating. Whether you agree that the creation of an undercaste is a matter of intentional design or not, the condemnation and exclusion of ex-offenders from mainstream society is undeniable. This "ex-offender undercaste" and their families live across a widening and unbridgeable gulf from the rest of American society.

Returning to my assertion that art has the potential to transcend rhetoric, all of this background has motivated me to write about this issue. Unfortunately, because of the current nightmarish landscape in a publishing industry where people are not buying literary novels, publishers are owned by conglomerates, and editors have to get past the hurdles of their sales department in order to purchase titles, risk aversion has set in. It is harder and harder for writers to raise their critical voices about subjects which are unpopular or to speak out from alternative angles of vision. The job

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[6] Barack Obama, President of the United States, *State of the Union*, Jan. 25, 2011, http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address.

[7] Jason DeParle, *Harder for Americans to Rise from Lower Rungs*, N.Y. TIMES, Jan. 4, 2012, http://www.nytimes.com/2012/01/05/us/harder-for-americans-to-rise-from-lower-rungs.html?pagewanted=all.

of the artist is getting more difficult in this market, in which everyone is looking for the next book that is just like *The Help*.[8] Limited perceptions about what people want to read and will buy are intransigent. Nevertheless, I know that fiction has the potential to take the conversation past the surface, to move people past fear and indifference and make them feel the truth about lives ignored, rejected, and disappeared.

So, I want to close by reading a short, I promise it's short, excerpt from my novel *Life Without*, which is about the lives of ten characters who are incarcerated in two neighboring American prisons, one for men and one for women. The characters are connected by common experience and proximity, daily routines and interactions, and rolling domino and bid whist games to which they gather to socialize and philosophize. The characters are serving various sentences for different kinds of crimes. Each character struggles with violence and memory, and seeks to keep a way to keep alive. Some try to confront both hurting and being hurt. Some, more than others, achieve healing and momentary grace. Although the growing numbers of incarcerated Americans are either invisible to most citizens or presented as simplistic other in redacted media accounts, each one has his or her own story of loss, despair, imagination, and survival. And although my characters don't begin to comprise an exhausted portion of men and women who fill American prisons, all are part of the whole of prison life.

So, in this excerpt, which was published in a literary journal as a kind of prose poem, the narrator pans from cell to cell, kind of like a camera, just before sleep and asks that you enter the inner lives of these prisoners, moving past disregard and discomfort to take on their stories as your own. I do have to offer a warning, there is profanity in here, and you know, I struggled for the voice to do justice to this experience, which is so radically different from my own life experience. My voice tends to be rather lyrical. I made the decision to use harsh language sometimes in order to capture the harsh reality of

[8] KATHRYN STOCKETT, THE HELP (Penguin Books, 2009).

prison of life. There are no kids here, so I should be ok.

> This is called *Lights Out*[9]:
>
> Night has come again.
>
> Darkness amplifies the sounds of coughing, sneezing, shitting, weeping, talking, cursing, coming, praying, and somehow, underneath the noise, each body hears its own breathing, its own pulse.
>
> All day long you pray for quiet, each one thinks. What you get is grief.
>
> Sleep, escape for some and torment for others, has not yet come to Oak Ridge.
>
> You are lying in your cell on your thin, hard bunk, and everything you have depended on, outside and in, is burned away. It is down to you, minus your possessions, your posturing and excuses, your legal analyses and time-doing strategies. Your walk and your bench presses, your prowess in dominoes and spades. Your jump shot and your hair-braiding talent and your glory stories. Your wolf tickets and your reputation for lunacy, your scorn and indifference. Your sneakers and commissary and pipeline to purchased bliss. Your place above the niggers or the honkies or the spies, above the pedophiles and rapists and faggots, even if you are below the thieves. You are not so low as some, *you* are not so low. You may still have your lies, but the night can take even those from you. It's down to you, and your story, and whatever *you* may call your god.
>
> Marcus whispers, "Fuck all a you," so quietly that no one notices, and then slams his fist against his bunk to make them hear.
>
> Monroe has almost recalled the reason he's locked up, before it slips away and he is old and sick and

[9] "Lights Out," excerpt from manuscript of novel, "Life Without," Hanging Loose #92, 2008, pp. 44-47.

disappearing, lost again within in the past. And the man way down the tier can't help but wonder who will try to take him, and whether he can be the first to strike, whether he can keep alive that way, while the man in the cell above him can't escape his mother's absence and his father's disapproving eyes. This one, down below, he feels his blade meet flesh again and still can't stop it, while that one is shaking noiselessly from head to toe, terrified that he will use again and terrified that he will not.

Someone two tiers down is thinking its three years since he's had a visit and six since he's felt a women's touch, but maybe, maybe that faggot on the tier below will suck him off for extra toothpaste, or chips, or even quid pro quo. One of the new ones, over there, he's too bedazed with meds to know which crimes are his, which ones were done to him.

So many, so many are here. So many are back on the block, eyes closed as hip-hop warrior chants go throbbing in their heads, their hearts.

Travis is counting down the hours, wondering what he will find upon release, how he will join a world that's kept on spinning, regardless his plight. What will it mean, "exonerated," what will it mean outside the walls? What will it be? What will he do? What will he say to his sister and her boy?

Travis will be leaving Oak Ridge and Quake will be arriving, filled with pride and will and fury, while 3.7 miles down the road in Oak Hills, Keisha is starting her 5 to 10 behind his drugs and guns. She is dreaming of the daughter who is so far away, cursing the lover who played her, the father who left her, the hunger she has always felt. And below her, on the bottom bunk, Ranita is getting sort, picturing jewel-seeded pomegranates and her father's heartbeat, *my name's Ranita and I'm a addict*, circling through her, round and round and round, as she dreams of picnics and fishing trips and tucking in her kids for sleep, if she can only,

only get them back. Why will this release be different, she wonders, how will I know up from down?

In and out and in they go, In and out and in.

Some who take to living day-by-day, they find relief when the lights go out.

This one plans out his pencil sketches for tomorrow, praising Allah for his gift. This one reads by hallway light. That one thinks he is nothing and never will be, just like his mama said would happen, just like the one who owns him tells him as he fucks him in the ass, and that one uses his pillow to muffle his crying, wondering if his sons will grow up to look like him, if he will ever see them free, if he will manage not to explode into a livid firestorm, or die slow, from the inside out.

Over here, one is going over and over her mistakes: bad checks and desperate lies and nameless tricks, and never enough of anything to go around. Too many to name lie trembling and exhausted, breaking apart on the inside from the habits that have ruled their lives, unsure of who is out to get them, who will help them, how they got there, who the fuck they are. If they only had rock, a fix, a smoke, if they only had a quick escape of any kind. What can they choose, what can they choose but what they know?

For some the only choice is take or get took, law of the land.

"And fuck you, too," Marcus says to everything above and below, to the right and the left of him, while Kelvin is thinking of the ripe flesh of falling pears as he tries to keep alive a self that's young, a pleasure that's simple, a taste that's free, wishing as the ghosts of convict's past march by, wishing he could holler out for all to know that he is more than his worst thing. Next door to Kelvin, Boo wills his eyes open, for the darkness brings with it the uncle who stole away his childhood nights. He takes refuge in the newfound

written word and tries to bear the heartbreak that cracks across his chest for his dead mother and his lost daughter, for love, so easy to say, so hard to do.

Over there, one is dying, a little more each night, one is crying. Two more locked-up brothers you won't have time to meet.

Maxine mourns Ranita, even though she's still three months to go before wrapping up. Trying to choose the struggles that matter, she thinks through reversible error and precedent, indenture and exploitation, power and politics. She imagines trees and ocean close. Eldora thinks of the family she has put together on the inside that has grown and shrunk and grown over so many locked-up, counted years. She thinks of the plants her granny introduced her to, and the stories they inspire which bind her kin.

Over there, one is caught in memory, unable to evade or stop the yelling and indifference and hurting, received and given and received again. And this one meets the dark with pure alarm. *Who's there*, she asks and she turns to face the wall, steeling herself for the taking, known since childhood, that lives on and on and on inside her head. Like the sister above her, like this one and that one, she is rocked by angry shame.

Their children recede, despite the conjuring of phone calls and letters and photographs, a missing limb, each one, with its abiding ache.

Some are praying silently and some are talking to their gods out load. And over at Oak Ridge, Marcus turns on his side, pulling in his knees and forcing his gaze outward, and mutters, "Puck God, too. What's he ever done for me?"

Vernon tries to keep his eyes open and avoid his ghosts, returning to his "if only's," wishing it hadda rained and he hadda stayed inside that night almost a year ago, after which there was no turning back. He has let his mama, his little brother, even his woman

down. He has ended up uncertain, he has never managed to get anywhere but out. Below him, his cellie is regretting the robbery that sent him here the first time and the parole violation that brought him back, looking to Jesus for salvation this time, this time around. This one is praying no one finds out he is gay, and that one is praying no one finds out he is scared, and that other one, further down the tier, is cursing himself for the way he teased his sister about her gap-toothed smile, twenty years ago.

They pray for peace and sleep and a silence that's benign.

Other there one is clinging to her Jesus. Over there one is clinging to her temporary butch. Over here one is wishing she could believe in anything. Is this the end of the world, they wonder? Is there only winter up ahead?

And Avis tries to think of the good things and push away the endless skein of his ugly pretty words and the day of blood on starched, white shirts that she keeps on living, the day when she tried to save her life and died instead.

From Oak Ridge to Oak Hills, and back and forth and back again, this one and that one, too many to get to know, to many to name, lie curled up and dreaming of the sweet release of drugs, of arms that might hold instead of hurting, of doors that might stay open instead of locked. Trying to anneal their hearts for battle and for waiting, stuck in their mistakes, their crimes, their numb regret, they try to be more than their worst things. They cry for the world that has forgotten them. They cry for their sons and daughters, for their kinfolk, all. They cry for themselves.

The darkness comes, distilling what is and was. Magnifying what is lost again, this October night. The lights are out and they are finding sleep or waiting, still, for it to come. Vernon and Avis and Boo and Ranita and Travis and Quake. Keisha and Monroe and

> Kelvin and Maxine and Eldora. Marcus, too, do not forget that he is here. And all the others above and below them, to the left and to the right, all the ones whose names you'll never learn. They live in the ever-present past and in the future, salvaging what they can from the present, grieving all the things they live without.

So, don't you look away. Thank you.

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THE EXECUTIVE BRANCH: TOO MUCH POWER?*

*Michael Steele***

I. INTRODUCTION

It is a real pleasure to be at the Duncan School of Law and to share some insights with you on how the relationship between the various branches of government has evolved and changed in recent months, days, and years.

Just as a point of background, a little more about me—I am a native Washingtonian (I actually grew up in Washington, D.C.). So, politics have been a big part of my life. Watching

* Lecture given by Mr. Steele at Lincoln Memorial University Duncan School of Law's symposium "Navigating the Political Divide: Lesson from Lincoln," held April 20, 2012 in Knoxville, TN.

** Michael Steele served as the first African American chairman of the Republican National Committee from January 2009 to January 2011. Mr. Steele is a political analyst for MSNBC.

the evolution of politics is a sport for many of us in that part of the world. I went to Johns Hopkins for undergraduate and Georgetown for law school. In between undergraduate and law school, I entered an Augustinian monastery where I studied for the priesthood for a number of years. I wore the habit, and lived a life of poverty, chastity, and obedience. But as with all vocations, one evolves and remains open to other opportunities. After much reflection, I wound up coming back to Washington, D.C., settling down, going to law school, getting married, raising a family, and entering politics. The rest as they say is still unfolding.

II. A LAWYER'S ROLE IN THE SCHEME OF POWER

When asked to come to the Duncan School of Law and talk a little bit about the subject of the separation of powers, the use of executive power, and the like, I reached out and grabbed one of my old law books, which I had not opened in a long time. I am sorry I did, because it brought back some scary memories.

However, I did stumble across an interesting description of lawyers, for those of you who are about to enter into the profession and those of you who are already practicing: hopefully you will be able to appreciate this. It said: "Lawyers, more than the members of any other profession, enjoy power, prestige, income and the genuine affection of both clients and non-clients."[1] Wow. Really? Who knew, right? Wait, there is more. It continues, "also probably more than any other profession, lawyers are the target of some

[1] Charles W. Wolfram, Modern Legal Ethics §1.1, at 1(1986).

of the most cutting, wide-sweeping, and relentless criticism."[2] That sounded more like it.

Lawyers occupy a very special place. It may be one of ambivalence, but it is a very special place in America's public life. Your work, our work, makes us indispensable to so many people and what they do at work, what they do at home, and what they do in their business. The impact that we have, that you have, and that you will have, is enormous. The work that we do, while it may make us loathed by many, is also what makes us appreciated by so many more. We may not believe that half the time, because there are some really good lawyer jokes out there. However, the reality of it is simply this: the impression and the impact that you have in moving the country's agenda, supporting the Constitution, and making the argument on behalf of freedom and individual liberties is important. We are definitely a challenged species. Ours is also a special "calling", to use a theological term. That calling is purely to defend our civil liberties under the law, to ensure our freedoms granted by the Constitution, to protect the rights of every citizen, and to enforce the rule of law.

Now, why is this important? It is important precisely because our nation was founded on the ideals of liberty and justice. This class of individuals—current and future lawyers—is specifically charged under our Constitution, to defend and protect those liberties at all costs. Consequently, as Frederick Douglass noted: "Human law may know no distinction between human men in respect of rights, but human practice may."[3] What does that mean? Basically, it says that as a lawyer, or even as a judge, you will have a very distinct role to play in protecting our citizens when the law appears on its face ready to deprive them of their fundamental rights as established by the Constitution.

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[2] *Id.*

[3] *See* JAMES MONROE GREGORY, FREDRICK DOUGLASS THE ORATOR, 150 (1893).

Similarly, your role will be equally important when human practice denies our citizens those same rights. This is why, for example, an independent judiciary is so important to how we govern ourselves, and how the three branches of our government work together.

III. THE EXECUTIVE BRANCH: TOO MUCH POWER

It is with particular interest that attention has been paid to actions taken by the executive branch of government in recent years. In most of these skirmishes, the nature and extent of executive power has centered on actions or decisions largely affecting foreign affairs and national security. For example, President Bush's claim of unlimited executive power to detain terrorist suspects[4] or President Obama's pursuit of military action in Libya without so much as an e-mail to members of Congress, are very good examples of this growing tension between the executive branch and the legislative branch in trying to maintain that balance of power.[5]

But the order of things has changed. The reach of executive power is no longer limited to the ethereal world of clandestine operations with names that make no sense, but

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[4] *E.g. Authorization to Use Military Force (AUMF)*, 107-40, 115 *Stat*. 224 (2001); On Feb. 7, 2002, President Bush issued an executive order determining that members of al Qaeda and the Taliban are unlawful enemy combatants who are not entitled to the protections of the Third Geneva Convention. The full text of the executive order can be seen at: http://lawofwar.org/Bush_torture_memo.htm.

[5] *See* Charles Savage, *Attack Renews Debate Over Congressional Consent*, N. Y. TIMES, Mar. 21, 2012, http://www.nytimes.com/2011/03/22/world/africa/22powers.html,(last visited 7/10/2012); *see also* Laura Meckler, *Obama Shifts View of Executive Power*, WALL ST. J., March 30, 2012, http://online.wsj.com/article/SB10001424052702303812904577292273665694712.html (last visited July 10, 2012).

now claims, with greater frequency the upper hand over the legislative branch in domestic matters as well.

We all remember the now-infamous battle with the U.S. Senate over President Bush's recess appointment of John Bolton as United Nations ambassador, during which then-Senator Barack Obama made clear that Mr. Bolton will have less credibility to do his job without Senate approval.[6] But what you say as a Senator may not be what you do as President. President Barack Obama breached that very wall of separation of powers by his decision not only to make recess appointments but to do so as the Wall Street Journal noted by telling the Senate that it was in recess even though those very Senators said they were not.[7] Now, *that's* what I call executive power.

For a president, executive power can be a very sexy thing. Now, you have probably never thought of executive power as a sexy thing, but look at it this way—it is a lot like having a sledgehammer with lingerie on it. There's a visual for you. The point is, something may look appealing, but when it hits you, it hurts. That is how presidents have come to use executive power over the last ten or fifteen years. And that is part of the problem. James Madison once said: "There can be no liberty where the legislative and executive powers are united in the same person … or if the power of judging be not separated from the legislative and executive powers."[8] What

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[6] *See* Trish Turner, *Obama Administration Tests Constitutional Power after Controversial Appointment,* FOX NEWS, Jan. 4, 2012, http://www.foxnews.com/politics/2012/01/04/obama-administration-tests-constitutional-power-after-controversial-appointment/ (last visited July 10, 2012).

[7] *Contempt for Congress,* WALL ST. J., Jan. 12, 2012, http://online.wsj.com/article/SB10001424052970203471004577140770647994692.html (last visited July 10, 2012).

[8] THE FEDERALIST NO. 47, 194 (Alexander Hamilton, John Jay, and James Madison) (Hayes Barton Press, 2007) (Originally published under the pen name Publius in 1788).

he was basically saying is that there is a reason we designed the system the way we did. There is a reason why these checks and balances were put in place.

Our Founding Fathers immortalized the principle in the very framework of our Constitution by implementing a self-enforcing system in which each branch of government is given the means to participate and, when necessary, to temporarily obstruct the workings of the other branches. All of the Washington power plays resulting in gridlock that people like to complain about—why don't they do this or that or why can't they just get in a room and work it out—is in many ways part of the orchestration of our Constitution. It is the very art of the legislative and executive branches, and, to some extent the judiciary, working out what the law is going to be, what the impact of that law will be; how that law will be enforced; and, who is subject to that law—in other words, what is its reach. Keep that in mind—what is its reach—because that is at the core of the clash we see between the White House and the Congress.

When you step back and look at the Ninth Amendment to the Constitution, it clearly states that: "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[9] Now, let's see how that has worked out.

a. EXECUTIVE POWER POST 9/11

I think you will find it interesting that in the months following the terrorist attacks of September 11, 2001, several questions were raised concerning issues of law and justice in the United States in response to terrorism. How would our

[9] U.S. CONST. amend. IX.

legal, political and judicial systems respond to the human toll Americans now had to confront? Democrats looked at terrorism as a criminal act no different than someone robbing a store or killing someone in a neighborhood; while Republicans saw a broader, more global threat that would require a much greater response. Both political parties had to answer the question to what extent are we prepared to go to protect the American people? The threat of terrorist attacks within our borders had became a new reality that ultimately required government intervention and thus, the Patriot Act[10] was born.

The Patriot Act came enhanced surveillance procedures and expanded the government's authority to intercept wire, oral, and written communications including mail, email, voicemail, and telephones as well as making it easier for our criminal justice system, whether it was law enforcement, at the local level or at the federal level, to obtain search warrants with a broader scope.[11] This authority was vested in the executive branch, through the Federal Bureau of Investigation.[12] This was our response to the fear of terrorism. For many, the Patriot Act was a necessary evil, very much akin to the steps taken by President Lincoln to detain individuals by suspending habeas corpus during the Civil War in order to protect the Union and to keep it together. The same arguments used to justify Lincoln's actions were not that dissimilar from the arguments made when the Patriot Act came into place.

More recently, in keeping with his personal opposition to the Defense of Marriage Act, for example, President Obama declared that the Justice Department would no longer defend

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[10] Pub.L. 107-56, 115 Stat. 272 (2002).
[11] *Id.*
[12] *Id.* at 115 Stat. 287-88.

the statute in court.[13] Here is a bold example of the executive branch saying, not just to the American people, but to its co-equal branches in particular: "we will no longer defend the law because we don't like the law." Really? Try this the next time the IRS shows up because you have not paid your taxes. "Well, I'm not paying my taxes because I just don't like the law." Yet, in the broader scope of the use of executive power, we are seeing the administration—and not just this administration—cherry pick where they are willing to push the bounds of constitutional powers, in order to obtain a political or policy objective.

Similarly, to address the growing concerns of the No Child Left Behind Act ("NCLB"),[14] the Obama Administration effectively used administrative authority to rewrite the law. Again: "We don't like this provision; we do not like the law." Remember my reference to the impact of a law and who it touches? The Administration's actions in this case illustrate its conclusion that it did not like the administrative impact of NCLB, nor did they like who it touched. So, guess what? The Administration decided it was just not going to work with Congress, because "they are not going to work with us so we will just rewrite it ourselves." Interesting.

Now the question becomes: What impact has the use of executive power to breach the separation between the various branches had on how we govern ourselves and on how we look at these respective branches?

b. MANIPULATING THE SYSTEM TO GAIN POWER IS NOT A NEW SCHEME.

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[13] Statement of Attorney General Eric Holder on behalf of President Obama Feb. 23, 2011, http://www.justice.gov/opa/pr/2011/February/11-ag-222.html (last visited July 10, 2012).
[14] Pub. L. 17-110, 115 Stat. 1425, (2002).

It's important to keep in mind that these presidential breaches are not alien to the separate branches of government. It is a bit like a yo-yo in the sense that the President wants to extend the reach of executive power and authority, and the other two branches want to pull it back.

However, it is not always the executive branch taking power from the other branches, but rather the other branches relinquishing authority that constitutionally belongs to them. In other words, one branch says: "Not my problem. I do not want to deal with it; you deal with it."

The two most egregious examples of this are the Patient Protection and Affordable Care Act,[15] which we lovingly refer to as ObamaCare, and the Dodd-Frank Reform and Consumer Protection Act,[16] both of which provide a broad statutory framework for governing the single largest component of the economy (healthcare) and a critical sector of the economy (financial services). In each case, the legislative branch deferred to the executive branch the responsibility to fill in the details through regulations that were ultimately developed by bureaucrats, not elected representatives. Remember the famous quote by Speaker Pelosi on healthcare? "But we have to pass the bill so that you can find out what is in it."[17] You cannot make this stuff up. In short: the legislative branch punted on the hard work of developing the mandate, outlining the scope of the regulations, and putting in

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[15] Pub.L. 111-148, 124 Stat. 119, to be codified as amended into sections of the Internal Revenue Code as well as in section 42 of the United States Code.

[16] Pub. L. 111-203 (2010).

[17] Press Release, Nancy Pelosi, Speaker, U.S. House of Representatives, Pelosi Remarks at the 2010 Legislative Conference for National Association of Counties (Mar. 9, 2010), available at http://pelosi.house.gov/news/press-releases/2010/03/releases-March10-conf.shtml (last visited July 10, 2012).

place the restrictions that the Congress would want to see in place.

Our national legislature has reached the point where it simply creates broad packages of legislation that are weak on substance and lack direction. This in turn gives the executive branch the ability to actually shape the implementation law, which is not their responsibility. Why has this slow but steady slide into blurring, if not outright disregarding the otherwise very bright lines separating the branches of government been allowed to occur? Is it just about aggregating power to the executive branch or is it something more?

The evidence seems to suggest that we are witnessing the "Red State-Blue State" politics of our times redefine how each branch views its role of shaping the law of the land. The real danger, however, is inherent in congressional and presidential actions that stretch the reach of executive power or abandon legislative authority, resulting in an unprecedented encroachment upon the liberties of private citizens and religious institutions.

Case in point: the recent Department of Health and Human Services mandate requiring employers, including religious institutions, to cover procedures for sterilization, in vitro fertilization, and some contraception and abortion drugs, despite the theological mandate that these institutions follow for themselves;[18] or the unprecedented effort to have the government direct a church whom to appoint to a ministerial position within that church.[19] Fortunately, this effort was

[18] *See* Florida v. U.S. Dep't of Health and Human Servs., 648 F.3d 1235 (11th Cir. 2011), aff'd in part, rev'd in part sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).
[19] *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694 (2012).

unanimously rejected by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*.[20]

These are just two examples of how important it is to establish important thresholds for stopping the steady erosion of individual liberty. For example, in the case of *Hosanna-Tabor*, [21] the judiciary pushes back, unanimously, against an apparent executive power grab making clear it would not allow the federal government to direct a church whom it should hire, whom it should fire, and under what conditions such employees could work for that church.

Liberal and conservative judges unanimously concluded that was a reach too far. The challenge, then, that lies ahead is a daunting one as more and more efforts are undertaken that narrows the constitutional definition of what separates the three branches. Oddly enough, it may fall to the Supreme Court, in a sort of modern day *Marbury v. Madison*-style[22] ruling, to begin to put this genie back in the bottle after the executive and legislative branches have so egregiously distorted the balance between freedom, privacy, and security.

After all, if the government is allowed to become unnecessarily intrusive and authoritative in its exercise of power, who will protect the interests and the rights of the nation and its citizens?

IV. CONCLUSION

As this new era unfolds, the role of those who are members of the bar, those who are in this system to defend and protect personal rights, are to make the argument for the

[20] *See id. at* 707-10.
[21] *See id.*
[22] *See generally* Marbury v. Madison, 5 U.S. 137 (1803).

limitation of government power and its intrusiveness upon those rights, liberties, and freedoms, will increase in importance. As Justice Kennedy noted during the oral arguments on the Affordable Care Act, "When you are changing the relation of the individual to the government in this way . . . a unique way, do you not have a heavy burden of justification to show authorization under the Constitution?"[23]

That sounds a lot like *Marbury v. Madison* 2.0 to me.

[23] See Transcript of Oral Argument at 11, Dept of Health and Human Svs. v. Florida, 132 S. Ct. 2566 (2012) (No. 11-398), *available at* http://www.supremecourt.gov/oral_ arguments/argument_ transcripts/11-398-Tuesday.pdf (Paul Clement for respondents Florida et al.).

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THE POWERS OF THE PRESIDENT*

*Siegfried Wiessner***

I. INTRODUCTION

In his theory of the republic, Plato conceived of the leader of a community as a wise philosopher-king, dedicating himself to the pursuit of the good of the community and the common interest.[1] The American Revolution[2] set itself against

* Lecture given by Professor Wiessner at Lincoln Memorial University Duncan School of Law's symposium "Navigating the Political Divide: Lesson from Lincoln," held April 20, 2012 in Knoxville, TN. The author is grateful for comments offered by Professors Michael Reisman and Keith Nunes as well as transcription and careful editing by his research assistant Alexandra Salvador and by Jeff Glaspie and his team at the LMU Law Review. Above all, he thanks Professor Sandra Ruffin, a long-time friend and former colleague at St. Thomas Law, for the honor of inviting him to this symposium. One of a kind, Professor Ruffin was a distinguished scholar and teacher who reminded everyone of the task of law to build an order of human dignity which leaves nobody behind. This essay is dedicated to her memory.

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[1] PLATO, THE REPUBLIC, bk. V, at 153 (Allan Bloom trans., 2nd ed. 1991).

[2] BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789 (1985); GORDON S. WOOD, THE

this idea of one benign, all-powerful monarch on the assumption that human beings cannot be seen as completely altruistic, committed to the well-being and the flourishing of others. In particular, they saw clearly that men—and I assume women as well—are no angels[3] and therefore governmental powers had to be, by necessity, divided so that the excessive ambition of one could be held in check by the ambition of others.[4] Thus the construct of separating powers, both vertically[5] and horizontally,[6] and the particularly American principle of having nobody serve in two branches at the same time, i.e. the personal separation of powers—an idea unfamiliar to other modern democracies such as the United

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RADICALISM OF THE AMERICAN REVOLUTION (1992). The ideals of its democratic revolution have become a model for the world. GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY (2002); R.R. PALMER, THE AGE OF THE DEMOCRATIC REVOLUTION. VOL. I: THE CHALLENGE (1959).

[3] *Cf.* THE FEDERALIST NO. 51 (James Madison) (February 6, 1788), with its iconic language: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary." *See also* GOTTFRIED DIETZE, THE FEDERALIST: A CLASSIC OF FEDERALISM AND FREE GOVERNMENT (1960); DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST (1984); THE ENDURING FEDERALIST (Charles A. Beard ed., 1948).

[4] Madison, *supra* note 3, "Ambition must be made to counteract ambition."

[5] Siegfried Wiessner, *Federalism: An Architecture for Freedom*, 1 NEW EUROPE L. REV. 129 (1992-1993); A.E. Dick Howard, *The Values of Federalism,* 1 NEW EUROPE L. REV. 143 (1992-1993); Victoria Nourse, *The Vertical Separation of Powers,* 49 DUKE L.J. 749, 777 (1999). Roots of the idea can be found in JOHANNES ALTHUSIUS, POLITICA (1603) (Frederick S. Carney ed. & trans., 2013).

[6] Charles-Louis de Secondat, baron de La Brède et de Montesquieu, in his 1748 book DE L'ESPRIT DES LOIS (translated 1750 into English as *The Spirit of the Laws)*, urged that the political authority of the state be divided into separate and independent legislative, executive and judicial powers.

Kingdom where the Chief Executive, the Prime Minister, is also a member of Parliament.[7]

On the other hand, the Constitution appears to recognize the need for a strong community response to threats —thus the grant of apparently undivided executive power, novel from the Articles of Confederation.[8] While Congress' power was enumerated in Article I, with whatever minor adjustments *McCulloch* and the necessary and proper clause wrought to it,[9] the President was vested with "executive power" as declared in Article II.[10] It is argued that therefore all executive action in the burgeoning welter of the modern administrative state derived ultimately from the President. The President also was accorded the original power of Commander-in-Chief,[11] and the power to appoint members of his or her branch and also the judiciary.[12] In order to acquit

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[7] The requirement, by constitutional convention, that the Prime Minister be elected by Parliament, reduces the danger of gridlock more likely to be experienced in a presidential system, where both the head of the executive branch and all the members of the legislative branch enjoy direct democratic legitimacy conferred by the people.

[8] The Articles of Confederation of 1781 constituted a "firm league of friendship" amongst the thirteen seceding former British colonies (Article III). Their institutional focus was on the legislature of the "united states, in Congress assembled" (*e.g.*, Article IX), with the standing committee of this institution representing the closest analogue to an executive in the sense of a permanently sitting organ.

[9] *See* McCulloch v. Maryland, 17 U.S. 316 (1819).

[10] U.S. CONST. art. II, § 1, cl. 1: "The executive Power shall be vested in a President of the United States of America."

[11] U.S. CONST. art. II, § 2, cl. 1: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States. …"

[12] U.S. CONST. art. II, § 2, cl. 2: "He … shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the

themselves of what they saw as their responsibility to the nation, Presidents since Lincoln and Roosevelt have asserted the power to control their branch by issuing commands from the White House directing departments and administrative agencies to pursue certain policies. This original content of the theory of the "unitary executive,"[13] advocated mainly at the end of the 20th and the beginning of the 21st century, was arguably expanded to include broad powers in the field of national security[14] resting more on an emergency rationale, rather than the idea of the President's accountability for all the acts of his or her branch.

Opponents of this idea of strong executive power, unbridled within the branch and far-reaching outside, were pointing to the Constitution's grant of power to Congress to make all laws necessary to execute their legislative powers, including measures directed towards "departments." The Congress created departments and agencies with discretion, isolated from direct orders by the President or other members of the Executive Branch. The motives were often respect for the subject-matter expertise of agency decision makers, who were in need of protection against overly political or partisan incursions (such as the Federal Reserve[15]), or required safeguards for their independence and impartiality to ensure the quality and fairness of quasi-judicial determinations (such

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President alone, in the Courts of Law, or in the Heads of Departments."

[13] For a history of the idea from the beginnings of the Republic, *see* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE. PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008). For a highly critical assessment, *see* JOHN P. MACKENZIE, ABSOLUTE POWER: HOW THE UNITARY EXECUTIVE THEORY IS UNDERMINING THE CONSTITUTION (2008).

[14] *See* CALABRESI & YOO, *supra* note 13, at 18-19: "Most recently, the administration of George W. Bush has explicitly invoked the theory of the unitary executive as the basis for asserting sweeping implied emergency powers in waging the War on Terrorism."

[15] Federal Reserve Act, 12 U.S.C. § 341 (1913).

as asylum decisions rendered by an immigration judge[16]). As we will see, the Supreme Court respected these limits by allowing Congress to limit the President's originally unrestrained removal power to cause, at least in cases of certain officials exercising quasi-legislative or quasi-judicial power.

To properly delimit the scope of Presidential power, it would help to start with the structure, the architecture of the Constitution. The Executive Power is not the first one mentioned in this foundational document; in the sequence of the Constitution, it is listed after the powers of Congress, enumerated in Article I. That should tell us something. It reflects the judgment of the fathers of the Constitution that Congress is, or should be, pre-eminent in setting policy for the nation. The President has to "take care" that he or she implement the policy set by Congress; he or she has to faithfully execute it -- *nota bene* "faithfully."[17] He or she is not allowed to depart from the text and policy of a congressional statute; that is the original idea. For these reasons, I usually start my Constitutional Law class in Miami with *McCulloch v. Maryland*,[18] not, as most other teachers and casebooks do, with *Marbury v. Madison*[19]—the former dealing with the range of

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[16] "Immigration Judges are responsible for conducting Immigration Court proceedings and act independently in deciding matters before them. Immigration Judges are tasked with resolving cases in a manner that is timely, impartial, and consistent with the Immigration and Nationality Act, federal regulations, and precedent decisions of the Board of Immigration Appeals and federal appellate courts." IMMIGRATION COURT PRACTICE MANUAL, last revised June 10, 2013, ch. 1.2(a), at http://www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm (last visited November 24, 2013).

[17] U.S. CONST. art. II, § 2, cl. 3: "[H]e shall take Care that the Laws be faithfully executed. ..." Even his oath of office includes this commitment: "I do solemnly swear (or affirm) that I will *faithfully execute* the Office of President of the United States." (U.S. CONST. art. II, § 1, cl. 8, emphasis added).

[18] *See supra* note 9.

[19] 5 U.S. 137 (1803).

express and implied powers of Congress, the latter with the authority of the Supreme Court.

Now, Congress often does not live up to the exalted role that the founding fathers foresaw for it. Part of the reason for it is that the Senate straight-jacketed itself with the requirement, not constitutionally mandated, of a super-majority of sixty (60) votes to close debate and proceed to a vote on the merits of a bill, if a so-called filibuster is signaled. At a time of a nearly ubiquitous use of that instrument,[20] a simple majority of fifty-one (51) is often no longer sufficient to have pieces of legislation approved by the Senate. The House of Representatives, on the other hand, still makes decisions by simple majority vote, so that institution should not have as much of a problem in reaching decisions and molding legislation. Since, however, every enactment has to be to the comma the same in both houses, federal legislation is hard to achieve, especially when government is divided by political party and ideology. In addition, the various branches of government are not hermetically sealed from each other. There

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[20] *See* Citizens for Responsibility and Ethics in Washington, *Reforming a Broken Senate: Filibuster Reform,* http://www.citizensforethics.org/policy/entry/filibuster-reform (last visited November 21, 2013): "Some simple statistics highlight the present predicament. From roughly 1920 to 1970, filibusters averaged one a year. In stark contrast, in 2005-2006, there were an average of 34 cloture motions filed to end filibusters, and in the 2007-08 Congress there were 139 cloture motions filed, roughly 70 a year. So far in the session (2009-2010), 132 cloture motions have been filed." *See also* http://senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm (last visited November 21, 2013) for a year-by-year statistical chart tracking Senate cloture motions from 1917 to present; *See also* Janet Hook & Kristina Peterson, *Democrats Reign In Senate Filibusters,* WALL STREET J. (Nov. 21, 2013), http://online.wsj.com/news/articles/SB10001424052702304607105792211881413579404 on a November 21, 2013 Senate rule change which effectively ends the use of filibusters for executive branch appointments and most judicial branch appointments. This so-called "nuclear option" will not affect filibusters of legislation or Supreme Court nominations.

are checks and balances between them. In the area of legislation, the President has a veto power. Once a law has been passed, though, he or she owes the duty to faithfully execute Congress' will. On the other hand, he or she has the original power of the Commander-in-Chief,[21] the power to make treaties,[22] and the power to appoint, with the advice and consent of the Senate, and also to remove, officers of the United States.[23]

The *Federalist Papers* do not talk much about the general nature of how this executive power should be interpreted. Alexander Hamilton, however, made the comment that "energy in the Executive is the leading characteristic in the definition of good government."[24] One would hope that any person who exercises governmental power be energetic, particularly one holding an office within the Executive Branch. Theodore Roosevelt has staked out the position of broad executive power in his theory of the stewardship of the country by the President. He stated:

> [T]he executive power is limited only by specific restrictions and prohibitions appearing in the Constitution, or imposed by the Congress under its Constitutional powers. My view was that every executive officer, and above all every officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the Nation could not be done by

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[21] *See supra* note 11.

[22] U.S. CONST. art. II, § 2, cl. 2: "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur…"

[23] *See supra* note 12.

[24] THE FEDERALIST No. 70 (Alexander Hamilton) (March 15, 1788).

> the President unless he could find some specific authorization to do it. [25]

His successor, and his own Secretary of War, William Howard Taft, is cited for the opposite position:

> The President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. There is, he said, no undefined residuum of power which he can exercise because it seems to him to be in the public interest.[26]

These are two conflicting positions, and they have led to controversies over certain exercises of Presidential powers. Ultimately, they rest on the seemingly eternal conflict between an interpretation of the Constitution that relies virtually exclusively on its text and original meaning[27] and the other reading which considers it a "living document."[28]

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[25] THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 388-89 (1913).

[26] WILLIAM H. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139-140 (1916).

[27] For early formulations of this position, see Maurice Merrill, *Constitutional Interpretation: The Obligation to Respect the Text, in* PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT 260 (Roscoe Pound et al. eds. 1964); *see also* Justice Sutherland in *Home Bldg. & L. Ass'n v. Blaisdell*, 290 U.S. 398, 448-49, 453 (1934) (Sutherland, J., dissenting). Justice Black summarizes: "Our written Constitution means to me that where a power is not in terms granted or not necessary and proper to exercise a power granted, no such power exists in any branch of the government -- executive, legislative or judicial. Thus, it is language and history that are the crucial factors which influence me in interpreting the Constitution -- not reasonableness or desirability as determined by justices of the Supreme Court." HUGO BLACK, A CONSTITUTIONAL FAITH 8 (1968). For today's defense of the textualist position, see Justice ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997). *See also* the video *Scalia explains textualism*, available at

II. THE DUTY TO FAITHFULLY EXECUTE THE LAWS

Let us address first the duty to faithfully execute the laws. Under this rule, the President may not simply refuse to execute the law or a decision of a court interpreting it. May I offer one example. In *Worcester v. Georgia*,[29] the Supreme Court under Chief Justice John Marshall upheld the validity of a treaty between the United States and the Cherokee Nation, which gave the latter rights to self-government over their lands in the State of Georgia. Andrew Jackson, President at the time, supposedly said, "John Marshall has made his ruling, now let him enforce it."[30] Actually, Jackson had the military force to back him up, and, indeed, he failed to take any action to enforce the Supreme Court's decision in this case. What happened instead, in his Presidency, was the forced exodus of

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http://www.youtube.com/watch?v=FEKVXK61mew (last visited November 24, 2013).

[28] The idea is generally attributed to Chief Justice John Marshall's statement in *McCulloch v. Maryland*: "We must never forget that it is a constitution we are expounding . . . intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *See supra* note 9, at 407. Chief Justice Charles Evans Hughes amplified that the "power of 'judicial review' has given the Court a crucial responsibility in assuring individual rights, as well as in maintaining a 'living Constitution' whose broad provisions are continually applied to complicated new situations." Supreme Court of the United States, *The Court and Constitutional Interpretation, Charles Evans Hughes Cornerstone Address,* at http://www.supremecourt.gov/about/constitutional.aspx (last visited November 24, 2013). *See also* Karl Llewellyn, *The Constitution as an Institution,* 34 COLUM. L. REV. 1 (1934); and William H. Rehnquist, *The Notion of a Living Constitution,* 54 TEX. L. REV. 693 (1976).

[29] 31 U.S. 515 (1832).

[30] CALABRESI & YOO, *supra* note 13, at 450, referencing JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 516-18 (1996), who noted that Jackson "probably did not make that statement, at least not in that form," and that he "had no duty to enforce that particular judgment at that point."

Native Americans to Oklahoma, the tragic Trail of Tears[31] – an area declared to be Indian territory forever, only to be turned over half a century later to new inhabitants of the later State of Oklahoma in the Land Run of 1889.[32] President Obama went in a different policy direction when he, on December 16, 2010, declared the United States' support[33] for the 2007 U.N. Declaration on the Rights of Indigenous Peoples,[34] including rights to land and autonomy,[35] reversing the Bush administration's initial rejection of that declaration. Now there has not been an executive order or a Presidential directive, which would be binding and arguably within the President's executive power, that would force the administrative agencies, like the Bureau of Indian Affairs (BIA) or the Bureau of Land Management (BLM), to implement the Declaration. But I am

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[31] Based on the Indian Removal Act of 1830, the Trail of Tears of the "Five Civilized Tribes" with its countless deaths, trauma and misery represented the nadir of the United States policy to remove Indians from the Eastern seaboard. *See* GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS (1953); *see also* ANGIE DEBO, AND STILL THE WATERS RUN (1972).

[32] *See* KENNY A. FRANKS & PAUL F. LAMBERT, OKLAHOMA, THE LAND AND ITS PEOPLE 17-30 (1994); *see also* STAN HOIG, THE OKLAHOMA LAND RUSH OF 1889 (1989).

[33] For President Barack Obama's declaration of support, see http://www.whitehouse.gov/the-press-office/2010/12/16/ remarks-president-white-house-tribal-nations-conference (last visited November 24, 2013).

[34] United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res.61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), *available at* http://www.un.org/esa/socdev/unpfii/documents/ DRIPS_en.pdf.

[35] According to the International Law Association's Resolution No. 5/2012 of August 30, 2012, the Declaration reflects customary international law rights of indigenous peoples to their cultural heritage, autonomy, and traditional lands. For its text, see http://www.ila-hq.org/en/committees/index.cfm/ cid/1024; for background, see Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 EUR. J. INT'L L. 121-140 (2011), available at http://ejil.oxfordjournals.org/content/22/1/ 121.full.pdf+ html (last visited November 24, 2013).

told that, at least now, Indian leaders feel much more welcome in the corridors of power. Prior to the President's endorsement of the Declaration, Indian representatives may have been given a few minutes with a low-level employee of the BIA in Washington; now, I understand, they get one hour, courteously provided by the head of the agency. Things change.

President Lincoln provided another example of a somewhat controversial use of executive power, when he interpreted the Constitution contrary to the Supreme Court's decision in *Dred Scott v. Sandford*.[36] Technically speaking, he was questioning the rule of law, at least in its formal sense. Although the fugitive slave clause of the Constitution itself, as interpreted by the Court, might have violated natural law, or what we think is right and decent, positivist lawyers could see his attitude as disrespect for the ruling of the Supreme Court which had to be obeyed whether one liked it or not. Later, on the other side of history, Southern governors refused to comply with *Brown v. Board of Education*,[37] the command to desegregate. The Supreme Court did not take too kindly to that act of resistance. Arkansas' Governor, Orval Faubus, had referred to his oath of office where he swore to abide by the Constitution; he maintained he would just interpret the Constitution differently than the Supreme Court and remain with the "separate, but equal" doctrine, then overruled, of *Plessey v. Ferguson*.[38] The Supreme Court did not agree, reaffirming that it is its exclusive domain to say, with finality, what the Constitution means.[39] *Brown* was now the supreme law of the land, to be observed by any other agent of

[36] 60 U.S. 393 (1857).
[37] 347 U.S. 483 (1954).
[38] 163 U.S. 537 (1896).
[39] Cooper v. Aaron, 358 U.S. 1 (1958) (holding that the Arkansas Governor and Legislature were bound by the Supreme Court's interpretation of the U.S. Constitution after state officials had failed to properly implement the Court's holding in *Brown v. Board of Education*, 347 U.S. 483 (1954)).

Government.[40] *Marbury* had already held that it is "emphatically the province and duty of the judicial department to say what the law is."[41] The Supreme Court also reaffirmed against Congress its pre-eminence in interpreting the Constitution when it struck down the Religious Freedom Restoration Act, as applied to the states, in which Congress attempted to redefine the standard of review for the application of the Free Exercise Clause.[42]

Controversy also surrounds a third issue of the exercise of presidential power, i.e. the increasing practice of the President to issue statements on the validity or interpretation of a law at the time of his signing it. Some of these "signing statements" had already been issued under President Clinton; they proliferated under President George W. Bush; and they continued under President Obama, though to a lesser degree; functionally, they may go back as far as President Monroe.[43] These statements do not only provide for an interpretation of the law as seen from the President's perch; they also include declarations of the law that he just signed as unconstitutional.[44] Some of President Bush's statements stood out as they "routinely asserted that he will not act contrary to the constitutional provisions that direct the president to

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[40] *Id.* at 18.

[41] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[42] City of Boerne v. Flores, 521 U.S. 507 (1997).

[43] *See* The American Presidency Project, *Presidential Signing Statements*, http://www.presidency.ucsb.edu/signingstatements.php (last visited November 22, 2013) for general information about presidential signing statements as well as a detailed database on signing statements issued by various Presidents.

[44] *See* President Bush's signing statement regarding H.R. 2068 made on August 23, 2002 found at http://gpo.gov/fdsys/pkg/PPP-2002-book2/html/PPP-2002-book2-doc-pg1471.htm (last visited November 22, 2013); *see also* Memorandum for the Heads of Executive Departments and Agencies from President Obama on Presidential Signing Statements (March 9, 2009) found at http://www.whitehouse.gov/the_press_office/ Memorandum-on-Presidential-Signing-Statements (last visited November 22, 2013).

'supervise the unitary executive branch.'"[45] A couple of times these statements merely reflected political differences because they go to the reach of the President's war power or they introduce new reporting requirements to Congress, and so on. The President, in this case, just wants to maintain his position on an issue that has not yet been finally decided by the Supreme Court. In a second set of statements, President Bush has been clearly in the right. These include flagging a statute as unconstitutional when it includes provisions that provide a "legislative veto" held unconstitutional in *Immigration & Naturalization Service v. Chadha*[46] and its progeny.[47] That means that the executive implementation of a law cannot be made subject to the review, reconsideration and ultimate rejection by members of Congress, even individual committee chairs, or one house of Congress or both houses, and so on. That statutory reservation of power appears to plainly violate *I.N.S. v. Chadha* and established Supreme Court jurisprudence. As to the President, what would be the alternative to him? Could he veto that particular provision? This, again, would be unconstitutional as it would be equivalent to a line-item veto, declared unconstitutional in *Clinton v. The City of New York*.[48] So, if Congress decides to bundle everything on its legislative agenda into one statute, an omnibus bill, then the President has to either veto the entire legislation or let it pass in its entirety. In this regard, many of the states' constitutions are probably much more preferable because they have allowed line-item vetoes.[49] They also often include a single-subject requirement, disallowing the bundling, in one piece of

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[45] *Presidential Signing Statements*, *supra* note 43.
[46] 462 U.S. 919 (1983).
[47] *See* President Bush's statement cited *supra* in note 44.
[48] 524 U.S. 417 (1998).
[49] *See Separation of Powers—Executive Veto Powers*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-executive-veto-powers.aspx (last visited November 22, 2013) noting that 44 states allow their executive the power of the line-item veto.

legislation, of all kinds of different issues (as in an "omnibus bill").[50] In the absence of such a constitutional provision on the federal level, what is the President to do? An ABA Blue-Ribbon Task Force has stated that signing statements denying the constitutionality and enforceability of certain provisions of non-vetoed legislation are highly problematic in light of the Constitution's separation of powers and the rule of law.[51] The legislative intent could not be determined out of a mix between what the Congress intended and the President intended. The Congress, in Article I, is appointed to be the principal legislator; the President is encouraged to veto the law if he or she finds it unconstitutional or unwise. At this point, no single court has yet used signing statements as binding interpretations of a law, but the legality of administrative action based on them is a subject of controversy.[52]

III. THE EXPRESS POWER OF THE PRESIDENT TO APPOINT AND REMOVE OFFICERS OF THE UNITED STATES

[50] *See Single Subject Rules*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/single-subject-rules.aspx (last visited November 22, 2013) stating "41 states have constitutional provisions stipulating that bills may address only one subject, and several others have chamber rules for single-subject bills."

[51] Press Release, American Bar Association, Blue-Ribbon Task Force Finds Bush's Signing Statements Undermine Separation of Powers (July 24, 2006), available at http://archive.is/Z4V4y (last visited November 24, 2013). *See also* Walter Dellinger, *The Legal Significance of Presidential Signing Statements*, Memorandum to Bernard N. Nussbaum, Counsel to the President, November 3, 1993, at http://www.justice.gov/olc/signing.htm (last visited November 24, 2013).

[52] Nicholas J. Leddy, *Determining Due Deference: Examining When Courts Should Defer to Agency Use of Presidential Signing Statements*, 59 ADMIN. L. REV. 869 (2007).

Beyond the obligation to faithfully executive the laws, which translates into a power derived from Congress, the President has original powers. One of them is the power to nominate and remove officers of the United States.[53] The logic is that the President has to have the authority to choose the members of his branch and to entrust the job of faithfully executing the law to them.[54] If the President cannot trust them, he or she cannot perform his or her constitutional obligation; thus the argument for an unfettered power of removal under the theory of a unitary executive branch. At first, Congress approved allowing the President to remove, at will, the Secretaries of War, Foreign Affairs, and Treasury as seen fit by the President. Vice-President John Adams, in a famed decision of 1789, broke a 10 to 10 tie in the Senate in favor of the President's power to fire the Secretary of the Treasury.[55] Subsequently, in September 1833, Andrew Jackson fired two Treasury Secretaries to appoint one who would agree with him and his command to terminate the Second Bank of the United States.[56] That was a successful use of the claimed unfettered power. Later, President Nixon, fired attorney generals Elliot Richardson and William Ruckleshaus in sequence one Saturday night,[57] when they would not remove special prosecutor Archibald Cox, appointed to investigate the Watergate affair. This "Saturday Night Massacre" led to a

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[53] U.S. CONST. art. II, § 2, cl. 2.

[54] U.S. CONST. art. II, § 3, cl. 5.

[55] JAMES HART, THE AMERICAN PRESIDENCY IN ACTION: 1789, at 217-18 (1948); CALABRESI & YOO, *supra* note 13, at 59, 445.

[56] CALABRESI & YOO, *supra* note 13, at 105 et seq. *See generally* Jonathan L. Entin, *The Removal Power and The Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 721-22 (1987).

[57] Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit: President Abolishes Prosecutor's Office; FBI Seals Records*, WASHINGTON POST (Oct. 21, 1973), http://washingtonpost.com/politics/nixon-forces-firing-of-cox-richardson-ruckelshaus-quit-president-abolishers-prosecutors-office-fbi-seals-records/2012/06/04/gJQAFSR7IV_story.html (last visited November 22, 2013).

statute, the Ethics in Government Act, which we will address in a moment.

The Supreme Court addressed this claimed presidential removal power first in *Frank Myers v. United States*.[58] President Woodrow Wilson fired Frank Myers, a postmaster in Oregon despite the fact that he had a statutory four-year term, and his firing required Senate advice and consent. The Supreme Court in *Myers* decided that the President can fire any executive branch employee who performs only executive functions. That was the high point of the unitary executive theory. In *Humphrey's Executor v. U.S.*,[59] President Franklin D. Roosevelt fired the Senate-confirmed chairman of the Federal Trade Commission, William E. Humphrey -- not for inefficiency, neglect of duty, or malfeasance in office, as the act required, but because a rather business-oriented Mr. Humphrey would not go along with his views on the New Deal.[60] The Supreme Court declared this firing unconstitutional. Independent agencies with quasi-legislative and/or quasi-judicial functions can be created by Congress; and Congress can limit the Presidential removal power of officers performing these functions to cause.

The last pertinent case is *Morrison v. Olson*.[61] Ted Olson was the Assistant Attorney General in charge of the Office of Legal Counsel who tangled with some House committees who investigated Superfund environmental clean-up law enforcement efforts and alleged his having committed criminal offenses in the process. He was investigated by Alexia Morrison, a so-called independent counsel, the

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[58] 272 U.S. 52 (1926).
[59] 296 U.S. 602 (1935).
[60] CALABRESI & YOO, *supra* note 13, at 283-84. The Court affirmed *Humphrey's Executor* in the 1958 decision of *Wiener v. United States*, 357 U.S. 349, which involved the removal of a member of the War Claims Commission – a body with judicial functions – even though the Congress had not specified the legitimate grounds for removal.
[61] 487 U.S. 654 (1988).

functional equivalent of a special prosecutor appointed by a special division of the courts and subject only to removal for cause. This unique form of appointment and removal was established through the Ethics in Government Act[62] enacted in the wake of Watergate. Mr. Olson challenged the constitutionality of the independent counsel, stating that her appointment by the courts violated the principle of the separation of powers: instead of the courts, the President should have appointed her. The D.C. Circuit Court of Appeals, 2 to 1, ruled for Olson.[63] Judge Silverman confirmed the unitary executive branch idea. His position was that the power to appoint and remove persons from office must come from the same branch.[64] You cannot have some other branch come in and appoint a person with such core executive functions as a prosecutor has. The Supreme Court reversed in a 7 to 1 decision. Chief Justice Rehnquist stated for the Court that the federal courts can appoint inferior officers, as they qualified the independent counsel to be, and the Attorney General can still remove him, but only for good cause.[65] So removal restrictions were extended even to officers that do not perform legislative or judicial functions, but also core executive functions such as investigation and prosecution. The only limit is for Congress to tie the hands of the President regarding removal if it impedes the President's ability to perform his constitutional duty.[66] That is a very broad standard.

Thus, the pendulum swings back to Congress and the take-care clause;[67] meaning that Congress may construct an office in a way that dictates the terms of appointment and removal of officials holding such office. I would, however, think that there could, and should, be a more limiting

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[62] Ethics in Government Act of 1978, 5 U.S.C. §§ 101 *et seq.* (1978).
[63] In re Sealed Case, 838 F.2d 746 (D.C. Cir. 1988).
[64] *Id*. at 481-82.
[65] *Olson*, 487 U.S. at 690.
[66] *Id*. at 691.
[67] U.S. CONST. art. II, § 3, cl. 5.

interpretation of this opinion, restricting it to its rather unique facts. This was a situation in which the executive branch itself could possibly only be credibly investigated by someone who gets appointed from the outside and does not work under the full authority and supervision of the Attorney General. So there could and should be, for this particular conflict of interest, the case of an exception to *Myers*. It would make eminent sense to consider *Myers* to still be in force for all other executive employees.

IV. EXECUTIVE PRIVILEGE

Executive privilege is another area of asserted executive power which we do not find in the text of the Constitution itself. The case of *United States v. Nixon* was concerned with a subpoena of certain documents and tapes which the President claimed were privileged.[68] The President's counsel argued that the Constitution grants an absolute privilege of confidentiality for all presidential communications. On the other hand, it was asserted that it is the judicial department's role to say what the law is. The President claimed that communications between high government officials and advisors need to be protected, and that the executive branch needs to be kept independent, within its own sphere. For these reasons, the President should be immune from being subpoenaed in an ongoing criminal prosecution. The Supreme Court shot that argument down, holding that there is no absolute unqualified presidential privilege of immunity from judicial process.[69] It is not enough to state a broad and undifferentiated claim of a public interest in the confidentiality of presidential communications. The Court held what a President can claim as privileged are concretely identified military, diplomatic, or sensitive national

[68] *See* 418 U.S. 683 (1974).
[69] *Id.* at 706.

security secrets.[70] Furthermore, the Court stated that this type of information will be checked in chambers to verify that a claim of privilege is justified.[71]

V. WAR AND EMERGENCY POWERS

The last area of controversial exercises of power concerns executive authority in the case of war or other emergencies. At Lincoln Memorial University, it is appropriate to talk about the Civil War. During the war, Lincoln blockaded Southern ports after the secession of the states which formed the Confederacy.[72] The suits challenging the proclamation of that blockade resulted in a decision by the United States Supreme Court, the *Prize Cases* of 1863, where, not surprisingly, Justice Grier for the Supreme Court stated that the President is the pre-eminent war-maker in his role as Commander-in-Chief, and that Congress has a very narrow veto power.[73] The only dissenter, Justice Nelson, saw Congress as the primary war-maker, since they had the power to declare war and to raise monies for the Armies and to fund it.[74] All the President had, in his view, was the power to repel sudden attacks.[75]

The outcome of this case was a major victory for the President. This theory, however, came under heavy attack during the Vietnam War due to the high cost of error and misperceptions in international relations. This set the scene for great economic, physical, and emotional sacrifice for the

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[70] *Id.* at 713.
[71] *Id.* at 711.
[72] For a concise historical account of Lincoln's blockade of the South, see *The Blockade of Confederate Ports, 1861-1865*, U.S. DEPARTMENT OF STATE OFFICE OF THE HISTORIAN, http://www.history.state.gov/milestones/1861-1865/ blockade (last visited November 22, 2013).
[73] *See* 67 U.S. 635 (1862).
[74] *Id.* at 668.
[75] *Id.* at 691-92.

nation. As a result, the Congress determined that there need to be some deliberative process before the nation goes to war. To that end, in 1973, the War Powers Resolution was enacted.[76] Congress overruled a Presidential veto of this resolution, and it became the War Powers Act which required an end to an armed conflict if certain conditions were fulfilled.[77] All Presidents have rejected this resolution, and have not complied with all of its required procedures. The Court has not yet ruled on any attempts to clarify the reach of Congress' war powers.

In 1936, however, the Supreme Court in *United States v. Curtiss-Wright Export Co.* provided the Executive Branch with another strong victory in the field of foreign affairs.[78] This case concerned the sale of arms to Bolivia in violation of a Presidential proclamation that prohibited this transaction.[79] Justice Sutherland said that the President alone has the power to speak or listen as a representative of the nation in the international arena. He alone negotiates treaties; the Congress and the Senate cannot invade that territory. The President is the sole organ of the federal government in the field of international relations also in order to avoid embarrassment internationally. Congress' legislation must often accord the President broad discretion, one not admissible when dealing with domestic affairs. The President has more information, he

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[76] The War Powers Resolution of 1973, 50 U.S.C. §§ 1541-1548 (1973).

[77] For an overview of the historical background and detailed requirements of the War Powers Resolution, see *War Powers*, THE LIBRARY OF CONGRESS, http://www.loc.gov/law/help/war-powers.php (last visited November 22, 2013).

[78] 299 U.S. 304 (1936).

[79] For the actual copy of the U.S. Senate report adopting a House Joint Resolution granting the President the power to impose an arms embargo against nations participating in the Chaco War, see http://congressional.proquest.com/congressional/result/pqpresultpage.gispdfhitspanel.pdflink/http%3A$2f$2fprod.cosmos.dc4.bowker-dmz.com$2fapp-bin$2fgisserialset$2f5$2f4$2f2$2fa$2f9770_srp1153_from_1_to_2.pdf/entitlementkeys=1234%7Capp-gis%7Cserialset%7C9770_s.rp.1153 (last visited November 22, 2013).

communicates secretly with other leaders and there is a longstanding tradition of broad delegation. What now about the constitutional text?

There are many foreign affairs powers allocated to Congress in the Constitution. For example, Congress may declare wars, raise armies, militias and navies, regulate commerce with foreign nations, and so on.[80] Still, the President is Commander-in-Chief of the Armed Forces and the President negotiates treaties, even though he or she needs them to be approved in the Senate by a two-thirds majority. In practice, this Presidential power has been ever more cabined by Congress by it becoming much more involved, particularly, in congressional-executive agreements, and in the Senate approval debate of treaties, where this body adds reservations, interpretations, and declarations of understanding.[81]

The case of *Youngstown Sheet & Tube Co. v. Sawyer*, decided in 1951, however, limits Presidential power in such important ways that it will forever be in all constitutional law textbooks.[82] *Youngstown* involved a labor dispute in the steel industry where a strike was imminent. A few hours before the strike, President Truman issued Executive Order 10340, directing the Secretary of Commerce to take possession and

[80] U.S. CONST. art. I, § 8: "Congress shall have the power…To declare war…To raise and support Armies…To provide and maintain a Navy."

[81] U.S. CONST. art. II, § 2, cl. 1-2: "The President shall be commander in chief of the Army and Navy of the United States…[and] He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur…". For details, see W. MICHAEL REISMAN, MAHNOUSH H. ARSANJANI, SIEGFRIED WIESSNER & GAYL S. WESTERMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE (2004), at 1286 *et seq*. (re congressional-executive agreements), and 1320 *et seq.* (re reservations). For an example, see the "declaration" in the Senate Report on the 1966 International Covenant on Civil and Political Rights that the rights under this covenant are "not self-executing." *Id*. at 1329.

[82] 343 U.S. 579 (1952).

run most of the steel mills.[83] The President argued this strike would jeopardize national defense because of the on-going Korean War. The Secretary issued possessory orders. On April 30th the District Court enjoined the Secretary of Commerce from continuing the seizure and possession of the mills, and the Court of Appeals stayed the District Court's decision. Cert was granted immediately on May 3rd, argued on May 12th, and the decision announced on June 2nd. The Court affirmed the judgment of the District Court. The plurality opinion was written by Justice Black, but he was practically alone in stating that the President's power can only be derived from an act of Congress or from the Constitution itself.[84]

The controlling law is difficult to discern. There is the opinion by Justice Frankfurter who advocated some theory of adverse possession of powers, which included a systematic, un-broken practice known to Congress and never before disapproved.[85] Justice Jackson, another eminent jurist on the Court, started with the axiom that, in order to have a workable government, the two branches have to work together. If Congress opposed some action of the President, the President cannot do it. If it is at least to be implied, from the facts, that Congress agrees with the President, he can go ahead with his planned action. If there is silence, whichever branch acts first can do so under the doctrine of concurrent authority.[86] In this case, Congress spoke first through the Taft-Hartley Act[87] in

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[83] To view the complete text of President Truman's Executive Order, see The American Presidency Project, *Executive Order 10340 – Directing the Secretary of Commerce to Take Possession of and Operate the Plants and Facilities of Certain Steel Companies*, http://www.presidency.ucsb.edu/ws/?pid=78454 (last visited November 22, 2013).

[84] 343 U.S. at 585.

[85] *Id.* at 610-11.

[86] *Id*. at 635 *et seq.*

[87] Labor Management Relations Act of 1947, 29 U.S.C. §§ 401-531 (1947).

which it expressly rejected Presidential involvement in labor strikes. Stated simply, Congress said the President should not have the power to interfere in domestic labor disputes. An often overlooked but interesting fact is that there were three dissenters, led by Chief Justice Vinson, who said essentially that the President can make law in the presence of a national emergency.[88] They were joined by two members of the majority, Justice Clark and Justice Burton, who were not disinclined to follow that line of reasoning, albeit in a much more restricted way. They formed what constitutes, in my view, the real holding of *Youngstown.* Justice Clark stated that the President has broad authority in times of grave and imperative national emergency.[89] The situation at hand, in his view, did not constitute such a compelling emergency at this time. Justice Burton agreed with this, finding that Congress had also specified procedures for this particular emergency, i.e. the Taft-Hartley Act, which excluded the measure of seizure. Therefore, despite Justices Jackson's and Frankfurter's opinions, the rule of *Youngstown* is that the President possesses special emergency powers in times of grave and imperative national threat.

The *Dames & Moore v. Regan* decision in 1981 elevated Justice Jackson's tripartite test to the test of the majority.[90] This case interpreted an executive agreement that suspended private claims against Iran in the wake of the Mullahs' takeover of Iran where American interests were harmed. This case arose from a deal negotiated by President Carter in Algiers the day before President Reagan took office. Under this agreement, the private claims that were pending in U.S. courts were to be suspended and then directed to arbitration

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[88] *Youngstown*, 343 U.S. at 667 *et seq.*

[89] *Id.* at 662 ("In my view, the Constitution does grant to the President extensive authority in times of grave and imperative national emergency. In fact, to my thinking, such a grant may well be necessary to the very existence of the Constitution itself.").

[90] 453 U.S. 654 (1981).

in a newly-constituted Iran-U.S. claims tribunal. Many such claims are still pending. This suspension of claims and their subsequent arbitration was not one of the actions foreseen in the International Emergency Economic Powers Act[91] which Congress had enacted in 1977. The Executive Branch could nullify private claims, but it could not suspend them. However, Congress' silence on the issue was looked upon by the Court as favoring Presidential power, and Congress did not really object to that kind of solution. The Court also referred to Justice Frankfurter's idea that international settlements have been entered into in a systematic, unbroken way never before challenged by Congress and thus allowed this agreement to stand.

Taken together, these decisions may confirm a presidential emergency power, but not an extra-constitutional one. This is not like Germany during the Weimar Republic in 1933 where President Hindenburg's emergency powers allowed him to abrogate democratic freedoms and pave the way for Hitler to become the sole, pernicious leader of the nation.[92] It is also not the type of powers found under the 1853 Argentinian Constitution, which allowed many military dictatorships to live freely under the Constitution because they came into power under the pretext of responding to an emergency situation.[93] That kind of extra-constitutional emergency power has been effectively rejected in the United

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[91] 50 U.S.C. §§ 1701-1707 (1977).

[92] *See generally* Neil MacCormick, *Jurisprudence, Democracy, and the Death of the Weimar Republic*, 77 TEX. L. REV. 1095 (1999). The operative provision was Article 48 of the Constitution of the Weimar Republic.

[93] Carlos Rosenkrantz, *Constitutional Emergencies in Argentina: The Romans (not the Judges) Have the Solution*, 89 TEX. L. REV. 1557, 1558 (2011) ("The 1853 constitution allowed congress, in case of internal commotion, and the senate, in case of foreign attack, to declare a state of siege and to suspend individual rights provided that the constitution or authorities created thereby were in danger. From 1854 until 2001, the state of siege was declared fifty-seven times.").

States. Justice Jackson, in *Youngstown*, noted that "emergency powers tend to kindle emergencies."[94] The thought being, once one has that power written in the Constitution the powers that be tend to take advantage of it. The U.S. Constitution does not expressly confer such powers. There was no discussion regarding such powers in the Constitutional Convention either. This does not, however, exclude the fact that the need for such emergency powers exists. In fact, a Senate special committee established in 1972 found that, by then, Congress had enacted 470 statutes that grant the President emergency powers.[95] I already mentioned the International Emergency Economic Powers Act, but there is also the National Emergency Act of 1976.[96] They can be broadly interpreted, as we have seen in *Dames & Moore*, but the question is: can they be interpreted against the will of Congress? Probably not. In any event, they are only to be exercised in the face of grave and imperative national emergencies.

There have been arguments that, especially in war time, there is no law, *inter arma silent leges*.[97] This is no longer true, since we have the Lieber Code in the U.S.[98] and the 1949 Geneva Conventions and their Additional Protocols internationally. They define what is allowable in times of war. The U.N. Charter and international practice also define when war can be started.[99] There is an international crime of

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[94] *Youngstown*, 343 U.S. at 650.

[95] CRS Report for Congress, National Emergency Powers, Harold C. Relyea Specialist in American National Government, Government Division, December 10, 1990, revised April 29, 1991, at http://usa-the-republic.com/emergency%20powers/crs.html#/48.

[96] National Emergency Act of 1976, 50 U.S.C. §§ 1601-1651 (1976).

[97] "In times of war, the law falls silent." For detailed discussion, see ROZA PATI, DUE PROCESS AND INTERNATIONAL TERRORISM. AN INTERNATIONAL LEGAL ANALYSIS 14 *et seq.* (2009).

[98] *See* Jordan J. Paust, *Dr. Francis Lieber and the Lieber Code*, 95 AM. SOC'Y INT'L L. PROC. 112 (2001).

[99] U.N. Charter art. 39-51 (self-defense and authorization by the UN Security Council). There is also the apparent approval, under customary international law, of humanitarian intervention in cases

aggression that was just also defined for the International Criminal Court,[100] and our Supreme Court did in fact use Common Article III of the Geneva Conventions when it decided the *Hamdan* case.[101] Only a month later, the Military Commissions Act turned this around by declaring that all the provisions of the Geneva Conventions are non-self-executing, and as a result cannot be used in U.S. courts.[102] Beyond the concept of emergency powers, we have executive orders, and presidential directives. These have the full force of law, but they need to rest within the original powers of the President or within the confines of legislation set by Congress.[103]

VI. APPRAISAL AND RECOMMENDATION

When we aim at determining the limits of executive powers, or any other legal issue within the structure of the Constitution, we ought to look at the problem from the perspective of the political opponent as well. That is, how would he or she use whatever power we ascribe to him or her? In particular, how could these powers be abused by a President of the other political persuasion? Second, the structure of decision-making should be seen in the context of achieving a public order of human dignity, for the function of

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of massive violation of fundamental human rights. Myres S. McDougal & Siegfried Wiessner, *Law and Minimum World Public Order, in* MYRES S. MCDOUGAL & FLORENTINO FELICIANO, THE INTERNATIONAL LAW OF WAR xix, lii (1994).

[100] The international crime of aggression was defined in Kampala, Uganda on June 11, 2010. Coalition for the International Criminal Court, *The Crime of Aggression*, at http://www.iccnow.org/?mod=aggression (last visited November 24, 2013).

[101] Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (holding that the use of military tribunals to try Guantánamo Bay detainees violated Common Article 3 of the 1949 Geneva Conventions).

[102] The Military Commissions Act of 2006, 10 U.S.C. §§ 948-949 (2006).

[103] John Contrubis, *Executive Orders and Proclamations*, CRS Report for Congress #95-722A, March 9, 1999, at 1-2.

all law is to serve human beings and not the other way around. We have to appraise the outcome, in terms of its consequences on human beings, of whatever constitutional structuring we have now and what we aim to have. Does it maximize access by all to all the things humans desire, humans want out of life? Does it pave the road for access to the processes of shaping and sharing of all the things humans strive to achieve in this great republic: power, wealth, affection, rectitude, enlightenment, skills, well-being, and respect?[104]

In the area of the vertical separation of powers, commonly known as federalism, we see that its structure in our nation has for quite some time allowed for the exclusion of some people from the political process. But today, especially since President Lincoln issued the Emancipation Proclamation, we can say, with good reason, that federalism is an "architecture for freedom":[105] its structuring allows decision-making on the lowest possible level – close to maximum quality access to power for all. Combined with the principle of subsidiarity, it empowers individuals. The question then is: is this also true for the principle of the horizontal separation of powers, i.e. the personal walls dividing the various branches of government? A similar yardstick should be applied here: do the legal consequences drawn from it fulfill the needs and

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[104] Professor Myres McDougal has provided a most useful methodology to analyze a problem in this context and to resolve it. It is outlined, in great detail, in his lecture *The Application of Constitutive Prescriptions: An Addendum to Justice Cardozo*, 1 CARDOZO L. REV. 135 (1979). His approach to law in general is problem- and policy-oriented, and was developed in close collaboration with policy scientist Harold D. Lasswell. *Cf.* Lasswell & McDougal's two-volume treatise, HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992). *See also* W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575-582 (2007).

[105] Wiessner, *Federalism*, *supra* note 5.

meet the aspirations of humans which the Constitution and all laws under it are supposed to serve? The powers of the President in this context do have to face the same scrutiny as any other decision making body under our venerable Constitution.

Does our constitutional system properly balance the interests of security and liberty? As a lawyer, you will be party to important decisions – in the courtroom, in legislatures, as advisor to, or even member of, the government. You should, as a law student, see yourself as one of the future leaders of the nation, as trustee of the community. You know that the law of yesterday is not necessarily the law of tomorrow. I recommend that you take a close look at yesterday's laws, responses to the social problem they try to cure, and attempt to improve them in the interest of all. While teaching practical legal skills is important, legal education has a broader calling. As public servant, you ought to try to understand and shape the law[106] -- convince others that different arrangements might better achieve the goals of the flourishing of all. As to the President, we would not want to see him as a philosopher-king, but it helps for him or her to have a good philosophy.

[106] Siegfried Wiessner, *The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law*, 18 ASIA PACIFIC L. REV. 45-61 (2010).

LINCOLN MEMORIAL UNIVERSITY
LAW REVIEW

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THE FOURTH AMENDMENT: NOT LIKE FINE WINE

Nicholas S. Davenport, V[*]

MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY FIRST CENTURY.
By *Stephen J. Schulhofer*.
New York: Oxford University Press. 2012. Pp. xi, 192. $21.95

When someone gifts an expensive bottle of wine, the recipient is likely to place that bottle in safe-keeping for a "special occasion." When that occasion arrives, the recipient is more than glad to have a fine bottle of wine to consume. In some respects the Fourth Amendment is like a bottle of fine wine. It is a gift from the Founders - one that is held by every citizen and should be jealously guarded and only used when appropriate. Americans are lucky to have the Fourth Amendment when that "special occasion" occurs.

However, in *More Essential than Ever*, Professor Stephen Schulhofer argues the United States Supreme Court is limiting what qualifies as "special occasions" that invoke the Fourth Amendment right. The Court, along with various social factors, is eroding the

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Fourth Amendment. Metaphorically, unlike fine wine, the Fourth Amendment has not become better with age – quite the contrary.

Prior to his career in academia as a professor at New York University School of Law, Schulhofer served as a law clerk to Justice Hugo Black and practiced law for three years in France.[1] Schulhofer has published numerous books and articles, the majority of which focus on criminal law and liberties of the American people.[2] Based on Schulhofer's previous publications, the topic of liberty appears to be his passion.[3] His interest and focus, at least in *More Essential than Ever*, is not purely academic, but also journalistic in nature as he emphasizes raising awareness of the ever-present erosion of the Fourth Amendment:

> A central concern of this book is to demonstrate the importance for all Americans of preserving our capacity to limit the government's access to facts about ourselves – even when practical necessities or goals we choose to pursue oblige us to share those facts with trusted individuals and institutions for limited purposes.[4]

In addition to raising awareness, Schulhofer seeks to disprove common misconceptions regarding the Fourth Amendment; he strives to offer the current reality of the Fourth Amendment in an attempt to enlighten the reader's knowledge and interest in search and seizure law.

Schulhofer identifies the causes of modern Fourth Amendment dilemmas and offers thoughtful explanations as to why the Fourth Amendment is now "more essential than ever." His display of historical knowledge regarding Fourth Amendment law

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[1] New York University School of Law Faculty Profiles, https://its.law.nyu.edu/facultyprofiles/profile.cfm?section=bio&personID=20270 (last visited Aug. 14, 2012).
[2] *Id*.
[3] *Id*.
[4] P. 9

and thorough discussion of modern search and seizure issues makes *More Essential than Ever* worth the investment and time to read.

In *More Essential than Ever*, Schulhofer diagnoses two misconceptions about the Fourth Amendment. First is the illogical theory that increasing liberty makes everyone less safe, and the second misconception is that people do not fully understand the Fourth Amendment's intended purpose. Schulhofer not only identifies misconceptions but he discusses them, while stating the adverse effects of recent Supreme Court holdings. Most importantly, he deems the Fourth Amendment a pillar supporting American society, which a variety of forces affect.

A societal misconception identified in *More Essential Than Ever* is that some Americans believe increasing liberty makes everyone less safe, while enhancing security makes people safer. However, Schulhofer argues that decreasing liberty could reduce respect for law enforcement. For example, "[Ordinary citizens] will not help [law enforcement] unless they want to."[5] This makes sense because not all enemies can be caught by the government acting alone – it needs support from its people. Consider:

> Worldwide, there are at most only a few thousand Islamic extremists determined to do us harm. But there are more than a million law abiding Muslims in the United States and more than a billion worldwide. To combat terrorism successfully, the support of these communities is imperative. Unless our laws foster trust by guaranteeing transparency and accountability, strong search and surveillance authority quickly becomes self defeating.[6]

Appropriately, Schulhofer quotes Justice Brandeis on the importance of government action and its effect: "Our Government is the potent, the omnipresent teacher …. If the Government becomes a law breaker, it breeds contempt of law; … it invites anarchy."[7] "Everyone

[5] P.166.
[6] *Id*. at 168-169.
[7] *Id.* at 66 (Quoting Justice Louis Brandeis).

needs the Fourth Amendment,"[8] even the government. It appears that solutions to Fourth Amendment problems are not as easy as simply giving up liberties and exchanging them for safety. Therefore, Schulhofer offers an "outside the box" approach that in reality, increasing liberty makes us safer.

In addition, Americans misconstrue the nature of the Fourth Amendment. Some people do not understand its purpose. For instance, "[t]he common refrain is 'why should I worry about government surveillance? I have nothing to hide.'"[9] In reality, no one wants his or her personal details known by everyone. Schulhofer explains that proponents of this argument are not saying they "never need confidentiality, but only that they should not worry about keeping details of their private lives from police and prosecutors whose only interest is to [apprehend] those who are up to no good."[10] Schulhofer describes the Fourth Amendment, not as a personal privacy right, but as something much more than that. "When we think of privacy as a constitutional principle, we must remember that the well-being it aims to foster is not only personal but political…it also serves, perhaps more importantly, to sustain the foundation of a true democratic society."[11] In other words, the Fourth Amendment is more than just a guarantee of privacy; it is a shield from government abuse and is essential for a democracy. "When unrestricted search and surveillance powers chill speech and religion, inhibit gossip, and dampen creativity, they undermine politics and impoverish social life for everyone."[12] After considering Schulhofer's arguments, it seems there is more to the Fourth Amendment than America remembers.

In addition to the notion that America has forgotten the "long train of abuses"[13] that governments tend to impose on people, *More Essential than Ever* offers additional causes for erosion of the Fourth

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[8] *Id.* at 179.
[9] P.5.
[10] P.12.
[11] P.13.
[12] P.14.
[13] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Amendment. One cause is tragic events, such as the Civil War, Pearl Harbor, and the Cold War. "In all these periods, civil liberties came under assault, often by well-meaning citizens convinced they were living through a period of unique danger."[14] A modern reader can relate to this statement because he or she was alive during the tragedy of September 11, 2001. Schulhofer references the September 11th attacks twenty-five times in his work.

Besides tragic landmark events, gradual changes in American ways of life contribute to relaxing Fourth Amendment principles. Urbanization is one such example; housing inspectors need to enter buildings to conduct inspections to make sure the buildings are safe[15] and the rise in transportation creates a public need to keep roads safe. Schulhofer suggests that the Supreme Court has allowed leniency because of these changes in society; moreover, Schulhofer suggests the Court now implements "theoretical distinction between 'primary' or 'secondary' purposes" of law enforcement.[16] This determination is based on law enforcement objectives, and if law enforcement's primary purpose is not criminal prosecution, but some other justified end, the Court allows more flexibility. "The Court's more permissive approach allows police far more leeway than necessary and takes from the traveling public an important part of our traditional 'right… to be secure' from government intrusion."[17]

The most recent and problematic change in society is electronic information sharing, such as Facebook and online banking. Schulhofer's stance in regard to applying the Fourth Amendment to modern innovation is simple: "Fourth Amendment safeguards should apply whenever individuals convey personal information to a service provider or other intermediate institution under promise of confidentiality."[18] His argument is well-supported and attacks the notion that since the information is held by a third party, then it is not

[14] P.145.
[15] P.93-102.
[16] P.106.
[17] P.106.
[18] P.134.

subject to Fourth Amendment protection. The author references the "third-party doctrine"[19] as "inexcusably formalistic."[20] Schulhofer's argument against the third-party doctrine maintains his broader argument that the Fourth Amendment right is not a guarantee of "secrecy but autonomy."[21] Autonomy is the "right to control" and "what makes privacy valuable are the relationships and projects we develop by sharing information with others."[22]

Schulhofer places most of the blame on Supreme Court interpretation of the Fourth Amendment. The Court's interpretation, however, is an "unavoidable concern" in *More Essential Than Ever*.[23] "In the contemporary Court, a majority of justices increasingly put police convenience above original Fourth Amendment priorities."[24] Judicial oversight is imperative for the Fourth Amendment to operate properly, but there is an "underlying assumption that privacy and judicial oversight are obstacles to our society."[25] Schulhofer believes "[t]he Court has repeatedly sacrificed protection from government intrusion to unconvincing claims for ease and efficiency."[26] There are references throughout *More Essential than Ever* blaming the Court for decreasing the liberty of the People "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[27]

While there are more positive features of this work than negative ones, *More Essential than Ever* could benefit from restructuring chapter topics. A more definitive shift between

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[19] For a more informative discussion on electronic communication and, more specifically, the third party doctrine *See e.g.*, Christopher R. Brennan, *Katz Cradle: Holding On to Fourth Amendment Parity in an Age of Evolving Electronic Communication*, 53 Wm & Mary L. Rev. 1797 (2012); *See also* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 Mich. L. Rev. 561 (2009).
[20] P.127.
[21] P.6.
[22] P.8.
[23] P.17.
[24] P.44.
[25] P.158.
[26] P.99.
[27] U.S. CONST. amend. IV.

traditional and modern Fourth Amendment problems and a definition section in the Table of Contents would make it more user-friendly in referencing specific topics. Therefore, this book would benefit from a more rigid and sub-divided format compared to the one Schulhofer provides his reader.

Also, Schulhofer daringly blames the Supreme Court. He accuses the Court with audacious language: "The Supreme Court has failed to understand the Fourth Amendment's central goals or failed to take them seriously."[28] This is the most glaring instance in which Schulhofer allocates blame in his work. Furthermore, Schulhofer's claim is unsubstantiated and incorrectly categorizes all the Supreme Court Justices under one umbrella of criticism. There are other explanations for the legal conclusions drawn by the Justices besides lack of understanding and not taking the Fourth Amendment seriously. However, the positive aspects of the book far outweigh any criticisms.

Schulhofer provides history of the Fourth Amendment at the beginning of the work, focusing mainly on the importance of warrant requirements. He uses history to criticize the leaps in logic made by the Supreme Court in analyzing more modern issues in various chapters. For example, "health and safety inspectors can enter homes and apartments without permission, by using an 'area warrant'." Schulhofer connects the modern warrant to one that is forgotten by most: "The area warrant is nothing more than a modern name for the dreaded general warrant that the Fourth Amendment was meant to forbid."[29] Thereby implying even lessons of history are becoming a thing of the past.

In addition, case law is strategically placed throughout the chapters and provides a broad and educational summary of search and seizure law that supports Schulhofer's arguments. Schulhofer does a thorough and seamless job of explaining previous case decisions while remaining brief and on-point.

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[28] P.115.
[29] P.93-94.

Moreover, Schulhofer's choice of quotations serves to ignite the reader's passion and adoring nature for the history of liberty. To illustrate one such quote:

> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all force dares not cross the threshold of the ruined tenement. [30]

CONCLUSION

The premise of *More Essential than Ever* is alarming. Schulhofer's accurate presentation of the current state of Fourth Amendment law presents a most worrisome position for Americans. It is readily apparent that human nature has not changed, but sentiment toward defending civil liberties has, especially the right to be free from unreasonable search and seizure. "Modernization" cannot be a one-way street where the government benefits from new technologies while citizens are left with no protective buffers other than those that sufficed in 1791."[31] In other words, the Fourth Amendment has not aged like fine wine.

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[30] P.22 (quoting William Pitt, speech on the Excise Bill., House of Commons March 1763).
[31] P.121.

LINCOLN MEMORIAL UNIVERSITY LAW REVIEW

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GOVERNMENT, WHAT HAVE YOU DONE FOR ME LATELY?

*Tracy Provo Knight**

TO PROMOTE THE GENERAL WELFARE THE CASE FOR BIG GOVERNMENT.
By *Steven Conn*.
New York: Oxford University Press. 2012. Pp. ix, 265. $19.95.

Americans like to believe that we share the same strong, persevering spirit possessed by our pioneering ancestors; yet, we are often quick to forget that our modern government has played an integral role in enabling us to grow and prosper. According to Dutch organizational studies researcher Geert Hofstede, Americans in general tend to lean toward individualism, preferring to act as an individual rather than as members of a group.[1] We are a society of people with each person looking out for number one. Hofstede's studies further illustrate that Americans tend to favor values such as assertiveness and the acquisition of material goods and money over

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[1] STEPHEN ROBINS & DAVID DECENZO, FUNDAMENTALS OF Management 36 (7th ed., Prentice Hall 2010); ANGELO KINICKI & BRIAN WILLIAMS, MANAGEMENT A PRACTICAL INTRODUCTION 123-24 (5th ed., McGraw-Hill Irwin 2010)

relationships and sensitivity.[2] Like small children, we desire material things, but we often have a difficult time sharing with others. We are a society which teaches its members that protection of self is paramount, yet we are quick to forget the constant, behind the scenes, role government plays in our lives. Instead, we are apt to question our government: "What have you done for me lately?" In *To Promote the General Welfare*, Steven Conn presents a series of essays which serve as reminders of the many and varied ways in which government has served as the "boost" Americans have needed in our effort to climb the ladder of what we perceive as individual success.

From the birth of this nation, Americans have relied upon government for growth and improvement. In order for us to maintain a free country, it has been essential that we have an active government which has operated in a manner that allows its citizens to prosper and grow. By our very nature, as outlined in Hofstede's research, we do not like to rely on others.[3] How foolish we have been. We are not a nation of individuals who have worked alone for what we have; instead, we each have relied upon the government for assistance in one form or another. Because government in the United States has a long history of functioning in a manner which is hidden within the economy, Americans seem to have forgotten that the free market we so adore depends greatly upon the government. The government provides the federal and state-funded infrastructure upon which we rely, as well as initiatives sponsored by federal, state, and local governments. Our founding fathers were so distrustful of a large, centralized government that they created a federal system of government that gave significant power to state and local government. From the interstate system upon which we travel to the public school system that educates the vast majority of us, each of us has been touched in some way by a program or initiative which has enriched our lives either directly or indirectly. For most Americans, college education and home ownership would not be possible without federally subsidized higher-education loans and federal

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[2] *Id.*
[3] *Id.*

housing programs. Conn's essays, presented in *To Promote the General Welfare,* illustrate the myriad of ways in which government programs have permeated and enriched each of our lives.

For many years, Americans have regarded the transportation infrastructure not merely as a means for facilitating the economic growth of our country, but as a vital system upon which the nation as a whole depends and a system in which government has played a significant role. As early as the completion of the Erie Canal by New York State and the railroad boom in the 1820s, the federal government has sought to address the challenge of connecting this broad nation together through webs of waterways, rails, and roads. In the 1820's, the federal government started granting federally owned land to states, enabling the states to utilize that land for roads and railroads. In 1824, Congress authorized the President to provide army engineers trained at the US Military Academy at West Point for civilian projects. Following WWII, the National Interregional Highway Committee, appointed by the President, recommended the construction of a system of nearly 34,000 miles of interstate highways to connect our states. Today, we are reliant upon both this transportation system which united our many states and the governmental investment which made it possible.

According to U.S. Census Bureau records, from 1900 to 1940 fewer than 50% of Americans were homeowners. That percentage has jumped to nearly 70% due to federal programs which have extended mortgage assistance to military veterans, set standards for home construction, created a secondary market for mortgages, and allowed for the deduction of home mortgage interest payments.

Although American education is primarily a local and state undertaking, the Federal government has played a major role in its development. The Morrill Act of 1862 allowed for the distribution of 17 million acres of land for colleges and universities. The New Deal legislation of the 1930's marked the first significant influx of federal government involvement in the educational sector. In the years of economic decline during the great depression, local school districts

found that they were no longer able to support their schools. President Roosevelt and his "alphabet agencies" stepped forward to fill the void that economic decline had created. For example, the Federal Emergency Relief Administration allocated monies to employ teachers, allowing many rural schools to remain open. The New Deal not only served as a reactionary measure which allowed schools to remain open but also created many educational innovations. The Emergency Education Program, and later the Lanham Act, allowed for the creation of public nursery schools. In 1946, the GI Bill of Rights provided not only federal assistance for veterans returning from WWII but also provided federal assistance allowing those veterans to attend colleges and universities. The Higher Education Act of 1965 and the Pell Grant program of 1972 allowed larger segments of the population to attend colleges and universities. While Roosevelt's New Deal focus was mainly on improving school structures and preventing teacher layoffs in rural areas, President Johnson's "War of Poverty" took aim at the education received by the poor in our country. The Elementary and Secondary Education Act provided poor school districts with books, teacher training, and equipment needed in the classroom. Again, each American has been touched in some way by federal government's involvement in the education.

Throughout the 20th century, the life expectancy of the average American increased by 28 year, due in large part to the federal government's role in advancing medical research and medical and public health progress. The Food and Drug Administration, the National Institutes of Health, the Centers for Disease Control, and Public Works programs greatly contributed to a more expansive distribution system of vaccinations, furthered research on diseases, and advanced proactive plans for disease prevention. Again, the New Deal allowed for federal funds to construct thousands of miles of water and sewer line, as well as allowing for the construction of water treatment plants to combat the sanitation problem which plagued our nation. The Social Security Act of 1935 proved to be legislation between state and federal government, which relied heavily upon federal support. Though most Americans view the Social Security Act

as merely a form of retirement supplementation, Titles V and VI provide aid for mothers and children and allow for the matching of grants for health departments as a method of stimulating spending at the state and local levels. The 1965 Medicare and Medicaid amendments to the Social Security Act aided in extending medical care to those who lacked the financial means to access private sector heath systems. Since the inception of Medicare, physicians have spent much time and money lobbying for the preservation of the rates of reimbursement on which they have become so dependent. This is in stark contrast to the stance taken by the American Medical Association in the early 1920s, when the organization was in support of a universal healthcare program for Americans. Interestingly enough, since 1939, the AMA has opposed every proposed national health care bill.

In this collection of essays, Steven Conn reminds us of the many and varied ways in which the government has enriched our lives though an often unassuming manner. Conn presents an America which differs greatly from the one presented in John Steinbeck's depression era work, *The Grapes of Wrath*, and Upton Sinclair's 1906 work, *The Jungle*. Both Steinbeck and Sinclair opened America's eyes to the absence of social programs, substandard health and medical care, poor working conditions, and the cloud of hopelessness which held firm above the working class of that era. Perhaps these works served as a catalyst for many of the programs discussed in *To Promote the General Welfare*. From the miles of interstate highways that have facilitated interstate commerce and travel, to Medicaid, Social Security, government-subsidized student loans for higher education, home loan options for United States veterans, a secondary market for home loans, and a plethora of other endeavors, we have each been touched in some way by a federal program. Rather than ask what has the government done for us, Conn's collection of essays reminds us, instead, to marvel at all that this comparatively young government has done to improve the lives of its citizens.