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A Sword and a Shield: The Uses of Law in the Bush Administration

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Abstract

The Bush administration has been criticized for departures from the rule of law, but within the administration law was not ignored. Instead it was seen variously as a tool and as a potential threat to the operation of the executive branch. Two narratives compete for attention. In an era when the legality of torture was openly debated, the deployment of law in wartime seemed the most immediate issue. At the same time, however, a decades-long conservative movement to change American law was both significantly furthered and complicated, as Supreme Court appointments moved the Court to the right, but the lack of a common jurisprudence hampered the consolidation of a new conservative constitutional vision. More conservative courts might seem a safe haven for the president, less likely to challenge executive branch actions, but the Bush administration had a complicated relationship with courts. The administration sought out the courts to further aspects of a social policy agenda, such as restricting abortion rights and gun control. But when it came to challenges to the executive branch itself, the Administration used creative means to avoid court jurisdiction, including constitutional theories about executive power. Law was both a sword and a shield: it was a tool used to further some conservative objectives, and it was a shield intended to protect executive autonomy.

THE PRESIDENCY OF *George W. Bush*

A First Historical Assessment

JULIAN E. ZELIZER, *Editor*

Princeton University Press Princeton and Oxford

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The Presidency of George W. Bush features contributions by Mary L. Dudziak, Gary Gerstle, David Greenberg, Meg Jacobs, Michael Kazin, Kevin M. Kruse, Nelson Lichtenstein, Fredrik Logevall, Timothy Naftali, James T. Patterson, and the book's editor, Julian E. Zelizer. Each chapter tackles some important aspect of Bush's administration—such as presidential power, law, the war on terror, the Iraq invasion, economic policy, and religion—and helps readers understand why Bush made the decisions he did. Taking readers behind the headlines of momentous events, the contributors show how the quandaries of the Bush presidency were essentially those of conservatism itself, which was confronted by the hard realities of governance. They demonstrate how in fact Bush frequently disappointed the Right, and how Barack Obama's 2008 election victory cast the very tenets of conservatism in doubt.

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JULIAN E. ZELIZER is professor of history and public affairs at Princeton University. He is the author of *Arsenal of Democracy*, *On Capitol Hill*, and *Taxing America*. He is a frequent contributor to CNN.com, *Politico*, and the *New York Times*, among others.

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A SWORD AND A SHIELD

The Uses of Law in the Bush Administration

MARY L. DUDZIAK

The Bush administration has been criticized by the Right as well as the Left for departures from the rule of law. Yet within the administration, law was not ignored. Instead, although the president and his advisers feared law as a potential threat to the operation of the executive branch, they turned to law as a means of achieving important goals. What is ultimately most interesting about law in the Bush administration is not the formal legal question of how "lawful" its actions were, on which there will be varying judgments, but instead what the basic conception was of law and the presidency in the Bush era. How is it that a president christened in court rather than through the ballot box would proceed to avoid the jurisdiction of courts and the lawmaking power of Congress? The facile answer often offered is that the nation was at war, and war changes the rules. But the presence of a "war on terror" provided a context for the administration's legal strategies, not their justification.[1]

Two narratives of law in the Bush administration compete for attention. In an era when the legality of torture was debated not only within the White House but on television talk shows, the deployment of law in wartime seemed the most immediate issue. At the same time, however, a decades-long conservative movement to change American law was both significantly furthered and complicated, as Supreme Court appointments moved the Court to the right

but the lack of a common jurisprudence hampered the consolidation of a new conservative constitutional vision.

As courts became increasingly conservative, they would seem to have been a safe haven for the president, less likely to challenge the actions of a conservative administration, but the Bush administration had a complicated relationship with courts. The Bush Justice Department sought out the courts to further aspects of a social policy agenda, such as restricting abortion rights and gun control. But when it came to the executive branch, the administration used creative means to avoid court jurisdiction, including constitutional theories about executive power. Law was both a sword and a shield: it was a tool used to further some conservative objectives, and it was a shield intended to protect executive autonomy.

THE SUPREME COURT ENDS AN ELECTION

Our story opens in Palm Beach, Florida, December 9, 2000. That day, a recount of ballots in the disputed presidential election came to a halt when the Supreme Court issued a stay. Justice Antonin Scalia released an opinion explaining the order: "The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner [President Bush], and to the country, by casting a cloud upon what he claims to be the legitimacy of his election." With the recount halted in Florida, the die was cast, though the rest of the legal drama continued to play out. Following a highly compressed schedule, the Court took briefs, heard arguments, wrote opinions, and issued a ruling in *Bush v. Gore* in just a few days. If an impasse in Florida had continued, George W. Bush would most likely have been selected by the House of Representatives as the nation's president if the dispute had followed the process laid out in the Constitution. But instead the Court put an end to the controversy, overturning a Florida Supreme Court ruling ordering the recount and effectively ending the election controversy with a very narrow margin for Bush in Florida. Among the most surprising elements was that conserva-

tive justices who usually argued for a narrow reading of the equal protection clause embraced a novel and expansive reading to reach their result. In doing so, they announced that their equal protection analysis was applicable to this case only.[2]

Many were outraged by what they saw as judicial activism on the part of conservatives who had themselves decried it. For others, concerned that uncertainty about the election would lead to a constitutional crisis, the Court had fallen on its sword, having taken a step of questionable legitimacy for the good of the nation.[3]

Democratic presidential candidate Al Gore quickly announced he would not pursue other avenues to challenge the outcome.[4] This cleared the path for George W. Bush's inauguration, but it would take another event, on a bright and tragic morning in September, to make him the country's leader. September 11 did more than rally a frightened nation behind a weak president. It provided an argument for the powers of his presidency.

THE "TERROR PRESIDENCY"

War and emergency powers are often invoked as the basis for the Bush administration's conception of executive power, but the effort to expand executive power was a priority from the very beginning. While the scope of presidential power had recovered from the post-Watergate era, Charlie Savage suggests that the Bush administration came into office motivated by a concern that the Clinton years had damaged the presidency, and the president instructed his staff that they needed to rehabilitate the office, leaving it "in better shape" than they found it. One way to protect executive prerogative, Bush officials believed, was to protect secrecy, and so an initial battle was over an effort to shield from disclosure records of Vice President Cheney's energy task force, which was challenged by both Congress and private litigants. After September 11, the administration expanded its efforts to make executive actions secret, using national security as the rationale, even though secrecy extended to non-security-related matters.[5]

President Bush sought to exercise power in a way that was insulated from the usual checks and balances provided by Congress and the courts. That did not leave him without legal cover, however. The Office of Legal Council (OLC) in the Justice Department often serves as a minor brake on executive action, offering its opinion on the legality of proposed presidential initiatives. The office took on particular importance during the Bush presidency, even though, when its services were most sorely needed, the OLC was without a director.[6]

Following the terrorist attacks on September 11, 2001, as the rest of the staff at the OLC evacuated, John Yoo, the only lawyer with experience with foreign affairs issues, was asked to stay behind. Soon, wrote Tim Golden, Yoo "found himself in the [Justice] department's command center, on the phone to lawyers at the White House." The young lawyer was on his way to becoming a crucial insider in the war on terrorism. Yoo's views on expansive presidential power were outside the mainstream but in keeping with the direction the administration had favored from the beginning.[7]

Yoo was not on his own, of course. David Addington, Vice President Cheney's chief of staff and legal adviser, liked to carry around a copy of the Constitution in his pocket. He found in its sparse words the same robust vision of executive power as did Yoo, and he devoted the energies of his office to realizing it. Addington has at times been characterized like the man behind the curtain in *The Wizard of Oz*, directing the development of a conservative legal agenda, perhaps at the behest of the vice president. It is important, however, to see Addington not as a legal innovator but as a staff person positioned to further a legal agenda much longer in the making. Addington would carry out this role in part through vetting presidential appointees, using appointments to proliferate a broad view of executive power throughout the Bush administration.[8]

Congress, stunned by the September 11 attacks, responded by quickly passing the Patriot Act and an Authorization for the Use of Military Force. While these actions were intended to give the

president the authority he sought to act effectively at home and abroad, there was just one difficulty. The Bush administration did not want to concede that Congress's support was needed. If that was the case, then Congress would be able to withdraw its grants of power. Yoo began crafting OLC opinions based on the idea that the president could act alone. On September 20, 2001, he wrote that congressional resolutions had recognized the presidential response to terrorism, but they could not "place any limits on the president's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing and nature of the response." International law was also not a limit; he would later write that the Geneva Conventions did not apply to the conflict in Afghanistan, and he authored a particularly controversial memo legitimizing torture. Yoo's basic justification was that the U.S. Constitution granted broad executive power to the president, and Congress and the courts did not have power to undermine it. This was based on a reading of Article II of the Constitution, which provides that "the executive Power shall be vested in a President of the United States of America" and that "the President shall take care that the laws be faithfully executed." In essence, these clauses were read as vesting *all* power that is executive in nature in the president, with incursions on presidential power therefore unconstitutional. A more modest version of the "unitary executive" thesis had been argued for in earlier years by conservative legal scholars. During the Bush years, it entered the broader political debate.[9]

The unitary executive thesis was especially important to OLC decision making on torture. An August 1, 2002, OLC memorandum on interrogation stated that "Any effort by Congress to regulate the interrogation of battlefield detainees would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President." Congress could not play a role, leaving the president to determine appropriate policy. At the same time, governing statutes were interpreted in a way that gave the administration as broad authority as possible. A federal statute banning torture was interpreted to prohibit only "the most extreme acts." For physical

pain to be torture, "it must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." An effort to keep judgments like this secret reinforced the administration's efforts to retain broad, unilateral power over detainees.[10] Documents released by the Justice Department in 2009 showed that actual interrogation practices went beyond the brutal tactics authorized by the memos. For example, CIA operatives used waterboarding 183 times in one month against September 11 planner Khalid Sheik Mohammed.[11]

The unitary executive thesis embraced such a robust view of presidential power that it would seem to have given the administration plenty of room to maneuver. But the embrace of this analysis would be only one of the steps taken to expand the scope of presidential power. One way to shield executive acts from judicial oversight was to take them outside the jurisdiction of courts.

The effort to avoid judicial review illustrates an important aspect of the Bush administration's perspective on the role of law. The majority of federal judges had been appointed by Republican presidents, and by 2005 conservatives would be in the majority in ten of the thirteen U.S. courts of appeals. This might have made the courts a welcome forum, but the Bush administration viewed judicial review of its own actions as an affront to its conception of the presidency.[12] Taken together, the successful efforts to place conservatives on the courts and to avoid submission of executive action to the courts illustrate a two-pronged approach to law. Conservative courts could aid the administration's legal agenda by striking down gun control laws or upholding restrictions on abortion, but the courts were not to be the president's overseer.

Two strategies were used to insulate administration actions in the war on terror from judicial review. The first was to place detainees outside U.S. territory, on the theory that U.S. constitutional protections would not apply to those held by the U.S. government in another country. The second strategy was to create a new category of legal persons, "illegal enemy combatants." As enemy soldiers during wartime, it was argued, they were not enti-

tled to the protections of domestic courts that attended criminal prosecutions. But as *illegal* enemy combatants they were also not protected by the laws of war. The president claimed the right to designate the status of individuals as illegal enemy combatants and applied it not only to suspected al Qaeda operatives captured on the battlefield in Afghanistan but also to U.S. citizens apprehended on American soil.[13]

On November 13, 2001, President Bush issued an order authorizing the detention of terrorists and their trial by military commission. In early 2002, construction began of a new prison facility at Guantánamo Bay, Cuba. Soon, prisoners from the conflicts in Iraq and Afghanistan were incarcerated there, potentially keeping them outside the jurisdiction of American courts. With no apparent end to a war on terrorism, there seemed to be no limits to the prisoners' detention.[14]

President Bush did not seek legislation authorizing military tribunals, and argued that congressional authorization was unnecessary. Why not put such important initiatives on stronger legal footing? Bush's lawyers advised against it. Addington and other White House insiders "believed cooperation and compromise signaled weakness and emboldened the enemies of America and the executive branch," writes Jack Goldsmith, who served as director of the OLC from 2003 to 2004.[15]

Although the Bush administration sought to avoid judicial review, lawyers were front and center in White House decision making. According to Goldsmith, faced with concerns about the possibility of another terrorist attack and fearful of being blamed for not avoiding it, the president could only justify the failure to take protective action if he had a good reason. "A lawyer's advice that a policy or action would violate the law, especially a criminal law, was a pretty good excuse." The White House was "haunted" by 9/11, Goldsmith argues, and "obsessed with preventing a recurrence of the expected harsh blame after the next attack." Because of this, "the question, 'What should we do?' . . . often collapsed into the question 'What can we lawfully do?' . . . It is why there was so much pressure to act to the edges of the law." The central role

played by lawyers had limitations, however. Lawyers "look to *legal sources* to find the answers," said 9/11 Commission executive director Philip Zelikow. This left out other important factors, such as the impact of a policy on U.S. foreign relations and on domestic public opinion.[16]

Addington and Vice President Cheney in particular "viewed every encounter outside the innermost core of most trusted advisors as a zero-sum game that if they didn't win they would necessarily lose," according to Goldsmith. In this context, arguments about law were volleys in an international struggle for power; they were "strategic lawfare." The fusion of war and law—lawfare, or warlaw—is usually thought of as law on the battlefield, the way the laws of war might characterize as lawful a soldier shooting one person (an enemy soldier) but not another (a civilian). But after September 11, the fusion of war and law seeped into the basic domestic administration of justice. Legal actors saw their lawmaking role as affecting the course of the war on terror. And judgments about legality were infused by questions of security.[17]

In this rendering, law appears as a tool of power, not a practice of democratic constraint. Such a conception may seem lawless, as if the avoidance of law was essential to maintain sovereign power. But Ruti Teitel provides a different logic for the Bush administration's law avoidance. Faced with post-9/11 fears about international terrorism, she argues, the U.S. government acted as the "sovereign police," as if it were a global enforcer of law. It is inconsistent with that position to submit to the enforcement power of others. From this perspective, the operating paradigm would not be the maxim that necessity knows no law, but instead that necessity has required that the sovereign *be* the law.[18]

In the post-9/11 environment, laws that had once been seen as tools of domestic governance became securitized. For example, immigration law, once fueled by concerns about economic policy and humanitarianism, was now the door through which the next terrorists might slip through the borders. The Immigration and Naturalization Service was folded into the Department of Homeland Security, and a barrier at the Mexican border was recast as a

means of thwarting terrorism. Overall, the security threat was real, but many initiatives pushed through quickly as 9/11-related matters had been part of a preexisting political agenda. Whether because of real links with security or because of the political opportunities opened by the new national security environment, across categories, law became implicated in the war on terror.[19]

NO BLANK CHECK?

Terror-related cases would ultimately find their way into court. President Bush did not suspend the writ of *habeas corpus*, and lawyers for detainees invoked the great writ on behalf of prisoners at Guantánamo and elsewhere. A series of Supreme Court cases concerning detainees reveals a conflict over the basic conception of wartime during the Bush years. The parties and the Court initially framed their arguments within the traditional paradigm, assuming that wartime was temporary and its impact on law would eventually wane. Toward the end of the Bush administration, however, the seemingly endless character of the war on terror challenged the idea that war is necessarily bounded in time.[20] Eventually, this affected the Court's willingness to place limits on executive power.

The Supreme Court had addressed the problem of wartime detention before. During World War II, the Court justified the exclusion and relocation of persons of Japanese heritage from the West Coast based on the wartime context. It posed a hardship, but, wrote Justice Black for the Court in *Korematsu v. United States*, a case soon vilified as one of the great tragedies in American legal history, "hardships are part of war."[21] The temporary character of the program was thought to be inherent in its wartime circumstances. But wartime's inherent limits were fraying by the time the Guantánamo cases came before the Court.

In the detainee cases, the Bush administration argued that the Supreme Court lacked authority to rule. To a large degree, the Court's rulings in these cases simply reasserted the Court's own role in American governance. *Rasul v. Bush* (2004) was the opening volley. Fourteen detainees, citizens of Kuwait and Australia,

argued they had been unlawfully detained without charges. The Supreme Court rejected the Bush administration's argument that the Court lacked power to hear the case because the men were held outside U.S. territory. The *Rasul* ruling was limited to the power of federal courts to hear such a case, and the case was sent back to the district court to consider the merits. Meanwhile, the Department of Defense set up military tribunals on Guantánamo. According to Benjamin Wittes and Zaahira Wyne, the tribunals were "clearly intended to place the military in a stronger litigation position" in subsequent *habeas* cases.[22]

Also in 2004, the Court decided the case of a U.S. citizen, Yasser Esam Hamdi, who had been captured by American forces in Afghanistan and held first at Guantánamo, then at a U.S. naval facility in South Carolina. Hamdi argued that he was not an "unlawful combatant." Could the federal courts hear his case? Hamdi's U.S. citizenship complicated the legal context, for a federal statute required that "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The Fourth Circuit Court of Appeals held that Congress's authorization of the use of force in Afghanistan was sufficient to satisfy this requirement, and that searching *habeas* review was not constitutionally required. In a split opinion, the Supreme Court stepped back. Justice Sandra Day O'Connor, writing for a plurality of four, was troubled by the potentially indefinite character of Hamdi's detention. Her concern, O'Connor wrote, was not "the lack of certainty regarding the date on which the conflict will end, but . . . the substantial prospect of perpetual detention." She believed that

> If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life.

The Court did not have to face the prospect of endless detention, however, at least not yet. Justice O'Connor found that the war on

terror, at that moment in time, fit within conventional understandings of military conflict, bounded by time, for there were "active combat operations" against the Taliban in Afghanistan. It was appropriate to detain enemy combatants "for the duration of these hostilities."[23]

The plurality found, however, that detention must be subject to judicial review. "We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens," O'Connor wrote. Hamdi's right to a hearing would be limited by the security context, however. He was entitled to a lawyer, but evidence based on hearsay need not be barred. Justice Antonin Scalia went further in his concurrence, arguing that the only lawful options for the government were for Congress to suspend the right to *habeas corpus*, which Congress may do only in times of invasion or rebellion, or Hamdi must be tried using the usual procedures in criminal cases. Only Justice Clarence Thomas agreed with the federal government that the Court lacked the power to act. For him, Hamdi's detention fell "squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision." The Constitution placed all necessary war-related powers in a "unitary Executive."[24]

While *Hamdi* was touted as an example of constraints on the executive, in practice the decision was "little more than slaps on the wrist," Goldsmith writes, for "it did not at that time require the President to alter many of his actions." Instead, it merely showed that Guantánamo was not a complete legal black hole. It was, however, a counterforce against the administration's go-it-alone efforts. President Bush finally sought statutory authorization for military commissions to try detainees.[25]

In 2005, a Republican-dominated Congress sought to limit the Court's role, passing the Detainee Treatment Act, which stripped jurisdiction of U.S. courts over *habeas corpus* petitions from Guantánamo detainees. The statute seemed to be aimed at cases in the pipeline to the Supreme Court, but the Court did not back down. In *Hamdan v. Rumsfeld*, a detainee argued that the military

commissions created to try detainees violated military and international law. The Bush administration argued that the Court lacked power to hear the case. Coming in June 2006, well after the exposure of abuses of prisoners at Abu Ghraib and allegations of improper treatment at Guantánamo, and amid growing dissatisfaction with the administration's war efforts, this case would put a more serious brake on executive autonomy. Justice John Paul Stevens, writing for the Court, found that abstention by the Court would be improper, that the commissions were not authorized by Congress, and that their procedures violated both the Uniform Code of Military Justice and the Geneva Conventions. Congress, still dominated by Republicans, again responded, giving the president more power over detainees than he had had prior to the *Hamdan* ruling.[26]

Jurisdiction-stripping legislation was not the only strategy to keep a case out of the Supreme Court, as the strange case of José Padilla would reveal. A U.S. citizen, Padilla was arrested in Chicago, suspected of plotting to detonate a "dirty bomb" in the United States, but he was not immediately charged with a crime. Instead, he was held in military detention for three years as an illegal enemy combatant. Padilla challenged his indefinite detention and was successful in the Second Circuit Court of Appeals, but the Supreme Court dismissed the case on jurisdictional grounds, shifting it to a more conservative jurisdiction. The Fourth Circuit Court of Appeals denied relief in 2005. Padilla again sought Supreme Court review, but then something unusual happened. While his case was pending, the federal government took the extraordinary move of asking the Fourth Circuit to withdraw its opinion and seeking to transfer Padilla to civilian custody in Florida. The Bush administration now sought to charge Padilla with a crime and accord him the protections of the U.S. justice system that, they had previously argued, would undermine American national security. Padilla would no longer be an unlawful enemy combatant but an ordinary criminal. This move was too much for Judge Joseph Luttig, a staunch conservative on the Fourth Circuit who had

been on short lists of possible Supreme Court nominees and who wrote the Fourth Circuit opinion in the *Padilla* case. In a step widely seen as taking him out of contention for the Court, Luttig blasted the administration in a surprisingly sharp opinion denying the government's motions and suggesting that the government's new strategy was an effort to avoid review of the case in the Supreme Court.[27]

The Court then declined to consider Padilla's appeal. Although the case raised "fundamental issues respecting the separation of powers, including consideration of the role and function of the courts," the Court was wary of addressing claims that had now become "hypothetical," particularly since Padilla was now getting what he had originally sought, a transfer to the civilian criminal court system. The strategy of shifting Padilla's confinement to avoid a potentially negative Supreme Court assessment had worked. Padilla was then tried in Miami and convicted on August 16, 2007, of terrorist conspiracy and of material support for terrorists. Padilla's sentence of more than seventeen years in prison was less than the prosecution had sought, reflecting the judge's concern about the harsh treatment Padilla had received while in confinement. In the meantime, Judge Luttig, considered "one of the brightest conservative stars in the federal judiciary," resigned from the bench.[28]

The detainee cases captured the headlines and showed that wartime would not completely displace the Court's role, but while these rulings limited the president's autonomy, it was only at the margins. They established the power of courts to review detainee cases, but so far had not altered an executive decision to detain anyone. And plaintiffs challenging widespread warrantless data-mining of telephone and Internet communications found that the government escaped judicial scrutiny because the data they needed to bring a lawsuit was itself a government secret. Secrecy itself undermined the ability of those targeted to challenge their surveillance.[29]

The Supreme Court and Congress continued to assume that

wartime's temporal limits mattered to legal decision making. War legitimated restrictions on liberties in part because it was thought to be temporary. The framing of wartime seemed to slip, however, in the last important Guantánamo case during the Bush years. *Boumediene v. Bush* was a *habeas corpus* case brought by six men captured overseas and held at Guantánamo who claimed they were not al Qaeda terrorists and were not supporters of the Taliban. A 5-4 Supreme Court majority found unconstitutional the latest and broadest statute attempting to strip federal courts of jurisdiction over *habeas corpus* challenges brought by detainees. The Court noted that it was lawful to detain those who had fought against the United States "for the duration of the conflict." But Justice Anthony Kennedy, writing for the majority, was troubled by this war's lack of boundaries. The present conflict, "if measured from September 11, 2001, to the present, is already among the longest wars in American history." One of the reasons *habeas corpus* was needed was that "the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more." The lack of time boundaries made this conflict different from past wars, Kennedy reasoned, requiring more judicial oversight.[30]

And so the troublesome nature of twenty-first-century war, with no end in sight, would lead the Court to limit the Bush administration's power, but, as before, this ruling had its limits. Months after the ruling, detainees were still waiting for their *habeas* challenges to be resolved, even though the Court had stressed that "the costs of delay can no longer be borne by those who are held in custody." On November 20, 2008, Federal District Judge Richard J. Leon granted *habeas* relief to five detainees, finding their detention unlawful. They had been held at Guantánamo for seven years. Judge Leon urged the administration not to appeal the case because the evidence was so weak, and to release these detainees "forthwith." Finally, on December 16, 2008, three of the men were repatriated to Bosnia. Lakhdar Boumediene himself would remain five more months.[31]

THE COURT AND THE CONSERVATIVE AGENDA

That the exigencies of a war on terror did not place unlimited power in the hands of the president was clear when George W. Bush stood in the Cross Hall of the White House on October 31, 2006, and announced his second choice to replace Justice Sandra Day O'Connor on the U.S. Supreme Court. In 1968, Lyndon Johnson had underestimated the degree to which his power had waned and nominated a friend, Homer Thornberry, for the Court, only to find little support for his lackluster nominee. Harriet Meirs was George Bush's Homer Thornberry. Unlike LBJ, whose presidency was in its last months, after the Meirs nomination collapsed, President Bush had time to recover. He did so with Samuel Alito, placing a more qualified and more predictably conservative justice on the Court. Alito would solidify an effort many years in the making. To many, it appeared that the Right finally had its Court. While some legal analysts stressed the continuing uncertainty created by deep divisions on the Court, by the end of the 2006–7 term, others, such as Thomas Goldstein, suggested it was "quite clear by the numbers that the Court took a genuine step to the right."[32]

The Meirs nomination was a temporary setback for a conservative legal movement that had built a legal infrastructure in lower courts and American law schools and was hoping for the day when a staunchly conservative Supreme Court majority would finally be achieved. For these lawyers, Republican Party affiliation was certainly not enough. Membership in the Federalist Society and a career record of conservatism were more reliable predictors of a justice who would move the court to the right.[33]

A conservative effort to remake American law was long in coming. Richard Nixon ran for president in 1968 on a platform of reversing liberal Warren Court rulings. Once he was in office, the argument for judicial restraint was also relied on to insulate executive power from judicial review. Alexander Bickel's thesis in *The Least Dangerous Branch*, that judicial review is inherently problematic in a democracy because it is countermajoritarian, was the

touchstone in the Nixon administration. In later years, after *Roe v. Wade*, the Supreme Court became an even more pressing target of conservatives. By the Bush years, Bickel had been relegated to the sidelines, and the work of a new generation of scholars emerged as influential. Their starting point was not Bickel's, that the design of our constitutional system required a restrained role for courts. Instead, they argued that the original meaning of the Constitution set the appropriate terms of government power and determined the nature of rights. Bickel's theory of judicial restraint left policy choices largely to the political branches, but originalism was consistent with a more prominent role for the courts, which could restrain Congress and the states when they violated an original understanding of the Constitution. Under a reading of constitutional provisions on executive power championed by some conservatives, however, judicial power diminished when it came to the president.[34]

One aspect of a broader conservative legal movement was the Federalist Society. Organized by Yale and Chicago law students in the early 1980s, it was initially intended simply as a way for conservatives to find each other in a predominantly liberal law school environment. It grew into an effective organization that facilitated mentorship and networking among legal conservatives. In the Bush years the organization became a pipeline for legal positions at all levels in the administration. Meanwhile, religious groups focused on cultural issues such as prayer in school and abortion, new conservative public interest law firms handled cases challenging affirmative action programs and gun regulations, and an academic law and economics movement sought to reshape academic thinking about private law. One of the goals was a more conservative judiciary.[35]

Abortion rights were a principal target of the effort to move the Court to the right. Despite the Court's conservative majority, *Roe v. Wade* had not been formally overturned. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* in 1992, the Court abandoned *Roe*'s analytical structure and its insistence that abortion restrictions impinged on fundamental rights, therefore requiring

strict judicial scrutiny. *Casey* allowed to stand regulations burdening abortion rights that would have been invalid under *Roe*. The Court appeared to draw a line in a case about a late-term abortion procedure called by its opponents "partial-birth abortion." In *Stenberg v. Carhart* (*Carhart I*) in 2000, a 5–4 majority struck down a Nebraska law that outlawed the procedure, with no exception for situations in which a doctor thought it necessary to protect a woman's health. Without an exception for health reasons, the Court held that the law constituted an "undue burden" on women's right to reproductive privacy. Justice O'Connor voted with the majority.[36]

Congress responded to the case, passing a new ban on the procedure in 2003. The Court then granted review in a case that seemed a mirror image of *Carhart I*. Justice O'Connor resigned in July 2006, before the case was argued, raising the question of whether a change in Court personnel would result in a reversal. *Gonzales v. Carhart* (*Carhart II*) was decided the next April. With Justice Alito joining a new five-vote majority, the Supreme Court upheld the ban on the procedure. More striking than the different outcome, however, was the rhetoric of Justice Kennedy's surprisingly graphic majority opinion, which described the intimate details of the way the body of a fetus would be torn apart and expressed concern about the impact of such a procedure on women's mental health. Called "wrenching" and "melodramatic" by Tony Mauro, the opinion laid out the new terms of the Court's reproductive rights jurisprudence. The narrative structure of *Carhart II* placed the perspective of the fetus itself front and center. The fetus had not attained formal legal personhood, but it nevertheless gained a powerful spokesperson: a majority on the U.S. Supreme Court.[37]

Another focus of the conservative legal strategy was an attack on government programs related to race, such as affirmative action. The Court upheld the limited use of affirmative action in higher education in *Grutter v. Bollinger* in 2003, with Justice O'Connor providing a crucial vote. In 2007, after O'Connor's departure, the Court struck down voluntarily adopted student assignment plans that took race into account to maintain some degree of racial bal-

ance in public schools in *Parents Involved in Community Schools v. Seattle School District*. Chief Justice John Roberts argued in the Court's plurality opinion that constitutional equality required colorblindness, relying for support on *Brown v. Board of Education*, sparking a debate over whether the historic ruling that schools may not be segregated by race required as well that any use of race, even to maintain desegregation, was unlawful. Geoffrey Stone characterized the reliance on *Brown* in this case as "willful ignorance of American history." The Court's colorblindness analysis, many argued, would ironically lead to the result that more children would go to predominantly one-race schools, reinforcing a racial identifiability that was in tension with the premise underlying colorblindness, that race should no longer matter.[38]

The Court furthered a conservative constitutional agenda in other areas, but the Court did not predictably embrace conservative outcomes. In *District of Columbia v. Heller* (2008), the Court struck down a District of Columbia ban on handguns, ruling that the Second Amendment protects an individual's right to bear arms. In the area of gay rights, however, a ruling in *Lawrence v. Texas* (2003), finding a sodomy conviction to be unconstitutional, seemed downright liberal. Relying on an analysis of constitutional liberty, the Court reversed a 1986 ruling and held that consensual sex between adults of the same gender was protected by the due process clause.[39]

Federalism was long a favorite of constitutional conservatives hoping to limit the scope of federal government power by protecting state autonomy. During the Bush years the Court first advanced but then appeared to retreat from a conservative "federalism revolution." Chief Justice William Rehnquist was "the Court's leading advocate" of the New Right critique of the welfare state, as Thomas Keck puts it. Rehnquist's view was that the Tenth Amendment and the role of states in the U.S. constitutional system required limitation of federal power in order to maintain the proper role for the states. This approach promised to roll back the expansion of federal power since the New Deal, reversing a trend in Su-

preme Court decisions since the late 1930s. In this area, Keck argues, "conservative justices proved willing to abandon their commitment to restraint in an effort to enforce what they saw as fundamental principles of limited government." This "revolution" had its limits, however. Kathleen Sullivan argues that "the Court did more to change the constitutional jurisprudence of federalism than it did to realign actual constitutional power."[40]

The most important Rehnquist Court federalism cases were decided before George W. Bush took office. In the early years of the Bush administration, the Court furthered its federalism-related rulings in the area of state sovereign immunity under the Eleventh Amendment, which protects state autonomy by limiting the ability of individuals to sue states. Outcomes were not predictable, however, and Rehnquist himself authored a 2003 opinion allowing individuals to sue states that violated the Family and Medical Leave Act. It remains unclear whether the Roberts Court will build on Rehnquist-era federalism jurisprudence. Christopher Banks and Jon Blakeman have suggested that "although there is a reconfigured 'States' Rights Five' voting coalition," neither Roberts nor Alito endorses rigid viewpoints about federalism, and it "remains uncertain if the Court will return to the type of aggressive new federalism which arguably defined the legacy of the Rehnquist Court." Differences over federalism were just one example of the way the lack of a unified approach limited the ability of the conservative majority to consolidate its power.[41]

When it came to actions of the executive branch, however, national security put new strains on federalism. "The war on terror has created new frontiers of federalism," Susan N. Herman argues, as the federal government "has attempted to enlist state and local law enforcement officials as its 'hands and feet.'" This turn was consistent with broader Bush administration policy. The president embraced "big government conservatism" and called on Congress to expand federal power in areas beyond national security. In education, for example, the No Child Left Behind Act established federal standards for school achievement and enforced costly penal-

ties on schools that failed to meet them, expanding the federal government's role in an area where states and local governments hoped to maintain some autonomy.[42]

LAW AND THE CRISIS PRESIDENCY

The dangers facing the nation took on a new character in the last months of the Bush administration as the United States and the world plunged into an economic crisis. President Bush, by now weakened and unpopular, was nevertheless able to get through Congress broad authority to intervene in the economy. Americans worried about the impact of an economic downturn on their communities and on U.S. national security and the nation's standing as a world power, as global skepticism about American security policy was now supplanted by criticism of American economic policy. This new crisis was the bookend to an administration launched in a political crisis and then legitimated by a security crisis.

The Bush administration invoked security to pursue its goals, but the strategy threatened to collapse on itself. Fear was needed to justify expansive power, but if fear persisted, that suggested the powers granted had not achieved their purpose. And there were too many things to be afraid of in the waning days of the Bush presidency. Amid the deepening economic downturn, former advocates of the free market found federal economic regulation suddenly comforting. As his hold on power frayed, President Bush worked to embed remnants of the conservative legal agenda in federal regulations, from a rule that allowed greater dumping of mine waste in rivers to one that enabled medical personnel to refuse services that conflicted with their religious faith, even if that included refusing to prescribe birth control.[43] In these and other actions, the president deployed law to isolate and insulate his power, as long as he could.

CHAPTER 3
A Sword and a Shield

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[1] E.g., Louis Fisher, *The Constitution and 9/11: Recurring Threats to America's Freedoms* (Lawrence: University Press of Kansas, 2008), 361–62; David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*, 2nd ed. (New York: New Press, 2005), 206–7, 228–29; David Cole and James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties for National Security*, 3rd ed. (New York: New Press, 2005), 148–49, 174–75; the Constitution Project, "Statement of the Coalition to Defend Checks and Balances," October 2006, http://www.constitutionproject.org/pdf/Checks_and_Balances_Initial_Statement.pdf, 1–2. More sympathetic works include Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (New York: Oxford University Press, 2006).

[2] *Bush v. Gore*, 531 U.S. 1046, 1047 (2000); *Bush v. Gore*, 531 U.S. 98, 109, 111 (2000); Howard Gillman, *The Votes That Counted: How the Court Decided the 2000 Election* (Chicago: University of Chicago Press, 2001), 152–59.

[3] Gillman, *The Votes That Counted*, 151–71; Keith Whittington, "Yet Another Constitutional Crisis?" *William and Mary Law Re-*

view 43 (2001–2): 2093–2149; Mark V. Tushnet, "Renormalizing *Bush v. Gore*: An Anticipatory Intellectual History," *Georgetown Law Journal* 90 (November 2001): 113–25.

[4] Gillman, *The Votes That Counted*, 151–52.

[5] David Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (New York: Little, Brown, 2007), 73–75, 85–118; John Yoo, "How the Presidency Regained Its Balance," *New York Times*, September 17, 2006, http://www.nytimes.com/2006/09/17/opinion/17yoo.html?_r=3&oref=slogin&oref=slogin&oref=slogin.

[6] Jack Goldsmith, *The Terror Presidency* (New York: W. W. Norton, 2007), 9, 22–24, 31–32. On the history of the Office of Legal Council, see Frederick A. O. Schwarz Jr. and Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (New York: New Press, 2007), 187–99. On Vice President Cheney's role, see Barton Gellman, *Angler: The Cheney Vice Presidency* (New York: Penguin Press, 2008), 131–94.

[7] Tim Golden, "A Junior Aide Had a Big Role in Terror Policy," *New York Times*, December 23, 2005, http://www.nytimes.com/2005/12/23/politics/23yoo.html?_r=1&scp=1&sq=tim%20golden%20a%20junior%20aid%20yoo&st=cse&oref=slogin; Goldsmith, *The Terror Presidency*, 22–23.

[8] Jane Mayer, "The Hidden Power: The Legal Mind behind the White House's War on Terror," July 3, 2006, *New Yorker*, http://www.newyorker.com/archive/2006/07/03/060703fa_fact1; idem, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008), 48–50, 62–63; Goldsmith, *Terror Presidency*, 25–30, 77–79, 171.

[9] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001*, Public Law 107-56 (2001), *U.S. Statutes at Large* 115 (2001): 272; *Authorization for Use of Military Force*, Public Law 107-40, *U.S. Statutes at Large* 115 (2001): 224; Golden, "A Junior Aide"; John C. Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago: University of Chicago Press, 2005), 17–24; John C. Yoo, "Memorandum Opinion

for the Deputy Counsel to the President," September 25, 2001, http://www.usdoj.gov/olc/warpowers925.htm; Jay S. Bybee, memorandum for Alberto Gonzales, "Re: Standards of Conduct for Interrogation under 18 U.S.C. Secs. 2340–2340A," August 1, 2002, http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_pdf, 1–2, 36–39; Goldsmith, *Terror Presidency*, 148; Jay S. Bybee, memorandum for Alberto R. Gonzales and William J. Haynes II, January 22, 2002, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf, 1–2, 9–11. On the unitary executive thesis, see Steven G. Calabresi and Kevin H. Rhodes, "The Structural Constitution: Unitary Executive, Plural Judiciary," *Harvard Law Review* 105 (April 1992): 1153–1216; Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (New Haven: Yale University Press, 2008).

The unitary executive thesis threatened to displace the analysis of presidential power articulated by Justice Robert Jackson in the Korean War–era Steel seizure case. Jackson's analysis in a concurrence, widely relied on thereafter, suggested that the president's power varied depending on whether the president was acting pursuant to a grant of power by Congress, when it was at its height; in opposition to Congress, when it was at its lowest point; or in an in-between "zone of twilight." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (the Steel Seizure Case). See Louis Fisher, *Presidential War Power*, 2nd rev. ed. (Lawrence: University Press of Kansas, 2004), 101–31, 190–91.

[10] Bybee, memorandum for Alberto Gonzales, "Re: Standards of Conduct for Interrogation"; Goldsmith, *Terror Presidency*, 148. The memo is signed by Bybee but according to Goldsmith was written by John Yoo.

[11] Scott Shane, "Waterboarding Used 266 Times on 2 Suspects," *New York Times*, April 19, 2009, http://www.nytimes.com/2009/04/20/world/20detain.html; Steven G. Bradbury, memorandum for John A. Rizzo, May 30, 2005, http://luxmedia.vo.llnwd.net/o10/clients/aclu/olc_05302005_bradbury.pdf.

[12] Warren Richey, "Conservatives Near Lock on US Courts,"

Christian Science Monitor, April 14, 2005, http://www.csmonitor.com/2005/0414/p01s02-uspo.html; Savage, *Takeover*, 73.

[13] Mayer, *The Dark Side*, 52, 108–10, 120–25; Fisher, *The Constitution and 9-11*, 197; Goldsmith, *Terror Presidency*, 100–101; Schwarz and Huq, *Unchecked and Unbalanced*, 74, 103.

[14] "Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," November 13, 2001, http://www.presidency.ucsb.edu/ws/index.php?pid=63124; Amnesty International, "United States of America: No Substitute for Habeas Corpus: Six Years without Judicial Review in Guantánamo," November 1, 2007, http://www.amnesty.org/en/library/asset/AMR51/163/2007/en/7577c886-a6c3-11dc-a534-f71c5306095d/amr511632007en.html; Cole, *Terrorism and the Constitution*, 183–84.

[15] Goldsmith, *Terror Presidency*, 126, 128.

[16] Ibid., 131–33; Philip Zelikow, "Legal Policy for a Twilight War," *Houston Journal of International Law* 30 (Fall 2007): 89–109 (lecture delivered April 26, 2007).

[17] Goldsmith, *Terror Presidency*, 126, 128. On warlaw, see David Kennedy, *Of War and Law* (Princeton: Princeton University Press, 2006).

[18] Ruti Teitel, "Empire's Law: Foreign Relations by Presidential Fiat," in *September 11 in History: A Watershed Moment?*, ed. Mary L. Dudziak (Durham, NC: Duke University Press, 2003), 198–200.

The effort to avoid the legal judgment of others informed the vociferous arguments against the reliance on "foreign law" in American courts. Compare, e.g., Steven G. Calabresi, "'A Shining City on a Hill': American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law," *Boston University Law Review* 86 (2006): 1335–1416, with Mark Tushnet, "Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars," *University of Baltimore Law Review* 35 (2006): 299–312. See also "Symposium: 'Outsourcing Authority?': Citation to Foreign Court Precedent in Domestic Jurisprudence," *Albany Law Review* 69 (2006): 645–888.

[19] John Yoo, *War by Other Means: An Insider's Account of the War on Terror* (2006), 71; Jennifer C. Evans, "Comment, Hijacking Civil Liberties: The USA Patriot Act of 2001," *Loyola University of Chicago Law Journal* 33 (2002): 933, 967; Beryl A. Howell, "Seven Weeks: The Making of the US Patriot Act," *George Washington Law Review* 72 (2004): 1145, 1178–79; Julie Farnam, *U.S. Immigration Laws under the Threat of Terrorism* (Algora: Algora Publishing), 50; Mary Beth Seridan, "Immigration Law as Anti-Terrorism Tool," *Washington Post*, June 13, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/06/12/AR2005061201441.html. See also Margaret Chon and Donna E. Arzt, "Walking While Muslim," *Journal of Law and Contemporary Problems* 68 (2005): 215–54.

[20] The issue of war's perceived temporal boundaries and the way they affect ideas about law is taken up in Mary L. Dudziak, "Law, War, and the History of Time," *California Law Review*, 2010.

[21] *Korematsu v. United States*, 323 U.S. 214, 219 (1944). On criticism of *Korematsu*, see, e.g., Peter Irons, *Justice at War: The Story of the Japanese-American Internment Cases* (New York: Oxford University Press, 1983); Jacobus TenBroek, Edward Norton Barnhart, and Floyd W. Matson, *Prejudice, War, and the Constitution* (Berkeley and Los Angeles: University of California Press, 1968).

[22] *Rasul v. Bush*, 542 U.S. 466, 485 (2004); Benjamin Wittes and Zaahira Wyne, "The Current Detainee Population of Guantánamo: An Empirical Study," Brookings Institute, December 16, 2008, http://www.brookings.edu/reports/2008/1216_detainees_wittes.aspx.

[23] *U.S. Code* 18 (1948), § 4001(a); *Hamdi v. Rumsfeld*, 542 U.S. 507, 520–21 (2004).

[24] *Hamdi*, 542 U.S. at 579; *Hamdi*, 542 U.S. at 573 (Scalia, J., dissenting); *Hamdi*, 542 U.S. at 589 (Thomas, J., dissenting).

[25] Goldsmith, *Terror Presidency*, 135–39.

[26] *Detainee Treatment Act of 2005*, Public Law 109-148 §§ 1003, 1004 (2005); *Hamdan v. Rumsfeld*, 548 U.S. 557, 655 (2006); *Military Commissions Act of 2006*, Public Law 109-366 (2006). The Court held that the Military Commissions Act of 2006 was an un-

constitutional suspension of the *writ of habeas corpus* in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

[27] *Padilla v. Hanft*, 423 F.3d 386, 396 (4th Cir. 2005); *Padilla v. Hanft*, 423 F.3d 582, 584-86 (4th Cir. 2005). The authority cited by administration lawyers for the detention of Padilla as an unlawful enemy combatant was the *Authorization of the Use of Military Force*, which authorized the president to "use all necessary force against . . . such nations, organizations, or *persons*" (emphasis added). The jurisdictional problem in the case was that the Court ruled that Padilla had brought his *habeas* petition in the wrong federal court, for the federal district court in New York did not have personal jurisdiction over the defendant, the commanding officer of the South Carolina brig where Padilla was being held. The case was dismissed without prejudice so that Padilla could refile in a proper court in South Carolina. *Authorization for Use of Military Force*, Public Law 107-40, *U.S. Statutes at Large* 115 (2001): 224; *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004).

[28] *Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006); Peter Whoriskey, "Jury Convicts Jose Padilla of Terror Charges," *Washington Post*, August 17, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/08/16/AR2007081601009.html; Debra Cassens Weiss, "Judge Lowers Padilla Sentence Because of Harsh Confinement," *ABA Journal*, January 22, 2008, http://www.abajournal.com/news/judge_lowers_padilla_sentence_because_of_harsh_confinement; Liz Aloi, "Luttig leaves bench for corporate post," SCOTUS Blog, May 10, 2006, http://www.scotusblog.com/wp/luttig-leaves-bench-for-corporate-post.

[29] *American Civil Liberties Union v. National Security Agency*, 467 F.3d 590, 653, 687–88 (6th Cir. 2007). Some detainees were released, but not pursuant to court orders. Some releases resulted from pressure from human rights organizations or from the detainee's home country. According to Pierre-Richard Prosper, American Ambassador-at-Large for War Crimes Issues, 207 detainees were transferred or released following military tribunal hearings and other reviews by February 25, 2007. "U.S. Releases Juveniles from Guantanamo Prison," MSNBC.com, January 29,

2004, http://www.msnbc.msn.com/id/4096774/; "Guantanamo Inmates back in France," BBC News.com, July 27, 2004, http://news.bbc.co.uk/2/hi/americas/3928767.stm; Declaration of Pierre-Richard Prosper, *el-Mashad v. Bush*, no. 2005-0270 (U.S. District Court for the District of Columbia, February 25, 2005), 2–3, http://www.state.gov/documents/organization/45849.pdf.

[30] *Boumediene v. Bush*, 128 S. Ct. 2229, 2277, 2270 (2008). For Justice Scalia in dissent, however, a traditional wartime frame should continue to guide the Court.

[31] *Boumediene*, 128 S. Ct. at 2275; William Glaberson, "Despite Ruling, Detainee Cases Facing Delays," *New York Times*, October 4, 2008, http://www.nytimes.com/2008/10/05/us/05gitmo.html; Lyle Denniston, "Judge orders five detainees freed," SCOTUS Blog, November 20, 2008, http://www.scotusblog.com/wp/judge-orders-five-detainees-freed/; William Glaberson, "U.S. Is Set to Release 3 Detainees From Base," *New York Times*, December 15, 2008, http://www.nytimes.com/2008/12/16/washington/16gitmo.html?scp=4&sq=guantanamo%20detainees%20released%20bosnia&st=cse; Steven Erlanger, "Ex-Detainee Describes His 7 Years at Guantánamo," *New York Times*, May 26, 2009, http://www.nytimes.com/2009/05/27/world/europe/27paris.html?scp=8&sq=guantanamo%20detainees%20released%20bosnia&st=cse. See also Wittes and Wyne, "The Current Detainee Population of Guantánamo."

[32] David Alistair Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (Chicago: University of Chicago Press, 1999), 91–94; Greenberg, *Supreme Conflict*, 263–315; "Reading the Roberts Court: Four Advocates Discuss the Court's First Full Term under Roberts and the Emergence of Kennedy" (panel discussion), *Legal Times*, August 17, 2007, http://www.law.com/jsp/article.jsp?id=1187168522747. Of the Roberts Court, Erwin Chemerinsky writes that it "is the most conservative Court since the 1930s." He attributes this to Justices Roberts and Alito who have "voted in a conservative direction in virtually every single ideologically divided case since they came on the Court." Erwin Chemerinsky, "The Roberts Court at Age Three," *Wayne State Law Review* 54 (Fall 2008): 947, 948, 955. See also Charles

Whitebread, "The Conservative Kennedy Court—What a Difference a Single Justice Can Make: The 2006–2007 Term of the United States Supreme Court," *Whittier Law Review* 29 (2007): 1–2. For a different assessment, see Jonathan H. Adler, "Getting the Roberts Court Right: A Response to Chemerinsky," *Wayne State Law Review* 54 (Fall 2008): 983. On divisions among the justices, see Pamela S. Karlan, "The Law of Small Numbers: *Gonzales v. Carhart*, Parents Involved in Community Schools, and Some Themes from the First Full Term of the Roberts Court," *North Carolina Law Review* 86 (June 2008): 1369; Maxwell L. Stearns, "Standing at the Crossroads: The Roberts Court in Historical Perspective," *Notre Dame Law Review* 83 (2008): 875, 937–38.

[33] Steven M. Teles, *The Rise of the Conservative Legal Movement* (Princeton: Princeton University Press, 2008), 1, 4–5, 160–61.

[34] Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: University of Chicago Press, 2004), 61–65, 97–103, 108, 110–13; Teles, *Conservative Legal Movement*, 22–46, 60, 145–46; Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New York: Bobbs-Merrill Co., 1962), 16–23; Steven G. Calabresi and Kevin H. Rhodes, "The Structural Constitution: Unitary Executive, Plural Judiciary," *Harvard Law Review* 105 (April 1992): 1153–1216; Yoo, *The Powers of War and Peace* , 17–29. Other originalists did not share the unitary executive thesis. Ingrid Wuerth argues that much new originalist scholarship says little about executive power. Ingrid B. Wuerth, "An Originalism for Foreign Affairs?" *St. Louis University Law Review*, 53 (2008): 8–13.

[35] Teles, *Conservative Legal Movement*, 137–42, 265–77, passim.

[36] Keck, *Most Activist Supreme Court*, 130, 135, 172; *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833, 876 (1992); *Stenberg v. Carhart*, 530 U.S. 914, 939 (2000) (*Carhart I*). See Reva B. Siegel, "Dignity and the Politics of Protection: Abortion Restrictions Under *Casey/Carhart*," *Yale Law Journal* 117 (2008): 1694–1800.

[37] Partial-Birth Abortion Ban Act of 2003, 18 U.S. Code Sec. 1531; *Gonzales v. Carhart*, 550 U.S. 124, 135–40, 168 (2007) (*Carhart II*); Tony Mauro, "Kennedy Reshapes Abortion Conflict as He Refines 'Swing Vote' Role," *Legal Times*, April 23, 2007, http://www.law.com/jsp/article.jsp?id=1177059874125.

The stark language of violence in *Carhart II* contrasted with the dispassionate opinion for the Court in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008), a Second Amendment case limiting the power of government to control firearms. The context, "the problem of handgun violence in this country," was mentioned only as an afterthought at the end of Scalia's majority opinion.

[38] *Grutter v. Bollinger*, 539 U.S. 306, 310 (2003); *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 746-49 (2007); *Brown v. Board of Education*, 347 U.S. 483 (1954); Adam Liptak, "The Same Words, But Differing Views," *New York Times*, June 29, 2007, http://www.nytimes.com/2007/06/29/us/29assess.html?_r=2&oref=slogin&oref=slogin; Geoffrey Stone, "The Roberts Court, Stare Decisis, and the Future of Constitutional Law," *Tulane Law Review* 82 (March 2008): 1533, 1540; Keck, *Most Activist Supreme Court*, 5–6, 143–48, 181–82, 186–90.

[39] *Heller* at 2821–22; *Lawrence v. Texas*, 539, 578–79 U.S. 558 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986); Tushnet, *A Court Divided*, 169–76, 231–39.

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