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FOREWORD

Article II: The Uses and Abuses of Executive Power

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This issue of the *University of Miami Law Review* is comprised of papers delivered during the live proceedings of the *Law Review's* annual symposium held on February 24, 2007. The symposium, entitled *Article II: The Uses and Abuses of Executive Power*, was organized to create a venue for legal scholars and practitioners to engage in sustained analysis of the scope and significance of the Bush administration's invocation of Article II of the U.S. Constitution as legal authority for its warrantless surveillance program, its authorization of "harsh interrogation techniques," extraordinary renditions, indefinite detentions, military commissions, and other assertions of executive power that incrementally and now cumulatively have come to define the administration's global War on Terror.¹ The idea for this symposium was originally inspired by the proceedings of a remarkable hearing before the Senate Judiciary Committee on March 31, 2006, entitled *An Examination of the Call to Cen-*

* Professor of Law and Director, University of Miami School of Law Center for Hispanic and Caribbean Legal Studies. Thanks to the Honorable Elizabeth Holtzman for providing an example of professional courage, to University of Miami President Donna Shalala for supporting this conference, to Projects Editor Kelly Feig for her administrative skills and unfailing grace under pressure, to Editor in Chief Todd Allison for the good cheer with which he deploys unparalleled diplomacy, to my colleagues Ken Casebeer, Marnie Mahoney, Mario Barnes, Steve Vladeck, Zanita Fenton, David Abraham, Steve Schnably, and Rick Williamson for the excellence of their substantive contributions to the live discussions and written record of this important conference, and most importantly, to Madeleine M. Plasencia, for her unwavering friendship, brilliant insights, and substantial contributions to the conference proceedings and the production of this foreword.

1. See *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833, 57,833 (Nov. 13, 2001).

sure the President.² The hearing was organized and chaired by U.S. Senator Arlen Specter (R-Pa.) in response to a resolution proposed by Senator Russ Feingold (D-Wis.) to censure President George W. Bush for secretly authorizing the National Security Agency to engage in warrantless electronic surveillance in violation of the Foreign Intelligence Surveillance Act of 1978.³

The committee's censure hearing had its own origin and context. On December 16, 2005, the *New York Times* published a story revealing the existence of the Bush administration's warrantless electronic surveillance program.⁴ On December 19, 2005, the President held a press conference in which he confirmed that he had authorized the surveillance program,⁵ and thereafter Bush officials asserted various legal arguments in support of the President's actions including assertions that Congress had in fact authorized the surveillance program through the Authorization for the Use of Military Force and, equally if not more provocatively, that the President did not need statutory authority to conduct warrantless surveillance as part of his global War on Terror because he had inherent authority to do so under Article II of the U.S. Constitution.⁶

This was not the first time, nor the last, that the Bush administration would seek to use Article II as legal justification for extraordinary assertions of executive power in connection with its global War on Terror. Internal legal memos released by the Justice Department in June 2004, as well as legal arguments advanced before the Supreme Court in

2. *An Examination of the Call To Censure the President: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006), available at http://www.fas.org/irp/congress/2006_hr/censure.html [hereinafter *An Examination of the Call To Censure the President*].

3. S. Res. 398, 109th Cong., 152 CONG. REC. S2041-01 (2006).

4. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

5. Press Release, White House, Press Conference of the President (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html>.

6. Press Release, White House, Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html>. Attorney General Gonzales explained,

[W]e believe signals intelligence is . . . a fundamental incident of war, and we believe [it] has been authorized by the Congress. . . . even though signals intelligence is not mentioned in the authorization to use force

I might also add that we also believe the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity.

*Hamdi v. Rumsfeld*⁷ and *Hamdan v. Rumsfeld*⁸ reveal Article II arguments underlying a breathtaking array of asserted executive powers, including the power to classify individuals, indeed entire groups, as “unlawful enemy combatants”; to order indefinite detentions of citizens and noncitizens alike both within and beyond the territorial boundaries of the United States; to create military tribunals and establish trial procedures in violation of otherwise applicable treaties and statutes; to suspend the Geneva Conventions; to ignore even preemptory norms of customary international law, and to buttress claims that application of the federal antitorture statute to interrogations performed under the authority of the commander in chief would infringe upon the President’s Article II powers.⁹ Against this backdrop, the Bush administration’s resort to Article II for legal justification to head off the gathering scandal over its secret domestic surveillance program was hardly surprising.

What was surprising was the censure hearing held in the Senate Judiciary Committee on Friday, March 31, 2006. Here was a Republican-controlled committee of the Republican-controlled Senate examining a call to censure a Republican President at the request of a Democratic Senator. Could it be the President had gone too far even for his own party? The five Republicans at the hearing clearly outnumbered Senators Leahy and Feingold, the only two Democrats present. Did this mean that constitutional principle was poised to surge over party interest? If so, where then were Senators Kennedy, Biden, Feinstein, and Schumer?¹⁰ Surely they would want to be present for so momentous a turning point, or was this hearing a political stunt—a staged event for political consumption by the American people? And if so, to what end? Was it designed to assure us that constitutional checks and balances had survived the consolidation of a one party government? A public performance of intra-party conflict orchestrated to create the illusion of interbranch accountability—a tempest in the teapot of a censure resolution. What, after all, was the significance of a censure resolution in the

7. 542 U.S. 507 (2004) (“The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government’s alternative position, that Congress has in fact authorized Hamdi’s detention . . .”).

8. 548 U.S. 557 (2006); see also Brief for Respondents, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184).

9. See *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 3–380 (Karen J. Greenberg & Joshua L. Dratel, eds. 2005).

10. See, e.g., David D. Kirkpatrick, *Call To Censure Is Answered by a Mostly Empty Echo*, N.Y. TIMES, Apr. 1, 2006, at A11; Dana Milbank, *The Feingold Resolution and the Sound of Silence*, WASH. POST, Mar. 15, 2006, available at 2006 WLNR 4272031; David Welna, *Sen. Feingold Finds Little Support in Censure Motion*, NPR.ORG, Mar. 31, 2006, <http://www.npr.org/templates/story/story.php?storyId=5316457>.

Senate's Judiciary Committee when, outside the committee, the ever louder call was for impeachment?¹¹

A sticking point during the censure hearing was not so much the warrantless surveillance program, itself, as the legal theory the Bush administration had advanced in support of the program. Senator Feingold, the proponent of the call for censure, put the matter quite starkly:

[I]f the President has the inherent authority to authorize whatever surveillance he thinks is necessary, then he surely will ignore [any future legislation] just as he has ignored FISA on many, many occasions.

. . . .

If the President's legal theory . . . is correct, then FISA is a dead letter. All of the supposed protections for civil liberties contained in the reauthorization of the PATRIOT Act that we just passed are a cruel hoax, and any future legislation we might pass regarding surveillance or national security is a waste of time and a charade. Under this theory, we no longer have a constitutional system consisting of three coequal branches of Government. We have a monarchy.¹²

In Feingold's view, the legal arguments advanced in support of the President's warrantless domestic surveillance program not only raise questions about the scope of the President's inherent powers under Article II and the relationship between those powers and the powers of Congress under Article I and the Judiciary under Article III, but also—and more fundamentally—place in doubt the President's commitment to be governed by the rule of law.¹³ Accordinally, in Feingold's view, a resolution of censure was a necessary step for the Senate to avoid complicity in the President's lawlessness and resist his efforts to dismantle the constitutional structure of American government: "None of us here can predict how history will view this current episode, but I do hope that 30 years from now this Senate will not be seen to have backed down in the face of such a grave challenge to our constitutional system."¹⁴

11. See, e.g., Sarah Baxter, 'Impeach Bush' Chorus Grows, *SUNDAY TIMES* (London), Mar. 19, 2006, at 29, available at <http://www.timesonline.co.uk/tol/news/world/article742744.ece>; Elizabeth Holtzman, *The Impeachment of George W. Bush*, *THE NATION*, Jan. 30, 2006, at 11, available at <http://www.thenation.com/docprint.mhtml?i=20060130&s=holtzman>; Garrison Keillor, *Impeach Bush*, *SALON.COM*, Mar. 1, 2006, <http://www.salon.com/opinion/feature/2006/03/01/keillor>; *National Briefing New England: Vermont: Senate Says, Impeach Bush*, *N.Y. TIMES*, Apr. 21, 2007, at A12; *National Briefing West: California: Push To Impeach Bush*, *N.Y. TIMES*, Mar. 2, 2006, at A22.

12. *An Examination of the Call To Censure the President*, *supra* note 2 (statement of Senator Russ Feingold, Member, Senate Committee on the Judiciary).

13. *Id.* ("We can fight terrorism without breaking the law. The rule of law is central to who we are as a people, and the President must return to the law. He must acknowledge and be held accountable for his illegal actions, and also for misleading the American people both before and after the program was revealed.")

14. *Id.*

Despite the high rhetoric and spectacular performances by some members of the committee, the censure hearing produced no censure resolution. This hearing was, however, the single most immediate and direct influence that inspired me to imagine and, thereafter, to organize a symposium exploring the uses and abuses of executive power in the Bush administration's global War on Terror. This is because the hearing raised more questions than it answered. To me, the viewer, the censure hearing had the air of a choreographed performance by Senate actors whose institutional capacity to enforce constitutional limits on aggressive assertions of executive power was placed in serious doubt by a spectacle of their own production.¹⁵ The rhetorical maneuvers deployed at the hearing obfuscated and confused every major issue the hearing was called to examine, not least of which was the fundamental issue whether the President should be censured.¹⁶

This *Law Review* issue constitutes a written record of a conference organized to examine questions the Senate Judiciary Committee's Censure Hearing left unanswered and, in some instances, unasked. It opens with a contribution by the Honorable Elizabeth Holtzman delivered as the conference keynote presentation. Unlike Senator Lindsay Graham, who during the censure hearing repeatedly refused to recognize any historical parallels that might justify a Senate censure of the President,¹⁷ in Holtzman's view historical parallels to the Nixon administration are not only obvious, but compelling reasons, not merely for censure, but for impeachment of the President.

15. See *An Examination of the Call To Censure the President*, *supra* note 2. Senator Patrick Leahy, Ranking Member of the Senate Committee on the Judiciary, stated,

[B]ecause the Republican-controlled Congress has not conducted real oversight, and because the attempts that this Committee had made on oversight have been stonewalled by the administration, we don't know the extent of the administration's domestic spying activities. But we know that the administration has secretly spied on Americans without attempting to comply with FISA, and we know that the legal justifications it has offered . . . are patently flimsy.

I therefore have no hesitation in condemning the President for secretly and systematically violating the laws of the United States of America. I have no doubt that such a conclusion will be history's verdict. History will evaluate how diligently the Republican-controlled Congress performed the oversight duties envisioned by the Founders. As of this moment, history's judgment of the diligence and resolve of the Republican-controlled Congress is unlikely to be kind.

Id.

16. For an extended critical analysis of the proceedings of this censure hearing, see Elizabeth M. Iglesias, *The Spectacle of Censure* (forthcoming 2008) (on file with the author).

17. *An Examination of the Call To Censure the President*, *supra* note 2 ("My point is this is apples and oranges. Anybody who believes that Richard Nixon was relying on some inherent authority argument to allow himself to break into a political opponent is recreating history. This debate is about when does the power of the President begin and end in a time of war. This is an honest, sincere debate.").

Holtzman's speech, entitled *Abuses of Presidential Power: Impeachment as a Remedy*, centers on the President's constitutional duty to "take care that the laws are faithfully executed," a charge that requires the President to both "take care" to execute the laws and to do so "faithfully."¹⁸ Having served as a member of the House Judiciary Committee that undertook impeachment proceedings against President Richard M. Nixon, Holtzman is acutely aware of the constitutional imperative underlying the impeachment process. She reminds us that the impeachment power was specifically provided for in the Constitution as an important protection against abuses of power by officials, whose positions in high office might otherwise render them above the law.¹⁹

Reviewing the gamut of abuses constituting "high crimes and misdemeanors," Holtzman draws historical parallels between the abuses of the Nixon administration and the conduct of the federal government under the current Bush administration. According to Holtzman, illegal surveillance of political enemies, the use of governmental agencies to harass opponents and dissenters, failure to correct false testimony by the attorney general are common themes of abuse that mar both the Nixon and the Bush administrations.²⁰ Beyond noting such historical parallels, Holtzman outlines four instances in which she believes that President Bush's failure to discharge his constitutional duty to "take care" and do so "faithfully," whether taken together or separately, constitute impeachable offenses: (1) the unilateral invocation of domestic national security wiretapping in violation of the Foreign Intelligence Surveillance Act of 1978 (FISA);²¹ (2) the campaign of disinformation and lies designed to deceive Congress and the American people into approving a war in Iraq after the attacks of September 11;²² (3) the failure to take care that laws requiring the humane treatment and prohibiting the torture of persons detained under the authority of the United States are faithfully executed;²³ and (4) his gross failure to implement and faithfully execute hurricane relief following the devastation caused by Hurricane Katrina.²⁴

18. Hon. Elizabeth Holtzman, *Abuses of Presidential Power: Impeachment as a Remedy*, 62 U. MIAMI L. REV. 213, 216–17 (2008).

19. *Id.* at 213–16.

20. *Id.*

21. *Id.* at 215–18. For a review of arguments at issue in pending litigation challenging the legality of the NSA warrantless surveillance program, see Michael Avery, *The Constitutionality of Warrantless Electronic Surveillance of Suspected Foreign Threats to the National Security of the United States*, 62 U. MIAMI L. REV. 541 (2008) (drawing on arguments and briefs produced by team of lawyers representing plaintiffs challenging the surveillance program in *Center for Constitutional Rights v. Bush*, No. 06-CV-313 (S.D.N.Y. filed Jan. 17, 2006)).

22. *Id.* at 218–23.

23. *Id.* at 223–24.

24. *Id.* at 225–26.

Writing independently, Professors Dorothy Roberts and David Abraham see other historical parallels reflected in the activities through which the Bush administration has prosecuted its global War on Terror. For Roberts, images of torture and prisoner abuse at Abu Ghraib recall disturbing images from a not so distant American past in which white supremacy achieved racialized dominance through suspension of the rule of law for people of African descent.²⁵ In unflinching and vivid detail, Roberts recounts the violence directed at African Americans in slave-holding and Jim Crow America. Scenes of American soldiers engaged in extraterritorial torture at Abu Ghraib recall earlier scenes of spectacle lynchings.²⁶ Pointing to the torture culture evidenced by the images from Abu Ghraib, Roberts notes the lynching iconography of nooses, hooded and naked shackled bodies, and dogs depicted in these images. Roberts explains, "As spectacle lynchings validated white beliefs about black subjection and criminality, the familiar images of torture in Abu Ghraib helped to construct the racialized terrorist in the public imagination."²⁷

The current milieu created by the Bush administration's global War on Terror is one in which the brutal treatment of persons cast as "unlawful enemy combatants" is justified in moral and political terms. The objective and effect of these justifications is to desensitize and acculturate the American people to torture: a phenomenon Roberts calls the "normalization of torture," and sees evidenced in reported findings that only one-third of Americans believe that the abuses at Abu Ghraib constitute torture.²⁸ Roberts argues that this desensitization is produced through the racialization of persons cast as enemy combatants, and that torture is one of the practices through which this racialization is achieved.²⁹

In a similar vein, Professor Madeleine Plasencia's remarks urged conference attendees to consider the implications of the photos produced at Abu Ghraib. Drawing on Susan Sontag's book *Regarding the Pain of Others*, Plasencia noted how the circulation of these gruesome images worked to shrivel sympathy and neutralize the moral implications of the brutality captured by the photos and videos—certainly among the soldiers involved in their production.³⁰ These remarks, in turn, call to mind the work of the philosopher Hannah Arendt. Writing of the Holo-

25. Dorothy Roberts, *Torture and the Biopolitics of Race*, 62 U. MIAMI L. REV. 229, 230 (2008).

26. *Id.* at 231–34.

27. *Id.* at 234.

28. *Id.* at 244.

29. *Id.* at 240.

30. See Madeleine M. Plasencia & Elizabeth M. Iglesias, *Righting the Wrongs of Others*:

caust, Arendt noted the crucial role of brutality in legitimating the consolidation and deployment of totalitarian power:

No conceivable chronicle of any kind could succeed in turning six million dead people into a political argument. The attempt of the Nazis to fabricate a wickedness beyond vice did nothing more than establish an innocence beyond virtue. . . .

Yet Nazi policy, realized best in the phony world of propaganda, was well served by the fabrication. Had the Nazis been content merely to draw up a bill of indictment against the Jews and propagandize the notion that there are subhuman and superhuman peoples, they would hardly have succeeded in convincing common sense that the Jews were subhuman. Lying was not enough. In order to be believed, the Nazis had to fabricate reality itself and make Jews *look* subhuman. So that even today, when faced by the atrocity films, common sense will say: "But don't they look like criminals?" Or, if incapable of grasping an innocence beyond virtue and vice, people will say: "What terrible things these Jews must have done to have the Germans do this to them!"³¹

The connection Roberts draws between the torture scandal at Abu Ghraib and the history of racial terror directed at African Americans in this country raises significant questions about the political agenda underlying efforts to desensitize the American people to torture—even as Arendt's reflections on the way the Nazi regime managed to legitimate itself through the horrors produced by its inhuman brutality provide apt reminder that this logic has no necessary stopping point. Nevertheless, the fact that the deployment of brute power creates conditions in which third party observers are led to accept the subhumanity of the brutalized persons may describe the process through which desensitization is achieved, but it does not tell us why this desensitization is pursued. What exactly is the agenda driving our leader's effort to "normalize" torture?

In this vein, Professor David Abraham's article provides much to consider.³² Abraham links the Bush administration's rhetoric and policies in the global War on Terror to the rhetoric and policies of the Nazi regime.³³ Though many in this country may balk, quite violently, at any suggestion that America may be careening toward dictatorship, Abraham sees mounting and irrefutable evidence that the fascist state that

Signing Statements, Superheroes and the Spectacle of the Detainee Treatment Act of 2005 in Critical Perspective (forthcoming) (manuscript at 5–6, on file with authors).

31. Hannah Arendt, *The Image of Hell*, in *ESSAYS IN UNDERSTANDING: 1930–1954*, at 197, 199 (Jerome Kohn ed., 2005) (1994).

32. David Abraham, *The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights*, 62 U. MIAMI L. REV. 249 (2008).

33. *See id.* at 256–69.

arose in Europe in 1933 bears an uncanny resemblance to the legal, political, and rhetorical moves being made in the United States under the Bush administration. First and foremost, Bush's platform as a presidential candidate was to dismantle the welfare state, revive the legacy of Ronald Reagan, and empower the rich and religious in the name of traditional values. However, since Bush's presidency was "never democratically attained," its ability to achieve the objectives for which he was never elected "depend[ed] on the construction of a grave terrorist threat."³⁴ Once the September 11 attacks occurred, Bush's presidency began in earnest, as he declared that "my most important job as your President is to defend the homeland."³⁵

Abraham sees a nonrandom coincidence between Bush's articulation of his own President-as-prophet role and the emergence in European fascism of the image of the mystical, charismatic, personalistic Executive whose election by the whole nation, rather than the parts represented in the national assembly, rendered him the only true repository of the nation's sovereignty, and placed him above the law in times of emergency. Abraham draws a direct link between the rhetoric deployed by the President and the philosophy articulated by the Nazi legal scholar Carl Schmitt. In response to critics of Defense Secretary Donald H. Rumsfeld in 2006, Bush said this: "I hear the voices, and I read the front page, and I know the speculation. But I'm the decider, and I decide what is best."³⁶ In Abraham's view, Bush's proclamation of himself as the "Decider" has historical and political significance much deeper and more alarming than that reflected in the amused reaction of the popular press and pundits, who dismissed it as the awkward tantrum of a grammatically challenged neophyte. In Schmitt's legal philosophy, the sovereign is he who decides on the state of exception.³⁷

Against this more historically informed backdrop, Bush's proclamation of himself as Decider conjures the specter of two equally alarming positions. The first is the notion that Bush has claimed for himself

34. *Id.* at 261.

35. *Id.*

36. *Id.* at 265 n.86.

37. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 15–16 (Daniel Heller-Roazen trans., 1998). Schmitt writes that:

The exception is that which cannot be subsumed; it defies general codification, but it simultaneously reveals a specifically juridical formal element: the decision in absolute purity. . . . There is no rule that is applicable to chaos. *Order must be . . . created, and sovereign is he who definitely decides if this situation is actually effective. . . . He has the monopoly over the final decision.* Therein consists the essence of State sovereignty, which must therefore be properly juridically defined not as the monopoly to sanction or to rule but as the monopoly to decide

Id. (quoting Carl Schmitt, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 19–22 (George Schwab trans., 1985)) (emphasis added).

the sovereign power of the people of the United States: a claim whose legal implications are concretely manifested in assertions of inherent power to act outside the Constitution and the system of separated powers it established—the type of claim that induced Senator Feingold to call for censure.³⁸ Even more pointedly, reading Bush's self-anointment as Decider against the backdrop of Schmitt's philosophy conjures the eerie warning that Bush has claimed the power to suspend the Constitution—to decide on a state of exception. Read in this light, the Bush administration's global War on Terror is the back door through which we, as Americans, can expect to be terrorized, not by outsiders traversing vast expanses to attack us in our homeland, but by the ever-expanding power of a sovereign Decider and the specter that constitutional government in this country will give way to a state of exception of perpetual duration.

The three articles by Professors Stephen Vladeck, Tucker Culbertson, Mario Barnes and Attorney Frank Bowman significantly expand our analysis of the scope of executive power by taking up the issue of extraterritorial detentions and the treatment of enemy combatants captured in the global War on Terror. All three articles are important interventions in ongoing legal debates regarding the constitutional validity of executive detentions in the global War on Terror. These debates, however, reflect a radically changed environment in which the unilateral assertions of executive power advanced in the President's Military Order of November 13, 2001,³⁹ and thereafter repudiated by the Supreme Court's decisions in *Rasul*⁴⁰ and *Hamdan*,⁴¹ have since been superseded by the Military Commissions Act of 2006 ("MCA").⁴² The significance of this changed environment cannot be overstated.

Through the MCA, the Republican-controlled Congress, to a significant degree, ratified the procedures established unilaterally by the President's Military Order. The MCA purports to strip federal courts of jurisdiction to consider habeas corpus applications filed by or on behalf of persons subject to executive detention as unlawful enemy combatants.⁴³ Not only does the MCA purport to eliminate federal habeas juris-

38. See *supra* notes 2–4 and accompanying text.

39. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

40. *Rasul v. Bush*, 542 U.S. 466 (2004).

41. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

42. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28 & 42 U.S.C.).

43. *Id.* § 7(a), 120 Stat. at 2636 (to be codified at 28 U.S.C. § 2241). Section 7(a) amends the habeas statute, 28 U.S.C. § 2241, by striking the jurisdiction-stripping provision of the Detainee Treatment Act of 2005 and inserting the following:

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by

diction, it also purports to eliminate any other actions through which federal district courts might be petitioned to review conditions of detention, alleged mistreatment, or unlawful renditions of persons subject to executive detention.⁴⁴ The MCA also limits the sources of law that may be invoked to determine whether detainee rights have been violated. Significantly, Section 5 of the MCA declares that the Geneva Conventions may not be invoked as a source of rights against the United States or its agents in U.S. courts.⁴⁵

Prior to the enactment of the MCA, *Hamdan* had struck down the military commissions established pursuant to the President's Military Order. The Court held that the President's Article II powers do not include authority to establish military commissions unilaterally⁴⁶ and that the procedures established pursuant to the President's Military Order violated provisions of the Uniform Code of Military Justice ("UCMJ"), which conditioned the President's use of military commissions on compliance with American common law of war, the UCMJ, and the law of nations—most notably, the four Geneva Conventions.⁴⁷

the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

§ 7(a), 120 Stat. at 2636 (to be codified at 28 U.S.C. § 2241).

44. *Id.*

45. § 5(a), 120 Stat. at 2631–32 (to be codified at 28 U.S.C. § 2241 note) (stating that “[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or any current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories”).

46. *Hamdan*, 126 S. Ct. at 2772–73 (“The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity. . . . Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by [the United States Constitution] unless some other part of that document authorizes a response to the felt need. . . . And that authority, if it exists, can derive only from *the powers granted jointly to the President and Congress in time of war.*”) (emphasis added). The Court went on to quote extensively from *Ex parte Milligan*:

[N]either can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.

Id. at 2773–74 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)).

47. *Id.* at 2786 (“The UCMJ conditions the President's use of military commissions on

Through the MCA, indefinite executive detentions, trial by military tribunals pursuant to otherwise constitutionally suspect procedures, and suspension of federal judicial review are no longer the work of the President acting alone under his asserted Article II powers, but are the joint work product of the President and the Congress. Accordingly, these concerted acts are entitled to the highest standard of judicial deference afforded to acts of government under the framework established by Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.⁴⁸

From this perspective, enactment of the MCA raises a critically important concern. Given the heightened deference afforded government actions when the President and Congress are acting in concert, does passage of the MCA make either the constitutionally suspect procedures of the military commissions or the practice of extrajudicial executive detention constitutional? The answer to this question has significant implications, given the political reality of a one-party state that was so dramatically evidenced by the spectacle of the Senate Judiciary Committee's Censure Hearing. If fundamental individual rights and constitutional restrictions on federal power are to be discarded whenever the President and Congress agree to restrict individual rights and ignore constitutional restrictions, then the spectacle of the Censure Hearing is truly a window into a future where executive impunity and congressional impotence will be enshrined in the positive laws enacted through the machinery of a one-party system. Notably, the articles by Professors Vladeck, Culbertson, and Barnes and Bowman seek to avoid this logical inference and, equally notably, to do so, they look to the courts.

Professor Stephen Vladeck's article takes up the issue of the constitutionality of executive detentions by intervening in ongoing debates regarding the question whether the Suspension Clause of the U.S. Con-

compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations,'—including, *inter alia*, the four Geneva Conventions signed in 1949. The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws.") (citations omitted).

48. 343 U.S. 579 (1952). According to Justice Jackson:

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure [of private property] executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

Id. at 636–37 (Jackson, J., concurring).

stitution applies to aliens detained under U.S. power outside the territorial boundaries of the United States. He proceeds by examining, and ultimately rejecting, the competing positions articulated by Judges Randolph and Rogers of the D.C. Circuit Court of Appeals in the case of *Boumediene v. Bush*.⁴⁹ Vladeck argues that the debate over the constitutionality of Section 7 of the Military Commissions Act of 2006, which purports to divest the federal courts of jurisdiction over habeas petitions filed by or on behalf of noncitizens detained abroad under U.S. power, is fundamentally flawed because both sides have misinterpreted the textual language of the Suspension Clause and have failed to take proper notice of the historical context of its initial inclusion in the Constitution or the significance of subsequent precedential developments. His point of reference for resolving the constitutional debate is the Framers' intent, and his methodology is careful analysis of the logical inferences that can fairly be drawn from broad and narrow readings of judicial precedents understood in their historical and doctrinal contexts. His points of reference and methodology underlie the significant strengths of his analysis, but lead him to discount the full significance of the debate framed by the competing interpretations of the Suspension Clause in *Boumediene*.⁵⁰

In *Boumediene v. Bush*, a three-judge panel of the D.C. Circuit Court of Appeals considered arguments on behalf of Guantánamo detainees. Judge Randolph, writing for himself and Judge Sentelle, held that the MCA jurisdiction-stripping provisions applied to pending habeas petitions, such as the ones before the court, did not violate the Suspension Clause because nonresident aliens have no constitutional rights outside the territorial boundaries of the United States.⁵¹ In her dissent, Judge Rogers concluded that the MCA *did* violate the Suspension Clause because the limitation the Clause imposes on congressional power to suspend the writ of habeas corpus is a structural limitation on congressional power *in all cases*, not just in cases involving citizens or other classes of persons who are recognized rights holders under the U.S. Constitution.⁵² Put differently, where Judge Randolph argued that the Suspension Clause protects only U.S. rights holders, Judge Rogers argued that the Suspension Clause operates as a fundamental limitation on federal power, wherever and against whomever the government may act.

Instead of engaging this debate on its own terms, Vladeck attempts

49. 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007).

50. The Suspension Clause appears in Article I, Section 9: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

51. 476 F.3d at 988–92.

52. *Id.* at 995–98 (Rogers, J., dissenting).

a sidestep. He asserts that the issue is not whether the Suspension Clause operates as a structural limit on the power of Congress to suspend habeas corpus or only as a partial limit effectuated through the judicial enforcement of individual rights that only U.S. rights holders enjoy.⁵³ This debate is, in Vladeck's view, a false debate because both sides begin from faulty premises by assuming that the Suspension Clause is a restriction or limitation on the power of Congress.⁵⁴ Instead, he points out that, given its historical origins and development, the Clause is more properly understood as an affirmative grant of power specifying the limited circumstances in which Congress may act to suspend the preexisting right of habeas corpus.⁵⁵ He points to ample historical evidence documenting original debates over the nature and scope of the power granted the national government by the new Constitution.⁵⁶ This evidence points in one direction.

The government created by the Constitution was a government of strictly limited powers. It was understood to have no powers other than the powers enumerated by the written text of the Constitution. Against this backdrop, the Suspension Clause could only have been understood as a grant of power to suspend the writ of habeas corpus in cases of rebellion or invasion when required by public safety.⁵⁷ Absent the Suspension Clause, the federal government would have *no power* to suspend the writ of habeas corpus under any circumstance because the Clause is the only provision in the Constitution that confers this power, even as it limits it to the specific instances identified by the Clause.⁵⁸ Presumably, this means that the Suspension Clause applies to the MCA's suspension of federal courts' habeas jurisdiction over the claims of aliens detained extraterritorially under U.S. power because, under the Constitution, Congress can suspend the writ only pursuant to the Suspension Clause.

Vladeck proceeds from this starting point through a systematic,

53. Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. 275, 276 (2008). According to Vladeck, this debate can yield no definitive answer because "[s]ome provisions of the Constitution are clearly 'structural'; others are clearly 'individual.' The line dividing the two is elusive at best, if not downright illusory, and supporters of both views of the Suspension Clause can marshal support for the notion that the Clause falls on either side." *Id.* at 602.

54. *Id.* at 276–78.

55. *See id.* at 277 ("[T]he Suspension Clause did not create a 'structural right'; it provided structural constitutional underpinnings for the common-law right that already existed, and specified the *only* instances in which that right could be abridged. On this view, both readings of the Suspension Clause in the D.C. Circuit's *Boumediene* decision are incorrect because both presuppose that the relevant question is how the clause limits Congress." (footnote omitted)).

56. *See id.* at 282–84.

57. *Id.* at 277–78.

58. *Id.*

analytical, and historical deconstruction of the obstacles flung in the way of his thesis by Judge Randolph's opinion in *Boumediene*. Echoing Judge Rogers, Vladeck concludes that

[u]nless the writ of habeas corpus . . . was categorically unavailable to noncitizens overseas at common law—and the absence of relevant case law does *not* itself answer this question—then the MCA interferes with the common-law writ, and can only do so if it is a valid exercise of Congress's Suspension Clause power.⁵⁹

To support this conclusion, Vladeck deploys the classic methodology of legal reasoning, which proceeds by distinguishing the broad and narrow holdings of a precedent and choosing the most advantageous reading that logic and context allow. Vladeck's reading of precedent demonstrates that the Court *could* legitimately strike down the MCA as unconstitutional—and he does make a compelling case that a correct understanding of the historical developments surrounding the right of habeas corpus and a narrow analytical reading of controlling precedents in their appropriate historical context provide ample resources to support such a move. The alarming undercurrent reflected in the *Boumediene* debate between Judges Randolph and Rogers must, however, be dealt with directly.

To dismiss as a false debate the question whether the Suspension Clause constitutes an absolute limitation on the power of the federal government or a guarantee to secure the fundamental right to habeas corpus for a limited class of U.S. rights holders is to ignore the extent to which the struggle over the nature of federal power—the struggle between a commitment to republican government based on respect for the universal rights of man and the historical deployment of despotic power for the benefit of a privileged faction—has been waged precisely in terms reflected in the debate between Judges Randolph and Rogers. In other words, the claimed power to govern persons outside the restrictions of constitutional law is a claim to unlimited, arbitrary (sovereign) power over persons accorded no rights—but at the discretion of the sovereign.⁶⁰ This is the power Judge Randolph affirms and Judge Rogers denies. The claimed power to govern persons outside the legal restrictions imposed by the Constitution is a claim at odds with the universal principles of right upon which the Framers purported to ground the American experiment in enlightened self-government. It is a claim of power whose historical genealogy hails back to the ignoble, and to this day still repudiated, decision in *Dred Scott v. Sandford*, where the Court

59. *Id.* at 303–04.

60. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819) (noting that sovereign power knows no limitation other than its own discretion).

concluded that persons of African descent, not being part of the “people of the United States”⁶¹ were “governed as subjects with absolute and despotic power”⁶² and had “no rights which the white man was bound to respect.”⁶³

From this perspective, the debate between Judges Randolph and Rogers is not a false debate but instead reflects two competing positions on the scope of federal power that have each found expression at various points in our history and that repeatedly call into fundamental question the nature of American government. Put differently, at stake in this debate is nothing less than the question whether the government created by our Constitution will govern in the world as the lawless agent of some increasingly contested locus of sovereignty or whether it will operate as a government under the rule of law grounded on universal principles of right. The debate whether the Suspension Clause constitutes a structural limitation on federal power independent of the rights-bearing status of the persons targeted by this power or whether its limitations on the suspension of habeas corpus protect only U.S. rights bearers might certainly be rhetorically sidestepped by reading the Clause as an affirmative grant of enumerated power limited by the terms of its text, but this reading cannot sidestep the more fundamental and pervasive issue reflected in repeated jurisprudential debates over the scope of the federal government’s power to govern outside constitutional limits persons whom the courts may declare are not part of “the people.”⁶⁴

In a similar context, Professor Culbertson’s article engages the debate over the rights of persons detained as unlawful enemy combatants in the global War on Terror from a very different perspective. Rather than grounding access to federal courts on Congress’s failure to invoke the Suspension Clause, Culbertson contends that the Fifth Amendment restricts governmental power and protects the rights of individual detainees, “even and perhaps especially criminal enemy aliens held abroad—pursuant to domestic and international laws and customs

61. 60 U.S. (19 How.) 393, 404 (1857).

62. *Id.* at 409.

63. *Id.* at 407. The Court also stated,

The words “people of the United States” and “citizens” are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the “sovereign people,” and every citizen is one of this people, and a constituent member of this sovereignty.

Id. at 404.

64. *See, e.g.,* United States v. Verdugo-Urquidez, 494 U.S. 259, 261, 265, 267 (1990) (finding that the Fourth Amendment does not apply to activities of the United States directed against aliens in foreign territory or in international waters because nonresident aliens are not part of “the people” protected by the Fourth Amendment).

comprising humanitarian law.”⁶⁵ He proceeds to develop this contention along two trajectories: The first asserts arguments based on what he calls the “incorporative universality of humanitarian law”; the second grounds detainee rights on the “incorporative humanitarianism of the Fifth Amendment.”

As precursor to addressing the scope of Fifth Amendment rights that he would accord to detainees in the War on Terror, Culbertson makes a series of arguments regarding the nature of humanitarian law. On a superficial first reading, it seems that Culbertson is deploying some version or another of natural law philosophy—ascribing to humanitarian law a transcendental status insofar as he asserts that humanitarian law establishes principles of right and of substantive justice that are not only universal but, in some unspecified way, transcend the particular expressions of these principles in positive law. By humanitarian law, he means to refer not exclusively to the conventional law of Geneva or the Hague, but to the underlying policy objectives and methodological foundations that inform these and other codification efforts. This is because, in his view, “[a]ny particular enactment of humanitarian law is dependent upon historical contingencies and is binding only in specific circumstances,”⁶⁶ even as humanitarian law itself constitutes a body of principles that “substantively should, methodologically can, and morally must reach ‘wars with terror.’”⁶⁷

The question his argument regarding the nature of humanitarian law most immediately raises is by what authority he asserts the truth and general applicability of this “incorporative universality of humanitarian law.” His response invokes as foundational the authority of “logical and linguistic necessity.”⁶⁸ It is, in his view, logically and linguistically incoherent for the United States to establish military tribunals to try al Qaeda and al Qaeda’s allies for violations of the laws of war even as it declares the laws of war inapplicable to this conflict. The Bush administration cannot label the attacks of September 11 war crimes and ground its response in international conventions and declarations even as it simultaneously denies the reach of those very same instruments to our own conduct in this conflict.

While Culbertson’s contentions place him in very good company,⁶⁹

65. Tucker Culbertson, *The Constitution, the Camps & the Humanitarian Fifth Amendment*, 62 U. MIAMI L. REV. 307, 336 (2008).

66. *Id.* at 337.

67. *Id.*

68. *Id.* at 338.

69. See, for example, Justices Souter and Ginsberg’s concurrence in part and dissent in part in *Hamdi v. Rumsfeld*, where they said this regarding the administration’s efforts to ground its claimed authority to subject Hamdi to indefinite executive detention on the laws of war:

I do not believe that the “incorporative universality of humanitarian law” that he advocates is a matter of linguistic or logical necessity, but that it is instead a political commitment to the repudiation of imperial power. There is nothing incoherent or illogical (which is not to say immoral) about empire, and empire can and historically has declared principles applicable to others, even as it declares itself outside or above the law it imposes on others. That indeed is the essence of sovereignty—the power to stand outside the law even as it declares what the law will be for its subjects. Given that, in my view, the “incorporative universality of humanitarian law” presupposes and depends upon a political commitment to the repudiation of imperial power, I question the substantive and strategic value of grounding the incorporation of humanitarian law, even its most universal and transcendental formulations, in the “incorporative humanitarianism of the Fifth Amendment.”

Though the failure of our Supreme Court to give domestic effect to international humanitarian law will no doubt produce incalculable harm to the stature of the United States in the international system, and though the Supreme Court has from time to time considered and cited international human rights law in articulating doctrines of constitutional law,⁷⁰ our history of conquest and empire provides compelling evidence that high principles of universal justice and natural law—not to mention at times even the imperatives of positive law—have not fared well when invoked against the sovereign power of conquest in the courts of the conqueror.⁷¹ Asserting that *all* detainees have a claim under the Fifth

[T]he government . . . repeatedly argues that Hamdi’s detention amounts to nothing more than customary detention of a captive taken on the field of battle . . . [T]he Government’s stated legal position in its campaign against the Taliban (among whom Hamdi was allegedly captured) is apparently at odds with its claim here to be acting in accordance with customary law of war.

542 U.S. 507, 549 (2004). Secretary of State Colin Powell similarly grounded objections to an across-the-board presidential determination that the Geneva Convention did not apply to the conflict in Afghanistan on the grounds that such a determination would “undermine the protections of the law of war for our troops” as well as undermining “the President’s Military Order by removing an important legal basis for trying the detainees before Military Commissions.” Memorandum of Colin L. Powell to Counsel to the President and Assistant to the President for National Security Affairs, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), *reprinted in THE TORTURE PAPERS*, *supra* note 9, at 122.

70. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (contrasting a European case to a previous Supreme Court decision).

71. For an example, see *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), in which the Court rebuffed efforts by the Cherokee Nation to invoke its original jurisdiction to challenge the State of Georgia’s abrogation of its treaty rights as a Contract Clause violation. In response, Justice Johnson remarked,

What [do the Cherokee] allegations exhibit but a state of war, and the fact of invasion? . . . [T]he contest is distinctly a contest for empire. It is not a case of *meum and tuum* in the judicial but in the political sense. Not an appeal to laws but

Amendment for redress of violations of the minimum and fundamental protections of humanitarian law is certainly a defensible aspiration, but saying so doesn't make it so. This is not to say that the project to incorporate humanitarian law by way of the Fifth Amendment is unworthy or misguided, it is only to say that its full realization will, in my view and as a matter of political reality, require a prior repudiation of imperial power by the political branches of government, achieved either through the agency of an awakened electorate or at the command of some international legal tribunal or political coalition backed by superior sovereign power. This is particularly likely to be so in instances where the consolidation and deployment of imperial power is the combined work product of the President and Congress acting in concert. In such instances, resort to domestic courts must, in my view, be combined both with the sorts of grass-roots mobilization efforts Congresswoman Holtzman has advocated,⁷² as well as with strategies of the sort the New York Center for Constitutional Rights is deploying to vindicate universal principles of humanitarian law through foreign courts.⁷³

Professors Barnes and Bowman take yet a different approach in working through the terms of judicial review of executive detentions of aliens abroad as part of the Global War on Terror. Their objective is to produce a unified approach that in their view will enable scholars to develop a common discourse from which to integrate the substantive commitments and methodological approaches of Law and Economics, on the one hand, with its emphasis on prioritizing rules of decision that maximize efficiency by calculating risks and benefits,⁷⁴ and the competing school of legal scholarship, which they identify as Critical Legal Studies/Critical Race Theory ("CLS/CRT") and to which they attribute an emphasis on rules of decision that prioritize a commitment to anti-

to force. A case in which a sovereign undertakes to assert his right upon his sovereign responsibility; to right himself, and not to appeal to any arbiter but the sword, for the justice of his cause. . . . In the exercise of sovereign right, the sovereign is sole arbiter of his own justice. The penalty or wrong is war and subjugation.

Id. at 28–29. See also *Johnson & Graham's Lessee v. M'Intosh*, in which Chief Justice Marshall noted this about the "transcendent" property rights of Native American peoples to the land they inhabited: "Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted." 21 U.S. (3 Wheat.) 543, 588 (1823).

72. See Holtzman, *supra* note 18 (mapping out a series of steps ordinary Americans can pursue to produce political change).

73. Press Release, Ctr. for Constitutional Rights, Donald Rumsfeld Charged with Torture During Trip to France (Oct. 26, 2007), <http://ccrjustice.org/newsroom/press-releases/donald-rumsfeld-charged-torture-during-trip-france>.

74. Mario L. Barnes & F. Greg Bowman, *Entering Unprecedented Terrain: Charting a Method To Reduce Madness in Post-9/11 Power and Rights Conflicts*, 62 U. MIAMI L. REV. 373–74 (2008).

subordination social justice.⁷⁵

To achieve their unified approach, the authors posit four alternative rules of decision through which judicial review of executive detentions might be legally organized.⁷⁶ These four alternatives represent positions reflected in ongoing debates over the terms of detainee access to the writ of habeas corpus. The authors arrange the four alternatives along a continuum in which the first rule of decision is grounded on a broad interpretation of the Supreme Court's decision in *Johnson v. Eisentrager*.⁷⁷ There, the Court held that enemy aliens, captured, tried, and imprisoned outside the United States could not obtain writs of habeas corpus from the federal courts to challenge their convictions for war crimes under the Fifth Amendment. The rule of decision at the other end of Barnes and Bowman's continuum marks the opposite position in which the Fifth Amendment and Suspension Clause of Article I mandate judicial review of all detentions under U.S. authority regardless of the nationality of the detainee or the location of detention. In between these two positions, the authors identify rules of decision based on the concept of "de facto sovereignty" and "statutory jurisdiction."

After laying out these four alternatives, the authors proceed to examine each alternative rule of decision in light of the substantive commitments and methodological approaches of the two competing schools of legal scholarship they posit. Viewed through the lens of Law and Economics, the authors assert that the preferred rule of decision would be one that concentrates power in the executive branch, including the power to detain and try suspected alien enemy combatants without judicial interference. The reason for this result is that "[u]nder emergency conditions, the security benefits to be gained by concentrating power in the Executive are presumed to outweigh the risk of misusing power,"⁷⁸ while the "cost[s] involved in the judiciary erroneously ordering the release of an al Qaeda member is enormous Balanced against these costs, the increased liberty gained through judicial review can be seen as negligible."⁷⁹ Viewed, by contrast, through the lens of CLS/CRT, the preferred rule of decision would provide a judicial forum for reviewing the legality of executive detentions without distinctions based on nationality or location of detention. This is because the commitment to social justice and antisubordination attributed to CLS/CRT grounds the legitimacy of U.S. power on its recognition of universal human dignity and its commitment to substantive equality for the socially disempowered.

75. *Id.* at 401.

76. *Id.* at 377–80.

77. 339 U.S. 763 (1950).

78. Barnes & Bowman, *supra* note 74, at 382.

79. *Id.* at 385.

At the end of their efforts to develop a “unified approach” with which to examine the tradeoffs of justice and efficiency at stake in each competing rule of decision, the authors conclude that they are left in the same position they started—agreeing to disagree. In my view, this is not a surprising result. The cost-benefit analysis at the center of Law and Economics methodology reflects a utilitarian perspective in which individual rights are not fundamental, but contingent and negotiable for the sake of the “greater good” posited by theory’s practitioners.⁸⁰ The authors’ “unified approach” seeks to de-center simplistic calculations of costs and benefits attributable to the different rules of decision through which judicial review of executive detentions in the War on Terror might be provided (or not). Though the authors examine these alternatives in light of a series of variables, none of their chosen variables puts the fundamental humanity of the detainees at the center of the analysis.⁸¹

Professor Schnably’s contribution illustrates yet another approach to dealing with the constitutional challenges implicated by the aggressive assertion of “inherent” executive powers underlying the array of practices and policies that have come to define the Bush administration’s global War on Terror.⁸² Like Culbertson, Schnably argues that international law is not only a central, but also a superior and foundational source of authority for the articulation of constitutional doctrine. However, Professor Schnably’s contribution focuses on the institutions, practices, and regimes through which international law has developed democratic norms that implicate the internal structures of constitutional government. In so doing, the piece provides a rather profound and extended “glimpse” into how the international community might be called to weigh-in in the event that an American Decider might one day decide to suspend our Constitution.

In his detailed and scholarly piece, Schnably challenges the assumption that *domestic* law supplies all the relevant answers to constitutional questions regarding the scope of executive power, the role of the courts, and the separation of powers. Over and again, Schnably finds compelling evidence linking the structure of constitutional government to the articulation of international law. Indeed, even the case most often

80. See, e.g., Elizabeth M. Iglesias, *Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. MIAMI L. REV. 575, 652–53 (1999).

81. The authors suggest that under their unified approach the rule of decision preferred is the rule that will: “(1) maximize participation by the three branches of government; (2) provide clear and predictable rules; (3) identify substantive norms to guide government action or judicial review or both; and (4) allocate the burden of legislative inaction on the party best positioned to overcome it.” Barnes & Bowman, *supra* note 74, at 412.

82. Stephen J. Schnably, *Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal*, 62 U. MIAMI L. REV. 417 (2008).

cited in support of expansive executive power in the field of foreign affairs grounds its assertions of executive power in international law. In *United States v. Curtiss-Wright Export Corp.*,⁸³ the Supreme Court asserted that the authority for executive power over foreign affairs was not vested through, nor dependent on, the Constitution, but was instead grounded in international rules recognizing the independence and sovereignty of the nation-state.⁸⁴ The Bush administration's repeated assertions of Article II "inherent powers" are substantially grounded in an ever-enlarging interpretation of the *Curtiss-Wright* precedent in the wake of September 11; however, in a brilliant reading, Schnably shines a powerful light on the future paths that this domestic appeal to international law for authoritative norms to determine the scope of executive power might one day be fashioned into taking. In particular, Schnably ponders aloud "what it would mean to imagine a world in which the President's claims of inherent authority to detain civilians might be tested against, for example, the provisions of the Inter-American Democratic Charter, adopted by the Organization of American States in 2001."⁸⁵

Schnably notes post-World War II changes in international law and regional arrangements pointing in this direction—most notably the emergent norms in international human rights law, in which individual and collective human rights trump traditional views of sovereign impunity. As Schnably rightly notes, certain human rights such as the right to an independent tribunal and the rights to democracy and representative government arguably constrain the way a state may establish the structural relationship between the branches of government and the scope of independence that the state's courts must enjoy in order to meet the standards established by international law.⁸⁶ Notably, the Charter of Paris, adopted in 1990, declared that "Democracy has as its foundation respect for the human person and the *rule of law*."⁸⁷ This link between democracy and the rule of law is further linked by the Charter to constitutionalism: "Democracy, with its representative and pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. *No one will be above the law*."⁸⁸

Indeed, Professor Schnably's significant contribution is to highlight

83. 299 U.S. 304 (1936).

84. Schnably, *supra* note 82, at 427–28.

85. *Id.* at 431.

86. *Id.* at 436–41.

87. *Id.* at 439 (quoting Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 190, 194) (emphasis added).

88. *Id.* at 440 (quoting Charter of Paris for a New Europe, at 194) (emphasis added).

the many ways in which international treaties, instruments, and organizations have increasingly linked the rule of law to representative democracy and constitutionalism, making the internal legal structures of democracy a matter of international concern. He focuses specifically on the efforts in this area of three regional organizations: the Organization of American States, the Organization for Security and Co-operation in Europe, and the African Union.⁸⁹ He notes, for example, the OAS's Charter Amendment in 1992, which provides that a member state "whose democratically constituted government has been overthrown by force may be suspended" and further proclaims that the "unconstitutional alteration or interruption of the democratic order in a state of the Hemisphere constitutes an insurmountable obstacle to the participation of that state's government in the Summit of the Americas process."⁹⁰ Similarly, the Inter-American Democratic Charter adopted in 2001 by the OAS provides that maintenance of the rule of law, the separation of powers, and the independence of the branches of government are essential to any democracy. The Charter "prohibits any 'unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state.'"⁹¹

Similarly, the Organization for Security and Cooperation in Europe ("OSCE") has proclaimed the importance of "a clear separation between the State and political parties,"⁹² while the 2007 meeting of its Office for Democratic Institutions and Human Rights ("ODIHR") emphasized the need to "prevent[] an over-concentration of powers in the executive branch;"⁹³ to ensure national legislatures have the "authority to effectively represent the citizenry and oversee the executive;"⁹⁴ and to proscribe any "*de facto* imposition . . . of a state of emergency" that is not imposed in accordance with law.⁹⁵ This specific restraint on extra-constitutional moves in a "state of emergency" is echoed by the U.N.

89. *Id.* at 441–57.

90. *Id.* at 445 (quoting the Third Summit of the Americas, Quebec City, Can., Apr. 22, 2001, *Declaration of Quebec City*, available at <http://www.state.gov/p/wha/rls/59660.htm>).

91. *Id.* at 431–32 (quoting Organization of American States, Inter-American Democratic Charter art. 19, Sept. 11, 2001, 40 I.L.M. 1289 (2001)).

92. *Id.* at 446 (quoting Conference on the Human Dimension of the CSCE, Copenhagen, Den. June 5–29, 1990, *Document of the Copenhagen Meeting*, ¶ 5.4 (June 29, 1990)).

93. *Id.* at 449 n.152 (quoting Organization for Security and Co-operation in Europe, Permanent Council, Address by Ambassador Christian Strohal, Director of the OSCE Office for Democratic Institutions and Human Rights (ODIHR), 685th Session of the Permanent Council, ODIHR.GAL/88/07, at 3 (Oct. 30, 2007)).

94. *Id.*

95. *Id.* at 449 (quoting Conference on Security and Co-operation in Europe: The Moscow Meeting on the Human Dimension, Moscow, Russ., Oct. 3, 1991, ¶ 28.4, *reprinted in* 30 I.L.M. 1670, 1683 (1991)).

Human Rights Committee.⁹⁶

Schnably also notes important developments in Africa that reflect increased regional attention to the internal constitutional arrangements of member states in the Organization of African Unity.⁹⁷ In 2000 OAU member states met in Lomé, Togo. In adopting the Constitutive Act of the African Union, the heads of state at the Lomé meeting issued a “Solemn Declaration” affirming, among other things, the obligation of the executive, legislative and judicial branches of government to “respect their national constitutions and adhere to the provisions of the law and other legislative enactments promulgated by National Assemblies. No one should be exempted from accountability.”⁹⁸ In addition, heads of state at the Lomé meeting approved the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, which defined specific situations constituting unconstitutional changes of government and committed member states, in the event of such a situation, to “press for a return to constitutional order through means including suspension of the state’s membership and the imposition of sanctions.”⁹⁹

To be sure, Schnably is fully aware of, and seeks to illustrate through two revealing case studies, the pitfalls and possibilities latent in the project of invigorating the application of international enforcement mechanisms to member-states’ internal structures of democracy. His case studies of the political crises in Nicaragua and Togo demonstrate that the institutions and procedures of international (and regional) law are a ways away from providing the kinds of substantive norms and institutional responses one might imagine necessary to prevent the world’s only remaining super-power from a constitutional free-fall. Nevertheless, these case studies illuminate the increasingly significant role international and regional organizations are playing in the effort to make fidelity to the internal legal structures of constitutional government a matter of international concern.

Professor Corn’s article takes up the issue of an amendment to the UCMJ¹⁰⁰ inserted into the National Defense Authorization Act of 2007.¹⁰¹ The amendment, inserted by Senator Lindsay Graham, was

96. Schnably, *supra* note 82 at 450.

97. *Id.* 451–57.

98. *Id.* at 452–53 (quoting OAU, *CSSDCA Solemn Declaration*, ¶ 11(A), OAU DOC. AHG/Decl. 4 (XXXVI) (July 10–12, 2000), available at www.africa-union.org/Special_Programs/CSSDCA/cssdca-solemndeclaration.pdf).

99. *Id.* at 454.

100. 10 U.S.C. §§ 801–940 (2000).

101. Geoffrey S. Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military Criminal Jurisdiction over Civilian Augmentees*, 62 U. MIAMI L. REV. 491 (2008).

apparently enacted without discussion, debate, or even much notice.¹⁰² The provision makes a seemingly small but profoundly significant change to Article 2 of the UCMJ.¹⁰³ Before the 2007 amendment, the UCMJ applied to civilians accompanying armed forces in the field only in cases of *declared* war.¹⁰⁴ As Corn notes, this interpretation of Article 2(a)(10) established “what is best described as the de facto immunity from military-criminal jurisdiction that civilians accompanying the armed forces in operational areas enjoy.”¹⁰⁵ This is because Congress has not formally declared war against any nation-state since World War II.¹⁰⁶ Accordingly, prior to the 2007 amendment, civilian military contractors operating in places like Iraq, Afghanistan, Bosnia, and elsewhere were not subject to the military’s court-martial jurisdiction under Article 2(a)(10) because these operations were not authorized by a congressional declaration of war.

Informed observers of news reports on the war in Iraq will surely have noticed that the difficulty of holding civilians legally accountable for even gross misconduct has become an increasingly serious problem as more and more civilians are employed by private for-profit contractors providing support services to U.S. armed forces in the field. Perhaps the most egregious example of lawlessness and insubordination attributed to the legal impunity enjoyed by civilian contractors that support military operations in Iraq involves the alleged participation of Titan and CACI International employees in the torture scandal at Abu Ghraib.¹⁰⁷ According to a 2004 article in the *Washington Post*, an Army report investigating the scandal at Abu Ghraib found that, among other things,

contract interrogators and linguists were involved in 16 of the 44

102. *Id.* at 496.

103. Article 2(a) of the UCMJ delineates the categories of persons subject to the Uniform Code of Military Justice. See 10 U.S.C. § 802(a) (2000). Prior to passage of the National Defense Authorization Act of 2007, Article 2(a)(10) provided for military jurisdiction “*in time of war*” over civilians “serving with or accompanying an armed force in the field.” 10 U.S.C. § 802(a)(10) (emphasis added). The amendment inserted into the National Defense Authorization Act of 2007 changed Article 2(a)(10) to read “In time of *declared war or a contingency operation*, persons serving with or accompanying an armed force in the field.” John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (to be codified at 10 U.S.C. § 802(a)(10) (emphasis added)).

104. *United States v. Averette*, 19 C.M.A. 363, 365 (1970).

105. Corn, *supra* note 101, at 491.

106. Some have argued that Congress has failed “to maintain strict formality in the separation of government functions relating to the decision to go to war.” J. Gregory Sidak, *To Declare War*, 41 *DUKE L.J.* 27, 33 (1991). It is worth emphasizing that the de facto immunity civilians enjoy under Article 2(a)(10) is purely a function of this failure. See also *infra* note 133 and accompanying text.

107. See Renae Merle & Ellen McCarthy, *6 Employees from CACI International, Titan Referred for Prosecution*, *WASH. POST*, Aug. 26, 2004, at A18.

alleged abuses at the prison. According to the report, an unidentified CACI interrogator grabbed a prisoner from a vehicle, pulled him to the ground and dragged him to an interrogation booth as the prisoner tried to stand. The same CACI employee allegedly drank alcohol at the prison and refused to take orders from a military officer, saying, "I have been doing my job for 20 years and do not need a 20-year-old to tell me how to do my job."¹⁰⁸

Gross civilian misconduct has also been alleged in other instances, including an incident involving Blackwater employees who fired on Iraqi civilians, killing many Iraqis, wounding numerous Iraqis, and triggering demands from the Iraqi government that the company leave the country.¹⁰⁹

Viewed against this backdrop of increased privatization and civilian lawlessness, the extension of military court-martial jurisdiction over civilian military contractors could certainly be perceived as a necessary and proper means to punish and deter civilian misconduct in the field of military operations. The 2007 amendment to the UCMJ achieves this result by expanding the scope of Article 2(a)(10) to provide military jurisdiction over civilian contractors supporting the armed forces in the field, not only during a declared war, but during "contingency operations" as well.¹¹⁰

While this amendment may provide military jurisdiction over private military contractors in places like Iraq, it also has other effects. As Professor Corn explains, "the amendment has the effect of subjecting any civilian—civil servant or contractor—'accompanying' the armed forces in a deployed location to the jurisdiction of the entire UCMJ, including the jurisdiction of military courts."¹¹¹ This may certainly be one way to address the problem of civilian lawlessness of the sort alleged against employees of private military contractors such as Blackwater, CACI, and Titan. Corn's concern, however, is that the amendment's broad brush could produce untoward results.¹¹² This is especially true given that prior precedents have interpreted the scope of Article 2(a)(10)'s provision regarding civilians "accompanying the force" to include not just civilian employees of the armed forces, but

108. *Id.* It is also worth noting that as of November 13, 2007, none of CACI's employees has been indicted for any misconduct associated with its work in Iraq. See R. Robin McDonald, *Judge Lets Abu Ghraib Suit Go Forward*, 118 FULTON COUNTY DAILY REP. 222 (2007).

109. See Sudarsan Raghavan, *Tracing the Paths of 5 Who Died in a Storm of Gunfire*, WASH. POST, Oct. 4, 2007, at A01; Zachary A. Goldfarb, *A Tougher Line on Government Contracting*, WASH. POST, Oct. 8, 2007, at D1.

110. See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006) (to be codified at 10 U.S.C. § 802(a)(10)).

111. Corn, *supra* note 101, at 496.

112. See *id.* at 494.

journalists, American Red Cross workers,¹¹³ and even “U.S. civilians whose employment with the armed forces had been terminated but who remained in the theater of operations.”¹¹⁴

The prospect of seeing every U.S. citizen in the field of a “contingency operation” subjected to every punitive article in the UCMJ—including unique military offenses like “disrespect to superiors,” “disobedience of orders,” “absence without authority,” “desertion,” and other similar offenses—raises troubling practical and constitutional issues.¹¹⁵ This is, as Professor Corn notes, in no small part because trial by court-martial means trial without the fundamental rights to which American citizens subject to federal criminal prosecution are constitutionally entitled.¹¹⁶ These fundamental rights include the right to be tried in a federal court presided over by an Article III judge with life tenure and the right to be charged by grand jury indictment and convicted or acquitted by the unanimous verdict of a jury of one’s peers.¹¹⁷ Subjecting civilians to trial by court-martial means subjecting American citizens to trial before judges who serve at the pleasure of the executive branch and to conviction by panels of military officers rather than juries of one’s peers.

In my view, the 2007 amendment to the UCMJ, which expanded military jurisdiction over civilians, when read in light of the other contributions to this symposium, provides a startling glimpse into a dystopian future in which the line between imperial and totalitarian power is quite thin indeed. Recall, for example, the constitutional debate over the jurisdiction-stripping provision in Section 7 of the MCA, which purports to deprive Guantánamo detainees of access to federal habeas jurisdiction.¹¹⁸ Arguments supporting the constitutionality of this provision are premised in part on the notion that, *unlike American citizens*, noncitizens do not have extraterritorial constitutional rights against the U.S. government.¹¹⁹ This notion that the Constitution applies and restricts what the U.S. government can do to American citizens outside U.S. territory hails back to the Supreme Court’s opinion in *Reid v. Covert*.¹²⁰ *Reid*’s broad reasoning, in my view, could well support a determination that Section 7 is unconstitutional, not because the Suspension Clause is a structural limitation on the power of Congress to suspend the writ of habeas

113. *Id.* at 518–19.

114. *Id.* at 518.

115. *See id.* at 524.

116. *Id.* at 525–26.

117. *Id.* at 505.

118. *See supra* notes 43–44 and accompanying text.

119. *See Boumediene v. Bush*, 476 F.3d 981, 991 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3078 (2007) (“[T]he Constitution does not confer rights on aliens without property or presence within the United States.”).

120. 354 U.S. 1 (1957).

corpus, but more generally because the federal government, being a republican (not imperial) form of government, must *at all times* govern within constitutional limits.

This interpretation of the constitutional limits on federal power was, in fact, the position articulated in Justice Brennan's dissenting opinion in *United States v. Verdugo-Urquidez*, in which Justice Brennan invoked the Court's decision in *Reid* as grounds for holding that non-resident aliens are protected by the Fourth Amendment¹²¹ because they become part of "the people" whenever they become part of "the governed."¹²² It was Justice Rehnquist's opinion that restricted the scope of *Reid v. Covert* to American citizens only and declared that nonresident aliens have no right to challenge the constitutionality of warrantless searches conducted by federal officials abroad because they are not part of "the people."¹²³ Against this backdrop of precedential devolution, the quiet enactment of the 2007 amendment to the UCMJ expands military jurisdiction over American citizens accompanying our armed forces in contingency operations and provides chilling insight into the dynamic of self-inflicted "necessity," through which the asserted power to govern, outside constitutional limits, persons who are not part of "the people" can assume, for itself, a power asserted against "the people" as well—*Reid v. Covert* notwithstanding.

Professor Corn might not agree with my characterization of the practical problems underlying the need that he sees for some sort of military jurisdiction over civilians—perhaps the summary court martial and opt-out provisions he advocates in his article—as a "self-inflicted necessity." This is because his analysis proceeds on the assumption that privatization and the increasing participation of civilians in the *business of war* is a foregone conclusion.¹²⁴ Civilians have accompanied the armed forces in operational areas as far back as the Revolutionary War.¹²⁵ Since the end of the Cold War, military downsizing has meant outsourcing more and more soldier work and that trend, in his view, is

121. 494 U.S. 259, 281 (1990) (Brennan, J., dissenting).

122. *See id.* at 284. According to Justice Brennan, *Verdugo-Urquidez* was entitled to Fourth Amendment protections:

He has become, quite literally, one of the governed. Fundamental fairness and the ideals underlying our Bill of Rights compel the conclusion that when we impose "societal obligations," such as the obligation to comply with our criminal laws, on foreign nationals, we in turn are obliged to respect certain correlative rights, among them the Fourth Amendment.

Id. (citation omitted).

123. *See id.* at 269–70 (distinguishing *Reid*, and making it inapplicable to *Verdugo-Urquidez*'s Fourth Amendment claim).

124. *See* Corn, *supra* note 101, at 492 & n.6.

125. *Id.* at 501.

unlikely to reverse.¹²⁶ In light of this practical reality and the impunity and disorder occasioned by civilian lawlessness and insubordination, military commanders need tools to bring civilian contractors under military discipline.

To be sure, Professor Corn's analysis does seek to weigh the competing interests,¹²⁷ but, in my view, it is worth noting that military solutions to civilian disorder, corruption, and mismanagement have played a significant role in the history of transitions from democracy to dictatorship. When the Argentine military overthrew the government of "Isabelita" Peron in March of 1976, the change in government was called the "Gentlemen's Coup" and the military junta was received by the country as the "new authorities" who would bring order out of the chaos of economic crisis and domestic unrest.¹²⁸ That coup began what has since become known as the "Dirty War," in which Argentine citizens were "disappeared" and tortured in a network of detention centers and concentration camps scattered throughout the country as part of the junta's effort to root out and destroy the hidden internal enemy that threatened the security of the nation.¹²⁹

The 2007 amendment to the UCMJ is not, by any means, a military coup, but it does provide a window into a dystopian future in which American constitutional values and principles are quietly, but steadily, chipped away in order to provide "practical solutions" to problems created by prior violations of constitutional values and principles.¹³⁰ Recall, for example, that the "de facto immunity" for which the amendment is a proffered solution is itself a result of Congress's failure since World War II to confine the country's war making activity within the boundaries established by its expressly enumerated power to "declare war."¹³¹ From this perspective, the quiet passage of the 2007 amendment to the UCMJ should sound major alarms. Not only has Congress passed a law that profoundly alters the scope of constitutional rights that American citizens enjoy against executive power abroad, but it has done so apparently without discussion, debate, or notice. Additionally, the changed legal landscape confronting American citizens abroad is no

126. See Bernd Debusmann, *War Is Also Taking a Toll on Contractors: At Least 647 Support Personnel Killed*, SAN DIEGO UNION-TRIB., Oct. 12, 2006.

127. Corn, *supra* note 101, at 520.

128. See MARGUERITE FEITLOWITZ, *A LEXICON OF TERROR: ARGENTINA AND THE LEGACIES OF TORTURE* 6-7 (1998).

129. *Id.* at 8.

130. See Michael Smith & Sarah Baxter, *US Generals 'Will Quit' If Bush Orders Iran Attack*, SUNDAY TIMES (London), Feb. 25, 2007, at 22 (reporting that some of the country's most senior military commanders are prepared to resign if the White House orders a military strike against Iran).

131. See *supra* note 106 and accompanying text.

longer limited to wars declared by Congress; it now applies to any “contingency operation” the President might unilaterally decide to launch in the exercise of his commander-in-chief powers.¹³²

In my view, such alterations in the fundamental constitutional rights enjoyed by American citizens should, as a matter of separation of powers, require at minimum a formal declaration of war by the Congress. This may seem “anachronistic,” “archaic,” or “unrealistic” given that Congress has, since World War II, preferred to fund “low intensity conflicts” rather than formally declared wars.¹³³ However, in my view, the quiet passage of this amendment is compelling evidence that a Congress that willingly abdicates its constitutional responsibility to protect the nation from ill-advised presidential deployments of our armed forces in foreign military adventures by failing, among other things, to jealously guard its expressly enumerated power to declare war, can hardly be expected to jealously guard the constitutional rights of American citizens against executive overreaching.

This is not to say that the problem of civilian lawlessness in the field of “contingency operations” is not a compelling problem in need of immediate solution. It is to say that the lessons offered by the excellent contributions to this symposium point in directions very different from the solution proffered by the 2007 amendment to the UCMJ. These solutions require high-level accountability of the sort Congresswoman Holtzman advocates for the lies and misrepresentations that have led the country to war in the first place.¹³⁴ They also require investigation and prosecution of the network of interlocking interests that allegedly have corrupted the serious matter of national security and converted war into a for-profit business for the benefit of a transnational network of economic and political elites,¹³⁵ retired generals,¹³⁶ and party operatives.¹³⁷

132. See, e.g., Gene Healy, *War with Iraq: Who Decides?*, CATO INST., Feb. 26, 2002, http://www.cato.org/pub_display.php?pub_id=3405 (criticizing Congress's failure to put the decision to commit armed forces to Iraq to an up or down vote on a formal declaration of war).

133. See Sidak, *supra* note 106, at 94; see also Elizabeth M. Iglesias, *Out of the Shadow: Marking Intersections in and Between Asian Pacific American Critical Legal Scholarship and Latino Critical Legal Theory*, 40 B.C. L. REV. 349, 367–68 (1998) (noting the role of “low-intensity conflicts” in the realization of American national-security ideology and the creation of common contexts of struggle for articulating intersections in and between LatCrit and APACrit legal scholarship).

134. Holtzman, *supra* note 18, at 227.

135. See *A Halliburton Primer*, WASH. POST, July 11, 2002, <http://www.washingtonpost.com/wp-srv/onpolitics/articles/halliburtonprimer.html>; see also Maggie Mulvihill et al., *Bush Advisers Cashed in on Saudi Gravy Train*, BOSTON HERALD, Dec. 11, 2001, at 7; The Carlyle Group, http://www.apfn.org/apfn/Carlyle_group.htm (last visited Mar. 23, 2007) (exploring links between high level government officials and the profits of the defense-contract industry).

136. See, e.g., William M. Arkin, *Microwaves, Lasers, Retired Generals for Sale*, WASH. POST, Oct. 6, 2005, <http://integrator.hanscom.af.mil/2005/October/10132005/10132005-07.htm>.

137. See, e.g., *Blackwater Runs Red*, <http://iraqforsale.bravenewfilms.org/blog/344-black>

Read cumulatively, as a body of scholarship, the articles and essays in this symposium demonstrate the wide range of issues implicated by the Bush administration's repeated assertion of Article II of the U.S. Constitution as legal authority for the policies, practices, and institutional rearrangements through which it is prosecuting its war, not on a nation-state with which the country might one day conclude a treaty of peace, but rather *on terror*. The Bush administration's assertions that its global War on Terror is a "new kind of war," over and over again, provide shorthand sound bites for unprecedented claims of inherent executive powers. These claims of inherent executive power challenge traditional understandings of individual rights and republican government. They manipulate and destabilize foundational distinctions between criminal acts and acts of war, between citizen and noncitizen, between domestic and international, chipping away the line between constitutional government and the state of exception, between the rule of law and the politics of "necessity," between inevitable discretion and lawless impunity.

Starting with Congresswoman Holtzman's important contribution exploring the constitutional foundations and contemporary justifications for invoking impeachment proceedings against the President, the symposium articles reveal historical parallels that significantly undercut the idea that the War on Terror is a "new" kind of war. To the extent it is prosecuted through warrantless domestic surveillance, disinformation directed, not at foreign enemies, but at the American people, and bombing campaigns against civilian populations, whose deaths are discounted as collateral damage justified by military necessity, the Bush administration's War on Terror is *not* new, but bares remarkable similarities to the Nixon administration's War on Communism. To the extent it is prosecuted through torture and secret detention centers, the War on Terror calls to mind practices of racial terror and colonial domination that are also decidedly *not* new.

Against this backdrop of familiar abuses, the symposium authors demonstrate the abundance of established legal doctrines and traditions that our history of struggle to establish and maintain a government of laws, under the rule of law, both domestically and internationally, has bequeathed to the American experiment in enlightened self-government. These articles show us why the notion that American separation of powers doctrine and the sovereignty of the *people* of the United States reflected in and effectuated by this doctrine will be thrown to the waste

water-runs-red (last visited Mar. 23, 2007) (documenting extensive relationship between Blackwater principals and Republican party); see also Joshua Frank, *Senator Feinstein's War Profiteering*, ANTIWAR.COM, Feb. 28, 2006, <http://www.antiwar.com/frank/?articleid=8609> (arguing that war profiteering conflicts are a bipartisan problem).

basket of our future's history by the actions and utterances of a self-proclaimed "Decider" is neither warranted nor inevitable. They show us why notions that international human rights and emerging norms regarding the right of all peoples to democratic government under the rule of law must give way to the expanding assertions of imperial power extra-territorially and totalitarian power domestically are neither warranted nor inevitable. In the words of Senator Feingold, whose call for censure inspired me to organize the conference documented by this symposium volume, "[w]e can fight terrorism without breaking the law. The rule of law is central to who we are as a people, and the President must return to the law."¹³⁸

138. *An Examination of the Call To Censure the President*, *supra* note 2 (statement of Senator Russ Feingold, Member, Senate Committee on the Judiciary).