

1-1-2008

The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights

David Abraham
University of Miami School of Law, dabraham@law.miami.edu

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Human Rights Law Commons](#)

Recommended Citation

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)
Available at: <https://repository.law.miami.edu/umlr/vol62/iss2/5>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

The Bush Regime from Elections to Detentions: A Moral Economy of Carl Schmitt and Human Rights

DAVID ABRAHAM*

I. INTRODUCTION

To many people in the United States and abroad, the Bush regime is known primarily for the international mess it has created as the world's only superpower, and for the way it has sacrificed long-accepted legal norms—military and civilian, international and domestic—in the name of its so-called War on Terror.¹ These violations of legal norms can be divided into two categories: (1) domestic repression, as exemplified by the PATRIOT Act² and surveillance projects;³ and (2) the brutality and denial of legal obligations toward enemy non-Americans at Abu Gharib and the Guantánamo detention camps, as well as rejection of the Torture Conventions⁴ and the provisions of the Geneva Conventions on Prisoners of War.⁵ Most recently, Congress approved the denial of judicial review (through habeas corpus) of the so-called “military tribunals” for alleged terrorist combatants—tribunals that are empowered to proceed, after years of legal blackout, without informing defendants of the evidence against them or allowing them to confront either the evidence or their accusers.⁶

* Professor of Law, University of Miami School of Law.

1. See, e.g., *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2007), cert. granted, 127 S. Ct. 3067 (2007); *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), cert. granted, 127 S. Ct. 3078 (2007); see also Hansje Plagman, *The Status of the Right to Life and the Prohibition of Torture Under International Law: Its Implications for the United States*, 2003 J. INST. JUST. & INT'L STUD. 172 (discussing the United States' failure to follow domestic and international laws in the War on Terror).

2. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (to be codified in scattered sections of the U.S.C.).

3. See Rhonda McMillion, *Balancing Act: Surveillance Bills Should Account for Individual Rights, Executive Power*, Says ABA, 92 A.B.A. J. 67 (2006); Gil Smart, *Fear of Terrorism, Terrorism of Fear*, SUNDAY NEWS (Lancaster, Pa.), Mar. 25, 2007 at 1.

4. See, e.g., 18 U.S.C. §§ 2340, 2340A (2000) (providing for limited implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (Dec. 10, 1984)).

5. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

6. See 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.); see also *Boumediene*, 476 F.3d 981.

We all hope, even pray, that these changes have not become—and will not become—hardwired, permanent features of U.S. law at home or U.S. policy abroad. It is ultimately too early to tell. How will the Iraqi debacle end? Will that war end with the United States receiving a bloody nose, retreating from its transient and aberrant form of Empire back to a more modest position? Will the next administration repair the damage by winning back allies? relaxing adversaries? settling regional conflicts, especially in the Middle East, with a more modest *realpolitische* approach? and cooling the world temperature (literally and metaphorically)?

Or are we only at the beginning of a period in which the sole hegemon, a reactionary United States run by the rich and religious, embarks on various ideological crusades to promote its peculiar way of life? Are we being led into a “clash of civilizations”—one where both sides, all sides, are marked by aggression and intolerance without end?⁷ Are there bases for domestic resistance within the United States? So far, we have seen very little resistance as the Bush regime has successfully employed a reckless policy—one that permits no visible economic sacrifices (quite the opposite) and no *levée en masse* military draft, while it successfully deflects mass public attention from its military failures, domestic incompetence, and corruption by posturing about and manipulating terrorism concerns. In the absence of a serious opposition party or organized civil society, effective opposition may only develop following repeated defeats in the international arena.

Finally, is “the West,” the liberal and social democratic Atlantic World as we have known it for sixty years, a thing of the past? Is the pressure of a demographic crisis and an Islamic presence in Europe, combined with an unanchored America, too much for “the West,” as we know it, to bear? I will return later to the issue of whether “the West” is now a smokescreen for naked U.S. power, or whether Europe can provide an embedding of U.S. power as the European Union (“EU”) and the North Atlantic Treaty Organization (“NATO”) earlier did for Germany.⁸ Or has the U.S.-supported expansion of the EU and NATO thinned and undercut an already weak and divided Europe? Should we, as Americans, ask our friends and allies abroad then for taming à la Blair or for your resistance, for multilateralism, or for outright opposition?

The Bush regime’s ability to transform the United States, the

7. See generally SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF THE WORLD ORDER* (1997) (describing the new era in world politics, modernization, and reactions to Westernization).

8. See, e.g., Karsten D. Voigt, *Bündnistreue als Emanzipation [Alliance as Emancipation]*, 29 FREITAG, July 16, 1999, <http://www.freitag.de/1999/29/06p.htm>.

“indispensable” hegemon,⁹ into the source of disorder and disaster in one land after another has its roots in Bush’s own illegitimacy, as well as in our national arrogance and incompetence. I am inclined to trace much of the energy, aggression, and (ultimately) crimes of this government back to the regime’s original illegitimacy and its subsequent need to legitimate itself. Much can be understood about the Bush government through the lens of Bochum historian Hans Mommsen in his discussions of the Nazi regime and its leadership.¹⁰ I do not mean to suggest that the agendas, practices, or goals of the two are the same, or that the crimes, so far, are of the same order. I will in fact argue that a sincere post-holocaust, assertive human-rights consciousness, as well as a parallel hypocritical ideology, are essential to understanding the Bush regime’s policies.¹¹ But I do mean to suggest that there are some useful and illuminating comparisons to be made between the United States’ current government and others with which we are not usually associated.

II. THE BUSH COUP

The coalition that was put together around the pallid, dull, and almost clownish George W. Bush in 2000 continued the conservative Republican strategy developed by Ronald Reagan in the 1980s. It

9. It should be noted that the description of the United States as the world’s “indispensable nation”—able to see into the future and use force when necessary—was articulated already by Madeleine Albright in the Clinton years. See Interview by Matt Lauer with Madeleine Albright, U.S. Sec’y of State, on NBC (Feb. 19, 1998), available at http://www.fas.org/news/iraq/1998/02/19/98021907_tpo.html. It is not surprising that after the Soviet Union fell and the EU failed to assert a common and strong military posture, hegemonic thinking in the United States became irresistible. We cannot know where Clinton foreign policy was headed, particularly after the failure of Israeli-Palestinian negotiations. See Robert Malley & Hussein Agha, *Camp David: The Tragedy of Errors*, N.Y. REV. OF BOOKS, Aug. 9, 2001, at 59–65, available at <http://www.nybooks.com/articles/14380>. Of course, it is possible that Clintonians would have returned to try again to solve the Middle East’s point of combustion or *Brennpunkt*, in which case much could be different today. On the other hand, it would be foolish to exaggerate Clinton/Democratic readiness to do all that would be necessary to broker or compel an Israel-Palestine agreement. Still, it was a first effort. *Id.*

10. See, e.g., HANS MOMMSEN, FROM WEIMAR TO AUSCHWITZ: ESSAYS ON GERMAN HISTORY 1 (Philip O’Connor trans., 1991).

11. Many commentators have remarked on the dramatic presence of Jewish figures in the Bush administration and among its apologists. See e.g., JACOB HEILBRUNN, THEY KNEW THEY WERE RIGHT: THE RISE OF THE NEOCONS (2008); JOHN J. MEARSHEIMER & STEPHEN M. WALT, THE ISRAEL LOBBY AND U.S. FOREIGN POLICY 5 (2007); Jonathan Freedland, *That Is a Racist Slur: Tam Dalyell’s Belief that a Cabal of Neoconservative Jews Controls Bush Is Gaining Currency in Liberal Circles*, GUARDIAN (London), May 7, 2003, at 21; Ori Nir & Ami Eden, *Ex-Mideast Envoy Zinni Charges Neocons Pushed Iraq War To Benefit Israel*, JEWISH DAILY FORWARD, May 28, 2004, <http://www.forward.com/articles/5719>. Not incorrectly, this presence is associated with a neoconservative desire to support in the strongest possible way what are perceived as Israel’s interests. But I think one would be gravely mistaken to miss or disregard the regime’s very real, aggressive commitments to protecting human rights and fighting dictatorships, especially among the regime’s intellectual enablers and supporters.

intended, above all, to dismantle further the welfare state and empower U.S. elites, while promoting so-called traditional values.¹² Its strategy consisted, as it has all along, of economic elites and the media they control preaching the antigovernment gospel of tax reduction and the free market; and anti-left, religious self-employed business owners and white-collar employees or *Mittelständler* in the “new” south and mountain west especially, whose underappreciated belief in God and rugged individualism are as difficult to understand and deconstruct today as they were when Alexis de Tocqueville wrote so lavishly about them in the middle of the nineteenth century.¹³ As to Bush, we should remember how that other great commentator of the mid-nineteenth century, Karl Marx, could describe Louis Napoleon as a clown—a farcical recurrence of his great uncle¹⁴—which, however, didn’t prevent the successful coup d’état of 18th Brumaire. Likewise, George W. was but a farcical *déclassé* repeat of his father, only now without a Soviet Union to encourage caution in the world. In retrospect, seven years after George W.’s election, it is salutary to recall Mommsen’s argument that Hitler, too, was a weak and unimpressive leader in many respects, often detached from key decisions both before and after he took office.¹⁵

Unlike 1851, 1922, 1933,¹⁶ and other years that witnessed coups d’état or historical transitions of political power, 2000 was not an auspicious year for an opposition victory, let alone a radical change. Despite the deep sins Bill Clinton had committed against the nation’s puritanical soul, and despite his decision to move the Democratic Party even further to the right on nearly all domestic issues, he was fortunate to oversee a period of broad growth and full employment. So, it took something of a coup d’état for Bush to become President.¹⁷ Living in Miami, I was able

12. This coalition and its strategies are described, for example, in THOMAS FERGUSON & JOEL ROGERS, *RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS* 114–15, 127–30 (1986).

13. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Arthur Goldhammer trans., Library of Am. ed. 2004) (1835); see also FERGUSON & ROGERS, *supra* note 12, at 119–24. On religion and individualism, see generally THE ROBERT BELLAH READER (Robert N. Bellah & Steven M. Tipton eds., 2006); *INDIVIDUALISM & COMMITMENT IN AMERICAN LIFE* (Robert N. Bellah et al. eds., 1988); SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* (1997).

14. KARL MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* 84 (Eden & Cedar Paul trans., Int’l Publishers 1926) (1853).

15. MOMMSEN, *supra* note 10, at 185.

16. In 1851, Napoleon unilaterally dissolved the French National Assembly; in 1922, Benito Mussolini became prime minister of Italy; in 1933, Hitler and the National Socialists came to power in Germany.

17. Of course, the 2000 election should never even have been close. The failures of the Gore campaign were many—before and after the vote—but I cannot address them here, beyond mentioning the fatal error of distancing himself from Clinton. See Ron Fournier, *Gore Tries To Distance Himself from Scandal Bush*, CNN.COM, Aug. 11, 2000, <http://archives.cnn.com/2000/>

to view this coup d'état close up as it was prepared and as it unfolded just a few miles from my office. Like the quasi-coups in Paris of Brumaire 1851,¹⁸ Rome of March 1922,¹⁹ or Berlin of January 1933,²⁰ the Miami coup combined established conservative/rightist party participation, both legal and illegal, with radical street terror similar to that used by Louis Napoleon's Society of December the 10th, Mussolini's *squadristi*, Hitler's S.A. storm troopers, and Bush's Cuban-exile cadres.²¹

ALLPOLITICS/stories/08/11/politicsofvalues.ap/index.html. On the other hand, Clinton's failure to kowtow to the right-wing Miami elite in the Elian Gonzalez affair, though quite in accordance with the law or *rechtsstaatlich*, turned out to have disastrous electoral consequences *precisely at the election's "ground zero."* See Dexter Filkins & Dana Canedy, *Counting the Vote: Miami-Dade County; A Mayor, Once Vocal for Gore, Is Silent*, N.Y. TIMES, Nov. 25, 2000, at A11; Robert Richie, Letter to the Editor, *Elian and the Election*, N.Y. TIMES, Apr. 20, 2000, at A28. Those consequences could have been negated had Gore chosen the veteran Florida senator (and later one of the very few outspoken opponents of the Iraq war) Bob Graham as his running mate. But, looking for someone who had criticized Clinton's behavior, Gore chose instead the Jewish conservative, Joe Lieberman. Lieberman cost Gore anti-Semitic votes in the South while bringing absolutely nothing. See Jake Tapper, *Too Jewish?*, SALON.COM, Aug. 9, 2000, <http://archive.salon.com/politics/feature/2000/08/09/lieberman/print.html>. Lieberman has subsequently become the best proof that appeasement doesn't work. See Adam Clymer, *The Nation; Choosing a Running Mate Matters. Or, Mattered.*, N.Y. TIMES, Aug. 20, 2000, § 4, at 4 (noting that Gore's unexpected choice of Lieberman as a running mate was likely to distance himself from Clinton).

18. See MARX, *supra* note 14, at 103–26.

19. See ADRIAN LYTTTELTON, *SEIZURE OF POWER: FASCISM IN ITALY 1919–1929* (3d ed. 2004). For a discussion of the march on Rome, see *id.* at 77–93.

20. See KARL DIETRICH BRACHER, *THE GERMAN DICTATORSHIP: THE ORIGINS, STRUCTURE, AND EFFECTS OF NATIONAL SOCIALISM* 14 (Jean Steinberg trans., 1970).

21. The history of Miami's radical Cuban exiles must be left for another occasion. Suffice it to say that these terrorists *avant la lettre* have been harbored and active on the right fringes of the Republican Party for many years. They played, for example, key roles in the putsch against Salvador Allende in Chile, Richard Nixon's Watergate, the Reagan Contra war in Nicaragua, and in other Western Hemisphere mischief that has yet to end. See generally ANN LOUISE BARDACH, *CUBA CONFIDENTIAL: LOVE AND VENGEANCE IN MIAMI AND HAVANA* (2002). Of particular interest in the terrorism context: A quarter-century before September 11, 2001, a Cuban civilian jetliner in the skies off Barbados plummeted into the ocean, causing all seventy-three people on board to die in an attack that appeared to have been planned by Cuban Exile, Luis Posada. See The National Security Archive, Documents Linked to Cuban Exile Luis Posada Highlighted Targets for Terrorism, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB218/index.htm> (last visited Nov. 20, 2007). Cuban exiles are always handsomely rewarded, not only with an endless U.S. campaign against the Castro government, but also with huge financial and ideological subsidies. Their "legitimate" elite face is also well represented in Washington. John Negroponete is the former director of National Intelligence, while Cuba-born Otto Reich, with whom he worked on Nicaragua and Honduras, is in charge of menacing Latin America. Miami's three Republicans in Congress, Ileana Ros-Lehtinen, Lincoln Diaz-Balart, and son Mario Diaz-Balart, are among the most reactionary in Washington and completely untouchable in Miami. See, e.g., BARDACH, *supra*, at 306–20; Duncan Campbell, *The Bush Dynasty and the Cuban Criminals: New Book Reveals Links of Two Presidents and the Governor of Florida with Exiled Hardliners*, GUARDIAN (London), Dec. 2, 2002, at 14; Bob Norman, *Contra Campaign*, MIAMINEWTIMES.COM, Sept. 23, 2004, <http://www.miaminewtimes.com/2004-09-23/news/contra-campaign>; Council on Hemispheric Affairs, Otto Reich: A Career in Disservice, <http://www.coha.org/2004/07/13/otto-reich-a-career-in-disservice> (last visited Oct. 12, 2007); *New Docs Shed Light on Negroponete's*

To many minds, the December 12, 2000, U.S. Supreme Court ruling that terminated the Florida recount and installed Bush as President capped an improbable stolen election.²² The Florida voting process was overseen by the candidate's governor-brother and an elected Florida interior minister working under him, who simultaneously functioned as co-chair of the Bush election campaign in Florida.²³ This is true and reprehensible; yet it undervalues the fascistic moves, or *Züge*, that preceded it. These consisted of two major efforts, one culminating on Election Day and the other on display during the critical moments of the recounting process.

First, relying on trustworthy knowledge that almost 90% of former felons vote Democrat,²⁴ and knowing that available racist sentiment would back them up, Florida Republicans voted to spend \$4 million to purge approximately 8,000 former felons from the voter rolls (including, as it turned out, 2,883 who were absolutely entitled to vote, having committed their crimes in previous states of residence where felons were not disqualified), along with a still-unknown number of false positives disqualified in a deliberately, but not randomly, overbroad search.²⁵ This came after Republicans rejected a bill to spend \$100,000 for voter education.²⁶ These "disqualifications" were first activated and effective on the day of the 2000 election so that there was no opportunity for counterchallenge or remedy.²⁷ So did the southern ancien régime overturn the Voting Rights Act,²⁸ the jewel of the 1960s civil-rights movement, at least for this occasion. As much as the Weimar period elites hated popular democracy and universal suffrage,²⁹ I am unaware of any efforts of this sort in 1932 to keep the wrong people from voting.

Role in Honduras, Iran-Contra Affair, DEMOCRACYNOW.ORG, Apr. 13, 2005, <http://www.democracynow.org/article.pl?sid=05/04/13/1356211&mode=threat&tid=25>. See generally DAVID RIEFF, *GOING TO MIAMI: EXILES, TOURISTS, AND REFUGEES IN THE NEW AMERICA* (1987).

22. See *Bush v. Gore*, 531 U.S. 98 (2000).

23. See Dana Milbank & Jo Becker, *Controversy Swirls Around Harris; Florida Secretary of State Seen as Partisan Figure with Strong Republican Ties*, WASH. POST, Nov. 14, 2000, at A22.

24. See Kenneth P. Vogel, *Felons Vote Democratic, National Study Says*, THE NEWS TRIBUNE.COM, May 10, 2005, <http://dwb.thenewstribune.com/news/local/story/4850294p-4452879c.html> ("Of Democratic presidential candidates, . . . Bill Clinton's successful 1996 re-election campaign would have gotten the highest percentage of felon votes, at 85.4 percent."); see also Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felony Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 792 (2002) (arguing that Gore would have won the 2000 election if disenfranchised felons in Florida had the right to vote).

25. These matters are recounted in Richard Ray Perez & Joan Sekler's movie, UNPRECEDENTED: THE 2000 PRESIDENTIAL ELECTION (Sony 2002).

26. *Id.*

27. *Id.*

28. 42 U.S.C. §§ 1971, 1973-1973bb-1 (2000).

29. See generally DAVID ABRAHAM, *THE COLLAPSE OF THE WEIMAR REPUBLIC: POLITICAL ECONOMY AND CRISIS* (2d ed. 1986).

Second, are the truly remarkable but still underappreciated events in Miami on the 22nd and 23rd of November 2000. After an automatic machine recount reduced Bush's Florida lead from 1,700 votes to 327 votes,³⁰ the Florida Supreme Court ordered a full recount in several counties, including Miami-Dade.³¹ As the hand recounts showed a definite trend, with a more than sufficient gain for Gore, the recount in Miami was shut down and reversed. To read mainstream press accounts of those days is frightening still, and they underscore what circumstances made this President:

After a furious demonstration by Republicans, Miami-Dade County election officials stunned both sides in the bitter contest for Florida's presidential vote and decided unanimously today to end their recount of 654,000 ballots.

. . . .

The recount began on [November 20, 2000]. By the time it came to end today, Mr. Gore had gained 157 votes with 99 of 614 precincts counted.³²

The next day we learned some of the particulars of this "furious demonstration."

The Miami-Dade County Canvassing Board's decision [yesterday] to shut down its hand recount . . . followed a rapid campaign of public pressure that at least one of the board's three members says helped persuade him to vote to stop the counting.

. . . .

The city's most influential Spanish-language radio station, Radio Mambi, called on staunchly Republican Cuban-Americans to head downtown to demonstrate. Republican volunteers shouted into megaphones urging protest. A lawyer for the Republican Party helped stir ethnic passions by contending that the recount was biased against Hispanic voters.

The subsequent demonstrations turned violent on Wednesday after the canvassers had decided to close the recount to the public. Joe

30. See David Firestone & Michael Cooper, *Bush Sues To Halt Hand Recount in Florida; Palm Beach Tally Starts as G.O.P. Cites Risk of Flaws in Process*, N.Y. TIMES, Nov. 12, 2000, at A1.

31. See *Gore v. Harris*, 772 So. 2d 1243, 1246 (Fla. 2000), *rev'd*, 531 U.S. 98 (2000). There is no question that the Gore campaign, relying on top corporate lawyers, made a fatal political and ideological error insofar as it demanded a recount only in those counties where it saw potential gains, rather than in the entire state. See, e.g., Jim Drinkard & Dennis Cauchon, *Gore Missed Big Chance While Chasing Chads*, USATODAY.COM, May 11, 2001, <http://www.usatoday.com/news/politics/2001-05-10-recountgore.htm>.

32. Dana Canedy & Dexter Filkins, *Counting the Vote: Miami-Dade County; A Wild Day in Miami, with an End to Recounting, and Democrats' Going to Court*, N.Y. TIMES, Nov. 23, 2000, at A31 (internal paragraph divisions omitted).

Geller, chairman of the Miami-Dade Democratic Party, was escorted to safety by the police after a crowd chased him down and accused him of stealing a ballot. Upstairs in the Clark center, several people were trampled, punched or kicked when protesters tried to rush the doors outside the office of the Miami-Dade supervisor of elections. . . .

When the ruckus was over, the protesters had what they had wanted: a unanimous vote by the board to call off the hand counting.

. . . .

Republican supporters scoffed at the accusation that they had engaged in a scheme of intimidation, saying the protest had been nothing more than a spontaneous manifestation of people's anger.

"It's the same type of democracy in action when Jesse Jackson parachutes in and starts a protest in the black community," said Miguel De Grandy, a lawyer for the Republican Party. "People have a right to express their opinions."

. . . .

[Radio Mambi reporter Evilio Cepero] played a key role in the protests, roaming around the building outside . . . with a megaphone He regularly cut into Radio Mambi's broadcasts to encourage people to come downtown. And he also phoned in interviews with two Republican lawmakers—United States Representatives Lincoln Diaz-Balart and Ileana Ros-Lehtinen, both Cuban-Americans—who also helped persuade people to come.³³

III. *REICHSTAGSBRAND* AND *ERMÄCHTIGUNGSGESETZ*; SEPTEMBER 11 AND THE PATRIOT ACT

Given the enormity of the Nazis' crimes and deviousness, it has taken a long time to accept the proposition that the Nazis actually did not themselves torch the *Reichstag* to create a crisis that would enable them to eliminate their opponents and tighten their grip on the nation. The arson of the *Reichstag* took place more or less as the government claimed.³⁴ The "genius" of the Nazis, so difficult for rationalists to accept, lay not primarily in lies and deceptions (though certainly there

33. Dexter Filkins & Dana Canedy, *Counting the Vote: Miami-Dade County; Protest Influenced Miami-Dade's Decision To Stop Recount*, N.Y. TIMES, NOV. 24, 2000, at A41.

34. See DIETER DEISEROTH, HERSCH FISCHLER & WOLF-DIETER NARR, NEUES VOM REICHSTAGSBRAND? EINE DOKUMENTATION: EIN VERSÄUMNIS DER DEUTSCHEN GESCHICHTSSCHREIBUNG [NEWS ABOUT THE *Reichstags* Arson? A Documentation: An Omission in German Historiography] (2004). See generally Hans Mommsen, *The Reichstag Fire and Its Political Consequences*, in REPUBLIC TO REICH: THE MAKING OF THE NAZI REVOLUTION 129–223 (Hajo Holborn ed., Ralph Manheim trans., 1972) (describing the *Reichstag* fire and its political consequences).

were plenty of those), but in being able to exaggerate and transform a real attack by their enemies and to *use* it for their own ends. “Sweet are the uses of adversity / Which like the toad, ugly and venomous, / Wears yet a precious jewel in his head”³⁵

With al Qaeda’s attacks of September 11 and the more than 3000 deaths they caused,³⁶ the United States was attacked in the Homeland—not the furthest reaches of the distant territory of Hawaii as in 1941, but at its very iconic centers of business and military power, the World Trade Center in Manhattan and the Pentagon in Washington. This was almost inconceivable to Americans. In fact, the very word *homeland* subsequently had to be rescued from linguistic obscurity.³⁷ (Of course, the iconic value of the *Reichstag*, inscribed with its dedication “To the German People,” should not be understated either, and having suffered recent invasions, the resonance of *Heimat* to Germans was immediate.³⁸)

It was widely—and correctly—remarked at the time that George W. Bush became President *not* upon his inauguration in January 2001, but instead on September 11—or at least whenever he resurfaced from hiding (until which time it seemed that Mayor Giuliani of New York was in charge). That was the moment of Bush’s *Reichstag* fire. Whether one considers Bush a strong and central figure or, following the Mommsonian analysis (which certainly seems persuasive to anyone with a vivid recollection of the moment), the product of his supporters, it was the turning point.³⁹ Unable to become a President by legitimate election, he now proved able to legitimate the presidency he occupied by building and fighting a struggle against terrorism, from that day onward and through the Military Commissions Act of October 2006.⁴⁰ But not before: During the summer of 2001, Bush and National Security Advisor, Condoleezza Rice, had ignored an explicit intelligence report warn-

35. WILLIAM SHAKESPEARE, *AS YOU LIKE IT* act 2, sc. 1.

36. Eric Lipton, *A New Count of the Dead, But Little Sense of Relief*, N.Y. TIMES, Dec. 2, 2001, at A41. March 2008 saw the 4000th U.S. military death in Iraq and at least the 300,000th Iraqi civilian death since the U.S. invasion. See Kim Gamel, *Bomb Kills 4 U.S. Soldiers in Baghdad, Raising Overall U.S. Death Toll in War to 4,000*, ASSOCIATED PRESS, Mar. 24, 2008, WL 3/24/08 APWORLD 02:38:25; U.S. Military Deaths in the Conquest of Iraq, <http://www.ac.wvu.edu/~stephan/USfatalities.html> (last visited Feb. 4, 2008). One study has reported 600,000 dead civilians. See Lizette Alvarez & Anderw Lehren, *3,000 Deaths in Iraq, Countless Tears at Home*, N.Y. TIMES, Jan. 1, 2007, at A1 (citing Gilbert Burnham et al., *Mortality After the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey*, 368 LANCET 1421 (2006)).

37. See Mickey Kaus, *The Trouble with “Homeland”: It’s a Creepy, Morale-Sapping Word. Let’s Drop It*, SLATE, June 14, 2002, <http://www.slate.com/?id=2066978>.

38. See Michael P. Steinberg, Letter to the Editor, “*To the German People*,” N.Y. TIMES, Apr. 4, 2000, at A22.

39. MOMMSEN, *supra* note 10, at 7.

40. 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.).

ing that al Qaeda was planning an imminent attack against the United States by crashing hijacked planes into major buildings.⁴¹

What followed with astounding rapidity (thirty days) was the USA PATRIOT Act⁴²—the U.S. government's version of the *Ermächtigungsgesetz*, which permitted the German chancellor and his cabinet to enact laws without parliamentary approval.⁴³ The German government in 1933 had required twenty-four days, as the senescent President Hindenburg was still part of the regime and there was opposition from the Social Democrats.⁴⁴ 94 of 538 *Reichstag* deputies (not quite 18%) opposed the *Ermächtigungsgesetz*.⁴⁵ The PATRIOT Act, though not nearly so far-reaching (see below), was opposed by 67 legislators (13%), passing 98–1 in the Senate and 356–66 in the House⁴⁶ (and renewed and toughened in 2005).⁴⁷ Quickly, and whether coincidental or otherwise, the well-founded panic of September 11 was exacerbated by a mysterious and never-solved anthrax bio-terrorism panic less than two months later.⁴⁸ In Mommsonian fashion, things were just happening, and with each such development, the underachieving dolt, the perpetually vacationing mediocrity personified was transformed into a steely commander in chief. Louis Napoleon the flop might soon don the purple robes of Emperor Napoleon III.

The constitutional mandate later claimed by Bush for the powers he

41. Although repeatedly denied by Rice, undeniable proof that she received and ignored that report from July 10, 2001, has become incontrovertible, as former CIA Chief Tenet bails out. See Phillip Shenon & Mark Mazzetti, *Records Confirm C.I.A. Chief Warned Rice on Al Qaeda*, N.Y. TIMES, Oct. 3, 2006, at A18.

42. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S.C.).

43. See Gesetz zur Behebung der Not von Volk und Reich [Law for Remediating the Distress of People and Nation], Mar. 24, 1933, RGBl. I S.173, available at <http://www.documentarchiv.de/ns.html>; see also Paul H. Haagen, *A Hamburg Childhood: The Early Life of Herbert Bernstein*, 13 DUKE J. COMP. & INT'L L. 7, 13–14 (2003) (explaining how Hitler “cajoled and bullied the Reichstag into passing the notorious Enabling Act,” which “created the framework for the legal lawlessness that would characterize the [Nazi] regime”). Both acts have the required Orwellian full names: “Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001” is as deranged as the “Law for Remediating the Distress of the People and Nation.”

44. See BRACHER, *supra* note 20 at 224–29; Haagen, *supra* note 43, at 12–14.

45. See Gesetz zur Behebung der Not von Volk und Reich [Law for the Remediating of the Distress of People and Nation], Mar. 23, 1933, RGBl. I at 45, available at http://mdz1.bib-bvb.de/cocoon/reichsblatt/Blatt_bsb00000141,00049.html.

46. See Adam Clymer, *Antiterrorism Bill Passes; U.S. Gets Expanded Powers*, N.Y. TIMES, Oct. 26, 2001, at A1.

47. See Sheryl Gay Stolberg, *Senate Passes Legislation To Renew Patriot Act*, N.Y. TIMES, Mar. 3, 2006, at A14; Sheryl Gay Stolberg, *House Renews Antiterror Law, But Opposition Builds in Senate*, N.Y. TIMES, Dec. 15, 2005, at A1.

48. See Peter Slevin, *For a Country Already on Edge, Added Anxiety; Anthrax Scare Underscores Vulnerability*, WASH. POST, Nov. 4, 2001, at A8.

inferred from the PATRIOT Act law, the administration claimed, in the President's powers as commander in chief in times of war.⁴⁹ This was ratified, according to the President and his ministers, by the robust congressional Authorization for Use of Military Force resolution passed seven days after September 11.⁵⁰ In a total of under sixty words, it authorized the President "to use all necessary and appropriate force against those *nations, organizations, or persons he determines* planned, authorized, committed, or aided the terrorist attacks. . . ."⁵¹

Thus was born the War on Terror that has brought us all the terror of war. The domestic war began promptly with the arrest and secret detention of over 1200 resident aliens, mostly Muslim.⁵² Often, detention was based on civil-immigration violations, but sometimes detention was based on nothing whatsoever.⁵³ In nearly all cases, detained aliens were neither charged nor even arraigned.⁵⁴ Under a so-called Special Registration Program, 80,000 young men from two dozen, mostly Muslim, countries were called into the offices of the Immigration and Naturalization Service for "voluntary" interviews, photos, and other procedures.⁵⁵ For 14,000 of them, the reward for cooperation was deportation, mostly on technical grounds that had always previously

49. See generally JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005).

50. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat 224 (2001) (codified as amended at 50 U.S.C. § 1541).

51. *Id.* § 2(a) (emphasis added).

52. *America After 9/11: Freedom Preserved or Freedom Lost?: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Muzaffar A. Chishti, Director, Migration Policy Institute at New York University School of Law) [hereinafter *America After 9/11*].

53. See *id.*

54. See, e.g., Matthew Brzezinski, *Hady Hassan Omar's Detention*, N.Y. TIMES, Oct. 27, 2002, § 6 (Magazine), at 50. U.S. immigration law has long required that anyone detained for deportable immigration violations receive a formal, written Notice to Appear within forty-eight hours that states the alleged grounds for possible deportation and from which both sides work. 8 C.F.R. § 287.3(d) (2007); see also *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991) (county must provide arrested persons with a determination of probable cause within forty-eight hours of arrest); Letter from Nat'l & Local Groups, Nat'l Immigration Forum, to Asa Hutchinson, Undersec'y, Border & Transp. Sec. (Sept. 10, 2004), available at <http://immigrationforum.org/DesktopDefault.aspx?tabid=657>. A Homeland Security memorandum instead became the official charging document. See Memorandum from Asa Hutchinson, Undersec'y, Border & Transp. Sec., to Michael J. Garcia, Assistant Sec'y, U.S. Immigration & Customs Enforcement, on Guidance on ICE Implementation of Policy and Practice Changes Recommended by the Department of Justice Inspector Gen. (Mar. 30, 2004). It has been well documented that many post-September 11 immigration detainees were detained for up to six months. See *Turkmen v. Ashcroft*, No. 02 CV 2307 (JG), 2006 U.S. Dist. LEXIS 39170, at *122 n.36 (E.D.N.Y. 2006).

55. These programs and deportations were widely covered in the press. See, e.g., Cam Simpson & Flynn McRoberts, *U.S. Ends Muslim Registry*, CHI. TRIB., Dec. 2, 2003, at 1; Migration Policy Institute, *DHS May Axe Special Registration of Foreign Visitors*, <http://migrationinformation.org/USFocus/display.cfm?ID=187> (last visited Oct. 12, 2007).

been ignored.⁵⁶ An unknown number of others were invited for interviews by security agencies from which they did not return for extended periods.⁵⁷ Another fifty or so individuals were held as “material witnesses” and temporarily disappeared without ever being charged or called to be witnesses to anything.⁵⁸ No one may ever know how many people were detained or rendered overseas (perhaps for torture by proxy), where they were held, for how long, or under what circumstances. In February 2008, however, the International Red Cross estimated that (excluding those held in Iraq and 390 in Guantánamo) there were still over 620 known detainees in Afghanistan and an unknown number elsewhere.⁵⁹

In contrast, the *Ermächtigungsgesetz* was derived from Hindenburg’s *Reichstagsbrandverordnung*, formally the Order “for the Protection of the People and the Nation” (*zum Schutz von Volk und Staat*).⁶⁰ It too had been a brief declaration: a one-sentence decree issued the day after the Reichstag arson, restricting habeas corpus, freedom of assembly and organization, press rights, and the requirements for warrants to search homes or monitor electronic communications.⁶¹ Under its authority, about 10,000 people, mostly Communists, were arrested during the next two weeks.⁶² Before long, Nazi military success, economic recovery, and the cowardice of Germany’s enemies made domestic repression less necessary, at least until the military tide turned. As Hermann Goering later explained it while at Nuremberg:

[T]he people can always be brought to the bidding of the leaders.

56. Simpson & McRoberts, *supra* note 55, at 1.

57. See Asli Ü Bâli, *Changes in Immigration Law and Practice After September 11: A Practitioner’s Perspective*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 161, 165 (2003).

58. See *e.g.*, *America After 9/11*, *supra* note 52; U.S. DEPT. OF JUSTICE OFFICE OF THE INSPECTOR GEN., REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT (2003). On the federal material-witness statute, 18 U.S.C.S. § 3144 (LexisNexis 2007), and its abuse, see generally Ricardo J. Bascuas, *The Unconstitutionality of “Hold Until Cleared”*: *Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet*, 58 VAND. L. REV. 677 (2005) (discussing the illegal detention of “material witnesses”). Perhaps needless to say, not a single one of these individuals has been convicted of a terrorist crime.

59. International Committee of the Red Cross, US Detention Related to the Events of 11 September 2001 and its Aftermath—the Role of the ICRC, May 31, 2007, *available at* <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/usa-detention-update-121205?opendocument>. There were still almost 390 detainees at Guantánamo in May 2007. *Id.*; see also Press Release, President George W. Bush, President Discusses Creation of Military Commissions To Try Suspected Terrorists (Sept. 6, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/09/print/20060906-3.html>.

60. See, *e.g.*, INTERESSENVERBÄNDE IN DEUTSCHLAND 70 (Thomas von Winter & Ulrich Willems eds., 2007).

61. Under Article 48, Section 2 of the Weimar Constitution, Articles 114–118, 123, 124, 153, could be and were suspended. See WEIMAR CONSTITUTION, art. 48, § 2 (providing that civil rights could be suspended for the sake of public safety).

62. DEBORAH DWORK & ROBERT JAN VAN PELT, HOLOCAUST: A HISTORY 67–68 (2002).

That is easy. All you have to do is tell them they are being attacked and denounce the pacifists for lack of patriotism and exposing the country to danger. It works the same way in any country.⁶³

Of course, we Americans have been told that such comparisons, perhaps phenomenological, can harm the United States and endanger national unity. It is supposed to mean something different when Bush declares that “my most important job as your President is to defend the homeland.”⁶⁴ Or as Attorney General, John Ashcroft, rather menacingly put in while championing the PATRIOT Act in December 2001, “[T]o those who scare peace-loving people with phantoms of lost liberty[,] my message is this: Your tactics only aid terrorists—for they erode our national unity and diminish our resolve.”⁶⁵ To rephrase a recent observation by Claus Offe, the bootstrapping argument of the Bush regime is the following: “If our government adopts measures of *this* sort, then just imagine how acute and ubiquitous the dangers must be that it thereby protects against”⁶⁶—not to mention how necessary and legitimate our own government must be. Such a government can do whatever it wants and its leaders ought not to be challenged.

The Bush *Ermächtigung* and the legitimation of a presidency never democratically attained therefore both depend on the construction of a grave terrorist threat and the need for Ashcroft’s and his successors’ unembarrassed repression at home. The result is what Offe describes—acutely—as an intensified long-term fear of terrorism that accompanies a “second order” regime terrorism (voiced especially by the vice president, secretary of defense, and selected congressional party leaders).⁶⁷ Working from the customary description of terrorism allows—again in Mommsonian fashion—for a regime of self escalation.⁶⁸ Terrorists use illegal methods to induce and spread fear and dread in a population in

63. G.M. GILBERT, NUREMBERG DIARY 256 (Signet 1961) (1947). Goering made this statement to Gilbert, an Allied psychiatrist, during the Easter recess of Goering’s trial on April 18, 1946. See *id.*

64. President George W. Bush, President’s Remarks at Victory 2002 Event (Mar. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/03/20020328.html>.

65. DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary, 107th Cong. (2001) (statement of John Ashcroft, Att’y Gen. of the United States).

66. Claus Offe, *Rekonstruktion oder Dekonstruktion des “Westens”*, in SOUVERÄNITÄT, RECHT, MORAL: DIE GRUNDLAGEN POLITISCHER GEMEINSCHAFT [*Reconstruction or Reconstruction of the “West”?*, in SOVEREIGNTY, LAW AND ETHICS: THE FOUNDATION OF POLITICAL COMMUNITY] 185 (Tine Stein et al. eds., 2007); see also ROBERT E. GOODIN, WHAT’S WRONG WITH TERRORISM? viii (2006); OLD EUROPE, NEW EUROPE, CORE EUROPE: TRANSATLANTIC RELATIONS AFTER THE IRAQ WAR (John Torpey et al. eds., 2005).

67. Offe, *supra* note 66, at 189.

68. See Hans Mommsen, *Die Realisierung des Utopischen: Die “Endlösung der Judenfrage” im “Dritten Reich”* [Realization of the Utopian: The “Final Solution of the Jewish Question” in the “Third Reich”], 9 GESCHICHTE UND GESELLSCHAFT [HIST. & SOC’Y] 381 (1983).

order to gain political advantage. What the “Bushies” have done is the following: “(a) at the risk of and sometimes through the very use of illegal means accomplish (b) the spread of fear and dread throughout the dramatization of and warnings of terrorism (c) for the purpose of anchoring and enhancing political power.”⁶⁹ Instead of fear generated by the brutal acts of “real” terrorists, the empowered regime unhesitatingly escalates “multifaceted and derisive assaults on and suspensions of civil and human rights way beyond any measure of the requisite, proportionate, or *rechtstaatlich*.”⁷⁰

Being the hegemon means that such practices will be contagious and become accepted by at least some U.S. allies. Being the hegemon also means that the foreign-policy interests of the United States, as construed and articulated by the self-legitimizing regime itself, are performed in the interests of all so that no other state can or should stop the United States from pursuing these interests. A long tradition in political theory accepts the role of the hegemon as the pivot of order and stability.⁷¹ Yet this is, of course, a very dangerous business, as the Berlin legal theorist Ulrich Preuß has made clear.⁷² When a power is the protector of the international constitution, so to speak, the very real danger exists that “the enemies of the hegemonic state appear to be the enemies of all humanity It could be, then, that the democratic hegemon is not the answer to the problem of global order but rather perhaps the problem itself.”⁷³

69. Offe, *supra* note 66, at 189. The original text reads as follows: “(a) unter und durch Einsatz rechtswidriger Mittel erzielen (b) Verbreitung von Furcht und Schrecken durch Dramatisierung des und Warnung vor dem Terrorismus (c) zum Zwecke politischer Machtsicherung.” *Id.*

70. *Id.* at 189–90. The original text reads as follows: “Dabei unterscheiden sich regierende von ‘wirklichen’ Terroristen vornehmlich durch die Art der rechtswidrigen Mittel, die sie für die Erzeugung von Furcht einsetzen; im einen Fall sind es brutalste Mordtaten, im anderen die großflächige, jeden Maßstab von Erforderlichkeit, Verhältnismäßigkeit und Rechtsstaatlichkeit spottende Verletzung und Suspendierung von Bürger- und Menschenrechten.” *Id.* (emphasis omitted); see also Eric Lichtblau, *Documents Reveal Scope of U.S. Database on Antiwar Protests*, N.Y. TIMES, Oct. 13 2006, at A18 (confirming that the Department of Defense’s Talon database of 1,500 “suspicious incidents” in 2004 and 2005 included dozens of antiwar meetings and demonstrations as “threats” to security).

71. The literature here is beyond voluminous. See ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* 72–92 (1987); ROBERT GILPIN, *WAR AND CHANGE IN WORLD POLITICS* (1981); Robert Gilpin, *The Theory of Hegemonic War, in THE ORIGIN AND PREVENTION OF MAJOR WARS* 15 (Robert I. Rotberg & Theodore K. Rabb eds., 1989); see also *INTERNATIONAL REGIMES* (Stephen D. Krasner ed., 1983).

72. Ulrich K. Preuß, *Demokratischer Hegemon und Pariastaaten [Democratic Hegemony and Pariah States]*, FRANKFURTER ALLGEMEINE ZEITUNG, May 9, 2006, at 10.

73. *Id.* The original text reads as follows: “Seine Feinde, die er als partikularer Staat natürlich hat, erscheinen ihm leicht als Feinde der Menschheit. . . . Es könnte also sein, daß ein demokratischer Hegemon nicht die Lösung der globalen Ordnungsprobleme der Menschheit ist, sondern vielmehr selbst ein gravierendes Ordnungsproblem darstellt.” *Id.*

IV. SOVEREIGN IS HE WHO DECIDES: THE PROTECTOR OF THE
CONSTITUTION AND THE CONSERVATIVE
ECONOMIC AGENDA⁷⁴

Enter theorists Carl Schmitt and John Yoo. The defense of such extraordinary measures lies in the claim that the United States faces an existential threat. Such an existential threat cannot be managed from within a conventional constitutional legal framework, it is argued, because it is simply too dire. Theories of a strong executive and expanded wartime executive powers are hardly new in the United States, but they have rarely been pushed so far or so hard.⁷⁵ What is certain is that the treatment of enemy combatants and the current issues of torture, rendition, and disappearances are of a piece with the domestic repression of the PATRIOT Act.⁷⁶ The authority given to the President under the Military Commissions Act of 2006 (which was passed against the urgings and protests of Colin Powell and others in the military establishment)⁷⁷ to define and detain enemy combatants without the benefit of

74. For a discussion of the theory that the sovereign is the person who holds decisionmaking power in a time of crisis, see CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., 1985).

75. For an overview, see generally *THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY* (Mark Tushnet ed., 2005). The name most associated with the unitary executive legal theory underlying both the PATRIOT Act and the famous "Torture Memo," which places decisions on torture in the hands of the President, is John Yoo. See Memorandum from the U.S. Dep't of Justice, Office of the Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002) [hereinafter *Torture Memo*]; JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 182–214 (2005).

76. As is relatively well known by now, the PATRIOT Act, section 215 in particular, extends to almost every aspect of law enforcement, including obtaining the personal records and tangible things of nearly anyone without a warrant. See Pub. L. No. 107-56, § 215, 115 Stat. 272, 287 (2001) (codified as amended in 50 U.S.C. §§ 1861–1863). Libraries, hospitals, and businesses are subject to demand letters—"national security letters"—for records and information that are deemed by the Executive to be "sought for" in terrorism investigations. See *id.* § 215, 115 Stat. at 287; Laura K. Donohue, *Anglo-American Privacy and Surveillance*, 96 J. CRIM. L. & CRIMINOLOGY 1059 (2006). The institutions and persons in question are prohibited from even acknowledging that such a demand has been made of them. 50 U.S.C. § 1861 (2000). Internet activity is also monitored, along with credit-card billing data. See Donohue, *supra*, at 1108. Specific "probable cause" is no longer a prerequisite. *Id.* at 1095. Incognito detention, initially an abuse reserved for aliens in trumped-up immigration proceedings after September 11, would become a permissible part of any terror investigation according to section 201 of the Domestic Security Enhancement Act of 2003, a.k.a. PATRIOT Act II. See Draft of the Domestic Security Enhancement Act of 2003, Ctr. for Pub. Integrity, § 201 (Jan. 9, 2003), available at http://www.publicintegrity.org/docs/PatriotAct/story_01_020703_doc_1.pdf. See generally DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (The New Press 2006).

77. See Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28 & 42 U.S.C.); Military Commissions Act of 2006 (Opposition), SOURCEWATCH, http://www.sourcewatch.org/index.php?title=Military_Commissions_Act_of_2006_%28opposition%29 (last visited Oct. 21, 2007).

either Geneva Treaty protections *or* U.S. court review is the outward-facing aspect of the same power that permits the abridgment of domestic freedoms.⁷⁸ Thus, the 2001 Authorization for Use of Military Force,⁷⁹ 2002 Global War on Terror, 2003 Iraq War, 2004 Torture Memo explicating torture justifications,⁸⁰ 2005 National Security Agency “domestic spying” revelations⁸¹ and warrantless searching bypassing the Foreign Intelligence Surveillance Act,⁸² and 2006 Military Commissions Act⁸³ are all of a piece. It is at the moment of such emergency—of the exception—that we find the font of sovereignty and learn who is sovereign.

As is well known, Article 48, paragraph 2, of the Weimar Constitution read: “In case public safety is seriously threatened or disturbed, the Reich President may take the measures necessary to reestablish law and order, if necessary using armed force. In the pursuit of this aim he may suspend the civil rights described in articles . . . partially or entirely.”⁸⁴ The benign interpretation of this power, at the time and ever since, has been that democracies must be militant in their own defense against serious threats and that, therefore, protecting the constitution can sometimes require suspending or going outside of it. Thus, the guardian of the constitution—*der Hüter der Verfassung*—inevitably the Executive, the President, turns out to be the one who goes outside the constitution. Still, under this benign theory of the exception, the power to declare the state of emergency is found in the constitution,⁸⁵ and so the sovereign must respect constitutional restraints on the exercise of that power. Inevitably, however, such restraints prove illusory, and so in the Schmittian version, and perhaps in the incipient U.S. version as well, the sover-

78. Upon the law’s signing on October 17, the Justice Department made clear that the government would move immediately to dismiss more than 500 pending habeas lawsuits. See Sheryl Gay Stolberg, *President Signs New Rules To Prosecute Terror Suspects*, N.Y. TIMES, Oct. 18, 2006, at A20.

79. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541).

80. See Torture Memo, *supra* note 75; Mike Allen & Dana Priest, *Memo on Torture Draws Focus to Bush*, WASH. POST, June 9, 2004, at A3.

81. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; James Risen & Eric Lichtblau, *Bush Secretly Lifted Some Limits on Spying in U.S. After 9/11, Officials Say*, N.Y. TIMES, Dec. 15, 2005, available at <http://www.nytimes.com/2005/12/15/politics/15cnd-program.html>; Interview by Amy Goodman, DEMOCRACYNOW.ORG, with Russell Tice, Former Nat’l Sec. Agency Agent (Jan. 3, 2006), <http://www.democracynow.org/article.pl?sid=06/01/03/1435201>.

82. Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–1811, 1821–1829, 1841–1846, 1861–1862 (2000).

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

84. Die Verfassung des Deutschen Reichs vom 11. August 1919, art. 48 (Weimar Constitution).

85. See SCHMITT, *supra* note 74, at 16–36; see also DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 1–59 (2006); DAVID DYZENHAUS, *LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS KELSEN AND HERMANN HELLER IN WEIMAR* 1–98 (1997).

eign comes to operate in a legal black hole, turned perhaps into a gray hole by broad legislative empowerment or indemnification.

Indeed, in a linguistic twist stranger even than the rediscovery of “homeland,” President Bush has discovered a theory of his extra-legal virtual self or *Eigentlichkeit*, namely that he is “The Decider.”⁸⁶ And it is “The Decider” who is sovereign: On this, Carl Schmitt and John Yoo agree, as both normalize the exception. The corresponding theoretical construct has been that of the “unitary executive”—the sovereign is the one who decides both *whether* there is an emergency *and* what to do about it (*Souverän ist wer über den Ausnahmezustand entscheidet*). That formula has been accompanied by the suggestion that a constitutional change has occurred.⁸⁷ Statutes from the 1970s that protected civil liberties are now declared outmoded, and the war-regulating understandings of international law emerging from World War II, Korea, and Vietnam are declared “quaint” relics.⁸⁸ Gonzales’s position, by the way, is the same one adopted at Nuremberg by Wilhelm Keitel—where it helped land him a noose around his neck.⁸⁹ Going forward, the “unitary executive” is alleged necessary for fighting an indefinite war on terrorism or Islamo-Fascism, a competing moral absolutism: “In America . . . the voice of the people is the voice of God,”⁹⁰ and our own sense of moral rightness has driven the development of a domestic side to the

86. Many critics have seen this as just another example of Bush’s difficulties with the language, but there is a nonrandomness to his selection: It conflates religious decision-making authorities (such as talmudic “decisors”) with the tie-breaking procedures in racing (“deciders”). In a statement released by President Bush on April 18, 2006, in support of Donald Rumsfeld, Bush stated, “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.” Ed Henry & Barbara Starr, *Bush: ‘I’m the Decider’ on Rumsfeld*, CNN.COM, Apr. 18, 2006, <http://www.cnn.com/2006/POLITICS/04/18/rumsfeld>.

87. One recalls Schmitt’s words from the opening pages of his *POLITICAL THEOLOGY*: “It is precisely the exception that makes relevant . . . the whole question of sovereignty. . . . The most guidance the constitution can provide is to indicate who can act in such a case.” SCHMITT, *supra* note 74, at 6–7; see also OREN GROSS & FIONNUALA NÍ AOLÁIN, *LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE* 162–70 (2006).

88. James Meek, “*Nobody Is Talking*,” *GUARDIAN* (London), Feb. 18, 2005, at 2; James Rowen, Editorial, *Confirming Our Worst Fears*, *CAPITAL TIMES* (Madison, Wis.), Feb. 7, 2005, at 8A.

89. Field Marshal Wilhelm Keitel, like Attorney General Alberto Gonzales was “The Decider’s” trusted confidant. Upon receiving a memo from General Canaris on the Eastern Front (when things were going very badly in 1945) that drew attention to the “exceptional arbitrariness and lawlessness admitted in connection with the Soviet prisoners of war[,]” Keitel wrote in the report’s margins that such quaint concerns of “chivalrous warfare” were unimportant because “[w]e are dealing here with the destruction of an ideology.” 10 *TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946*, at 622–23 (1949); see also EUGENE DAVIDSON, *THE TRIAL OF THE GERMANS* 342 (1966).

90. SCHMITT, *supra* note 74, at 49.

commander-in-chief power, and the perception of the U.S. “Homeland” as a theater of war.

The Bush legal thinkers simply reject the argument, associated with Dicey⁹¹ and the British, but also Kelsen,⁹² that the sovereign simply has no authority to suspend the constitution as long as the ordinary courts of law are open and able to function.⁹³ A little bit of legality to cover a “unitary executive’s” power grab is arguably worse if, as we have repeatedly seen since September 11, demi-legality facilitates the seepage of repression into ever-larger areas of life.⁹⁴ In the end, congressional approval of the new Military Commissions Act, for example, amounts to no more than a formally legal delegation of unchecked authority, a further *Ermächtigung*, an in-advance indemnification of executive law-breaking.⁹⁵ If “The Decider” continues on this path, then the next step would be “rule by prerogative” governing certain, ever-expanding “security” domains while the “rule of law” continued to govern other areas. That would leave us embarked on what Ernst Fraenkel described as “The Dual State.”⁹⁶

Objections to the movement toward a fascistic dual state have been met at every stage with both governmental and professional incredulity and outrage. How *dare* one compare the United States to a dictatorship.

91. See generally ALBERT DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (8th ed. 1915).

92. HANS KELSEN, 1 GENERAL THEORY OF THE LAW AND STATE (Anders Wedberg trans., 1945); HANS KELSEN, NATURAL LAW DOCTRINE AND LEGAL POSITIVISM (Wolfgang Herbert Kraus trans., 1945).

93. The American *locus classicus* for this position is found in *Ex parte Milligan*, 71 U.S. (4 Wall) 2, 123, 127 (1866), *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946), and *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 425–26 (1934). John Ferejohn and Pasquale Pasquino offer a contrary view, in which they argue that sovereigns everywhere in liberal polities have prerogative powers, and legislatures will later indemnify their use by the executive or not. John Ferejohn & Pasquale Pasquino *The Law of the Exception: A Typology of Emergency Powers*, 2 INT’L J. CONST. L. 210, 211–21 (2004). Bruce Ackerman would prefer to see legislators rather than judges regulating emergency powers, and he proposes to accomplish that through a “supermajoritarian escalator” that demands larger majorities, shorter time frames, and more checks and balances as the executive raises the stakes. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1031, 1047–49 (2004). David Dyzenhaus’s conclusion that “grey holes are more harmful to the rule of law than black holes” is, I think, correct. David Dyzenhaus, Schmitt v. Dicey: *Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005, 2026 (2006).

94. For but a few examples of this seepage, see Brian R. Decker, Comment, “*The War of Information*”: *The Foreign Intelligence Surveillance Act*, *Hamdan v. Rumsfeld*, and *the President’s Warrantless-Wiretapping Program*, 9 U. PA. J. CONST. L. 291, 291–92, 295, 303 (2006).

95. In Dyzenhaus’s words: “[T]he legislature will have decided to give the executive what the Bush administration had claimed it could have without legislative authorization.” Dyzenhaus, *supra* note 93, at 2039.

96. ERNST FRAENKEL, THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP 3–5, 9–10 (1941).

The argument goes that perhaps there have been necessary-if-unattractive measures (Guantánamo, torture memos, immigrant abuse, warrantless searches, and eavesdropping), but these have been in response to real threats and should not be compared with regimes that have simply subverted and destroyed the rule of law.⁹⁷ But neither a *Reich* nor a *Diktatur* is built in a day. Even after enjoying a monopoly of power for a full year, the Nazi Minister of Justice condemned and even prosecuted cruelty in the concentration camps.⁹⁸ Indicting a case of water torture (!), the *Reichsminister* wrote:

The nature of the assault, especially the use of water torture, reveals a brutality and cruelty on the part of the perpetrator that is alien to German sensibilities and feelings. These cruelties, reminiscent of oriental sadism, can neither be explained nor excused by even the most extreme form of hatred in battle.⁹⁹

As if on cue, however, we saw in the spring of 2007 how the seepage of prerogative power into the normal rule-of-law state has advanced. The exposure of the coordination of institutional powers or *Gleichschaltung* of the Justice Department apparatus at the highest levels has been a rude awakening. As in some other regimes,¹⁰⁰ purges violating established principles of professional merit are often implemented by young, religious party zealots—people like Monica Goodling and Kyle Sampson, who were promoted ahead of establishment figures.¹⁰¹ What is

97. Some readers of an earlier version of this piece insisted that it was disrespectful and wildly exaggerated to compare the trajectory of the Bush administration with dictatorships we have known. A persistent criticism was that the rule of law inside the United States on non-terrorism matters remains rock-solid. See, e.g., Posting of Dan Markel to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/2006/11/the_rise_of_bus.html (Nov. 17, 2006, 00:05 EST).

98. "Hatred in battle" was recognized and allowed by the Lieber Code, which was developed during the U.S. Civil War. FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, GENERAL ORDERS No. 100 (Apr. 24, 1863), reprinted in THE LAWS OF CONFLICTS (Dietrich Schlinder & Jiří Toman eds., 3d ed. 1988); 42 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946 (1949); 26 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 300–27 (1947) (recounting letters from the Minister of Justice to various subordinates sanctioning or scolding them for treating prisoners of concentration camps poorly).

99. 42 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946 (1949); 26 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 300–27 (1947).

100. See BRACHER, *supra* note 20; JOE CONASON, IT CAN HAPPEN HERE: AUTHORITARIAN PERIL IN THE AGE OF BUSH (2007); FREDERICK A.O. SCHWARZ, JR. & AZIZ Z. HUQ, UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR (2007).

101. Monica Goodling was a graduate of Pat Robertson's Regent University Law School and a product of the religious-populist wing of the Bush bloc, while Kyle Sampson was a representative of the Rocky Mountain Mormon wing of the Bush bloc. See Alan Cooperman, *Bush Loyalist Rose Quickly at Justice*, WASH. POST, Mar. 30, 2007, at A15; Charlie Savage, *Scandal Puts Spotlight on Christian Law School: Grads Influential in Justice Dept.*, BOSTON GLOBE, Apr. 8,

peculiarly American is that their appointments, like that of Gonzales himself, could be heralded as breakthroughs for minorities.¹⁰² This illegitimate zealotry was on display in the recent Miami Liberty City and Sears Tower trial, where the government's loudly proclaimed claim to have disrupted a massive terrorist undertaking was revealed to be a sham.¹⁰³ Meanwhile, near-simultaneous release of the Miami-based terrorist Luis Posada Carriles by the same Department of Justice returns us to the origins of the Bush presidency.¹⁰⁴

Lest one forget: Along with aggrandized executive sovereignty and its ramifications, it is worth pointing out that there is an internal, reactionary *economic* policy that is consistently part of this package. Corruption and jobbism characterized Marx's and Mommsen's dictators, and clearly the Bush regime has been characterized by the Halliburton and Enron scandals, among others. As noted earlier, however, the Bush economic program, above all, promised to further dismantle the welfare state¹⁰⁵ and empower America's elites while promoting so-called tradi-

2007, at A1; Thom Patterson, *Key Witness in Attorney Scandal 'Under Attack,' Friends Say*, CNN.COM, Mar. 29, 2007, <http://www.cnn.com/2007/POLITICS/03/28/sampson.profile/index.html>. On the purge activists, see Editorial, *A Feeble Performance*, N.Y. TIMES, May 12, 2007, at A1; Eric Lipton, *Colleagues Cite Partisan Focus by Justice Official*, N.Y. TIMES, May 12, 2007, at A1.

102. They and their comrades worked for Gonzales, himself a classic crony appointment, whose naming was heralded, even by those who should have known better, as a breakthrough for Hispanics and a victory for affirmative action. Michael A. Olivas, *Introduction to "COLORED MEN" AND "HOMBRES AQUÍ": Hernandez v. Texas and the Emergence of Mexican-American Lawyering* xx (Michael A. Olivas ed., 2006).

103. We will, I predict, soon learn of a new Justice Department repression specialty—turning loud-mouth fools into terrorists—and the Miami martial-arts conspiracy of Winter 2006 and the New Jersey pizza-delivery plot and conspiracy will dissolve like the soap bubbles they are. See, e.g., Paul Thompson & Sarah Baxter, *Bizarre Cult of Sears Tower 'Plotter,'* SUNDAY TIMES (London), June 25, 2006; Abby Goodnough, *Trial Starts for 7 in Plot To Destroy Sears Tower*, N.Y. TIMES, Oct. 3, 2007, at A14; David Kocieniewski, *6 Men Arrested in a Terror Plot Against Ft. Dix*, N.Y. TIMES, May 9, 2007, at A1; see also Kirk Semple, *U.S. Falters in Terror Case Against 7 in Miami*, N.Y. TIMES, Dec. 14, 2007, at A28 ("The outcome was a significant defeat for the Bush administration, which had described the case as a major crackdown on homegrown terrorists."). Despite the acquittal of one defendant, a legal permanent-resident immigrant, the vindictiveness of the regime is used to cover up its own evil: The government is moving to deport the exonerated defendant on the theory that associating with terrorists is a deportable offense and that, even though he was acquitted by a "beyond a reasonable doubt" standard, the defendant would have lost under a "preponderance" standard, which is all that is necessary for deportability because it is a civil, not a criminal, issue. See Jay Weaver, *Absolved of Terrorism, Haitian Still in Limbo*, MIAMIHERALD.COM, Feb. 4, 2008, http://www.miamiherald.com/news/miami_dade/story/405217.html.

104. On the Posada affair and his release, see Ann Louise Bardach, *Twilight of the Assassins*, ATLANTIC MONTHLY, Nov. 2006, at 88, 91–101; Oscar Corral & Alfonso Chardy, *Posada Terror Case: Posada Is with Family but Unable To Comment*, MIAMI HERALD, Apr. 21, 2007, at B3; see also *supra* note 21 and accompanying text.

105. See Gwen Moore et al., *Elite Interlocks in Three U.S. Sectors: Nonprofit, Corporate, and Government*, 83 SOC. SCI. Q. 726, 731–32 (2002); Bob Wineburg, *Salvation Is No Solution to*

tional values.¹⁰⁶ Likewise, although we associate Carl Schmitt with executive power and sovereignty and the critique of liberal governance, we should recall that in the early 1930s, Schmitt propagated an economic policy very convivial to business and economic elites. Thus, in his famous 1932 speech to Weimar industrialists, Schmitt spoke of the “healthy economy in the strong state.”¹⁰⁷ The demand of Carl Schmitt and Weimar’s business elite, which is now a demand of Bush and America’s business elite, was “to free the economy from the state”—in other words, to de-state the economy (*Entstaatlichung der Wirtschaft*).¹⁰⁸ In fact, a line can be traced from Schmitt’s economic politics, via Friedrich Hayek, Ludwig von Mises, Karl Popper, and Milton Friedman, to the neoliberalism of Margaret Thatcher, Ronald Reagan, and George W. Bush. Their shared goal has been the end of embedded liberalism and the reestablishment, in its place, of favorable conditions for capital accumulation and the restoration of the power of economic elites.¹⁰⁹ This was, and is, a decidedly antidemocratic demand.¹¹⁰ Calling for the state to retreat from economic affairs means that the state should retreat from its social-policy obligations while being politically authoritarian.¹¹¹ Here, the Bush regime resembles the authoritarian liberalism of Schmitt in 1932 more closely than did the actual Nazi system.¹¹²

America’s Social Problems, FORWARD, Mar. 2, 2007, at A11, available at <http://www.forward.com/articles/10219>.

106. See DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 84 (2005) (stating that a coalition “between elite class and business interests intent on restoring their class power, on the one hand, and an electoral base among the ‘moral majority’ . . . now forms the core of the moral agenda of the neoconservative movement[.]” and that “[w]ithin the [United States] this assertion of moral values relies heavily on appeals to ideals of nation, religion, history, cultural tradition, and the like”); see also FERGUSON & ROGERS, *supra* note 12, at 115–30; HARVEY, *supra*, at 19 (“We can, therefore, interpret neoliberalization . . . as a *political* project to re-establish the conditions for capital accumulation and to restore the power of economic elites.”).

107. Carl Schmitt, *Gesunde Wirtschaft im starken Staat* [Healthy Economy in the Strong State], An Address to Business Leaders (Nov. 23, 1932), translated in RENATO CRISTI, *CARL SCHMITT: AUTHORITARIAN LIBERALISM: STRONG STATE AND FREE ECONOMY* 212 (1998).

108. *Id.* Also, for a description and discussion of the Reagan-Bush agenda to de-state the economy, see FERGUSON & ROGERS, *supra* note 12, at 124–30.

109. See HARVEY, *supra* note 106, at 11–22.

110. *Id.* at 31–38.

111. See Schmitt, *supra* note 107; see also ABRAHAM, *supra* note 29, at 306–12. For some industrialists, there was a tension between a healthy economy (*gesunde Wirtschaft*) and a free economy (*freie Wirtschaft*), but most wanted Schmitt’s authoritarian liberalism more than they wanted neo-Manchesterian economics. See generally INGEBORG MAUS, *BÜRGERLICHE RECHTSTHEORIE UND FASCHISMUS: ZUR SOZIALEN FUNKTION UND AKTUELLEN WIRKUNG DER THEORIE CARL SCHMITTS* [CIVIC RIGHTS THEORY AND FASCISM: REGARDING THE SOCIAL FUNCTION AND ONGOING EFFECT OF THE THEORY OF CARL SCHMITT] (1976) (commenting on Schmitt’s current influence over political theory). And one could say that that is true in Bush’s America as well.

112. The later Nazi economy was not at all antistate, but rather highly statist. See, e.g., R.J.

V. POSTMODERNIST HUMAN-RIGHTS IMPERIALISM: FROM MILOSEVIC TO SADDAM

I began this analysis by insisting that a sincere post-holocaust, assertive human-rights consciousness as well as a parallel hypocritical ideology were both essential to understanding the Bush regime. Permit me to close by elaborating briefly on this point. Only a few years ago, one of the leading liberal human-rights figures in the United States, Samantha Power,¹¹³ argued that holocaust consciousness was extremely important in politics because it provided “a *moral* life preserver in a sea of *interest-based callousness*.”¹¹⁴ From Armenia to Auschwitz, from the former Yugoslavia to Rwanda, and from Rwanda to Iraq, the cycle of “interest-based callousness”¹¹⁵ has permitted evil forces to destroy millions of lives. But in the new era of global human-rights consciousness and readiness to intervene, there would be fewer dictators and yet fewer killers. For the Pinochets, no harbor; for the Milosevics, no quarter; for the Hutu death squads, no looking away; and for the tyrants like Saddam Hussein, no more toleration, regardless of the oil they might have to offer the greedy countries of the West.¹¹⁶ There would be no more concessions to tyrants, such as those offered by Donald Rumsfeld to Saddam Hussein.¹¹⁷

OVERY, *THE NAZI ECONOMIC RECOVERY 1932–1938*, at 36–51 (2d ed., 1996); R.J. OVERY, *WAR AND ECONOMY IN THE THIRD REICH* 214–15 (1994); ADAM TOOZE, *THE WAGES OF DESTRUCTION: THE MAKING AND BREAKING OF THE NAZI ECONOMY* 32–33 (2006).

113. Michael Ignatieff and Samantha Power have both argued for an aggressive human-rights consciousness. See MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 35–43 (Amy Gutmann ed., 2001); SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE 503–16 (2002).

114. Samantha Power, *To Suffer by Comparison?*, 128 *DAEDALUS* 31, 49 (1999) (emphasis added).

115. *Id.*

116. See POWER, *supra* note 113, at 176, 204, 223 (referencing the extent and worth of the United States’ interest in Iraqi oil, and stating that “the United States was Iraq’s primary oil importer” during the Reagan administration).

117. The *National Security Archive Electronic Briefing Book No. 82* states the following:

National Security Decision Directive (NSDD) 114, dated November 26, 1983 . . . states, “Because of the real and psychological impact of a curtailment in the flow of oil from the Persian Gulf on the international economic system, we must assure our readiness to deal promptly with actions aimed at disrupting that traffic.” . . . Soon thereafter, Donald Rumsfeld (who had served in various positions in the Nixon and Ford administrations, including as President Ford’s defense secretary, and at this time headed the multinational pharmaceutical company G.D. Searle & Co.) was dispatched to the Middle East as a presidential envoy. His December 1983 tour of regional capitals included Baghdad, where he was to establish “direct contact between an envoy of President Reagan and President Saddam Hussein,” while emphasizing “his close relationship” with the president. Rumsfeld met with Saddam, and the two discussed regional issues of mutual interest, shared enmity toward Iran and Syria, and the U.S.’s efforts to find alternative routes to transport Iraq’s oil; its facilities in the Persian Gulf had been shut down by Iran, and Iran’s

It is perhaps never entirely possible to distinguish among falsehoods, self-delusions, ideological rationalizations, and utopian hopes.¹¹⁸ Now, we can only mock the way Bush and his officials went shopping for war rationales. But it is instructive to look at the most frequently proffered reasons for supporting war in Iraq offered by U.S. *liberals*. Surely, the entirety of the Bush regime or its foreign policy certainly cannot be reduced to Iraq, but the political and moral vision of the country's elites and their attitude toward an "axis of evil"¹¹⁹ and those who would fight that axis are, here, on display. Human rights-oriented liberals and compassionate conservatives could agree: Saddam was cruel;¹²⁰ Saddam had used chemical weapons against both his neighbors and his own citizens;¹²¹ Iraqis were suffering from both tyranny and material sanctions;¹²² Iraqis would, like all people everywhere, benefit from democracy;¹²³ a democratic Iraq could function as a challenge to repressive Saudi power;¹²⁴ a democratic Iraq could help break the Israeli-Palestinian logjam;¹²⁵ a democratic, multiethnic, and secular Iraq could liberalize and help educate the Arab world;¹²⁶ a democratic Iraq could offer idealistic Muslim youth an alternative to symbolic radicalism;¹²⁷ and a democratic Iraq would represent a place of virtue in international affairs.¹²⁸

ally, Syria, had cut off a pipeline that transported Iraqi oil through its territory. Rumsfeld made no reference to chemical weapons, according to detailed notes on the meeting. Rumsfeld also met with Iraqi Foreign Minister Tariq Aziz, and the two agreed, "the U.S. and Iraq shared many common interests." . . . Later, Rumsfeld was assured by the U.S. interests section that Iraq's leadership had been "extremely pleased" with the visit, and that "Tariq Aziz had gone out of his way to praise Rumsfeld as a person[.]"

NATIONAL SECURITY ARCHIVE ELECTRONIC BRIEFING BOOK No. 82, SHAKING HANDS WITH SADDAM HUSSEIN: THE U.S. TILTS TOWARD IRAQ, 1980-1984 (Joyce Battle ed., 2003), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB82> (last visited Oct. 30, 2007) (citations omitted).

118. See generally GEORGE LICHTHEIM, THE CONCEPT OF IDEOLOGY AND OTHER ESSAYS (1967) (discussing historical logic, ideology, human catastrophe, survival, and utopia); KARL MANNHEIM, IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE (1936).

119. The phrase *axis of evil* was used by President George W. Bush in his State of the Union Address on January 29, 2002, in reference to the countries of Iraq, North Korea, and Iran. President George W. Bush, State of the Union Address (Jan. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>.

120. George Packer, *The Liberal Quandary over Iraq*, N.Y. TIMES, Dec. 8, 2002, § 6 (Magazine), at 10.

121. POWER, *supra* note 113, at 171-79.

122. Packer, *supra* note 120.

123. *Id.*

124. See *id.*

125. *Id.*

126. See *id.*

127. See *id.*

128. See Doyle McManus, *Iraq Is All but Won; Now What?*, L.A. TIMES, Apr. 10, 2003, at 1

A merciless focus on the failures of the past and the need to come to terms with it—Germany’s *Vergangenheitsbewältigung*—has been a centerpiece of the general human-rights sensibility.¹²⁹ To use (but reverse) Max Weber’s famous dichotomy, we are to be guided in politics by an “ethic of ultimate ends” rather than by an “ethic of responsibility.”¹³⁰ Human-rights activists agreed that the amoral Bismarckian balance-of-power *Realpolitik* endorsed by Weber needed to be superseded by a higher goal.¹³¹ Rather than the crass and cold realism that has been with us since Thucydides’ Melian Dialogues,¹³² advocating a politics of states, liberal human-rights advocates urged us first to follow a politics of people and rights, and to heed the Sermon on the Mount.¹³³ Among the varied lessons of the Holocaust, without which none of these tendencies would be imaginable, is that evil must be resisted rather than accommodated,¹³⁴ and that sovereignty must yield to international civil society’s sense of justice.¹³⁵ Rather than the convenience of a Yugoslavia, for example, the legitimate right of self-determination for all peoples (especially for minorities¹³⁶), including Bosnians, Kosovars, Croats, Darfurians, Aecheans, and others, must be honored—through force if necessary. Liberal human-rights enthusiasts often welcomed the “end of history,” which really meant the “end of the Soviet Union,”¹³⁷ because it opened the door to a free, liberal world order¹³⁸ in place of a bipolar

(quoting then Secretary of State Colin Powell as saying that a democratic Iraq would serve as “an example for the region and to the rest of the world”).

129. See generally ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* (2000) (discussing the aftermath of World War II as well as colonialism); PETER NOVICK, *THE HOLOCAUST IN AMERICAN LIFE* (1999); *POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES* (John Torpey ed., 2003); JOHN TORPEY, *MAKING WHOLE WHAT HAS BEEN SMASHED: ON REPARATIONS POLITICS* (2006).

130. FROM MAX WEBER: *ESSAYS IN SOCIOLOGY* 120 (H.H. Gerth & C. Wright Mills eds., trans., 1946). Weber originally stated that “conduct can be oriented to an ‘ethic of ultimate ends’ or to an ‘ethic of responsibility.’” *Id.*

131. See, e.g., MICHAEL IGNATIEFF, *THE NEEDS OF STRANGERS* 28–29, 52–53 (1985); MICHAEL IGNATIEFF, *THE RIGHTS REVOLUTION* 2–3, 34–43 (2000) [hereinafter IGNATIEFF, *THE RIGHTS REVOLUTION*]; DAVID RIEFF, *A BED FOR THE NIGHT: HUMANITARIANISM IN CRISIS* 268–69, 311 (2002).

132. The Melian Dialogues can be argued to be the original text of international relations realism. See THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 392–401 (Richard Crawley trans., 1910).

133. See FROM MAX WEBER, *supra* note 130, at 119–24.

134. See POWER, *supra* note 113, at 515–16 (discussing how some protestors in the United States “believed that ‘never again’ would the United States allow men and women to be herded into concentration camps in Europe where they would be starved, raped, and murdered”) (emphasis omitted).

135. See RIEFF, *supra* note 131, at 268–69.

136. See IGNATIEFF, *THE RIGHTS REVOLUTION*, *supra* note 131, at 114–24.

137. Karen Bayne, *The Fall of the Berlin Wall*, *TIMES* (London), May 19, 2005, at 9.

138. See Jonathan Schell, *The Unfinished Twentieth Century; Attempt To Find a Designation for the 20th Century*, *HARPER’S MAG.*, Jan. 1, 2000, at 41.

world of “interest-based callousness” rationalized as a structure of security.¹³⁹

But as we now know, the end of the Soviet Union meant something altogether different. Rather than, for example, enabling the United Nations to build on its post–WWII treaties and initiatives and rather than bringing broadly accepted human-rights norms to bear on all, the world found itself subjected to a hyper-dominant military and economic power in the form of the United States. The absence of what U.S. state theorists domestically call “countervailing powers” would soon prove dangerous.¹⁴⁰ What liberal human-rights advocates could not know is that they were helping to prepare the ideological ground for the projection of the power of the United States by supplying a new liberal imperialist discourse. What no one could know was that, within a decade or so, that power would pass into the hands of an aggressive but petty and incompetent figure like Bush, surrounded by the basest members of his class. Together, they would steal an election and then use a vile and depraved, but nonetheless limited, attack by a tiny group of criminal terrorists¹⁴¹ to run amok at home and abroad.

The question that remains is whether the Bush regime is a brief, illegitimate, and repressive episode disturbing an otherwise largely stable United States Empire, or whether, as with the French Second Empire

139. In the pious world of human-rights advocacy, there is little room for irony or dialectic. Thus, Lincoln was “too practical” because he did not fight slavery “head on” but fought “only” for the Union; Franklin Delano Roosevelt was cowardly for fighting Germany rather than ending the Holocaust; and the Vietnamese surely get no credit for ridding Cambodia of the Khmer Rouge, since their actual goal was to dominate their neighbor. Ultimate values and transcendent norms create a new Wilsonianism, a new crusade. See generally JEREMY A. RABKIN, *LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* (2005).

140. After 1990, the Europeans agonized a great deal over their military powerlessness, but the EU certainly made no moves toward deepening or strengthening any independent power. See, e.g., John Vinocur, *Politicus: At EU, Another Blow to Anti-American Bloc*, INT’L HERALD TRIB. (Paris), June 22, 2004, at 2, available at http://www.iht.com/articles/2004/06/22/politicus_ed3_3.php; Memorandum from William Kristol to Opinion Leaders (Oct. 8, 1997), available at <http://www.newamericancentury.org/nato-19971008.htm>. In fact, the enlargement of the EU through the accession of the former Communist states was a great victory—that is, it was a great victory for the United States. In any event, in 2003 the United States outspent the next thirteen countries put together on defense. Charles V. Peña, *A Reality Check on Military Spending: The United States Can Fight an Effective War on Terrorism While Still Substantially Cutting Defense Spending*, 21 ISSUES IN SCI. & TECH. 41 (2005). The United States also spent more than the next ten countries put together on military costs in 2005. Anup Shah, *World Military Spending*, <http://www.globalissues.org/Geopolitics/ArmsTrade/Spending.asp?p=1> (last visited Dec. 18, 2007).

141. Out of the corners and interstices of debate, it becomes increasingly clear that the actual scope and scale of “terrorism” is far smaller than advertised by the regime. See, e.g., JAMES T. BENNETT, *HOMELAND SECURITY SCAMS* 7, 100, 106 (2006); STEPHEN HOLMES, *THE MATADOR’S CAPE: AMERICA’S RECKLESS RESPONSE TO TERROR* (2007); IAN S. LUSTICK, *TRAPPED IN THE WAR ON TERROR* 29–47 (2006); JOHN MUELLER, *OVERBLOWN: HOW POLITICIANS AND THE TERRORISM INDUSTRY INFLATE NATIONAL SECURITY THREATS, AND WHY WE BELIEVE THEM* 29–48 (2006); Zbigniew Brzezinski, *Terrorized by “War on Terror,”* WASH. POST, Mar. 25, 2007, at B1.

and the German Third Reich, only defeat abroad will topple the leader and reverse the course of events. But what if there is no power capable of defeating the American Empire? Is a Vietnam Quagmire, a morass or two, enough?¹⁴² What if change must instead await either the recovery of the American people's own good sense, or the slow erosion of the specific political economy undergirding its wealth and power.

142. See CHALMERS JOHNSON, *NEMESIS* (2007).