

TABLE OF CONTENTS

All the President's Lawyers: How to Avoid Another "Torture Opinion" Debacle

Dawn E. Johnsen

Tired of Kabuki? Time to Tango: The Case for Litigator-Led Questioning of Supreme Court Nominees

Seth Rosenthal

Running Aground: The Hidden Environmental and Regulatory Implications of Homeland Security

Mariano-Florentino Cuéllar

Reinventing the President's Pardon Power

Margaret Colgate Love

The Emerging Threat of Regulatory Preemption

David C. Vladeck

The Citizen's Advocate: A Perspective on the Historical and Continuing Role of State Attorneys General

Peggy A. Lautenschlager and Daniel P. Bach

Guantánamo Is Here: The Military Commissions Act and Noncitizen Vulnerability

Muneer I. Ahmad

Towards Full Participation: Solutions for Improvements to the Federal Language Assistance Laws

Jocelyn Friedrichs Benson

Restoring Effective Protections for Students Against Sexual Harassment in Schools: Moving Beyond the Gebser and Davis Standards

Fatima Goss Graves

Examining "Backlash" and Attacks on Landmark Decisions from Brown to Roe to Goodridge

Panel Discussion at 2007 ACS National Convention Featuring Edward Lazarus, Scott Lemieux, Robert Post, Jeffrey Rosen, Reva Siegel and Roger Wilkins



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Advance

The Journal of the ACS Issue Groups

TABLE OF CONTENTS

1	Introduction	
5	All the President's Lawyers: How to Avoid Another "Torture Opinion" Debacle	<i>Dawn E. Johnsen</i>
21	Tired of Kabuki? Time to Tango: The Case for Litigator-Led Questioning of Supreme Court Nominees	<i>Seth Rosenthal</i>
45	Running Aground: The Hidden Environmental and Regulatory Implications of Homeland Security	<i>Mariano-Florentino Cuéllar</i>
63	Reinventing the President's Pardon Power	<i>Margaret Colgate Love</i>
81	The Emerging Threat of Regulatory Preemption	<i>David C. Vladeck</i>
97	The Citizen's Advocate: A Perspective on the Historical and Continuing Role of State Attorneys General	<i>Peggy A. Lautenschlager and Daniel P. Bach</i>
109	Guantánamo Is Here: The Military Commissions Act and Noncitizen Vulnerability	<i>Muneer I. Ahmad</i>
123	Towards Full Participation: Solutions for Improvements to the Federal Language Assistance Laws	<i>Jocelyn Friedrichs Benson</i>
135	Restoring Effective Protections for Students Against Sexual Harassment in Schools: Moving Beyond the <i>Gebser</i> and <i>Davis</i> Standards	<i>Fatima Goss Graves</i>
149	Examining "Backlash" and Attacks on Landmark Decisions from <i>Brown</i> to <i>Roe</i> to <i>Goodridge</i>	<i>Panel Discussion at 2007 ACS National Convention Featuring Edward Lazarus, Scott Lemieux, Robert Post, Jeffrey Rosen, Reva Siegel and Roger Wilkins</i>

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Advance

Welcome to the latest edition of *Advance*, the Journal of the Issue Groups of the American Constitution Society for Law and Policy (ACS). The mission of ACS is to ensure that our country's founding values of human dignity, individual rights and liberties, genuine equality and access to justice enjoy their rightful, central place in American law.

Each semi-annual issue of *Advance* features a collection of articles advancing progressive ideas, proposals and views. Most editions, including this one, contain a selection of Issue Briefs written for ACS during the preceding several months, on topics spanning the breadth of the ACS Issue Groups. ACS Issue Briefs are intended to offer substantive analysis of a legal or policy issue in a form that is easily accessible to practitioners, policymakers and the general public. The expressions of opinion in *Advance* are those of the authors, as ACS takes no position on particular legal or policy initiatives.

In this issue of *Advance*, the authors offer a variety of proposals for improving American law and public policy and our democratic process. Some suggest specific ways in which a new Administration in Washington next year (of either party) should do things differently—offering their ideas, for example, on how to avoid abuses of executive power, exercise the President's pardon power, approach federal regulatory preemption of state health and safety protections, or keep sight of the less visible consequences of homeland security policies. One offers a proposal for improving Supreme Court confirmation hearings, with the goal of eliciting more meaningful information about the nominees' jurisprudential views. Another focuses on the Military Commissions Act and the particular vulnerability of non-citizens in our country in the post-911 world. Others propose federal legislative changes as well as state law remedies for pressing national problems such as sexual harassment in the schools and assistance for language minority voters. And one article, which advocates a robust role for state Attorneys General in protecting the public interest, is a particularly good reminder of the possibilities for advancing law at the state level.

In addition, this edition of *Advance* includes the transcript of a panel discussion at the 2007 ACS National Convention addressing the so-called "backlash" debate—the arguments and counter-arguments on the question of whether reliance on the courts has ultimately undermined progressive goals in areas from desegregation to abortion rights to gay rights. This lively debate drew a packed audience at the Convention and wide viewing on C-SPAN, and we are pleased that *Advance* offers a way to bring additional members of the ACS community into this important discussion.

We hope you enjoy this issue of *Advance*.

ACS Issue Groups

ACS Issue Groups are comprised of legal practitioners and scholars working together to articulate and publicize compelling progressive ideas. The Groups are led by distinguished co-chairs who are experts in their respective fields. They are open to all ACS members, and new members and new ideas are always welcome.

Access to Justice

The Access to Justice Group addresses barriers to access to our civil justice system, including, among other issues, efforts to strip courts of jurisdiction, raise procedural hurdles, remove classes of cases from federal court, insulate wrongdoers from suit, limit remedies and deprive legal aid services of resources. It focuses attention on ways to ensure that our justice system is truly available to all.

Co-Chairs: *Lucas Guttentag*, ACLU Immigrants' Rights Project
Marianne Lado, New York Lawyers for the Public Interest
Bill Lann Lee, Lewis, Feinberg, Lee, Renaker & Jackson, P.C.

Constitutional Interpretation and Change

Ideological conservatives have been quite successful in promoting neutral-sounding theories of constitutional interpretation, such as originalism and strict construction, and in criticizing judges with whom they disagree as judicial activists who make up law instead of interpreting it. The Constitutional Interpretation and Change Group works to debunk the neutrality of those theories and expose misleading criticisms. It also articulates effective and accessible methods of interpretation to give full meaning to the guarantees contained in the Constitution.

Co-Chairs: *Jack Balkin*, Yale Law School
Rebecca Brown, Vanderbilt University Law School
Andrew Pincus, Mayer Brown LLP

Criminal Justice

The administration of our criminal laws poses challenges to our nation's fundamental belief in liberty and equality. Racial inequality permeates the system from arrest through sentencing. The United States' imposition of the death penalty increasingly has set us apart from much of the world and has raised concerns about the execution of the innocent. Sentencing law and policy have led courts to impose lengthier sentences, resulting in the incarceration of an alarming percentage of our population. The recent invalidation of mandatory federal sentencing guidelines has left sentencing in flux. Failure to provide adequate resources for representation of accused individuals and investigation of their cases has weakened the criminal justice system. Restrictive rules governing collateral review of convictions have closed the courts to many. This Group explores these and other issues affecting criminal justice.

Co-Chairs: *David Cole*, Georgetown University Law Center
Gregory Craig, Williams & Connolly
Carol Steiker, Harvard Law School
Ronald Sullivan, Harvard Law School

Democracy and Voting

The Democracy and Voting Group focuses on developing a comprehensive vision of the right to vote and to participate in our political process. It identifies barriers to political participation that stem from race, redistricting, the partisan and incompetent administration of elections, registration difficulties, felon disenfranchisement and other problems that suppress access to voting and threaten the integrity of our electoral process.

Co-Chairs: *Julie Fernandes*, The Raben Group
Pamela Karlan, Stanford Law School
Nina Perales, MALDEF
Sam Hirsch, Jenner & Block

Equality and Liberty

The protection of individual rights lies at the core of a progressive approach to the law. The Equality and Liberty Group addresses means of combating inequality resulting from race, color, ethnicity, gender, sexual orientation, disability, age and other factors. It also explores ways of protecting reproductive freedom, privacy and end-of-life choices and of making work accessible and meaningful.

Co-Chairs: *Alan Jenkins*, The Opportunity Agenda
Nina Pillard, Georgetown University Law Center
Paul Wolfson, Wilmer, Cutler, Pickering, Hale & Dorr

Economic, Workplace, and Environmental Regulation

The work of the Economic, Workplace, and Environmental Regulation Group encompasses a broad range of issues in the areas of labor law, environmental protection, economic opportunity, and administrative law. Among the topics it examines are workplace democracy, climate change and the enforcement of environmental laws, the regulatory process, corporate governance, and wealth inequality.

Co-Chairs: *Stephen Berzon*, Altshuler Berzon LLP
Catherine Fisk, Duke Law School
Albert H. Meyerhoff, Coughlin, Stoia, Geller, Rudman & Robbins

Religion Clauses

No issue was more central to our Nation's founding than freedom of religion and no part of the Constitution continues to capture the imaginations and passions of Americans more than the Religion Clauses of the First Amendment. The Religion Clauses Group provides a forum for discussion about the meaning and interpretation of the Establishment and Free Exercise Clauses and also investigates broader questions regarding religion in America—including the appropriate relationship between church and state in contemporary society and the role of religion and religious belief in American politics and public life.

Co-Chairs: *William P. Marshall*, University of North Carolina School of Law
Melissa Rogers, The Divinity School at Wake Forest University

Separation of Powers and Federalism

Recent years have witnessed an increase in executive power at the expense of the other branches of the federal government. This change has had a profound effect on our civil liberties, government transparency and the rule of law. The Separation of Powers and Federalism Group addresses the proper balance of power in our system of checks and balances, as well as other issues related to the power of the President. It also addresses the importance of preserving the independence of the judiciary. In addition, this Group focuses on the federalism jurisprudence of the Supreme Court, which has led it to strike down an unprecedented number of congressional enactments, threatening the ability of Congress to protect civil rights, the environment and workers. It also addresses positive visions of federalism that will promote the ability of government at all levels to pursue progressive policies.

Co-Chairs: *Preeta Bansal*, Skadden, Arps, Slate, Meagher & Flom
Dawn Johnsen, Indiana University School of Law-Bloomington
Neil J. Kinkopf, Georgia State University College of Law
Simon Lazarus, National Senior Citizens Law Center
Christopher Schroeder, Duke Law School

International Law and the Constitution Working Group

This Working Group focuses on the relationship between international law and the Constitution and the implications of this relationship for human rights. The Group examines issues such as the incorporation of international human rights law into domestic law and U.S. compliance with human rights obligations. It brings together scholars and practitioners in mutually supportive efforts to shape the debate over human rights law and policy in the U.S.

Co-Chairs: *Jamil Dakwar*, American Civil Liberties Union
Laura Dickinson, University of Connecticut Law School
Catherine Powell, Fordham Law School
Cindy Soohoo, Center for Reproductive Rights

All the President's Lawyers: How to Avoid Another “Torture Opinion” Debacle

Dawn E. Johnsen*

Since the terrorist attacks of September 11, 2001, the Bush Administration has engaged in a host of controversial counterterrorism actions that threaten civil liberties and at times even the physical safety of those targeted: extreme interrogation techniques and even torture, enemy combatant designations, extraordinary renditions, secret overseas prisons and warrantless domestic surveillance. To justify policies that would otherwise violate applicable legal constraints, President Bush and his lawyers have espoused an extreme view of expansive presidential power during times of war and national emergency. The resulting debate about desirable external checks—principally from the courts and Congress—has underestimated an essential internal source of constraint on presidential excesses: legal advisors within the executive branch.

Questions about the appropriate role of presidential lawyers also lie at the heart of recent and ongoing scandals involving the Bush Department of Justice (DoJ). Among them: the Office of Legal Counsel's infamous Torture Opinion which found presidential authority to authorize torture in violation of a federal statute;¹ President Bush's firing of U.S. attorneys; inappropriate partisan considerations in the hiring of career lawyers and immigration judges; and, most dramatically, the threatened resignation of top DoJ officials when the White House unsuccessfully sought to pressure a critically ill Attorney General John Ashcroft into approving an unlawful warrantless domestic surveillance program.

To successfully prevent future executive branch abuses, we need as a nation to look long and hard at the standards and processes that should govern presidential lawyers as they work to ensure the legality of executive branch action. Congress should lead that public dialogue. A good reference point is a short statement of ten “Principles to Guide the Office of Legal Counsel,” in which nineteen former OLC lawyers, in the wake of the Torture Opinion, set forth the best of longstanding bipartisan practices

* Professor of Law, Indiana University School of Law—Bloomington. Acting Assistant Attorney General for the Office of Legal Counsel, U.S. Department of Justice (1997–1998); Deputy Assistant Attorney General (1993–1996). This paper is drawn from *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. Rev. (forthcoming 2007). A draft of that article, which includes extensive citations, is available at SSRN.com or from the author. This Issue Brief was first released by ACS in July 2007.

¹ Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice to Alberto R. Gonzales, Counsel to President George W. Bush (Aug. 1, 2002), *available at* <http://www.washingtonpost.com/wpser/nation/documents/dojinterrogationmemo20020801.pdf> [hereinafter Torture Opinion or Opinion].

in an effort to promote presidential fidelity to the rule of law.² The Bush Administration and every subsequent administration should either endorse these principles or develop and publicly announce their own.

I. INADEQUACY OF JUDICIAL AND CONGRESSIONAL CHECKS

The courts and Congress, of course, provide essential checks on the executive branch, but their issue-by-issue external review will incompletely constrain unlawful executive branch action. The obstacles to judicial or congressional review of executive branch action on matters of war and national security—particularly during times of crisis—are familiar. The courts face (and create) difficult justiciability requirements that mean, for example, that there may be no party who ever has standing to challenge a clearly unlawful governmental action. Courts may deny or delay relief even to parties with standing, because of the political question doctrine, the state secrets privilege, deferential standards of review, or years of complex litigation.

Congress tends to defer strongly to the Commander in Chief on matters of war and national security, even in times of divided government, and legislative efforts always face the possibility of a filibuster or a presidential veto. Perhaps the greatest challenge today is Congress already has enacted legislation with regard to many of the Bush Administration's most objectionable policies. Much of the controversy in fact stems from President Bush's claimed authority to refuse to comply with the relevant laws, including the Foreign Intelligence Surveillance Act (FISA),³ the anti-torture statute, and the numerous other laws for which President Bush has issued signing statements asserting the right to refuse to enforce the laws when doing so would conflict with his constitutional views.⁴

Executive branch secrecy further hinders both judicial and congressional review. At times, of course, secrecy is essential to preserving national security, but the Bush Administration has taken it to an unwarranted extreme. By its nature, secrecy undercuts the efficacy of external checks. Congress or potential litigants may not even know about unlawful executive action unless someone in the government violates administration policy, and perhaps statutory prohibitions, to leak information. Such leaks were responsible for the public disclosure of the Bush Administration's legal opinions and policies on coercive interrogations and torture, the National Security Administration's domestic surveillance program that operated outside the requirements of FISA, and the use of secret prisons overseas to detain and interrogate suspected terrorists. Ultimately, even with the current Supreme Court's relatively strong willingness to protect rights, coupled with scrutiny from the press and advocacy organizations, the Bush Administration has engaged in years of largely unconstrained illegal practices.

On a daily basis, the President engages in decision-making that implicates important questions of constitutionality and legality. Whether to seek congressional

² WALTER E. DELLINGER, DAWN JOHNSEN, ET AL., PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL (Dec. 21, 2004), *reprinted at* 81 IND. L.J. 1345 (2006) & *available at* http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf.

³ U.S. Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, 81 IND. L.J. 1374 (2006).

⁴ See T.J. HALSTEAD, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS (2007); Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1.

authorization before committing the nation to war or other hostilities, what limits, if any, to set (or when set by Congress, to respect) on coercive interrogation techniques, when to publicly release information regarding the course of war or counterterrorism efforts—all are issues over which the President exercises enormous practical control, and all can profoundly affect individual lives and the course of history. The possibility of after-the-fact external review of questionable executive action is an inadequate check on executive excesses. Presidents also must face effective internal constraints in the form of executive branch processes and advice aimed at ensuring the legality of the multitude of executive decisions.

II. TORTURE

Presidential failures to comport with the law have occurred throughout history, from administrations of both political parties. One particularly egregious example can be found in the Bush Administration's positions regarding the interrogation of detainees suspected of terrorism, and especially OLC's dangerously flawed advice in the early months after the September 11 attacks regarding the legality of using torture to acquire information from detainees. Although the Torture Opinion has been almost universally condemned and the Bush Administration publicly withdrew it after it was leaked, the failures that led to this debacle demand far greater scrutiny, both to determine accountability for past misdeeds and to promote understanding of how presidential lawyers should go about their job.

The images of U.S. soldiers abusing detainees at the Abu Ghraib prison in Iraq are well recognized and easily recalled. The celebratory photographs taken by those involved in the abuse, made public in February 2004, horrified the world. Shortly thereafter, someone leaked to the press an August 2002 legal memorandum, in which OLC advised then-Counsel to the President Alberto Gonzales on the meaning of the federal statute that makes it a crime to commit torture.⁵ Congress enacted the statute to implement the terms of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment. OLC's Torture Opinion, however, goes to great lengths first to read the scope of the statute in an exceedingly narrow manner, and then to methodically explore all conceivable arguments whereby persons who engage in aggressive interrogations, including torture, can escape conviction.

Numerous commentators have described, analyzed, and almost invariably harshly criticized the Torture Opinion, and I will just briefly review some highlights.⁶ The Opinion begins by interpreting the meaning of torture as limited to the most extreme of acts: "The victim must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function likely will result."⁷ The pain must be "excruciating and agonizing." Mental pain or suffering "must result in significant psychological harm of significant duration, e.g., lasting for months or even years." The infliction of such pain must be the defendant's precise objective; it is not enough that the defendant knew that such pain and suffering were reasonably likely to result from his actions.

⁵ 18 U.S.C. §§ 2340–2340A (2006).

⁶ For an outstanding compilation of posts on the Torture Opinion and related issues, see *The Anti-Torture Memos: Balkinization Posts on Civil Liberties, the War on Terror and Presidential Power*, BALKINIZATION, Dec. 22, 2006, available at: <http://balkin.blogspot.com/2006/12/anti-torture-memos.html> (by Professors Jack Balkin, Martin Lederman and others).

⁷ For all quotations from the Torture Opinion, see *supra* note 1.

Even more ominous, the Torture Opinion goes on to suggest that even acts that come within this extremely narrow definition of torture could not be successfully prosecuted under some circumstances. OLC makes the extraordinary claim that, notwithstanding its facially clear application to government actors, the statute could not be interpreted to allow the prosecution of someone who commits torture “pursuant to the President’s constitutional authority to wage a military campaign,” because to do so would interfere with the President’s Commander-in-Chief power. In exaggerating the President’s war powers, the Opinion ignores entirely Congress’s textually committed war powers—such as the power to make rules concerning captures on land and water and for the government and regulation of the land and naval forces. It fails even to cite a directly relevant watershed Supreme Court opinion, *Youngstown Sheet and Tube v. Sawyer*, in which Justice Jackson’s famous concurring opinion discusses Congress’s authority to limit presidential authority.⁸

Finally, the Torture Opinion crafts creative defenses to “eliminate criminal liability” in the event that “an interrogation method ... might arguably cross the line [into an act of torture] ... and application of the statute was not held to be an unconstitutional infringement of the President’s Commander-in-Chief authority.” A defense of “necessity” would argue that torture—notwithstanding the statute’s prohibition—was necessary to gain information to prevent a future terrorist attack. Similarly, the Opinion argues that a torturer could claim he or she acted in self-defense: not the traditional defense of one’s self, but an extension, to defense of one’s nation.

The Torture Opinion’s extreme reading of the President’s Commander-in-Chief powers also could overcome other laws that prohibit highly coercive forms of interrogation. The Bush Administration refuses to reveal whether it actually has relied on such arguments or which interrogation techniques it has authorized. However, news reports have described six “enhanced interrogation techniques” instituted in March 2002 and used on suspected terrorists incarcerated in secret locations outside the United States. They include “the cold cell,” in which the prisoner is stripped naked, repeatedly doused with cold water and held in a cell kept near fifty degrees, and “waterboarding,” in which the prisoner is smothered with water to make him feel he is drowning. Both “the cold cell” and “waterboarding” have reportedly resulted in the deaths of prisoners at the hands of CIA agents.⁹

On December 30, 2004, six months after the leak and public disavowal of the Torture Opinion, OLC issued a new opinion that provides a more careful and accurate analysis of the federal anti-torture statute.¹⁰ This Replacement Opinion opens by describing torture as “abhorrent” and acknowledges early on that many other sources of law regulate the detention and interrogation of detainees. Rather than craft creative potential defenses, the Replacement Opinion states: “There is no exception under the [federal anti-torture] statute permitting torture to be used for a ‘good reason.’”

⁸ 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

⁹ Brian Ross & Richard Esposito, *CIA’s Harsh Interrogation Techniques Described*, ABC News, Nov. 18, 2005, available at <http://abcnews.go.com/WNT/Investigation/story?id=1322866> (finding that “The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner’s face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt.”).

¹⁰ Memorandum from Daniel Levin, Acting Assistant Attorney General, to James B. Comey, Deputy Attorney General, Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004) [hereinafter Replacement Opinion].

Although it drops entirely the discussion of the claimed Commander-in-Chief authority to torture notwithstanding the statutory prohibition, the Replacement Opinion does not disavow that authority. Indeed, the Bush Administration has endorsed the same exceedingly broad view of presidential war powers in other contexts before and since. The definition of torture remains extremely narrow, and a footnote reassures recipients of earlier OLC advice—namely, the CIA—that the changes in analysis and tone do not affect the bottom line of prior OLC advice.

Congressional concern about the Bush Administration's interrogation practices ultimately led to the enactment of the Detainee Treatment Act of 2005 (DTA) and the Military Commissions Act of 2006 (MCA). Through these laws, Congress prohibited the government from subjecting any person to torture or cruel, inhuman, or degrading treatment. Congress, however, acceded to the Bush Administration's demands to limit dramatically the jurisdiction of the federal courts to hear claims that the government violated those prohibitions. For noncitizens whom the government imprisons outside of U.S. territory, the legality of the conditions of their confinement and interrogation depends more than ever on the executive branch's internal decision-making processes.

III. THE OFFICE OF LEGAL COUNSEL

The Torture Opinion thrust into the public eye a previously obscure, though enormously influential, office within DoJ: the Office of Legal Counsel. The constitutional text and structure make plain the President's obligation to act in conformity with the law and to ensure that all in the executive branch do the same. To fulfill their oath of office and obligation to "take Care that the Laws be faithfully executed," presidents require a reliable source of legal advice. In recent decades, OLC has filled that role. Thus, OLC's core function is to provide the legal advice the President—and by extension the entire executive branch—needs to faithfully execute the laws.

OLC functions as a kind of general counsel to the numerous other top executive branch lawyers who tend to send OLC their most difficult and consequential legal questions.¹¹ OLC's staff of about two dozen lawyers (most of whom are career employees, led by several political appointees) responds to legal questions from the Counsel to the President, the Attorney General, the General Counsels of the various executive departments and agencies, and the Assistant Attorneys General for the other components of DoJ. Regulations require the submission of legal disputes between executive branch agencies to OLC for resolution. By virtue of regulation and tradition, OLC's legal interpretations typically are considered binding within the executive branch, unless overruled by the Attorney General or the President (an exceedingly rare occurrence).

OLC's advice, therefore, ordinarily must be followed by the entire executive branch, from the Counsel to the President and cabinet officers, to the military and career administrators, regardless of any disagreement or unhappiness. The President, however, may overrule OLC's advice through formal direction, or simply by declining to follow it. To take a quasi-hypothetical example, if the CIA wanted to use waterboarding to

¹¹ For discussions of OLC and the standards that should govern its work, see, e.g., Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105 (2004); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005); Symposium, *Executive Branch Interpretation of the Law*, 15 CARDOZO L. REV. 21 (1993).

interrogate a detainee but DoJ's criminal division and the Department of State believed that doing so would be illegal, OLC would resolve that dispute. The CIA would be bound by an OLC conclusion that waterboarding was unlawful. The Attorney General or President could lawfully override OLC only pursuant to a good faith determination that OLC erred in its legal analysis. The President would violate his constitutional obligation if he were to reject OLC's advice solely on policy grounds. Of course, even if OLC were to find waterboarding lawful, the President or other appropriate officials could make the policy determination not to use it as a method of interrogation. The President or the Attorney General also could disagree with OLC's interpretation of the relevant law and prohibit waterboarding on legal grounds.

IV. GUIDELINES FOR OLC

Former OLC lawyers paid special attention when the Torture Opinion leaked. Many were deeply outraged and saddened by what they saw as a dramatic and dangerous deviation from the office's traditions of accurate and principled legal advice. These concerns inspired nineteen OLC alumni to coauthor a short statement of the core principles that should guide the formulation of legal advice regarding contemplated executive action. Their statement of ten principles, issued in December 2004 and entitled "Principles to Guide the Office of Legal Counsel" (Guidelines), affirmatively describes how OLC should function. They are aspirational in the sense that they describe best practices for the office, albeit practices that have not invariably been followed. Deviations undoubtedly can be found in many—possibly all—administrations, often on matters concerning presidential power during times of war or national emergency, when pressures against legal adherence are greatest. But the Guidelines also are realistic in the sense that they were drawn to reflect "the long-standing practices of the Attorney General and the Office of Legal Counsel, across time and administrations."¹²

A. OLC'S INTERPRETIVE STANCE: ACCURACY VERSUS ADVOCACY

The Guidelines' first principle articulates OLC's appropriate interpretive stance when formulating advice to "guide contemplated executive branch action." Where the law is clear—that is, only one reasonable interpretation exists—virtually all would agree that the President must adhere to it. Questions typically end up at OLC, though, when what the law requires is not entirely clear and the White House or other executive branch officers care about the answer. In these cases, what should be OLC's interpretive stance? Should OLC follow an advocacy model, providing legal opinions that set forth the strongest plausible arguments supportive of the desired policies? Or should OLC strive for what it considers an accurate and honest appraisal of the relevant legal constraints?

The Guidelines come down squarely on the side of accuracy over advocacy, and most of its ten principles follow from and elaborate upon the Guideline's first and most fundamental principle:

"OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies. The advocacy model of lawyering, in which lawyers craft merely plausible legal arguments to support their

¹² For all quotations from the Guidelines, see *supra* note 2.

clients' desired actions, inadequately promotes the President's constitutional obligation to ensure the legality of executive action."

In short, OLC must be prepared to say "no" to the President. For OLC instead to distort its legal analysis to support preferred policy outcomes would undermine the rule of law and our democratic system of government. The Constitution expressly requires the President to "take Care that the Laws be faithfully executed." This command cannot be reconciled with executive action based on preferred, merely plausible legal interpretations that support desired policies, rather than attempts to achieve the best, most accurate interpretations—especially when the enforcement of a statute is at stake. For OLC to present merely plausible interpretations framed as best interpretations would, as the Guidelines acknowledge, "deprive the President and other executive branch decisionmakers of critical information and, worse, mislead them regarding the legality of contemplated action." Alternatively, if OLC gave such advice with a wink and a nod so that the President was not actually misled, OLC would be wrongfully empowering the President to violate his constitutional obligations.

Although OLC serves a role more akin to that of a judge than an advocate—and sometimes literally does resolve intra-branch disputes between parties on conflicting ends of a legal question—OLC's role is more complicated than that of a disinterested arbiter. OLC's charge is to help the President achieve desired policies in conformity with the law, and that often involves actively devising alternatives to a legally flawed proposal. Because the President makes the final call and bears ultimate responsibility for legal determinations as well as policy choices, OLC's advice should fully inform the President, as well as other readers, and address strong arguments counter to its conclusions. OLC lawyers, though, never properly inform the exercise of the President's "Take Care" obligation by misrepresenting what the law requires.

That the President should premise actions on the administration's best—and not merely plausible—interpretations of the relevant law is a relatively uncontroversial principle with strong bipartisan support, at least as a theoretical matter. Senators questioned Attorney General Alberto Gonzales, Deputy Attorney General Timothy Flanigan, and Acting Assistant Attorney General for OLC Steven Bradbury during their confirmation hearings about their views on the Guidelines, and they all indicated their general agreement.¹³ In the weeks before President Bill Clinton assumed office, I personally conducted numerous interviews as part of the transition effort with current and former OLC lawyers, congressional staffers, and others who had worked

¹³ See, e.g., *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 229 (2005) (written responses of Alberto Gonzalez to questions from Senator Russell D. Feingold) ("I completely agree that it is, and has always been, the duty and function of the Office of Legal Counsel to provide the President and the Executive Branch with an accurate and honest analysis of the law, even if that analysis would constrain the pursuit of policy goals. If confirmed as Attorney General, I would work with the Assistant Attorney General for the Office of Legal Counsel to ensure that OLC continues to employ the practices necessary to meet the highest standards of legal analysis."); *Confirmation Hearing on the Nomination of Timothy Elliott Flanigan to be Deputy Attorney General: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 120 (2005) (written responses of Timothy Flanigan to questions from Senator Edward M. Kennedy) ("I have reviewed generally the [Guidelines] and agree with much of the document. I believe that the document reflects operating principles that have long guided OLC in both Republican and Democratic administrations."); *Confirmation Hearings on Federal Appointments: Hearings Before the S. Comm. on the Judiciary*, 109th Cong. 766 (2005) (written responses of Steven Bradbury to questions from Senator Patrick Leahy) ("The [Guidelines] generally reflect operating principles that have long guided OLC in both Republican and Democratic administrations.").

with OLC. Virtually all, regardless of party or institutional affiliation, described the primary function of OLC as ensuring the legality of executive action, and they ranked the ability to say “no” to the President as an essential qualification for the job of heading OLC. The challenge is to ensure that the tradition of the office is upheld through standards and practices that encourage consistent adherence to this core principle. In short, the challenge is to avoid another *Torture Opinion*.

B. DISTINCTIVE ATTRIBUTES OF PRESIDENTIAL LEGAL INTERPRETATION

Presidential lawyers must further confront whether and how the executive branch may legitimately promote and act upon sincerely held, yet distinctive legal views. The Guidelines address some of the complexities that distinguish OLC interpretation from judicial interpretation, complexities that both allow for a measure of presidential interpretive independence and also impose special obligations on presidential legal interpretation. As the Guidelines state, at times “OLC’s legal analyses ... should reflect the institutional traditions and competencies of the executive branch as well as the views of the President who currently holds office.” At other times, OLC “appropriately identifies legal limits on executive branch action that a court would not require” because “jurisdictional and prudential limitations do not constrain OLC as they do courts.” The President thus might be constitutionally obliged to refrain from taking a desired action even though a reviewing court would not enjoin the action.

In circumstances where executive action would likely encounter limited or no judicial review—as in the treatment of Guantanamo detainees, given the MCA’s limitations on jurisdiction—OLC’s review should not be limited to that which a court would perform. To the contrary, the President and OLC then have “a special obligation to ensure compliance with the law, including respect for the rights of affected individuals and the constitutional allocation of powers.” Without the possibility of judicial review and in the face of overwhelming secrecy, the legal rights of those affected—including their freedom from physical harm during interrogations—depend heavily on good faith efforts within the executive branch to ensure that all government actors adhere to legal constraints. The Bush Administration’s record raises grounds for serious concern about whether and how the Administration will enforce the MCA’s detainee protections. No serious question exists, though, about the President’s constitutional obligation to comply with them—or about OLC’s obligation to facilitate that compliance through its legal advice.

Yet in some contexts, OLC’s legal analysis may appropriately favor desired executive action precisely because executive branch entities possess relevant expertise, or the President holds views on the legal issue presented. In some instances, this presents no direct conflict with the other branches’ legal views and expectations. To take one example, the courts routinely afford the executive branch *Chevron* deference in appropriate circumstances, including where Congress has not made its intent clear, and Congress is well aware of that practice.¹⁴ Further, OLC typically and appropriately considers not only judicial precedent but also executive branch tradition and precedent in the form of Attorney General and OLC opinions, especially regarding separation of powers issues where judicial doctrine tends to be relatively scarce.

Far more suspect—and a more difficult subject of governing standards—are executive branch proposals premised on a legal view that flatly conflicts with the legal views of the Supreme Court or Congress. Presidents may disagree with prevailing judicial

¹⁴ See *Chevron v. NRDC*, 467 U.S. 837 (1984).

precedent or congressional sentiment, based on the advice of lawyers or their own legal understandings, and their alternative view may be principled and not merely policy driven. History provides interesting examples of presidents who openly sought to promote legal change. Prominent examples include Thomas Jefferson on the constitutionality of the Alien and Sedition Act of 1798, Abraham Lincoln on the *Dred Scott* decision,¹⁵ Franklin Roosevelt on congressional authority to address the Great Depression, and Ronald Reagan on many of the great issues of the day, from abortion to criminal procedure to congressional power. I have argued elsewhere that the legitimacy of such presidential actions depends on the context and that chief among the relevant factors are the particular presidential power being exercised and the interpretive processes followed.¹⁶ In formulating legal views, presidents and their advisors should always exercise principled deliberation, humility, and, as the Guidelines state, “due respect for the constitutional views of the courts and Congress.”

That presidents in at least some circumstances possess the authority to promote a distinctive legal view is beyond serious question and helps explain significant constitutional changes throughout U.S. history (some of them unquestionably for the better). Most clear, presidents may act on their own constitutional views, even counter to the Court’s interpretations, when exercising authority the Constitution assigns exclusively to them without limitation as to the reasons for the exercise of the authority. Presidents may exercise the veto or pardon powers based on policy preferences, which may include the desire to promote a preferred constitutional view. Also beyond dispute, presidents may publicly discuss their legal views, including their disagreement with the Court or Congress, and urge either of those bodies to change their views through litigation or legislation. And, as numerous presidents have, they may appoint federal judges likely to implement their view of the law. Those who disagree with a President’s substantive views of course remain free to oppose such efforts—in Congress, before courts, in public debate, and at the polls.

The Bush Administration’s claims go well beyond these widely accepted forms of advocacy and they threaten to tarnish the legitimacy of valuable and appropriate presidential interpretive practices. For example, President Bush has come under severe and warranted attack for frequently refraining from vetoing bills he views as constitutionally objectionable and instead issuing signing statements in which he raises constitutional objections to legislative provisions while signing them into law. In response, the American Bar Association has issued a sweeping condemnation of not only President Bush’s use of signing statements, but their use by past presidents as well.¹⁷ Signing statements that announce the President’s legal views or planned implementation of a law, however, provide the public with valuable information, which is especially rare and needed from the highly secretive Bush Administration. Critics should take care not to deter the appropriate use of signing statements as a form of presidential communication and should instead focus on evaluating the legal views expressed in the statements.¹⁸

¹⁵ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

¹⁶ See Johnsen, *Functional Departmentalism*, *supra* note 11, at 120–34.

¹⁷ American Bar Association, *Task Force on Presidential Signing Statements and the Separation of Powers Doctrine* (Aug. 2006), available at http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.

¹⁸ See David Barron, Dawn Johnsen, et al., *Untangling the Debate on Presidential Signing Statements*, posting to Georgetown Law Faculty Blog (July 31, 2006), available at http://gulcfac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html.

President Bush's claims of authority to act on his own legal views have been particularly controversial and deservedly condemned because he has made them in a context traditionally suspect and rarely justified: the refusal to enforce a statute. In addition to asserting nonenforcement authority, President Bush often has stated that he will interpret statutory provisions to avoid conflicts with what he views as his office's constitutional authority.¹⁹ President Bush's abuses notwithstanding, in relatively rare circumstances presidents do have the authority to refuse to comply with unconstitutional statutes. The easiest cases for nonenforcement authority involve statutory provisions that are clearly unconstitutional under applicable Supreme Court precedent. For example, despite the Court's ruling in *Chadha* to the contrary,²⁰ Congress persists in enacting clearly unconstitutional provisions (as parts of multi-provision legislation, which makes a veto more difficult) that require the executive branch to obtain approval from a single house of Congress or congressional committee before taking particular actions. Consistent with *Chadha*, presidents view such provisions as unconstitutional and do not comply with them; they typically treat the provisions instead as requiring mere reporting to the designated entity.²¹

Presidential nonenforcement is far more problematic, and far less often justified, when the Court has not provided clear direction and the constitutional issue is susceptible to reasonable dispute. But even then, nonenforcement may be warranted in rare instances. In the most well-known and compelling example, President Thomas Jefferson refused to prosecute anyone under the Sedition Act of 1798 because he viewed the statute as unconstitutional. His judgment that the law violated the First Amendment was hotly contested at the time and the Supreme Court did not expressly resolve the dispute (ultimately in Jefferson's favor) until 163 years later. Thus, at times presidential nonenforcement protects the constitutional rights of individuals. Nonenforcement far more often arises when the President is self-interested: in the context of a law that infringes on presidential authority, or more precisely, what a sitting President views as presidential authority, as in President Bush's expansive claims of presidential power.

The Guidelines do not take a position on the legitimacy or scope of presidential nonenforcement authority and describe the issue as beyond the scope of the statement. The Guidelines simply acknowledge the traditionally very "rare" practice and address the "bare minimum" process the President should follow (the subject of the next section). In practice, presidents rarely have declined to enforce constitutionally objectionable statutes. Former U.S. Attorney General Benjamin Civiletti, who served

¹⁹ In its classic statement of the judicial canon of constitutional avoidance, the Supreme Court wrote, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Professors Trevor Morrison and H. Jefferson Powell both have raised important questions about whether the executive branch should continue in this way to aggrandize executive power through the use of the constitutional avoidance canon. See Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006); H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313 (2006).

²⁰ See *INS v. Chadha*, 419 U.S. 919 (1983); Trevor Morrison, *The Canon of Constitutional Avoidance and Executive Branch Legal Interpretation in the War on Terror*, 1 ADVANCE: THE J. OF THE AM. CONST. SOC'Y ISSUE GROUPS 79 (2007).

²¹ See Neil Kinkopf, *Signing Statements and the President's Authority to Refuse to Enforce Law*, 3–4 (2006), available at <http://www.acslaw.org/node/2965>.

in the Carter Administration, aptly observed that when the President is confronted with a constitutionally objectionable statute, “it is almost always the case that he can best discharge the responsibilities of his office by defending and enforcing the Act of Congress.”²² Factors that have supported nonenforcement include a constitutional defect that is clear (either on its face or under controlling judicial precedent), an encroachment upon presidential power, or a constitutional violation unlikely to be justifiable absent nonenforcement.²³ I have argued elsewhere that this practice of typically enforcing statutes that presidents find constitutionally dubious properly reflects respect for the constitutional views of Congress and the courts and for the legislative process: the veto and points earlier in the legislative process are when the President ordinarily should act on constitutional concerns.²⁴

Because the Bush Administration is highly secretive, whether and to what extent President Bush actually has refused to comply with statutory provisions remains unknown. He has, however, asserted the right to refuse to enforce statutes far more frequently than any previous President. His vague and abbreviated explanations typically do not adequately inform Congress or the public about the precise nature of the alleged constitutional defect. Notwithstanding the extraordinary frequency of the assertions, the Bush Administration has never described the standards it follows in making nonenforcement decisions. The Torture Opinion in particular does not even acknowledge the profound challenges to the rule of law raised by presidential nonenforcement of statutes, let alone apply any limiting principles. Thus, what is known about the Bush Administration’s approach to nonenforcement puts it far out of the mainstreams of presidential practice and legal thought.

C. OLC’S INTERPRETIVE PROCESSES: SAFEGUARDS FOR THE RULE OF LAW

As the Guidelines’ first principle instructs, the paramount principle guiding OLC’s work should be to provide accurate and honest legal appraisals, unbiased by policymakers’ preferred outcomes. Several of the Guidelines’ remaining principles recommend internal executive branch processes to help achieve this ideal. The detailed nature of these recommendations—which cover everything from the form that requests for advice should take,²⁵ to how many OLC Deputy Assistant Attorneys General

²² The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55 (1980) (memorandum from Attorney General Benjamin R. Civiletti) [*hereinafter* 1980 Civiletti Memorandum].

²³ See 1980 Civiletti Memorandum, *supra* note 18, at 55; Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199 (1994) (memorandum from Assistant Attorney General Walter Dellinger). Under Presidents Ronald Reagan and George H.W. Bush, OLC at times described presidential nonenforcement authority in far more sweeping terms. See Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. Off. Legal Counsel 18 (1992) (memorandum from acting assistant attorney general Timothy E. Flanigan); Issues Raised by Foreign Relations Authorization Bill, 14 Op. Off. Legal Counsel 37 (1990) (memorandum from Assistant Attorney General William P. Barr).

²⁴ See Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS 7 (2000). See also David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61 (2000); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990); Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865 (1994); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

²⁵ “Whenever possible, agency requests should be in writing, should include the requesting agency’s own best legal views as well as any relevant materials and information, and should be as specific as circumstances allow.”

should sign off on advice before it is finalized²⁶—reflects the authors’ strong conviction that regularized internal processes and mechanisms are critical to maintaining commitment to the first principle in the face of inevitable pressures to the contrary.²⁷

The notion that, when assessing a proposed action, OLC should engage not in advocacy but in objective and accurate legal interpretation will not be intuitive to all observers (or to all new OLC attorneys) and therefore must be deliberately reinforced. Our law schools and legal culture teach that courts—not elected officials—are the appropriate neutral expositors of law. Indeed, many executive branch lawyers serving other functions appropriately do act as legal advocates for the government, including in court and in front of OLC.²⁸ Additionally, cynicism pervades public attitudes about the ability of political actors to interpret the law in a principled fashion, and the Torture Opinion and other legal positions taken by the Bush Administration in the “War on Terror” certainly have reinforced and deepened that cynicism. Lawyers now may come to the executive branch with a distorted view of OLC, knowing only that OLC issued the infamous Torture Opinion and sanctioned the Bush Administration’s other highly controversial national security policies. OLC therefore would greatly benefit its new attorneys, as well as potential OLC clients throughout the executive branch, by clearly articulating the principles that guide its work.

OLC also should make those standards available to the public, to inform Congress and the courts as they evaluate executive branch positions and to alert the press and public as they seek accountability. As the Guidelines state, “OLC can help promote public confidence and understanding by publicly announcing its general operating policies and procedures.” OLC’s failures during the Bush Administration and the resulting damage to OLC’s reputation have created a compelling need for clarification of the standards that actually govern OLC’s work. The Bush OLC’s excessive secrecy has compounded the damage to its reputation: because OLC has released shockingly few of its legal opinions, observers cannot assess the extent to which it adheres to best practices. The Guidelines provide a strong starting point, for they reflect what nineteen former OLC attorneys viewed as the best traditions of the office. Every presidential administration should either publicly embrace them or announce its own set of guidelines.

Perhaps most essential to avoiding a culture in which OLC becomes merely an advocate of the Administration’s policy preferences is transparency in the specific legal advice that informs executive action, as well as in the general governing processes and standards. The Guidelines state that “OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or nondisclosure.” The

²⁶ “Ordinarily OLC legal advice should be subject to multiple layers of scrutiny and approval; one such mechanism used effectively at times is a ‘two deputy rule’ that requires at least two supervising deputies to review and clear all OLC advice.”

²⁷ “OLC should maintain internal systems and practices to help ensure that OLC’s legal advice is of the highest possible quality and represents the best possible view of the law.”

²⁸ As the Guidelines note, OLC’s work may also involve other functions and the appropriate interpretive stance might vary accordingly. One common example: OLC at times assists DoJ litigating divisions in developing the government’s litigating position. When defending acts of Congress, DoJ typically offers courts all reasonable arguments in their defense—even arguments that do not represent the best view of the law. OLC’s advice in this context is not binding on others. The Guidelines provide that, whatever function it serves, OLC should always articulate precisely the nature of its advice: “OLC should be clear whenever it intends its advice to fall outside of OLC’s typical role as the source of legal determinations that are binding within the executive branch.” “Client agencies expect OLC to provide its best view of applicable legal constraints and if OLC acts otherwise without adequate warning, it risks prompting unlawful executive branch action.”

Guidelines describe several values served by a presumption of public disclosure, beyond the general public accountability that accompanies openness in government. The likelihood of public disclosure will encourage both the reality and the appearance of governmental adherence to the rule of law by deterring “excessive claims of executive authority” and promoting public confidence that executive branch action actually is taken with regard to legal constraints. The Guidelines note as well that public discourse and “the development of constitutional meaning” may benefit from the executive’s important voice, valuable perspective and expertise.

Of the Guidelines’ ten principles, this call for transparency is perhaps the most controversial, as well as the most susceptible to substantially different applications even among those who endorse it. The Guidelines note that the Administration undoubtedly will possess strong, even compelling, reasons for keeping some OLC advice confidential. The classic example is to protect national security interests, such as where the release of an OLC opinion might reveal the identity of a covert agent. Less obvious perhaps, OLC also has a strong interest in not releasing opinions that would embarrass the administration—or more to the point, the individual or agency who requested the advice. As the Guidelines recognize, “For OLC routinely to release the details of all contemplated action of dubious legality might deter executive branch actors from seeking OLC advice at sufficiently early stages in policy formulation.” Policymakers should not have to fear public disclosure of their hastily conceived ideas for potentially unlawful action—that is, as long as they act lawfully. The public interest is served when government officials run proposals by OLC, and publication policy must not unduly deter the seeking of legal advice. Thus, the Guidelines state, “[o]rdinarily, OLC should honor a requestor’s desire to keep confidential any OLC advice that the proposed executive action would be unlawful, where the requestor then does not take the action.”

A hypothetical helps illustrate: Assume that in the immediate wake of the Oklahoma City bombing, the counsel to the President had asked OLC to consider several necessarily rough and hurriedly prepared proposals, among them whether the government could torture and unilaterally wiretap the leaders of right-wing militias suspected of planning future attacks, notwithstanding federal statutes apparently to the contrary. If OLC advised that the proposed actions would be unlawful and the White House accepted that advice and decided not to pursue the policies, there ordinarily would be relatively little need to publicly disclose the request or the advice and good reason to keep them confidential. If, however, OLC had interpreted the relevant law to allow the torture and warrantless wiretapping, the public would have a strong interest in knowing of that advice and seeing those opinions in an appropriate, timely manner.

The Guidelines describe the need for public disclosure as particularly strong whenever the executive branch does not fully comply with a federal statutory requirement. Although the Guidelines do not take a position on the legitimacy of presidential non-enforcement, they note its “rare” occurrence and call, at a “bare minimum,” for full public disclosure and explanation: “Absent the most compelling need for secrecy, any time the executive branch disregards a federal statutory requirement on constitutional grounds, it should publicly release a clear statement explaining its deviation.” The supporting legal analysis “should fully address applicable Supreme Court precedent.” As the Guidelines also note, Congress has enacted a law that requires the Attorney General to notify Congress if DoJ determines either that it will not enforce a statutory provision on the grounds the provision is unconstitutional or that it will not defend a statute against constitutional challenge.

The Bush Administration, of course, has not complied with this public notice standard and generally has operated in extraordinary secrecy. Its coercive interrogation policy provides one striking example. The Administration kept secret OLC's determination that the President had the constitutional authority to violate the federal anti-torture statute. The public learned of the Torture Opinion only through a leak almost two years after OLC issued it. During that time, the Opinion was held out to the executive branch as a whole as the definitive legal interpretation and was used to silence those who objected to the use of extreme interrogation techniques.²⁹

Given the Bush Administration's propensity to claim that it is simply engaging in statutory interpretation when it in effect is claiming the authority to disregard a statute, Congress should amend the current notification requirement to extend beyond cases in which the executive branch acknowledges it is refusing to comply with a statute. Presidents should explain publicly not only when they determine a statute is unconstitutional and need not be enforced, but also whenever they rely upon the constitutional avoidance canon to interpret a statute. As Professor Trevor Morrison has explained, the most persuasive justification for allowing executive branch use of the avoidance canon—which promotes judicial restraint when used by courts—is to promote constitutional enforcement by requiring Congress to be clear about its intent when it comes close to a constitutional line. Executive use of the avoidance canon, like judicial use, protects constitutional norms by encouraging Congress to deliberate before coming close to violating them. This justification, which has the effect of forcing Congress to reconsider legislation, depends entirely on the executive branch disclosing its concerns to Congress.³⁰

But the Bush Administration has relied upon the avoidance doctrine in secret, depriving Congress of any opportunity to respond with clarifying legislation. Moreover, if the President fails to notify Congress when he refuses to comply with a statutory requirement, Congress—and the public—has little ability to monitor the executive branch's legal compliance. President Bush's frequent use of boilerplate, vague language in signing statements stating that he will interpret statutes consistent with his views of presidential powers does not provide genuine guidance about whether and how the President will enforce the provision.

Beyond the failure in transparency, the Torture Opinion did not adhere to some of the other best practices that the Guidelines advocate. For example, OLC appears to have acted contrary to the Guidelines' suggestion that "whenever time and circumstances permit, OLC should seek the views of all affected agencies and components of the DOJ before rendering final advice." OLC apparently either never solicited or outright ignored the advice of the Department of State and DOJ's Criminal Division.

The Guidelines also caution that, "OLC typically should provide legal advice in advance of executive branch action, and not regarding executive branch action that already has occurred." Otherwise, OLC will feel pressure not to opine that executive branch officials have engaged in unlawful activity. According to news reports, the CIA began using extreme interrogation methods, including waterboarding and cold cells,

²⁹ See DEPARTMENT OF DEFENSE WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (Apr. 4, 2003); Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, THE NEW YORKER, Feb. 27, 2006, at 32.

³⁰ See Morrison, *supra* note 19; Trevor W. Morrison, *Executive Branch Avoidance and the Need for Congressional Notification*, SIDEBAR: ONLINE PUBL. COLUM. L. REV., available at <http://clrsidebar.org/essays/executive-branch-avoidance>.

several months before OLC issued the Torture Opinion. If the Torture Opinion instead had concluded that these interrogations violated the federal anti-torture statute, the interrogators could have faced harsh criminal penalties; that knowledge could create understandable pressure on OLC to find no violation.

Related to this caution against post hoc advice, the Guidelines encourage executive branch “structures, routines and expectations ... to help ensure that OLC is consulted, before the fact, regarding any and all substantial executive branch action of questionable legality.” OLC, for its part, “must be attentive to the need for prompt, responsive legal advice that is not unnecessarily obstructionist.” OLC’s advice often should not end with saying no to a proposed action, but should help the President and policymakers achieve objectives through alternative, lawful means. If instead OLC is perceived as unhelpful and unnecessarily negative, the President and others in the executive branch might avoid asking OLC about the legality of strongly desired policies.

V. CONCLUSION

The proposition that the President’s own legal advisors can provide an effective constraint on unlawful action understandably engenders a high degree of skepticism. One of President Bush’s legacies undoubtedly will be the deepening of Americans’ cynicism about presidential adherence to the rule of law. Indeed, internal checks alone are insufficient; Congress and the courts must do their part, including encouraging appropriate executive branch practices. But we debase our commitment to democracy and justice if we do not view legal advice from within the executive branch as an essential component in efforts to safeguard civil liberties, the constitutional allocation of governmental authority, and the rule of law. We invite failure if we allow our cynicism to excuse presidential abuses as simply expected—in effect relieving presidents (and those who serve them) of their obligation to take care that the laws be faithfully executed, as the Constitution commands. Instead, we must work to develop standards and processes that promote fidelity to the rule of law. It is both possible and necessary for executive branch lawyers to constrain unlawful executive branch action.

Ultimately, though, the President’s own attitude toward the rule of law ultimately will go a long way toward setting the tone for the Administration. If the President desires only a rubber stamp, OLC will have to struggle mightily to provide an effective check on unlawful action. In addition to being prepared to say no, therefore, presidential lawyers must be prepared to resign in the extraordinary event that the President persists in acting unlawfully or demands that OLC issue opinions to help legitimize unlawful activity. Even from within the Bush Administration, some cause for optimism can be found in reports of internal opposition to extreme interrogation policies and of the threatened mass Bush DoJ resignations over the unlawful domestic surveillance program. Commitment to the rule of law must not be a partisan issue. Congress, the courts and the public all should work to empower principled executive branch lawyers—in administrations of both political parties—to safeguard our constitutional democracy.

Tired of Kabuki? Time to Tango: The Case for Litigator-Led Questioning of Supreme Court Nominees

Seth Rosenthal*

Many courthouse lawyers I know caught at least part of the confirmation hearings of Chief Justice John Roberts and Associate Justice Samuel Alito. For all of them, the experience produced the exact same sensation: an irresistible urge to bang their heads against the nearest wall in utter frustration over how little anyone was able to learn about the nominees' views on the law. Experienced litigators, indeed most people, know that trials and other court proceedings aren't perfect at ferreting out the truth. But at least they produce *information*—information from which judges and juries can usually render intelligent decisions. Despite their ostensible purpose, Supreme Court confirmation hearings, at least those involving “contested” nominees, haven't done so. Not since the nomination of Robert Bork, anyway.

The last term of the Supreme Court proves the point. A spate of contentious, precedent-altering decisions involving campaign finance reform, voluntary school integration, criminal procedure, abortion rights, civil rights protections and antitrust law, to name a few, show rather conclusively that the Court has begun charting a new course. Many predicted this would occur based on Chief Justice Roberts' and Justice Alito's pre-nomination records. But no one could have confidently offered any such prediction based on what little meaningful information senators obtained during the two newest justices' confirmation hearings.¹ And while the hearings of some less contentious picks have been more edifying, those of the most controversial post-Bork nominee, Justice Clarence Thomas, were by many accounts an exercise in obfuscation.²

Senate Judiciary Committee member Joseph Biden has referred to the hearings as a “kabuki dance,” because nominees give the illusion of providing meaningful responses but in reality say little of substance.³ At the 2007 convention of the American Constitution Society, fellow Judiciary Committee member Charles Schumer agreed,

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¹ Janet Malcolm, *The Art of Testifying*, NEW YORKER, Mar. 13, 2006.

² See, e.g., Michael Gerhardt, *Divided Justice: A commentary on the Nomination and Confirmation of Justice Thomas*, 60 GEO. WASH. L. REV. 969 (1992) [hereinafter “Gerhardt”]; Gary J. Simson, *Thomas's Supreme Unfitness: A Letter to the Senate on Advise and Consent*, 78 CORNELL L. REV. 619 (1993) [hereinafter “Simson”]. Jane Mayer and Jill Abramson reported that Justice Thomas himself acknowledged that his hearings concealed his judicial philosophy. Jane Mayer and Jill Abramson, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* 8, 216–20, 354 (1993).

³ Press Release, Biden Votes No on Judge Roberts (Sept. 22, 2005) (*available at* <http://biden.senate.gov/newsroom/details.cfm?id=246272&>).

asserting that the hearings are “often meaningless ... produc[ing] a lot of sound and fury, often signifying nothing.”⁴ Professor Ronald Dworkin similarly has observed, “[S]ince Robert Bork was rejected by the Senate in 1987, several nominees have reduced the hearings to a pointless recital of an established script.”⁵ Invariably for these nominees, the script has included (i) generic pledges to approach judging without an agenda, keep an open mind and respect precedent; (ii) bland recitations of the existing state of the law; and (iii) next-to-nothing about the nominees’ own views, save an embrace of the must-embrace-or-else-be-defeated decisions in *Brown v. Board of Education* and *Griswold v. Connecticut* and an occasional (somehow newsworthy) platitude like “the president is not above the law.”⁶ Standing alone, the hearings have revealed little about what kind of Supreme Court justices these nominees would be.

The view that the hearings rarely produce meaningful information isn’t held exclusively by liberals. Conservatives who lament the Senate’s rejection of Robert Bork—and who continue to seek public re-airing and vindication of the constitutional views that Judge Bork articulated—say the same thing. In the midst of the Roberts confirmation proceedings, Catholic University Professor Dennis Coyle wrote in *National Review Online*:

Perhaps never again will the members of the Judiciary Committee be treated by a nominee as if they were worthy of a candid and informed discussion. Roberts will not repeat that “mistake [of Judge Bork],” as he will not be inclined to give Democratic attack dogs any red meat. And that is a shame, as the country will be denied an opportunity to witness a deep and thoughtful engagement on the most fundamental principles of our constitutional order. Understandable, but unfortunate.⁷

It shouldn’t be this way. But how can the Senate Judiciary Committee improve the hearings? Conversely, should it even bother trying? Should reform efforts, if undertaken at all, concentrate instead on other aspects of the nomination-confirmation process?

In the past two decades, observers have advanced a number of proposals for improvement. Some suggestions have been structural: establishing a two-thirds confirmation requirement,⁸ informally requiring pre-nomination consultation between the White House and the opposition party in the Senate,⁹ and reducing the importance of the Supreme Court in American life by curbing its purported tendency toward

⁴ Senator Charles Schumer, Speech at ACS National Convention (July 29, 2007) [hereinafter “Schumer ACS speech”] (*available at* <http://aclslaw.org/pdf/Schumer%20speech.pdf>).

⁵ Ronald Dworkin, *The Strange Case of Judge Alito*, NEW YORK REVIEW OF BOOKS, Feb. 23, 2006.

⁶ Testimony of Samuel Alito (Jan. 10, 2006) (*available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011000781.html>) [hereinafter “Testimony of Samuel Alito”].

⁷ Dennis Coyle, *Studying John Roberts*, NAT’L REV. ONLINE, Sept. 1, 2005.

⁸ See, e.g., Calvin R. Massey, *Getting There: A Brief History of the Politics of Supreme Court Appointments*, 19 HASTINGS CONST. L. Q. 1, 14-16 (1991).

⁹ See, e.g., David A. Strauss and Cass R. Sunstein, *The Senate, the Constitution and the Confirmation Process*, 101 YALE L.J. 1491 (1992) [hereinafter “Strauss and Sunstein”]; *Senate Democratic Task Force on the Confirmation Process* (U.S. Senate, Dec. 18, 1991), reprinted in 138 Cong. Rec. S 898 (daily ed. Feb. 4, 1992) [hereinafter “Task Force Report”].

“judicial supremacy.”¹⁰ Others have been narrower in scope: focusing more on the pre-nomination record and less on the hearings,¹¹ establishing specific confirmation criteria,¹² limiting questioning to the nominee’s qualifications,¹³ and dispensing altogether with testimony from the nominee.¹⁴ The list goes on. But for a variety of reasons, discussed at length by others, most of the suggestions are unrealistic or inadvisable or both. Adoption of a two-thirds vote requirement just won’t happen. Pre-nomination consultation with the Senate (an attractive idea, adopted by President Clinton) may occur, but only when the president thinks it is in his or her self-interest; it is unlikely ever to be mandated.¹⁵ Specific confirmation criteria would be elusive and unworkable.¹⁶ The Senate will not stand for examining technical qualifications alone, nor should it, since presidents invariably do not.¹⁷ The hearings, as discussed below, are likely here to stay and will almost certainly remain a focal point of the confirmation process. And so on.

There is, however, a modest suggestion that holds out genuine promise for at least modest improvement, and it comes back to those frustrated courthouse lawyers mentioned above: let them lead the questioning, with senators doing follow-up. This idea, or at least an iteration of it (e.g., bring in outside constitutional experts), has been floated before, but either dismissed or treated cursorily. As unilluminating as the Roberts and Alito hearings proved to be, and with the current lull in Supreme Court nominations, we should stop to consider it anew.

Tapping experienced litigators to lead the questioning of Supreme Court nominees has several significant advantages. First, by virtue of their training, their experience and the time they will spend in preparation, courtroom advocates will be more adept at examining nominees. Improved questioning will either produce better information about a nominee’s views or, by more fully exposing the nominee’s unwillingness to divulge such information, show the Senate and the public that they are not getting what they deserve most from the hearings. Second, unlike a number of the proposals that have been advanced, turning the questioning over to outside experts should be politically tenable. Congress has done it before—with success—in other contexts. And despite what critics of outside counsel questioning might say, the Judiciary Committee can easily design the process so that senators continue to enjoy the platform they seek to air their views and dialogue publicly with nominees. Third, allowing experienced litigators to do the questioning may have the salutary effect of improving the level of bipartisan cooperation and reducing the level of rancor that often accompanies modern day nominations. This is, of course, highly speculative, but it is hard to imagine the situation growing more contentious than it is now.

¹⁰ See, e.g., John Yoo, *Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy*, 98 MICH. L. REV. 1436 (1999); M. Edward Whelan III, *Justices on Trial: Can Senate Confirmation Ever Be Less Tortuous*, WEEKLY STANDARD, June 18, 2007.

¹¹ See, e.g., Strauss & Sunstein, *supra* note 9; Gerhardt, *supra* note 2, at 992; David O’Brien, ed., *Judicial Roulette: Report of the Twentieth Century Fund Task Force on Judicial Selection* 11 (1988) [hereinafter “O’Brien”].

¹² William G. Ross, *The Supreme Court Appointment Process: A Search for Synthesis*, 57 ALB. L. REV. 993, 1019-21 & n. 103 (1994) [hereinafter “Ross”].

¹³ Michael M. Gallagher, *Disarming the Confirmation Process*, 50 CLEV. ST. L. REV. 513 (2004).

¹⁴ O’Brien, *supra* note 11, at 10.

¹⁵ See, e.g., John Maltese, *THE SELLING OF SUPREME COURT NOMINEES* 15-56 (1998); Michael Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J. L. & PUB. POL’Y 467 (1998).

¹⁶ O’Brien, *supra* note 11, at 79–80.

¹⁷ See, e.g., Schumer ACS speech, *supra* note 4.

I. THE SENATE HAS AN INDEPENDENT, SUBSTANTIVE ROLE TO PLAY

The proposal to delegate questioning responsibility to outside counsel is premised on two assumptions. The first is that the Senate has a meaningful role to play in the confirmation process. As others have explained at length, the Framers intended the Senate to play an independent role,¹⁸ academics agree that the Senate should play an independent role,¹⁹ and senators historically have insisted on playing an independent role, refusing to confirm one in five high court nominees. Historian Robert Caro has written: “[T]he nation’s Founders depended on the Senate’s members to stand up to a popular and powerful President. In the case of judicial appointments, the Founders specifically mandated the Senate to play an active role, providing both advice and consent to the President. That shared authority was basic to the balance of powers among the branches.”²⁰ Similarly, Senator Orrin Hatch has said: “I am not saying that the Senate can or should use its advise and consent power to block all judicial appointees whose political views we do not agree with. ... But conducting a fair confirmation process most assuredly does not mean granting the president *carte blanche* in filling the federal judiciary.”²¹ And 20 years ago Professors Philip Kurland (a conservative) and Laurence Tribe (a liberal) jointly asserted:

The Constitution entrusts the power to appoint the member of the third branch of the National Government not to the executive branch nor to the legislature, but to *both* political branches together: the President nominates, but the Senate must confirm. Providing “advice and consent” on judicial nominations, therefore, is no more senatorial courtesy but a constitutional duty of fundamental importance to the maintenance of our tripartite system of government. ... The Senate is surely not required to defer to the appointment of men and women whose most salient qualification is their location in a particular partisan line-up or their devotion to a particular cluster of political or philosophical views ... [The Nation] has a right to insist that the Senate, whatever the practice of the past decade or two, recall the Framers’ vision of its solemn duty to provide advice and consent, rather than perfunctory obedience, to the will of the President.²²

The second assumption is that it is appropriate for the Senate to consider and for nominees to disclose their legal views or “judicial philosophy.” According to University of Chicago Professor Cass Sunstein, “[A] bipartisan consensus has emerged on the relevance of ‘ideology,’ so much so that no Senator, and no outside observer, has seriously questioned that it does not matter.”²³ In fact, one would be

¹⁸ See, e.g., Strauss & Sunstein, *supra* note 9, at 1494-1502; Matthew D. Marcotte, *Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 519, 559-60 (2001-02).

¹⁹ See, e.g., Ross, *supra* note 12, at 2 & n.10.

²⁰ Letter from Robert Caro to Senators Trent Lott and Christopher Dodd (June 3, 2003).

²¹ Orrin Hatch, Speech to Federalist Society’s 10th Anniversary Lawyers’ Convention (Nov. 15, 1996).

²² Letter to the Senate Judiciary Committee (June 1, 1986).

²³ Testimony before Senate Judiciary Committee’s Subcommittee on Administrative Oversight and the Courts (June 26, 2001).

hard-pressed to find a senator, Democrat or Republican, who at one time or another hasn't expressed hearty agreement about the propriety of considering a nominee's legal views. Judges have, too. The late Chief Justice William Rehnquist, for instance, asserted in 1987 that an inquiry into "judicial philosophy ... has always seemed ... entirely consistent with our Constitution and serves as a way of reconciling judicial independence with majority rule."²⁴

The reason for such agreement is clear: it is the nominee's jurisprudential beliefs, more than anything else, that will affect our rights and make its mark on American life. If an independent, unaccountable government actor is going to wield such authority legitimately in a democratic society like ours, the public and its elected representatives have a basic right to know how and what he or she thinks. "Why should the public be asked to accept a pig in a poke? ... [I]t hardly seems right that a nominee should be permitted to give an answer that is a fancy version of 'trust me,'" National Public Radio legal affairs correspondent Nina Totenberg once wrote.²⁵ This is particularly true insofar as presidents invariably pick their nominees based on the belief that the nominees share their preferred vision of the law. If the Senate were to fail to consider a nominee's legal views in the face of this reality, it would effectively abdicate its independent advise-and-consent role. As Professor Charles Black maintained:

"[A nominee's] policy orientations are material—and ... can no longer be regarded as immaterial by anybody who wants to be taken seriously, and are certainly not regarded as immaterial by the President—it is just as important that the Senate think them not harmful as that the President thinks them not harmful. ... The Constitution certainly permits, if it does not compel, the taking of a second opinion on this crucial question, from a body just as responsible to the electorate, and just as close to the electorate, as is the President. Is it not wisdom to take that second opinion in all fullness of scope?"²⁶

This is not to say, of course, that nominees ought to divulge how they would rule in particular cases. Despite persistent efforts by some to suggest that this is what advocates of openness are demanding, it isn't. What they are demanding is insight into a nominee's views on established legal principles.²⁷

²⁴ William H. Rehnquist, Remarks of the Chief Justice, Columbia University School of Law, New York (Nov. 19, 1987) (cited in Ruth Bader Ginsburg, *Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate*, 1988 U. ILL. L. REV. 101, 111-12 (1988)). His statement echoed what he had written as a young lawyer: "The Senate should restore its practice of thoroughly informing itself on the judicial philosophy of a Supreme Court nominee before voting to confirm him." William H. Rehnquist, *The Making of a Supreme Court Justice*, Harvard Law Record, Oct. 8, 1959, at 7, 10.

²⁵ Nina Totenberg, *The Confirmation Process and the Public: The Right to Know or Not to Know*, 101 HARV. L. REV. 1213, 1218 (1988) [hereinafter "Totenberg"].

²⁶ Charles L. Black, *A Note on Senatorial Consideration of Supreme Court Nominations*, 79 YALE L.J. 657, 660 (1970).

²⁷ Yale Professors Robert Post and Reva Siegel contend that the best way to flesh out a nominee's views is to have the nominee offer candid opinions on previously decided cases. Robert Post and Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, YALE L.J. (THE POCKET PART) (Jan. 2006) (available at http://yalelawjournal.org/2006/01/post_and_siegel.html). Senator John Cornyn, one of the fiercest proponents of President Bush's judicial nominees, agrees: "It's completely inappropriate to ask nominees to make promises to politicians about how they're going to vote should a case come before them. ... [But] I think it's an appropriate question to ask what their views are on cases that have been decided and judicial opinions that have been written." Interview of Sen. John Cornyn, *This*

II. BECAUSE THE HEARINGS AREN'T LIKELY TO BE ABOLISHED, THEY SHOULD BE IMPROVED

The proposal outlined here operates on the assumption that it is worthwhile to seek to improve confirmation hearings. But is it? Some suggest not. After the hearings on Justice Thomas' nomination, David Strauss, Cass Sunstein and others advocated diminishing the role of the hearings and emphasizing the nominee's pre-nomination record. Some have gone further. In the wake of the Bork hearings, a task force of legal luminaries assembled by the Twentieth Century Fund recommended not only that the Senate base its confirmation decisions on a nominee's written record and the testimony of experts, but that nominees not be required to testify at all.²⁸ In a fit of exasperation during the Alito hearings, Senator Biden made the same suggestion: "The system's kind of broken. Nominees now, Democrat and Republican nominees, come before the United States Congress and resolve not to let the people know what they think about the important issues. Just go to the Senate floor and debate the nominee's statements, instead of this game."²⁹ Former *Washington Post* editorial page writer Benjamin Wittes recently suggested that, if the Senate won't eliminate the hearings, presidents should simply refuse to send nominees to Capitol Hill to testify.³⁰

De-emphasizing or even abolishing the hearings sounds good in theory. It would permit senators to focus, as they should, on the nominee's existing record, which is far more likely to be an accurate barometer of future performance. But some nominees do not possess extensive records. More significantly, at least as a practical matter, we have now come to the point where dispensing with the hearings seems unrealistic. Feeding off of each other, the Senate and the media have invested too much stock in the hearings to let them go.

The Bork confirmation process is probably what triggered the Senate and the media's mutual fixation on the hearings. Judge Bork's confirmation was an open question before his hearings, but the hearings sealed his fate. By most accounts, Judge Bork did himself in with his own testimony, which observers found to be unconvincing both because his vision of the law was not one that a majority of senators embraced and because his effort to qualify or distance himself from prior controversial statements rang hollow. The fallout from the Bork experience is the expectation that the hearings make all the difference, at least for non-consensus nominations, even if that's not really the case.³¹ All of the interested players—senators, the White House and interest groups on both sides—have made the hearings the focal point of the confirmation process, either hoping for or guarding against a repeat of the Bork outcome. The media have only magnified the focus.

Week, ABC, July 3, 2005. See also Vikram Amar, *It's the Specifics, Stupid*, Aug. 4, 2005, <http://writ.corporate.findlaw.com/amar/20050804.html>; Walter Dellinger, *Fair Questions for Roberts*, WASH. POST, July 27, 2005.

²⁸ See, e.g., O'Brien, *supra* note 11, at 10; Simson, *supra* note 2, at 653-56.

²⁹ *Biden Suggests Supreme Court Confirmation Hearings No Longer Useful*, ASSOCIATED PRESS, Jan. 12, 2006.

³⁰ Benjamin Wittes, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES (2006).

³¹ "The big thing that the Bork confirmation experience changed was not the rancor in the process, but the role of the hearings as national theater." Cliff Sloan, *The Snooze Hearings*, *Slate*, July 22, 2005, available at <http://www.slate.com/id/2123131/entry/2123296/>; O'Brien, *supra* note 11, at 103.

Senators routinely say that what happens at the hearings will prove determinative for them. The result is that they imbue the hearings with more importance in the eyes of the media and the public than the nominees' often extensive pre-hearing records. The media then reinforce the message. And they have powerful incentives to do so. What transpires on camera today is far more newsworthy, particularly for television and radio, than what appears in some ten year-old opinion. It is, after all, "news;" it is happening now. Moreover, it is much easier for the media, especially television, to convey matters that are, as Ohio State Professor Lawrence Baum observes,³² far less relevant than a nominee's past work—e.g., congeniality, comportment and platitudinous sound-bites. Also, by virtue of their format, the hearings carry with them the potential for political drama that those dusty old law books simply don't possess. Think of the hearings of the past 15 years or so. What the memory immediately brings forward, even for many astute observers, are Justice Alito's wife leaving the hearing room in tears, Justice Thomas' complaining of a "high tech lynching," and Chief Justice Roberts' analogy between judges and umpires—nothing concrete about those justices' legal views, but certainly some memorable, made-for-TV moments.

Even elite segments of the print media, such as *The Wall Street Journal*, *Los Angeles Times*, *Washington Post* and *New York Times*, contribute to this trend. Many have done a commendable job of exploring the pre-hearing records of the past few Supreme Court nominees. But like television and most other print media, these sources are also interested, quite naturally, in the politics surrounding a nomination and a nominee's prospects for confirmation. This focus leads them to place undue emphasis on the hearings and often to treat the hearings as the determinative, make-or-break point of a nomination.

With the press focused on the hearings, senators—particularly Judiciary Committee senators—become even more focused on them. Ordinary committee hearings do not receive anywhere near the exposure that Supreme Court confirmation hearings do. Senators understandably want to capitalize on this opportunity, particularly since they are being confronted with the awesome responsibility of voting on a potential Supreme Court justice. Senators have political incentives to retain the current focus on the hearings and no real countervailing incentives.

The upshot is that it is highly unlikely that the Senate can ever put the genie back in the bottle. The hearings are here to stay. The Senate, therefore, should make the most of them. It should ensure to the greatest extent possible that the hearings do what they were intended to do: meaningfully educate us and our elected representatives about individuals who stand to enjoy a lifetime of unaccountability in one of the most influential positions in government. As Nina Totenberg said: "The public deserves to find out ... about the men and women who, if confirmed, will be the final arbiters of the rules by which the country is governed."³³ The proposal described below is designed to provide such deserved enlightenment.

³² Lawrence Baum, *What Will Hearings Tell About Alito?* Little, NEWSDAY, Jan. 8, 2006. *See also*, *What's the Alternative?: A Roundtable on the Confirmation Process*, 78 A.B.A. J. 41 (Jan. 1992).

³³ Totenberg, *supra* note 25, at 1229. *See also* Maltese, *supra* note 15, at 148; Ross, *supra* note 12, at 1005.

III. LET LITIGATORS LEAD

Several observers of the confirmation process have raised the idea of turning over the questioning at hearings to people other than senators. Some reject it.³⁴ Some believe it's worthwhile.³⁵ I offer here a detailed explanation of what a revamped process, led by outside counsel, would look like and why it would improve the quality of the hearings.

A. THE PROPOSAL AND ITS PRECEDENTS

A litigator-led process would work as follows. The majority and minority parties in the Senate Judiciary Committee would each collectively select its own lawyer to take charge of the investigation and conduct the questioning. Each lawyer would be given the authority to hire a small team to help her. Each lawyer, or each small team, would be given sufficient time to conduct a meaningful, thorough inquiry at the hearing—perhaps eight hours each, divided into alternating two-hour increments (so that neither side could dominate the proceedings for too long). Each Committee member would then be permitted to ask follow-up questions, subject to time limits, with outside counsel retaining the authority to conduct additional, though strictly limited, follow-up. As is the case now, each Committee member could make an opening statement prior to any questioning and closing remarks prior to the Committee vote, in addition to statements on the Senate floor.

There is ample precedent for conducting high-profile hearings in this fashion. Over the past 30 years, Congress has tasked outside counsel with leading the investigations into and conducting questioning at hearings on the following matters, among others: Watergate; the Iran-Contra scandal; the Keating Five scandal; and Whitewater. Outside counsel were given investigative and interrogatory responsibilities for reasons equally applicable to Supreme Court nominations: the time they have to absorb the subject matter and prepare meticulously, and the experience they bring in delivering effective, probing questions.

In the Iran-Contra matter, to take one example, the House and the Senate agreed to conduct the investigation jointly. Each party designated a lead counsel. Arthur Liman, a former prosecutor and well-known firm litigator, represented the Senate Democrats, while John Nields, also a former prosecutor and firm litigator, represented the House Democrats. Republicans tapped George Van Cleve. For their part, Liman, Nields and their deputies worked together to map out and execute an investigation strategy, which involved sifting through millions of documents and interviewing or deposing hundreds of people. At the hearings, which spanned weeks, Liman and Nields divided questioning responsibilities. Van Cleve and his deputy, Richard Leon (now a federal judge), conducted all of the questioning for Republican members. The 11 senators and 15 representatives on the panel observed the questioning of Liman, Nields, Van Cleve and Leon, but did not ask questions of the witnesses themselves until the lawyers were largely done.³⁶ Liman, Nields, Van Cleve and Leon ultimately asked a substantial percentage of the questions. For instance, based on the

³⁴ See, e.g., Ross, *supra* note 12, at 1010-13; Task Force Report, *supra* note 9, at S896.

³⁵ See, e.g., Simson, *supra* note 2, at 656-67; Strauss and Sunstein, *supra* note 9, at 1519; Joseph L. Nellis, *An Imperfect Proceeding*, NAT'L L. J., Oct. 28, 1991.

³⁶ In fact, as originally planned, "the panels hope[d] to minimize the problem [of overly extensive questioning] by having Liman and Nields lead the questioning with two senators and two representatives acting as 'designated hitters' on interrogating specific witnesses." Robert Doherty & Dana Walker, *Senate, House Panels Combine Forces in Rare Iran Arms Probe*, UNITED PRESS INT'L, Mar. 22, 1987.

hearing transcript, questioning by Liman, Niels and Van Cleve accounted for roughly 65% of the questioning of arguably the main witness, Oliver North.

The idea that senators would allow outside counsel to question Supreme Court nominees appears to run headlong into the notion that senators prize the public exposure that the hearings provide them. But Congress' experiences with Watergate, Iran-Contra and other investigative hearings suggest that members of Congress are willing to cede effective control of highly-publicized proceedings to outside counsel, so long as they retain some authority to ask questions and make statements themselves. To be sure, unlike these other hearings, Supreme Court confirmation hearings are focused on discovering what individuals believe, not what individuals have done. But the larger objective—asking probing questions, getting illuminating answers—is the same. There is no persuasive argument that the process should not be the same as well.

Like the process utilized to investigate Iran-Contra, Watergate and other matters, the process proposed here has the great benefit of allowing senators, as those answerable to the electorate, to retain control of the investigation and hearing, including the subject matter they want covered, while turning execution over to those with the necessary time and expertise. As Arthur Liman said just before the Iran-Contra hearings began, “With senators, they have to make the decisions, and I have to do everything the way they think will be most effective in helping them make those decisions.”³⁷ By the same token, there was little doubt that Liman and his colleagues drove the investigation, advised members of Congress which direction to take based on what they learned, and “carr[ied] much of the interrogation, whoever the witness, whatever the subject, throughout the spring and summer.”³⁸

The proposed process has other practical advantages. By giving senators ample time to voice their opinions and question nominees, it preserves the opportunity for public exposure that senators might seek. Answering certain critics of counsel-led questioning,³⁹ the proposed process also continues to provide senators a chance to engage in public, face-to-face dialogue with their putative counterparts in another branch of government. Having the right both to ask follow-up questions and deliver opening comments in the nominees' presence, senators would still be able to inform nominees whether, how and why the courts, in their eyes, are behaving properly or improperly.

B. THE ADVANTAGES OF LITIGATOR-LED INQUIRY

Delegating the lead role in examining Supreme Court nominees to experienced courtroom advocates should facilitate the goal of obtaining better information for at least three reasons.

1. Preparation

Senators invariably have a number of different matters competing for their time and attention. As important as Supreme Court nominations are, senators simply do not have the luxury of focusing on them to the exclusion of all else. Judiciary Committee senators rely heavily on their staffs to research nominee records, identify issues of importance and prepare pertinent questions. Senators then take the prepared questions and recite them at the hearings, occasionally offering modest, but rarely thorough, follow-up. The lack of effective follow-up is largely the result of insufficient

³⁷ David E. Rosenbaum, *Washington Talk: Iran Arms Hearing; Preview of the Soon-to-be-Famous Lawyers for Congress*, N.Y. TIMES, Apr. 29, 1987.

³⁸ *Id.*

³⁹ Ross, *supra* note 12, at 1012.

preparation. For understandable reasons, most senators rarely take the time needed to know the nitty-gritty details about each subject that concerns them so that they may deliver sophisticated lines of questioning based on those details. And it is impractical for staff to prepare such sophisticated lines of questioning because those are useful only for examiners extremely well-versed in the subject matter. As litigators know, successful examinations almost never follow a verbatim “script” laid out in advance, especially one not crafted by the examiner.

With nothing to focus on besides the hearing, experienced litigators brought in as outside counsel would expend the time necessary to prepare themselves to conduct thorough questioning at the hearings. This is, after all, what they do in their professional lives. Whether preparing for a trial, an evidentiary hearing, a key deposition or, for prosecutors, the grand jury appearance of an important witness, they know how to do what senators have been trying to do for years in Supreme Court confirmation hearings. That is, they know how to explore subjects about which they want or need to find out; expose and nail down facts they know based on evidence they already have; and depending both on their objective and what occurs during questioning, bolster or create doubt about a witness’s candor. Pursuing such inquiries successfully at a court proceeding as involved as a Supreme Court confirmation hearing takes a lot of preparation time, sometimes weeks. It requires integrating often voluminous documents, witness statements and physical evidence into discrete lines of questioning aimed at achieving particular goals. With a Supreme Court nominee like Justice Alito, who had been a judge for 15 years and had previously served as a political appointee, the task would be quite formidable. It would involve:

- Pouring over hundreds of written opinions from a lengthy judicial record, thousands of pages of documents from years in government service, and a handful of significant, non-judicial public statements, oral and written.
- Choosing for questioning no more than a few of the many subjects the nominee has addressed, and learning or refreshing one’s self on the law in the areas chosen for questioning.
- Preparing lines of questioning that integrate the nominee’s record and the law, aiming to explore what the record might suggest but doesn’t make clear and/or to nail down what the record already reflects.
- Choosing for additional questioning no more than a couple of legal subjects that the nominee has never publicly addressed—or even hinted at—but senators want to know about, and learning or refreshing one’s self on the law on those subjects.
- Preparing lines of questioning aimed at discovering the nominee’s views on those subjects.

Unlike senators, who outsource most, if not all, of these tasks, outside counsel would perform all of these tasks themselves. In their own practice, they are accustomed to doing so. Accordingly, the person doing the questioning at the hearing would be far more familiar with the subject matter of the questioning, ready to call it up from memory at a moment’s notice. The process would be far more hands-on. The result would be more incisive questioning up front, and better follow up. Personally spending the long hours needed to sift through critical parts of the record, become intimately familiar with the relevant law and prepare possible lines of questioning is a tried-and-true recipe for more informed, and consequently more informative, witness examination.

As the old saying goes, the three keys to success in litigation are preparation, preparation and preparation. Skills and experience are important. But nothing counts as much as knowing everything there is to know and being ready to use it cogently when needed. The same is undoubtedly true for conducting questioning at Congressional hearings. Senators are not out of their depth when it comes to asking questions that shed light on the complex work of the Supreme Court. But because of competing demands on their time, there are others better suited to the task.

2. Questioning Quality

During Supreme Court confirmation hearings, many senators spend more time talking than eliciting testimony from the individual they have convened to hear from. Justice Alito's hearings showed that this holds true not only for senators who do whatever they can to bolster a nominee's confirmation prospects (including ensuring that the nominee says very little), but also for senators who strive to raise concerns about the nominee's record. Even where senators engage in bona fide questioning, however, what occurs is often wooden. There is little give-and-take, little real dialogue, none of the stuff that's ordinarily conducive to obtaining meaningful information. Certain senators, to be sure, have courtroom experience, and they sometimes use it effectively. But that is the exception, not the rule. The typical inquiry goes something like this: (i) the senator gives a lengthy, scripted, prefatory explanation of the question he or she is about to ask, making no secret of the desired answer; (ii) the senator asks the question, which, given the lead-in, often sounds rhetorical; (iii) the nominee gives a response that matches the question in length, usually digressing into non-responsive explanations about the state of the law rather than divulging his own views; (iv) the senator's follow-up is either weak or non-existent, both because the senator may not be sufficiently prepared to do incisive follow up (staff did most of the preparatory work) and because the senator is not, by training and experience, accustomed to doing it; (v) the senator moves on to the next scripted question, and the process is repeated.

Questioning by experienced litigators would not proceed like this. While the Senate Judiciary Committee may never operate under rules like those governing in-court witness examination—rules *designed* to ferret out reliable evidence efficiently—experienced litigators are habitually accustomed to working within such rules and to making such rules work for them. Evidentiary restrictions forbid them from delivering minutes-long prefatory explanations and, ideally, prevent them from asking sloppy, confusing, compound and argumentative questions. What's required is sharp, simple questioning—questioning that takes complex subjects and breaks them down so that they may be more easily understood. To an experienced litigator, it is second nature to use brief, open questions to explore virgin territory or begin a discussion (“Tell us about your approach to interpreting the Constitution”); tight, closed questions to propel the discussion forward and get more focused answers (“Do you agree that when the text of a constitutional provision isn't clear, courts ought to consider the provision's animating purpose in interpreting it?”); and direct, leading questions to explain complex subjects through the witness and to bring a point home after an adequate foundation has been laid (“You've explained that you believe in interpreting Constitutional text according to what those living at the time of its ratification understood it to mean? You would agree that's what people who call themselves originalists generally believe? So you would call yourself an originalist?”).

In other words, litigators are practiced in the art of engaging witnesses in *conversations*—fluid give-and-take, with illuminating follow-up, that is essential to getting

at the truth. Where the conversation falters, litigators know how to bear down on a witness, both gently and firmly, to get answers to their questions. If a witness remains unwilling to give answers, they know how to use questions to show that the witness is holding back or being evasive. And the good ones know how to do all of this without being unfairly argumentative, disrespectful, long-winded or confusing.

This is not to say that litigators would or should always adhere strictly to courtroom norms when examining nominees. The leeway they would enjoy under Senate rules might help them make a point more quickly than they could in court. For instance, they would be able lay certain foundations themselves, without having to go through the trouble of laying them through the witness. Such expediciencies might prove necessary to prevent nominees from “running out the clock” to forestall more probing questions—something the nominees’ handlers at the Justice Department and White House Counsel’s Office undoubtedly encourage them to do.

Courtroom advocates also routinely incorporate documentary evidence into their examinations. There is a good reason for this: evidence people can see and/or read has an impact, clarifying and strongly reinforcing the information they receive aurally. With the wealth of material that a typical nominee produces prior to nomination, documentary evidence—say, video projections of brief, absorbable snippets of a nominee’s own writings—might be used to some effect. During the Bork hearings, Senator Edward Kennedy played a tape recording of Judge Bork saying that constitutional precedents are not “all that important.” Because Judge Bork’s contradictory testimony about that key topic reflected what some key senators, like Howell Heflin, regarded as an artificial “confirmation conversion,” it packed a punch. But the use of such evidence during confirmation hearings is exceedingly rare, perhaps because easy-to-use audio/video recordings usually don’t exist and, for those without practice, seamlessly employing documentary material during questioning is far more cumbersome. Litigators, however, would see no difficulty using documents in a Senate hearing room. Recognizing just how effective the judicious use of documents can be, they employ documents as part of their routine courtroom practice.

Some might find unappealing the prospect of experienced examiners bringing their skills to bear on a Supreme Court nominee. Chief Justice Roberts, for instance, has bristled at the notion of confirmation hearings as “Perry Mason” moments. But allowing skilled practitioners to conduct questioning is not intended to be, and should not be, a Perry Mason-like game of “gotcha.” Its purpose is simply to produce better information and, therefore, to give senators and the public a more comprehensive picture of someone who might well become one of the most powerful figures in the country. If, consistent with their purpose, the hearings are to serve an expository function, the idea of using expert examiners should not be cynically viewed as an underhanded means of degrading nominees to the High Court.

3. Coordination and Depth of Questioning

In recent hearings, each senator has been given 30 minutes during the opening round of questioning, 20 minutes during a second round, and if authorized by the Chair, a short additional time to finish up. This framework suffers from several shortcomings. First, although it might well be possible to cover one topic thoroughly within the time allotted for each round of questioning, there is simply no way a questioner can meaningfully explore three or more subjects within those time limits. Yet because of their legitimately profound interest in the myriad issues that the judiciary confronts, this is what senators try to do. The often complex nature of the subject matter

makes their task even more difficult. So does the tendency of nominees to respond to questions with discursive, indirect and exceedingly long answers.

Moreover, under this framework, senators often wind up duplicating each other's efforts. Although there is sometimes loose coordination among the staffs of senators for each party regarding the topics that each senator will cover, senators invariably cover the topics that are important to them. That often leads different senators to address the same topics. Occasionally, such duplication produces more information. More often, it produces mere repetition.

If the majority and minority on the Judiciary Committee each selected one lawyer, accompanied by a small team, to conduct the investigation and examination of a Supreme Court nominee, these problems would either be mitigated or extinguished. There would be no need to coordinate among offices because the lawyers would already be working together, in two separate teams. While conducting its investigation, each team could consult with all of the senators/staffs from the party that selected it to find out which topics of inquiry each senator would like to cover, and the team could proceed accordingly to craft lines of questioning that address its bosses' various concerns. Duplication would be eliminated.

More importantly, with a number of hours (I suggest eight) to conduct questioning, the lawyers selected to do the job would not operate under the same time constraints that senators currently do. They could pursue a line of questioning without worrying excessively about having to cut it short to get to the next subject. To cover all of the material they would want and need to cover, they would not be able to tarry too long on any one issue. But unlike senators, they would not try to address five different subjects in approximately an hour divided up into 30-, 20- and 10-minute increments. Rather, they could pursue one topic, continuously, until they fully exhaust it, much as they would during a court proceeding. To be sure, they would still have to pick and choose among the bounty of important issues the Supreme Court addresses. But with more time to cover each issue without interruption, the depth and breadth of the Senate's inquiry would improve.

C. THE PROPOSAL APPLIED

So what would the examination of Supreme Court nominees by professional litigators look like? I envision three basic types of questioning: exploratory, expository and hortatory. Senators, of course, already use such questioning to varying degrees, but courthouse lawyers would bring rigor and discipline to the process.

Exploratory questioning would entail largely open-ended inquiries aimed at obtaining new insight into a nominee's judicial outlook. It would mirror questioning during a discovery deposition in civil litigation or questioning of certain kinds of witnesses by prosecutors during a criminal grand jury probe. The object is to discover new information. With most nominees, and on most subjects, exploratory questioning should make up the bulk of the inquiry. That would certainly be the case for a nominee without an extensive public record. It would also probably be the case for someone with an extensive record. Even for nominees who have been lower court judges for a long time, there are a number of important issues that they likely will not have addressed directly; and with most of the issues they have addressed, they will not have expressed their own, original thoughts because they will have been tightly constrained by Supreme Court precedent.

Expository questioning would entail confirming, or "exposing," what nominees are already known to believe. It would resemble questioning during a trial, or "lock-in"

questioning during a deposition or grand jury appearance, where the object is not to discover new information but to verify what is already known. Expository questioning would be used to show the rest of the Senate, as well as the public, that a nominee already has expressed certain views, continues to hold them, and is likely to adhere to them on the Court if confirmed. Depending on the objective, senators might want their designated attorneys to use expository questioning either to shine a light on a nominee's views or, more pointedly, to support or weaken the case for confirmation.

Hortatory questioning would entail prodding, or “exhorting,” nominees to begin providing meaningful answers by demonstrating that they have been illegitimately refusing to provide them. Ideally, such questioning would be used sparingly, if at all—a last resort to be employed when neither exploratory nor expository questioning is producing real answers. The immediate objective is to show that nominees are not providing information that they ought to provide if the hearings are to serve their educational purpose. The long-term objective is to encourage nominees to become more forthcoming in responding to future areas of inquiry. If a nominee repeatedly proves unresponsive, however, the long-term objective is to strengthen the Senate's resolve to refuse to give its consent to the nomination. Nominees are, of course, ethically bound to say nothing about how they would rule in particular cases. But they are under no obligation to demur when asked about their views regarding settled legal principles.⁴⁰ Senators can complain, and have complained, about how certain nominees have not been sufficiently forthcoming about their views. But complaining about it and actually showing it are very different things. As litigators know, juries—and people—do not like to be told what to believe; they like to be shown the facts so that they can draw conclusions for themselves. As much as some senators have protested nominees' lack of candor, their protests would prove substantially more persuasive, to their colleagues and to the public, if they had effective, demonstrative lines of hortatory questioning to back them up.

What follows are abbreviated examples of lines of exploratory, expository and hortatory questioning that might have been pursued at the Judiciary Committee's most recent Supreme Court confirmation hearing. These examples are not meant to suggest what was, in fact, most important. Each simply draws on one area that one or more senators saw fit to address. Keep in mind that questioning would never proceed verbatim according to the “scripts” below. Again, the idea is to engage the nominee in a natural give-and-take, which requires active listening and follow-up—something that could never take place if the examiner were to rigidly follow a script.

1. Exploratory Questioning

At the time of his nomination, Justice Alito had been on the Third Circuit for 15 years. But because his position as a lower court judge obligated him to follow Supreme Court precedent, he never had much of a chance to show whether he subscribed to a particular method of interpreting the Constitution. Nor had he publicly embraced a particular interpretive theory in any other forum. Nevertheless, he had dropped a few hints along the way—hints that provided an opening for some real fact-finding at his

⁴⁰ According to Northwestern University Law School Professor Steven Lubet, there is, for instance, nothing ethically impermissible about opinion testimony regarding decided cases: “[N]ominees may find it tactically advantageous to duck tough questions about endangered precedent, but they cannot find refuge in the Code of Judicial Conduct.” Steven Lubet, *Questioning Ethics*, YALE L.J. (THE POCKET PART) (Jan. 2006) (available at <http://yalelawjournal.org/2006/01/lubet.html>). See also Ronald Dworkin, *Judge Roberts on Trial*, N.Y. REVIEW OF BOOKS, Sept. 21, 2005.

hearing. Justice Alito widened the opening himself when, consistent with these hints, he answered a broad question on constitutional interpretation from Senator Charles Grassley as follows:

[I]f it is a question of absolutely first impression—and there aren’t that many constitutional issues that arise at this point in our history that are completely issues of first impression—you would look to the text of the Constitution and you would look to anything that sheds light on the way in which the provision would have been understood by the people reading it at the time. [If it were not a matter of first impression, you also] certainly would look to precedent ...”⁴¹

He answered another open-ended inquiry from Senator Sam Brownback with similar testimony: “I think we should look to the text of the Constitution, and we should look to the meaning that someone would have taken from the text of the Constitution at the time of its adoption.”⁴² But then the exploration ended. There was no follow-up from Senators Grassley or Brownback, and no follow-up from Democratic senators who otherwise indicated they wanted to know whether Justice Alito was like Justice Thomas or Justice Scalia, whose brands of originalism sound a lot like what Justice Alito was describing.

A meaningful conversation on the subject might have gone like this:

What things do you take into account when interpreting a provision of the Constitution?

When you say you’d “look to the meaning that someone would have taken from the text of the Constitution at the time of its adoption,” what do you mean—how they expected a provision to be applied at that particular time in history; how they anticipated it might be applied to future developments they couldn’t foresee; what? Give an example. What would you look at to determine this original understanding? What would you do if there were differing, even opposing, original understandings?

Do you take into account the purpose the Framers had in drafting a constitutional provision? Why/why not?

Do you take into account the consequences of a particular interpretation, and whether those consequences are consistent with the provision’s overriding purpose? Why/why not?

Do you take into account how a provision has been understood throughout history, and not just when it was ratified? Why/why not?

⁴¹ Testimony of Samuel Alito (Jan. 10, 2006).

⁴² Testimony of Samuel Alito (Jan. 11, 2006).

Apart from the plain words of the text and the way those words were understood at the time of ratification, do you take anything else into account? Anything else besides precedent? If a precedent relies on something more than text and original understanding, is it entitled to less consideration than a precedent that relies only on text and original understanding?

Let's try to make this discussion a little more concrete. Let's take a few of the Constitution's vaguer clauses and explore what you've just told us. Let's start with the Due Process Clause of the Fourteenth Amendment. It's true that the Court has interpreted it to protect the right to control many of our most important, private decisions free from government interference? Decisions like whom to marry? And whether to have and how to raise children?

In your view, does the text of the Due Process Clause support a right of privacy? Does the original understanding? If so, how? If neither the text nor the history of the Due Process Clause supports a right of privacy, what, if anything, does? Do you agree with Justice Harlan's dissent in *Poe v. Ullman* regarding the right of privacy? Why/why not? In your view, is that dissent rooted in either the text or the original understanding of the Due Process Clause? Justice Harlan himself suggested it was also rooted in the purpose of the Clause and the traditions that have evolved from it: "Each new claim to Constitutional protection must be considered against a background of Constitutional *purposes*, as they have been rationally perceived and historically developed." [display on screen] Do you agree with that? How is reliance on only text and original understanding consistent with it?

The Supreme Court's decision in *Loving v. Virginia* said in part that due process prohibits the states from forbidding someone to marry a person of another race. In your view, does the text of the Due Process Clause support *Loving*? The original understanding? If so, how? If neither the text nor the original understanding supports the due process portion of *Loving*, does the Due Process Clause, in your view, support *Loving* in any way? How? [Use the same series of questions to probe the nominee's views about *Skinner v. Oklahoma*, *Pierce v. Society of Sisters*, *Meyer v. Nebraska*, *Griswold v. Connecticut*, *Moore v. City of East Cleveland*, *Lawrence v. Texas*, *Roe v. Wade*]

Have you written opinions that shed light on your view of how the Due Process Clause should be interpreted? Which ones? What about *Alexander v. Whitman*, a case where the Third Circuit held that the Due Process Clause does not authorize recovery for fetuses killed prior to delivery? In a brief concurrence you wrote, "I think our substantive due process must be informed by history. It is therefore significant that at the time of the adoption of the Fourteenth

Amendment and for many years thereafter, the right to recover for injury to a stillborn child was not recognized.”⁴³ [*display relevant language on screen*] Does that reflect what you’ve described as your position on interpreting the Constitution? Explain. [*Ask similar questions regarding (i) a memo he prepared at the Justice Department in 1984, in which he wrote that shooting a fleeing felon, no matter how minor the threat the felon posed, could never violate the due process clause because the law historically authorized such conduct;*⁴⁴ and (ii) his solitary—but, with the help of a visiting judge, ultimately successful—effort to overturn a line of Third Circuit precedents that provided due process protection against impurely-motivated government actions.⁴⁵]

You would agree that those who choose to interpret the Constitution solely according to its text and original understanding—as you’ve said you do—are called “originalists”? You would agree that Justices Scalia and Thomas call themselves originalists? That Robert Bork calls himself an originalist? Given that you, like they, believe that judges should only look to text and original understanding (and precedent) when interpreting the Constitution, do you consider yourself an originalist? If not, what distinguishes your method of constitutional interpretation from theirs?

2. Expository Questioning

One aspect of Justice Alito’s pre-nomination record that prompted intense scrutiny was his apparently stringent view of the Constitution’s limitations on Congress’ powers. During the hearings, Justice Alito provided still more material for a meaningful exposition of that view when he maintained that he had taken “really a very modest position” in his dissent in *United States v. Rybar*.⁴⁶ In *Rybar*, Justice Alito broke from other circuits and voted to strike down the federal law banning machine gun possession, saying it exceeded Congress’ Commerce Clause authority in view of the Supreme Court’s decision in *United States v. Lopez*.⁴⁷ If it was the Democrats’ intent to expose Justice Alito’s federalist leanings (as appeared to be the case), or even just to understand them better, that statement provided a clear opening. But no senator picked up on it. Nor did other questioning do much to illuminate Justice Alito’s views about federal vs. state authority.

An experienced litigator might have done more to spotlight Justice Alito’s beliefs:

Would you agree that, ever since the New Deal era, the interstate Commerce Clause has been a vital source of Congress’ law-making

⁴³ *Alexander v. Whitman*, 114 F.3d 1392, 1409 (3d Cir. 1997) (Alito, J., concurring).

⁴⁴ Memorandum from Samuel Alito to the Solicitor General re: *Memphis Police Dept. v. Garner* (May 18, 1984).

⁴⁵ See *Homar v. Gilbert*, 89 F.3d 1009, 1026 (3d Cir. 1995) (Alito, J., dissenting), *rev’d on other grounds*, *Gilbert v. Homar*, 520 U.S. 924 (1997); *Phillips v. Borough of Keyport*, 107 F.3d 164, 183 (3d Cir. 1997) (*en banc*) (Alito, J., concurring in part and dissenting in part) (12-1 decision, with Judge Alito as the lone dissenter); *United Artists Theatres, Inc. v. Twp. Of Warrington*, 316 F.3d 392 (3d Cir. 2003).

⁴⁶ 103 F.3d 273 (3d Cir. 1996).

⁴⁷ Testimony of Samuel Alito (Jan. 10, 2006).

authority? That Congress enacted much of the most significant legislation of the 20th century based on its Commerce Clause authority? Environmental laws like the Clean Air and Clean Water Acts? Food and drug safety laws? Civil rights laws like the landmark Civil Rights Act of 1964 and the Fair Housing Act? Labor laws—laws providing for a minimum wage, overtime pay and workplace safety? Just to name a few? And without the Commerce Clause as a source of Congressional power, some—perhaps none—of these laws would have been permitted to be enacted?

The Commerce Clause has also provided the constitutional basis for federal laws designed to protect public safety, true? In *United States v. Rybar*, you had occasion to rule on whether Congress had acted within its Commerce Clause powers when it banned the possession of machine guns? You wrote a dissent that would have struck down the machine gun ban? On the grounds that Congress did not have the authority, under the Commerce Clause, to do what it did? (To be clear, this was not a case under the Second Amendment, which some believe—and others don't—guarantees an individual right to bear arms?)

Why did you rule the way you did in *Rybar*? So your position is that *Lopez* compelled what you wrote? At the time you wrote your opinion, other courts had also ruled on the constitutionality of the machine gun ban in the wake of *Lopez*? How many? None of them agreed with you? All of them agreed with your colleagues in the majority?⁴⁸ Other courts also ruled on the constitutionality of the machine gun ban after *Rybar* came down? How many? How many courts agreed with you? All except one?⁴⁹ As to the one that did agree with you, the Supreme Court vacated that decision after its ruling in 2005 in *Gonzales v. Raich*?⁵⁰ What did *Raich* hold? Would you agree with legal commentators who have said that *Raich* is at odds with the position you staked out in *Rybar*? Why/why not?

You characterize your opinion in *Rybar* as “really very modest”? Yet you wanted to strike down a federal statute? You would agree that some people loudly accuse judges of “judicial activism” when they vote to invalidate legislation? Whether it should be called “activism” or not, how is invalidating an act of Congress—one of the gravest things a federal judge can do—“really very modest”?

⁴⁸ *United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996); *United States v. Kenney*, 91 F.3d 884 (7th Cir. 1996); *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1995); *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995).

⁴⁹ *United States v. Franklyn*, 157 F.3d 90 (2d Cir. 1998); *United States v. Knutson*, 113 F.3d 27 (5th Cir. 1997); *United States v. Wright*, 117 F.3d 1265 (11th Cir. 1997), *reh'g en banc granted in part and opinion vacated in part on other grounds*, 133 F.3d 1412.

⁵⁰ *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003), *vacated* 545 U.S. 1112 (2005).

As you know, many do not believe you were correctly applying *Lopez*, or acting very “modestly” in *Rybar*. Your colleagues in the majority didn’t—they said your opinion “runs counter to the deference the judiciary owes to its two coordinate branches of government” and requires Congress to “play Show and Tell with the federal courts.”⁵¹ [*display on screen*]. In hindsight, do you think that assessment is right or wrong? The appeals courts that came both before and after you also didn’t think your position was compelled by *Lopez*. In hindsight, do you agree with those assessments? The Supreme Court, in *Raich*, also suggests that your position wasn’t compelled by *Lopez*. Do you agree with that assessment? Do you agree with the *Raich* majority or do you agree with the dissent in *Raich*? [*If consistent with the senators’ wishes, insert questions using visual displays quoting others who found the Rybar dissent to be immodest, including supporters of Chief Justice Roberts’ nomination—e.g., Jeffrey Rosen*⁵², *The Washington Post*⁵³ and Senator Tom Coburn.⁵⁴]

Is it fair to say that your position in *Rybar* reflects your core beliefs about how the Constitution allocates power between Congress and the states? And places limits on Congress’ power?

When you submitted an application for a political appointment as Deputy Assistant Attorney General in the Reagan Administration, you wrote, “I believe very strongly in ... federalism.”⁵⁵ [*display on screen*] You would agree that the result you advocated in *Rybar* is consistent with that?

When you worked in the Justice Department, you recommended that President Reagan veto a bill aimed at regulating what was then the rampant practice of odometer tampering? Just about everyone, including the used car industry, was in favor of the law—in favor of national, rather than patchwork, regulation? Yet you recommended that the president veto the law because it “violates the principles of federalism supported by this administration. ... After all, it is the states, and not the federal government, that are charged with protecting the health, safety and welfare of their citizens.”⁵⁶ [*display on screen*] You would agree that the result you advocated in

⁵¹ *Id.* at 282.

⁵² Jeffrey Rosen, *How to Judge*, NEW REPUBLIC, Nov. 29, 2004, at 18 (characterizing Justice Alito as “a conservative activist who [is] determined to use the courts to strike at the heart of the regulatory state ... [and whose] lack of deference to Congress is unsettling.”).

⁵³ Editorial, *Judge Alito on the States*, WASH. POST, Nov. 21, 2005.

⁵⁴ Transcript of *Today Show*, Oct. 31, 2005 (“Those aren’t decisions judges should be making. Those are decisions legislatures should be making.”).

⁵⁵ Memorandum from Mark Sullivan to Mark Levin re: Samuel A. Alito, Jr., Deputy Assistant Attorney General, SES I (Dec. 12, 1985) [hereinafter “Application”].

⁵⁶ Memorandum from Samuel A. Alito, Jr. to Peter J. Walliston re: Enrolled Bill S. 475 (Oct. 27, 1986).

Rybar is also consistent with the views you expressed there? Did President Reagan accept your advice? That prompted the *Washington Times* to report, “Judge Alito apparently believed in the ideals of federalism even more strongly than Mr. Reagan.”⁵⁷ [*display on screen*] Do you agree?

You have a well-earned reputation for using modest, measured prose in your opinions, even when you disagree with your colleagues. Is that something you strive for? Yet these were the very first words in your *Rybar* dissent: “Was *United States v. Lopez* a constitutional freak?” [*display on screen*] In hindsight, you would agree that this is not what most would consider to be modest, measured language? And it’s perhaps uncharacteristically strident for you? So a reasonable observer might conclude that you felt pretty passionately about the views you expressed in your *Rybar* opinion?

3. Hortatory Questioning

At his hearing, Justice Alito almost always resorted to explaining legal principles and precedents without revealing his own views, even if he had expressed such views before. Faced with that situation, many senators repeatedly failed to ask the most obvious, *exploratory*, follow up question: “I understand that’s the law. Do you agree with it? Is that *your* view?” But even on the limited number of occasions when such follow-up was pursued, Justice Alito demurred, either continuing to avoid a direct answer or asserting that providing one would improperly compromise the appearance of impartiality on matters that might come before him. At the same time, Justice Alito *did* offer his views on certain matters, such as the propriety of looking to foreign law in constitutional adjudication, even though such matters continue to be debated on the Court. Senators did not expose that inconsistency effectively and did not persuasively show that, when faced with a follow-up question on his own views, Justice Alito refused to provide meaningful information.

[*This line of inquiry would have to be preceded by an educational line of crisp, easily comprehensible questions about Morrison v. Olson, the unitary executive theory and the fact that, if adopted, the theory would abolish the independent status of many agencies (e.g., the SEC, FCC, FEC, FTC, NLRB, OSHA, CPSC).*] In a speech you gave in 2001, you embraced the theory of the unitary executive, true? You said “I thought [when working at DOJ], and I still think, that this theory best captures the meaning of the Constitution’s text and structure.” [*display on screen*] In the same speech, you also criticized the decision in *Morrison*? As you had done in an earlier speech, in 1999? In the 1999 speech, you also applauded Justice Scalia’s lone dissent in *Morrison*—the dissent that, in your view, applied the unitary executive theory? You called the dissent “brilliant”? Do you still hold these same views today? *Morrison* was wrong? Justice Scalia was right? The theory of the unitary executive best captures the meaning of the Constitution? You cannot tell us?

⁵⁷ Charles Hurt, *Alito Papers Evince a Conservative*, WASH. TIMES, Nov. 15, 2005.

[Perhaps ask similar series of questions regarding his reluctance to discuss (i) his view of whether the Constitution protects a right to abortion (he said it didn't in a 1985 job application for a political appointment at the Justice Department)⁵⁸; and (ii) his view of whether presidential signing statement should help shape the meaning of legislation (he said they should in a memo he wrote as a Justice Department official)⁵⁹]

You say you won't give your views on these subjects because you believe they might come before you if you're confirmed? That it might compromise the appearance of impartiality if you told us what you think? But you've already expressed your views on the subjects we just talked about? How would giving your views now compromise your impartiality any more than what you said before? When you gave those speeches on *Morrison* and the unitary executive in 1999 and 2001, you were a sitting appeals court judge? The issues could have come before you then? But you went ahead and gave the speeches? So why can't you tell us what you think now?

You've also given us your views on other matters that might come before you? You've testified that foreign law should have no bearing on the interpretation of the U.S. Constitution? Isn't that something that might come before you? Isn't it also something that, unlike *Morrison*, you had not publicly expressed an opinion about before now? And isn't it true that whether the Court should consider foreign law remains an unsettled issue? A subject of intense controversy, in fact? In the case of *Roper v. Simmons*, which outlawed the death penalty for juveniles? In the case of *Atkins v. Virginia*, which outlawed the death penalty for those with mental retardation? And as a result of those decisions, in academia? In politics? And in the court of public opinion? How exactly are you choosing which matters, still before the Court, you will discuss and which you won't?

IV. TOWARD A LESS RANCOROUS FUTURE?

While a number of observers have pointed out quite forcefully that Supreme Court nominations have been a political football throughout American history,⁶⁰ critics of the modern day process still complain that things are just too heated. So what might lower the temperature?

In the wake of the Thomas confirmation hearings, David Strauss and Cass Sunstein advocated one solution. They said that if senators flexed their muscles more by rejecting candidates whose convictions they vehemently disagreed with, the president might

⁵⁸ Application, *supra* note 55.

⁵⁹ Memorandum from Samuel A. Alito, Jr., to The Litigation Strategy Working Group, re: Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting

Law (Feb. 5, 1986).

⁶⁰ See, e.g., Jeffrey Rosen, *Supreme Court Confirmations are as Messy as They Should Be*, CHRON. OF HIGHER EDUC., Nov. 11, 2005; David Greenberg, *The Judge Wars: Borking Didn't Start with Bork*, SLATE, July 6, 2005, available at <http://www.slate.com/id/2122081/>.

be compelled to consult with the Senate prior to nomination and to select someone whose views reflected those of the Senate at large. By the same token, if the Senate were allowed to provide genuine “advice” to the president before a nomination, senators would be less inclined to be oppositional—or to go searching for some disqualifier unrelated to the nominee's views—afterward. Strauss and Sunstein stressed that their conclusions were speculative, but they maintained that the process could scarcely get any less political than it already was, given that then-recent presidents had made such a concerted effort to choose justices with hard-line conservative orientations.⁶¹

There is much to commend Strauss and Sunstein's suggestion, however speculative their conclusion. But it begs the question of what, exactly, will give senators the *political will* to exercise their constitutional prerogative not to consent to a nomination if circumstances warrant it. Is it enough that a nominee holds disagreeable views, or refuses to divulge his or her views during the hearing? It may well be that some senators will never be convinced to vote against a nomination based on a nominee's unwillingness to share his or her views, or to vote no because they find such views unacceptable. But if anything will give senators such resolve, it is *demonstrating* to their constituents that a no vote is warranted. Recent history has shown that senators cannot rely merely on their own characterizations of either a nominee's record or a nominee's lack of testimonial candor to persuade their on-the-fence colleagues to side with them. They might stand a better chance of succeeding, however, if they were able to point to dynamic proof of a nominee's views or a nominee's obfuscation—i.e., proof from the nominee's hearing testimony. As noted above, it was precisely such forceful “proof” that led wavering senators to vote against Judge Bork and that, as a result, decided the outcome of his nomination.

Senators have tried repeatedly to elicit the same kind of evidence from contested, post-Bork selections. But with nominees cognizant of and coached to avoid Judge Bork's pitfalls, they have not succeeded in obtaining it. Litigators might not fare any better. By virtue of their expertise, however, they might. If they were able to elicit the kind of testimony senators appear to believe is needed to reject a nominee who either hides or holds unacceptable views, then Strauss and Sunstein's already speculative chain of events might unfold: the Senate's wavering members might develop the political fortitude to exercise their constitutional prerogatives more forcefully; the president might respond by genuinely seeking the Senate's advice prior to nomination; the Senate might respond by giving the president's selections the benefit of the doubt; and the confirmation process might become less contentious. But without first ensuring that the Senate obtains tangible evidence of what a nominee either believes or refuses to divulge, there will be nothing to set this process in motion. For all the reasons discussed above, litigators would be well-suited to provide the impetus.

⁶¹ Strauss & Sunstein, *supra* note 9, at 1514-16.

V. CONCLUSION

For nearly two decades, senators, academics, journalists and countless others have complained that Supreme Court confirmation hearings have become meaningless, formulaic rituals. At the same time, however, the hearings remain a focal point of the confirmation process and the Senate has given no indication that it is going to eliminate them or diminish their importance. What's left to do but try to improve them? The most practical and politically feasible way to do so is to allow litigators to take the lead in examining nominees. Because of their preparation habits and examination skills, litigators are better equipped to ensure that the hearings serve their intended purpose of educating the Senate and the public about how and what a nominee thinks. To be sure, even under questioning from an experienced courtroom advocate, a nominee may still refuse to divulge anything of substance. And even if an experienced courtroom advocate can more effectively demonstrate that a nominee is stonewalling, senators may still refuse to insist on their institutional prerogatives, particularly if the Senate majority and the president are of the same party. But in light of the current, unhappy state of affairs, the Senate Judiciary Committee ought to do *something* to shake things up. Tapping seasoned litigators to lead the way is worth a try.

Running Aground: The Hidden Environmental and Regulatory Implications of Homeland Security

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Substantial commitments to environmental protection and safety regulation epitomize the modern American state. While no reasonable observer can blindly ignore lingering regulatory challenges, the United States has achieved an enviable environmental record compared to countries of comparable size and population.¹ Americans have witnessed such advances in environmental protection and related safety goals in no small measure because of public institutions forged during the last several generations.² The U.S. Coast Guard is a case in point. For years, its 43,000 employees have endeavored to safeguard living marine resources, prevent overfishing, stop toxic spills degrading the environment, and ensure the safety of Americans who work or travel on oceangoing vessels.³ Coast Guard officials work with the Environmental Protection Agency to limit catastrophic oil spills, and to carry out responsibilities parallel to those of the Occupational Safety and Health Administration (OSHA) for protecting the hundreds of thousands of Americans who work on watercraft. Together, the work of these employees helps paint a reassuring picture, where an agency engineered to meet its distinctive challenges protects thousands of miles of coastline, tens of thousands of watercraft, and millions of Americans.⁴

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¹ See Yale Environmental Performance Index (2006), Full 2006 EPI Report, available at <http://www.yale.edu/epi/> (recognizing notable American achievements in protecting ecosystem vitality, providing clean water, and reducing particulate air pollution, while indicating potential for U.S. improvement in wilderness protection, regional ozone levels, overfishing, and addressing global warming).

² See *generally id.* The study attempts to compare countries in the extent to which they reduce environmental stresses on human health and protect ecosystem vitality. The U.S. ranks 28 out of 133 countries studied. The performance of the U.S. appeared to suffer because of its provision of agricultural subsidies (counted as problematic because of its effect on ecosystem vitality), and its high energy usage. Despite this, no country of comparable population exceeded the performance of the U.S. in this study.

³ See *infra* Part I.

⁴ See e.g., Renae Merle, *For the Coast Guard Fleet, A \$15 Billion Upgrade; Agency's Profile, and Its Duties, Have Grown Since September 11*, WASH. POST, June 25, 2002, at A1 (discussing the Coast Guard's multiple missions of "rescuing boaters, stopping suspected drug traffickers and helping in environmental cleanups," and how "[i]ts reach even includes enforcing sanctions in the Persian Gulf and watching for migrants fleeing Haiti"); Spencer S. Hsu, *Katrina Report Spreads Blame*, WASH. POST, Feb. 12, 2006, at A1, (describing how the Coast Guard "alone rescued nearly half of the 75,000 people" stranded in New Orleans in the wake of Hurricane Katrina).

But that picture is beginning to blur. The Coast Guard has become the largest bureau within a new Department of Homeland Security (DHS). Under pressure from budget reallocations, new missions, and bureaucratic reorganization, the bureau faces constraints on its regulatory functions—a development foreseen by a bipartisan group of legislators who unsuccessfully sought to protect the Coast Guard's environmental and safety functions by keeping it out of DHS.⁵ Indeed, as it was being moved into the vast new homeland security bureaucracy, the Coast Guard was already reporting a one third drop in the absolute number of hours its boats, cutters, and planes were devoting to protecting living marine resources (compared to pre-September 11 reporting periods),⁶ a 43% drop in hours devoted to marine safety enforcement, and a 64% drop in hours spent on environmental protection. Between 2001 and 2005, Coast Guard outlays for environmental protection plummeted from over \$250 million a year to less than \$150 million a year.⁷

These developments bring into focus a new picture. In it, the Coast Guard is increasingly at risk of running aground somewhere on the frontier between regulatory policy and homeland security. The changes rippling through the Coast Guard even raise the larger question of how pollution control, wildlife protection, accident reduction, and other American regulatory priorities are being affected by the burgeoning focus on homeland security. In fact, DHS' own figures indicate that the proportion of resources dedicated to non-homeland security missions within the department has already fallen from 40% in 2003 to 10% in 2006. Because the Department's overall budget remained nearly flat during this period (excluding emergency supplemental appropriations), these percentage declines translated into sizeable cuts in non-homeland security spending by DHS bureaus.⁸

This new picture of DHS and its bureaus is worth scrutinizing because the nation's interests depend on a mix of policies that straddle the divide between homeland security and domestic regulatory affairs. While managing the risk of terrorism in a post-September 11 world is unquestionably important, any reasonable effort to assess such policies should examine their broader impact on marine safety, toxic spills, natural disaster recovery and the full range of federal regulatory functions. Yet regulatory policy garners relatively limited attention in public debates about American priorities in the post-September 11 world. Instead, the half-decade following the attacks will be remembered in large measure for debates about Guantanamo, torture, enemy combatants, warrantless surveillance, and the Geneva Conventions. While these debates are unquestionably important, they have overshadowed certain less visible implications of recent policy changes. The present Administration has forced regulatory agencies to shoulder new homeland security responsibilities without adequate resources, changed statutory priorities, and emphasized the value of secrecy. In the process, the

⁵ See *Sen. Cantwell Questions Decision to Ignore Coast Guard needs in President's \$52 Billion Emergency Aid Bill*, U.S. FED. NEWS, Sept. 9, 2005, avail. at 2005 WLNR 15196787.

⁶ Office of U.S. Senator Patty Murray, *New Coast Guard Report Shows Decline in Traditional Missions*, May 1, 2003 (enforcement of "international fisheries laws and treaties declined 33 percent" compared with the previous reporting period, reflecting pre-September 11 levels).

⁷ See *id.* (resource hours devoted to marine environmental protection missions, compared to pre-September 11 levels "decreased 64%"). Drops in Coast Guard environmental outlays are discussed *infra* in Part III.

⁸ See *infra* Figure 2 (indicating the falling proportion of DHS outlays devoted to non-homeland security missions); Dara Kay Cohen, Mariano-Florentino Cuéllar, and Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 733 (2006) (showing the relative lack of change in non-emergency DHS budget authority).

present Administration has risked undermining important regulatory goals for the American people. These developments are most readily apparent at the U.S. Coast Guard, which was moved to the DHS about a year and a half after the September 11 attacks. While the bureau's work on defense readiness has skyrocketed, the statutory, bureaucratic, and budgetary changes affecting the Coast Guard are reflected in cuts to the agency's work protecting against oil and chemical spills, safeguarding living marine resources, and promoting marine safety.

As the Coast Guard struggles to meet the nearly-impossible demands placed upon it, developments at the frontier between homeland security and regulatory policy raise larger issues meriting attention from discerning lawyers, scholars, and policymakers. First, whatever other missions the DHS performs, the new cabinet department is also a preeminent environmental regulator. Its performance should be judged accordingly. Second, national and homeland security policies have become inextricably intertwined with domestic regulatory policy. Third, the realities defining the impact of environmental, health, and safety policies do not depend only on the content of statutes. Instead, regulatory policies are indelibly affected by budget compromises, the scope of agency missions, and the priorities emphasized by executive branch political appointees. Lawmakers with an interest in effective regulatory policy must therefore depend on vigorous congressional oversight to ensure that legitimate environmental and safety priorities are not forgotten amidst concerns about homeland security.

I. HOMELAND SECURITY AND ENVIRONMENTAL PROTECTION

Alone among major regulatory agencies, DHS houses nearly a quarter of a million employees, dozens of distinct bureaus recently transferred from other regulatory agencies, and a high-profile counter-terrorism mandate that now competes for attention with all the agency's other important missions. DHS is thus strikingly different from other regulatory agencies in its size, the vastness of its \$70 billion budget, and the difficult governance problems the agency poses. In contrast, the Department of Interior boasts 71,000 employees, a \$9.3 billion budget, and a relatively settled history. DHS also dwarfs the Environmental Protection Agency's \$8.3 billion budget and 18,000 employees.⁹

Despite these differences, DHS is similar to other agencies in the broad scope of its regulatory mission. Some of the new department's regulatory activities, such as issuing rules from the Transportation Security Agency governing access to commercial aviation, plainly implicate the new cabinet super-agency's core counter-terrorism mandate.¹⁰ Other DHS regulatory missions involve an overlap between concern over terrorism and more traditional regulation. Examples include the interim final rules governing the security of chemical facilities—where a successful attack could lead to millions of Americans being poisoned.¹¹ In still other cases, the Department performs regulatory functions that directly involve health, safety, or environmental goals. DHS investigators enforce laws against child- and prison-labor. The Department's inspectors are supposed to protect American plant and animal life by policing the borders

⁹ See, OMB, Budget of the United States Government (2008), BLS figures on numbers of employees from the U.S. Dep't of Labor, Career Guide to Industries (2006–2007).

¹⁰ See, e.g., *Air Cargo Security Requirements*, 71 FED. REG. 30478 (May 26, 2006).

¹¹ See, e.g., *Proposed Chemical Facility Anti-Terrorism Standards*, 71 FED. REG. 78276 (Dec. 28, 2006). See also Public Citizen, *Homeland Unsecured: The Bush Administration's Hostility to Regulation and Ties to Industry Leave America Vulnerable* (Oct. 2004).

against invasive species or diseased animals. Its clerks collect billions of dollars in customs duties. Its officials run a flood insurance program providing \$606 billion of coverage to 4.3 million policyholders. DHS units shoulder responsibility of mitigating the immediate consequences of natural disasters, and the longer-term environmental consequences of toxic spills such as the ones that flooded the waters around New Orleans in the aftermath of Hurricane Katrina.¹²

The Coast Guard's multifaceted functions in responding to Katrina—from mitigating toxic oil spills to rescuing stranded Ninth War residents on rooftops—are a testament to its importance within DHS. The largest single component of the new cabinet department, the Coast Guard alone has over twice as many employees as the entire EPA.¹³ These employees work on missions of comparable importance to many of those undertaken by the EPA, and in some cases, implement policies together with that agency. The bureau limits the risks from dangerous oil spills. Coast Guard employees bear the burden of protecting marine environments and other bodies of water from environmental degradation. The bureau's rules limit the extent to which toxic chemicals leak into the water from ship engines. Its employees regulate the cruise ship industry, with its floating cities each capable of producing hundreds of thousands of gallons of waste in a single day. The Coast Guard protects against over-fishing and against the elimination of marine endangered species. And Coast Guard officials oversee an elaborate regulatory framework designed to ensure the safety of (among others) vast cruise ships in Miami, fishing vessels off the coasts of Alaska and North Carolina, small pleasure craft in San Diego. Statutes have long entrusted these functions to the Coast Guard, and these continue among the bureau's responsibilities even after the recent transfer to DHS.¹⁴ Indeed, in previous decades, safety and environmental responsibilities consistently accounted for more than half of the total amount of Coast Guard operational activity in terms of resource hours.¹⁵

But while the story of the Coast Guard and its sister bureaus shows the continuing relevance of longstanding environmental protection and safety responsibilities (often referred to as "legacy" mandates), it is also a story marked by remarkable recent changes in the bureaus' operating environments. The September 11 attacks focused attention on counter-terrorism and away from other national priorities. While government managers, Administration officials, and legislators reacted to shifting public perceptions, new counter-terrorism responsibilities began to add to agencies' burdens.¹⁶ Even before it was moved into DHS, for example, the Coast Guard assumed several new missions, including that of escorting ships to port.¹⁷ Even more pronounced

¹² See, e.g., FEMA, National Flood Insurance Program: Program Description (2002); U.S. Government Manual (2006). See also Cohen et al., *supra* note 8.

¹³ See Thomas Frank, *Panel Pares Homeland Agency*, NEWSDAY, July 12, 2002 ("The Coast Guard, with 43,000 employees, is the largest of 22 agencies that Bush wants in the new department.").

¹⁴ See Homeland Security Act of 2002, Pub. L. No. 107-296, § 888 116 Stat. 2135 (discussing Coast Guard non-homeland security functions). Despite these provisions, Section 101(b)(1)(E) ultimately underscores the power of the Secretary's power over the bureaus and allows the dilution of non-homeland security missions. See also Cohen et al., *supra* note 8, at 723.

¹⁵ See Office of Inspector General, Department of Homeland Security, *Annual Review of Mission Performance: United States Coast Guard (FY 2005)*, Office of Audits, OIG-06-05 3 (July 17, 2006) (the average proportion of resource hours the Coast Guard spent on non-homeland security missions in the eight fiscal year quarters preceding September 11, 2001 was 62%).

¹⁶ See, e.g., Merle, *supra* note 4 (The Coast Guard "now must also escort vessels into port, enforce safety zones around Navy ships, board commercial ships in search of chemical and biological weapons, and secure the nation's ports.").

¹⁷ See *id.*

changes followed, culminating in the creation of DHS. As bureaus such as the Coast Guard, immigration authorities, and FEMA were moved into DHS, they were placed in a different organizational environment, with institutional priorities more focused on countering terrorism than performing legacy functions.¹⁸ Despite language in the statute creating the new Department to the effect that legacy missions would retain importance,¹⁹ the bureaus were placed in an institutional structure that appeared to intensify—and to reify—changes in priorities.²⁰ Political appointees overseeing the amalgam of 22 bureaus melded into the new Department would have been hard-pressed not to appreciate the extent to which their performance would be judged primarily on the basis of counter-terrorism.²¹ And those officials were working in a statutory framework that centralized power within a new Secretary, whose position would permit him to shift bureau activities and resources in the course of administering the Department.²²

These changes in structure are likely to continue taking their toll. Bureaus such as the Coast Guard previously existed in an institutional environment that had long supported substantial engagement with complex and significant non-homeland security missions. Earlier in history, lawmakers and executive branch officials have often seemed aware of the political stakes involved in organizational charts, political superiors, agency missions, and congressional overseers. Examples include Jimmy Carter's creation of the Energy Department in the 1970s and Franklin Roosevelt's establishment of a new Federal Security Agency in the late 1930s.²³ These episodes are a testament to the fact that the law's impact depends not only on the meaning of statutory provisions, but on the context in which policy is implemented. Efforts to control regulatory policy in a system of separated powers are therefore likely to involve conflict over the intricate statutory, structural, and budgetary provisions that affect the bureaus' day-to-day operations. Accordingly, to fully understand the current status of the nation's commitment to clean oceans, endangered marine species, natural disaster preparedness, and even child labor enforcement we must take a closer look at how statutes interact with budgets and organizational priorities inside DHS.

II. THE COMPETITION TO CONTROL REGULATORY POLICY

A. THE STAKES INVOLVED IN MAKING, ENFORCING, AND CONTROLLING REGULATORY POLICY

To fully appreciate how different players endeavor to shape the work of public agencies such as the Coast Guard, it is important to recall how much of an impact regulations can have on the American people.²⁴ Regulations can protect fragile ecosystems and save lives, but they can also affect the economic interests of businesses,

¹⁸ This was, after all, the ostensible reason for creating the new Department in the first place. *See, e.g.,* Cohen et al., *supra* note 8, at 690-691.

¹⁹ *See* Homeland Security Act, *supra* note 14.

²⁰ *See, e.g.,* David E. Lewis, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997 (2003).

²¹ They could therefore be expected to change not only how the bureaus within DHS were managed but what budget priorities were emphasized in requests to Congress. *See generally* Walter J. Oleszek, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS (2007) (discussing the role of presidential administrations in setting the baseline for discussions about the budget).

²² *See* Homeland Security Act, *supra* note 14. For an example of concerns raised by a Republican legislator regarding the extent to which the new Secretary could change the focus of Coast Guard missions, *see* Frank, *supra* note 13.

²³ *See generally* Cohen et al., *supra* note 8, at 746-748.

²⁴ *See generally* James Q. Wilson, BUREAUCRACY (1990).

industries, and regions. The more prominent the role of regulatory bureaucracies in managing the environment, shaping public priorities, affecting the costs of doing business, and calibrating risks, the greater the effort politicians and organized interests will make to control public agencies.²⁵

One such agency is the Coast Guard, whose work demonstrates not only the complexities of overlapping environmental, safety and homeland security responsibilities, but also the stakes riding on regulatory decisions. An example: the cruise ship industry contributes over \$11 billion to the American economy and about 170,000 jobs.²⁶ The industry also generates vast quantities of waste. The extent to which the industry degrades its surrounding environment depends to a substantial degree on the content and enforcement of federal regulations. So does the extent to which the industry remains as lucrative as it has been.²⁷ Not surprisingly, the industry has explicitly decided to become increasingly involved in politics as a means of ensuring attention to its concerns.²⁸ Its representatives have made extensive political contributions, and devoted particular attention to reining in Coast Guard regulatory enforcement.²⁹ Political controversy has also enveloped a range of other facets of Coast Guard regulatory activity. In 1994, for instance, Representative Billy Tauzin of Louisiana sought to legislatively invalidate Coast Guard regulations that imposed higher liability standards on companies involved in spills of oil and toxic materials, claiming that the absence of regulatory relief would make it all but impossible for some shippers to operate.³⁰

These examples help explain why politicians and organized interests seek to affect the performance of regulatory agencies such as the Coast Guard. But it is not always easy for them to do so. Civil society groups, trade associations, and members of the mass public often support the goals of regulatory programs. Armed with public support for regulation, legislators and agency officials may gain the political ammunition to resist cutbacks in environmental, health, and safety policies.³¹ When Ronald Reagan became President, for instance, he explicitly announced his opposition to an elaborate regulatory state, and appointed a number of administrative officials who shared this view. Even with the Administration's relative popularity, Reagan appointees' high-profile deregulatory policies encountered considerable resistance. In some cases, litigants seeking stricter regulatory enforcement used the courts to stop agencies from watering down regulatory provisions. For example, the Reagan-era leadership of the National Highway Traffic Safety Administration sought to roll back passive restraint rules to improve automobile safety, but insurance companies and consumer groups convinced the courts that the agency was acting arbitrarily in doing so.³² In other cases, high-profile officials who were particularly explicit about their efforts to curtail regulatory programs paid a political price for appearing to overstep the bounds of

²⁵ See Lawrence S. Rothenberg, *REGULATION, ORGANIZATIONS, AND POLITICS* (1994).

²⁶ See Meredith Dahl, *The Federal Regulation of Waste From Cruise Ships in U.S. Waters*, 9 *Env'tl. Law* 609, 613 (2003).

²⁷ See *id.*

²⁸ See *Cruise Ships Sail Into Political Arena*, BRADENTON HERALD (Bradenton, FL.), Nov. 6, 2000, at 5.

²⁹ See Cohen et al., *supra* note 8, at 726 n.182. See also Dahl, *supra* note 26.

³⁰ See Alan Abrams, *Tauzin Slams Coast Guard Rules, Says Ship Reforms Endangered*, J. OF COMMERCE 8B, Sept. 29, 1994.

³¹ See, e.g., Robert F. Durant, *Hazardous Waste, Regulatory Reform, and the Reagan Revolution: The Ironies of an Activist Approach to Deactivating Bureaucracy*, 53 J. Pub. Admin. Res. & Theory 29 (1992).

³² See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983).

their authority. Reagan Administration EPA Administrator Anne M. Burford, one such official, eventually resigned under pressure as a result.³³

B. NAVIGATING WITH A CLEAR DIRECTION: REGULATORY POLICY AND ACCOUNTABILITY

The high-profile public battles over regulation that characterized the Reagan Administration reinforce the idea that presidential administrations are supposed to be accountable to the public in part on the basis of what they choose to say and do about regulatory policy. In principle, the existence of accountability justifies a number of familiar features of the regulatory state, such as an extensive role of the White House Office of Information and Regulatory Affairs (OIRA),³⁴ and the presumption that agency legal interpretations are entitled to deference.³⁵ Justice Scalia cites accountability when excoriating courts that fail to defer sufficiently to agency legal interpretations.³⁶ Justice Rehnquist, too, echoed the accountability fugue in the passive restraints case, where the Supreme Court invalidated the Reagan Administration's move to dilute automobile safety regulations. Dissenting from the majority opinion, Rehnquist praised the alleged virtues of the executive branch's accountability for its regulatory decisions. In his view, the Reagan Administration was simply carrying out publicly-ratified choices when it sought deregulation at NHTSA and EPA.³⁷ Rehnquist did not persuade the majority in the passive restraints case with this argument. Nonetheless, judges, lawyers, and scholars have often found such assertions to be persuasive over the years, and have repeated the mantra of presidential accountability in a host of regulatory context. Given the importance of passive restraints on automobiles, reductions in air pollution, marine safety, and the potential costs of regulation, voters are supposed to respond to changes in regulatory policy when making political choices.

Or do they? Upon closer inspection, the basic story of how the public monitors executive branch regulatory policy brushes over a host of complexities. It is doubtful, for example, whether voters routinely appreciate the full complexity of regulatory decisions at NHTSA, EPA, FEMA, or the Coast Guard. Moreover, because of political opposition engendered by regulatory policy changes, presidential administrations may aspire to hide what they are doing. By moving less publicly, politicians interested in ratcheting down regulatory enforcement can minimize the risks inherent in directly taking on policies that the public and organized interests might want to protect if the changes were more readily apparent. In short, accountability of politicians—and particularly the executive branch—for regulatory policy changes has become a foundational assumption of modern American public law. Yet accountability can be costly to those who must shoulder public scrutiny for regulatory changes. Consequently, some politicians craving changes in regulatory policy should be expected to look for strategies that avoid such public scrutiny.

³³ See Marissa Martino Golden, *Exit, Voice, Loyalty, and Neglect: Bureaucratic Responses to Presidential Control During the Reagan Administration*, 2 J. Pub. Admin. Res. & Theory 29 (1992).

³⁴ See generally Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. Chi. L. Rev. 821, 827-828 (2003).

³⁵ See *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

³⁶ See Antonin Scalia, *Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 518 (1989).

³⁷ See *State Farm*, 463 U.S. at 59 (Rehnquist, J., dissenting).

C. HIDDEN COURSE CHANGES: MODIFYING REGULATORY POLICY BENEATH THE SURFACE

The preceding dynamics force politicians to navigate through a dilemma when seeking major cuts in regulatory activity while attempting to minimize public opposition: How might regulatory activity be discreetly diluted? One tactic is to simply avoid public confrontation while using appropriations riders in Congress. Lawmakers allied with Microsoft sought to use such a tactic to stifle antitrust enforcement by the Justice Department.³⁸ In some cases, even appropriations riders can draw so much attention that their sponsors fail to achieve their goals. But by using a technical change in appropriations, Microsoft's supporters leveraged the substantial power of appropriations subcommittees, and avoided taking an explicit position against the substance of the antitrust laws that Microsoft was accused of violating.

Policymakers can also use changes in agency structure or missions to affect governance. By changing an agency's mission, placing it in a new bureaucratic context where political appointees emphasize new priorities, or loading it with new responsibilities but restricting its resources, a *de facto* change in regulatory policy may become possible. In response to such changes, bureaus' organizational cultures may evolve. Political appointees with different goals can reorient a bureau's priorities. Bureaus shouldering new responsibilities can become a locus of fierce internal competition for limited resources, playing out amidst signals from political superiors regarding what priorities can fall by the wayside. Such possibilities led the Roosevelt Administration to seek removal of the Public Health Service from the Treasury Department in the late 1930s.³⁹ The bureau's health-related missions were among the Treasury's lowest priorities. When President Roosevelt encountered an increasingly hostile congressional coalition blocking his efforts to strengthen the Public Health Service, he sought a more subtle approach to enhance what the bureau was able to accomplish by placing it in a new entity that would be more supportive of its health-focused mission. Decades later, between the 1970s and the 1990s, legislators hostile to another Treasury agency—the Bureau of Alcohol, Tobacco, and Firearms (ATF)—used a different organizational tactic to shape bureaucratic activity. Because lawmakers succeeded in pressuring ATF to assume additional responsibilities for investigating federal gun cases without corresponding increases in resources, they effectively diluted firearms-related regulatory activity.⁴⁰

³⁸ See *Microsoft Allies Urge Congress to Cut Antitrust Unit's Budget*, L.A. TIMES, Oct. 10, 1999.

³⁹ See Mariano-Florentino Cuéllar, *'Securing' the Bureaucracy: The Federal Security Agency and the Political Design of Legal Mandates, 1939–1953* (2006). STANFORD PUBLIC LAW WORKING PAPER No. 943084, available at SSRN: <http://ssrn.com/abstract=942447>.

⁴⁰ One of the major responsibilities of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (previously Alcohol, Tobacco, and Firearms or ATF) is to regulate the nation's federally licensed firearms dealers (FFLs) to limit the lucrative transfers of firearms from such dealers to individuals engaged in criminal activity or other prohibited purchasers. See Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, *Commerce in Firearms in the United States* (Feb. 2000). While the population of FFLs has grown from 152,232 in 1973 to 250,833 in 1994, *id.*, at A-21, the number of agents stayed nearly flat from 1973 to 1994 (1,622 to 1,884), and the number of inspectors declined from 826 to 800. *Id.*, at B-13. The rate of compliance inspections on FFLs fell from a high of 54.7% in 1969 to 4.8% in 1998. *Id.*, at A-21. The drop took place as the ATF assumed the responsibility of tracing firearms from crime scenes, *id.* at A-25, and while it was being increasingly pressured to assign its agents to assist with federal prosecutions targeting firearms use connected to state and local offenses. See Daniel C. Richman, "Project Exile" and the Allocation of Federal Law Enforcement Authority, 43 *Ariz. L. Rev.* 369 (2001).

Wary of even the scrutiny generated by these indirect tactics, politicians may discover unique opportunities to pursue budgetary and bureaucratic changes affecting regulatory policy in the midst of a national crisis, or in its immediate aftermath. If crises by definition focus attention on some national problems and away from others, they may provide political cover for subtly affect regulatory functions. As public attention shifts to focus on matters such as the energy crisis (in the 1970s) or counter-terrorism (in recent years), the political constraints that keep the status quo in place begin to loosen. Hence, legislative action becomes possible in response to the new political circumstances, when such action ordinarily would have been blocked by watchful lawmakers trying to protect existing arrangements. Bureaucratic resistance may become easier to overcome. The result can be a new organizational structure, changed budget priorities, and new responsibilities imposed on bureaus that together forge a new context for regulatory policymaking and enforcement. Which brings us back to the Department of Homeland Security, and the Coast Guard within it.

III. THE IMPACT OF HOMELAND SECURITY ON REGULATORY POLICY: THE CASE OF THE COAST GUARD AND DHS

Notwithstanding its enormous size and vast responsibilities, the Coast Guard became something of a pawn after the September 11 attacks. Although the Administration was initially reluctant to create a Department of Homeland Security, it eventually decided to proceed with such a venture in a manner that was all but guaranteed to pressure the Coast Guard to reduce its regulatory functions. Overcoming resistance to the idea of including the Coast Guard from Congress and reluctance from the President's own Homeland Security Advisor, the Administration placed the entire bureau in DHS.⁴¹ The Administration did not separate out the agency's regulatory policy or enforcement functions from its interdiction capabilities. Neither did it create within the new DHS a special office to ensure attention to environmental and safety functions within the Coast Guard or its sister bureaus, as it did to oversee narcotics enforcement and privacy issues. At the same time, new budgets only partially offset the burdens of the Coast Guard's growing security-related burdens, and in some cases, policymakers explicitly pursued cuts in budgets for regulatory enforcement that would have been more politically costly in normal circumstances. Regulatory performance has begun to shift in response. Consider each of these developments in turn.

For high-level officials in the new Department, the task of overseeing the Coast Guard would proceed against the backdrop of the White House's narrow approach to defining homeland security. The present Administration construed homeland security primarily in terms of counter-terrorism, thereby making it more difficult to protect legacy mandates merely by using homeland security rhetoric to describe longstanding missions.⁴² And the possibility that organizational changes would diminish Coast Guard environmental and safety activities was not lost on members of Congress. "I am concerned," noted one lawmaker who echoed the reactions of others in both chambers "about taking resources from traditional Coast Guard missions and diverting them to homeland defense."⁴³ In fact, the House committee overseeing the creation of the new department voted to keep the Coast Guard out of DHS. Across party lines, legislators cited concerns that folding the multifaceted bureau into the new super-department

⁴¹ See Cohen et al., *supra* note 8, at 728.

⁴² See *id.*, at 681 n. 24.

⁴³ See Office of Senator Kerry, Senator Kerry on the Coast Guard Commandment, March 19, 2002.

would erode its safety and environmental functions.⁴⁴ Government auditors echoed the legislators' concern about legacy mandates, concluding that the Coast Guard would face pressure to cut from existing resources absent dramatically higher financial resources.⁴⁵ In response, legislators added provisions to the Homeland Security Act in an attempt to limit the extent to which legacy functions might be eviscerated in the new Department,⁴⁶ even though the overall statute still permits the Department's leadership to refocus the agency's activities on defense and homeland security.

Within days of the September 11 attacks, the Coast Guard had been forced to assume new functions that placed further strain on the agency's already-scarce resources. These responsibilities grew as the Coast Guard moved to DHS. Predictably enough, these changes made resource hours focused on homeland-security related activity at the Coast Guard (including domains such as defense readiness, port security, and interdiction) skyrocket 1200% by 2005 (compared to the pre-September 11 resource allocation).⁴⁷ Meanwhile, even before the move to DHS was completed, resource hours spent on legacy environmental and safety missions began to plummet, with hours spent on living marine resource protection falling by a third, hours spent on marine safety falling by 43%, and hours spent on marine environmental protection falling by 64% in the reporting period following the September 11 attacks.⁴⁸ These shifts dramatically illustrated the constraints under which the Coast Guard was laboring. They also underscore the extent to which Coast Guard legacy functions depended on substantial additional resources. The Coast Guard would likely continue being forced to cut back on environmental and safety regulation, moreover by a succession of choices made by the Administration with respect to the Coast Guard. These included, among others, adding responsibilities to an existing bureau rather than creating a new one, placing the entire bureau within DHS, and demanding such a high degree of security-related activity at the agency. After all, budgets interact with agency structure, management choices, and statutory priorities to affect government functions. Moreover, even before the September 11 attacks, the Coast Guard already faced substantial budgetary pressures to accomplish its full range of missions.⁴⁹

Ironically, the Administration did not approach the challenge of creating DHS by requesting the vast resources necessary for bureaus to cover their full range of missions. Instead, the White House curiously insisted on revenue neutrality.⁵⁰ The Administration's position again drew criticism from the Government Accountability Office (GAO). In a study focused on the needs of bureaus that would be placed within

⁴⁴ See Amy Klamper, *Congress Set for Tug-of-War Over Coast Guard Jurisdiction*, 48 SEA POWER 6 (Mar. 1, 2005). Even in other countries that have reason to view coast guard bureaus as an important national defense resource, the bureau is ordinarily treated as a stand-alone agency or placed within ministries focused on marine and fisheries issues.

⁴⁵ See *Coast Guard: Comprehensive Blueprint Needed to Balance and Monitor Resource Use and Measure Performance for All Missions*, Statement of JayEtta Z. Hecker, Director, Physical Infrastructure, General Accounting Office, GAO—03-544T (Mar. 12, 2003).

⁴⁶ See Homeland Security Act, *supra* note 14.

⁴⁷ See Les Blumenthal, *Old Fleet Asked to Fill New Mission*, NEWS TRIB. (Tacoma, Wash.) July 19, 2005, at A1.

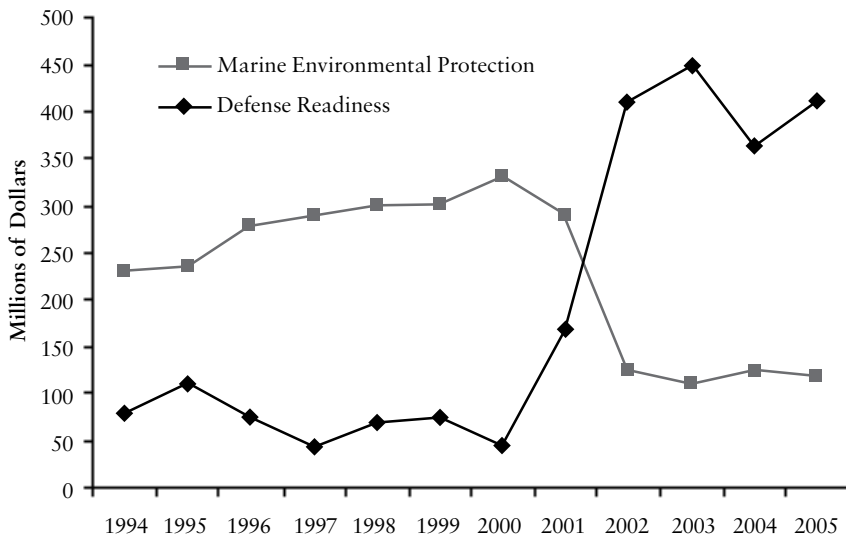
⁴⁸ See Office of Sen. Murray, *supra* note 6, at 1-2. These figures measure drops in the absolute number of resource hours (comparing the reporting period of April 2002–March 2003 with the previous reporting period) dedicated to the missions in question in terms of the use of the Coast Guard's cutters, boats, and planes.

⁴⁹ See Blumenthal, *supra* note 47.

⁵⁰ See GAO, *Comprehensive Blueprint*, *supra* note 45; Merle, *supra* note 4.

the Department, the GAO cautioned that only substantial budget increases could give the merger a chance to succeed.⁵¹ Although the Coast Guard's budget did eventually increase after the merger, the effect of those increases on regulatory policy was blunted by several factors. In particular, the Coast Guard faced substantial expenses associated with its preparation to modernize an aging fleet. Pressure to perform additional security-related functions continued after the bureau moved to DHS. And in some cases, the new Department explicitly downgraded the importance of some regulatory missions such as environmental protection. As a result, as Figure 1 shows, initial budgetary changes early in the Administration slashing Coast Guard marine environmental protection funding were cemented in later years, with the change in mission and structure reinforcing the change in budget priorities.

FIGURE 1: CHANGING OUTLAYS IN TWO COAST GUARD PROGRAM AREAS



Source: Data compiled from the Office of Management and Budget, *Appendix, Budget of the United States Government* (fiscal years 1996–2007).

None of this bodes well for the regulatory side of the Coast Guard's work. The preceding changes in the Coast Guard's organizational context, missions, and budgets have come at a time when the bureau's regulatory responsibilities for matters such as fisheries enforcement, ship safety, and environmental pollution remain substantial.⁵² And in some cases, the Coast Guard's responsibilities in these domains are growing. The Coast Guard must now enforce a new regulatory requirement bringing the U.S. into compliance with treaty obligations under the International Convention for the Prevention of Pollution From Ships.⁵³ It must supervise a cruise industry that is growing dramatically.⁵⁴ Given these challenges, it may seem encouraging that the

⁵¹ See U.S. GEN. ACCOUNTING OFC., GAO-03-260, *HOMELAND SECURITY: MANAGEMENT CHALLENGES FACING FEDERAL LEADERSHIP*, 44–45 (Dec. 2002).

⁵² See Inspector General, *Annual Review of Mission Performance*, *supra* note 15.

⁵³ See Cohen et al., *supra* note 8, at 737 n. 220.

⁵⁴ See Dahl, *supra* note 26.

Coast Guard recently reported some slight increases in resource hours devoted to non-homeland security missions,⁵⁵ and that some agency officials have also recently claimed relative success in meeting selected non-homeland security performance goals in spite of the budgetary changes noted above.⁵⁶ But there is less than meets the eye to both of these developments. First, although the Coast Guard's database for keeping track of how it uses its boats, cutters, and aircraft includes categories for recording full range of non-homeland security activity, it has only provided information about resource hour increases in a limited number of program areas, such as fisheries enforcement. And the increases do not erase the impact of precipitous drops in activity registered earlier.⁵⁷ Second, the Coast Guard's performance measures for non-homeland security functions suffer from a number of problems. For instance, the Coast Guard currently measures its success in protecting living marine resources as a function of the "percent of fishermen in compliance with regulations."⁵⁸ Upon closer examination, it turns out the bureau's measure focuses only on the proportion of compliance observed in vessels *boarded* by the Coast Guard.⁵⁹ Plainly, the Coast Guard could observe more compliance on the meager number of vessels it boards while actual compliance is decreasing.⁶⁰ Similar problems afflict other regulatory performance measures.⁶¹

Meanwhile, the pace and focus of Coast Guard regulatory rulemaking activity—which combines with enforcement policy and resource allocation to shape overall regulatory activity—has also been shifting. While counts of regulatory rulemaking proceedings furnish an imperfect measure of life at the bureau, they do illustrate some apparent changes in agency activity and priorities. The average number of safety or environmental regulatory rules issued yearly by the Coast Guard dropped from about

⁵⁵ See Inspector General, *Annual Review of Mission Performance*, *supra* note 15, at 3.

⁵⁶ See *id.* at 19-20.

⁵⁷ See *id.* Curiously, government auditors failed to provide any new data on the extent of drops in resource hours dedicated to marine environmental protection and marine safety. Auditors explained the decision not to analyze resource hour changes involving marine safety and marine environmental protection on the basis that the excluded functions were largely undertaken without the use of actual Coast Guard physical resources. This rationale may have been advanced by agency officials, who may have harbored concerns about what updated analyses of resource hours would show. But it is difficult to accept. The technical system the Coast Guard uses to keep track of resource hours, after all, includes a category for both marine environmental protection and marine safety. Moreover, it is difficult to assess how the Coast Guard would be able to accomplish marine safety and marine environmental protection missions, which depend crucially on inspections, without using its physical resources.

⁵⁸ See *id.*

⁵⁹ See *id.*, at 15.

⁶⁰ See U.S. GOV'T. ACCOUNTABILITY OFC., GAO-06-816, COAST GUARD: NON-HOMELAND SECURITY PERFORMANCE MEASURES ARE GENERALLY SOUND, BUT OPPORTUNITIES FOR IMPROVEMENT EXIST, 15 (Aug. 2006).

Because the Coast Guard targets vessels, the primary measure does not reflect the compliance rate for all fishermen in those areas patrolled by the Coast Guard, as could be inferred by the description, but rather is an observed compliance rate, that is, the compliance rate of only those fishing vessels boarded by Coast Guard personnel.

⁶¹ See *id.*, at 18 (discussing problems with the measures for marine environmental protection). Although government auditors found performance measures for marine safety to be sound, these are based on a five-year average of the annual number of deaths and injuries of recreational boaters, mariners, and passengers. As such, changes in Coast Guard regulatory performance in this domain is likely to take longer to become observable from an analysis of the bureau's performance measures, even if underlying compliance rates are beginning to change substantially.

3.8 in the last six years of the Clinton Administration, to about 2.6 during the first two years of the Bush Administration—before the Coast Guard was transferred to DHS—and then to approximately 2 per year during the four years the bureau has existed within DHS. Economically-significant safety or environmental rules⁶² were emerging from the bureau at the rate of about one a year during the last six years of the Clinton Administration and the first two (pre-DHS) years of the Bush Administration. Rules in this category issued during that period included, for example, limits on the release of harmful species in water ballast dumped into the Great Lakes, and requirements that shipping companies install tank pressure monitoring devices reducing the danger of ruptured tanker vessels. In contrast, the Coast Guard has not issued a single economically-significant safety or environmental rule since its transfer to DHS.⁶³ This slowdown appears to reflect the fact that major, congressionally-required Coast Guard environmental and safety rules have yet to be completed. For example, the Coast Guard recently postponed issuing comprehensive oil spill mitigation regulations designed to limit the extent and consequences of Exxon Valdez-style oil spill. The rules were postponed, according to agency representatives, because of its “heavy workload guarding against terrorism in the post 9/11 era.”⁶⁴

Nor do developments within the Coast Guard seem to be isolated incidents. As Figure 2 shows, DHS is devoting a dramatically shrinking share of its resources primarily to non-homeland security missions, including (among others) anti-child or prison-labor enforcement, flood insurance, animal and plant safety, as well as the Coast Guard’s marine safety, marine environmental protection, and living marine resources activities.⁶⁵ Drops in the share of spending on legacy missions have coincided, moreover, with flat non-emergency appropriations to the Department, and falling overall spending on some regulatory functions.⁶⁶ FEMA’s base budget was eroding before Katrina, for example, making it more difficult for the agency to mitigate disasters taking a massive environmental toll.⁶⁷ Meanwhile, the full range of environmental, regulatory, and revenue missions of the new bureaus of Customs and Border Protection and Immigration and Customs Enforcement seem to have fallen through the cracks, as neither successor agency has explicitly assumed responsibility over them or mentions them as priorities,⁶⁸ referrals for Customs duty violations have

⁶² OIRA treats rules as “economically significant” under Executive Order 12,866 when they “have an annual effect on the economy of \$100 million or more, or adversely affect the economy or a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities.” For an insightful analysis of the OIRA review process, see Croley, *supra* note 34, at 827-828.

⁶³ The preceding analysis was conducted using the Government Printing Office’s RegInfo database, available at <http://www.reginfo.gov/public/do/eoAdvancedSearchMain>.

⁶⁴ See Robert McClure, *Oil Spill Rescue Rule Keeps Seeking*, SEATTLE POST-INTELLIGENCER, Mar. 19, 2007.

⁶⁵ The changes in the proportion of resources devoted to non-homeland security missions may seem less important if overall DHS resources have been rising dramatically. Excluding supplemental appropriations, however, recurring programmatic funding at DHS has risen only mildly since 2003. See Cohen et al., *supra* note 8, at 732-733. As a result, the decreases in the proportion of resources devoted to non-homeland security missions at DHS are leaving the Department with a shrinking absolute amount of resources for such programs.

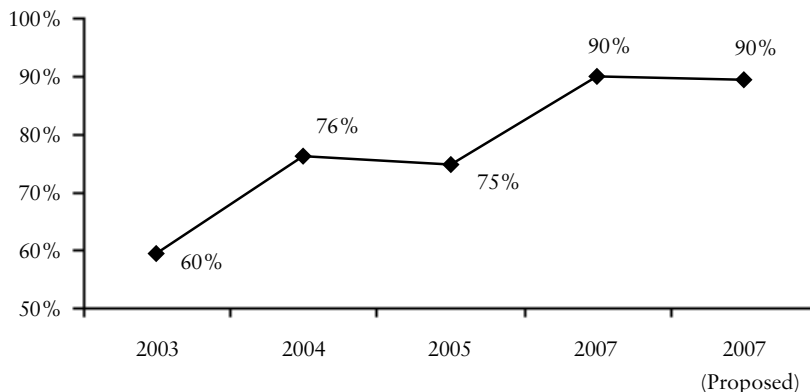
⁶⁶ See Cohen et al., *supra* note 8, at 733.

⁶⁷ See *id.*, at 738.

⁶⁸ See, e.g., *CBP: Securing America’s Borders*, available at <http://www.cbp.gov> (“U.S. Customs and Border Protection’s top priority is to keep terrorists and their weapons from entering the United States”).

plummeted,⁶⁹ and inspectors formerly working for the Agriculture Department's Animal and Plant Health Inspection Service (APHIS) have little incentive to emphasize environmental missions.⁷⁰

FIGURE 2: SHIFTING DHS PRIORITIES, REFLECTED IN CHANGING PROPORTION OF ANNUAL NON-EMERGENCY OUTLAYS SPENT ON HOMELAND SECURITY MISSIONS



Source: Calculations based on data from the Office of Management and Budget, *Budget of the United States Government* (fiscal years 2004–2007).

It may be tempting for some observers to chalk up the preceding changes to the new demands of security.⁷¹ Yet upon closer inspection, the case for such security benefits turns out to be a good deal harder to make than one might imagine. First, even from a perspective concerned only about security as it is traditionally defined, centralization includes long-term costs as well as benefits. Federal drug enforcement, for example, has thrived in part because of competition between agencies.⁷² Second, even if substantial benefits could have been derived from centralizing agencies in DHS, those benefits are diluted because of the fragmented legislative oversight authority that largely persists in Congress.⁷³ Third, any potential security benefits from reorganizing the Coast Guard and its sister bureaus also entailed pronounced transition costs,

⁶⁹ See Transactional Records Access Clearinghouse (TRAC), Federal Criminal Enforcement Database (program category, Customs-Duty Violations).

⁷⁰ In the Bush Administration's original proposal for DHS, all of APHIS would have moved to the Department. After substantial resistance materialized, however, the Administration chose to move only APHIS inspectors into the new agency. See Cornell News, *Cornell Official Testifies on Proposal for Department of Homeland Security*, July 17, 2002.

⁷¹ No doubt many Americans would think it an eminently reasonable bargain to tolerate some dilution in regulatory policy in exchange for worthwhile improvements in national security. Nonetheless, for a contrary perspective (arguing that the failure to prevent the September 11 attacks was not necessarily a policy failure), see Richard Posner, *The 9/11 Report: A Dissent*, N.Y. Times, Aug. 29, 2004. Moreover, the regulatory policy changes described above would still raise concerns among lawyers and policymakers committed to sound environmental policies even if we could be certain that substantial security benefits would follow from them. Yet the actual and potential neglect of regulatory functions would be more troubling still if Americans were not deriving substantially greater national security benefits in exchange.

⁷² See Cohen et al., *supra* note 8, at 710–711.

⁷³ See *id.* at 699–700 (discussing fragmented congressional oversight authority).

which is why Bush Administration officials initially sought to discourage the creation of a new Department,⁷⁴ and probably why some officials later sought to keep the initial proposal for a new department smaller by excluding the Coast Guard (they were overruled).⁷⁵ Fourth, resources taken away from environmental and regulatory functions do not seem to have been focused on areas that experts most readily cite as urgent homeland security priorities.⁷⁶

Finally, even if the security benefits of reshaping the Coast Guard's priorities and creating DHS were sufficient to offset the preceding problems, the present Administration has avoided explicitly taking responsibility for the regulatory policy changes it has set in motion. In part as a consequence, the Administration has failed to justify why it did not mitigate the environmental policy impact of its decision. If the Coast Guard's fleet of cutters and aircraft, for example, were so indispensable to the President's vision for a new department (even though the White House Homeland Security Adviser at the time, Tom Ridge, initially counseled against including it in reorganization efforts), it is still unclear why the White House still pressed to include within DHS all of the Coast Guard's marine environmental regulatory authority (recall that other agencies were split up, and in the case of Customs, for example, much of the revenue regulating authority remained at Treasury; and much of APHIS remains at Agriculture). And beyond the context of DHS, the present Administration has subtly pursued efforts to restrict public access to environmental information on security-related grounds,⁷⁷ to siphon budgetary resources away from environmental programs and to pour them into national security priorities.⁷⁸ In effect, even if one places new national security laws and policies in the most positive light, little public scrutiny has focused on thorny questions about where necessary trade-offs should be made to pay for new security policies, making it harder to judge the very goals of a homeland security establishment that has itself repeatedly proven to be deeply troubled.⁷⁹

IV. CONCLUSION

No one should seriously contemplate a complete reversal of the statutory changes that created DHS. Such a move would prove politically treacherous. It would force

⁷⁴ See STEVEN BRILL, *AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA* 54 (2003).

⁷⁵ See *id.* at 397.

⁷⁶ See *infra* note 72. See also STEPHEN FLYNN, *AMERICA THE VULNERABLE* (2005).

⁷⁷ See Sidney A. Shapiro & Rena Steinzor, *The People's Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism*, 69 *Law & Contemp. Prob.* 99, 124 (2006) (describing changes in the public availability of offsite consequence analyses describing potential environmental consequences of chemical leaks, and changes in FOIA-related policies further restricting access to the availability of environmental information).

⁷⁸ See Steven Dennis, *Bush Boosts Request for War Funding, Proposes Domestic Cuts*, C.Q. Today, Mar. 10, 2007 (discussing a recent Bush request for national security funding that proposed to cut from "environmental programs"). For an analysis of how "[h]ealth rules, environmental regulations, energy initiatives, worker-safety standards and product-safety disclosure policies have been modified in ways that often please business and industry leaders," see Joel Brinkley, *The Bush Record—First in a Series: Domestic Policy*, N.Y. TIMES, Aug. 14, 2004, at A1.

⁷⁹ See Cohen et al., *supra* note 8, at 753 n. 279. See also Richard A. Clarke et al., *THE FORGOTTEN HOMELAND: A CENTURY FOUNDATION TASK FORCE REPORT* (2006). A related question concerns the appropriate scope of the underlying concept of homeland security. The question was initially avoided by the Administration's narrow focus on counter-terrorism. It emerged again in the aftermath of the Katrina disaster, when some observers questioned why natural disasters were not firmly acknowledged to represent homeland security threats. For a discussion of the legal and political implications associated with different definitions of security, see Cuéllar, *Securing the Bureaucracy*, *supra* note 39.

Americans to incur more of the transition costs that have already depleted the nation's resources. And unquestionably, some changes in federal priorities should be expected following a major national security emergency. Nonetheless, a more defensible balance between critical regulatory missions and traditional security functions is likely to depend on the use of complementary techniques of institutional design and oversight. For example, several shorter-term changes could make a contribution to a principled balance. Congress should direct DHS to create an environmental protection and safety policy office staffed primarily with career officials within the agency, to focus attention on the environmental missions within the Department. Although such an office does not guarantee that the Department will honor its regulatory responsibilities, its existence can create an internal constituency for monitoring environmental performance and provide concerned legislative staff a unified point of contact within the agency. The agency already has civil liberties, privacy and a counter-narcotics offices to play such a role in their respective domains.⁸⁰ In addition, enhanced regulatory review mechanisms—whether based in the DHS Inspector General's Office or elsewhere—should better monitor gaps in agency regulatory activity. Monitoring should encompass failures to issue rules under statutes that require them, or to adequately enforce the mandates that protect our marine resources, coastal areas, and clean water. Without these measures, we are more likely to witness continued erosion of protections against over-fishing, toxic spills, and marine safety problems.

The American public will have achieved a great deal if it manages to stem the erosion of the Coast Guard's capacity to deliver environmental and safety protection while simultaneously supporting a sensible homeland security policy. But despite its importance, the fate of the Coast Guard is just a piece of the larger puzzle. By scrutinizing the intersection of homeland security and domestic regulation, three larger lessons emerge. First, whatever else one says about the largest government reorganization in 50 years, one legacy of it has been to create a vast new regulatory entity. In fact, DHS is in part a massive environmental agency, with sprawling responsibilities for protecting our natural resources that now compete with higher-profile terrorism-related missions.

Second, notwithstanding frequent assumptions to the contrary, "security" policy cannot be entirely separated from the rest of the government's work. In fact, "security" and domestic regulation have become inextricably intertwined. Homeland security—even narrowly defined to encompass threats from terrorism or international conflict—depends crucially on decisions of agencies such as the Nuclear Regulatory Commission,⁸¹ or in rulemaking proceedings governing the security of chemical facilities. A single attack against one such facility could risk the lives and health of thousands.⁸² Moreover, just as American security may ultimately depend on regulatory policy, so too does the quality of Americans' health and safety protections depend on security policy. The story of the Coast Guard is part of a larger picture, where domestic regulatory policy is increasingly affected by budgetary, statutory, and bureaucratic developments involving homeland security. Indeed, the nation's experience with

⁸⁰ See Department of Homeland Security, Organizational Charts (Jan. 29, 2007), available at http://www.dhs.gov/xlibrary/assets/DHS_OrgChart.pdf.

⁸¹ See Keay Davidson, *Nuclear Officials Say Plants Strong Enough: Decision Angers Watchdog Groups*, S.F. CHRON., Jan. 30, 2007, at B2.

⁸² See Richard A. Clarke et al., *supra* note 79, at 85-87.

Hurricane Katrina offers a cautionary note to anyone determined to exclude natural disasters, serious health emergencies, and infrastructure failures from the scope of discussions about national security.⁸³

Third, vigorous congressional oversight is necessary to ensure that crucial regulatory policies enacted by Congress do not run aground. Legislative oversight can bestow greater significance to the brief references in the HSA requiring protection of legacy mandates. Lawmakers can achieve these goals by calling hearings and pressuring for DHS to act on concerns raised by partner agencies with related environmental policy mandates, such as EPA, Interior, and Agriculture. Without such attention from lawmakers and civil society groups, regulatory priorities may become hopelessly mired amidst the recent policy changes, administrative modifications, and new organizational structures focused on national security. As those changes have taken root during the last half-decade, Americans have begun to grasp how the national security state poses difficult trade-offs with long-term consequences. The consequences are beginning to affect our environmental and regulatory policy, just as they have civil liberties. Americans cannot respond intelligently to these consequences if they are blind to them.

⁸³ Cf. Cuéllar, *supra* note 39. For an argument explaining the importance of expanding the scope of “national security” to encompass major natural disasters and infrastructure failures, see Stephen J. Flynn, *THE EDGE OF DISASTER: REBUILDING A RESILIENT NATION* (2007).

Reinventing the President's Pardon Power

Margaret Colgate Love*

The president's pardon power took center stage for the second time in this young century when, on July 2, 2007, President Bush commuted the prison sentence imposed on White House Aide I. Lewis "Scooter" Libby.¹ Libby, Vice President Cheney's former chief of staff, had been convicted the previous March of perjury and obstruction of justice in connection with the leak of CIA agent Valerie Wilson's identity, and sentenced to 30 months in prison. The President acted just a few hours after the court of appeals rejected Libby's request to remain free on bail while pursuing his appeal, bypassing entirely the Justice Department clemency review process. At the time, the President had commuted only three other prison sentences in more than six years in office, all grants to small-time drug dealers who had served many years in prison, and his overall pardoning record was far from generous.

In explaining his action, the President said that he "respected" the jury's guilty verdict, but considered Libby's 30-month prison term "excessive" for "a first-time offender with years of exceptional public service." He added that Libby had otherwise been harshly punished by the damage to his reputation and suffering of his family, and by the fine and period of supervision left in place.² But by these standards, scores—perhaps hundreds—of people doing hard time in federal prison are also worthy of the President's mercy. The only thing that distinguishes Libby is his unique access to the Oval Office. Like the final Clinton grants six years before, the Libby commutation in context seemed to confirm the popular view of pardon as a personal prerogative of the president, a remnant of tribal kingship generally reserved for the well-heeled or well-connected.

How is it tolerable, in a democracy, for the president to be able to reach into the machinery of criminal justice to pluck out one of his close associates, particularly if ordinary people have no hope of similar favor? The answer is, it isn't. The president's

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¹ The term "pardon" refers both to the president's constitutional power under Article II § 2, and to a specific form of relief under that power, in modern times generally (though not always) a forgiveness after completion of sentence. "Commutation" is a form of clemency that reduces a prison sentence or converts a sentence to a less severe form. (Because President Bush's grant eliminated Libby's prison sentence in its entirety, it is technically styled a "remission.") "Clemency" is an umbrella term used to describe all forms of relief available under the pardon power. See Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575–578 (1991), cited in *Herrera v. Collins*, 506 U.S. 390, 412, n. 12 (1993).

² President George W. Bush, Statement on Executive Clemency for Lewis Libby (July 2, 2007) (available at <http://www.whitehouse.gov/news/releases/2007/07/20070702-3.html>).

constitutional pardon power was never supposed to be used the way it was in the Libby case, and in our country's history it rarely has been.³

The Framers did not subscribe to a notion of pardon as a species of high-level gift-giving. They were intensely practical men, who conceived of the pardon power as an instrument of statecraft, and would not otherwise have given it to the president. They understood that the pardon power would be distrusted by the people and abused from time to time, but thought the risk worth taking. For them, pardon was a necessary and functional part of their carefully calibrated system of checks and balances, not a perk of office. Until quite recently that is how the pardon power was understood by our presidents, and they exercised it in a considered and meaningful fashion.

In the past twenty-five years, we have lost touch with the rich history of presidential pardoning. Four successive presidents have allowed the pardon power to atrophy, not because there was no more use for it—certainly this is not true since the advent of determinate sentencing—but because they both misunderstood and feared it. The Department of Justice, pardon's trusted official custodian for more than a century, marginalized and compromised the power; the regrettable events at the end of the Clinton Administration were the direct result of this failure of stewardship.

And yet, even as pardon appears increasingly anachronistic and corrupt, its continued relevance in the federal justice system is suggested by the sheer size of the prison population and the array of collateral disabilities imposed on the growing population of people with criminal records. The fact is that the federal sentencing scheme assigns a central role to pardon, if only by default, because it provides no other way to take a look at sentences that have become final, or to release a federal offender from the collateral consequences of conviction. No legal system should have to rely on executive clemency to do justice, but ours does.

The Libby commutation calls us again to consider whether pardon has a legitimate role in the criminal justice system, or whether it should be consigned by constitutional amendment to the dustbin of history where it can do no more mischief. This essay argues for a reinvigoration of the constitutional pardon power—a reinvention if you will—by a president who has the political courage to use that beneficent power as the Framers intended. It describes the historical use of the power, explains how pardon fell into disuse and disrepute late in the last century, and proposes that pardon can and should be restored to a useful and respectable role in our present-day justice system, and in our national politics.

³ The closest parallel to the Libby grant in recent history is President George H.W. Bush's pardon of six government officials prosecuted in connection with the Iran-Contra investigation. There, the President was straightforward about his reasons for extending clemency, stating that all six were "patriots" with a "long and distinguished record of service to the country" who had been caught up in "the criminalization of policy differences." See Proclamation 6518 (Dec. 24, 1991) (*available at* <http://jurist.law.pitt.edu/pardonsex5.htm>). See also President Reagan's pardon of two FBI officials convicted of authorizing illegal "black bag jobs," whose cases were still on appeal. President Ronald Reagan, Pardon for W. Mark Felt & Edward S. Miller (Apr. 15, 1981), *reprinted in* 17 Weekly Comp. Pres. Doc. 437 (generosity due "two men who acted on high principle to bring an end to terrorism that was threatening our nation"). This same sentiment appears to have been behind the Libby grant, as evidenced by the complete remission of Libby's "excessive" prison sentence, rather than the more usual reduction of sentence accomplished by a "commutation." If Libby is given a full pardon at the conclusion of President Bush's term as some predict, the remission of his prison sentence will likely be seen in retrospect as a temporary expedient to allow Libby's challenge to his conviction to go forward, while at the same time retaining his Fifth Amendment protection against testifying about the circumstances of his offense.

I. PRESIDENTIAL PARDONING IN HISTORICAL CONTEXT

When the Framers included a power to pardon in Article II of the Constitution, they did so with the understanding that there must be some ability to dispense “the mercy of government” in exceptional cases where the legal system fails to deliver a morally or politically acceptable result.⁴ When Alexander Hamilton described pardon as a “benign prerogative” in Federalist 74, he understood that term in the Lockean sense of “doing public good without a rule.” Congress would enact rules of punishment, but the decision about when to make exceptions to those rules would be entirely the president’s free choice, an act of grace perhaps, but not a private one.

In addition to mitigating “the rigor of the law” in individual cases, pardon also would have a more purely political function, to put down rebellions, reward spies and cooperators, and heal the wounds of war.⁵ Well aware of the historical abuse of the English king’s pardon, the Framers nonetheless determined to vest this great power in the president alone, because of the occasional need for speed and secrecy, and because (as Hamilton thought) “the sense of responsibility is always strongest in proportion as it is undivided.” They put the pardon power beyond the reach of Congress and the courts, trusting that a president would be restrained in its exercise either by the threat of reprisal at the ballot box, or by what James Iredell called “the damnation of his fame to all future ages.”

Pardon proved its practicality right away, in helping the president deal with a series of rebellions and invasions in the early years of the Republic: “The pardon could bring rebels back into the fold, or it could repopulate the army by restoring deserters to service.”⁶ President Lincoln issued pardons throughout the Civil War to deal with desertion and draft evasion on the Union side, and to undercut the rebellion in the Border States. Presidents Johnson and Grant used the power to clean up afterwards, as did Presidents Theodore Roosevelt, Coolidge, Harding and Truman in connection with

⁴ See, e.g., The Federalist No. 74, at 422 (Alexander Hamilton) (Penguin Books ed., 1987) (“the criminal code of every country partakes so much of necessary severity that, without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel”); James Iredell, Address in the North Carolina Ratifying Convention, *reprinted in* 4 The Founders’ Constitution 17 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter Iredell Address] (“It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.”). For a discussion of the development and use of the pardon power in England, see William Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977); see also CHRISTEN JENSEN, THE PARDONING POWER IN THE AMERICAN STATES (1922).

⁵ See THE FEDERALIST No. 74, *supra* note 4, at 423 (“[I]n seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth, and which, if suffered to pass unimproved, it may never be possible afterwards to recall”); Iredell Address, *supra* note 4, at 18 (noting pardon’s usefulness in time of “civil war,” and the need to obtain the testimony of accomplices and to protect spies who have proved useful to the government).

⁶ President Washington made the first use of the pardon power in 1795 by issuing an amnesty to quell the Whiskey Rebellion, and he later pardoned those of its leaders who were convicted of treason. Later presidents used the power freely as Commander-in-Chief:

President Adams pardoned the rebels of Fries Rebellion. President Thomas Jefferson pardoned deserters from the Continental Army. In order to fill up the army ranks to fight the War of 1812, President James Madison pardoned deserters and, after the war, pardoned Lafitte’s pirates. As the presidents well knew, pardons are a better signal than an armistice agreement to show that a war is truly over and that peace is restored.

KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST 51 (1989).

later wars.⁷ More recently, Presidents Ford and Carter both issued amnesties to draft law violators and military deserters from the Vietnam era. Like the Nixon pardon, these amnesties represent classic uses of the power to reconcile national differences. Pardon was also used for reasons of state,⁸ and to override or preempt unpopular or inconvenient laws. For example, after the election of 1800, President Jefferson released those still imprisoned for violating the hated Alien and Sedition Act. Likewise, Presidents Harrison and Cleveland issued blanket pardons to Mormon polygamists in anticipation of Utah's admission to statehood, and President Wilson expressed his opposition to Prohibition by pardoning more than 500 liquor law violators after his veto of the Volstead Act was overridden.⁹ In a more recent "systematic" use of the power evidently intended to send a message to Congress, Presidents Kennedy and Johnson commuted the sentences of more than 200 drug offenders serving mandatory minimum sentences under the Narcotics Control Act of 1956.

It is less well known that from the early days of the republic the pardon power was pressed into regular service as an integral part of the day-to-day operation of the federal justice system. At a time when the laws were relatively harsh and inflexible, pardon was virtually the only way that federal offenders could have their convictions reviewed, prison sentences reduced, and rights of citizenship restored.¹⁰ Many pardons and sentence commutations were issued each year to ordinary people convicted of garden variety crimes, often upon the recommendation of the prosecutor or the sentencing judge.¹¹ Far from being an "extraordinary" remedy, pardon was a very ordinary form of early release and restoration of citizenship rights.¹²

⁷ Roosevelt pardoned participants in the Philippine insurrection, Coolidge pardoned World War I deserters, Harding commuted the sentences of dozens of people imprisoned under sedition and espionage laws (including Eugene Debs and a number of Wobblies), and Truman pardoned people with convictions who had served honorably in World War II. See also Charles Shanor & Marc Miller, *Pardon Us: Systematic Pardons*, 13 FED. SENT'G REP. 139 (2001) (cataloguing historical instances in which the president has used his pardon power in a systematic way).

⁸ See, e.g., Exec. Grant of Clemency to Adil Shahryar (June 11, 1985) (son of aide to Indian Prime Minister Rajiv Gandhi, serving 35-year federal sentence for explosives and fraud offenses, freed as "good-will gesture" on occasion of Gandhi's visit to U.S.); Exec. Grant of Clemency to Marian W. Zacharski (June 7, 1985) (foreign spy's life sentence commuted in contemplation of a "swap" for several U.S. nationals imprisoned abroad), U.S. DEP'T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, WARRANTS OF PARDON, 1935-1999.

⁹ Wilson, who was an "ardent advocate of temperance," nonetheless felt the government's attempt to regulate the morals of "a great cosmopolitan people" was "the wrong way of doing the right thing," P.S. Ruckman, Jr., "The Pardoning Power: The Other Civics Lesson." Paper presented at the Annual Meeting of the *Southern Political Science Association* (November 2001), quoting from JOSEPH P. TUMULTY, WOODROW WILSON AS I KNEW HIM (Doubleday, 1921). See <http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper5.pdf>.

¹⁰ "Clemency provided the principal avenue of relief for individuals convicted of criminal offenses ... because there was no right of appeal until 1907." *Herrera v. Collins*, *supra* note 2, at 412, citing 1 L. Radzinowicz, A HISTORY OF ENGLISH CRIMINAL LAW 122 (1948). IT WAS ALSO "THE ONLY MEANS BY WHICH ONE COULD CHALLENGE HIS CONVICTION ON THE GROUND OF INNOCENCE." *Id.*, citing U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES, Volume III Pardon 73 (1939) (Wayne L. Morse, ed.) [hereinafter Attorney General's Survey]. Clemency not only recognized defenses unknown in the law (such as duress, incapacity, and self-defense), it functioned as the federal paroling authority until 1910. See Attorney General's Survey at 295-313.

¹¹ See, e.g., George P. Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790-1850*, 16 FED. SENT'G REP. 212 (2004).

¹² In his classic 1941 study of federal pardoning practices, W.H. Humbert reported that between 1860 and 1900, 49 percent of all applications for presidential pardon were granted. In 1896 there averaged 64 acts of pardon for every 100 prisoners, and in the next five years the ratio between acts of clemency and

In 1854, presidents began to rely regularly on the attorney general for advice in clemency matters, and in 1898 President McKinley signed the first federal clemency rules, directing that all applications for pardon or sentence commutation should be submitted to the Justice Department's pardon attorney for review. Those rules have remained essentially the same to this day. And, until the final years of the Clinton Administration, with only a handful of exceptions, the president's grants of clemency were made pursuant to a report and recommendation drafted by the pardon attorney and signed by the attorney general or his designee. The degree to which the president historically depended upon the attorney general's advice in clemency matters is suggested by the fact that, until the Kennedy Administration, most applications that the attorney general did not support were not even sent to the White House, but were closed administratively without presidential action.

The attorney general's central role in administering the constitutional pardon power reflected and reinforced the link between the pardon power and the ordinary operation of the federal criminal justice system. It also kept the federal pardoning power honest, if not always entirely regular. Directing all pardon applicants to the Justice Department gave the president a measure of protection both from unwelcome importuning and political controversy. The low-key routine of the Department's pardon office, headed almost continuously since its establishment in 1891 by a career appointee, was "of such a character as not to attract wide attention."¹³ Between 1953 and 1999, there were only three occasions on which the president did not follow the established Justice Department procedure for handling pardons, and all were controversial: President Ford's 1975 pardon of Richard Nixon, President Reagan's 1981 pardon of two FBI officials who had authorized illegal surveillance of radicals, and President Bush's 1992 pardon of six Iran-Contra defendants. While the president did not always follow the advice of his attorney general, the practice of always consulting him gave the president full access to the facts of a case, to the law enforcement perspective on its merits, and to the counsel of a key member of his Cabinet. Through the attorney general's mediation, pardon could be counted on to assure a fair result in individual cases, to signal the president's law enforcement priorities, and to underscore the value of rehabilitation as a goal of the justice system.

By the end of the 19th century, the federal justice system had begun to develop a variety of judicial and administrative mechanisms for sentence mitigation, post-conviction review, and early release from prison, all of which reduced reliance on pardoning. Yet the Annual Reports of the Attorney General between 1885 and 1932 reveal that Justice continued to rely heavily on the pardon power as an early release mechanism even after the enactment of parole and probation statutes. And the published reasons for each clemency recommendation in these years are a sad commentary on how little progress had been made toward the humane and efficient justice system that the Enlightenment philosophers had expected would eliminate the need for pardon.¹⁴

the federal prison population was, on average, 43 percent. W.H. Humbert, *The Pardoning Power of the President* 111 (1941).

¹³ *Id.* at 5.

¹⁴ *Id.* at 124-33. Often the reasons for clemency involved doubt as to guilt, lack of capacity, or excuse; they also reflected the practicalities of a primitive prison system (fear of contagion was as likely as imminent death to qualify a prisoner for early release). Pardon was granted to avert deportation or to hasten it, to reward assistance to the government, and to immunize a witness. Sometimes the reasons seem hopelessly quaint: e.g., "to enable petitioner to catch steamer without delay," "to enable farmer prisoner to save his crops," "to encourage good conduct among other prisoners," and "not of criminal type."

In 1933, President Roosevelt directed the Justice Department to cease publishing the reasons for its clemency recommendations, ostensibly for reasons of efficiency, but the zeal for pardoning evidently continued unabated: during FDR's twelve years in office, he issued 3,018 pardons and 557 commutations, while denying only 1,574 petitions.

Until 1980, each president granted well over a hundred post-sentence pardons and sentence commutations almost every year, without fanfare or scandal. Grants were issued almost every month for much of this period, evidence that pardoning was considered part of the ordinary housekeeping work of the Presidency, not something reserved for holidays or departure from office.¹⁵ The percentage of clemency petitions acted on favorably remained high, approaching or exceeding 30% in every administration until President Jimmy Carter's. While it would be naïve to suggest that special pleading outside of regular channels never entered into a decision to pardon or commute a sentence, irregular grants rarely gave rise to controversy as long as ordinary people were perceived to have access to the president's mercy. Sheer volume protected the president's ability to make an occasional grant for personal or political reasons that the public might otherwise not understand. In addition to the generous grant rate, it was the thoroughness and perceived fairness of the Justice Department's review process that kept the pardon process from being cynically viewed as a lottery, and that protected the president's ability to exercise his discretion as he thought best.¹⁶

II. THE DECLINE AND FALL OF ORDINARY PARDONING

Presidential pardoning went into a decline during the Reagan Administration, more sharply during his second term. This is attributable primarily to two relatively new influences in the criminal justice system: the retributivist theory of "just deserts," and the politics of the "war on crime." The philosophers whose ideas eventually triumphed in the 1984 Sentencing Reform Act took "a dim view" of pardon, considering it an unprincipled and unwelcome intrusion in the law's enlightened process.¹⁷ The retributivist view of punishment embodied in the 1984 Sentencing Reform Act made no place for clemency, and looked askance even at those who were simply seeking

¹⁵ Graphs and tables showing pardon grant patterns from 1900 through 2001, based on data from the Office of the Pardon Attorney, can be found in P.S. Ruckman, Jr., Last-Minute Pardons: Fact and Fiction, Annual Meeting of the Midwest Political Science Association 15–27 (2004) (*available at* <http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/Paper2.pdf>). These figures show that almost every president from William McKinley to Lyndon Johnson issued pardons on a monthly basis (Eisenhower was the exception, disposing of dozens of cases at a time every three or four months with the "master warrant" introduced during his administration). From Nixon through Reagan, pardoning was less frequent but still fairly regular. In the first Bush administration pardoning became somewhat more erratic, partly due to management problems in the Justice Department that temporarily stopped the delivery of recommendations to the White House. But the Clinton Administration saw a qualitative change in the President's approach to his pardoning responsibilities. *See infra* notes 20–25.

¹⁶ The Justice Department's clemency review process is described in Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 35–43 (2005). *See also* Abbie H. Erler, *Executive Clemency or Bureaucratic Discretion? Two Models of the Pardons Process*, 37 PRES. STUD. Q. 427, 437–38 (2007).

¹⁷ *See* Moore, *supra* note 6, at 28–34, 84. Utilitarian theory also had no use for pardon, believing that "clemency is a virtue which ought to shine in the code, and not in private judgment." C.B. Beccaria, *An Essay on Crimes and Punishment*, *quoted in* Moore, *supra* note 6, at 39.

restoration of the right to vote or a gesture of forgiveness. In the rule-bound milieu of the federal sentencing guidelines, the Hamiltonian idea of pardon as prerogative was at once quaint and threatening.¹⁸

And yet, given the absence of other mechanisms to provide relief in case of some fundamental change in a prison's situation after sentencing, or for relieving collateral penalties after release from prison, the law itself implicitly recognized a place for the pardon power. That is, in stripping all relief mechanisms out of the law, Congress left clemency as the only "fail safe."¹⁹

At the same time, pardoning began to seem a very dangerous practice to be avoided by elected politicians if at all possible. The crime war of the 1980s transformed "just deserts" into "tough deserts." It became conventional wisdom that appearing "soft on crime" could only get an elected official into trouble, and the Willie Horton episode during the 1988 presidential campaign confirmed that pardoning could ruin a political career. Guidelines sentencing seemed to provide politicians useful cover, in obviating the need to take such risks. The inherent mystery of the pardon process and the infrequency of actual grants reinforced in the public's mind what had until then been only a popular myth, that pardon was a way for a president to reward intimates at the end of his term. At about the same time, for essentially the same reasons, pardoning went off the radar in most states where the power is exercised by the governor.

A third influence contributing to the decline in federal pardoning in the 1980s was the hostility of federal prosecutors. A change in the administration of the pardon power allowed that hostility to gain control of the Justice Department's clemency recommendations. While prosecutors had always had a formal role in the pardon process, only in the 1980s did they begin to view pardon as inconsistent with their interests. It is no secret that retributivist sentencing did not eliminate discretion and disparity from the system; they simply migrated to the prosecutor's office, and were given effect through charging and plea bargaining decisions. Pardon threatened a degree of oversight and revision of prosecutorial decision-making that, from prosecutors' point of view, required its incapacitation. This was inadvertently facilitated by Attorney General Griffin Bell's decision in the late 1970s to delegate the clemency advisory responsibility to subordinate officials within the Department. This fateful decision, whose implications were apparently not fully appreciated at the time, had a transforming effect on the Department's clemency program, and on the general tenor of the advice in clemency matters the president would thereafter receive.

As a member of the president's cabinet, the attorney general enjoys a special status as political counselor that complements his primary role as chief law enforcement officer. Historically, in advising the president in clemency matters, the attorney general could be expected to bring to bear both of these perspectives, resolving on a case-by-case basis the tension between his duty to enforce the criminal law, and his duty to advise the president about when to dispense with that law, for political purposes or for

¹⁸ Austin Sarat, defending the legitimacy of a redemptive theory of clemency, points out that for the retributivists the "essentially lawless" exercise of mercy is a "threat to society dedicated to the rule of law." Austin Sarat, *MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION* 69 (Princeton University Press 2005) (2005). See also Samuel Morison, Book Review of Sarat, *MERCY ON TRIAL*, 1 CRIM. L. & PHIL. 327, 328 (2007) ("Mounting an effective defense on behalf of mercy turns out to be a daunting challenge in the current political climate, because a large majority of elected officials, like the most vocal segment of the electorate, are reflexively committed to the twin pillars of the prevailing theory of criminal justice, namely the retributivist theory of punishment and its close ideological cousin, the 'victims rights' movement.").

¹⁹ *Herrera v. Collins*, *supra* note 1, at 415, quoting Moore, *supra* note 6, at 131.

mercy's sake. When the clemency advisory responsibility devolved within the Justice Department to officials whose duties were exclusively concerned with law enforcement, and whose backgrounds were almost exclusively as prosecutors, the animating spirit of pardon recommendations became more one-sided. This in turn had important consequences for the independence and integrity of the Department's pardon program, which soon became an extension of the "tough on crime" agenda of federal prosecutors. The possibility that pardon might actually help prosecutors do their job went largely unexplored. Without a predicate decision from the White House about what role (if any) pardon should play in the administration's criminal justice agenda, and armed with a mandate to vigorously enforce the criminal laws, the Justice Department made fewer and fewer favorable clemency recommendations every year. By the time President Clinton took office in 1993, the pardon program was functioning primarily to ratify the results achieved by prosecutors, not to provide any real possibility of revising them.

Under President Clinton, the number of commutation applications soared as the pardon caseload began to reflect mandatory sentencing and stepped-up federal prosecution of drug crimes.²⁰ But Clinton continued the policy of parsimony that had informed pardoning in the 1980s, with a portentous departure from prior administrative practice: in spite of a steady stream of clemency recommendations from the Justice Department, Clinton issued no clemency grants at all in four of the first five years of his presidency.²¹ Justice Department clemency recommendations piled up at the White House without action, for senior political officials at Justice had little institutional incentive to try to interest the President in an activity to which he seemed so obviously indifferent. During Clinton's second term, several high profile grants were staffed directly out of the White House, an unprecedented public distancing that reflected the President's generally strained relations with Justice.²² As a result, President Clinton entered his final year in office having pardoned less generously than any president since John Adams.

As the time on his watch grew short, another side of President Clinton emerged. He began talking publicly about his interest in pardoning, lamenting how few pardons he had granted, and signaling an intention to do more before leaving office.²³ For the first time in eight years, he expressed sympathy with nonviolent drug offenders serving

²⁰ See OFFICE OF THE PARDON ATTORNEY, PRESIDENTIAL CLEMENCY ACTIONS BY FISCAL YEAR, 1945 TO PRESENT (2007) [hereinafter Pardon Attorney Statistics].

²¹ *Id.* See also Ruckman, *supra* note 15. After George Washington's first administration until the Clinton presidency, the number of years in which an American president issued no clemency grants at all can be counted on the fingers of one hand: John Adams' first year in office, Lyndon Johnson's last year in office, and two years during the administration of George H.W. Bush.

²² See THE PARDON ATTORNEY REFORM AND INTEGRITY ACT, S. REP. NO. 106-231, at 8 (2000) (commutation of 16 Puerto Rican terrorists on recommendation of White House Counsel Charles Ruff); Darryl W. Jackson et al., *Bending Toward Justice: The Posthumous Pardon of Lieutenant Henry Ossian Flipper*, 74 IND. L.J. 1251 (1999) (first posthumous pardon); *President Pardons Veteran Convicted in 1944 Mutiny*, WASH. POST., Dec. 24, 1999, at A4 (racist wartime incident); Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483, 1499 n. 57 (2000) ("Collar Buttons") (pardon of long-time fugitive).

²³ See, e.g., President William J. Clinton, Remarks at the ceremony appointing Roger Gregory to an interim seat on the Fourth Circuit Court of Appeals (Dec. 27, 2000) (*reprinted in* 13 Fed. Sent'g Rep. 228) [hereinafter Gregory Remarks] ("I wish I could do more [pardons]. I'm going to try. I'm trying to get it out of the system that exists, that existed before I got here, and I'm doing the best I can"). Newsweek reported an incident in early January in which the President wandered into the press section of Air Force One on a trip to Arkansas and asked "You got anybody you want to pardon?" Weston Kosova, *Backstage at the Finale*, NEWSWEEK, Feb. 26, 2001.

long prison terms,²⁴ and articulated a generous policy of restoring civil rights to anyone who had completed his sentence.²⁵ At the eleventh hour, Clinton seems to have recognized how meager his overall pardoning record was compared to that of his predecessors, notably President Reagan, and resolved to make up for lost time. But by that time the Justice Department was either unwilling or unable to meet his demands, and he was left to work around the problem using his own White House staff. Thus relieved of the constraints imposed by the Justice Department's administration of the power, President Clinton enjoyed a final unencumbered opportunity to reward friends, bless strangers, and settle old scores.²⁶ But the flawed decision-making that produced the spate of irregular grants on his last day in office is attributable at least as much to the Justice Department's decade-long neglect of its responsibilities as it is to the President's disregard of his own.

President Bush entered office with the controversy over President Clinton's final grants ringing in his ears, and with a reputation from his days as governor of Texas that did not bode well for the rejuvenation of the federal pardoning program. He agreed at the beginning of his term to adhere to the Justice Department's review process, and until the Libby grant it appears that he had for the most part done so. But his meager grant rate shows him to be less generous and more risk-averse than any president in the last 100 years, including his father, and at the time of this writing a large backlog of cases awaits his consideration.²⁷ It is hard to discern any pattern or message from his pre-Libby grants, except that they appear calculated not to get him into any trouble. It seems unlikely that President Bush will make any radical course changes before the end of his tenure, at least insofar as the regular pardon caseload is concerned, for he does not appear to share Clinton's personal inclination to extend compassion towards strangers, or have an independent interest in criminal sentencing. It is ironic that a president who has stretched all other executive powers to the breaking point and beyond, has been so timid and unimaginative in using the one power that is indisputably his and his alone.

²⁴ Jan Wenner, *Bill Clinton: The Rolling Stone Interview*, ROLLING STONE MAGAZINE, Dec. 28, 2000–Jan. 4, 2001, at 98 (“We really need a reexamination of our entire policy on imprisonment....[A] lot of people are in prison today because they have drug problems or alcohol problems....I think the sentences in many cases are too long for nonviolent offenders....I think [mandatory minimum sentences] should be reexamined”).

²⁵ Gregory Remarks, *supra* note 23:

I have always thought that Presidents and governors should be quite conservative on commutations—that is, there needs to be a very specific reason if you reduce someone's sentence or let them out—but more broad-minded about pardons because, in so many states in America, pardons are necessary to restore people's rights of citizenship. Particularly if they committed relatively minor offenses, or if some years have elapsed and they've been good citizens and there's no reason to believe they won't be good citizens in the future, I think we ought to give them a chance, having paid the price, to be restored to full citizenship.

²⁶ For a discussion of the break-down of the Justice Department's pardon process and the ensuing chaotic effort at the White House to compensate for seven years of indifference to pardoning, see *Hearings Before the Subcomm. On Government Reform on the Pardon of Marc Rich* (2001) (testimony of Beth Nolan, Counsel to former President Clinton). Some of the more unusual grants are described in my *The Pardon Paradox: Lessons from Clinton's Last Pardons*, 31 CAP. U. L. REV. 185, 188–193 (2003).

²⁷ At the time of the Libby commutation, President Bush had denied 5,218 applications for sentence commutation and granted three, all from relatively minor drug offenders who had spent a decade or more in prison. He had granted 113 post-sentence pardons, and denied 1,028 pardon applications. About 2,500 applications for commutation and 1,000 applications for pardon remained pending for consideration. See Pardon Attorney Statistics, *supra* note 19.

III. DOES PARDON HAVE A FUTURE?

Pardon has not played a meaningful role in the justice system for many years. Recent presidents have neglected or abused it (or both), criminal justice professionals have no respect for it, and the public understandably regards it with cynicism. Without anything to keep it busy, it has become the problem child in the president's nursery. Why then would any president want to try to tame this unruly power? Here are four reasons:

- Federal criminal law has produced a great deal of injustice for which only pardon provides a remedy.
- Pardoning is the most immediate way for the president to communicate his law enforcement priorities to executive officials, including prosecutors.
- Pardon allows the president to advance his criminal justice agenda with Congress and the public.
- Pardon is susceptible to misuse, real and imagined, when it is not gainfully employed in the service of the justice system.

A. DOING JUSTICE

History teaches that the demand for clemency increases when the criminal justice system lacks other mechanisms for delivering individualized justice, recognizing changed circumstances, and correcting errors and inequities. Clemency is less necessary, and is therefore less justifiable, where the law itself balances rule and discretion. It could therefore have been predicted that the enactment of the Sentencing Reform Act in 1984, with its abolition of parole, would reawaken interest in clemency. In the 20 years since the federal sentencing guidelines system took effect, the president's power to commute has been invoked frequently because of the severity of mandatory prison terms, because courts have very limited ability to individualize sentences or revise a sentence once imposed, and because other post-conviction early release mechanisms have either been abolished or allowed to atrophy. Pardon has become virtually the only way that a federal sentence, once final, can be reconsidered and, in appropriate cases, reduced. Justice Anthony Kennedy has urged that the pardon process be "reinvigorated" in response to "unwise and unjust" federal sentencing laws, stating that "[a] people confident in its laws and institutions should not be ashamed of mercy."²⁸ The president's personal intervention in a case through the pardon power not only benefits a particular individual, it reassures the public that the legal system is capable of just and moral application. At least until laws are reformed and workable post-conviction relief mechanisms are adopted, there is a place for pardon.

After the court-imposed sentence has been served, pardon should play an important role in offender reentry and reintegration by relieving legal disabilities and certifying good character. In the federal system, pardon is the only way for a federal offender to overcome the legal disabilities and stigma of conviction, since there is no authority for judicial expungement or sealing of a criminal record even for a first offender. Particularly since 9/11, laws excluding people with a criminal record from jobs and other opportunities have proliferated, and decision-makers have become more

²⁸ Justice Anthony M. Kennedy, Speech before the Annual Meeting of the American Bar Association (Aug. 9, 2003) (*available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html). *See also* Dretke v. Haley, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting) ("Among its benign if too-often ignored objects, the clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider").

risk-averse. Background checks have become the norm for employers, landlords, and other decision-makers: there are now more than 600 companies engaged in the business of backgrounding, and many states have begun to make their court records available for a fee on the internet.

Surprising as it may seem, in some states a federal offender cannot exercise basic civil rights, including the right to vote, without a presidential pardon. As a result of this web of “invisible punishment,” people convicted of a crime in America are deprived of the tools necessary to reestablish themselves as law-abiding and productive members of the free community. The fact that so many of this population are African-American only aggravates the phenomenon that has been described as “internal exile.”²⁹ The collateral consequences of conviction operate as continuing punishment, and a just system must afford deserving individuals some way of alleviating them. Until some alternative way is found to give federal offenders a way to satisfy their debt to society, there is a place for pardon.

B. SPEAKING TO THE TROOPS

Within the executive branch, pardon can serve as a useful policy and management tool to help the president carry out his constitutional obligation to take care that the laws are faithfully executed, in two ways. First, the pardon caseload provides a unique birds-eye view of how the federal justice system is being administered, revealing where particular laws or enforcement policies are overly harsh, and where prosecutorial discretion is being unwisely exercised. In addition, a grant of clemency allows the president to intercede directly to change the outcome of a particular case, thereby sending a very direct and powerful message about how he wishes the law to be enforced by his appointees in the future. It was hard to miss the message sent by Bill Clinton’s rush to preside over the execution of Ricky Ray Rector during the 1992 presidential campaign. The “extraordinary potential for arbitrariness” that some see as an argument against pardon³⁰ can be turned on its head: a clemency program administered rigorously at a national level may be the best corrective for the sort of systemic arbitrariness that can result from unchecked prosecutorial discretion. In this fashion, pardon can address the disparity and overreaching that many believe have compromised the integrity of the federal justice system in recent years. In turn, prosecutors can be challenged to regard clemency as something that can be useful to them, rather than a threat to their independence or a sign of weak resolve.³¹

Clemency can be a useful management tool for prison administrators as well, rewarding good conduct and accomplishment by prisoners, and even easing the strain on prison budgets where prisoners are elderly or infirm and can be taken care of more efficiently and effectively in the free community. A grant of executive clemency may be instructive to prison officials in interpreting their responsibilities under one or another of the early release mechanisms at their disposal.

²⁹ Nora V. Demleitner, *Preventing Internal Exile: The Need For Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 157 (1999). See also Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE SOCIAL COSTS OF MASS IMPRISONMENT 16 (Meda Chesney-Lind & Marc Mauer eds., 2002).

³⁰ Daniel J. Freed & Steven L. Chanenson, *Pardon Power and Sentencing Policy*, 13 FED. SENT’G REP. 119, 123 (2001).

³¹ See David M. Zlotnick, *Federal Prosecutors and the Clemency Power*, 13 FED. SENT’G REP. 168 (2001) (analyzing five 2000 Clinton commutations where rationale for grant served prosecutors’ interests, including correction of a mistake).

C. ADVANCING LAW REFORM

Historically, pardon has played a policy role in raising awareness of shortcomings in the law in the context of a particular case.³² If the case illustrates some system-wide problem, as opposed to an exceptional situation not likely to recur, pardon's anecdotal approach can effectively demonstrate the need for reform, and encourage public support for it. The Libby case reminds us how powerfully the president can speak from this bully pulpit. The fact that President Bush found Libby's 30-month sentence "excessively harsh" (even though it was entirely legal) may influence courts looking at other similar cases, embolden defenders arguing for leniency, and encourage the United States Sentencing Commission to rethink its guidelines. While the Libby grant itself is unlikely to persuade Congress that prison terms for nonviolent offenses should be reduced, a more systematic use of the power in less politically-charged cases might do so. Even in the heyday of parole, "changed public opinion after a period of severe penalties" was recognized as a respectable basis for the use of the pardon power.³³ If a judicious use of commutations can draw out support for more flexibility in the sentencing laws, post-sentence pardons can illustrate the need for more generally available administrative or judicial relief mechanisms (such as certificates of good conduct or expungement) by which convicted persons may avoid collateral legal penalties and gain respectability in the community.

Finally, apart from its role in encouraging law reform, pardon can tell good news about the justice system by recognizing and rewarding criminal justice success stories. Pardoning a former drug addict who has turned her life around and become a productive member of the community emphasizes the system's capacity to encourage rehabilitation, and its redemptive goals.

D. AVOIDING INFAMY

Over the years, the practice of issuing pardons frequently and regularly has tended to keep the power generally honest, or at least apparently honest, in the eyes of the public. While there have been many controversial pardons in our history, the president was never accused of using the power corruptly to reward friends or to conduct personal vendettas as long as they were issued at the request of the Justice Department. When ordinary pardoning became irregular and infrequent during the Clinton years, and the administration of the power was taken over by the White House itself, the perception of fairness and accessibility flowing from the Justice Department's review process no longer protected him. Even plainly meritorious grants were suspect. Until the Libby grant, President Bush enjoyed the insulating effect of the Justice Department review process, though his small number of unremarkable grants gave rise to a different kind of criticism, that he was trivializing the power. In this case, failure to exercise the power may have much the same consequence as abusive exercise.

IV. REINVENTING THE PARDON POWER

Our next president ought to identify the values pardon serves, define a clear role for it in the criminal justice system, and establish a system for administering the power that will maximize its potential for correcting injustice and encouraging reform. This

³² The 1939 Justice Department survey of release procedures in the United States pointed out that pardon was the "direct or collateral ancestor of most [statutory release procedures]." Attorney General's Survey, *supra* note at 9 at 295. In addition, pardon was "the tool by which many of the most important reforms in the substantive criminal law have been introduced." *Id.*

³³ *Id.* at 299.

process, long overdue in our jurisprudence, will likely suggest ways in which the law itself needs to be reformed. In rethinking pardon's role, and the most efficient use of the power under present circumstances, here are three questions the president might ask:

A. SHOULD EXECUTIVE CLEMENCY BE AVAILABLE ON A ROUTINE BASIS TO ORDINARY INDIVIDUALS, OR SHOULD IT BE RARE AND ITS BENEFICIARIES EXTRAORDINARY?

The concern for political risk that has informed pardoning for the past twenty years has become a self-fulfilling prophecy: as the power is exercised less and less frequently and produces fewer and fewer grants, it is increasingly regarded with suspicion and cynicism, and is harder and harder to justify. Happily, the process can work in the opposite direction: when pardons are issued generously and at regular intervals, as they were prior to 1980, the power appears more a function of government than a perk of office, and thus more legitimate in the public eye. Purely as a practical matter, in a substantial batch of pardons, people will not expect too much of any one recipient.

But more frequent and generous pardoning is not enough by itself to bolster public confidence in the power. Indeed, too much pardoning may indicate that there is something seriously wrong with the legal system, and thereby undermine confidence in the rule of law. Pardon must be perceived to advance rather than interfere with the just functioning of the legal system, which requires due respect for principles of comity with the other branches of government. Thus, the pardon power should not be used routinely to thwart clear legislative mandates or to revise the discretionary judgments of courts.³⁴ When the president intervenes in an area that is as elaborately regulated by statute and judicially-crafted guidelines as criminal sentencing, it is particularly important that he does so pursuant to clearly articulated standards, and a protocol of consultation with affected agencies and individuals. The generic criteria laid out in the United States Attorneys Manual ("disparity or undue severity of sentence, critical illness or old age, and meritorious service rendered to the government") do not begin to exhaust the extraordinary circumstances in which commutation may be appropriate.³⁵ For example, commutation and early release may be appropriate where there has been a fundamental change in a prisoner's situation unrelated to age or medical condition, such as exigent family circumstances, or some intervening event like a change in the law that has not been made retroactive. Commutation may also be warranted to remedy some act or omission by the prosecutor, or an error by the court. There may occasionally be cases outside these broad categories in which continued incarceration is deemed to be unjust or inappropriate. Finally, commutations may be used to signal a change in law enforcement priorities, or to suggest the need for reform of the law itself.

³⁴ I do not mean to suggest that the president is in any way constitutionally constrained in exercising his pardon power. Whatever constraint there may be is purely one of politics. President Clinton's suggestion that "Presidents and governors should be quite conservative on commutations ... but more broad-minded about pardons" reflects just such a commonsense political calculation. See note 25, *supra*.

³⁵ See THE UNITED STATES ATTORNEYS' MANUAL § 1-2.112 (pardon), § 1-2.113 (commutation) (available at <http://www.usdoj.gov/pardon/petitions.htm>). For an interesting perspective on the role of clemency in a guidelines system, see John Steer & Paula Biderman, *Impact of the Federal Sentencing Guidelines on the President's Power to Commute Sentences*, 13 FED. SENT'G REP. 154 (2001). See also United States Sentencing Guidelines § 1B1.13 (court may reduce a term of imprisonment where a prisoner is terminally ill, suffering from a permanent debilitating physical or medical condition, including from the aging process; death or incapacitation of the only caregiver of a minor child; or any other "extraordinary and compelling reason" identified by the Bureau of Prisons).

It is easier to justify frequent pardoning after the court-imposed sentence has been fully served, when the president has less competition from the other branches.³⁶ An individual who has fully satisfied the court-imposed penalty, accepted responsibility for the offense and made a reasonable effort to reconcile with those injured by it, and lived productively for a period of time in the community, should ordinarily be considered favorably for pardon. Humble status and modest means should not be disqualifying. Indeed, reserving post-sentence pardons for those who have performed heroic acts or rendered extraordinary service to their communities may send a message that forgiveness is not a final closure to which ordinary people may aspire. At the same time, the gravity of the offense or notoriety of the offender may suggest the desirability of imposing a longer waiting period before favorable action, in consideration of the symbolic effect of a pardon. A specific need for a pardon (e.g., to qualify for a particular job or license, obtain a security clearance, or avoid deportation) may be a relevant factor in considering whether to grant clemency, but a simple desire for forgiveness should be sufficient.

In the end, favorable consideration for pardon or commutation will always involve a weighing of aggravating and mitigating factors in the particular case. Risk is inherent in the enterprise of pardoning, and it is not for the faint-hearted. This just underscores the importance of a vetting process that maximizes the chances that a grant will be well received in the community, for, after all, it is the public to whom the president is ultimately responsible in pardoning.

There is a fine line between using the pardon power to point out and remedy shortcomings in the law, and relying on it to compensate more generally for failures in the system. Pardon is not justice, and there can be no expectation that it will be “fair” in the same sense that an equitable justice system is.³⁷ Pardon cannot fix every case of “unfortunate guilt,” and should not be expected to. Because a popularly chosen president has been designated as the “dispenser of the mercy of government,” his decisions will be informed not just by what an individual morally deserves, but also by what serves the public welfare. He cannot be deterred by knowing that not all similarly situated individuals will have the benefit of his mercy.³⁸

³⁶ While pardon does relieve collateral statutory penalties, this is an anticipated effect frequently written right into the law. *See, e.g.*, 18 U.S.C. § 921(20) (2000)(firearms disability); 8 U.S.C. § 1251(a)(2)(A) (iv)(removal of criminal aliens). Furthermore, the executive has a degree of discretion in deciding whether to enforce legislatively mandated collateral penalties like removal of non-citizens, a ban on union office-holding or firearms possession.

³⁷ Philosopher Jeffrie Murphy argues that mercy is not constrained by principles of fairness in the same way that justice is, because it is entirely voluntary and, in the case of public mercy, because it has a political dimension. For example, mercy “is more likely to be needed by the poor and weak than by the rich and powerful.” *Mercy and Legal Justice*, in JEFFRIE MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 182 (1988). Murphy points out that there is also a pragmatic reason why mercy is not constrained by a conventional obligation to be even-handed: “[I]f rational persons thought that once having shown mercy they would be stuck with making a regular practice of it, they might be inclined never to show it at all.” *Id.* at 183.

³⁸ I have argued elsewhere that the president has a duty to pardon, not just where moral desert has been established in a particular case, but also as a more general obligation of office: “This latter aspect of the duty to pardon is neither grounded in nor limited by considerations of law or morality, but is essentially one of politics.” *See Collar Buttons*, *supra* note 21, at 1506.

B. HOW CAN THE PARDON POWER BE MOST EFFECTIVELY ADMINISTERED TO PROTECT THE PRESIDENT AND REASSURE THE PUBLIC?

The question of who should be responsible for shaping federal pardon policy and for staffing individual clemency cases was squarely raised at the conclusion of the Clinton Administration, when the breakdown of the established process for vetting pardon cases stoked public outrage at some of the more unusual grants. But when President Bush took office, a decision was evidently made to go back to business as usual as if a hurricane had not just blown through. Presumably as this President wishes, that process has produced very little since he took office, and the Justice Department was entirely by-passed in the Libby case.

The pardon power has been administered by the Justice Department for many years, but it may be timely to rethink this arrangement in light of the inherent conflict with the Department's responsibility for prosecuting cases. The legitimacy of the president's use of the power depends importantly on how accessible it is, and prosecutors should not be seen as having an effective veto power in this regard. Particularly in commutation cases, it is the prosecutor's own discretionary decisions that are often at issue. While the views of the prosecutor and the sentencing judge should always be taken into account, as long as the pardon advisory function remains tied so closely to the interests of prosecutors it cannot provide the objectivity that the president needs to exercise the power wisely and responsibly. The president needs an advisor who has some degree of independence from those who prosecuted the underlying criminal case, who can bring a different policy perspective and different values to bear on the matter, and whose independent political accountability can provide the president a measure of protection from public criticism. On the other hand, the obvious public comfort taken from Justice's involvement in pardon cases, evidenced in the complaints heard about the lack of it at the time of the Libby grant, suggests a somewhat less radical restructuring may be in order.³⁹

In any reconsideration of how the pardon power is administered, questions of transparency and accountability must be considered. The states have developed a variety of arrangements for administering pardon under their own constitutions that include public hearings and reasoned justifications, which may produce greater accountability but have efficiency trade-offs when compared to the confidential Justice Department advisory process.⁴⁰ It is also essential to consider what to do about staffing if a reinvigorated pardon power turns out to be wildly popular, as seems likely after so long a dry spell. While any statutory regulation of the pardon power would

³⁹ Compare Evan P. Schultz, *Does the Fox Control Pardons in the Henhouse*, 13 FED. SENT'G REP. 177 (2001) (responsibility for administration of pardon power should be moved away from the influence of prosecutors into the White House), with Brian M. Hoffstadt, *Guarding the Integrity of the Clemency Power*, 13 FED. SENT'G REP. 180 (2001) (responsibility for staffing clemency cases should remain in the Justice Department, but program should be restructured so as to restore attorney general's role in process).

⁴⁰ See MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 18-38 (2006) (updated profiles of each state's pardoning practice accessible at <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>).

require a constitutional amendment, there is no reason why the president himself could not put in place a system for administering the power that would enable him to use it more efficiently and purposefully than the present system permits.⁴¹

C. HOW CAN THE PRESIDENT MOST EFFECTIVELY USE THE PARDON POWER TO PROVOKE AND SHAPE A NATIONAL CONVERSATION ABOUT CRIMINAL JUSTICE POLICY?

Both at a national and state level, there is a growing concern that the crime control strategies of the past 20 years have yielded only broken minority communities, budget deficits, and a powerful prison-industrial complex that demands a steady stream of involuntary recruits. Long prison sentences and permanent collateral penalties are now generally recognized as inefficient and ineffective, particularly where no serious violence is involved, yet legislators and executive officials alike are reluctant to support law reform for fear of being labeled “soft on crime.” While we may not have reached a Hamiltonian “season of insurrection,” there is an urgent need for presidential leadership to begin the work of reviewing laws and policies that have aggravated social and public health problems without yielding offsetting gains in public safety. The public is probably more prepared than are most legislators to welcome and support serious and sensible efforts to reduce federal prison sentences, and to encourage criminal offenders to turn their lives around, including pardoning them where they are successful. The president could weigh into this important domestic policy discussion using the tool the Framers put at his most immediate disposal.

Given the high level of dissatisfaction with federal sentencing laws and practices, the president will inevitably be called upon to decide particular clemency cases with a larger agenda in mind. With a clear vision of that agenda, and a reliable system of administration devised to accomplish it, the pardon power need not remain the one executive power whose leadership potential has gone entirely untapped in contemporary politics.

Used wisely, the pardon power can reveal flaws in the legal system, influence attitudes, and build consensus for change. Some of President Clinton’s less controversial final grants highlight harsh drug sentencing laws, failure to give retroactive effect of changes in the law, unwarranted disparity among co-defendants, mandatory deportation of non-citizens convicted of minor and dated offenses, and unreasonably harsh collateral sanctions. As discussed above, there are sensible limits on the extent to which the president may want to rely on the pardon power if it puts him on a collision course with Congress or the courts. But the president is not so constrained where the reason for the grant relates to policies and practices that are under the executive’s control, such as unwarranted disparity among co-defendants, unrewarded cooperation with the government, or some discretionary act or omission by the prosecutor that warrants correction. And there are many less institutionally threatening things that the pardon power can accomplish, like recognizing and rewarding rehabilitation, enabling prisoners to die at home with their families, or simply satisfying an individual’s desire for an official gesture of forgiveness. Pardon can emphasize the redemptive goals of the justice system, just as front-end prosecution emphasizes its retributive goals.

⁴¹ See U.S. Presidential Clemency Board, Report to the President (1975) (describing system establishing for administering President Ford’s Vietnam amnesty proclamation). Dan Kobil recommended years ago that an administrative board be appointed to decide most routine clemency applications, leaving the president free to consider more purely political uses of the power, but that interesting suggestion has never been seriously considered. See Kobil, *supra* note 1, at 622.

Finally, to obviate the need to rely on the pardon power as a routine relief mechanism, the president should also consider developing alternative ways in which individuals can obtain reduction of court-imposed sentences in appropriate cases and from the collateral consequences of conviction. Federal law now provides for judicial relief where there has been a fundamental change in a prisoner's situation since sentencing. This mechanism, controlled by the Bureau of Prisons, should be used more frequently in light of its purpose and usefulness, under guidelines promulgated by the United States Sentencing Commission.⁴² Consideration should be given to establishing an administrative mechanism for reconsidering prison sentences in light of changed circumstances, which would resemble a parole system only insofar as it would permit early release from prison in appropriate cases. In addition, an alternative mechanism for recognizing and rewarding an individual's "rehabilitation," similar to the administrative and judicial certificates of good conduct now available in New York and Illinois,⁴³ could be developed to give people who have been convicted a chance to put their past behind them.

V. CONCLUSION

In the past 25 years, presidents have allowed the pardon power to atrophy as a remedy available to ordinary people. During all of this time there has never been a considered discussion of the role that pardon should play in the justice system, even after the transformation of federal sentencing to a determinate no-parole system. There have been few pardon grants in recent years, and no effort to make pardoning meaningful. Grants are rare and appear random, and the pardon process arbitrary and untrustworthy. Without either a clearly defined role or a reliable system for management, pardon is susceptible to abuse, real and imagined, as evidenced by the public response to the final Clinton grants and by President Bush's Libby commutation. Recognizing the possibility that the power may be lost entirely unless it is brought under control and the public's confidence in it restored, it is best to start the discussion now.

Many doubt the relevance of old-fashioned unruly pardon to our streamlined modern-day justice system. But they are wrong. If there was little practical need or theoretical justification for pardon in an indeterminate sentencing system, its virtues shine now that the criminal justice system so often seems merciless. Rule-based sentencing has severely limited the courts' ability to dispense individualized justice and created new possibilities for disparity and unfairness, the more pernicious because they are hidden within the prosecutor's office. With the proliferation of collateral penalties and easy access to criminal history information, the overwhelming majority of people convicted of a crime in America have no realistic hope of ever satisfying their debt to society. Not since the 19th century has pardon been as relevant from both a moral and practical point of view, for those who make and apply the law, as well as for those convicted of breaking it. No one should be fooled into thinking otherwise by the fact that the power has in recent years been used so sparingly and irregularly.

⁴² See 18 U.S.C. § 3582(c)(1)(A)(i) (2002); United States Sentencing Guidelines § 1B1.13 (2007) (available at <http://www.ussc.gov/2007guid/may2007rf.pdf>).

⁴³ See Margaret Love & April Frazier, *Certificates of Rehabilitation and Other Forms of Relief from the Collateral Consequences of Conviction: A Survey of State Laws* (2006) (prepared for the ABA Commission on Effective Criminal Sanctions) (available at http://meetings.abanet.org/webupload/commupload/CR209800/sitesofinterest_files/AllStatesBriefingSheet10106.pdf). The National Conference of Commissioners of Uniform State Laws is developing a Uniform Act on the Collateral Consequences of Conviction that combines a certificate program with a nondiscrimination provision. See http://www.law.upenn.edu/bll/archives/ulc/ucsada/2007_amdraft.pdf

The Libby commutation will be redeemed if it marks the beginning of a discussion about the role of pardon in the justice system, and in our national politics. Any serious discussion of this venerable back-end remedy will feed into the conversation already underway about the utility and fairness of our front-end law enforcement and sentencing strategies. If pardon is revived only to set the scene for its own decent interment, that will be a lot. There are many who believe that the harsh criminal penalties put in place 20 years ago have done little to reduce crime and a lot to produce injustice and burden poor communities. They are ready to turn the page and try something new. The pardon power can play a useful role in this reform effort, as it has in past eras, if public confidence in it is restored. This in turn requires perceived fairness and actual reliability in the pardon process, regularity and frequency of pardon grants, and above all a president's commitment to using the power in an intentional and generous manner.

The Emerging Threat of Regulatory Preemption

David C. Vladeck*

The Bush Administration has been quietly waging a campaign to dramatically reconfigure American tort law by claiming that routine regulatory action taken by federal agencies has the effect of preempting state law damages claims. The campaign has been remarkable not just because of its scope, but also because it has attracted virtually no public attention. Why has the campaign gone essentially unnoticed? Because the Administration does not seek to change tort law through transparent means, like the enactment of a federal law or the adoption of regulations. Instead, it has resorted to simply including statements in lengthy and obscure preambles in Federal Register notices that regulatory action taken by an array of federal agencies—the Food and Drug Administration, the National Highway Traffic Safety Administration, the Consumer Product Safety Administration, to name a few—broadly preempts state law. One commentator has aptly dubbed this campaign “preemption by preamble.”¹

The concern here is not with agencies expressing their position on the preemptive effect of their regulatory actions. That is unobjectionable, and, in many instances, unavoidable. What is objectionable is that agencies are making substantive preemption determinations in a way that is neither transparent nor democratic, and are doing so because the Administration has determined that insulating big business from tort litigation is right as a matter of federal policy. Invariably, in making these preemption determinations, the agency is repudiating long-standing agency policy to the contrary.

This White Paper is intended to serve two purposes: First, to inform readers that this campaign is well-underway and sketch out, albeit briefly, some of the serious policy implications that it raises; and second, to explain why making preemption determinations by regulatory fiat raises serious separation of powers and agency capture concerns.

I. THE ADMINISTRATION’S REGULATORY PREEMPTION CAMPAIGN

Historically, state tort and damages law have served as a background to state and federal regulatory law. That makes sense. At its core, tort law serves a complementary purpose to direct government regulation. Regulation seeks to prevent injuries,

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¹ Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007).

weed out products that are unsafe or ineffective, and reward innovation. Tort law serves related but different functions—it compensates those injured through the fault of others, alerts the public about unforeseen hazards, and deters excessive and unwarranted risk taking.²

Congress has generally been respectful of the role that state tort law plays in our system of justice and has rarely expressly preempted tort law. When it has, it has generally provided a federal remedy in lieu of the displaced state remedy.³ But at times, Congress has included express preemption provisions in statutes that seek to harmonize federal and state regulatory schemes, often making clear that state regulatory requirements different from or in addition to federal ones are preempted. These statutes are generally silent on whether they wipe away state tort claims as well, and the Supreme Court has held that, in some cases, regulatory preemption provisions may provide a basis for preempting some, but generally not all, state tort law claims. Many statutes contain no preemption provision at all, and one would think that, in those cases, preemption claims would be especially problematic.⁴ This Administration has decided to use federal regulatory action to bar tort liability without much regard to whether Congress, in the statute that authorizes the federal agency to act, has determined the scope of federal preemption.

Of course, the Administration's preemption determinations are not self-enforcing. It will be up to state and federal courts, in private cases brought by those injured by defective products, to decide whether the federal action has the claimed preemptive effect. This inquiry raises a host of thorny, yet unresolved, legal questions, including: (1) in the absence of any clear delegation of authority by Congress on preemption questions, do agency views on preemption matter at all?⁵; (2) what deference, if any, should be accorded agency legal pronouncements on preemption questions that are not the

² Consider the following example. When the *Titanic* set out on its maiden and final voyage on April 10, 1912, it was in full compliance with applicable regulations regarding the number of lifeboats it had to carry, which had been set in 1884 by the British Board of Trade when the largest vessel afloat was one-quarter the *Titanic*'s size. The *Titanic* carried sixteen lifeboats, with a maximum capacity of 980 people, although it had on board 2,227 passengers and crew. When the *Titanic* hit an iceberg and sank, over 1,500 people perished. The *Titanic* example demonstrates the perils of relying on regulatory standards alone to define the appropriate level of care. When functioning well, a regulatory system prevents injury and rewards innovation. But all too often there are gaps in our regulatory process that jeopardize the public's safety. That is certainly true today, where one only needs to read the day's headlines to see examples of regulatory failure and ossification.

³ See, e.g., 42 U.S.C. §§ 2210 *et seq.* (Price-Anderson Act which federalizes all claims for personal and property damage arising from significant accidents at nuclear power plants). The constitutionality of the Act was upheld in *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978); 42 U.S.C. §§ 300aa-1 *et seq.* (Vaccine Act which federalizes all claims arising from personal injuries relating to the administration of vaccines); Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, 115 Stat. 230 (2001) (9/11 Compensation Fund, which substitutes a federal remedy for tort claims 9/11 victims and their families could have asserted against the airlines whose planes were hijacked); 29 U.S.C. §§ 1001 *et seq.* (Employee Retirement Income Security Act of 1974, which federalizes disputes over employment related benefits).

⁴ See *Bates v. Dow AgroSciences LLC*, 554 U.S. 431, 449-450 (2005) (noting that "The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against pre-emption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.")

⁵ *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006) (holding that the answer to that question is no).

product of rulemaking or other deliberative means?⁶; and (3) should agency preemption determinations be given retrospective or only prospective effect?⁷

There are many examples of agencies claiming for themselves the power to define the boundaries between federal and state law. Canvassing them all would be a Herculean task beyond the scope of this Issue Brief. Instead, I will focus on agencies that regulate everyday consumer products, such as the Food and Drug Administration (FDA), the National Highway Traffic Safety Administration (NHTSA), the Consumer Products Safety Commission (CPSC), and the Federal Railroad Administration (FRA).

A. FDA AND DRUG SAFETY

Reversing a position held by the agency since its founding nearly 80 years ago, the FDA has announced that its approval of a drug's label immunizes the manufacturer from most failure-to-warn claims. According to the FDA, determination in civil litigation that an FDA-approved warning fails to warn adequately of risks may force manufacturers to add warnings not approved by the FDA, or even warnings that the FDA considered and rejected.⁸ For that reason, the FDA asserts that most failure-to-warn litigation is preempted.

The FDA makes this claim even though Congress has declined to enact a preemption provision shielding drug manufacturers from failure-to-warn litigation, even though there has been a steady procession of failure-to-warn litigation both before and after the advent of the FDA with no evidence that any case has, in fact, interfered with the FDA's control of drug labels, and even though the federal Food, Drug and Cosmetic Act (FDCA) and FDA implementing regulations obligate manufacturers to modify drug labels to reflect newly-discovered risk information either by asking the FDA for permission or by making the change and then seeking the FDA's permission after-the-fact.⁹

In a forthcoming article in the *Georgetown Law Journal*, former FDA Commissioner David A. Kessler and I argue that the factors the FDA cites to support its new preemption position do not justify insulating labeling decisions from state failure-to-warn litigation. We make three main points:

First, the FDA's pro-preemption arguments are based on a reading of the FDCA that, in our view, is not only unsupported by the Act (which has no preemption provision), but also, if adopted, would undermine the incentives drug manufacturers have to change labeling unilaterally to respond to newly-discovered risks, or to seek labeling changes from the FDA. Drug manufacturers have significant authority—and indeed a responsibility—to modify labeling when hazards emerge and may do so without securing the FDA's prior approval. The background possibility of failure-to-warn litigation provides important incentives for drug companies to ensure that drug labels reflect accurate and up-to-date safety information.

⁶ See *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001) (suggesting that strong deference, or Chevron deference, should be accorded only agency pronouncements made in rulemaking or through other formal means).

⁷ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988) (stating general rule that newly-adopted agency rules may be applied only prospectively).

⁸ FDA, *Final Rule, Requirements on Content and Format of Labeling for Human Prescription Drugs and Biological Products*, 71 FED. REG. 3922, 3934 (Jan. 24, 2006).

⁹ 21 C.F.R. § 201.80(e).

Second, the FDA does not have the resources to perform the monumental task of monitoring the performance of every drug on the market.¹⁰ The FDA regulates products that amount to one-quarter of consumer spending in the United States,¹¹ but it has only 9,000 employees nationwide.¹² According to the most recent statistics, the FDA's Office of New Drugs, which reviews new drug applications, employs over 1,000 physicians and scientists to review the approximately 100 new drug applications each year and to supervise post-marketing studies. In contrast, FDA's Office of Drug Safety, the unit charged with monitoring adverse events associated with the 3,000 prescription drugs (and 11,000 drugs altogether) on the market, has about 100 professional employees.¹³ To be sure, Congress has recently enacted the Food and Drug Administration Amendments Act of 2007 which will add resources to the FDA and bolster its statutory authority.¹⁴ But as Senator Edward Kennedy, the Act's principal Senate sponsor warned, even a beefed-up FDA will still face resource constraints and that "the resources of the drug industry to collect and analyze" safety data "vastly exceeds the resources of the FDA, and no matter what we do, they will always have vastly greater resources to monitor the safety of their products than the FDA does."¹⁵

Third, state damages litigation helps uncover and assess risks that are not apparent to the agency during a drug's approval process, and this "feedback loop" enables the agency to better do its job. FDA approval of drugs is based on clinical trials that involve, at most, a few thousand patients and last a year or so. These trials cannot detect risks that are relatively rare, affect vulnerable sub-populations, or have long latency periods. For this reason, most serious adverse effects do not become evident until a drug is used in larger population groups for periods in excess of one year.¹⁶ Time and again, failure-to-warn litigation has brought to light information that would not otherwise be available to the FDA, to doctors, to other health care

¹⁰ INST. OF MED., *THE FUTURE OF DRUG SAFETY: PROMOTING AND PROTECTING THE HEALTH OF THE PUBLIC* 193 (National Academies Press 2006) available at <http://www.iom.edu/CMS/3793/26341/37329.aspx>.

¹¹ FDA News, *The Food and Drug Administration Celebrates 100 Years of Service to the Nation* (Jan. 4, 2006) available at: <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01292.html>.

¹² Food and Drug Administration, *An Overview of the FDA*, available at: www.fda.gov/oc/opacom/fda101/sld015.html (last visited July 11, 2007). In addition to drug safety, these employees also review applications to market new medical devices, monitor the safety of the medical devices on the market, inspect drug and device manufacturing facilities, inspect virtually all of the non-meat food products sold in this country (including a rising flood of imported foods), inspect food processing and storage facilities, regulate dietary supplements, oversee the safety of the blood supply and tissues for transplantation, regulate radiologic and biologic products, and regulate veterinary medicines and cosmetics. *Id.*

¹³ *FDA's Approval Process: Up to the Challenge?*, Hearings before the S. Comm. on Health, Education, Labor and Pensions, 109th Cong., 10 (Joint Statement of Sandra L. Kweder, M.D., Deputy Director, Office of New Drugs, and Janet Woodcock, M.D., Acting Deputy Commissioner for Operations, Food and Drug Administration, to the Committee on Health, Education, Labor and Pensions, U.S. Senate) (March 1 & 3, 2005) (reporting that for fiscal year 2005 the Office of Drug Safety had about 90 full time employees, but projecting for fiscal year 2006 an increase to about 110 full time employees) available at: <http://www.fda.gov/ola/2005/drugsafety0301.html> (table).

¹⁴ Pub. L. No. 110-85, 121 Stat. 823 (2007).

¹⁵ 153 Cong. Rec. S. 11832 (daily ed., Sept. 20, 2007) (remarks of Sen. Kennedy).

¹⁶ See, e.g., *Hearings on Risk and Responsibility: The Roles of the FDA and Pharmaceutical Companies in Ensuring Safety of Approved Drugs, Like Vioxx*, Before the H. Comm. on Government Reform, 109th Cong., 23, 55 (2005) (testimony of Steven Galston, Acting Director, Center for Drug Evaluation and Research, FDA).

providers, and to consumers. And failure-to-warn litigation has often preceded and clearly influenced FDA decisions to modify labeling, and, at times, to withdraw drugs from the market.¹⁷

Congress is, of course, acutely aware of the shortcomings in the FDA's ability to police the marketplace on drug safety, which have been driven home by the recent public health failures involving widely-prescribed drugs like Vioxx, Bextra, Celebrex, Avandia, Rezulin and Baycol. Indeed, the 2007 Amendments reflect Congress's dissatisfaction with the FDA's performance. The FDA's current claim that it can single-handedly discipline this market is a difficult claim to accept.

But even if there were more to the FDA's claim, that still leaves unanswered the key point here: namely, that the agency's claim that it is authorized to direct the preemption of state law is not based on any mandate from Congress. Congress has not delegated to the FDA the authority to define the borderline between federal regulation and state tort law. Nonetheless, the agency claims authority to cut off state law *now* because, at some point in the future, a state court *might* issue a ruling that undercuts the agency's regulatory authority.¹⁸

B. FDA AND MEDICAL DEVICES

The FDA has also recently reversed track with respect to medical devices, contending that approval of specific medical devices triggers the preemption provisions of the 1976 Medical Device Amendments (MDA) to the FDCA. The shift in positions here is as dramatic as it is for drug preemption. For more than twenty-five years after the MDA's enactment, the government formally opposed preemption for medical devices, including devices specifically approved by the FDA through the premarket approval process (so-called PMA devices).¹⁹

The case for preemption of medical device claims is especially weak. The Medical Device Amendments were enacted in the wake of the Dalkon Shield debacle²⁰ to strengthen, not water-down, consumer remedies. At no point during Congress's extensive deliberations on the MDA did anyone suggest that Congress should strip people injured by defective medical devices of their only recourse. Indeed, Congress was well aware of the massive litigation over the Dalkon Shield and cited it favorably in its deliberations.²¹ Nor is the FDA's argument consistent with the narrow preemption

¹⁷ See, e.g., Lasser, *et al.*, *Timing of New Black Box Warnings and Withdrawals for Prescription Medications*, 287 J. Am. Med. Ass'n 2215, 2218 (2002); Aaron Kesselheim & Jerry Avorn, *The Role of Litigation in Defining Drug Risks*, 287 J. Am. Med. Ass'n 308, 310 (2007) (citing examples).

¹⁸ The FDA first announced its shift of position in 2002 and since then lower courts are divided on whether to accord the FDA's position deference and whether failure-to-warn claims are preempted. Brief of the U.S. in *Motus v. Pfizer, Inc.*, 358 F.3d (9th Cir. 2004), available at 2002 U.S. 9th Cir. Briefs LEXIS 89. The Supreme Court has asked the Solicitor General to provide the Court with the government's views about whether to review a ruling of Vermont Supreme Court rejecting a drug company's preemption claim. See *Wyeth v. Levine*, petition for cert. pending No. 06-1249 (filed Mar. 12, 2007). At some point, the Court will have to address the growing division in the lower courts on this question.

¹⁹ See generally Margaret Jane Porter, *The Lohr Decision: FDA Perspective and Position*, 52 Food & Drug L.J. 7 (1997); U.S. Amicus Brief, *Smith Indus. Med. Sys., Inc. v. Kernats*, No. 96-1405, cert. denied, 522 U.S. 1044 (1998).

²⁰ Dalkon Shield refers to an intrauterine contraceptive device introduced by the A.H. Robins Co. in 1970. Despite being aware of potentially harmful flaws in the device, the manufacturer pursued aggressive marketing, claiming the device to be both safe and effective. Ultimately, over 300,000 lawsuits were filed against the A.H. Robins Company and led to billions of dollars spent in settlements. Richard B. Sobol, *BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY* (U. Chi. Press 1991).

²¹ See S. Rep. No. 94-33, at 1 (1975); H.R. Rep. No. 94-853, at 3-8 (1976).

provision in the Act, which is aimed at displacing state laws and regulations that are out of step with the FDA's.²² When Congress was crafting the MDA, it had to confront the serious problem that, in the absence of FDA regulation of medical devices, states stepped in to fill the void. The MDA was thus enacted against a backdrop of relatively robust *state* regulation of medical devices. Congress therefore had to address the preemption question and chose, as an initial matter, to preempt state regulation that was not identical to the FDA's regulation of devices. But the MDA goes on to *permit* states to seek FDA approval to impose their own, stricter requirements on devices.²³ Again, there is nothing in that history that suggests that Congress intended to wipe away state tort claims.

This conclusion is fortified by the Supreme Court's decision in *Medtronic Inc. v. Lohr*,²⁴ which held that the MDA did not preempt tort claims for devices which were permitted to enter the market because they were "substantially equivalent" to devices on the market in 1976 when the MDA was enacted. *Medtronic* strongly suggests that the Court is likely to reject a preemption claim for even those medical devices specifically approved by the FDA, since the Court was, above all else, concerned with actual inconsistencies between federal and state mandates, not with an abstract potential for tension.²⁵ Given the long history of litigation over medical devices, both before and after the MDA, a showing of actual tension or conflict is, in my view, highly unlikely.

The FDA has also had to strain to suggest that its approval of a device is a warrant for its safety. In fact, premarket approval is a one-time licensing decision that is based on whether the device's sponsor has shown a "reasonable assurance" of safety. There is no provision in the MDA for devices to be periodically re-certified by the FDA. Medical devices are often approved on the basis of a single clinical trial, often involving very small numbers of patients. After all, device companies cannot ethically conduct double-blind clinical trials on life-saving or sustaining medical devices with placebo groups, or place medical devices in healthy people to see whether the device is safe. Consequently, the pre-approval testing on medical devices is often quite limited to small groups of patients who are studied for relatively brief periods of time. Once on the market, the FDA engages in only limited surveillance and defective devices typically remain on the market until the manufacturer commences a voluntary recall or pulls them for other reasons. The FDA depends on the manufacturer of the device to closely monitor the device's performance and alert the FDA when problems arise.

The FDA's track record demonstrates the agency's woeful inability to single-handedly protect the American people against defective and dangerous medical devices. Just in the past few years, we have seen massive recalls of defibrillators,²⁶

²² The preemption provision in the MDA has two parts: the first part, 21 U.S.C. § 360k(a), preempts state requirements that are "different from, or in addition to," those imposed by the FDA. The second part, 21 U.S.C. § 360k(b), sets up a procedure to permit states to get waivers from the first part to enable the state to impose stricter standards than the FDA. For that reason, the argument that the word "requirements" subsumes state tort law seems especially strained since there is no way for the waiver provision in subsection (b) to apply to rulings in tort litigation.

²³ See 21 U.S.C. §§ 360k(a) & (b).

²⁴ 518 U.S. 470 (1996).

²⁵ 518 U.S. at 500-503.

²⁶ Consider the case of the Guidant Prizm II defibrillators. Even after Guidant learned of serious defects in its defibrillators, and even after Guidant had developed a newer, safer model, it kept selling the defective defibrillators until forced by adverse publicity (generated by the death of a 21-year-old college student and tort litigation) to recall the devices. By that time, more than 24,000 of the defective devices had been implanted in patients, who then faced the daunting decision of whether to have replacement

pacemakers,²⁷ heart valves,²⁸ hip and knee prostheses,²⁹ and heart pumps³⁰—all of which have exacted a terrible toll on the patients who have had them implanted in their bodies, and who often face the daunting prospect of explantation and replacement surgery. If the FDA gets its way, all of these people would be left without any remedy at all.³¹ Premarket approval is an important process intended to put an end to the marketing of devices without meaningful testing and with no assurance of safety. But while the PMA process provides minimum safeguards, it cannot replace the continuous and comprehensive safety incentives, information disclosure, and victim compensation that tort law has traditionally provided.³²

surgery. See generally *In Re Guidant Corp. Implantable Defibrillators Prod. Liab. Litig.*, 2007 WL 1725289 (D. Minn. June 12, 2007); Barry Meier, *FDA Expanding Inquiry into Heart-Device Company*, N.Y. Times, Aug. 25, 2005, at C3.

²⁷ Although Medtronic's 4004M pacemaker was approved by the FDA, it was later determined to be defectively designed. Some patients died when the pacemaker's defective lead failed; many patients were forced to undergo open-heart surgery to replace the defective lead. The courts have split on whether the plaintiffs' claims were preempted. Compare *Cupek v. Medtronic, Inc.*, 405 F.3d 421 (6th Cir. 2005) (finding claims preempted) with *Goodlin v. Medtronic, Inc.*, 167 F.3d 1367 (11th Cir. 1999) (finding no preemption).

²⁸ The St. Jude Silzone heart valve is another instructive case. This valve was approved on the basis of only scanty testing involving 20 human subjects. After St. Jude starting selling the valve, testing revealed that its silver coating not only did not protect against infection, but it also caused the valves to leak. Litigation publicized the risk and forced St. Jude to recall the problem valves, but not until they had been implanted in over 36,000 patients. See generally *In re St. Jude, Inc. Silzone Heart Valves Prod. Liab. Litig.*, 2004 WL 45503 (D. Minn. Jan. 5, 2004); see also *Bowling v. Pfizer*, 143 F.R.D. 141 (S.D. Ohio 1992) (class action involving 55,000 patient implanted with defective heart valve).

²⁹ The Sulzer hip and knee implant litigation underscores the need for tort law to compensate patients whose lives are disrupted and health jeopardized by defective devices. The FDA granted approval to these implants, but it soon turned out that a manufacturing defect kept the implants from bonding properly with the patients' bones. *In re Sulzer Hip Prothesis & Knee Prothesis Liab. Litig.*, 455 F. Supp. 2d 709, 712 (N.D. Ohio 2006). Testimony in litigation exposed the fact that the leakage was caused by unsanitary conditions at the manufacturing facility. See J. Scott Orr & Robert Cohen, *Messy Plant Made Faulty Hip Joints*, Times-Picayune, Aug. 13, 2002, at 1. Finally, in December 2000 Sulzer notified the FDA that it recalled about 40,000 defective hip implants, 26,000 of which had been implanted in patients. *In re Sulzer Hip Prothesis & Knee Prothesis Liab. Litig.*, 268 F. Supp. 2d 907, 911 (N.D. Ohio 2003). Even after the recall, Sulzer reprocessed 6,000 of the implants and sold them to patients; many of these devices failed as well. Many of the victims needed to undergo multiple additional surgeries to explant the faulty devices and replace them with more effective ones. Ultimately, due to a settlement, patients received some compensation for their pain and suffering, as well as compensation for each additional surgery that was needed to replace a defective implant. See Orr & Cohen. Again, under the FDA's approach, the agency's approval of the Sulzer device might well have absolved the company of liability.

³⁰ See generally, *Horn v. Thoratec Corp.*, 376 F.3d 163 (3d Cir. 2004) (finding claim against manufacturer of heart pump device preempted, even though evidence showed that it was defectively designed and that the pump had been redesigned to correct design defect).

³¹ I do not mean to suggest that the FDA's pro-preemption campaign has been limited to drugs and medical devices, although they constitute the bulk of specific product regulation in which the agency engages. The FDA has gone so far to claim that its proposed regulation of sun-screen products, once finalized, will preempt not only conflicting state positive law (statutes and regulations), but also state common law claims. See FDA, *Sunscreen Drug Products for Over-the-Counter Human Use, Proposed Amendment of Final Monograph; Proposed Rule*, 72 Fed. Reg. 49070, 47109-10 (Aug. 27, 2007).

³² As with drug preemption, lower courts are widely divided on whether FDA approval of PMA devices preempts state law claims. Compare, e.g., *Goodlin v. Medtronic, Inc.*, 167 F.3d 1367 (11th Cir. 1999) (no preemption) with *Horn v. Thoratec Corp.*, 376 F.3d 163 (3d Cir. 2004) (preemption). On December 4, 2007, the Supreme Court heard argument in a case presenting the question whether the MDA preempts tort claims involving PMA devices. *Reigel v. Medtronic, Inc.*, No. 06-179. The Court will issue its ruling by June 2008.

C. NHTSA AND ROOF STRENGTH

The campaign to engage “preemption by preamble” is scarcely limited to the FDA. The National Highway Traffic Safety Administration (NHTSA) now routinely claims that its regulatory actions preempt state law—both state statutory and regulatory law *and* state damages actions. The NHTSA makes these claims even though its governing statute, the federal Motor Vehicle Safety Act (Safety Act), contains a “savings clause” that says that “compliance with” a NHTSA standard does “not exempt a person from liability at common law.”³³ The Act also makes clear that NHTSA standards are *minimum* standards that manufacturers may exceed.³⁴ If that were not so, then all cars would have identical safety equipment, and the Volvo, which markets its cars on the basis of safety, would in all likelihood have gone the way of the Edsel.

Despite these clear signals from Congress, the NHTSA now claims that its new standards preempt state law. Take one illustration.³⁵ More than 10,000 people die and another 24,000 are seriously injured each year in rollover crashes. After considerable prodding from Congress, the NHTSA is finally on the brink of issuing a new standard on roof strength. Regrettably, NHTSA’s proposed standard would save fewer than 60 lives a year, mainly because most vehicles manufactured today meet or exceed NHTSA’s proposal. Nonetheless, NHTSA contends that its new standard will preempt all state law claims for roof crush, thereby cutting off the only redress injured consumers have and stifling innovation.³⁶ Nowhere has NHTSA satisfactorily explained how its position can be reconciled with Congress’s clear instruction in the Safety Act to preserve common law remedies.³⁷

There are other reasons for concern over NHTSA’s new preemption theory. To begin with, there are questions about NHTSA’s capacity to regulate the massive automobile industry without the backstop of state damages law. NHTSA faces formidable challenges in doing battle with the industry because it is so profoundly outmatched. NHTSA is a tiny agency, with only a skeletal staff (625 employees), with limited information-gathering authority, and no demonstrated ability to act quickly

³³ 49 U.S.C. 30103(e).

³⁴ 49 U.S.C. §§ 30103(b)(1)

³⁵ NHTSA has also claimed that its new standard governing door locks preempts state common law, see NHTSA, *Federal Motor Vehicle Safety Standards; Door Locks and Door Retention Components, Final Rule*, 72 Fed. Reg. 5385 (Feb. 6, 2007); and NHTSA has argued that its proposed standard on designated seating positions and seat belt assembly anchorages will preempt state common law. 70 Fed. Reg. 36094 (June 22, 2005).

³⁶ Survivors of rollover crashes often face serious brain and spinal cord injuries. Consider the example of Major Barry Muth, who was serving in the Army in Saudi Arabia when he was a passenger in a Ford Crown Victoria involved in a rollover. Both he and the driver were wearing seat belts. The driver sustained only minor injuries. But on Major Muth’s side of the vehicle, the roof crush was so severe that he sustained serious spinal damage, leaving him a quadriplegic. Muth and his family sued Ford, alleging that the Crown Victoria provided inadequate protection in a rollover crash. Muth’s expert testified that the roof had collapsed twelve to fifteen inches on the passenger side, and that a slight increase in the thickness of the steel in the roof structure would have reduced roof collapse to only one or two inches. Ford did not dispute this, but argued instead that the cause of injuries in rollover accidents is the fact that even a belted passenger in a rollover will drop five inches—more than the normal three-to-four inches of headroom in most cars. The jury sided with Major Muth, concluding that if the roof had buckled only a few inches rather than a foot or more, Muth would not likely have been seriously injured. Ford appealed, but the court of appeals rejected Ford’s argument. *Muth v. Ford Motor Co.*, 461 F.3d 557 (5th Cir. 2006). Of course, if NHTSA gets its way, cases like Major Muth’s will be preempted, and the families of the 10,000 people killed each year in rollover crashes, and the 24,000 more who are seriously injured, will have no recourse.

³⁷ NHTSA, *Federal Motor Vehicle Safety Standards; Roof Crush Resistance, Notice of Proposed Rulemaking*, 70 Fed. Reg. 49,223, 49,225-27, 49,245-56 (Aug. 23, 2005).

in the face of emerging safety hazards.³⁸ It took the Ford Explorer/Firestone Tire debacle, and considerable prodding from Congress, to prompt NHTSA to revise its roof strength standard. Congress had to step in to require NHTSA to force manufacturers to install tire pressure warning gauges.³⁹ And NHTSA's fuel safety standard is at least thirty-five years out of date, even though fuel-fed fires are a leading cause of fatalities in vehicle crashes.⁴⁰

NHTSA may have bowed to industry pressure on preemption as well. Career NHTSA employees claim that the preemption language inserted into the roof strength standard was written by political employees at the behest of the auto industry.⁴¹ Given how little the standard will accomplish in terms of reducing deaths and injuries from rollover crashes, some auto safety groups claim that the new standard's main purpose is to provide a liability shield to industry, not to enhance protection for consumers.⁴²

Indeed, there is a powerful argument that the most effective discipline on the automobile industry has not been the issuance of NHTSA standards, but has been state damage actions, which have forced the industry to develop roofs far stronger, and fuel systems far safer, than NHTSA's outdated standards. This concern is reflected in the Safety Act itself. The "savings clause" stands as a clear signal that Congress intended to preserve the corrective justice function of state damage claims, and the minimum standards provision reflects Congress's determination that manufacturers should compete on the basis of enhanced safety. None of those concerns is effectively addressed by NHTSA.

D. THE CPSC AND MATTRESS FLAMMABILITY

The Consumer Product Safety Commission (CPSC) has also joined the Administration's drive for preemption of state law remedies for injured consumers. Like the FDA and NHTSA, it too has seen a substantial reduction in its personnel and resources over the years. At present, it has only 400 full-time staff and an annual budget of about \$63 million—less than half of its size when it was created. According to its former Chair and Executive Director, "the agency oversees about 15,000 types of products that are associated with about 27,000 deaths and 33 million injuries each year, costing the nation more than \$700 million annually."⁴³

In the preamble to the agency's long-awaited mattress flammability rule, the agency contends that, once in effect, the rule will displace state common law remedies.⁴⁴ As with the FDA and NHTSA, nowhere does the CPSC explain why it has reversed field and, for the first time in the agency's history, taken the position that its regulatory

³⁸ See David C. Vladeck, *Defending Courts: A Brief Rejoinder to Professors Fried and Rosenberg*, 31 Seton Hall L. Rev. 631, 638-39 (2001); see also Dept. of Transp. Fiscal Year 2008 Budget Request, at 70, available at: <http://www.dot.gov/bib2008/pdf/bib2008.pdf> (NHTSA staffing authorization).

³⁹ See *Public Citizen v. Mineta*, 340 F.3d 39 (2d Cir. 2003) (noting that Congress mandated tire pressure warning gauges be installed in passenger vehicles and overturning NHTSA rule because it wrongly adopted the approach preferred by industry).

⁴⁰ See Vladeck, *Defending Courts*, *supra*, 31 Seton Hall L. Rev. at 638-40; Barry Meier, *Officials Did Little, Despite Report Saying U.S. Wasn't Cutting Fatal Car Fires*, N.Y. Times, Nov. 21, 1992, at A7.

⁴¹ Myron Levin & Alan Miller, *Industries Get Quiet Protection from Lawsuits*, LA Times, Feb. 19, 2006.

⁴² 35 BNA Product Safety Liability Reporter, *Roof Crush: Safety Advocates Discuss Adequacy of Roof Strength Standard, Seek Upgrade*, 695 (July 30, 2007).

⁴³ Ann Brown & Pamela Gilbert, *Reviving a Consumer Watchdog*, Wash. Post, Aug. 26, 2007, B7.

⁴⁴ CPSC, *Final Rule, Flammability (Open Flame) of Mattress Sets*, 71 Fed. Reg. 13,472 (March 15, 2006).

action extinguishes tort law remedies. This claim is especially troubling because the preemption provision of the Flammable Fabrics Act is expressly limited to positive state law; it says that “no State or political subdivision of a State may establish or continue in effect” a flammability standard unless it “is identical to the Federal standard.”⁴⁵ But the CPSC was not deterred by the plain language of the law. Instead, the agency contends that the statute preempts all state “requirements”—even tort litigation—because that word appears not in the statute, but in one brief passage of the House Report on the Act, which suggests that CPSC *standards* preempt state *standards*, not state tort law.⁴⁶ This is the sum total of the legal analysis offered by the agency. Nor does the agency cite, let alone address, the many court rulings holding that the Act does *not* preempt state tort law.⁴⁷

The Commission’s action was so out of line that Commissioner Thomas H. Moore filed a statement expressing his strong disagreement with the Commission’s position on preemption. Commissioner Moore noted that “States are often pioneers in consumer protection, providing the impetus for new or improved federal regulation and California is usually on the forefront on consumer issues.” Commissioner Moore was especially troubled because, although he saw the standard as a step forward, he did not believe in the CPSC’s ability to set standards that would stand the test of time: “If we have gotten this standard right, then [lawsuits] against manufacturers should be a rarity and prevailing ones even less common. But if we have gotten it wrong, the fastest way we will find out is through people bringing lawsuits that challenge our conclusion.”⁴⁸

Senator Daniel Inouye has made the same point about the ossification of safety standards: “I would hazard to guess that after this rule is finalized, the issue of home fire safety may not be addressed for several more decades, while science and the ability to make mattresses even safer will continue to evolve. Removing a significant incentive for industries to improve outside of meeting the federal standard may have a chilling effect on industries integrating new safety technology into their products.”⁴⁹

⁴⁵ 15 U.S.C. § 1203(a).

⁴⁶ See CPSC, *Final Rule, Flammability (Open Flame) of Mattress Sets*, 71 Fed. Reg. 13,472, 13,496 (March 15, 2006) citing H. R. Rep. No. 1022, 94th Cong. 29 (1976). The Supreme Court has repeatedly cautioned against using the language of legislative reports to deviate from the text of statutes. See, e.g., *Arlington Central School Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455 (2006).

⁴⁷ See, e.g., *Topliff v. Wal-Mart Stores East LP*, 2007 U.S. Dist. LEXIS 20533 (N.D.N.Y. 2007); *Davis v. N.Y. City Housing Auth.*, 246 A.2d 575 (N.Y. 1998); *Feiner v. Calvin Klein, Ltd.*, 157 A.2d 501, 502 (N.Y. 1990); see also *Raymond v. Riegel Textile Corp.*, 484 F.2d 1025 (1st Cir. 1973) (addressing predecessor statute). The agency also overlooks the fact that manufacturers routinely settled these cases, which strongly suggests that they do not believe that they have a viable preemption defense. See, e.g., Marsha K. Seff, *Fanning the Fire for Safer Bedding*, San Diego Union-Trib., Feb. 1, 2000, at H1; Caroline E. Mayer, *Rules Would Limit Lawsuits*, Wash. Post, Feb. 16, 2006, D1.

⁴⁸ U.S. Consumer Product Safety Comm’n, *Statement of the Honorable Thomas H. Moore on the Final Rule and Preamble for the Flammability (Open-Flame) of Mattress Sets* (Feb. 16, 2006) available at: <http://www.cpsc.gov/cpscpub/prerel/prhtml06/06091.html>.

⁴⁹ Senator Inouye’s letter is quoted in Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DePaul L. Rev. 227, 233 (2007).

E. FRA AND RAILROAD SAFETY

The Federal Railroad Administration (FRA) has also pushed regulatory preemption.⁵⁰ The FRA cites the express preemption of the Federal Railroad Safety Act (FRSA) as support for its broad preemption theory. But that statute preempts only a state “law, regulation or order” that covers the “same subject matter” as the federal rule.⁵¹ The reference to “law, regulation or order” is plainly a reference to positive state law—statutes, regulations and orders issued by regulatory bodies—not judicial rulings. This point is driven home by a separate savings provision in the Act, which says that “[n]othing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damages alleging that a party ... (C) has failed to comply with a State law, regulation or order that is not incompatible” with the preemption provision.⁵²

Lest there be any doubt about Congress’s intention to limit preemption to cases in which there is an actual conflict between federal dictates and state common law, Congress recently enacted a provision in the Implementing Recommendations of the 9/11 Commission Act of 2007 (the 9/11 Act) which was intended as a “clarification” of the FRSA’s preemption provision. The 9/11 Act makes explicit that actions “under State law seeking damages for personal injury, death, or property damage” are preserved, and are preempted when, but only when, they are “incompatible with” federal mandates.⁵³ Notwithstanding this clear preservation of state damages law, the FRA now claims, in every rule that it is developing, that the rule, once finalized, will preempt any common law theory of liability.⁵⁴

The FRA’s new preemption could have dire consequences to those injured in rail crashes. Only three days after Congress passed the 9/11 Act, the FRA included broad preemption language in its notice of proposed rulemaking regarding passenger equipment safety standards. In the preamble the FRA claims that the rule preempts “any State law, regulation, or order, *including State common law*, concerning the operation of a cab car or [multiple-unit] MU locomotive as the leading unit of a passenger train” emphasizing that the “operation of cab cars and MU locomotives is a matter regulated by FRA, and not one which FRA has left subject to State statutory, regulatory, or common law standards on this matter.” The FRA claims to base this expansion of its preemption authority on Congress’s intent to “promote national uniformity and security standards.”⁵⁵ If the FRA issues a final rule, as currently drafted, and the courts defer to the FRA’s opinion in the rule’s preamble, victims of passenger train derailments, like the victims of the 2005 Metrolink commuter train accident in California,

⁵⁰ The agency’s recent rulemakings claim that, once in effect, the rule will preempt common law remedies. See, e.g., FRA, *Passenger Equipment Safety Standards; Front-End Strength of Cab Cars and Multiple-Unit Locomotives*, 72 Fed. Reg. 42,016 (Aug. 1, 2007); FRA, *Railroad Operating Rules: Program of Operational Tests and Inspections; Railroad Operating Practices, Switches and Derails*, 71 Fed. Reg. 60,372 (Oct. 12, 2006); FRA, *Reflectorization of Rail Freight Rolling Stock*, 70 Fed. Reg. 144 (Jan. 5, 2005).

⁵¹ 49 U.S.C. §§ 20106(a)(1) & (2).

⁵² See 49 U.S.C. §§ 20106 (b).

⁵³ See Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1528 (entitled “railroad preemption clarification”), 121 Stat. 453, amending 49 U.S.C. § 20106.

⁵⁴ See n.45, *supra*.

⁵⁵ See, e.g., FRA, *Passenger Equipment Safety Standards; Front-End Strength of Cab Cars and Multiple-Unit Locomotives*, 72 Fed. Reg. 42,016, 42,036 (Aug. 1, 2007).

will be denied the ability to seek fair compensation.⁵⁶ This double train derailment resulted in eleven deaths and injuries, many quite serious, to approximately 150 passengers. Injured passengers and the families of those killed in the crash are suing Metrolink for compensation for their injuries or for the deaths of their loved-ones. There is no question that their claims are cognizable under California law. However, if the court defers to the FRA's preamble claim of broad preemption, California law, and the law of every other state that requires railroads to exercise due care for the safety of passengers, will be swept aside. This result cannot be squared with the FRSA or Congress's more recent *rejection* of a broad theory of preemption in the 9/11 Act.

E. CROSS-AGENCY CONCERNS

I could elaborate, but I hope by now my point is clear. This is not a case of a few, isolated efforts to preempt discrete tort claims. Rather, this appears to be an Administration-wide effort to reshape tort law to the Administration's liking.⁵⁷ There are three threads that tie the actions of these agencies together. First, none of the statutes the agencies administer explicitly bars tort claims. Indeed, in one case, the governing statute has no preemption provision at all, and in two others, the agency's governing statute contains a "savings clause" reflecting Congress's determination to *preserve* state law. For this reason, the agencies are *not* making "express preemption" claims. Instead, the only preemption argument available to the agencies is that state law claims are *impliedly* preempted because they either actually *conflict* with federal law or erect an impermissible *obstacle* to the achievement of federal objectives.⁵⁸ Conflict preemption claims are very difficult to sustain because the agency must show an actual, irreconcilable conflict—not simply the burden of paying an adverse judgment.⁵⁹ For a conflict preemption claim to succeed, the agency has to show that a regulated entity cannot comply with specific federal and state requirements at the same time.⁶⁰ That is a very heavy burden that agencies cannot meet. For that reason, agencies do not make explicit claims of conflict preemption, but instead place their emphasis on obstacle preemption.

Second, in arguing in favor of obstacle preemption, agencies disregard the benefits that flow from traditional tort litigation. If the question that an agency has to answer is how best to fulfill the goals set for it by Congress, then the agency should also consider whether state tort litigation *advances* those goals. No agency has done that, even though, long before there were agencies, we depended on tort law to safeguard us from dangerous products, to compensate those injured through the fault of others, and to provide an early warning system about newly emerging risks. Agencies also fail to come to grips with the effect of regulatory ossification. It now takes years, or at times, decades, for agencies to promulgate regulations, and often even longer to

⁵⁶ The details of this tragic crash are set forth in Ralph Vatabedian, *Crash Blamed on Confluence of Highly Improbable Factors*, L.A. Times, March 22, 2005.

⁵⁷ Although each of these actions is taken by an agency and not by the Administration, there is little doubt that the Administration is coordinating these efforts. Under Executive Order 12,866, as amended by Executive Order 13,258, all Federal Register notices must be approved by the Office of Information and Regulatory Affairs (OIRA)—a component of the Office of Management and Budget, which coordinates federal regulatory policy for the President. In addition, the "Federalism" Executive Order, 13,132 requires OIRA's review of any policy that bears on preemption questions.

⁵⁸ See, e.g., *United States v. Locke*, 529 U.S. 89, 109 (2000); *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873-74 (2000).

⁵⁹ *Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 445 (2005).

⁶⁰ *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

revisit older, out-of-date regulations. All too often, an agency's first regulation on a subject is its last. But outdated regulations enshrine obsolete standards and stifle the development of newer and better protections. Tort law, by contrast, is dynamic and responsive to technological advances that can better protect consumers. The Supreme Court has often highlighted the beneficial interplay between tort litigation and regulation. "[T]ort suits can serve as a catalyst" to improve industry and federal regulatory practices by "aid[ing] in the exposure of new dangers" and addressing their consequences.⁶¹

Third, agency decisions to extinguish common law remedies are not made in a transparent way. Agencies simply announce their conclusions in preambles, which are lengthy and jargon-filled explanations of agency regulatory action. Agencies do not go through notice and comment rulemaking to formulate their positions, even though, in the past, agencies generally submitted regulatory proposals on preemption to the rulemaking process, thereby subjecting the agency's decision to public comment and ultimately to judicial review.⁶² Nor do agencies even make a pretense of complying with Executive Order 13,132, which requires agencies to provide states and local governments with notice and an opportunity to participate in any proceeding that may affect state and local law. Indeed, the agencies' excuses for ignoring the notice and consultation requirements of the Executive Order range from the far-fetched to the disingenuous.⁶³

It may be that, in some cases, there are sound arguments why federal law ought to displace state law. But let us have that debate in Congress, where all views can be aired, and those directly accountable to the American people can make decisions on the public record.

II. THE POLICY IMPLICATIONS OF REGULATORY PREEMPTION

Apart from the fact that I disagree with the Administration's policy, I think that there are two structural flaws in its campaign that warrant mention. First and most importantly, in my view, these assertions of preemption of state law by federal regulatory agencies raise serious separation of powers concerns. The preemption campaign

⁶¹ *Bates*, 544 U.S. at 451 (quotation omitted). *Bates* is yet another example of the Administration's pro-preemption push. In that case, the government abandoned its no-preemption position asserted before the Court only five years earlier, to argue that the Federal Insecticide, Fungicide, and Rodenticide Act broadly preempted state law. The Court called "particularly dubious" the government's claim that the Act set forth a "nonambiguous command" to preempt. *Id.* at 449.

⁶² Consider one example. Although the FDA now argues that all claims involving medical devices it has specifically approved are preempted, it has never rescinded its regulation governing preemption and medical devices, which limits preemption to positive state law. This regulation was developed through notice and comment rulemaking, thereby enabling affected members of the public and state and local governments to submit comments and otherwise engage the agency. 21 C.F.R. § 808.1(b); *see also* 42 Fed. Reg. 30383, 30385 (June 14, 1977); 43 Fed. Reg. 18,661, 18,663 (May 2, 1978).

⁶³ The FDA could not comply with these requirements for its recent position on drug preemption because the preamble to its proposed labeling rule stated unequivocally that "this proposal does not contain policies that have federalism implications or that preempt State law." FDA, *Proposed Rule, Requirements on Content and Format of Labeling for Human Prescription Drugs and Biological Products*, 65 Fed. Reg. 81,082, 81,103 (Dec. 22, 2000). The National Highway Traffic Safety Administration avoided complying with the Executive Order by asserting that its roof crush standard "would not have any substantial impact on the States" and therefore did "not have sufficient federal implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement." NHTSA, *Federal Motor Vehicle Safety Standards; Roof Crush Resistance, Notice of Proposed Rulemaking*, 70 Fed. Reg. 49,223, 49,245 (Aug. 23, 2005).

is, in my view, nothing less than an effort by the Executive Branch to arrogate power that properly belongs to Congress. Displacing state law is no trivial matter. Our federalist system of government is based on the premise that federal and state law can generally comfortably coexist. And for most of our nation's history, state tort and damages law has served as a backstop to state and federal regulatory law.

To be sure, the Constitution's Supremacy Clause recognizes that, when federal and state law conflict, state law must give way, and there are instances when state law must yield in order to achieve federal objectives. The question raised by the Administration's current campaign is which branch of government should decide *when* federal law should displace state law—Congress or the Executive Branch.

The Constitution supplies the answer to that question: Decisions on whether to displace state law to achieve federal objectives are quintessentially legislative judgments that Article I, Section 1 of the Constitution entrusts to Congress.⁶⁴ Federal administrative agencies do not have the power to regulate with the force of law, absent a clear and express delegation of that authority from Congress. This directive takes on special force because Congress stands alone as the constitutional body structured to accommodate state interests. Certainly the Executive Branch does not—its interest is in consolidating federal power. For these reasons, a regulatory agency may exercise preemptive authority if, but only if, the agency has been explicitly delegated that power by Congress, and does so in a way that is faithful to Congress's mandate.⁶⁵

This Constitutional mandate is reflected in the Executive Order on Federalism, which was first issued by President Reagan. Modified only slightly by President Clinton, Executive Order 13,132 instructs agencies to construe federal law to preempt state law “only where the statute contains an express preemption provision or there is some other clear evidence that Congress intended the preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.”⁶⁶

The problem is that the agencies are not following the Executive Order's essential edict: follow Congress's lead on preemption matters unless there is an intolerable conflict between federal and state law. Agencies are instead attempting to define the scope of preemption based on the Administration's policy goals, but with little or no guidance from Congress. In so doing, agencies have strayed from their proper function of *applying* the law as defined by Congress into the constitutionally impermissible role of *making* the law on their own—untethered by guidance from Congress, unconstrained by the political process, and using backdoor means that escape serious oversight—all in an effort to eliminate state law.⁶⁷

⁶⁴ “All legislative Power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”

⁶⁵ See *Gonzales v. Oregon* is 546 U.S. 243, 255 (2006).

⁶⁶ 64 Fed. Reg. 43,255, 43,257 (Aug. 10, 1999).

⁶⁷ It should be noted that recent Supreme Court decisions have played a role in encouraging agencies to set forth their position on preemption as a way of influencing the outcome of private litigation. For instance, in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), the Court found preempted a claim by a woman injured when her car crashed into a tree. The car was outfitted with a shoulder belt, but no airbag, and Ms. Geier claimed that the omission of an airbag was a design defect. The Court rejected that argument on conflict preemption grounds, based on the government's contention that the Department of Transportation had decided to phase-in airbags and a ruling in Ms. Geier's favor would conflict with the agency's decision. And in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), the Court suggested that an agency's views on preemption were entitled to consideration by the Court. But the Court has not resolved the question of what degree of deference, if any, should be accorded to an agency's views. Professor Nina

The second structural issue is one of agency capture. This is far from an idle concern. The concept of agency capture is not new to Washington, D.C., and there have been repeated charges that the regulators implementing this pro-preemption campaign have deep ties to the industries that will benefit. For example, the architect of the Food and Drug Administration's new preemption position is a partner at a major law firm where he specializes in representing drug companies regulated by the FDA—the very companies that benefit from the agency's new pro-preemption position. Prior to joining the FDA, he worked at a different law firm representing drug companies.⁶⁸ At NHTSA, career employees have suggested that the preemption language was inserted by political employees with ties to the auto industry.⁶⁹ And career employees at the Consumer Product Safety Commission complain that the agency's leadership has been drawn from industry lawyers and others hostile to the agency's consumer-protection mission.⁷⁰

I do not suggest that these agency officials deliberately misused their public office for private gain. Indeed, I believe that each of these officials carried out their responsibilities in the manner they believed best fulfilled their agency's mission. Agency capture theory does not depend on subjective notions of abuse of power. Rather, the theory argues that one's views about government regulation often reflect one's background, and that a revolving door between government and the industries government regulates can be a breeding ground for abuse. My submission is simply this: to avoid agency capture problems, decisions of this magnitude are made in open, publicly-transparent ways, with opportunities for input and review. Preemption decisions are simply too important to entrust to unelected and largely unaccountable senior political appointees, many of whom will simply return via the revolving door to the industry that they have overseen during their brief tenure in government.

III. CONCLUSION

While the public watches the Supreme Court wrestle with the preemption questions presented in *Reigel v. Medtronic*, and perhaps in *Wyeth v. Levine*, the more troubling action is taking place out of public view. The quiet but insidious erosion of state tort law remedies—and the health and safety benefits that are associated with them—continues unabated. Our health and safety agencies have been subject to a hostile takeover by an Administration that cares more about constituent-serving outcomes than their statutory mission to protect the public. The winners will be the Administration's corporate patrons who will be given the immunity from tort liability they never could have gotten from Congress. The loser will be the tens of thousands of Americans injured through no fault of their own but who will no longer have any means of redress.

Mendelson has argued that agency views on preemption, expressed in passing in regulatory preambles, should get minimal deference. *Chevron and Preemption*, 102 Mich. L. Rev. 737 (2004).

⁶⁸ See, e.g., Anne C. Mulkern, *Watchdogs or Lapdogs? When Advocates Become Regulators*, The Denver Post, May 23, 2004.

⁶⁹ Myron Levin & Alan Miller, *Industries Get Quiet Protection from Lawsuits*, L.A. Times, Feb. 19, 2006.

⁷⁰ See Eric Lipton, *Safety Agency Faces Scrutiny Amid Changes*, N.Y. Times, Sept. 2, 2007, A1.

The Citizen's Advocate: A Perspective on the Historical and Continuing Role of State Attorneys General

Peggy A. Lautenschlager and Daniel P. Bach*

State attorneys general have been both praised and criticized for going beyond what has been characterized as their “traditional” role representing state agencies and issuing advisory opinions interpreting state law. Whether acting individually, using the resources of their own office, with or without the assistance of outside counsel, or collectively with other state attorneys general on multi-state cases, state attorneys general have effected significant results both in monetary and public policy terms. Those results, in turn, have garnered added attention to an office largely misunderstood in terms of its obligations as a protector of the rights and interests of the citizens of each respective state.

This paper will focus on the rationale for the progressive measures being taken by many state attorneys general for the benefit of citizens, using specific cases and issues involving a particular attorney general’s office, representative of those criticized as exercising powers beyond their authority. We will begin with a summary explanation of the historical and current bases of attorney general legal authority, as a predicate to establishing the proposition that “activist” attorneys general are doing precisely what those in their position are required to do to fulfill their obligations to the public.

I. HISTORICAL BASES OF ATTORNEY GENERAL AUTHORITY

The position of attorney general is rooted in the English legal system. For centuries, lawyers were appointed by the king to represent his legal interests in courts of law.¹ As early as the mid-thirteenth century, the “King’s Attorney” was assigned by the sovereign to represent the crown in various civil and criminal matters of law.² Indeed, by 1400, the King’s Attorney could appear in all courts regarding any matter concerning the crown.³ The ability of the King’s Attorney to appear in any court in England

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¹ STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 3 (Lynne M. Ross ed., BNA Books, 1990).

² JOHN EDWARDS, THE LAW OFFICERS OF THE CROWN 14-16 (Sweet and Maxwell, 1964).

³ *Id.* at 35.

gave rise to the title “attorney general” and, with it, life tenure and the recognition of the position as the “leading officer in the legal department of the state.”⁴ As well, in 1461, the Attorney General of England was authorized to appoint subordinates to assist in his broad representational obligations.⁵

From the early 1500’s through the pre-American Revolutionary War period came an expansion of the powers of the Attorney General of England. With it, a constitutional and institutional struggle developed to define the role of the attorney general. Both houses of Parliament and the King and his ministers vied to have the attorney general as their advocate. As a result, by the mid-1700’s, the Attorney General of England “emerged as legal advisor to the Crown” and “appeared on behalf of the Crown in the courts,” but also gave legal advice to all departments of state and appeared for them if they wished to take action in the courts.⁶ The Attorney General of England thereby, over time, became less of the “King’s lawyer” and more a public official responsible for justice.⁶

As England colonized the Americas, the legal matters of the Crown were handled by attorneys general appointed in each of the colonies. These New World lawyers complained of scant resources, ill-defined statutory frameworks, and lack of direction from England.⁷ English common law, naturally, provided the basis for much of their authority. The unique nature of the settlers in each of the colonies, such as their countries of origin and the political philosophies of their colonial leaders, also influenced the laws of the various colonies. Accordingly, “the wide variety of duties undertaken by colonial attorneys general resulted in different development of the office from colony to colony.”⁸

The differences in the institutional authority of attorneys general among the states remain today. While all fifty states, and the jurisdictions of the District of Columbia, Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and Samoa, now have attorneys general, the powers of these attorneys general and the institutional means by which their authority is derived differ. Moreover, the individual priorities of the attorneys general vary greatly as well.⁹

The office of attorney general is constitutionally established in forty-four of the fifty states. The remaining states have offices established by statute. The authority granted state attorneys general by their state constitutions differs between states. As well, that authority has been interpreted differently by the various state courts. Many constitutions, for example, charge attorneys general to perform duties “prescribed by law.”¹⁰ In some states, such as Illinois, this language has been interpreted to give the attorney general broad common law powers that may not be limited by the courts or the legislature. In most states, however, courts recognize legislative limits on constitutional grants of common law authority.¹¹ Some states, such as Wisconsin, specifically preclude use of common law authority by the attorney general. State statutes and

⁴ *Id.* at 27.

⁵ *Id.* at 26-27.

⁶ Rita Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 304, 307-311 (1958).

⁷ Sewall Key, *The Legal Work of the Government*, 25 VA. L. REV. 165, 169-73 (1938).

⁸ See Ross, *supra* note 1, at 8.

⁹ *Id.* at Appendix A.

¹⁰ *Id.* at 34.

¹¹ *Mem’l Hosp. Ass’n, Inc. v. Knutson*, 239 Kan. 663, 722 P.2d 1093 (Kan. 1986).

court decisions also shape the parameters of each attorney general's ability to act. Again, this creates disparities in the powers granted individual attorneys general.

Despite the differences in the authority of attorneys general, there exists a certain commonality in the duties assigned to the office. In virtually all states, attorneys general control most, if not all, litigation concerning the state and act as the state's chief legal officer.¹² In addition, attorneys general have the ability to opine on issues that require a clarification of law. Modern attorneys general often provide programs for public education and outreach, as well. The criminal enforcement obligations of attorneys general vary greatly from state to state; however, most have some primary prosecutorial authority and the ability to investigate matters of legal concern. Simply stated, while these duties may differ, every attorney general has an obligation to enforce the law.

II. POLICY REASONS FOR CURRENT USE OF EXISTING AUTHORITY

"The existing system has many powerful friends because the status quo always has powerful friends. Those who benefit from the status quo never want change." These are among the remarks of then-New York Attorney General Eliot Spitzer at the National Press Club in January 2005. His speech focused on the role of government in defining the boundaries of ethical business conduct. In his remarks, Spitzer referred to the controversy surrounding the efforts of President Theodore Roosevelt to combat business cartels, a success story that paved the way for the economic expansion the United States experienced in the last century. Noting that Roosevelt was reviled by business leaders who invoked free market principles to defend their illegal practices, Spitzer pointed out that government intervention was essential then, as it is now, to enforce the law and safeguard the integrity of the marketplace.¹³

In that context, not much has changed since Roosevelt's era, except that the role of enforcing the law, including instances when such enforcement has nationwide implications, is one increasingly abandoned by federal authorities and thus assumed, necessarily, by the states. For example, state attorneys general, not the United States Justice Department, spearheaded the effort to recover billions of taxpayer dollars spent on health care for those suffering from the myriad ills related to cigarette smoking. Antitrust specialists working in state justice departments meet regularly to coordinate review, and possible litigation, involving corporate mergers, an area where federal enforcement has fallen off dramatically. Witness that colossal mergers between 1998 and 2002 halved the number of oil refiners supplying our national thirst for gasoline, the retail price of which has skyrocketed along with oil company profits.¹⁴ No wonder state attorneys general have responded with efforts to investigate whether unlawful collusion might explain those spikes as well as historical highs in the price of natural gas.

Perhaps most telling is the failed attempt by the United States Environmental Protection Agency to assert that it *lacked* authority to regulate noxious emissions

¹² See Ross, *supra* note 1, at 12.

¹³ Eliot Spitzer, New York Attorney General, Business Ethics, Regulation and the "Ownership Society," Address Before the National Press Club, Washington, D.C. (Jan. 31, 2005) (transcript available from State of New York, Office of the Attorney General, 120 Broadway, New York, NY 10271).

¹⁴ Mark N. Cooper, *The Role of Supply, Demand, Industry Behavior and Financial Markets in the Gasoline Price Spiral*, May 2006, at 13, available at <http://www.doj.state.wi.us/docs/gasoline.pdf> (last visited May 16, 2007) (Prepared for Wisconsin Attorney General Peggy A. Lautenschlager).

emanating from motor vehicle exhaust.¹⁵ Citizens trusting in the nation's chief steward of our air and water should revisit any confidence placed in that agency to safeguard our vital resources, given its willingness to plead to the United States Supreme Court that a major source of air contamination is not its concern. State attorneys general, a few cities and environmental groups brought the case, and in so doing won a pivotal decision confirming that states have standing to take legal action to enforce protection of natural resources falling within their domain.¹⁶

Lately, when the federal government has moved to regulate a certain type of activity, its efforts have often countermanded state measures aimed at protecting citizens. For example, when states passed laws allowing citizens to stop most types of telephone solicitation—the wildly popular “No Call” laws—state attorneys general banded together to oppose federal legislation that could have pre-empted, and weakened, the state statutes.¹⁷ State attorneys general are also increasingly vocal about international treaties, designed and negotiated by federal authorities, that have the incidental effect of overriding state laws, such as those restricting illegal gambling.¹⁸

Those favoring a status quo reflected by current federal action, or inaction, tend to disparage the individual and collective efforts of state attorneys general as unconstitutional violations of the separation of powers doctrine, improper usurpation of the legislative prerogative to effect public policy, and wholly incompatible with the notion of federalism.¹⁹ The first and third arguments, concerning separation of powers and federalism, have been refuted quite persuasively.²⁰ Succinctly put, the doctrine of separation of powers pertains to the division of authority among the three federal branches; it does not apply to the states.²¹ Federalism precludes state action that is either permanently limited by the Constitution or contingently limited by congressional grants of authority to states in otherwise constitutionally prohibited areas, or in areas where the states and federal government share authority.²² A thorough discussion of federalism as it pertains to cases brought by state attorneys general is outside the scope of this paper.²³ However, at base, federalism prohibits states from usurping power bestowed upon the federal government, and vice-versa. As will be discussed in the next section, state attorneys general are, individually and in partnership, exercising powers in areas long recognized as matters legitimately within state control, or in

¹⁵ *Massachusetts v. Envtl. Prot. Agency*, 549 U.S. ___, 127 S.Ct. 1438 (2007).

¹⁶ *Envtl. Prot. Agency*, 127 S.Ct. at 1454. Notably, the Court quoted extensively from *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907), which held that a state has standing to protect its citizens from air pollution originating beyond its borders.

¹⁷ Comments from National Association of Attorneys General to the Federal Trade Commission (Apr. 2002), available at <http://www.ftc.gov/os/comments/dncpapercomments/04/naag.pdf> (last visited May 16, 2007).

¹⁸ In 2005, the World Trade Organization ruled that the General Agreement on Trade in Services (GATS) overrides federal, state and local restrictions on gambling. Just recently, the United States Government announced that it would withdraw its global trade agreement to open United States markets to foreign gaming services.

¹⁹ See, e.g., Robert J. Gaglione, *The Modern Role of State Attorneys General: A New Activism*, THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES, Jan. 16, 2007, available at: http://www.fed-soc.org/publications/pubID.41/pub_detail.asp (last visited May 16, 2007).

²⁰ Jason Lynch, *Federalism, Separation of Power, and the Role of State Attorneys General in Multi-State Litigation*, 101 COLUM. L. REV. 1998 (2001).

²¹ *Id.* at 2027, n. 165 (citing Michael C. Dorf, *The Relevance of Federal Norms for State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 53 (1998)).

²² *Id.*

²³ See Lynch, *supra* note 20.

areas such as antitrust, where federal and state authority is concurrent. Contrary to what one might expect, if the claims of critics had any merit, the overwhelming majority of cases brought by state attorneys general are not falling victim to constitutional challenges based on federalism.

The remaining criticism concerns policymaking: are state attorneys general appropriating traditionally legislative functions by effecting changes in public policy through lawsuits? This complaint arises most likely, although not exclusively, from successes achieved in the long standing practice of several states coordinating their individual cases, legal theories and resources to effect a common enforcement objective. These collective actions are known as multi-state litigation.²⁴ Those interested in maintaining a system where powerful, moneyed interests are able to overwhelm individual state efforts to enforce the law despise the leveled playing field created when states work cooperatively. Yet multi-state cases differ only to the degree that they bring greater efficiency and more resources to bear upon an issue than states acting alone. The actions of each and every attorney general remain constrained by the grant of authority his or her state law confers, as permitted by the federal Constitution. Law enforcement involves the effectuation of public policy, as reflected in the law; it is not the genesis of public policy. A much better argument could be made that those who have authority to enforce the law, but who choose not to exercise that authority, are thwarting the objectives of policymakers.

Attorneys general have an obligation to the citizens they represent to enforce the law. Moreover, states on their own often lack the ability to act against a well-financed offender; and for individual citizens, that ability is much less, particularly when faced with jurisdictional hurdles requiring proof of substantial monetary losses and causes of action available to the sovereign, but not the citizen.²⁵ Nonetheless, those with interests in maintaining the status quo continue to describe such efforts to enforce the law as “overreaching,” and misrepresent the significance of individual cases brought by attorneys general. The following is a sampling of cases and issues involving our own state, Wisconsin, which inspired cries of attorney general activism similar to those levied against other state attorneys general.

III. ACTION (RATHER THAN ACTIVISM) IS THE OPPOSITE OF DORMANCY

The claim that one is an activist attorney general, meant in an accusatory fashion, spawns the rhetorical rejoinder: who, besides lawbreakers, favors an inactive attorney general? Activism is a relative term, measured in the context of authority conferred and resources available. Thus, comparisons of the actions taken by attorneys general from state to state must factor in the recognition that the offices share many similarities, but also some profound differences, as outlined above.

²⁴ Just this month, in his presidential inaugural remarks to the National Association of Attorneys General, Idaho Attorney General Lawrence Wasden reminded the audience of the historic role played by state attorneys general in multi-state actions in the last century. “In 1907 the first multi-state was directed at the Standard Oil monopoly. One hundred years later, one of our more common citizen complaints is the ‘price of gas,’” Wasden noted. Lawrence Wasden, Idaho Attorney General, NAAG President’s Inaugural Remarks, Atlanta, GA (June 21, 2007) (transcript available at <http://www.naag.org>).

²⁵ For example, citizens seeking redress in federal court based on diversity of citizenship must allege damages exceeding \$75,000. See 28 U.S.C. § 1332; *Env’tl. Prot. Agency*, *supra* note 16, at 1453-54 (stressing that states have special standing to protect their broad sovereign interests, whereas citizen litigants must establish more concrete, particularized harms).

A. GLOBAL WARMING

Environmental protection cases are a lightning rod for those opposed to enforcement actions brought by attorneys general. One such case was cited in an article critical of the “modern” role of attorneys general.²⁶ There, Wisconsin’s attorney general, in conjunction with attorneys general from seven other states, and the City of New York, brought an action against the five largest coal burning utilities in the United States. One opponent of the case described it as follows:

... The most aggressive state attorneys general such as New York’s Eliot Spitzer “have become nationally prominent as a result of their enforcement activism.” Recently, Spitzer and seven of his fellow state AGs sued the nation’s five largest public utilities, even though none of the utilities are located in their states. The lawsuit sought a three percent annual reduction in carbon dioxide emissions over the next decade. “Never mind that the AGs have neither the authority nor the responsibility to act in the broader national interest,” writes Cato Institute Senior Fellow Robert Levy. Indeed, the state AGs are increasingly performing the function that Congress and federal regulatory agencies are supposed to carry out as well as saddling the general public with tax and regulatory burdens that were never voted on by elected representatives.²⁷

The case was brought on the grounds that these utility companies run coal-fired power plants that emit grossly excessive amounts of carbon dioxide, a byproduct of burning coal unhealthy to human beings and almost universally accepted as a major contributor to global warming. The defendants’ conduct, it was alleged, constituted a public nuisance—a common law cause of action steeped in hundreds of years of jurisprudence and defined in this context as an activity having an injurious effect on the health or welfare of the public.²⁸ The plaintiff states and city sought to effect relatively minor reductions in these emissions over the course of a decade, allowing the defendants considerable latitude in determining how that could be accomplished.

Ultimately, the need to bring the case arose because the federal government and coal burning utility companies failed to implement any meaningful measures to address a matter of worldwide significance. The reality and impact of global warming need not be reiterated here; it is significantly troubling that state attorneys general, while attempting to employ a well-established legal practice as the basis of an action brought to safeguard the health and welfare of their own constituents, would be accused of improperly interfering with a matter of purely national interest.²⁹ As an example, one of the defendant utility companies does operate a coal-fired power plant

²⁶ See Gaglione, *supra* note 19.

²⁷ Gaglione, *supra* note 19, at 10, quoting John Fund, *Cash In, Contracts Out: The Relationship Between State Attorneys General and the Plaintiff’s Bar*, Report of the United States Chamber of Commerce’s Institute for Legal Reform (Oct. 14, 2004).

²⁸ See, e.g., 66 C.J.S. Nuisances § 4 (1998 ed.) (Public nuisance “includes conduct that significantly interferes with public health, safety, peace, comfort or convenience....”).

²⁹ *State of Connecticut, et al. v. American Elec. Power, et al.* 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (finding that the issue presented a political question, and thus dismissed the case). Whether that holding survives an appeal, and Supreme Court authority recognizing the right of states to protect their citizens from internally and externally generated air pollution, remains to be seen.

in Wisconsin,³⁰ and each of the plaintiff states and city suffers from the documented impacts of air polluted by coal burning power plants. The recent United States Supreme Court decision regarding automobile emissions³¹ should serve as reminder that air pollution does not respect political boundaries, and that state attorneys general have the legal authority and moral responsibility to take action to address unlawful conduct that is harmful to the public.

B. IN FACT, ALL POLITICS IS CRANBERRIES ...

... in Wisconsin, at least. The cranberry is Wisconsin's state fruit, and Wisconsin produces more cranberries, at last count, than any other state. Doubtless that is why cranberry operations in Wisconsin are allowed by statute to impact state waters in certain ways others may not,³² in addition to rights all farmers enjoy under the state Right to Farm Act.³³ Wisconsin's constitution, however, recognizes public ownership of navigable waters (the Public Trust Doctrine), which converges with the doctrine of public nuisance, essentially prohibiting substantial interference with the public's use of its waterways. The state attorney general is authorized to take action to enforce the Public Trust Doctrine and combat public nuisances.

In 2004, the state filed suit against a single cranberry grower whose operations, the state alleged, had badly polluted a large area of the state's eighth largest lake, creating a public nuisance and depriving the public of waterway use. The case was tried to a judge, who issued written findings that the defendant had intentionally polluted the lake and that he had interfered with the public's use of its waterway. The judge stopped short of finding that a public nuisance existed; however, he warned the defendant that he was well on the way to creating one.³⁴ As of this writing, the case is on appeal.

The case became a major political issue, with members of the Republican-controlled legislature threatening to rescind the attorney general's authority to bring nuisance cases. To many, it apparently was irrelevant that the judicial opinion affirmed nearly all of the contentions made by the state, or that this particular cranberry grower's operation was woefully out of line with current practices employed by the vast majority of those in the business. Elements dedicated to insulating the larger business community from the enforcement of state laws, particularly environmental laws, asserted that the attorney general had overstepped her role and should be replaced.

This case illustrates how well-financed opposition to a public servant's efforts to protect public resources can succeed in creating the impression that a singular civil prosecution of an alleged lawbreaker amounts to an assault on an entire industry, and that laws must be changed for fear that any person or business could be next in the crosshairs. The lesson to politicians in Wisconsin is clear: cranberry growers, and no doubt others with sufficient financial and political clout, can do no wrong, even if they do.

³⁰ Xcel Energy, Inc., one of the five defendant utility companies, controls Northern States Power of Wisconsin, and operates a coal burning plant in Ashland County, Wisconsin. See <http://www.xcelenergy.com> (last visited Jun. 1, 2007).

³¹ See *Env'tl. Prot. Agency*, *supra* note 16.

³² In general, cranberry growers are allowed to construct ditches and divert water to their bogs. See Wis. Stat. § 94.26.

³³ Wis. Stat. § 823.08.

³⁴ *State v. Zawistowski*, Case No. 04-CV-75 (Sawyer County (Wis.) Circuit Court 2006).

C. STRONG CAPITAL MANAGEMENT CO.

The New York Attorney General is among the relatively few state attorneys general empowered with a staff sufficiently large and experienced in certain specialty areas to handle multiple complex cases with little or no outside assistance. This ability, coupled with the fact that New York is the hub of financial markets in the United States, allowed then-Attorney General Eliot Spitzer to pursue simultaneous investigations of several mutual funds for a variety of regulatory violations, including market timing and late trading. Given the targets, it was no surprise that his efforts drew acclaim in some circles and considerable ire in others. Among the critics, the *Wall Street Journal* labeled Spitzer the “Lord High Executioner” and considered his pursuit of mutual fund executives “overzealous prosecution.”³⁵

One of the mutual funds investigated by Spitzer’s office and the Securities Exchange Commission was Strong Capital Management Co. (“SCM”), headquartered in Menomonee Falls, Wisconsin. SCM not only was a large employer and significant presence in the Milwaukee area, it also managed funds invested through EdVest, Wisconsin’s program allowing parents to establish accounts to pay for their children’s higher education. The announcement of Spitzer’s investigation, which focused on the unlawful trading activities of SCM’s founder, chairman and primary owner, Richard Strong, triggered grave concern in Wisconsin that SCM might vanish, and with it the jobs and college savings of many Wisconsin residents.

In early 2004, recognizing the significance of this investigation to Wisconsin citizens, the state attorney general directed lawyers from the Wisconsin Department of Justice to contact Spitzer’s staff and join forces in the SCM investigation. The resulting teamwork, along with the cooperation of the SEC, culminated in a civil settlement with SCM and Richard Strong involving \$140 million in disgorged profits and fines, along with reduced fees to SCM investors valued at an additional \$35 million. Richard Strong agreed to a lifetime ban from the securities industry. Moneys generated from the settlement are to be disbursed to investors, while the swift disposition enabled SCM to remain in business under new ownership.

Clearly, the work of these state lawyers and their investigators, under the direct supervision of two state attorneys general, remedied corrupt practices in a company trusted with the investment funds of thousands of families and removed a repeated violator from the investment business. Fortunately, the unabashed criticism of such cases did not succeed in undermining measures necessary to clean up the mutual fund industry and restore integrity to that vital financial market.

IV. OPINIONS, AMICUS BRIEFS AND OTHER WAYS TO GET BRANDED AN “ACTIVIST”

Issuing advisory opinions on questions of state law is a responsibility shared by all state attorneys general.³⁶ Statutory or constitutional requirements as to whom opinions must be given or what subjects may be addressed differ among states, but the duty of issuing opinions is considered an inherent aspect of every attorney general’s job.³⁷

State attorneys general also frequently participate as *amicus curiae* in federal cases, particularly when the issues before a court somehow impact state agencies or state

³⁵ Editorial, *Thanksgiving News: American is a lucky country. Here are five reasons why.*, WALL ST. J., Nov. 23, 2005.

³⁶ See ROSS, *supra* note 1, at 61.

³⁷ *Id.*

laws. It is a common practice that a single state will author an *amicus* brief and circulate it among other state justice departments, through the National Association of Attorneys General, for other state attorneys general to sign on. State attorneys general engage in a similar practice involving letters to federal agencies or Congress on topics deemed significant to their states.

Attorneys general have varying responsibilities when reviewing pending legislation or proposed amendments to the state constitution. For example, in Wisconsin the attorney general may be asked for an opinion on the constitutionality of a bill, but must provide a written explanation of the meaning and legal impact of a referendum to amend the state constitution.³⁸ Of course, the fulfillment of any one of these or many other authorized duties may subject an attorney general to criticism and charges that she is using the office improperly to pursue a personal agenda.

Over the past four years the Wisconsin Attorney General's Office issued countless formal and informal opinions, signed on to dozens of *amicus* briefs and letters to federal officials, and provided written explanations regarding two proposed amendments to the state constitution. A handful of these actions sparked statewide attention, and in some quarters, criticisms such as: "We have an activist attorney general on the loose!" Three examples will suffice.

A. THE MARRIAGE AMENDMENT

In 2006, the Wisconsin legislature, both houses then firmly in the hands of partisan conservatives, maneuvered two referenda onto the November ballot that would amend the state constitution. One of those provisions was intended to outlaw any marriage other than one between a man and a woman, already a feature of a state statute defining marriage accordingly. However, the referendum went further, stating: "(a) legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."³⁹

What, exactly, did that clause mean? Would the amendment affect guardianships? Powers of attorney? Authorizations to make health care decisions? What competent attorney would not envision a host of legal issues arising from that clumsy and wholly unnecessary provision? That, in essence, is how the state Justice Department considered that language, which is why the attorney general's written explanation of the amendment pointed out that the scope of that clause "would be left to further legislative or judicial interpretation."⁴⁰

The objective legal observation that the proposed amendment raised questions inviting judicial or legislative review was attacked by gay marriage opponents as a calculated attempt to torpedo the referendum. Ironically, those pushing for the amendment's passage rationalized their position using the theory that activist judges could misinterpret or override the existing state law limiting marriage to heterosexual couples. But, if the attorney general's assessment proves correct, state courts and/or the new legislature now will have ample opportunity to clarify what voters now have approved.

³⁸ Wis. Stat. § 10.01(2)(c).

³⁹ 2005 Enrolled Joint Resolution 30 (Wis.).

⁴⁰ Letter from Peggy A. Lautenschlager, Wisconsin Attorney General, to Kevin J. Kennedy, Executive Director of the State of Wisconsin Elections Board (Aug. 4, 2006) (on file with State of Wisconsin Elections Board, 17 West Main Street, Suite 310, Madison, WI 53703).

B. NO CHILD LEFT BEHIND

Amicus briefs often are the subject of discussion among attorneys general and their staff because a pointed concern exists regarding the use of briefs to advance views on politically-charged issues, some of which are of arguable relevance to inherent state interests.⁴¹ By contrast, federal cases that impact state spending, the enforcement of state laws, or the health and welfare of all citizens logically invite input from state attorneys general.

One of the latter cases involved the federal No Child Left Behind Act (NCLB), a controversial measure directing states to comply with unfunded educational mandates in matters previously within state and local purview only. In 2004, in response to a state senator's request for an opinion, the Wisconsin Attorney General responded that NCLB's own provisions rendered it unenforceable, since the federal law included no federal funding yet precluded states and localities from having to pay for compliance costs.⁴² In 2006, Wisconsin joined Connecticut in an *amicus* brief, filed in *Pontiac School District v. Secretary of Education*, arguing that NCLB was unconstitutional.⁴³

The arguments against NCLB seemingly reinforced fiscal and social conservatives' long-held opposition to federal interference with matters of state and local concern. Nonetheless, forces favoring public financing of private education, among them many of today's conservative politicians and commentators, argued that NCLB opponents were carrying water for the teachers unions and propping up unsuccessful public school systems. Ironically, it was the state attorneys general—those attacked as “activists”—who were taking a traditionally conservative stance while costly systemic changes and increased federal control found support on the political right.

C. HEALTH CARE IN EMPLOYMENT SITUATIONS

In 2004, the Secretary of the Wisconsin Department of Health and Human Services requested an opinion on whether excluding contraceptives from an employer-sponsored benefits program covering prescription drugs violated Wisconsin laws prohibiting sex discrimination. Many states have so called “contraceptive equity” laws in place; Wisconsin does not, but that does not mean that Wisconsin law permits inequity. Thus, the attorney general issued an opinion that because the Wisconsin Fair Employment Act (WFEA)⁴⁴ essentially prohibited employment discrimination in terms, conditions or privileges of employment on the basis of sex, it also did not allow employers to exclude prescription contraceptives from benefit plans that provide prescription drug coverage.⁴⁵

Despite the reality that many employers in Wisconsin were including contraceptives in the benefit plans they provided, and that case law interpreting WFEA had long disapproved of gender-related disparities in employer-sponsored health care plans,

⁴¹ See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). One might claim, for example, that the input of state attorneys general, alongside the United States Department of Justice, was not vital to an informed analysis of whether the “under God” language in the nation's Pledge of Allegiance withstood First Amendment scrutiny.

⁴² Letter from Peggy A. Lautenschlager, Wisconsin Attorney General, to Senator Fred Risser (May 12, 2004) (on file with Wisconsin Department of Justice, 17 West Main Street, Madison, WI 53703).

⁴³ *School Dist. Of City of Pontiac v. Spellings*, 2005 WL 3149545, (E.D. Mich., Nov. 23, 2005).

⁴⁴ Wis. Stat. §§ 111.31-111.395.

⁴⁵ Op. Wis. Att'y Gen. (Dec. 27, 2006).

the attorney general's opinion was headline news in the state. Supporters of reproductive rights hailed the advisory opinion, while in this instance vocal opposition to it was more muted. Nonetheless, adherence to clearly established legal precedents, as in this opinion, did not stop political opponents from making broad allegations during the ensuing years that a political agenda drove the attorney general's decision-making, contrary to the duty of that office to enforce the law.

V. CONCLUSION

There is little doubt that the efforts by state attorneys general to enforce the law, through both criminal and civil proceedings, are having a substantial—and positive—impact on business conduct, civil rights protections and the public welfare. Those whose interests may be threatened by these efforts sometimes attack them as “activism.” However, upon closer inspection, the conduct that is attacked is no more than the exercise by state attorneys general of their lawful authority to do exactly what public servants in their position ought to do: protect law-abiding businesses from unfair advantages obtained by law-breaking competitors; recover taxpayer and consumer dollars from those marketing dangerous products or engaging in fraudulent conduct; and safeguard the rights, interests and health of citizens. Performing these functions is not “activism” in the pejorative sense intended by critics; it is the proactive fulfillment of the traditional duty of attorneys general to enforce the law. The good people of a state expect and deserve no less.

Guantánamo Is Here: The Military Commissions Act and Noncitizen Vulnerability

Muneer I. Ahmad*

On December 5, 2007, the Supreme Court will for the third time in five years hear argument on the rights of detainees at Guantánamo Bay. At issue in these cases, *Boumediene v. Bush* and *Al Odah v. United States*,¹ is whether the recently enacted Military Commissions Act of 2006 (“MCA”)² may constitutionally remove the right of the detainees to challenge the legality of their detention in habeas corpus proceedings in federal court. However, the ramifications of the Court’s decision may extend well beyond the Guantánamo detainees, affecting the rights of noncitizens more broadly, including those within the territorial United States. This is because the MCA is built upon a sharp distinction between citizens and noncitizens, and allocates rights accordingly. Indeed, the focus of the MCA is not on terrorist suspects, but *noncitizen* terrorist suspects. The Court’s first consideration of the Act may tell us as much about the rights of noncitizens as it does about the rights of those accused of terrorism.

When Congress passed the MCA, it ostensibly was concerned with the treatment of the approximately 350 noncitizen detainees at Guantánamo Bay, Cuba.³ The Act emerged in response to two Supreme Court cases that struck down central features of the Bush Administration’s Guantánamo policy, and sought to erect a comprehensive scheme for the detention and trial of detainees there. But on its face and according to its own logic, the MCA extends well beyond Guantánamo. The legal regime created by the MCA to regulate noncitizens detained outside the territorial United States traverses national boundaries and necessarily implicates the rights, status, and condition of noncitizens within the United States. In this way, the MCA makes clear that while geographically remote, Guantánamo is tethered to the United States, and in the legal, cultural, and political imaginations, is contiguous with it.

As a framework to govern the Guantánamo detainees, the MCA is deeply flawed, as it strips the federal courts of habeas corpus jurisdiction to review the legality of detention, and endorses a rudimentary and substandard legal process for the trial of

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¹ 127 S.Ct. 3078 (Mem) (June 29, 2007) (No. 06-1195).

² Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948-50; 18 U.S.C. § 2441; and 28 U.S.C. § 2241(c)-(e)) (2006).

³ As of this writing, there are approximately 330 individuals detained at Guantánamo. Press Release, U.S. Dep’t of Def., Detainee Transfer Announced (Sept. 29, 2007), <http://www.defenselink.mil/releases/release.aspx?releaseid=11368>. Approximately 445 detainees previously held have been released even though the Administration claims they were properly determined to be “enemy combatants.” *Id.*

those accused of war crimes. But in addition to its substantive defects, the MCA represents two threats to noncitizens, including those inside the territorial United States. First, by stripping habeas only for noncitizens, and by reserving the degraded proceedings of military commissions for noncitizens, the Act unnecessarily, and perhaps unconstitutionally, hardens a rights divide between citizens and noncitizens. Second, the MCA accelerates a worrying trend of criminalizing, and “national securitizing,” immigration law, without the panoply of protections that ordinarily attach in criminal proceedings. The MCA goes farther than any previous national security-related law, including the USA PATRIOT Act⁴, in expanding Executive power over noncitizens. In so doing, the MCA inaugurates a body of national security law that permits maximum state sanction with minimum individual rights.

Ultimately, these developments are troubling not only for the legal jeopardy they create for noncitizen terrorism suspects, but for noncitizens generally. The MCA’s citizenship-based erosions of rights further undermines a felt sense of security among noncitizens, and telegraphs to them a message of legal and political vulnerability as well as social and cultural displacement. These consequences extend well outside the realm of national security, and affect low-wage immigrant workers, asylum seekers, and even lawful permanent residents.

I. PRELUDE TO CONGRESSIONAL INTERVENTION: THE *RASUL* AND *HAMDAN* DECISIONS

Congress enacted the MCA in direct response to two Supreme Court decisions, *Rasul v. Bush*⁵ in 2004, and *Hamdan v. Rumsfeld*⁶ in 2006, both of which were major setbacks to the Bush Administration’s Guantánamo policy. In *Rasul*, the Court rejected the Administration’s position that the detainees could not challenge the legality of their detention in habeas corpus proceedings.⁷ In *Hamdan*, the Court invalidated the Administration’s hastily created military commission system.⁸ But to understand the significance of these decisions, and the congressional action that followed, one must start with the fundamentals of the Administration’s Guantánamo policy.

It is well understood that Guantánamo was designed by the Bush Administration as an interrogation center located in a no-rights zone, or what has often been called a legal black hole.⁹ Detainees were brought there for interrogation primarily, and detention only incidentally. In order to free its hand in interrogation—both literally and figuratively—the Administration sought to place the detainees outside the law and beyond the reach of the courts. The Administration has maintained that the Guantánamo detainees are not prisoners of war, who would be entitled to a bundle of rights under the Geneva Conventions, but are instead “enemy combatants” who fall outside the

⁴ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (“USA PATRIOT Act”), Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁵ 542 U.S. 466 (2004).

⁶ 126 S.Ct. 2749 (2006).

⁷ *Rasul*, 542 U.S. 466 (2004).

⁸ *Hamdan*, 126 S.Ct. 2749 (2006).

⁹ See generally JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 11 (2006).

purview of the Geneva Conventions, or any other body of law.¹⁰ Indeed, prior to the *Hamdan* decision, it was the consistent position of the Administration that the detainees have no rights at all under any source of law: the Constitution, U.S. statutes, the Geneva Conventions, other international treaties, or customary international law.¹¹ By this account, any limitation on the treatment of detainees was a matter of executive grace rather than detainee right.

The Administration argues that it has the authority to designate individuals as “enemy combatants” without any meaningful role for the courts in reviewing such determinations, and then to detain them without charge or trial for the duration of hostilities.¹² Because the Administration has also maintained that the hostilities—namely, the “war on terrorism”—are likely to last beyond our lifetime, this is tantamount to claiming authority to detain individuals indefinitely and without charge based solely on an unreviewable executive determination.

Although the Administration’s broad assertion of detention authority obviates trials, it has nonetheless decided to try a small number of individuals for alleged war crimes in military commissions. Initially, military commissions began under the putative authority of the same executive order that authorized the detention of noncitizens at Guantánamo.¹³

The *Rasul* and *Hamdan* decisions invalidated key features of both the detention and trial ambitions of the Administration. In *Rasul*, the Supreme Court rejected the Administration’s contention that the habeas jurisdiction of the federal courts did not reach the detainees at Guantánamo. In a decision that rested on statutory interpretation, the Court opened the way for all detainees at Guantánamo to challenge the legality of their detention, and correlatively, to gain access to counsel. Thus did the Supreme Court sanction piercing the veil of secrecy at Guantánamo that the Administration had worked so assiduously to create and maintain. With the arrival of

¹⁰ See U.S. Dep’t of Def., *The Legal Basis for Detaining Al Qaida and Taliban Combatants* (Nov 14, 2005), <http://www.defenselink.mil/news/Jan2006/d20060215legalbasis.pdf> [hereinafter *The Legal Basis for Detaining Al Qaida and Taliban Combatants*]; Presidential Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Presidential Military Order] (purporting to authorize the detention and trial by military commission of those held at Guantánamo).

¹¹ See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 454 (D.D.C. 2005) (summarizing the government’s position that the detainees “do not hold any ... substantive rights” under the Constitution and other laws); White House Fact Sheet, *Status of Detainees at Guantanamo* (Feb 7, 2002), <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> [hereinafter *Status of Detainees at Guantanamo*] (stating U.S. policy that neither Al Qaida nor Taliban members are entitled to Prisoner of War Status under the Geneva Conventions).

¹² See *The Legal Basis for Detaining Al Qaida and Taliban Combatants*, *supra* note 10 (“There is no question that under the law of war the United States has the authority to detain persons who have engaged in unlawful belligerence for the duration of hostilities, without charges or trial.”). Following the Supreme Court’s decisions in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Administration created a post-hoc administrative review process known as the Combatant Status Review Tribunal (“CSRT”), purportedly to determine the combatant status of Guantánamo detainees. Subsequently, Congress enacted the Detainee Treatment Act of 2005 (“DTA”), Pub. L. No. 109-148, 119 Stat. 2680, 2739-44 (codified at 10 U.S.C. § 801, 28 U.S.C. § 2241(e), and 42 U.S.C. § 2000dd) (2005), which created a limited form of review of the CSRT determinations in the U.S. Court of Appeals for the D.C. Circuit. For a thorough discussion of the infirmities of the CSRT process and the inadequacy of the review available in the D.C. Circuit, see *The Guantanamo Detainees’ Second Supplemental Brief Addressing the Effect of the Detainee Treatment Act of 2005 on this Court’s Jurisdiction Over the Pending Appeals*, *Al Odah v. United States*, 05-5064 (D.C. Cir.), 2006 WL 679965.

¹³ Presidential Military Order, *supra* note 10.

counsel at Guantánamo, and the initiation of numerous proceedings in federal court, the dirty laundry of Guantánamo—the stories of the detainees, and their torture—began to be aired in earnest.

The *Hamdan* decision was no less damaging for the Administration. At issue was whether the government could try detainees for alleged war crimes in a military commission system created by the Executive. Concluding that it could not, the Court held that the executive order creating the commissions violated the Uniform Code of Military Justice (UCMJ), which governs the use of military commissions. The Court found that the UCMJ requires military commissions to comport with the laws of war, including the four Geneva Conventions, and that the structure and procedures of the commissions violated the requirements of Common Article 3 of the Geneva Conventions. The defeat for the Administration was therefore twofold: not only were its commissions invalidated, but the Administration's position that the detainees existed outside the protections of the Geneva Conventions was repudiated as well.

Despite the seeming conclusiveness of these decisions on the questions of habeas review and trial by military commission, because both were, at base, statutory decisions, they left open the possibility of congressional override. Indeed, in a concurring opinion in *Hamdan*, Justice Breyer, joined by Justices Kennedy, Souter, and Ginsburg, invited as much.¹⁴ Soon after that ruling was handed down, Congress passed the MCA, and the President signed it.

The MCA for the first time congressionally authorizes trials by military commission of noncitizen “unlawful enemy combatants.”¹⁵ Moreover, it purports to strip from the courts habeas jurisdiction over challenges to the detention of “enemy combatants.”¹⁶ If these habeas-stripping provisions withstand legal challenge—the question before the Supreme Court in the *Boumediene* and *Al Odah* cases—the practical effect will be to sanction the indefinite detention of individuals determined to be “enemy combatants.” Because the statute creates no procedural requirements for the enemy combatant determination,¹⁷ it is at least arguable that an individual may be detained indefinitely on the basis of executive fiat uncontested in any court. All the executive needs to do is declare someone an enemy combatant, and his or her detention is instantly unreviewable.

Although the MCA does not require it, most, if not all, “enemy combatants” will have available a limited form of judicial review of their combatant status determination before the U.S. Court of Appeals for the D.C. Circuit, pursuant to the Detainee

¹⁴ *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring) (“Nothing prevents the President from returning to Congress to seek the authority he believes necessary”).

¹⁵ 10 U.S.C. § 948d(a).

¹⁶ See MCA, § 7 (amending 28 U.S.C. § 2241). The MCA was the second time that Congress attempted to strip the courts of habeas jurisdiction over the legal claims of Guantánamo detainees. In December 2005, Congress passed the Detainee Treatment Act (DTA), which also amended the federal habeas statute, 28 U.S.C. § 2241, to exclude review of claims brought by Guantánamo detainees. Because the statute was passed after the Supreme Court had granted *certiorari* in *Hamdan*, the effect of the DTA was briefed, argued, and decided in that case. At least as applied to review of military commissions, the Supreme Court concluded that the habeas-stripping provision of the DTA did not apply retroactively. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2762–69 (2006).

¹⁷ See MCA, § 3(a) (adding 10 U.S.C. § 948a(1)(ii)). At most, the MCA only requires that the individual be determined to be an “unlawful enemy combatant” by a “competent tribunal established under the authority of the President or the Secretary of Defense.” *Id.*

Treatment Act of 2005 (“DTA”).¹⁸ A central question in the *Boumediene* and *Al Odah* cases will be whether the DTA procedures are an adequate substitute for *habeas* review, though as a threshold matter, the Court will confront the question of whether the detainees have constitutional *habeas* rights in the first instance.

II. THE HARDENING OF THE CITIZEN/NONCITIZEN DIVIDE

The MCA does violence to a number of important values in the U.S. legal system, not the least of which are the sanctity of *habeas corpus*, and our fundamental commitment to fair trials before deprivation of life or liberty. Among its many deficiencies is the special jeopardy it creates for noncitizens, and the danger that this jeopardy will migrate from the detainees at Guantánamo to noncitizens within the territorial United States.

Despite the numerous examples of U.S. citizens accused of terrorist activity—John Walker Lindh,¹⁹ Yasir Hamdi,²⁰ and Jose Padilla,²¹ to name just three—the MCA strips substantive and procedural rights of noncitizens only. It does so explicitly, by reserving the use of the degraded proceedings of military commissions only for noncitizens,²² and for stripping *habeas* protections only of noncitizen “unlawful enemy combatants.”²³ Thus the MCA ingrains a citizenship distinction in our national security law, and allocates substantive and procedural rights solely on the basis of citizenship. This is at odds with our historical practice with respect to both *habeas* and criminal law proceedings, and is potentially unconstitutional as well.

¹⁸ Pub. L. No. 109-148, 119 Stat. 2680, 2739-44 (codified at 10 U.S.C. § 801, 28 U.S.C. § 2241(e), and 42 U.S.C. § 2000dd) (2005). Following the Supreme Court’s decisions in *Rasul*, establishing the federal courts’ *habeas* jurisdiction over Guantánamo, and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), suggesting what procedural protections must exist for a U.S. citizen to challenge his detention as an “enemy combatant,” the Department of Defense hastily constructed a post-hoc process known as Combatant Status Review Tribunals (“CSRTs”). Under the DTA, CSRT determinations can be reviewed by the D.C. Circuit Court of Appeals, but only to evaluate whether a given determination was consistent with the CSRT rules and procedures established by the Department of Defense, and whether those rules and procedures are consistent with the laws and Constitution of the United States, to the extent they apply. It remains the Administration’s position that neither the Constitution nor any U.S. laws apply to the detainees. Thus, the D.C. Circuit is unable to consider factual challenges to the detainees’ detentions, as a *habeas* court ordinarily would be able to do. The scope of the D.C. Circuit’s DTA review is currently being litigated, most notably in *Bismullah v. Gates* and *Parhat v. Gates*, Nos. 06-1197 and 06-1397, 2007 WL 2067938 (D.C. Cir. July 20, 2007).

¹⁹ See *U.S. v. Lindh*, 227 F. Supp. 2d 565 (E.D.Va, 2002) (approving sentence of twenty years for U.S. citizen John Walker Lindh for supplying services to the Taliban government and carrying an explosive during the commission of a felony).

²⁰ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 512-513 (2004) (describing the detention of U.S. citizen Yasir Hamdi by the U.S. government on grounds he fought with the Taliban in Afghanistan).

²¹ See *Padilla v. Hanft*, 432 F.3d 582, 584 (4th Cir. 2005) (describing the detention of U.S. citizen Jose Padilla by the U.S. government on grounds he entered the U.S. for the purpose of blowing up buildings in American cities).

²² See MCA § 3(a) (amending 10 U.S.C. § 948(c)) (“Any alien unlawful enemy combatant is subject to trial by military commission under this chapter.”).

²³ See *id.* at § 7(a) (amending 28 U.S.C. § 2241(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 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.”).

A. THE DEGRADED PROCEDURES OF THE MILITARY COMMISSIONS ARE RESERVED FOR NONCITIZENS

Because of their martial provenance, and their deviation from standard trial procedure, military commissions were viewed with suspicion by the Framers of the Constitution.²⁴ However, commissions have been tolerated historically on the stated rationale that their use, as opposed to the use of regular courts, has been required by military necessity.²⁵ Indeed, the first use of military commissions by the United States was necessitated by jurisdictional limits on courts-martial.²⁶ Each subsequent use has arisen from, and been circumscribed by, the exigencies of war. The question posed in *Hamdan* was “whether the preconditions designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal have been satisfied.”²⁷

The *Hamdan* court noted that, as reflected in the UCMJ and consistent with historical practice, any deviation from standard procedural practices of courts-martial must be “tailored to the exigency that necessitates it.”²⁸ Specifically, Article 36 of the UCMJ established a presumption of uniformity among military commissions and courts-martial, as well as a presumption of uniformity between all military tribunals and the principles of law and rules of evidence ordinarily applicable in criminal trials in federal district courts.²⁹ According to the Court, military commissions could depart from either court martial or federal court practices only where such practices would be impracticable.³⁰ The President’s failure to establish the impracticability of applying the rules of courts-martial in the military commissions was one of the primary bases for the Court’s invalidation of the commission system.³¹

The MCA jettisons this well-settled historical practice and statutory requirement that the procedural and substantive departures of military commissions from courts-martial be based on impracticability. As a statutory matter, Congress simply excepted military commissions for noncitizen “unlawful enemy combatants” from the impracticability requirements of Article 36 of the UCMJ.³² As a substantive matter, too, it is clear that military necessity is no longer the basis for the substandard procedures of

²⁴ See *Loving v. United States*, 517 U.S. 748, 760 (1996) (noting that “the Framers harbored a deep distrust of executive military power and military tribunals”).

²⁵ See *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.” (citing W. Winthrop, *Military Law and Precedents* 831 (rev. 2d ed. 1920))).

²⁶ *Hamdan*, 126 S.Ct. at 2773.

²⁷ *Id.* at 2777.

²⁸ *Id.* at 2790.

²⁹ At the time that *Hamdan* was decided, Article 36 provided:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions, and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

10 U.S.C. § 836 (2000). The MCA amended both paragraphs so as to except military commissions from the impracticability requirement. See MCA § 4(a)(3).

³⁰ *Hamdan*, 126 S.Ct. at 2791.

³¹ *Id.* at 2792-93. The Court also invalidated the commissions as violative of Common Article 3 of the Geneva Conventions. *Id.* at 2793.

³² See MCA § 4(a)(3) (amending 10 U.S.C. § 836).

the military commissions. For if it were, then the military commissions would apply to all “unlawful enemy combatants,” citizens and noncitizens alike. And yet, as under the old system, commissions under the MCA are authorized only for noncitizens.

Indeed, the deciding factor as to whether an individual in the “war on terror” will be subject to the degraded proceedings of a military commission is alienage, not the exigencies of war. The MCA creates a bifurcated system of justice, with citizenship as the dividing line. A citizen who meets the MCA’s definition of an “unlawful enemy combatant” and is accused of war crimes will be tried not by commission, but instead either by court martial under Article 47 of the UCMJ,³³ or in federal district court under the War Crimes Act,³⁴ both fora which offer a full panoply of substantive and procedural protections. The noncitizen, and only the noncitizen, will be subject to the degraded proceedings of a military commission.

We might imagine two individuals, one a noncitizen and the other a citizen, who are in exactly the same place, at exactly the same time, and engaged in exactly the same conduct. Both individuals are captured by the United States, detained, and charged with exactly the same substantive war crime offense. Despite being identically situated in every way but citizenship, the two will get radically different trials. The citizen’s trial, in either a court martial or federal court, will be governed by the ordinary rules of evidence, including hearsay rules and prohibitions on evidence obtained through coercion, while the noncitizen will endure the markedly inferior procedural and substantive protections of a military commission.

As previously mentioned, citizens—such as John Walker Lindh, Yaser Hamdi, and Jose Padilla—have been caught up in the government’s anti-terrorism regime just as noncitizens have. The Lindh case is particularly instructive, as he was a young American citizen picked up in the battlefield in Afghanistan and charged with, among other things, conspiracy to murder U.S. nationals and providing material support and resources to foreign terrorist organizations.³⁵ Those charges were brought in federal district court, while roughly analogous charges of murder by an unprivileged belligerent, conspiracy, and providing material support for terrorism have been brought against a young Canadian citizen, Omar Khadr, in the degraded proceedings of the military commissions.³⁶

Thus, it was a political decision, and not the exigencies of war, that dictated the use of military commissions for noncitizens only. The refusal to authorize the use of military commissions for all “unlawful enemy combatants,” regardless of citizenship, constitutes a tacit admission by Congress as to the inferiority and inadequacy of the commission system, and reflects a political judgment that such a degraded form of justice could not be used for American citizens, even those accused of committing war crimes while engaged in hostilities against their own country.

The MCA frankly admits the inadequacy of the military commissions in another way as well, as several provisions of the statute hermetically seal off the “jurisprudence” of the commissions from application in war crime trials in courts-martial, and

³³ 10 U.S.C. § 847 (2000).

³⁴ 18 U.S.C. § 2441 (2006).

³⁵ See *United States v. John Phillip Walker Lindh*, Indictment (Feb. 2002, E.D. Va.), <http://www.usdoj.gov/ag/2ndindictment.htm>. See *supra* note 19 and accompanying text.

³⁶ *United States v. Khadr*, Charge Sheet (Apr. 5, 2007), available at <http://www.defenselink.mil/news/Apr2007/Khadrreferral.pdf>.

vice versa.³⁷ This reflects a jurisprudential anxiety about the commissions, and a concern that its substandard proceedings and decisions, reserved for noncitizens, not contaminate the legitimate proceedings in courts-martial and federal court to which citizens (including U.S. servicemembers) are entitled.

The legal question of whether Congress can single out noncitizens for the substandard treatment of commissions remains unanswered. It might be argued, for example, that such a distinction based on alienage is subject to strict scrutiny under the Equal Protection Clause. And yet, whether the detainees at Guantánamo have constitutional rights at all remains unresolved. Legality aside, the political feasibility of such targeting of noncitizens was established by the passage of the MCA.

B. THE MCA ATTEMPTS TO STRIP HABEAS CORPUS FOR NONCITIZEN ENEMY COMBATANTS WITHOUT GEOGRAPHIC RESTRICTIONS

The MCA is unambiguous in attempting to strip the federal courts of habeas jurisdiction only over noncitizens. As a legal matter, whether Congress can remove habeas jurisdiction over Guantánamo remains to be seen. Two courts have addressed the issue thus far, both ruling that the MCA does in fact remove habeas jurisdiction, and does so without running afoul of the Constitution's Suspension Clause.³⁸ After initially denying *certiorari* in one of those cases—*Boumediene* (and its companion *Al Odah*)—the Supreme Court dramatically reversed itself, reviving the legal question. But again, as a political matter, the ability to strip noncitizens of habeas was reflected in the quick passage of the MCA.

It might be argued that the rights dividing line is not merely citizenship, but a combination of citizenship and territoriality. For example, both courts that have upheld the habeas-stripping provisions of the MCA have concluded that the detainees at Guantánamo lacked constitutional habeas rights not merely because they are noncitizens, but because they lack sufficient connection, territorial or otherwise, to the United States. In *Hamdan*, on remand from the Supreme Court, District Judge James Robertson concluded that Hamdan's connection to the United States "lacks the geographical and volitional predicates necessary to claim a constitutional right to habeas corpus."³⁹ Similarly, in *Boumediene v. Bush*,⁴⁰ the D.C. Circuit held that the "Constitution does not confer rights on aliens without property or presence within the United States."⁴¹

As a textual matter, however, the MCA is explicit in applying its habeas-stripping provisions to noncitizen "unlawful enemy combatants" regardless of geography. Indeed, neither § 7, purporting to strip habeas, nor § 3(a), defining "unlawful enemy

³⁷ See MCA § 3(a) (adding 10 U.S.C. § 948b(e)):

The findings, holdings, interpretations, and other precedents of military commissions under this chapter may not be introduced or considered in any hearing, trial, or other proceeding of a court-martial convened under chapter 47 of this title. The findings, holdings, interpretations, and other precedents of military commissions under this chapter may not form the basis of any holding, decision, or other determination of a court-martial convened under that chapter.

See also, MCA § 3(a) (adding 10 U.S.C. § 948b(c) ("The judicial construction and application of [chapter 47, governing courts-martial] are not binding on military commissions established under this chapter.")).

³⁸ See *Hamdan v. Rumsfeld*, 464 F.Supp.2d 9, 11–16 (D.D.C. 2006); *Boumediene v. Bush*, 476 F.3d 981, 986–94 (D.C. Cir. 2007).

³⁹ *Hamdan*, 464 F.Supp.2d at 18.

⁴⁰ *Boumediene*, 476 F.3d at 981.

⁴¹ *Id.* at 991.

combatant,” contains any geographic limitation. Thus, on the face of the statute, habeas would appear to be stripped for all noncitizen “unlawful enemy combatants,” regardless of whether they are detained in or out of the territorial United States. The *Hamdan* and *Boumediene* decisions do not limit the habeas-stripping provisions to noncitizens who lack some meaningful connection to the territorial United States, but instead note that the detainees in those cases have none. Thus, even if those cases were to withstand challenge in the Supreme Court, this would not answer the question of whether habeas has been stripped even for noncitizens within the United States.

That question is not merely academic. Rather, the government has already detained at least one noncitizen within the United States as an “enemy combatant,” and seeks the dismissal of his habeas action on the basis of § 7 of the MCA. Ali al-Marri, a citizen of Qatar, entered the United States lawfully on a student visa in 2001, and was subsequently arrested by the FBI at his home in Peoria, Illinois.⁴² The government first held al-Marri as a material witness, then prosecuted him for various crimes in federal court. On the eve of a suppression hearing in which al-Marri planned to demonstrate that he had been tortured, the government aborted the federal prosecution and, pursuant to a presidential designation of al-Marri as an “enemy combatant,” transferred him into military custody at the brig in South Carolina, where, like the detainees at Guantánamo Bay, he faces indefinite detention without charge or trial. Following the enactment of the MCA, the government moved to dismiss al-Marri’s habeas action on the ground that § 7 divested the federal courts of jurisdiction.

The *al-Marri* case bridges Guantánamo and the United States, and if the government’s view prevails, represents the potentially borderless scope of the MCA. By the government’s account, al-Marri is legally indistinguishable from a detainee at Guantánamo, in that both are noncitizens who are, by presidential fiat, “enemy combatants,” and both are, by virtue of § 7 of the MCA, bereft of habeas protections. Thus, the government’s position in the case suggests that while the MCA may have been enacted with Guantánamo detainees in mind, the statute is hardly confined to it. Rather, its constraints on individual liberties reach into the heartland of America—even to Peoria—and travel along the citizen-noncitizen divide.

While a federal district court initially upheld al-Marri’s detention, as of this writing, the government has been rebuffed by the Fourth Circuit Court of Appeals. In *Al-Marri v Wright*, that court held that the MCA had not stripped al-Marri’s statutory habeas rights, reasoning in part that “as an alien captured and detained within the United States, [al-Marri] has a right to habeas corpus protected by the Constitution’s Suspension Clause.”⁴³ In addition, the court held that al-Marri was not properly detained as an “enemy combatant.” The court’s decision gives dispositive weight to the fact that, although a noncitizen, al-Marri was lawfully present in the United States, and therefore was entitled to a bundle of rights that might not attach to other detainees. With regard to the MCA, the court stated:

Congress sought to eliminate the statutory grant of habeas jurisdiction for those aliens captured and held outside the United States who could not lay claim to constitutional protections, but to preserve the rights of aliens like al-Marri, lawfully residing within the

⁴² See *Al-Marri v. Wright*, 443 F.Supp.2d 774, 776 (D.D.C. 2006).

⁴³ *Al-Marri v. Wright*, 487 F.3d 160, 167 (4th Cir. 2007).

country with substantial, voluntary connections to the United States, for whom Congress recognized that the Constitution protected the writ of habeas corpus.⁴⁴

In this regard, the *al-Marri* decision rejects the citizen-noncitizen distinction advanced by the government. However, the Fourth Circuit subsequently granted *en banc* review of the case, and so the question of whether the MCA stripped habeas for even lawfully admitted noncitizens in the territorial United States remains a live one. Moreover, even if habeas jurisdiction is upheld, the government's remaining arguments, regarding its purported authority to place noncitizens lawfully present in the United States in indefinite military detention, themselves reflect the seepage of the Guantánamo legal regime into the territorial United States.

Admittedly, *al-Marri* is currently the only case involving a noncitizen "enemy combatant" within the United States; his case may be an outlier, and if the Fourth Circuit decision stands, it may simply indicate the highwater mark of the government's "enemy combatant" regime. And yet, the *al-Marri* case suggests the Administration's ambition for the MCA. Moreover, the fact that *al-Marri* has remained in detention for over five years suggests once more the political feasibility of such treatment of noncitizens.

III. THE FURTHER CRIMINALIZATION OF IMMIGRATION LAW

Of course, the MCA is not the first statute to distinguish between citizens and noncitizens. But with the exception of a small category of laws known as alienage laws (for example, laws prohibiting noncitizens from holding certain law enforcement jobs, or from voting), citizenship distinctions historically have been the province of immigration law. The MCA—ostensibly a national security law—encroaches dangerously and problematically on immigration law, threatening to weaken significantly legal protections for noncitizens within the territorial United States.

Long before enactment of the MCA, and even before September 11th, the civil, administrative corpus of immigration law has been used against noncitizens to achieve the punitive outcomes of criminal law. Because immigration law is civil rather than criminal, it is a far more efficient tool for policing and regulating noncitizens than is criminal law. Unlike in a criminal trial, noncitizens in immigration proceedings have no Sixth Amendment right to counsel, *Miranda* rights, presumption of innocence, or right to a jury trial.⁴⁵ Since deportation, and detention incident to deportation are considered administrative rather than punitive,⁴⁶ the government is able to constrain the liberty of noncitizens with significantly greater ease than it can citizens. The result is a convergence of immigration and criminal law, or the criminalization of immigration law, a trend that the MCA has accelerated into the national securitization of immigration law.

Prior to September 11th, this trend was most evident in the expansion of the category of "aggravated felonies" that could subject noncitizens to deportation.⁴⁷ For

⁴⁴ *Id.* at 171.

⁴⁵ See generally *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39 (1984).

⁴⁶ See *id.* at 1038 (stating that a "deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry").

⁴⁷ See generally Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control, and National Security*, 39 CONN. L. REV. 1827, 1844-45 (2007) (discussing how amendments to the INA in 1996 greatly expanded the definition of "aggravated felony," significantly broadening the grounds for removability).

example, a noncitizen convicted of shoplifting was made deportable, even after completion of a criminal sentence.⁴⁸ It has become a maxim of immigration law that an “aggravated felony” need be neither aggravated nor a felony,⁴⁹ and the incoherence of this area of law has led many to conclude that, notwithstanding the doctrinal character of immigration law as civil, functionally it has been rendered criminal; the judgments meted out—namely, detention and deportation—are essentially punitive in nature.⁵⁰

In the aftermath of September 11th, immigration law became the most favored law enforcement tool of the federal government, and was deployed in newly aggressive ways. The initial investigation of the September 11th attacks involved the round-up and detention of nearly 800 Arab, Muslim, and South Asian men by the Immigration and Naturalization Service, the closure of historically public immigration proceedings, and the deployment of a strategy to detain individuals long after they had been ordered deported.⁵¹ (None of the individuals detained was ever charged with terrorist activity, and none are believed to have had any connection to the September 11th attacks.) Thus, national security law came to subsume immigration. Even the immigration bureaucracy was moved into the newly created Department of Homeland Security, a structural shift that communicated the view that immigration was principally a matter of national security.⁵²

Congress contributed to the post-September 11th criminalization of immigration law, most notably with the passage of the USA PATRIOT Act,⁵³ which authorized potentially indefinite immigration detention of noncitizens certified by the Attorney General, to be engaged in terrorist activity.⁵⁴ Thus, whereas a criminal offense of providing material support for terrorism exists, for which an individual could be imprisoned, the PATRIOT Act created a parallel immigration offense which enables the government to achieve the same result of imprisonment, unencumbered by the substantive or procedural individual rights that attach in criminal proceedings.

The MCA takes the trend significantly farther by empowering the Executive to achieve criminal law goals of imprisonment (and even death) with even fewer protections than the immigration law—including the PATRIOT Act—provides. National security law does to noncitizens what even immigration law does not permit. Specifically, a key provision of the MCA, defining “unlawful enemy combatants,” overlaps significantly with sections of the PATRIOT Act, but with fewer protections.

⁴⁸ See, e.g., *U.S. v. Christopher*, 239 F.3d 1191 (11th Cir. 2001).

⁴⁹ See *U.S. v. Pacheco*, 225 F.3d 148, 154 (2d Cir. 2000) (“[N]othing ... leads us to doubt our conclusion that a misdemeanor may, in some cases and consistent with legislative intent, fall within the INA’s definition of ‘aggravated felony.’”).

⁵⁰ See generally M. Isabel Medina, *Demore v. Kim—A Dance of Power and Human Rights*, 18 GEO. IMMIGR. L.J. 697 (2004); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003).

⁵¹ See Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

⁵² See David Firestone, *Traces of Terror: The Reorganization; Divided House Approves Homeland Security Bill, with Limited Enthusiasm*, N.Y. TIMES, July 27, 2002, at A8 (reporting that the INS will be dissolved into the newly created Department of Homeland Security).

⁵³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (“USA PATRIOT Act”), Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁵⁴ USA PATRIOT Act §412.

Like the various definitions of “enemy combatant” deployed by the Administration previously, the MCA’s statutory definition of “unlawful enemy combatant” is exceptionally broad. One consequence of its breadth is that the statute threatens to sweep within its ambit a class of noncitizens inside the territorial United States currently targeted by the PATRIOT Act. The MCA defines “unlawful enemy combatants” to include “a person who has engaged in hostilities or who has purposefully and *materially supported* hostilities against the United States or its co-belligerents.”⁵⁵ The italicized language bears strong resemblance to a provision of the Immigration and Nationality Act, added by the PATRIOT Act, regarding material support for terrorism.⁵⁶ That provision has been invoked numerous times in recent years in removal proceedings against noncitizens who have donated money to Islamic charities, among other causes.⁵⁷

Thus, the same noncitizens, including lawful permanent residents, who could be detained and deported on material support charges in immigration proceedings could also be detained indefinitely as “enemy combatants.”⁵⁸ On first inspection, this might not seem so different from expanded immigration detention authority granted the executive under the PATRIOT Act which, as noted previously, permits potentially indefinite detention of those certified by the Attorney General, upon his reasonable belief, to be engaged in terrorist activity, including providing material support to terrorists or terrorist organizations. But the MCA’s detention authority is more expansive, and more troubling, in two regards.

First, unlike the PATRIOT Act, the MCA lacks a certification requirement for “enemy combatants.”⁵⁹ Rather, the MCA leaves the process for “enemy combatant” determination solely to the discretion of the executive, and in any event, permits detention even while such a determination is pending. Second, and more critically, the PATRIOT Act explicitly authorizes habeas review of the Attorney General’s certification,⁶⁰ thereby bounding the exercise of executive authority statutorily and constitutionally. In contrast, the MCA explicitly strips the courts of habeas authority.⁶¹ Thus, while the Attorney General’s certification might be challenged in immigration court in the first instance and in federal habeas proceedings thereafter, the “enemy combatant” determination might never be meaningfully contested. Here, too, the *al-Marri* decision becomes critically important, for it suggests the continuing availability of habeas review for at least some noncitizens within the United States.

⁵⁵ MCA § 3(a) (adding 10 U.S.C. § 948a(1)) (emphasis added).

⁵⁶ Section 212(a)(3)(B)(i)(I) of the Immigration and Nationality Act (“INA”) renders a noncitizen inadmissible for engaging in terrorist activity. 8 U.S.C. § 1182(a)(3)(B)(i)(I) (2006). The same class of individuals is also deportable. INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B). The term “engage in terrorist activity” is defined to include “an act that the actor knows, or reasonably should know, affords *material support*, including a safe house, transportation, communications, funds, transfer of funds, or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives or training” for the commission of a terrorist activity, to another individual or to a terrorist organization. INA § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (emphasis added).

⁵⁷ See Neil MacFarquhar, *Muslim Charity Sues Treasury Dept. and Seeks Dismissal of Charges of Terrorism*, N.Y. Times, Dec. 12, 2006, at A24.

⁵⁸ It is not entirely clear what the differences are between “unlawful enemy combatants,” as defined by the MCA, and “enemy combatants,” a term used but not defined by the MCA. For the purposes of this discussion, I assume that someone determined to be an “unlawful enemy combatant” would also be considered an “enemy combatant.”

⁵⁹ The INA requires certification, as well as periodic review of the certification for those being detained indefinitely. See INA § 236A(a)(3), (7), 8 U.S.C. § 1226a(a)(3), (7).

⁶⁰ INA § 236A(b); 8 U.S.C. § 1226a(b).

⁶¹ MCA § 7 (amending 28 U.S.C. § 2241).

IV. CONCLUSION

When the Supreme Court takes up the *Boumediene* and *Al Odah* cases, it will be presented with the opportunity to clarify how, if at all, citizenship matters to the rights of nonterrorism suspects. But just as the MCA extends beyond Guantánamo, so does the vulnerability it creates for noncitizens extend beyond terrorist suspects. At a doctrinal level, the MCA targets noncitizen “unlawful enemy combatants.” But law is more than doctrine, and it casts a long shadow in our culture and our politics. The fact that such core legal protections as habeas corpus and fundamental fairness in criminal proceedings have been stripped for noncitizens, and only noncitizens, both reflects and perpetuates the political vulnerability of immigrants. Congress likely limited these provisions of the MCA to noncitizens not only because to apply them to citizens seems clearly unconstitutional, but because targeting noncitizens is politically possible in a way that depriving citizens of fundamental forms of protection against state power is not. Indeed, noncitizens are a quintessentially disenfranchised population, and their lack of electoral influence enables their targeting.

Moreover, the stripping away of habeas and criminal law protections for only noncitizens, when U.S. citizens such as John Walker Lindh, Yasir Hamdi, and Jose Padilla are also accused of terrorism, reinforces an equation of immigrants with terrorists. That association has been forged through the broader targeting of noncitizens as terrorists through immigration enforcement, as discussed previously. But once again the targeting has been imprecise, and terrorism concerns have been deployed as the basis for, among other things, a policy of mandatory detention for Haitian asylum seekers⁶² and efforts to expand local enforcement of federal immigration law, a practice that largely affects low-wage immigrant workers.

By escalating from the criminalization to the national securitization of noncitizens, the MCA continues to erode the felt sense of security of immigrants in the United States. This same lack of security inhibits low-wage immigrant workers from reporting labor and employment violations, discourages immigrant survivors of domestic violence to exit their abusive relationships, and prevents immigrants from reporting suspected criminal activity to the police. In this way, the MCA contributes to a culture of immigrant vulnerability, with broad and damaging consequences.

The bitter irony of the Supreme Court’s grant of *certiorari* in the *Boumediene* and *Al Odah* cases is that the Court now confronts the same fundamental issue as it did five years ago in *Rasul*—whether the detainees at Guantánamo can challenge the legality of their detention through habeas corpus. But Congress’s intervention since *Rasul* has sharpened the questions of how, and why, citizenship matters to the availability of the most fundamental protections against the exercise of state power. Whether the Court addresses them or not, the MCA has thus insinuated these questions into the territorial United States, and in so doing has brought Guantánamo to our shores.

⁶² In re D-J-, 23 I & N Dec. 572 (A.G. 2003) (denying Haitian asylum seeker’s request for release on bond on national security grounds).

Towards Full Participation: Solutions for Improvements to the Federal Language Assistance Laws

Jocelyn Friedrichs Benson*

During the extensive deliberations that surrounded the 2006 debate in Congress over the renewal of expiring provisions of the Voting Rights Act, the issue of federally-mandated language accommodations took center-stage.¹ The policies at issue, sections 203 and 4(f)4 of the Voting Rights Act,² together provide the federal government's most significant attempt to ensure that citizens facing barriers to educational opportunities that result in limited English proficiency are able to equally participate in the electoral process. And while these important provisions nearly fell victim to an unrelated controversy over immigration reform and anti-immigration sentiments,³ after much debate and consideration of related amendments Congress, ultimately voted to renew the provisions for an additional 25 years.⁴

This issue brief builds on the presumption that, so long as educational opportunities to learn English are limited for certain historically disadvantaged citizen groups, and so long as these citizen groups collectively face continued discriminatory barriers to electoral participation, language accommodations are necessary and vital to ensuring that voters in our democracy are able to cast educated and engaged votes.⁵ I maintain that existing federal and state protections for language minority citizens, though important and beneficial, are incomplete. In particular, I offer a detailed critique of current federal and state policies that seek to assist language minority voters and propose a flexible legal infrastructure to address existing inadequacies in government

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¹ For a thorough discussion of Congress' extensive deliberation and debate surrounding the reauthorization of certain sections of the Voting Rights Act, including Sections 4(f)4 and 203, see James Tucker, *The Politics Of Persuasion: Passage Of The Voting Rights Act Reauthorization Act Of 2006*, 33 NOTRE DAME J. LEGIS. 205 (2007).

² 42 U.S.C. § 1971 (2006).

³ For a discussion of this "misguided" use of language accommodations to inflame anti-immigration sentiments during the reauthorization debate, see Terry M. Ao, *When the Voting Rights Act Became Un-American: The Misguided Vilification Of Section 203*, 58 ALA. L. REV. 377 (2006).

⁴ See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246 (2006).

⁵ For more discussion on the arguments leading to this presumption, see, e.g., Jocelyn Friedrichs Benson, *!Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency Into American Democracy* 48 B.C. L. REV. 251 (2007).

protections. My suggested additions to existing state and federal policies, which include a call for federally trained and certified translators, the increased involvement of community organizations in determining the type and breadth of protections, and better enforcement of court orders that mandate protections, would fill existing gaps in accommodations and improve the accuracy and coverage of this assistance.

I. SHORTCOMINGS OF EXISTING LANGUAGE ASSISTANCE FOR VOTERS

In 1975, Congress found that certain limited English proficiency voters (LEP) were effectively excluded from participation in the electoral process as a result of poor educational opportunities, high illiteracy rates, and low voting participation.⁶ To remedy this, Congress added Sections 203 and 4(f)4 to the Voting Rights Act, requiring that certain jurisdictions provide translated election materials or bilingual pollworkers if a significant number of Latino, Asian American, Native American, or Alaskan Native citizens living in those jurisdictions suffered from high rates of illiteracy.⁷

The coverage formula for Section (4)(f)4 applies only to jurisdictions that, on November 1, 1972, failed to provide translated election materials to any language minority groups that comprised over five percent of the voting age citizen population on that date.⁸ Jurisdictions covered under Section 4(f)4 must also comply with the preclearance requirements of Section 5 of the VRA.⁹ Section 203 provides similar protections but incorporates a flexible coverage formula, linked to the U.S. Census' American Community Survey, and set to evolve with and remain tailored to the size and literacy levels of certain covered language minority communities.¹⁰

⁶ Voting Rights Act Amendments of 1975, Pub. L. No. 94-73 (1975). *See also* H.R. Rep. No. 94-196, at 17 (1975).

⁷ Section 203 as amended states in part that “no covered State or political subdivision shall provide voting materials only in the English language,” and defines covered jurisdictions as districts where “more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and are limited-English proficient; (II) more than 10,000 of the citizens of voting age of such political subdivision are members of a single language minority and are limited-English proficient; or (III) in the case of a political subdivision that contains all or any part of an Indian reservation, more than 5 percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are limited-English proficient; and (ii) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.”

⁸ 28 CFR § 55.5 (“Section 4(f)(4) applies to any State or political subdivision in which (1) Over five percent of the voting age citizens were, on November 1, 1972, members of a single language minority group, (2) Registration and election materials were provided only in English on November 1, 1972, and (3) Fewer than 50 percent of the voting-age citizens were registered to vote or voted in the 1972 Presidential election.”) Jurisdictions covered under Section 4(f)4 are also required to submit any changes to their accommodations for language minorities to the Attorney General for preclearance. *See also* 28 CFR § 55.2(d).

⁹ These requirements mandate that jurisdictions covered under Section 4(f)4 submit all changes to their election laws and procedures to the federal government for preclearance prior to or immediately following their enactment. The federal government, via either the Civil Rights Division of the Justice Department or the District Court for the District of Columbia, evaluates whether the changes will have a “retrogressive” effect on minority electoral power within the jurisdiction. *See* 42 U.S.C. § 1973c (2006).

¹⁰ Specifically, a jurisdiction is covered under Section 203 if the Director of the Census determines that two criteria are met. First, the limited-English proficient citizens, or citizens who speak English “less than very well,” who are of voting age in a single language group must: (a) number more than 10,000; (b) comprise more than five percent of all citizens of voting age; or (c) comprise more than five percent of all American Indians of a single language group residing on an Indian reservation. Second, the illiteracy rate of the language minority citizens must exceed the national illiteracy rate. Voting Rights Act § 203, 42 U.S.C.A. § 1973aa-1a (West 2001 & Supp. 2006).

Section 203 jurisdictions are required to fund and provide election materials and assistance in the language of the applicable minority group¹¹ and are expected to take reasonable steps to provide assistance in a way that allows members of the applicable language group to be informed of and participate in election activities.¹² Coverage is re-examined and altered every 5 years, under the direction of the U.S. Census Bureau.¹³ Compliance with Section 203 is monitored by the U.S. Department of Justice, and typically includes translated written materials (such as ballots, voter registration forms, and voting instructions),¹⁴ oral assistance (such as interpreters and bilingual poll workers),¹⁵ and publicity regarding the elections and availability of bilingual assistance.¹⁶ Section 203 jurisdictions are also encouraged, though not required, to work with local community groups to ensure the accommodations are tailored to the needs of the community.¹⁷

Problems resulting from these flexible and frequently under-enforced guidelines include noncompliance,¹⁸ poorly or incorrectly translated materials,¹⁹ and nonexistent oral language assistance.²⁰ The coverage formula is also limited to only four language minority groups; federal assistance in this form is not afforded to individuals of

¹¹ See generally, 28 CFR §§55.18–55.20 (2006).

¹² 28 C.F.R. § 55.2 (b)(1),(2)(2006). If the predominant language in the covered area is historically unwritten, as in the case of many Alaskan native or American Indian tribal jurisdictions, the State or political subdivision only need furnish oral instructions, assistance, or other information relating to registration and voting. 42 USCS § 1973aa-1a(c) (2005) (“[W]here the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.”) Jurisdictions may opt, though are not required, to use trained interpreters at poll sites 28 C.F.R. §§ 55.18, 55.20 (2006), and may opt to “target” their assistance to certain areas or precincts for coverage 28 C.F.R. § 55.17 (2006). They are also encouraged to take appropriate steps to publicize the availability of translated materials, including the display of notices in the minority language, announcements over minority language radio or television stations, publication of notices in minority language newspapers, and direct contact with language minority group organizations. 28 C.F.R. § 55.18(e) (2006).

¹³ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246 (2006).

¹⁴ §§ 55.15, 55.19.

¹⁵ §§ 55.18, 55.20. Sometimes assistance must be provided in more than one dialect of the language. For instance, although there is one written form of Chinese, there are several spoken dialects, like Cantonese, Mandarin, Toisan, and others. *Id.*

¹⁶ § 55.20.

¹⁷ 28 C.F.R. § 55.20.

¹⁸ See, e.g., Glenn D. Magpantay, *Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*, 11 ASIAN L.J. 31 (May 2004) (providing a detailed description of the lack of compliance among covered jurisdictions).

¹⁹ One infamous incident of mistranslated materials occurred in Queens, NY during the general election of 2000, when Chinese-language ballots were translated incorrectly at six voting sites, so that Democratic candidates were labeled as Republican, and Republican candidates were labeled as Democrats, while simultaneously translated ballots in Chinatown in Lower Manhattan asked voters to select five candidates for State Supreme Court justices when they were only permitted to select three. See Editorial, *Bungled Ballots in Chinatown*, N.Y. TIMES, Jan. 1, 2001, at A12 (noting that “The mistakes were corrected, but not before uncorrected absentee ballots were sent out.”)

²⁰ See, e.g., Kathy Feng, Keith Aoki & Bryan Ikegami, *Voting Matters: APIAs, Latinas/os, and Post-2000 Redistricting in California*, 81 OR. L. REV. 849, 867 (Winter 2002) (“A recurrent problem has been English-speaking and reading ability and the availability of multilingual voting materials and multilingual pollworkers to answer questions.”).

Haitian, Arab, or Russian descent, or any other non-English speaking community.²¹ And the fact that Section 203 only applies to areas with a certain number of language minority citizens speaking a *single* language leads to limited coverage for Asian Americans, who may collectively comprise over 5% or 10,000 voting age citizens in a particular jurisdiction, but will not trigger coverage unless they all speak the same language.²² As a result, following the 2000 census coverage determinations there were several localities with large Asian American populations that were not covered under Section 203's "individual language" calculation.²³ These issues highlight significant concerns about the efficacy of Sections 203 and 4(f)4 as the primary accommodation for LEP citizens in electoral politics.²⁴

Section 208 of the Voting Rights Act²⁵ and the Help America Vote Act of 2002 (HAVA),²⁶ are other sources of assistance for LEP voters. Section 208 permits any voter in need of any type of aid or accommodation to be accompanied by another individual who is able to provide such assistance.²⁷ The provision is frequently either ignored or misapplied by local election officials,²⁸ or blatantly violated.²⁹ It also does not require localities to provide poll workers to offer assistance, thus assuming that the voter needing assistance can access family members or friends who can aid them

²¹ Recent research has suggested that some of these other groups face similar educational and electoral barriers and should be included in the federal protections. See Jocelyn Benson, *Language Protections for All? VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION AND POWER*, (Ana Henderson ed., 2007); Brenda Fathy Abdelall, Note, *Not Enough of a Minority? Arab Americans and the Language Assistance Provisions (Section 203) of the Voting Rights Act*, 38 U. MICH. J. L. REFORM 911, 932-38 (2005).

²² Su Sun Bai, Comment, *Affirmative Pursuit of Political Equity for Asian Pacific Americans: Reclaiming the Voting Rights Act*, 139 U. PA. L. REV. 731, 761 (1991) (Section 203 inadequacies "are exacerbated in the case of Asian Pacific Americans because of the diverse languages spoken by the 'generic' Asian Pacific American group. Thus, although Asian Pacific Americans as a group may form more than five percent of the voting age population in a jurisdiction, it is extremely difficult for one language minority (i.e., Chinese, Japanese, or Korean) to constitute five percent of the relevant population.").

²³ Localities not covered under Section 203 with large Asian American populations post 2000: California: Los Angeles: Khmer, Thai, Samoan; Hawai'i: Honolulu: Korean and Filipino; New Jersey: Bergen: Korean Middlesex: Chinese; Massachusetts: City of Boston: Chinese Dorchester: Vietnamese Lowell: Khmer; Pennsylvania Philadelphia: Chinese.

²⁴ Sandra Guerra argues that there is a right to such accommodations for LEP voters.

²⁵ 42 U.S.C. §1973aa-6 reads:

"Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union."

²⁶ Pub. L. No. 107-252, 107th Cong., 42 USCS § 15301(b)(2)(G) (stating that states must use federal funding provided under HAVA to, among other things, "[improve] the accessibility and quantity of polling places, including providing ... assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language.")

²⁷ 42 U.S.C. §1973aa-6.

²⁸ James T. Tucker & Rodolfo Espino, *Minority Language Assistance Study* (2005) (noting a finding of their study that surveyed election officials claimed that voters in their jurisdictions do not receive assistance as required by Section 208, with only 1.9 percent of responding clerks able to correctly state the federal standard).

²⁹ See, e.g., *United States v. Berks County, PA*, 277 F. Supp.2d 570, 580 (E.D. Pa. 2003) (noting that election officials violated Section 208 when they denied Spanish-speaking voters the statutory right to bring their assistor of choice into the voting booth); Ernie Garcia, *Abuse of Interpreters is Alleged at Clifton Board Election*, North Jersey Herald & News, Apr. 20, 2000, at A1 (reporting an incident where, in violation of Section 208, white poll workers in Clifton, New Jersey yelled at two Spanish translators offering assistance to Latino voters and forced them to leave the polling site).

in the voting process, and is comfortable with any extra attention they receive by asserting their rights for extra assistance.³⁰ HAVA provides federal funds to assist states in improving their systems of election administration, and specifically lists the provision of language assistance as one of a handful of changes the state can make with the funds.³¹ HAVA makes no specific improvements to Sections 203 or 208, but it is significant that it explicitly encourages states to voluntarily provide and expand their language assistance provisions, while providing federal funds to support that effort.

The final avenue for federal protections for LEP voters comes from the courts in the form of consent decrees that, typically following an instance of discrimination against language minority voters, mandate various forms of accommodation. The cases typically require a great deal of time, resources, and funds,³² which are in limited supply for many LEP citizens and communities. And significantly, because the filing of a lawsuit is inherently remedial, seeking protection in the courts is only available as a strategy once a wrong is committed, and once an election is over. A resulting consent decree will typically mandate that the offending jurisdiction be required to provide bilingual poll workers,³³ translated election materials,³⁴ or procedures for the education and registration of LEP voters.³⁵

As detailed as they may be, and as much as they may involve jurisdiction leaders in constructing a remedy, court orders and consent decrees are also an imperfect remedy. Voters must not only endure discriminatory treatment before a case can even be brought, court orders are difficult to enforce and require a great deal of commitment and oversight from the federal government if they are going to result in changed actions on the grassroots level. Ultimately, policy responses from the state government, via supporting legislation that codifies an order or otherwise responds to findings that emerge through litigation, often are needed to ensure that a court order or consent decree is effective.³⁶

³⁰ Thomas H. Earle & Kristi M. Bushner, *Effective Participation or Exclusion: The Voting Rights of People with Disabilities*, 11 TEMP. POL. & CIV. RTS. L. REV. 327, 328 (2002) (noting that while “[e]lection officials, poll workers, relatives and friends are often present to help [disabled voters] cast their vote. The bad news is that ... there is a loss of anonymity, independence, dignity and acute embarrassment associated with the extra attention assistance from others often brings.”)

³¹ *Id.* But see Glenn Magpantay, *Two Steps Forward, One Step Back, and a Side Step: Asian Americans and the Federal Help America Vote Act*, 10 UCLA ASIAN PAC. AM. L.J. 31, 40 (2005) (while “[s]tates have broad discretion to use the money for language assistance or to use these funds for other purposes ... the federal government will pay for translated voting materials and interpreters at the polls, if states and localities seek funding for these purposes.”)

³² See Glenn Magpantay, *Two Steps Forward, One Step Back, and a Side Step: Asian Americans and the Federal Help America Vote Act*, 10 UCLA ASIAN PAC. AM. L.J. 31, 41 (2005) (noting that “litigating under the [language provisions of the Voting Rights] Act can sometimes be prohibitively expensive” because they require detailed evidence of electoral barriers reported by location and election).

³³ U.S. Court Order, *U.S. v. Hamtramck*, No. 0073541 (E.D. Mich. 2000).

³⁴ U.S. Court Order, *United States v. City of Boston*, MA (D. Mass. 2005).

³⁵ See, e.g., *U.S. v. Socorro County*, No. 93-1244 (D.N.M. filed Apr. 13, 1994); *U.S. v. Sandoval County*, No. 88-1457 (D.N.M. filed June 10, 1993); *U.S. v. San Juan County*, No. C-83-1287, First Amended Settlement and Order (D. Utah filed Aug. 24, 1990); *U.S. v. McKinley County*, No. 86-0028-M, First Amended Consent Decree and Order (D.N.M. Jul. 20, 1990).

³⁶ For example, the California Supreme Court issued a court order in *Castro v. State*, 466 P.2d 244 (Cal. 1970) (overturning a state literacy requirement) the California state legislature enacted a law mandating that counties provide translated election materials where 3 percent or more of the citizens in a county qualify as a language minority.

In addition to these federal efforts, a handful of states, most notably California, Colorado, and Florida, have enacted laws to provide assistance to LEP voters.³⁷ Under California law,³⁸ language minority voters who do not live in a county that is covered under Section 203 have the right to access a copy of the ballot if local election officials find a “significant and substantial need.”³⁹ California and Colorado both mandate that local jurisdictions provide translated election materials wherever at least three percent of the voting age citizens are limited-English proficient, or when citizens or organizations provide information supporting a need for assistance.⁴⁰ Local clerks in California are required to recruit poll workers who are fluent in Spanish and other languages,⁴¹ and the Secretary of State’s office provides voter information in six languages other than English.⁴² Florida law requires the Secretary of State to provide, upon request from any election official, a written translation of a statewide ballot issue in any of the languages included under Section 203 of the Voting Rights Act,⁴³ and Miami-Dade county provides materials translated into Haitian-Creole for its citizens of Haitian descent.⁴⁴

II. PROPOSALS FOR SUPPLEMENTING EXISTING ACCOMMODATIONS

Various community organizations and academics have suggested methods of improving upon existing language accommodations, particularly Section 203,⁴⁵ with most suggestions focusing on reducing the numerical cutoff for the coverage formula from 10,000 to anywhere from 7,500⁴⁶ to 1,000.⁴⁷ Some studies and reports have also

³⁷ According to a 2004 study by the ACLU, 30 states have enacted some form of accommodation mechanism for LEP voters. See AM. CIVIL LIBERTIES UNION, WASH. LEGISLATIVE OFFICE, STATE LAWS PROVIDE AVENUE FOR LANGUAGE ASSISTANCE (2004), available at <http://www.votingrights.org/resources/?resourceID=18>. These states include: Alabama, Alaska, Arizona, Colorado, Connecticut, California, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Maryland, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Wisconsin, and Wyoming. See also Benson *!Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency Into American Democracy* 48 B.C. L. REV 251 n290-n291 (2007).

³⁸ Ann.Cal.Elec. Code §14201(a)(1)-(2).

³⁹ *Id.*

⁴⁰ Ann.Cal.Elec. Code §14201. Colorado also requires that county clerks recruit full time staff members fluent in the relevant language where more than 3 percent of eligible voters are limited-English proficient. See CRSA §1-2-202(4).

⁴¹ *Id.*

⁴² California Secretary of State Debra Bowen, Multilingual Voting Services, http://www.ss.ca.gov/elections/elections_multi.htm (last visited Aug. 27, 2007).

⁴³ See F.S.A. §101.2515. Requests must be filed within 60 days of the Election. *Id.*

⁴⁴ MIAMI-DADE COUNTY, FLA., CODE § 12-16 (Supp. Ord. No. 99-160, 1999), available at <http://www.municode.com/resources/gateway.asp?pid=10620&sid=9> (mandating the availability of ballots translated into Creole in areas of Miami-Dade County where a significant portion of the electorate is Haitian American).

⁴⁵ American Bar Association, Report from the House of Delegates, *Standing Committee on Election Law Section of State and Local Government Law Section of Individual Rights and Responsibilities Government and Public Sector Lawyers Division* (declaring that the ABA urges Congress to lower numerical trigger from 10,000 to 5,000 and to require new coverage determination to every 5 years, instead of every 10 years).

⁴⁶ Testimony of Margaret Fung, Executive Director of the Asian American Legal Defense Fund, “Oversight Hearing on the Voting Rights Act: Section 203—Bilingual Election Requirements (Part I),” (November 8, 2005) available at <http://judiciary.house.gov/oversight.aspx?ID=204>.

⁴⁷ Sandra Guerra, *Voting Rights and the Constitution: The Disenfranchisement of Non-English*

suggested expanding Section 203 to include additional language minority groups, or eliminating the provision's illiteracy requirement.⁴⁸

But these suggestions, while significant, do not address gaps in the existing legal infrastructure involving non compliance, ineffective court orders, and inaccurately translated materials or ineffectual interpreters. In that regard, I propose three suggested reforms for the federal government to adopt in order to fill some of the gaps in current accommodations.⁴⁹ First, Congress should consider empowering the Election Assistance Commission (EAC) or U.S. Department of Justice (DOJ) to provide avenues for periodic expansions of the narrowly tailored coverage formula for Section 203 in order to better include all language minority communities who face linguistic, educational, and political barriers to participation. Second, Congress should also consider supporting the development of federally certified language translators to assist voters on Election Day. This program could be administered by the Justice Department, similar to how the DOJ currently hires and trains federal observers to oversee local enforcement of the Voting Rights Act.⁵⁰ Third, federal courts should actively provide better enforcement of court orders, including the levying of financial sanctions against states and local jurisdictions that refuse to comply or only loosely comply with legal agreements to accommodate language minority voters. Each of these changes could move beyond small adjustments to better address the deficiencies in existing federal language assistance for voters with limited access to opportunities to learn English.

A. EMPOWER THE EAC OR DOJ TO IMPROVE COVERAGE BY CONTINUOUSLY INVOLVING COMMUNITY GROUPS

Since its inception in 1975, Congress has listened to voices from national community organizations for advice in crafting Sections 4(f)4 and 203 of the Voting Rights Act. In testimony during deliberations in 1975, 1982, 1992, and 2006, nationally organized constituency-based non profit organizations such as the Mexican American Legal Defense Fund (MALDEF), the Native American Rights Fund (NARF) and the Asian American Legal Defense and Education Fund (AALDEF) presented Congress with overwhelming evidence of educational disparities, low turnout rates, and discriminatory

Speaking Citizens, 97 YALE L.J. 1419, 1436 (1988) (recommending that “instead of requiring multilingual elections in areas that meet the five percent requirement, the Act should be triggered in areas with ... 1,000 non-English speakers”).

⁴⁸ Glenn D. Magpantay, *Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*, 11 ASIAN L.J. 31, 55 (2004) (noting that because “Section 203 does not require a local jurisdiction to provide language assistance unless the illiteracy rate of the relevant language minority community is less than that of the national average” many Asian American communities do not receive necessary bilingual assistance).

⁴⁹ These reforms were first proposed and detailed in my corresponding law review article, Benson *!Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency Into American Democracy* 48 B.C. L. REV 251 (2007).

⁵⁰ See 42 U.S.C §1973f (2006) (authorizing the appointment of federal observers to investigate “meritorious complaints from residents, elected officials, or civic participation organizations that efforts to deny or abridge the right to vote under the color of law on account of race or color.”)

barriers to voting that members of their communities faced.⁵¹ Their testimony and the evidence provided to Congress led to the provisions' focus on the groups—Latinos, Asian Americans, American Indians, and Alaskan Natives—whose representatives provided substantial evidence to Congress of severe language barriers and other disparities that limited equal access to the political process.⁵² Some language minority groups that were not represented were considered,⁵³ but ultimately Congress on each occasion chose not to expand coverage to these, unrepresented, language groups.

One structural solution that could address these above concerns is for Congress, under its general constitutional authority to enforce the Fourteenth and Fifteenth amendments to the U.S. Constitution, to amend the current coverage formula of Section 203 to allow for jurisdictions to be added to the current list when community groups and local organizations produce evidence that their geographic area meets the same qualifications that led to existing jurisdictions and groups receiving coverage. Specifically, Congress can amend Section 203 to grant rulemaking authority to either the Justice Department or the Election Assistance Commission to expand the existing coverage formula and promulgate additional federal accommodations for LEP voters.⁵⁴ A process where groups apply for extended coverage or coverage exceptions can be based upon whether, among other things, the language minority citizen group petitioning for coverage can provide evidence of the presence of educational disparities, high levels of illiteracy, or low turnout and registration rates in their particular area or region.

Through this infrastructure, any voters or local constituency groups with a demonstrated need for translated materials could apply to the agency for an expansion of Section 203 coverage to include their jurisdiction where they can show evidence that they comprise a significant portion of the population or otherwise require language assistance. Similarly, any group could also submit data on a lack of need for coverage

⁵¹ Rodolfo O. de la Garza & Louis De Sipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479, 1482-84 (1993) (recounting testimony describing methods employed to exclude minority language voters from the voting booth); Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 U MONTANA L REV 269 (2004) at 279 (describing similar efforts on behalf of American Indians).

⁵² Mark Adams, *Fear of Foreigners: Nativism and Workplace Language Restrictions*, 74 OR. L. REV. 849, 874 (Fall 1995): (explaining that the definition of language minority under Section 203 was limited to citizens of American Indian, Asian American, Alaskan Native, or Spanish heritage because "Congress found that 'persons of Spanish heritage [are] the group most severely affected by discriminatory practices, while the documentation [of discriminatory practices] concerning Asian Americans ... [is] substantial.'").

⁵³ Both of the 1975 House and Senate Judiciary Committee reports acknowledge that other ethnic groups—such as German or Polish citizens—could likely suffer from racial and ethnic discrimination. S. Rep. No. 295, 94th Cong., 1st Sess. 24 (1975) ("As noted earlier, the hearing record did not disclose any evidence of voting discrimination against other language minority groups. ... [This] signifies only that we had no such evidence at the time this bill was drafted. It is not the intention of Congress to preclude other language minority groups from presenting their evidence of voting discrimination to the courts or to the Attorney General for appropriate relief.") See also *id.* at 22 (noting that "[n]o evidence was received concerning the voting difficulties of other language groups.")

⁵⁴ There is already some support for this in existing legislation; HAVA requires the Election Assistance Commission to study means of improving accommodations for LEP voters, and provides federal funds which may, at the state's discretion, supplement costs incurred in providing translated election materials. See 42 U.S.C. 15301(b)(1)(G) (2002)., and 42 U.S.C 15322 (2002).

where, perhaps, states or local jurisdictions have proactively provided such accommodation or accommodation is no longer needed.⁵⁵

Such a solution recognizes the inherently local and complex nature of determining which LEP communities face language barriers while empowering community groups to gain protections if they can show that their members endure high illiteracy rates, barriers to educational opportunities to learn English, low turnout rates, and instances of electoral discrimination. The agency charged with adjudicating these claims could also have authority to formally address any allegations of inadequate compliance, including poor translations or other problems relating to language accommodations, which would save community groups the expense and time of seeking remedies for such violations in federal courts.⁵⁶

Professor Heather Gerken, a leading authority in Election Law, has suggested an analogous bottom-up approach to actively involve grassroots constituency groups in the enforcement of Section 5 of the Voting Rights Act.⁵⁷ Several existing federal agencies, including the Environmental Protection Agency and the Federal Trade Commission, offer a similar infrastructure providing for bottom-up policy making strategies.

This is not to minimize the existing efforts of community groups to structure the coverage formula and other requirements for Section 203—indeed, the existing benefits of federally mandated language assistance are a result of the effective advocacy of several national constituency groups. What is evident from history, however, is that the groups with the most resources and influence nationally are the groups who received the most response from Congress, leaving less organized or smaller groups to have less influence.⁵⁸ The creation of a regulatory process to continually consider the scope of the language assistance requirements and tweak their effectiveness will provide an ongoing avenue for more regional and local language minority citizen groups to petition the federal government for language accommodations.

⁵⁵ This system would also preserve the ability of local and state governments to provide accommodations where not required under federal law. Voters who seek additional accommodations via the agency process will only have the incentive to do so where the local and state authorities have failed to act. For details on local and state governments that have voluntarily complied with requests for local LEP voters unprotected by Section 203, *see generally id.* at 51-54 (detailing instances in which, after great prodding from advocacy groups, the state governments of Georgia, and election officials in New York City, Los Angeles, San Jose, created accommodations for Asian communities that fell just under the numerical trigger for Section 203 coverage)

⁵⁶ *See* Julian S. Lim, *Tongue-Tied in the Market: The Relevance of Contract Law to Racial-Language Minorities*, 91 CALIF. L. REV. 579, 602 (March 2003) (discussing the general hesitancy among non-English speaking citizens to engage in litigation: “Unfamiliar with the legal system and overwhelmed by the situation in which they find themselves because of their language barriers, many racial-language minorities may prefer privately absorbing the damages rather than losing more money on a legal action brought before an unsympathetic audience.”)

⁵⁷ *See* Heather Gerken, *Race (Optional)*, THE NEW REPUBLIC, Sept. 2005 (proposing a change to the preclearance structure of Section 5 to allow civil rights groups to “have a chance to negotiate with local officials over any change they found objectionable” before the federal court or Justice Department steps in to evaluate preclearance.)

⁵⁸ For example, while a representative from the Arab American Discrimination Committee testified before the National Commission on Voting Rights in 2006, calling for greater inclusion of Arab Americans in the Voting Rights Act, no representatives from any Arab American community groups testified to Congress during the reauthorization hearings.

B. IMPROVE ACCURACY OF TRANSLATIONS WITH FEDERALLY CERTIFIED TRANSLATORS

One of the most frequent problems with language assistance is that translated materials are often inaccurate and reliable translators are difficult to recruit.⁵⁹ While federal observers and volunteers from constituency organizations can be on hand to record problems that can form the basis for subsequent litigation, there is very little that these individuals are able to do once Election Day has begun. To this end, it is imperative that translators or translated election materials are not only available, but accurate.

Some of these problems could be solved if the federal government were to become more directly involved, in a limited fashion, in the actual translation process. Through training and certifying translators to develop translated materials or to travel to states and localities who seek to provide accurate oral translations,⁶⁰ the federal government could play a significant yet cost-effective role in reducing inaccuracy problems on the ground. Federally certified interpreters could serve at the polls on Election Day, ensuring accurate language assistance is available during the election, and could accurately translate ballots and other materials before an election takes place. Congress can act to establish and fund such a program, while delegating the administration to the Voting Rights Section in the Department of Justice or the Election Assistance Commission. In doing so, the federal government can bolster its existing accommodations by ensuring the translation methods employed by the states or local jurisdictions are accurate and helpful, while covering the most significant administrative costs entailed in providing accommodations for LEP voters.

The federal court system provides an existing model for a national certified translation program that could be easily replicated. The Administrative Office of the United States Courts, through the National Center for State Courts (NCSC), administers a “Federal Court Interpreter Certification Examination” that certifies court interpreters to serve in federal courts across the country.⁶¹ The NCSC specifically administers written and oral English/Spanish certification examinations to interested applicants, preparing them to serve as reliable court interpreters for Latino individuals involved in judicial actions.⁶² NCSC also administers a “Consortium for State Court Interpreter Certification” that assists thirty member states in developing a standardized interpreter certification program.⁶³ Several states—including Arkansas, California, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Utah, and Washington—work with the NCSC to provide a test and certification program to ensure that individuals who serve as interpreters in state courts are providing accurate

⁵⁹ See, e.g., Second Amended Hamtramck Court Order (finding Hamtramck did not provide translators on Election Day, even though that was a significant requirement under the first court order. Hamtramck officials claimed they were unable to find or recruit any willing translators.)

⁶⁰ The interpreters and translation services could first be available to areas covered by Section 203, and secondly available to any areas where community groups or state or local election officials demonstrate a sufficient need for such assistance.

⁶¹ NCSC, *NCSC Receives Federal Contract for Court Interpreter Services*, available at: http://www.ncsconline.org/D_Comm/PressRelease/2006/Interpreter06.HTML (June 22, 2006).

⁶² *Id.* See generally, Alice J. Baker, *A Model Statute to Provide Foreign-Language Interpreters in the Ohio Courts*, 30 U. TOL. L. REV. 593, 599 (1999) (arguing generally for the importance of state-sponsored interpreters in the court system).

⁶³ National Center for State Courts, Court Interpretation, http://www.ncsconline.org/D_Research/CourtInterp.html (last visited Aug. 27, 2007).

translations for LEP individuals.⁶⁴ This unified effort also ensures that states with small LEP populations are able to minimize administrative and overhead costs associated with court interpreter programs.⁶⁵

C. BETTER ENFORCEMENT OF COURT ORDERS

Finally, as previously discussed, another way to obtain language accommodations is via consent decrees or court orders mandating that a jurisdiction provide written or oral language assistance for its language minority citizens. While the mandates in these court orders often go unmet,⁶⁶ scholars have noted that where court orders offer more detailed requirements for compliance, they can be successful.⁶⁷

One solution is for litigants to seek financial sanctions against states and localities that are being sued because they do not provide language accommodations. In the example of the court order in *U.S. v. Hamtramck*, the Justice Department could seek financial sanctions against the city when it is found to be out of compliance with the court's mandates. A significant problem with this strategy, however, is that financial sanctions may have little effect on encouraging compliance from a city like Hamtramck, Michigan, which was bankrupt and in receivership in the initial years the court order was in effect.⁶⁸ Were a court to levy a fine against a city like Hamtramck for not complying with a court order when the jurisdiction may not be able to afford to comply with the court order in the first place, it would only be making a dire situation even more problematic by adding to the debt of a city already sinking under a deficit. But for the jurisdictions that have been subject to similar lawsuits that are not facing financial distress, the threat of sanctions may promote compliance.

An alternative solution is for courts or Congress to threaten a loss or reduction in the federal funding that states receive under the Help America Vote Act (HAVA) if a county does not comply with a court order or consent decree. States receiving federal funds through HAVA are required to use the funds towards various election activities, including "providing assistance to ... individuals with limited proficiency in the English language"⁶⁹ and requiring that any "voting system used in an election for Federal office" must "provide alternative language accessibility pursuant to the requirements of Section 203 of the Voting Rights Act of 1965."⁷⁰ Thus in cases where the Justice Department or voters bring a lawsuit, particularly to force compliance with Section 203, courts may consider adding teeth to a court order or consent decree by taking away any federal funding received under HAVA.

⁶⁴ For a current and complete lists of states involved in this effort see http://www.ncsconline.org/D_Research/CourtInterp/Res_CtInte_ConsortMemberStatesPubJune2006.pdf. See also 39 HARV. C.R.-C.L. L. REV. 543, 574 (providing a description of the court interpreter programs).

⁶⁵ Daniel J. Rearick, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 575 (2004).

⁶⁶ See *U.S. v. Hamtramck*, No. 0073541 (ED Mich. 2000) (first consent decree); *U.S. v. Hamtramck*, No. 0073541 (ED Mich. 2004) (second amended consent decree).

⁶⁷ Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 423 (Spring 2002): (describing an "alternative approach ... taken in a consent decree between DOJ and Bernalillo County, New Mexico, where the court order was accompanied by, but did not incorporate, a manual containing procedures to be followed in order to comply" with the required language accommodations).

⁶⁸ Christopher M. Singer, *Hamtramck's New Budget Is Balanced; Emergency Financial Manager Conforms City To State Guidelines*, THE DETROIT NEWS, at 9D (June 26, 2001) (detailing Hamtramck's budget deficit in 2000 and 2001, the first years of the consent decree).

⁶⁹ 42 USC 15301(b)(1)(G) (2002).

⁷⁰ 42 USC 15481(a)(4) (2002).

III. CONCLUSION

As our country becomes increasingly diverse, it is imperative that our democracy continue to embrace and respond to the needs of the electorate. Specifically, for accurate election outcomes, it is necessary for our system of election administration to be one that encourages the full and equal participation of educated and engaged voters. This includes our nation's population of citizens who have limited English proficiency levels. It is not meant to minimize in any way the importance of learning English to function in American society. Indeed, it is the responsibility of our educational system to fully prepare its students to participate as active citizens in the United States and English proficiency is crucial to functioning as such in our current economic and political structure.

The argument for language accommodations in voting stems more from a respect of the fundamental importance of the right to vote in our democracy, coupled with the view that the government has a responsibility for ensuring that the right to vote is accessible to all, regardless of one's English speaking ability. In addition, while many language minority voters are proficient in English, they may not know enough to accurately decipher complex ballot initiatives, or understand written directions explaining the ballot and how to vote. It is for that reason that language assistance is essential to ensuring accuracy in our electoral outcomes.

Local election administrators and poll workers can and do intervene on the local level to fill existing gaps in the language assistance infrastructure, but the federal government must continue to work to construct a relevant and useful role in the process. Where existing federal assistance requirements fall short or are ineffective, new proposals must be considered. As federal, state, and local authorities work together to ensure that language assistance is effective, they stand to build a political infrastructure that ensures the inclusion of all American citizens in our diverse and robust democracy.

Restoring Effective Protections for Students Against Sexual Harassment in Schools: Moving Beyond the *Gebser* and *Davis* Standards

Fatima Goss Graves*

Over the past 35 years, Title IX of the Education Amendments of 1972¹—the federal law that prohibits sex discrimination by educational institutions that receive federal funds—has been instrumental in dismantling longstanding discriminatory programs and activities and in promoting equal opportunities for women and girls in education. Its reach has spanned all facets of education, from professional schools to athletic programs. But sex discrimination in education remains pervasive, and sexual harassment in particular remains widespread in schools throughout the country, from elementary and secondary schools through colleges and universities. Indeed, 81 percent of students report that they have experienced sexual harassment in secondary schools; 89 percent of college students report that sexual harassment occurs among students at their schools, with almost two-thirds of students stating that they have been sexually harassed.² And over one-third of students age 13–20 report that they have experienced physical harassment on the basis of their sexual orientation.³ The cases litigated in state and federal courts involve everything from harassment and sexual assaults by university football players and recruits, to a barrage of sexually offensive language and physical threats by students, to sexual assaults by teachers against students.⁴

Title IX provides, in pertinent part, that “[n]o person ... shall, on the basis of sex, be excluded from participation, be denied the benefits of, or be subjected to

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¹ 21 U.S.C. §§ 1681 *et seq.*

² CATHERINE HILL & ELENA SILVA, AMERICAN ASSOC. OF UNIV. WOMEN EDUC. FOUND., DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 14 (2005); AMERICAN ASSOC. OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: BULLYING, TEASING AND SEXUAL HARASSMENT IN SCHOOL 20-21 (1998).

³ GAY, LESBIAN, & STRAIGHT EDUC. NETWORK, THE 2005 NATIONAL SCHOOL CLIMATE SURVEY: EXPERIENCES OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS 26 (2005).

⁴ See, e.g., *Simpson v. University of Col. Boulder*, 500 F.3d 1170, 1177 (10th Cir. 2007) (allegation that the University was deliberately indifferent to the likelihood of sexual assault in its football recruitment program); *Sauls v. Pierce County Sch. Dist.*, 399 F.3d 1279 (11th Cir. 2005) (allegation that school district was ineffective in preventing sexual assault by teacher); *Vance v. Spence County Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2000) (allegation that the school district ignored complaints by students of ongoing verbal and physical peer harassment).

discrimination under any education program or activity receiving Federal financial assistance.” In enacting Title IX, Congress intended both to “avoid the use of federal resources to support discriminatory practices” and to “provide individual citizens effective protection against those practices.”⁵ Thus, the Supreme Court has made clear that Title IX bars sexual harassment and that a damages remedy is available in actions brought to enforce this prohibition.⁶ This mandate against discrimination is broad; indeed, the Supreme Court has stated that it should receive “a sweep as broad as its language.”⁷

But at the same time, the Court has imposed crippling burdens on students who attempt to recover damages for the harassment that they suffer at the hands of their teachers and peers. First, in *Gebser v. Lago Vista Ind. Sch. Dist.*,⁸ a case involving teacher-student sexual harassment, the Supreme Court determined that for an educational institution to be liable for damages for sexual harassment under Title IX, an appropriate school official must have had knowledge of the harassment and, in the face of that knowledge, been deliberately indifferent. The Court echoed that same standard in the context of student-on-student harassment and, in *Davis v. Monroe County Bd. of Educ.*, held that a private damages action in a peer harassment case will succeed only where “the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.”⁹

Together these standards have raised the bar, in perverse and unacceptable ways, for bringing private lawsuits for damages under Title IX. In many instances students may be more vulnerable to harassment than adults, particularly at the K-12 level where students are required to attend school, leaving few ways to escape unchecked pervasive harassment. Moreover, students report that they endure treatment, including sexual touching, grabbing and pinching, that in no way would be tolerated among adults.¹⁰ And less than half of students say that they would report peer harassment to adults.¹¹ Yet, despite the role of schools as *parens patriae*, there are fewer legal protections from harassment for students in school than for employees in the workplace, and students are as a result often unable to prevail in their cases. In the near decade since the Court articulated the standards for damages liability in a Title IX harassment case, the many cases of serious sexual harassment demonstrate that students lack critical protections and that schools lack sufficient incentives to take the necessary steps to prevent and effectively remedy it when it occurs.

This issue brief explains why the current Title IX standards for harassment claims are unsound and explores promising federal and state law solutions that could both restore the right of recovery for students who experience harassment in school and provide meaningful incentives for school districts to promote safe school environments. The Supreme Court majority in *Gebser* placed any additional relief for students under federal law squarely on the shoulders of Congress, calling on it to specifically outline the parameters for a Title IX sexual harassment claim. By enacting the Civil Rights Act of 2008, Congress can and should remove the unfair burdens imposed by the Court and reiterate its commitment to protecting students from sex discrimination by

⁵ *Cannon v. University of Chi.*, 441 U.S. 677, 704 (1979).

⁶ *Franklin v. Gwinnet County Pub. Sch.*, 503 U.S. 60 (1992).

⁷ *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982).

⁸ 524 U.S. 274 (1998).

⁹ 526 U.S. 629, 652 (1999).

¹⁰ AMERICAN ASSOC. OF UNIV. WOMEN EDUC. FOUND., *supra* note 2, at 22-23.

¹¹ *Id.* at 14.

making clear that in *Gebser* and *Davis* the Court added hurdles that Congress never intended for Title IX plaintiffs to have to meet. In addition to a federal legislative fix, moreover, a recent, groundbreaking case illustrates the prospects for applying state antidiscrimination laws to improve student protections against harassment. In *L.W. v. Toms River Regional School Board of Education*,¹² the New Jersey Supreme Court explicitly rejected the rigid Title IX liability standards and emphasized that, under New Jersey law, students are entitled to protection from discrimination and harassment in the classroom to the same extent that adults are protected in the workplace. Advocates and policymakers in other states should take the lead offered by the New Jersey Supreme Court and seek similar interpretations of their state laws.

I. SEXUAL HARASSMENT IN EDUCATION PROGRAMS

Sexual harassment in schools includes any unwelcome or unwanted behavior based on sex that interferes with a student's ability to learn, study, achieve, work or participate in school activities, benefits, services or opportunities.¹³ It can take many forms, including verbal or written (including on-line) insults, epithets, or inappropriate jokes; physical or verbal intimidation; offensive touching; pressure for sexual activity; and rape.¹⁴ Although often overlapping, sexual harassment in schools may result in quid-pro-quo conditions (*i.e.*, a reward for sexual favors or a punishment for declining them) or a hostile environment.¹⁵

Both male and female students have reported that they have experienced sexual harassment, and both male and female students can be perpetrators of harassment. In fact, at the secondary level, 79 percent of male students and 83 percent of female students report experiencing harassment in school, while more than half of male students and approximately half of female students admit that they have harassed someone.¹⁶ Moreover, male and female students at the college level are equally likely to be harassed, with 61 percent of male students and 62 percent of female students reporting that they have been subject to it.¹⁷

School employees also both experience and commit sexual harassment. Although students are more commonly harassed by peers, 41 percent of girls and 36 percent of boys report harassment by school employees.¹⁸ Regardless of the source of the harassment, students report emotional and behavioral consequences. Girls, in particular, report feeling self-conscious, embarrassed, afraid, and less confident. Further, students report that they stop participating in class, "find it hard to study," avoid "particular places in the school or on the school grounds."¹⁹ Indeed, students report that they routinely avoid the harassers—and the environment in which the harassment occurs—which in some cases can mean avoiding particular courses or leaving school altogether.²⁰

¹² 915 A.2d 535 (N.J. 2007).

¹³ See generally U.S. Department of Education, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512 (Jan. 19, 2001).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ AMERICAN ASSOC. OF UNIV. WOMEN EDUC. FOUND., *supra* note 2, at 21.

¹⁷ HILL & SILVA, *supra* note 2 at 17.

¹⁸ AMERICAN ASSOC. OF UNIV. WOMEN EDUC. FOUND., *supra* note 2, at 14.

¹⁹ *Id.* at 36-37.

²⁰ *Id.*; GAY, LESBIAN, & STRAIGHT EDUC. NETWORK, *supra* note 3, at 46-47.

Despite its widespread occurrence, schools have failed to take the steps necessary to fully address and prevent sexual harassment in schools. Although schools must maintain and distribute policies prohibiting sex discrimination and harassment, along with effective grievance procedures, many schools have failed to develop and promote effective policies.²¹ Furthermore, schools have few incentives to invest resources in developing adequate policies or remedying hostile school climates. Indeed, as I explain further below, the decisions in *Gebser* and *Davis* created incentives that undermine Title IX's goals of protecting students for discriminatory practices by allowing schools to "insulate themselves from knowledge about [harassment]."²²

II. PRE-*GEBSER*/*DAVIS* STANDARDS OF LIABILITY

Although Title IX does not expressly mention the term "sexual harassment," the Supreme Court in *Franklin v. Gwinnett County Public Schools*²³ recognized that sexual harassment is a form of sex discrimination that is prohibited by Title IX in the educational setting—just as it is barred by Title VII of the Civil Rights Act of 1964²⁴ in the workplace. In a unanimous holding that "all appropriate remedies," including monetary damages, were available for violations of Title IX and that the statute's mandate to end sex discrimination in education necessarily encompassed the eradication of sexual harassment, the Court in *Franklin* observed that "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe."²⁵ Citing *Meritor v. Savings Bank, FSB v. Vinson*²⁶—the case that initially established employer liability for sexual harassment in the workplace under Title VII—the Court compared the obligation to provide students with an educational environment free of harassment with similar employer duties under Title VII:

Unquestionably, Title IX placed on the [school district] the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student.²⁷

Taking the Court's lead in its reliance on Title VII, lower courts applied agency principles of liability, a common law standard used in the employment context, to Title IX sexual harassment cases. Indeed, some judges argued that Title IX should set stricter standards than Title VII.²⁸ Thus, some courts determined that school districts

²¹ AMERICAN ASSOC. OF UNIV. WOMEN LEGAL ADVOCACY FUND, A LICENSE FOR BIAS: SEX DISCRIMINATION, SCHOOLS, AND TITLE IX (2000) (finding that many schools ignore Title IX requirements for policies and grievance procedures addressing sex discrimination). Schools must have policies prohibiting sex discrimination, including sexual harassment, and appropriate grievance procedures, but there is no requirement that there be a separate sexual harassment policy. 34 CFR § 106.8(a).

²² *Gebser*, 524 U.S. at 300 (Stevens, J., dissenting).

²³ 503 U.S. 60 (1992).

²⁴ 42 U.S.C. §§ 2000 *et seq.*

²⁵ *Id.* at 75.

²⁶ 477 U.S. 57 (1986).

²⁷ *Franklin*, 503 U.S. at 75.

²⁸ *Smith v. Metropolitan Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1047 (7th Cir. 1997) (Rovner, J., dissenting).

could be liable any time a teacher (supervisor) harassed his/her students (subordinates). Other courts applied a “constructive notice” standard, determining that school districts could be liable if they “knew or should have known” of the harassment and failed to appropriately remedy it.²⁹

III. THE HURDLES SET FOR TITLE IX SEXUAL HARASSMENT PLAINTIFFS IN *GEBSER* AND *DAVIS*

The Supreme Court ended the debate among lower courts over whether, and what form of, agency theory was appropriate for Title IX sexual harassment claims in *Gebser v. Lago Vista Independent School District*.³⁰ In that case, Alida Gebser was sexually abused by one of her high school teachers over an extended period of time and never reported the abuse because she was “uncertain how to react and she wanted to continue having him as a teacher.”³¹ Following complaints by parents of other students about the teacher’s sexually inappropriate comments, the principal warned but never disciplined the teacher and also never informed the school district superintendent about the parents’ complaints.³² The abuse continued for several months, until a police officer discovered Alida and her teacher engaged in intercourse; the teacher was then arrested and dismissed from his teaching position.³³

In a 5-4 decision, the Court rejected arguments made by Gebser and the United States as *amicus* that damages should follow automatically when a teacher has harassed a student and the “teacher’s authority over the student facilitates the harassment.”³⁴ It likewise rejected the argument that a school district could be liable for harassment when it “knew or ‘should have known’ about harassment and failed to uncover and eliminate it.”³⁵ Listing several reasons, the majority claimed that using the Title VII agency model would “frustrate the purpose” of Title IX.³⁶ For example,

²⁹ Compare *Kracunas v. Iona College*, 119 F.3d 80, 88 (2d Cir. 1997) (applying Title VII supervisor-employee agency standard) with *Lipsett v. University of P.R.*, 864 F.2d 881, 899-900 (1st Cir. 1988) (applying a constructive notice standard).

³⁰ 524 U.S. 274 (1998). Contrary to suggestions by some courts, *Gebser and Davis* are limited to the harassment context. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174-75 (2005) (describing retaliation as a form of discrimination that is separate from deliberate indifference to sexual harassment and finding that both violate Title IX). Moreover, even in the sexual harassment context, courts have found that the *Gebser and Davis* standards are easily met in certain circumstances. For example, in *Simpson v. University of Col. Boulder*, 500 F.3d 1170, 1177 (10th Cir. 2007), the court contrasted the facts of *Gebser and Davis* with the conduct of the University of Colorado, holding that the notice requirements were met automatically where the allegations were that the university “sanctioned, supported, even funded a program (showing [football] recruits a ‘good time’) that, without proper control, would encourage young men to engage in opprobrious acts.” It also is unclear whether *Gebser and Davis* would apply to the quid pro quo context. The Supreme Court was silent on this issue and, since *Gebser*, there has been disagreement among the district courts over whether *Gebser* applies to quid pro quo claims. Compare *Liu v. Striuli* (applying *Gebser* to quid pro quo claims) with *Dodd v. Pizzo*, 2002 WL 1150727 (M.D. N.C. May 24, 2002) (holding that *Gebser* does not apply to employment quid pro quo claims). The Department of Education’s Office for Civil Rights, which has primary responsibility for enforcing and interpreting Title IX, applies a strict liability standard to quid pro quo harassment. See generally U.S. Department of Education, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 FED. REG. 5512 (Jan. 19, 2001).

³¹ *Gebser*, 524 U.S. at 278.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 282-83.

³⁵ *Id.*

³⁶ *Id.* at 285.

the Court emphasized that a judicially implied standard for Title IX liability should be more constrained than under Title VII, which expressly outlines the cause of action and forms of relief.³⁷ The Court also focused on the “contractual nature” of Title IX, which conditions federal funds on a “promise ... not to discriminate.”³⁸ Because Title IX was enacted pursuant to Congress’ Spending Clause authority, the Court expressed concern that an agency theory of liability could hold a recipient of federal funds liable even where it was unaware that discrimination had occurred.³⁹ By contrast, the Court emphasized that Title VII is an “outright prohibition” and applies “without regard to federal funding.”⁴⁰ Finally, the Court noted that the Title IX administrative enforcement scheme did not indicate that an agency theory of liability was an appropriate standard.⁴¹

Rejecting the Title VII comparison it had embraced in *Franklin*, the Court developed a new standard that it determined was consistent with the structure of Title IX and its regulatory scheme. As applied by lower courts, that standard has erected a series of hurdles that have grossly undermined Title IX’s protections.⁴² I will address each portion of the standard in turn.

1. The first hurdle established in *Gebser* and followed in *Davis* is a requirement that, to recover damages for sexual harassment, a plaintiff must show that the school has received “actual notice” of the harassment. The Court made clear that the knowledge of the teacher/harasser does not constitute “actual notice”; instead, an “appropriate official”⁴³ of the school must receive notice. Thus, in *Gebser*, the Court disregarded the teacher’s obvious knowledge that he had abused a student and determined that the school district did not receive notice of the harassment sufficient to trigger liability under Title IX.

Since *Gebser*, courts around the country have relied on the actual notice requirement to dismiss claims of egregious sexual harassment and in some cases promote an even more rigid standard. *Baynard v. Malone*⁴⁴ provides a particularly troubling example. There, a school principal was warned by a former student that a teacher had a history of sexual abuse and observed that the teacher had “excessive physical contact with one of his students.” The abuse of that student continued for several months before the principal took any action other than warning the teacher not to engage in excessive physical contact with his students. Nonetheless, the Fourth Circuit concluded that the school district could not be liable under Title IX because the evidence showed only that [the principal] “should have been aware of the *potential for ... abuse*,” not that he was “*in fact*” aware of abuse.⁴⁵ So construed, not only does the actual notice

³⁷ *Id.* at 289-90.

³⁸ *Id.* at 286.

³⁹ *Id.* at 286-88.

⁴⁰ *Id.* at 286.

⁴¹ *Id.* at 288-89.

⁴² The Court made clear that these liability standards were limited to private actions for money damages. *Gebser*, 524 U.S. at 283. Thus, administrative enforcement actions and actions for injunctive relief are not subject to the inconsistent standards. Nonetheless, the standards severely undermine enforcement in harassment cases because a graduated student likely lacks standing to seek prospective relief. *See Franklin*, 503 U.S. at 76 (in many school cases prospective relief would leave a harassment plaintiff “remediless.”). Without the availability of damages, moreover, school districts have few incentives to make improvements in their programs.

⁴³ *See* discussion *infra* Part III.2.

⁴⁴ 268 F.3d 228 (4th Cir. 2001).

⁴⁵ 268 F.3d at 238 (emphasis added).

requirement remove incentives for school districts to promote effective harassment prevention policies; but it also affirmatively creates perverse incentives for school districts to insulate themselves from knowledge of the harassment that occurs in schools.

2. Title IX harassment plaintiffs must also demonstrate that the required notice was given to an “appropriate person” with authority to “take corrective action.” The Court in *Gebser* did not provide examples of such persons, but some courts have made this “appropriate official” requirement extremely burdensome. For example, some courts have found that counselors and teachers are not appropriate officials who may take action.⁴⁶ Moreover, the Fourth Circuit has determined that notice to a school principal was not enough to hold a school district liable, even where the principal supervised teachers and other staff, evaluated employees, and could recommend disciplinary action.⁴⁷ Indeed, one district court in the Fourth Circuit determined that even a school superintendent was not an appropriate official.⁴⁸

3. Beyond the onerous notice requirements, the Court further restricted recovery for damages in a Title IX harassment claim by determining that the school district response must amount to “deliberate indifference to discrimination.”⁴⁹ Although the Court did not provide examples of deliberate indifference in *Gebser*, it addressed the issue again the following year in *Davis v. Monroe County Board of Educ.*, a case involving the sexual harassment of a student by another student. In *Davis*, fifth-grader LaShonda Davis and her mother repeatedly complained to her teachers and the school principal about a classmate who bombarded her with vulgar comments such as “I want to feel your boobs” and “I want to get in bed with you”; the student engaged in physical contact as well, once sexually rubbing against her.⁵⁰ Despite the complaints, school officials never disciplined the boy for his conduct. Moreover, it took over three months of complaints before LaShonda was even permitted to change her seat so that she was not directly next to him; even then, the two students remained in the same classroom. Finally, during the period of harassment, none of the school’s personnel had been instructed on how to respond to sexual harassment. Applying the “deliberate indifference” standard, the Court held that school districts may be considered deliberately indifferent “where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances[.]”⁵¹ Fortunately for LaShonda Davis, the Court found that the district was indeed clearly unreasonable in failing to address her situation.

⁴⁶ *Warren ex rel. Good v. Reading Sch. Dist.*, 278 F.3d 163 (3d Cir. 2002) (holding that jury should have been instructed that school guidance counselor cannot be an “appropriate person” for purposes of actual notice). Similarly, in *Liu v. Striuli*, 1999 WL 24961, at *10 (D. RI 1999), a court held that the director of financial aid and the Director of the Graduate History Department were not “appropriate officials” because they lacked supervisory authority over the alleged harasser and therefore could not fall within the scope of officials having “the authority to police relationships between faculty and doctoral students.”

⁴⁷ *Baynard*, 268 F.3d at 238-39. *Cf. Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 362 (3d Cir. 2005) (holding that the school principal and assistant principal could not be considered “appropriate officials” based solely on their positions).

⁴⁸ *Rasnack v. Dickenson County Sch. Bd.*, 333 F. Supp. 2d 560, 566 (W.D. Va. 2004) (“while local superintendents in Virginia have somewhat greater authority than school principals, including the authority to temporarily suspend teachers, in the present case only the School Board could take[] the sole corrective measure that would have ultimately protected the plaintiffs from harm—removing [the abusive teacher] as a teacher at the school.”).

⁴⁹ *Gebser*, 524 U.S. at 290.

⁵⁰ *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999).

⁵¹ *Id.* at 648.

Since *Gebser* and *Davis*, however, other plaintiffs have fared less well as lower courts have grappled with the type of school response that amounts to deliberate indifference, and, in many cases, have systematically removed incentives for schools to make concerted efforts to end harassment. For example, the Fifth Circuit has repeatedly emphasized that a school board is not “clearly unreasonable” even when its actions to stop harassment have been “proven ineffective.”⁵² And the First Circuit found that a university was not “clearly unreasonable” when it recommended that a visiting professor who had sexually assaulted a student continue on the faculty for an additional year despite the fact that he had made “mistakes.”⁵³

The results have been no better in peer harassment cases. In *Porto v. Tewksbury*,⁵⁴ for example, the court vacated a \$200,000 jury verdict, holding that there was no deliberate indifference as a matter of law. Although the school was notified on multiple occasions of the peer harassment and sexual abuse, it did nothing more than temporarily separate the students.⁵⁵ In finding for the town, the court emphasized that the test for Title IX is “not one of effectiveness by hindsight.”⁵⁶ *Rost v. Steamboat Springs Re-2 Sch. Dist.*⁵⁷ provides a similarly disturbing example. There, the Tenth Circuit found that the school district was not deliberately indifferent when it failed to discipline four male students who had harassed and assaulted a female student with learning disabilities. A police report confirmed that the student had been coerced into performing oral sex. In addition, the boys verbally harassed and threatened to start sexual rumors about the student and to distribute naked pictures of her. Nonetheless, citing *Davis* the court emphasized that the standard for schools is not to “remedy” peer harassment and that it should not second-guess disciplinary decisions (or in this case, the lack of) taken by the school.⁵⁸

4. The Court provided a final obstacle for Title IX harassment plaintiffs in *Davis*. In addition to reaffirming the rigorous *Gebser* standard, the Court added that actionable harassment amongst peers must be “so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”⁵⁹ The language used by the Court also contrasts with Title VII, under which plaintiffs must demonstrate only that peer harassment in the workplace is severe *or* pervasive.⁶⁰

Following *Davis*, some courts have made the burden for plaintiffs in Title IX peer sexual harassment cases nearly insurmountable. For example, in *Ross v. Corporation of Mercer Univ.*, the court concluded that a “single incident [of rape], however traumatic to its victim, is not likely to be pervasive, or to have a systemic effect on educational activities.”⁶¹ Further, in *Hawkins v. Sarasota County Sch. Bd.*,⁶² the court

⁵² E.g., *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 387-89 (5th Cir. 2000).

⁵³ *Wills v. Brown*, 184 F.3d 20 (1st Cir. 1999).

⁵⁴ 488 F.3d 67 (1st Cir. 2007).

⁵⁵ *Id.* at 70-71.

⁵⁶ *Id.* at 74.

⁵⁷ 2008 WL 54772 (10th Cir. Jan. 4, 2008).

⁵⁸ *Id.* at *6-7.

⁵⁹ *Davis*, 526 U.S. at 650.

⁶⁰ Cf. *Meritor v. Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). This is the standard adopted by the Office for Civil Rights in its sexual harassment guidance. U.S. Department of Education, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 FED. REG. 5512 (Jan. 19, 2001).

⁶¹ 506 F. Supp.2d 1325, 1358 (M.D. Ga. 2007).

⁶² 322 F.3d 1279, 1288 (11th Cir. 2003).

determined that persistent harassment by an eight year old, including sexually explicit and vulgar language and offensive touching, did not deprive students of their educational opportunities, despite the fact that targeted students feigned illness to avoid attending school.

The deliberate indifference standard in peer harassment cases is particularly striking when compared to the standard under Title VII. Of course perfection is not required, but employers that pursue an unreasonable course of action, particularly one that results in continued harassment, can be liable for damages in suits brought by their employees.⁶³ Not so under Title IX—courts have held that school districts can take what are clearly inadequate steps, such as maintaining the harasser in the same classroom or employing ineffective discipline policies, without meeting the Court’s “clearly unreasonable” test.⁶⁴

The combined *Gebser* and *Davis* standards have sorely undermined the remedies available for student victims of harassment and have eliminated incentives for school districts to take steps to address and prevent harassment in schools. I will discuss next alternatives to these rigid standards that could provide students with a broader range of legal protections and that are more consistent with the purposes of Title IX both to avoid supporting discriminatory practices with federal funds and to ensure effective protection from such practices.

IV. FEDERAL REFORM: THE CIVIL RIGHTS ACT OF 2008

The Supreme Court made clear in *Gebser* that it was not open to revisiting its actual notice and deliberate indifference standards absent further guidance from Congress “directly on the subject” of damages liability for sexual harassment claims under Title IX.⁶⁵ Congress initiated a response this month with the introduction of an omnibus civil rights bill intended to remedy the recent rollback of a number of civil rights protections, including the Court’s decisions in *Gebser* and *Davis*.⁶⁶ Among other things, the Civil Rights Act of 2008, introduced by Senator Edward M. Kennedy and Representative John Lewis and others, on January 24, 2008 (S. 2554 and H.R. 5129), would amend Title IX (as well as Title VI of 1964 Civil Rights Act, the Age

⁶³ In *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Court clarified that an employer may be “vicariously liable for actions of discrimination caused by a supervisor, subject to ... the reasonableness of the employer’s conduct as well as that of a Title VII plaintiff.”

⁶⁴ For example, a district court found that there was no Title IX liability where after two sexual assaults by an eight year-old against a seven year-old the school kept children in same reading room and further non-sexual harassment occurred. *Vaird v. School Dist. of Phila.*, 2000 WL 576441, at *2 (E.D. Pa. May 12, 2000).

⁶⁵ *Gebser*, 524 U.S. at 292.

⁶⁶ In addition to revising the Title IX sexual harassment standards, the Civil Rights Act of 2008 would address a number of Supreme Court decisions that have undermined the enforcement of federal civil rights statutes, including: *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Barnes v. Gorman*, 536 U.S. 181 (2002); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Circuit City Stores v. Adams*, 532 U.S. 105 (2001); *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Res.*, 532 U.S. 598 (2001); *Alden v. Maine*, 527 U.S. 706 (1999); and *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002). The Act also would address gaps in the Equal Pay Act of 1963, 29 U.S.C. § 201 et seq., to enhance enforcement of equal pay provisions and would eliminate the cap on damages under Title VII. A prior version of the bill was introduced in 2004, but did not move forward. H.R. 3809, 108th Cong. (2004); S. 2088, 108th Cong. (2004).

Discrimination Act of 1975, and Section 504 of the 1973 Rehabilitation Act)⁶⁷ to provide the same protection from harassment for students that employees receive under Title VII.

The Act would make full legal relief—including damages, costs, and fees—available where harassment occurs in an educational setting and the requisite standards are met. First, if an employee or an agent of an educational institution that receives federal funds engages in unlawful harassment that results in a tangible adverse action, such as a lowered grade or expulsion from school, the educational institution would be automatically liable. In addition, educational institutions would face liability and damages (as well as costs and fees) for the harassing conduct of their agents and employees that did not result in a tangible adverse action unless the institutions could show that they “exercised reasonable care to prevent and correct promptly any harassment,” and demonstrate that the harassed individual unreasonably “failed to take advantage of preventive or corrective opportunities.” Finally, educational institutions could be held liable for the harassment by persons who are not agents and employees if they “knew or should have known” of the harassment and failed to exercise “reasonable care to prevent and promptly correct the harassment.”

To demonstrate that it “exercised reasonable care to prevent and correct promptly any harassment,” an educational institution would be required to prove that it had:

- (1) established, adequately publicized, and enforced an effective, comprehensive harassment prevention policy and complaint procedure that is likely to provide redress and avoid harm without exposing the person subjected to the harassment to undue risk, effort, or expense;
- (2) undertaken prompt, thorough, and impartial investigations pursuant to its complaint procedure; and
- (3) taken immediate and appropriate corrective action designed to stop harassment that has occurred, correct its effects on the aggrieved person, and ensure that the harassment does not recur.

By adopting this framework, the Civil Rights Act of 2008 would provide meaningful incentives for schools to take steps to prevent sexual harassment and address it when it occurs. Congress should act without further delay to address the inequities created by the *Gebser* and *Davis* decisions and enact this critical legislation.

V. STATE LEVEL REFORM: *L.W. V. TOMS RIVER REGIONAL SCHOOL BOARD OF EDUCATION*

In addition to advising Congress to “speak directly on the subject,” the Court in *Gebser* specifically noted that its “decision does not affect any right of recovery that an individual may have against a school district as a matter of state law”⁶⁸ Many

⁶⁷ Title VI of the 1964 Civil Rights Act prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. 42 U.S.C. § 2000d. The Age Discrimination Act of 1975 prohibits discrimination on the basis of age in programs and activities receiving federal financial assistance. 42 U.S.C. § 6101. Section 504 of the 1973 Rehabilitation Act similarly prohibits discrimination on the basis of disability in programs and activities that receive federal financial assistance. 29 U.S.C. § 794(a).

⁶⁸ *Gebser*, 524 U.S. at 292.

schools are subject to state laws and regulations that expressly bar discrimination on the basis of sex in education programs and provide for relief in addition to Title IX. Some states bar discrimination in all places of public accommodation; other states have broad human rights or civil rights laws that expressly prohibit discrimination on the basis of sex in educational programs. For example, the Florida Education Equity Act specifically prohibits sex discrimination in education, while the New Jersey Law Against Discrimination bars discrimination in all places of public accommodation, including schools.⁶⁹ Furthermore, many states added Equal Rights Amendments to their state constitutions in the 1970s and 1980s to expand the protection against sex discrimination beyond that in the federal constitution.⁷⁰

Although states frequently look to federal law for guidance in interpreting their own laws, many state statutes provide broad protection against sex discrimination that extends beyond the mandates of Title IX. Moreover, even in those states that do not expressly provide broader protection than Title IX, the interpretation and application of state civil rights statutes need not be hampered by the barriers the Supreme Court applied in *Gebser* and *Davis*. Indeed, there often are critical differences between Title IX and state anti-discrimination laws that suggest that states could provide fuller protections for students against harassment in schools, while serving as a catalyst for reform at the federal level. The recent New Jersey Supreme Court decision, *L.W. v. Toms River Regional School Board of Education*,⁷¹ illustrates this point.

The *Toms River* decision arose from the following facts. Beginning in the fourth grade, L.W. was harassed by his classmates, who regularly used epithets such as “gay,” “homo” and “fag” toward him at school.⁷² The harassment continued and intensified through middle school and into high school and at times was so severe that L.W. refused to attend school.⁷³ Most of the abuse was verbal, but L.W. also was physically assaulted twice.⁷⁴ Although the schools disciplined the individual harassers, school officials failed to address the broader anti-homosexual environment.⁷⁵ The harassment continued for years until L.W. transferred to another school.⁷⁶

L.W.’s mother filed a complaint with the New Jersey Division on Civil Rights on behalf of her son and herself under the New Jersey Law Against Discrimination (LAD). The LAD is a broad civil rights statute that “ensures that the civil rights guaranteed by the State Constitution are extended to all its citizens.”⁷⁷ Its language states that “All persons shall have the opportunity to ... obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation ... without discrimination” based on, among many other categories, sex and affectional or sexual orientation.⁷⁸ The Act covers all places of public accommodation, including primary

⁶⁹ FLA. STAT. §§ 1000.05 *et seq.*; N.J. STAT. ANN. §§ 10:5-1 *et seq.*

⁷⁰ See Linda Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L. J. 1201 (2005).

⁷¹ 915 A.2d 535 (N.J. 2007).

⁷² *Id.* at 540-544.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 546.

⁷⁸ N.J. STAT. ANN. §§ 10:5-1 *et seq.*

and secondary schools, high schools and any other educational institutions supervised by the New Jersey State Board of Education.⁷⁹ It also expressly includes a private right of action for damages.⁸⁰

Despite the LAD's broad language, the administrative law judge who first reviewed the plaintiff's complaint applied the narrow Title IX standards to L.W.'s claim and found that the school district was not deliberately indifferent to the harassment because it had disciplined the individual harassers.⁸¹ On appeal, however, the New Jersey Supreme Court rejected the *Davis* and *Gebser* models and emphasized that the LAD was not subject to any of Title IX's limitations. Rather, in interpreting the LAD, the court emphasized that courts should apply the same standards to workplace discrimination and discrimination in public schools and that any other conclusion would conflict with the state's strong commitment against discrimination and its public policy of protecting students.⁸²

In distinguishing Title IX and the LAD, the New Jersey Supreme Court first emphasized that it had already recognized that an employer may be held liable to its employees under the LAD for a hostile work environment if the employer knew or should have known of the harassment and failed to take effective measures to stop it.⁸³ Thus, the court reasoned, applying two separate standards for the same antidiscrimination statute—one for students and one for employees—would be both inconsistent and unfair. As the court put it, “[s]tudents in the classroom are entitled to no less protection from unlawful discrimination and harassment than their adult counterparts in the workplace.”⁸⁴

Second, the court pointed to three substantial differences between the structure and language of Title IX and that of the LAD: the LAD protects a number of characteristics in addition to sex; the LAD is not a spending statute—it applies universally to places of public accommodation, including schools, regardless of whether they receive state or local funds; and finally, unlike Title IX's *implied* right of action, the LAD *expressly* empowers aggrieved persons to file private causes of action seeking legal and equitable remedies.⁸⁵

Applying this more flexible standard, the New Jersey Supreme Court held that “as a matter of state law it would be unfair to apply a more onerous burden on aggrieved students than on aggrieved employees.”⁸⁶ The court recognized that, “to avoid liability” a school district need not “purge its schools” of harassment⁸⁷—indeed, that no school can prevent all instances of peer harassment. But schools must “implement effective preventive and remedial measures to curb severe or pervasive discriminatory mistreatment.”⁸⁸ The decision in *Toms River* thus strikes the right balance, providing

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 915 A.2d 535, 544 (N.J. 2007). Because L.W.'s mother filed her complaint with the Division of Civil Rights, she appealed the administrative law judge decision to the Director of the Division, who held—like the New Jersey Supreme Court and the New Jersey appellate Court—that the district should be liable under the New Jersey Law Against Discrimination for the harassment L.W. suffered.

⁸² *Id.* at 550.

⁸³ *Id.* at 548.

⁸⁴ *Id.* at 549.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 550.

⁸⁸ *Id.*

necessary incentives for school districts to address harassment, including a broader hostile environment, and take preventative measures to protect students from invidious discrimination in schools.

Although the *Toms River* decision applies to schools only in the state of New Jersey, similarly broad protections can be construed in other states where there are laws with a structure and history comparable to that of the LAD. For example, although the Rhode Island Supreme Court has not yet considered the appropriate standard for a sexual harassment case, students in Rhode Island may be entitled to a standard more flexible than under Title IX in the Rhode Island Civil Rights Act of 1990 (RICRA).⁸⁹ The RICRA, like the LAD, is a broad civil rights statute that is significantly different in scope than Title IX. Like the LAD, it prohibits discrimination based on a number of characteristics and is not restricted to recipients of local or state funds. It also expressly guarantees a private right of action for damages, costs and fees.

The Maine Human Rights Act⁹⁰ and the Minnesota Human Rights Act,⁹¹ among other state laws, may similarly be appropriate candidates for a less onerous standard for sexual harassment claims in schools. Like the LAD, these statutes prohibit discrimination in educational institutions as well as the workplace, prohibit forms of education discrimination in a broad number of categories, and apply to educational institutions regardless of whether they receive state or local funds—indeed, both statutes cover all public and private schools at the elementary, secondary and post-secondary levels. Finally, unlike Title IX, they explicitly provide for a private right of action.

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By adopting the rigid *Gebser* and *Davis* standards, the U.S Supreme Court ensured that Title IX harassment claims would receive short shrift from courts around the country and, as a result, that school districts would be slow to adopt effective strategies for ending harassment. A more flexible standard could prompt school districts to develop effective practices that limit harassment and address the culture that leads to it—an outcome that is surely consonant with, and indeed required by the principles of, any broad antidiscrimination law. The Civil Rights Act of 2008 provides a vehicle for Congress to restore this balance.

Moreover, it is critical that victims of harassment (and their parents) take advantage of their broad state antidiscrimination laws in addition to Title IX. Most state courts have yet to examine the appropriate standard that should apply to student harassment claims in educational institutions, but as the law develops there is no reason for state courts to import the Supreme Court's application of more onerous standards for remedying harassment in the education than in the employment context. To the contrary, state courts should take into consideration that schools, particularly at the K–12 level, have broad duties to their students and substantial control over student conduct. Indeed, just last term the Supreme Court reiterated that schools have tremendous control over the conduct of their students.⁹² State officials may also proactively issue interpretations of state law that follow the *Toms River* and Civil Rights Act of 2008 models.

⁸⁹ R.I. GEN. LAWS §§ 45-112-1 *et seq.*

⁹⁰ ME. REV. STAT. ANN. 5 §§ 4551 *et seq.*

⁹¹ MINN. STAT. § 363.01 *et seq.*

⁹² *Morse v. Frederick*, ___ U.S. ___, 127 S. Ct. 2618 (2007).

With over 80 percent of secondary students and 60 percent of college students reporting that they have been subjected to harassment in school, the issue demands prompt attention. The Supreme Court has left the next steps up to Congress and the states, and it is time to begin the restoration process.

Examining “Backlash” and Attacks on Landmark Decisions from *Brown* to *Roe* to *Goodridge*

Panel Discussion at 2007 ACS National Convention Featuring
Edward Lazarus, Scott Lemieux, Robert Post, Jeffrey Rosen,
Reva Siegel and Roger Wilkins*

MR. EDWARD LAZARUS: Good morning. My name is Eddie Lazarus, and it is my distinct privilege to be the moderator of this panel, “Examining ‘Backlash’ and Attacks on Landmark Decisions from *Brown* to *Roe* to *Goodridge*.” Certainly, a very timely panel. We’ve just finished up a Supreme Court term in which the attacks on landmark decisions were quite evident from the late-term abortion case to the school pupil assignment cases from Seattle and Louisville, but I think beyond just thinking about this in terms of last year’s Supreme Court session, this is really a topic of broad significance for the progressive movement. It really boils down to the question of what role courts should play in the progressive agenda. Baby boomers like myself have grown up in the shadow of the Warren Court thinking about the Supreme Court in particular as an agent for social reform, but in more recent times, a wide body of scholarship has grown up suggesting that those judicial victories were in many respects Pyrrhic victories because of the political backlash that these various decisions have created.

And we have with us a very distinguished panel with wide-ranging views on this subject to discuss this issue with us today. I could take up pretty much all 90 minutes just reciting the credentials of the various people up here on the panel with me. I’m going to give a very abbreviated version with apologies for leaving out many of their extremely significant achievements. And I’m going to introduce them in the order in which they’re going to make presentations. After they give their set pieces, I’m going to invoke the moderator’s prerogative of asking a few questions of my own, but we’re also going to take questions from the studio audience.

First up today will be Jeffrey Rosen, who is well known I’m sure to all of you as professor of law at George Washington University Law School, long time legal affairs editor of the *New Republic* magazine, frequent contributor to many other publications, and he’s written, most recently *The Supreme Court: The Personalities and Rivalries That Shape America*, but perhaps more salient for this discussion today was his previous book, *The Most Democratic Branch: How the Courts Serve America*.

* This is an edited transcript of a panel discussion that took place at the Fifth Annual ACS National Convention, on July 27, 2007 in Washington, D.C. The discussion was moderated by Edward Lazarus, Akin Gump Strauss Hauer & Feld LLP. The panelists were: Scott Lemieux, Professor of Political Science, Hunter College; Robert C. Post, Professor of Law, Yale Law School; Jeffrey Rosen, Professor of Law, George Washington University Law School; Reva Siegel, Professor of Law, Yale Law School; and Roger Wilkins, Professor of History and American Culture, George Mason University.

Next up will be Scott Lemieux, who is an associate professor of political science at Hunter College in New York. His key areas of study are traditional politics and comparative constitutionalism and reproductive rights. He's written frequently for *The American Prospect*. He's an extremely well known and well respected blogger, and he's written some of the most thorough and thoughtful and empirical analyses of this issue of backlash.

We have a dynamic duo from my alma mater, the Yale Law School, Reva Siegel, who's the Nicholas deB. Katzenbach Professor of Law. Her academic work focuses on how courts interact with representative government in interpreting the Constitution. She is the co-author of the leading treatise, *Processes of Constitutional Decision Making*, and sits on the board of the American Society of Legal History. And particularly salient for this discussion, she is the co-author with Robert Post of an article called "Roe Rage," which examines the issue of backlash.

Robert Post is the David Boies Professor of Law at Yale. He teaches many subjects including constitutional law and legal history. He has a Ph.D. from Harvard in history of American civilization. He also is the author of many, many well received books, and as his most recent project, he is writing—and this is a very, very high honor in legal academia—he is writing a volume of the Oliver Wendell Holmes Devise, I believe it's volume 10, that will be dealing with the Taft Court.

And batting clean-up for us, Roger Wilkins, Robinson Professor of Humanities and Social Science at George Mason University. Most salient for the purposes of this discussion—this is someone who has not just written and studied the idea of backlash; this is someone who has lived backlash. He was, among other things the assistant attorney general of the Johnson administration, he is a Pulitzer Prize winning journalist for the editorials he wrote for the *Washington Post* during the Watergate era, he's written a fascinating autobiography called *A Man's Life*, and he also—just as a little side point in his career—interned with Thurgood Marshall at the NAACP during *Brown v. Board of Education*.

So you can see you're in for a real treat this morning. And with that, I'd like to turn it over—opening remarks of roughly seven minutes. I'm not like the chief justice; I will not slam my hand down on the table at exactly seven minutes, but somewhere around there. Jeff, would you start it off for us?

MR. JEFFREY ROSEN: Thank you so much, Eddie, and it's always a pleasure to be here at the American Constitution Society. When this panel was first convened several months ago, liberals were worried about the possibility of a backlash against liberal decisions, such as *Roe v. Wade* and *Goodridge*. But now, at the end of a bitterly divided Supreme Court term, liberals are in the mood for a backlash of a different kind—namely a backlash against the conservative excesses of the Roberts Court, and just yesterday, in *The New York Times*, Jean Edward Smith, author of the superb and definitive biography of John Marshall, wrote: "if the current five-man majority persists in thumbing its nose at popular values, the election of a Democratic president in Congress could provide a corrective."

I've come to rain on the parade of liberal as well as conservative backlash enthusiasts with a point that may be so obvious, that I hope you'll forgive me for belaboring it, and here it is: the court only provokes intense national backlashes when it does things that intense national majorities intensely oppose, and there have been only three periods in the court's history when the backlashes it's provoked have been intense enough to lead the justices to abandon their views. As for the Roberts Court, as long as it's led by Justice Kennedy, who has his antenna tuned to the attitude of the media

and the American voter with exquisite precision, it's unlikely to provoke significant national backlashes. Still, if the Roberts Court continues down this path and starts striking down laws that Americans do care intensely about such as environmental laws and health and safety laws, it could indeed provoke a backlash of national proportions.

What's the historical point about the relationship between backlash and popular opposition? Gerald Rosenberg makes it well. He notes three periods in the court's history when there's been an intense reaction to its decisions that's led the Court to abandon its views. First, the Marshall Court's response to the Jeffersonian Republicans attempt to curb its jurisdiction; second, the response to Dred Scott and Lincoln and Johnson between 1858 and 1869; and finally, the New Deal Court's switch-in-time in 1937—in all those cases, very unpopular decisions, congressional backlash and the court abandons its views.

But there are less dramatic backlashes. There have been three other periods, Rosenberg notes, when there's been less intense national opposition that's led the court to modulate its views without abandoning them entirely, and those include the resistance to the Marshall Court's nationalizing decisions at the beginning of the 19th century; the assault on the Warren Court's efforts to defend the free speech of communists and anti-communists in the 1950s; and finally, and we'll talk more about this today, the response to *Roe v. Wade*.

In other periods, opposition's been so diffuse that's it hasn't led to a meaningful change in the court's views and that's the response to *Lochner* by the progressives or the response to the Warren Court's school payer decisions by social conservatives in the '60s. There was opposition, bills introduced in Congress, but it wasn't focused enough to actually lead the court to change its views and the court stood its ground.

What about *Brown* and *Roe* and *Goodridge*—the topic of our conversation? Let me just make the obvious points quickly. *Brown*, as Michael Klarman has argued, was popular with 54 percent of the country when it came down in 1954, it inspired opposition mostly among Southern minorities. Its main effect was to galvanize the civil rights movement, Klarman argues, which was set on by police dogs in the South. Those television pictures were broadcast to the nation provoked so much national outrage that finally Northern voters were galvanized and the Civil Rights Act follows. But the idea that *Brown* by itself led to meaningful integration is not a case that can easily be sustained.

What about *Roe v. Wade*? Since *Roe* came down, the Gallup polls haven't changed much. Two-thirds of the country has consistently supported the right to choose early-term abortions. By the same token, larger super majorities, 70 or 80 percent oppose the right to chose in the second and third trimester. Those numbers have been remarkably consistent. When *Roe* came down then, the central holding, that first-term choice should be protected, wasn't unpopular. It was popular with 52 percent in the Harris Poll. It was *Roe*'s efforts to rule out of bounds more popular and more modest restrictions on late-term abortion including parental consent periods and waiting periods that proved nationally unpopular.

Between 1973 and 1982, Congress enacted 30 laws restricting abortion. *Roe* also galvanized the pro-life movement, it led to the creation of interest groups on both sides of the political spectrum that dedicated themselves to preserving and overturning it. And the important point here is the court modulated without abandoning its views—in *Casey v. Planned Parenthood* in '92, Kennedy and O'Connor and Souter, with exquisite sensitivity to public opinion, precisely embody it. They said early-term choice has to be protected, but late-term choice may be restricted.

As for *Carhart*, the recently decided partial-birth case, despite its unnecessary and paternalistic lucubrations about the need to protect women against so-called abortion trauma decision, its central holding was not especially counter-majoritarian because partial-birth abortions, especially in the late term, are opposed by bipartisan majorities of Democrats and Republicans in every state in the nation and in the Congress. To the degree that *Carhart* affects pre-viability abortions, it gets a little trickier—but the fact that as the court itself conceded the law would not ban any actual women from having actual abortions, because it assumed the availability of an equally safe procedure in all cases makes it foolish to hope that *Carhart* itself will provoke a dramatic national backlash.

And what of *Goodridge*? *Lawrence*, the sodomy decision, was popular with 60 percent of the country in a Gallup poll. There's no constituency even among most conservatives for banning consensual sodomy. By contrast, gay marriage is a position rejected in national polls by two to one when *Goodridge* was decided. There was a localized backlash to *Goodridge*: 13 states added to their state constitutions amendments that banned gay marriage even though before *Goodridge* only four states had those on the books. Some analysts think it may have made the difference for Kerry and states like Ohio, others dispute this. The point of *Goodridge*, certainly like *Roe* or perhaps even more like the school prayer decisions, a state court decision, not national, didn't provoke a national backlash, but had moderate backlashes and counter-backlashes.

So that's the obvious point. Only when decisions are really intensely unpopular with national majorities is there a big backlash that leads the court to change its views. Where does that lead the Roberts Court and liberals and progressives who are concerned, as Jean Edward Smith put it, that the court may be thwarting the views of popular majorities? Alas, I have to report that when I survey the leading decisions of the last term, I find it hard to conclude that they were intensely countermajoritarian. The partial-birth decision wasn't for the reasons I've already described. Affirmative action, a trickier case; there are backlashes and counter-backlashes. When the Court upheld the University of Michigan Law School's affirmative action program in 2003, Michigan voters repudiated it in a referendum, but there were also backlashes in the opposite direction. When a Texas court banned affirmative action in the '90s, the Texas legislature resurrected it with the so-called "10 percent plan."

As for the Seattle case, these programs exist in very few school districts in the country—around 5 percent according to estimates on both sides. Many believe that even in places like Seattle and Louisville, administrators that are determined to keep them going may be able to do so. So the practical effect of the decision may be limited. For all these reasons, although I found the Seattle decision an unconvincing and an example of conservative judicial activism, I wouldn't bet on it provoking a backlash. And then think of the rest of the cases: Kennedy's decision upholding the power of school principals to discipline students and limiting challenges to public funding of religion—these aren't likely to provoke a widespread rebellion either.

But the future is not entirely bleak for liberals who hope for the possibility of a backlash. Right now Kennedy is in the driver's seat, but it's not at all inconceivable that there could be six-man or six-person majority to join Justices Scalia and Thomas in their crusade in the future. And if that's the case, I could imagine the Court doing things that national majorities intensely oppose. If the court overturned *Casey* and said that early-term choice may be restricted, this position—unpopular with two-thirds of the country—might lead moderate GOP men and women to desert the party

in droves. And in a country of parity, that could make the difference for the Democrats which is why many of us pro-choice, Democratic critics of *Roe* think that the demise of *Casey* might ironically be one of the better things that could happen to the Democratic Party. That could provoke a backlash.

And then think about the cases associated with the movement that some of us have called the constitution in exile. Cass Sunstein and I were chastised a couple of years ago for suggesting that the conservatives were on a crusade to reverse environmental laws and health and safety laws. But as the recent decisions involving the Clean Air Act suggest, our fears are by no means hypothetical. And I could imagine that if it were not Kennedy but a reliable conservative who was running the show, the Court might actually strike down laws that people care intensely about. At that point especially with a Democratic president and Congress, I could imagine a meaningful confrontation between the Court and the political branches in a way that we haven't seen certainly since *Roe* and maybe even since the New Deal. So there may be hope or trouble ahead on those lines.

But the broad point, and I'll now conclude, is that it would be foolish for liberals to put too much faith in the courts right now. And they don't have to, because on many of the great issues that are most contested now, abortion, I think ultimately affirmative action, campaign finance, and environmental laws and health and safety regulations, we have public opinion on our side. We no longer need judges to fight our battles for us. And to the degree that judges thwart these intensely held national views by unwisely resorting to conservative judicial activism, liberals can respond with the cool and convincing voice of bipartisan judicial restraint. Thank you so much.

MR. LAZARUS: Yes, I give you fair warning that I'm sure some of the panelists are—and if they don't, I will, going to probe your views about some of the more activist liberal decisions and your criticisms of them. But you've given a wonderful historical description of the backlash phenomenon. And Scott, I have a feeling, since I've now read a couple of hundred pages of your work, that you will probably take issue with a few of the things Jeff has said empirically.

MR. SCOTT LEMIEUX: What's amazing is that when I started this interminable work many years ago, I was actually a believer in the backlash thesis. I expected to find that litigation would actually produce more opposition than other forms of change. And as I looked into it with respect to the issue of abortion—and the backlash thesis is believed by people on both the left and right—I found that it was a pretty convincing thesis, and the only things wrong with it were that there was no theory and there's no evidence. Other than that, it was completely airtight. But those are the only two flaws.

I won't talk in my initial remarks about my own reflection that I did not really find it theoretically convincing—because I know professors Post and Siegel have some interesting things to say about that. And I think it will come out in the discussion. So what I'll do is briefly explain the reasons why I think that empirically the idea that courts produce a greater backlash than other political changes achieved through other institutions is not an empirically solid thesis. And this is not to say that decisions like *Brown* and *Roe* and *Goodridge* don't produce a backlash. We know that they do. But if that's all that we're arguing, that's a fairly trivial claim. We can avoid backlashes by just never winning, and sometimes it seems like that is our strategy—but obviously nobody advocates that. So the real question is: does using the courts produce more of a backlash than using other institutions? And on this issue, unfortunately or fortunately or whatever, I actually don't really buy it. And I should say that I think this is

not only true of decisions I approve of, but I also think this is true, regrettably, of many decisions that I don't approve of. I wish that Professor Rosen had been right when he said that after *Bush v. Gore* the Court had committed suicide. But the decision didn't seem to produce as much of a backlash as might have been expected. So this isn't just about whether I agree with what the Court is doing or not, but I think that the idea of the courts producing unique backlash isn't very well founded.

So let me explain some of my reasons for this. When it comes to *Roe v. Wade*, the key obviously is to look at what was going on at the legislative level before *Roe*. If the backlash thesis is correct—and this my biggest misunderstanding, that I kind of bought this romanticized idea of what was going on before *Roe*, which is that state legislatures were slowly but surely moving towards liberalization and the Court may have sped things up a bit, but it did so by provoking a big backlash.

What I think a lot of people don't understand is that for all intents and purposes, abortion legalization at the state level had stopped by 1973—that most of the initial liberalization came during a brief flurry in 1967 before the pro-life movements got organized, and you had some states liberalizing entirely, only four, sometimes provoked by state litigation, and you had some other states engaging in compromise legislation that would insulate doctors from prosecution but would still criminalize abortion in some circumstances. But by 1973, abortion was still illegal, was not fully decriminalized in 46 states and was still illegal entirely in 37 states despite public opinion very similar to today, and it wasn't really getting any better. By the time of *Roe*, pro-life groups were extremely well mobilized, reform attempts after reform attempts were failing, referendums were losing. So essentially the movement was largely dead by 1973. And there are a variety of reasons for that, but the most important are that America's legislative institutions are not particularly majoritarian, especially when it comes to changing the status quo—that it's much harder to get legislation repealed once it's entrenched.

And the second problem where abortion is concerned is that for all intents and purposes, abortion laws are only applied against poor women—that affluent women in urban centers almost always have access to safe abortions anyway. So the people who have the biggest stake in decriminalization are the women with the least political power. So because of this arbitrary enforcement, it's harder to get abortion legislation repealed even when public opinion supports it. So for that reason, it's simply not true to say that *Roe* created the pro-life movement or that there was sort of an inexorable wave towards legalization before *Roe*. Basically the movement had stopped and it was going to be difficult, once we cherry-picked the most liberal states, to liberalize a lot more states. And I think without *Roe*, abortion would still be illegal in somewhere between 15 and 25 states today. So that's my first argument.

There are a variety of other pieces of evidence we can look at. Unfortunately, there wasn't a well developed conservative media then as there is now. But one interesting thing is that if you look at the *National Review* at that time, you'll find that there were more articles about abortion in the three years before *Roe* than in the three years after *Roe*. So this is clearly something that was on the agenda of movement conservatives, and if you read these articles, it's pretty remarkable. Bill Buckley is writing these editorials like: here's out four point plan for stopping abortion, we're going to picket clinics, we're going to write op-eds, we're going to compare them to the people running Auschwitz, et cetera, et cetera, et cetera, et cetera.

So movement conservatives were very aware of this issue; it's connected to a lot of their broader concerns, and they were clearly conscious of it and mobilizing about it

before *Roe*. *Roe* made it national but that's only because, again, it was a victory. But there clearly was a lot of counter-mobilization at the state level that was in fact very effective. And as Professor Rosen noted, public opinion on abortion has been relatively consistent. The backlash hasn't shown up in terms of increasing opposition to legal abortion. And I think perhaps the most interesting fact, if we're considering whether overturning *Roe v. Wade* would be good for reproductive freedom in general, is that *Roe* if anything actually polls better than its underlying policy goals. *Roe* is consistently supported by a two to one majority, and you can see this during presidential debates and confirmation hearings. Democratic candidates are very explicit: our candidates will support *Roe v. Wade*. When you ask Bush about *Roe*, he looks like someone's approaching with a cattle prod and starts babbling about slavery, whatever. So conservatives are not explicit about wanting to overturn *Roe* because they know it's not popular, which I think is inconsistent with the idea that resolving these through the courts was really damaging to reproductive freedom. So for all these reasons, although it's hard to know, I don't think that the backlash to *Roe* was—or the backlash to abortion rights was created by *Roe v. Wade*. And I certainly don't think that it would be better for reproductive freedom were *Roe v. Wade* to be overruled.

When it comes to *Goodridge*, again, I think what happened recently in Massachusetts is quite remarkable. If the backlash thesis was correct, we would expect the cause of gay marriage to have been set back both in Massachusetts and throughout the country. Instead what's happened is that gay marriage has become more popular in Massachusetts after *Goodridge*. And we went from having a majority of legislators opposed to gay marriage to not even be able to get 25 percent of the vote to bring a constitutional amendment that would repeal it. So that's quite a remarkable shift which is precisely the opposite of what the backlash thesis would predict. Gay marriage has actually become more popular, and legislators, even if they weren't crazy about giving the rights in the first place, are very reluctant to take them away, which is an interesting dynamic. And some other states have continued to enact civil unions. And in the states where there were referendums passed after *Goodridge*, these were all states for the most part in which there weren't civil union or gay marriage rights, in which there was no prospect of it.

So particularly since state constitutional amendments could be overturned like ordinary statutes for the most part, it's not clear how much this hurt the status quo. It hurt it a little but not an enormous amount. And I think a majority of the voting behavior analysis suggests that gay marriage was not a decisive issue in the 2004 election. And you may recall some people saying that when the New Jersey courts mandated civil unions before the 2006 election, that this was going to be a disaster to Democrats, it would mobilize social conservatives, and you're probably not hearing much about that now for obvious reasons. So I guess one problem I have with the backlash thesis is that some of its proponents have predicted eight of the last two backlashes. So it's important to remember when predicted backlashes don't happen.

And just very briefly, another thing I did in my dissertation was to try to bring some comparative perspective. One reason I have trouble convincing people about the American case is that people can see that there was a reaction to decisions like *Goodridge* and *Roe*. And we could play a counterfactual game, but it's still hard to know what would have happened otherwise; maybe a whole bunch of states would have liberalized without *Roe*, we don't know. So one thing I've done is looked at our neighbor to the North to see what's happened there: that if the key variable is litigation, this should show up in countries other than the United States.

What's interesting is that Canada, first of all, has the most liberal or one of the most liberal abortion regimes in the Western world. It's almost unregulated, state funded, and this was created by a decision—a Canadian Supreme Court decision about 20 years ago. And despite this, abortion is not a particularly salient issue in Canada, the policy has been completely stable, it hasn't been especially divisive. So in that case, litigation doesn't seem to have produced a major backlash. And similarly, Canada had a very litigation-driven legalization of gay marriage at the federal level. And there was recently an election—a new conservative government came in—they made one desultory attempt to repeal the ground of gay marriage. Several members of Prime Minister Harper's own cabinet voted against it. And Harper said right afterwards, after his attempt to repeal it had failed, that we don't plan on ever bringing this issue up again. Essentially for us, it's closed. So again, it seems that the litigation driven creation of gay marriage in Canada has not produced any kind of backlash. And in fact, gay marriage continues to be more popular and entrenched.

So I should in conclusion say that this is not to say that I'm completely Pollyanna about litigation. As will come out in discussion, I do agree with some aspects of what people like Professor Rosen and Gerry Rosenberg and Michael Klarman have argued. But on this narrow issue, my view is that issues like abortion and gay rights and civil rights are divisive because they're divisive. And this divisiveness was not created by litigation, nor do I think that this divisiveness will go away if progressives unilaterally disarm.

MR. LAZARUS: Thank you, Scott. And I'm going to turn now to Reva who has looked at this issue from not only an empirical standpoint, the way Scott has, borrowing I think on some of Scott's work, but also very much from a theoretical point of view of really what role should courts play in constitutional interpretation and what is the interplay between those courts and any backlash that does occur.

MS. REVA SIEGEL: Okay. So what I'm going to do is something near to impossible, which is—I was told that I had three minutes to speak—because Robert and I are presenting together here, so I'm going to give a very short account of the first half of a paper that we've recently done, which is called *Roe Rage: Democratic Constitutionalism and Backlash*.¹

The paper starts by examining a very common view of backlash, namely that it's bad. It's bad either because it involves popular resistance to authority, or because this popular response is itself a sign of judicial overreaching. It is this second understanding that Jeff is speaking from now—the idea that backlash occurs when courts have strayed from their proper role and entrenched upon popular consensus.

Our paper offers an alternate view of backlash. Rather than starting from the assumption that backlash is a social ill or a wrong that needs to be remedied or avoided, we are writing from the view that backlash is a normal part of the constitutional order in which we're living and that it has many benefits as well as some obvious and indisputable costs.

On what do we base this alternative understanding of backlash? We begin by considering the Constitution's authority. The Constitution's authority in the end is democratic. The Constitution is authoritative to us because we recognize it as *our* Constitution. It does not have authority except as we recognize it in those terms. The question then becomes: how is it that the Constitution's democratic authority is

¹ Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

sustained over time, from generation to generation? There is a conventional answer to that question, which grounds the Constitution's democratic authority in the authority of lawmaking. The founders went through a procedure. And in fact, if we want to change the Constitution that we've inherited from them, we have available to us the procedures of Article Five to alter the Constitution.

In *Roe Rage* and in other of our work, we observe that the lawmaking paradigm is insufficient to account for how the Constitution's democratic authority is sustained from generation to generation. This claim is not normative. We're observing something about the nature of the constitutional order in which we're all participating, namely that there are multiple mechanisms and feedback loops that sustain the authority of the Constitution over time. Formal constitutional lawmaking is supplemented by electoral controls over judicial nominations and appointments, which provide a crucial form of democratic input into the constitutional order. Once you begin to look, it is easy to identify other practices that provide courts democratic input. Think about threats of jurisdiction stripping or, in *The New York Times* recently, court packing.

You might also think about the role that state legislation and state constitutional interpretation plays in beginning to articulate or to question norms in the federal system. Or, you can think about other mechanisms of norm contestation in civil society: protest movements, civil disobedience, the like—the sit-ins, what have you. There are a variety of these feedback mechanisms, through which backlash is conducted.

Now, let's return to the question of whether we understand backlash as a sign of something gone awry or instead as normal and perhaps even valuable part of our constitutional order. It's plain that backlash is a threat to a Constitution that vindicates values associated with the rule of law as well as democratic self-governance. It is a threat to the authority of judges and it tears at the social fabric. We do not mean to minimize the cost of what happens when the various forms of interaction that we refer to as backlash occur. We're not disputing this.

The question is: is anything gained through this, is anything of social value or system value produced through it? And what we argue in this paper is that, indeed, there is. These goods will not be visible to us if we start from the assumption that the Constitution already has authority or that it sustains its authority simply by reflecting what are the homogenous views of the American people. This is the consensus account that Jeff is offering, namely that there is always a consensus out there and the Constitution, rightly interpreted, reflects that consensus, and that's that. Backlash will not appear to produce any social goods if we think that there is a simple, static consensus for the Constitution to reflect, or that, when there is no consensus, we think that people should just defer to authority, so that when they're told what the Constitution means they should listen and submit. If that posture is acceptable normatively, then indeed, backlash will appear socially destructive.

On the other hand, if you start to question any of these positive or normative assumptions, you begin to see why it is that backlash, not only inflicts costs, but also has social goods to contribute. These goods will be perceptible if you pay attention to the fact that each of us did not participate in the framing of the Constitution and the question of how it's "ours" has always been an issue for us. These goods will be perceptible if you pay attention to the deep normative heterogeneity of the American polity, and notice that people disagree with each other quite passionately about matters of constitutional moment. If you pay attention to all this, then you can see that the question of sustaining the Constitution's authority over time is much more

important and much more complicated than we conventionally acknowledge. In fact our constitutional order has complex social mechanisms for achieving this.

Since I'm doing the three-minute presentation of half our paper before Robert speaks, I'll just say two more things here. Our paper offers an account of how it is that backlash could have constructive social effect. There are forms of communicative action going on when there's popular resistance to judicial overreaching, as Jeff is pointing out. So backlash promotes what I call democratic "steering." Backlash also promotes forms of solidarism and "attaching." People are struggling to speak to each other about the meaning of a shared tradition. They're struggling to speak in the name of "We, the People." Therefore, they have to render themselves intelligible to one another and that struggle, that debate, that attempt to make a claim on a shared history and shared modalities of interpretation and to say what the Constitution, rightly understood, means is itself a form of community in conflict. That is the core, the foundational frame, of this paper.

Not only are there system goods produced through constitutional conflict, but there may also be goods for *liberals*, if you'll excuse the phrase here. We understand much liberal writing on backlash as an effort to cope with the rise of the new right—as reflecting dread about the forms of social practice that put the Second Reconstruction and the Great Society in peril. But these forms of retrospective mastery may not provide liberals what they need in their relationship to the courts in the coming decades. It may be time to look back at what it is that conservatives did in the 1970s when they faced a judiciary that was construing the Constitution in ways that felt normatively alien to them. And here I'm going to turn this over to Robert.

MR. ROBERT POST: Thank you. So I'm going to pick up from where Reva left off and very, very quickly discuss some implications of this analysis for the question of abortion. If you think back about 10 years ago, you can probably remember that progressives regarded courts as the fora of principle, where rights were vindicated. By contrast how do progressives regard courts now? We have popular constitutionalism, we have minimalism, we have liberals turning away from courts. The question is: why is this so?

One is that we've been traumatized by the rise of the new right. We are so afraid that if courts become too assertive they will provoke a reaction that will strip us of what we've gained through litigation. That trauma is the subject of my talk. It is absolutely explicit in writers like, for example, Cass Sunstein, who believe that one goes too far, and attempts decisions like *Roe*, one will provoke a backlash that will sweep away everything one wanted to accomplish. I want to ask whether, historically, this is true. I want to inquire into the actual backlash that surrounded *Roe* and to ask after its normative implications at for us now?

When *Roe* was decided in 1973, there was, as Scott says, opposition to the liberalization of abortion. The mobilized opposition was chiefly Catholic, and it was opposition that applied equally to legislative liberalization of abortion. It wasn't specifically related to anything judicial. It was opposition to abortion per se. If you read Jerry Falwell's autobiography, he says at the beginning of it something to the effect that: "I woke up one morning the day after *Roe* was decided and I read about this baby killing machine. I knew I had to be in politics." But as far as we can tell, this story is not true. Immediately after *Roe* there wasn't major organized opposition to *Roe* among protestants. It took about three or four years for major backlash to the decision to arise. And why is that?

One account, the liberal account that you will read endlessly in the pages of liberal academics, is that the court in *Roe* overstepped its proper boundaries, that it made judicial mistakes, that it didn't offer a correct explanation of its decision, that it went off on due process instead of equal protection, or that it went too far, etc. etc. These are certainly questions that academics talk about to each other. But they are not questions that create a social movement. People in the world don't care whether Blackman got his reasoning exactly right. They don't go into the streets to protest mistakes of judicial craft. Why then did they go into the streets after *Roe*? We point to three phenomena.

The first is that abortion was in the process of changing its meaning in the 1970s. When *Roe* was decided, it was written from the point of view that abortion was largely a doctor's issue. But in the 1970s the women's movement was in the process of transforming abortion into a woman's issue, of asserting that women had the right to end their pregnancies. This change in the meaning of abortion was emphasized in the debates over the ratification of the Equal Rights Amendment, when Phyllis Schlafly observed that the ERA would mean abortion on demand. Abortion came to stand for the social fact of women leaving home and becoming independent wage earners. So opposition to abortion became, in effect, opposition to women acting independently outside of the family.

The ERA was attacked as an assault on the role of women as wives and mothers; it was said to promote federal daycare centers for babies instead of homes and to promote abortions instead of babies. Government day care centers and abortions were attacked together. This conjunction continuously recurs, so by the time abortion entered the Republican Party platform in 1980, we find the party's pledge "To work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent life." This same pledge has remained virtually unchanged to the present. The "sanctity of life" and "traditional family values" are yoked together because from the point of view of social mobilization they are the same issues. Abortion became a woman's issue, so that by the decade's end mobilization against *Roe* was mobilization against women's equality. That's point number one.

The second point: There is a second strand to the mobilization against *Roe* which concerns religion. Catholics and evangelical Protestants have never been allied in the United States. But they came together in the late 1970s over abortion. Although at the time of *Roe* Falwell wasn't preaching against abortion, and although at that time the Baptist Convention didn't oppose abortion for therapeutic purposes, by 1976–77 Catholics and evangelical Protestants came together in a joint attack on secular humanism. They meant that the state had been taken over by secular forces who want to read religious values out of government and out of public policy. And in this context mobilization against abortion and against *Roe* began to stand for opposition to the loss of religious values in public life.

The third point is that this alliance between evangelical Protestants and Catholics, which is a new phenomenon in American politics, was brokered by Republican Party operatives like Paul Weyrich and Howard Phillips, who meet with Falwell in 1979 in Virginia to propose the formation of a mass political movement that would be allied with the Republican Party. Abortion was proposed as a central link that would unite evangelical Protestants with working class Catholics and so break apart traditional Democratic constituencies. This alliance was brokered as a conscious political deal.

This means that the backlash to *Roe*, which is connected to the rise of the new right, is really the expression of a coherent constitutional vision—the expression of what

Robert Cover used to call “nomos.” That constitutional vision concerns traditional family values—the idea that women should stay in at home—and the affirmation of a religious state—one in which the Bible would not be taken out of school. The Warren Court’s bible decisions are actually a major source for the rise of the religious right.

Now I ask you—Is minimalism a plausible way to fight a constitutional vision of this depth and power? This constitutional vision is inspiring great numbers of people to elect Presidents who will appoint judges to interpret the Constitution in light of this vision. And does one fight a constitutional vision like this? Not by minimalism. The only way is to counter a conservative nomos with a progressive nomos. So don’t imagine that by abandoning *Roe* we’re going to succeed in placating the conservative assault. That assault is about values that far transcend abortion. It is about the meaning of gender equality. About the role of religion and the persistence of the secular state. That vision has to be fought both politically and judicially. It has to be fought with both a politics and a jurisprudence. And that, for us, is the implication that liberals ought to take from the backlash to *Roe*.

MR. LAZARUS: Thank you, Robert. I was interested in your summation, before I turn it over to Roger, in that Cass Sunstein, while being the author of minimalism has also called for a new progressive vision. And I wonder how, if he were up here, he would reconcile those two ideas—and perhaps we can talk more about that as we get to the questions. Roger, the floor is yours.

MR. ROGER WILKINS: Thank you. I think there is a need on this panel for a plaintiff to speak. And since I am not a gay man nor am I a lesbian, nor am I a lesbian—get that, hear it? And I am not a poor pregnant teenager. So for the purpose of this discussion, I’ll pretend to be black. The work that I object to is done by University of Virginia Law Professor Michael Klarman who among other things suggests that *Brown v. Board* might well have been a mistake, that progress was being made in the South and that *Brown* elicited a massive backlash which has been destructive of the interest of *Brown* ever since.

Brown was a shot at segregation. Let me tell you something. I’m going to describe your plaintiff a little bit for you. I am a 75-year-old natural born citizen of the United States if you can call natural born being born in a segregated hospital, in a segregated town, in a segregated state, in the middle of the country—Kansas City, Missouri. My understanding of what segregation meant, I got from the strongest human beings I knew and that was my parents and their friends—all college graduates, all as I now understand it with their lives being defined, squashed, and diminished. And I learned what I learned about segregation from listening to them as they sat and talked to each other. And almost always, in their social discussions, ultimately the crushing, soul-breaking weight of segregation became the central subject of the conversations. As I grew up, I learned that my parents and their friends were right. I learned because of segregation or the racism in Grand Rapids, Michigan, where I ultimately grew up, that your soul could be shattered by any white person who just happened to be having a bad day and didn’t like black people and decided to do something nasty, whether it was clerk in a store or a policeman or just an adult dealing with a kid.

Segregation wasn’t just in the South. It was in the North too. I went to the University of Michigan for seven years, college and law school. Now, don’t get me wrong, I love the University of Michigan. And I am totally convinced of the source of all evil in the world is located in Columbus, Ohio. But I went to the University of Michigan for these seven years, 1949 to 1956, and I was never assigned a book, a poem, a short story, an essay, or a play that was either written by a black person or suggested that any

black people had ever done anything constructive in the history of the written word with one exception. In law school, we studied *Brown v. Board*, which had just come down the previous year. Well, there's a black guy who had done something named Thurgood Marshall.

I say those things to suggest to you that the real result of segregation was to put black people in a defensive crouch in our souls, all the time. And in a country where robust, vigorous, unending effort is required for success, I want to tell you, a defensive crouch is not really the way to begin any day that's going to be successful. *Brown* cracked segregation. Sure there was a backlash, but there's always been a backlash in this country when something good happens for black people. There was a movement after the revolution in the 18th century for Northern states to abolish slavery. Now, yes, what happened was that the Southern states began to import more and more slaves and send them down to the Southwest of the South; the slave trade became more vigorous. But the fact is that lots of black people in the North became free, not all of them, but lots of them. I don't think that those black people who became free in the 18th century would have had a tradeoff—"Oh, we will stay in slavery so there won't be a backlash and it will all be quiet the way it's always been."

Of course, in the 19th century, there was First Reconstruction and then there was about the most vicious backlash you can imagine, Ku Klux Klan, Knights of the White Camellia—a terrorism of a degree and kind that you just cannot in your mind think of being a part of the fabric of American culture but there was. But did black leaders decide that the thing that they wanted to do to stave off this backlash was to go to the Congress and say: "Gee, it would be a good idea if you got rid of the 13th, 14th and 15th Amendments." They didn't, and of course, they were right.

Then in the 20th century, there was *Brown* and the aftermath. I can tell you I do not believe that had *Brown* not come down that the Montgomery Bus Boycott, which followed the next year, would have occurred. As I matter of fact, I knew Mrs. Parks and one day I asked her, I said: "Mrs. Parks"—now she was the secretary of the NAACP branch in Montgomery. I said, "Mrs. Parks what made you do what you did that day?" And she said: "Well, you know, we had been trying to take a stab at the segregation for a long time. And we started to try it once, but it didn't work out." And she said: "You know, I think it was *Brown* that just made me say, 'This stuff has got to stop.' And that was the day that I kept my seat." *Brown* produced Martin Luther King. *Brown* produced an awful lot.

Now, Klarman says: "Well, it didn't produce a lot of desegregation." Well, that's true. But one of the reasons that it didn't produce a lot of desegregation in the schools was that the chief law enforcement officer of the United States neglected and ignored his duty. And he was Dwight David Eisenhower, he didn't support the Court. He was the most popular man in the United States. And if he said: "*Brown* is the law. I believe in the law. I believe that we ought to abide by what the court has done. And if it comes to it, I will of course use my powers as a law enforcement officer to do what is necessary to see that the court is obeyed." He didn't say that. On the contrary, he leaked it out that he was opposed to *Brown*, and thought that—as his words appointing Earl Warren chief justice was the biggest damn fool thing—mistake he'd even made.

Ultimately, I as your parent—plaintiff, sorry. Parent—I'm old enough to be a parent to most of you. But as your plaintiff, I will say this. *Brown* absolutely changed my life. It made the career that you heard about a few minutes ago possible. Had it not been for *Brown*, I would probably now be a retired lawyer who had spent his whole life practicing law between Grand Rapids and Detroit. But *Brown* made the whole world

open to me and to all kinds of people in my generation and it has rolled down. Would we give up what we've gained in order to avoid the backlash? No way. What you do in struggle is to struggle for justice from the day you're tall enough to understand what's going on till the day you die and the struggle—the struggle is not a sprint. Some people in the civil rights movement, the old people died in a—were sad and depressed because it all hadn't been achieved in their lifetimes. So I began to think of it as—not a sprint but a relay race and not a short relay race but a long-distance relay race.

So I am buoyed by the strength of my slave ancestors who believed that one day their children would be free and so they held it together and taught their children as best they could. And I hope that, in my lifetime, I am setting an example for my great grandchildren who have yet to be born that we did the struggle. Now, these kinds of struggles aren't for the faint of heart, they're not for scaredy-cats, and they are for people who know that these kinds of struggles are tough—that sometimes you lose and sometimes it hurts. So you go to bed and you get up the next day and you go out and fight some more. That's the way you do it and you don't worry about backlash and you treasure the achievements that your movement has produced. I can't speak for gays, lesbians, and pregnant youngsters, but I believe that they would agree with me. Thanks very much.

MR. LAZARUS: Thank you, Roger. And I am now going to display my cruel streak. And I'm going to turn to Jeff and going to note that you have sometimes written admiringly of Professor Klarman's work and have taken a somewhat different view, not of *Brown*, but of some of the decisions that we've been talking about. And in particular, you've written about the fact that there is an important categorical difference between judicial decision making and legislative decision making and that the quality of judicial decision making also matters. And I'm wondering if you could talk a little bit about your views on those topics and perhaps talk about whether all backlashes are created equal or whether some of the things we've been talking about our, with respect to one decision like a *Brown*, are different from your views with respect to a decision like *Roe*.

MR. ROSEN: Those are all good questions. But I'd like to get to the heart of the matter, because this debate was fascinating. Judicial craft matters to lawyers. So when I went to law school, I was upset about judicial activism not because I was traumatized by the prospect of living under a conservative judiciary—because this was the 1990s and such a judiciary didn't exist. I was upset because I found it difficult to accept decisions whose result I agreed with like *Roe* but whose reasoning I was unable to find persuasive. And I took that sort of stuff seriously. Does that matter broadly? No. Most people don't read Supreme Court decisions, and they don't care about the reasoning.

But to the degree that *Roe* in Robert and Reva's fascinating account precipitated—although it didn't cause this principal political backlash motivated by views of traditional women and of religious views about the nature of personhood, it was able to have the political influence it did only because of *Roe*. The truth is that only 20 percent of the country, even in the most conservative states, accepts these views of the role of women and wants to ban abortion in all circumstances.

The new right loses when they're subject to political tests. It was only because, first of all, *Roe* by protecting early-term choice allowed pro-choice women and men to vote for the GOP without fearing that abortion rights will be threatened, and more importantly, because the new right could portray *Roe* plausibly as an enemy of the late-term restrictions on abortions that most Americans, most Democrats and Republicans,

many people even in this room—if the polls are to be believed—support moderate late-term restrictions on abortions.

By painting *Roe* as a radical decision, the decision transformed our politics in a way that's been a disaster for Democrats. It has made every judicial confirmation hearing into a referendum on a decision whose reasoning many of us are unable to accept but we have to plead allegiance to. It's transformed the Senate and the House, whose leaders are persuaded to pander to their extremist bases—these interest groups which rose in response partially to *Roe*, weren't caused by it, didn't arise immediately afterward—but arose because *Roe* nationalized the abortion debate and has distorted this presidency and led us to live for the past two terms under a president whose more concerned about pandering to this anti-Democratic conservative base that has no national majority than he is about representing the views of the majority as a whole.

Was this all caused by the Supreme Court? Of course not. Of course it wasn't. But the Supreme Court, as Reva and Robert suggested, played a role in this dialogue, and the question that you put on the table, Eddie—here, I don't mean to dismiss your latest questions. But the first one you posed is the central one and I want to answer that: should liberals resurrect this heroic view of courts, look for a new vision as Robert suggested, and imagine that by embracing some kind of robust, new judicial liberalism they can fight conservative judicial activism? This seems to me completely implausible. The Supreme Court is going to be in the hands of conservatives for the foreseeable future, even if a Democrat wins the next time around. The idea that there could be a meaningful strong, five-vote liberal majority is a fantasy, so judicial activism will only redound to harm Democrats. And more importantly, it's always been a disaster for political movements that can win their points in the political arena, as the Democrats can.

I'll close by saying this: I do have a vision. I think of it as a heroic one. It's really not mine but I was inspired by it in law school, and I'm still inspired by it. It's a vision of bipartisan, judicial restraint. I write for *The New Republic* magazine where I'm the legal editor. The founders of *The New Republic* included Holmes and Frankfurter and Learned Hand who thought of themselves as progressives and were upset by conservative judicial activism. And by resisting expansive uses of the courts thought they could defend progressive values. This vision was continued through the 1960s by people like Alexander Bickel with *The New Republic* who opposed *Roe*'s reasoning, Eddie, as you suggest, but supported its result. And I've tried to keep it going till then.

Whether you want to embrace this vision for reasons of strategy or for principle, it seems to me obvious that in an era where conservatives will control the courts for the foreseeable future, liberals should focus their energies on winning their points in the political arena. They've proved their ability to do so. And by wasting our time imagining, hoping, yearning for judicial salvation that never comes, we risk shooting ourselves in the foot.

MR. LAZARUS: Well, Jeff, I appreciate—the battle is now joined. I had thought that the remarks you just made might have been your opening remarks, and I'm delighted you made them now. And Robert, I think I'm going to turn to you since it was your vision that I think Jeff was targeting right there.

MR. POST: I think Jeff has made a very eloquent statement, and I guess I'm going to respond in two ways. The first is: I don't think one should imagine this as a question that is either judicial or political. The tradition of *The New Republic* that I would identify with is that of Brandeis, who precisely didn't make a sharp distinction

between law and politics, and who precisely saw judicial rights as flowing from a vision of the state, which, as you know, was connected to his ideal of Athenian democracy.

So I would resist this premise of bifurcation. I would say: “Yes, of course we’re not going to control the Supreme Court for the next couple of years. But the question is how the next progressive judge who gets appointed is going to form his or her jurisprudence. Will that jurisprudence come from the striking and ineffectual posture adopted by the left in the context of the Roberts and Alito nominations, a posture that did not stress a constitutional vision but instead stressed issues like judicial independence, the rule of law and super-precedents? I don’t think so.”

Instead of stressing legal process values, the left should have been stressing a substantive constitutional vision. It should have arguing that the right has the wrong idea of courts; that they’ve got the wrong idea of what access to courts a democracy requires; that they’ve got the wrong idea of how equality and liberty should be protected. That’s what our opposition to the Roberts and Alito nominations should have been. But we didn’t come through, because we haven’t yet developed a convincing progressive constitutional vision that is politically effective. I suggest that we cannot have a constitutional vision until we first have a political vision. And this means that successful constitutional law is not bifurcated between the judicial on the one hand and the political on the other. They flow seamlessly together. It is exactly this sort of constitutional vision that the right has made. The right has mobilized in the name of a political vision that focuses on the need for religion, traditional family values, and the rights of property. And from that political vision has grown a judicial philosophy which they call originalism, but which of course has nothing to do with originalism. It’s just a brand that signals the nature of the conservative political philosophy that is being expressed. We need to create a similar vision and a similar brand. .

MR. ROSEN: Could I respond just very briefly. I embrace the resistance to bifurcation entirely. I was just responding to the way that Eddie phrased the question in a Manichean way to get us going.

MR. LAZARUS: That’s my job, Jeff.

MR. ROSEN: I know. I appreciate it. You’re doing very well. Brandeis is a model I’d be happy to embrace, too, because he really was ultimately a Democratic constitutionalist who believed strongly in certain values—First Amendment values that ultimately the public was willing to accept. He embraced a dialogue between the court and the public because he was essentially a restraint man—sensitive to state experimentation, deferential to Congress, and never making the mistake of imagining that judicial salvation could substitute for political activism. So I’m happy to join you on that one.

MS. SIEGEL: I just want to say one thing in response to Jeff’s vision of a social change emanating from *Roe* and that is to invite you to read the history section of our *Roe Rage* article, in which we explore whether and how *Roe* caused conservative counter-mobilization. It’s plain that *Roe* played an enormous, symbolic role in this mobilization. For a variety of reasons, *Roe* came to stand for values that many Americans thought insufficiently respected by the Court and the country. Groups that opposed the ERA and were concerned about the school prayer decisions, et cetera, came to talk about the abortion decision as a symbol of a court that was wrong—not just because it exceeded its proper role—but also because it imposed values that these Americans thought not theirs. Right?

It’s important to tease these two objections to *Roe* apart. When you do, you’ll see something that goes to the bifurcation point. Even though we talk about the Court as

a counter-majoritarian institution and judicial decisions as ending politics, it turns out that decisions like *Brown* and decisions like *Roe* and decisions like *Bowers* actually play an enormous role in distilling normative questions for a democratic polity and moving people to make claims on the meaning of their constitutional tradition. So that in fact, Supreme Court decisions can, and in a deep way, do lead to this integrated response: they provoke democratic deliberation and participation that finds expression in political and majoritarian arenas as well as in adjudicative fora.

MR. LAZARUS: One of the things that Reva just mentioned is the symbolic power of *Roe* and I would say there are perhaps a few other iconic decisions that get held up the same way whenever I'm driving across middle America and listening to talk radio. *Roe* is mentioned with remarkable frequency, and it does have this media generated power especially on the right. Scott, one thing I wanted to ask you—just to pick up on the theme that's been an undercurrent here a little bit—is: Okay, if we're facing a court that might turn radically to the right, do you think in the modern era that progressives are capable of generating backlash or has this really become a one-way ratchet and that the backlash phenomenon is really a right-wing phenomenon in this country?

MR. LEMIEUX: My—and hopefully we won't find out, but my guess is that it would not be one-way ratchet—that if you had a Supreme Court that legitimately was to find a constitution in exile to strike down major parts of the New Deal regulatory state, I am quite convinced that that would have major electoral implications.

MR. LAZARUS: So you think 1937 could happen again, in essence?

MR. LEMIEUX: That would be my guess, yes. Now, I think that's one potential danger, though of the kind of clever minimalism of the Roberts Court. It's that you're much less likely to get a backlash if you kind of hollow out precedents from the inside rather than overturning them explicitly. Overturning *Roe v. Wade* and *Casey* would have a major backlash, which isn't the same as saying, "we're not deciding anything about *Roe*. We're just saying that no abortion regulation is ever unconstitutional." That may produce less of a backlash in a way. And I do think that we should consider that as a major democratic cost of minimalism.

I sort of agree with Scalia in the campaign finance case that if you're going to logically overturn a precedent, you should be explicit about it. I think the real minimalists like Professor Sunstein would say that that's not real minimalism at all—that it's phony or whatever. But I do think that one thing to worry about with Roberts and Alito is that precisely because they're not as explicit and kind of abrasive as Thomas and Scalia, they may be able to get away with a lot more. Although that couldn't extend to actually striking down the Social Security Act or something like that. That would produce a backlash. I would hope.

MR. LAZARUS: I'd like to make sure to get to some of the questions that have come from the audience here. And Roger, I have one here that I think is well addressed to you which really has to do with a distinction between principles announced and means adopted. And that is: when we think about backlash, especially perhaps in the context of *Brown*, was the backlash—is the focus on backlash really about the principle that was announced or was it exacerbated substantially by the means used such as forced busing or other aspects of social engineering to achieve some of the broader-base social goals?

MR. WILKINS: I think the backlash was essentially against the principles enunciated. The methods used, particularly the attacks on busing and affirmative action, were tactical. Look, Klarman is right that you could not have gotten out of the

Congress of the United States in 1954 federal legislation that decreed that schools should be desegregated. There were goons from the South in all the congressional spots where you could throttle legislation and so—but these people, just a lot of the backlash people could not envision black kids and white kids going to school together and it wasn't just Southern. There was a lot of feeling like that in the North—in Michigan, for example, where I grew up to the extent that now, the state of Michigan is one of the most segregated places in the country. So no, I think it was there—I hate to tell you a secret, but there are a lot of white people still in this country who really just don't like black people. And that's the truth.

MS. SIEGEL: One way of thinking about this is that, through *Brown*, the courts succeeded in altering the debate in such a way that opposition to *Brown* got deflected onto busing, where it was still permissible to resist the courts. It is deep evidence of *Brown's* success that now everyone's fighting to control the meaning of *Brown*. That's what we've seen in the recent desegregation cases. The whole question is whether you can express your world view through a vision of *Brown* itself.

Brown's history shows us one way that the Supreme Court exercises authority in areas of ongoing public debate. Supreme Court decisions can structure debates without settling them. Neither *Brown* nor *Roe* settled debate. But as *Brown* and *Roe* illustrate: the struggle to control a decision's meaning changes the world as it existed before the Court handed down the decision—no matter how tattered and torn debate leaves the decision. A Supreme Court decision announces some set of understandings whose meanings still have to be vindicated in politics.

MR. LAZARUS: Right. I think one of the defining movements in 1986 at the Rehnquist confirmation hearings, was when he had to embrace *Brown*, a decision that as a younger man he had opposed. But what we now see as you say is the reinterpretation of *Brown* to fit a very different jurisprudential worldview. I suppose it's appropriate given that this is an ACS event that several questions have focused on the Federalist Society, and I'm trying to coalesce the suggested questions into a single one. And I think it might run something like this, and I'll pose it to Reva and Robert, which is the suggestion that legal reasoning doesn't matter because people ultimately care about results and the ultimate values announced in the decisions. But haven't there been now more than one generation of law students inspired by a sense of intellectual betrayal with the court where it's not just a question of disagreeing with bottom lines, but that in fact, there's a bankruptcy about the liberal enterprise that has driven a very large cadre of younger law students and now not so younger law students who are in the executive branch and on the bench to create what is—I don't know if I'll call it backlash, but I'll just say a deep retrenchment and reversal. And so, doesn't legal reasoning matter?

MR. POST: I spend my life teaching legal reasoning. I certainly believe it matters. The question is: for what does it matter and in what context? As professionals who want to instantiate the rule of law, legal reasoning matters—it is our craft. It matters that legal reasoning is done right because integrity matters, as do the standards of the legal profession. But when one talks about the boundary between law and politics and how law comes to express political vision, which it must do if law is going to be democratically accountable, then we are talking about a different question.

Why does law carry authority? Is it because somebody says, "This is the law"? That picture may tell us about why we stop at red lights in the middle of the night. But it will not tell us much about constitutional questions that matter, and about the way that controversial constitutional values acquire authority. That only happens if we

have some degree of trust in the judge announcing the values, if we come to believe that judges are speaking for us in some way. This means that law and politics cannot be opposed as simple opposites. Law has to take politics inside. If one looks at the actual sociological and historical mechanisms by which this happens, one can see that it is a mistake to think that the boundary between law and politics can be determined merely by professional craft. That boundary is determined by very deep concerns of political vision and ideology. The task of professional craft to shape these concerns through professional reason. The Federalist Society did not arise because judges were sloppy, but because people wanted a different form of politics and they wanted to create a different form of law that would express that politics.

MS. SIEGEL: I think it's really important, first, to disaggregate professional from popular response, and to give each their due. People know that there are norms of craft that give us the ability to distinguish better and worse, good arguments and bad arguments; from an internal perspective, we can make these discernments. Nothing we're saying calls that into question. But if the professional sphere is distinct from the popular, there are also bridges between them. These bridges are easy to find, once we look for them. Lawyers will assess the quality of an opinion, and eventually Jeff will tell us whether it's well reasoned or not. Meaning that there are mediations between these worlds. Another obvious example: law students going through school learn respect and disrespect for different judges and different opinions, and these will ultimately reverberate in the world.

Professional judgment has its own integrity, without being wholly insulated from the political. We don't think it makes sense to exempt the domain of professional reasoning—law school, litigation, and all—from the sphere of *nomos* and social value that the public is in. Social norms have their pull on lawyers as well. Why is it that the sex discrimination intermediate scrutiny cases, which have struck down every sex-based restriction on marriage that existed on the books in the recent past, have never touched sex restrictions on access to marriage, sex restrictions in the very definition of marriage itself? Why is it that intermediate scrutiny obliterated every single sex-based distinction in the law of marriage but this one? That is professional reasoning reflecting something about, if you will, the heterosexism of the social order that we're in. People have an understanding of what's plausible to argue to a bench, what's plausible for courts to find in the Constitution lest they, as Jeff would tell us, make a declaration of meaning so deeply at odds with social understanding that their interpretation will not look like a constitution that represents the understanding of "We, the people." So I think that there are ways in which these domains are distinct and that rationality deeply matters, and yet, rationality is unfolding within a space that's deeply social.

MR. LAZARUS: Jeff, did you want to add anything?

MR. ROSEN: Just one point which is I think the Federalist Society offers a cautionary tale obviously in many ways for the American Constitution Society but in one way in particular that's relevant to this discussion. When I was in law school, I took seriously the promise of the Federalist Society which was just getting up and running to actually separate its jurisprudential conclusions from its political agenda. And I admired the promise of originalism that it could actually achieve that goal. I was disappointed, to say the least, when I noted that in many of the important cases where the conservatives' history clashed with their policy preferences, the policy preferences won. And their failure to respond to the challenge of liberal originalists who pointed their errors didn't increase my faith in the enterprise.

Now, you've been given an inspiring challenge by two of the most inspiring law professors in the country which you should take seriously. And Robert and Reva have told you: go develop your own vision, American Constitution Society. As you do that, take seriously the distinction between law and politics and don't see yourself at least in this respect as purely driven by ideology. Your goal as scholars and thinkers about the law shouldn't merely be to achieve liberal results but actually to come up with methodologies that might in important cases lead your policy preferences to clash with your jurisprudential conclusions. That was the lesson of Brandeis who was much more concerned about state experimentation because of his commitment to federalism than with achieving liberal results in every case. That was Holmes at his best as well. And regardless of whether you join my quixotic devotion to bipartisan restraint, I'd at least hope that you'll take seriously the promise of the constraining rule of law.

MR. LAZARUS: Jeff, as someone who admires your attempt to achieve golden rules, I will applaud you. And I want to end with a practical question for Roger to bring it down from the theoretical. A question from the audience which is: in essence, do you think it's time in light of the school decisions from this last term to change strategies and to think about a legal regime based more on class difference than race differences or would that be abandoning a moral high ground that we simply must keep?

MR. WILKINS: I think that white people and black people and Hispanic people and Asian people in America don't know each other well enough. I think that the most important educational lesson I ever had was when I was 12-years-old and moved to Grand Rapids, Michigan and was enrolled in a high school with 1,200 white students and one black student. It was pure hell for a long time, and then it got better and then it got better, but it was never perfect. But of all the periods of education I have had, that time in that school with those white kids taught me the most invaluable lessons I will ever learn. Number one: there's no master race. Number two: us black folks have a lot of things to teach other folks, which if they will listen and pay attention they will find have enriched them.

So do I believe that we should still try to integrate our schools? Yes. And do I believe that the class-based solution would achieve the ends that I have in mind? I don't think so. On the other hand, because the education of the poorest black kids in this country, the poorest kids—but particularly the poorest black kids—should be an enormous issue for us. I do think we have to take class into consideration when we assign kids to public schools, but essentially I think I really am an integrationist. Because I think we all can learn from each other and we ought to try very hard to do that.

MR. LAZARUS: Well, our time has expired. We could go one for quite some time. This has been a wonderful panel. Thank you.



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