

2007

## George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change

Michael P. Allen

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

---

### Recommended Citation

Michael P. Allen, *George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change*, 72 Brook. L. Rev. (2007).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol72/iss3/2>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

# George W. Bush and the Nature of Executive Authority

## THE ROLE OF COURTS IN A TIME OF CONSTITUTIONAL CHANGE

*Michael P. Allen*<sup>†</sup>

### I. INTRODUCTION

It is no secret that the administration of President George W. Bush has consistently asserted a breathtakingly broad view of the scope of executive authority under Article II of the United States Constitution. It has seemed at times that not a month goes by without some new revelation of a secret program unilaterally adopted by the President, ostensibly to protect Americans from the threats we face in today's world. From November 2005 through June 2006, the country learned that: (1) pursuant to a presidential order the National Security Agency ("NSA") had been intercepting communications into and out of the United States made by citizens and non-citizens alike suspected of involvement with terrorist groups;<sup>1</sup> (2) the NSA, also likely pursuant to a presidential order, had been assembling a database of information generated by telephone calls made within the United States;<sup>2</sup> (3) the Central Intelligence Agency ("CIA") was operating secret prisons around the world at which an unknown (and unidentified)

---

<sup>†</sup> Associate Professor of Law, Stetson University College of Law; B.A., 1989 University of Rochester; J.D., 1992 Columbia University School of Law. I am grateful for comments I received on drafts of this Article presented at the 2006 Annual Meeting of the Southeastern Association of Law Schools and at a faculty works-in-progress presentation at Stetson University College of Law. In particular, I thank Richard Meyers for his frank comments. Thanks also to Debbie Allen for helpful suggestions (and her support), Stuart Wiseman for research assistance, and the staff of the *Brooklyn Law Review* for their excellent work on this Article. This Article was supported by a generous grant from Stetson University College of Law.

<sup>1</sup> See, e.g., James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

<sup>2</sup> See, e.g., Leslie Cauley, *NSA has Massive Database of Americans' Phone Calls*, USA TODAY, May 10, 2006, at A1.

group of prisoners was being held;<sup>3</sup> and (4) the CIA and the Treasury Department have gained access to a massive international database of financial transactions, including those of Americans.<sup>4</sup>

All of these actions were based, at least in part, on a claim of unilateral executive power. And they follow others that have been taken in the “war on terror” over the past several years, including the President’s claims that he has independent constitutional authority to craft a system of military commissions to try detained enemy combatants,<sup>5</sup> that courts lack the authority to review his independent determinations of who is an enemy combatant,<sup>6</sup> and that the executive branch may independently redefine the nature of torture.<sup>7</sup>

Less noticed, perhaps, is that the Bush administration’s assertions of broad executive power have not been limited to fighting terrorism.<sup>8</sup> For example, Attorney General John Ashcroft sought to derail Oregon’s Death with Dignity Act through his unilateral interpretation of the Controlled

---

<sup>3</sup> See, e.g., Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A1.

<sup>4</sup> See, e.g., Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. TIMES, June 23, 2006, at A1; Glenn R. Simpson, *Treasury Tracks Financial Data in Search Effort*, WALL ST. J., June 23, 2006, at A1.

<sup>5</sup> See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (2006) (rejecting claims of unilateral presidential authority to constitute military commissions). I discuss *Hamdan* in more detail below. See *infra* Parts III.A.1 and IV.A.1.

<sup>6</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 535 (2004) (rejecting administration’s position that courts lacked authority to consider individualized claims that designated enemy combatants were being unlawfully detained); *Rasul v. Bush*, 542 U.S. 466, 483-84 (2004) (rejecting administration claims that federal courts lacked habeas corpus jurisdiction to consider claims of individuals held at the United States facility in Guantanamo, Cuba). I discuss *Hamdi* and *Rasul* in more detail below. See *infra* Part III.A.1.

<sup>7</sup> See Memorandum from Jay S. Bybee, Assistant Att’y Gen., U.S. Dep’t of Just., Off. of Legal Counsel, to Alberto Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002) (on file with author), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>. For a critical assessment of presidential authority in connection with torture, see Harold Hongju Koh, *Can the President be Torturer in Chief?*, 81 IND. L.J. 1145, 1155-67 (2006).

<sup>8</sup> A few commentators have discussed “domestic” matters in connection with the Bush administration’s assertion of executive power. However, such discussions still tend to be focused at base on matters concerning national security. See, e.g., Elizabeth Drew, *Power Grab*, 53 N.Y. REV. BOOKS (June 22, 2006), available at <http://www.nybooks.com/articles/19092>.

Substances Act.<sup>9</sup> In a similar vein, administrative agencies have increasingly taken steps to displace state law through “executive preemption,” by which federal law’s preemptive effect is tied more closely to executive fiat than congressional intent.<sup>10</sup> And the President has used recess appointments to bypass the Senate in areas as diverse as the federal judiciary,<sup>11</sup> the United States Permanent Representative to the United Nations,<sup>12</sup> and the Board of Trustees for Social Security and Medicare.<sup>13</sup>

Of course, President Bush is not the first occupant of the office to assert a broad conception of executive power. For example, Thomas Jefferson fought the Barbary pirates and made the Louisiana Purchase.<sup>14</sup> Abraham Lincoln suspended the writ of habeas corpus, signed the Emancipation Proclamation, and engaged in a wide range of aggressive executive action during the Civil War.<sup>15</sup> President Franklin Roosevelt fought World War II and the depression and along

---

<sup>9</sup> See, e.g., *Gonzales v. Oregon*, 126 S. Ct. 904, 925 (2006) (striking down Ashcroft Directive on administrative law grounds). I return to this case below. See *infra* Parts III.A.3 and IV.A.2.

<sup>10</sup> See, e.g., Anna Wilde Mathews, *FDA Plan Would Aid Drug Makers in Liability Suits*, WALL ST. J., Jan. 14, 2006, at A1; Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. (forthcoming 2007). I discuss executive preemption below. See *infra* Part III.A.4.

<sup>11</sup> See, e.g., Mike Allen, *Bush Again Bypasses Senate to Seat Judge*, WASH. POST, Feb. 21, 2004, at A1. The Constitution expressly allows the President to fill vacancies in appointed positions on a temporary basis. See U.S. CONST. art. II, § 2, cl. 3 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”).

<sup>12</sup> See, e.g., Jim VandeHei & Colum Lynch, *Bush Names Bolton U.N. Ambassador in Recess Appointment*, WASH. POST, Aug 2, 2005, at A1.

<sup>13</sup> See, e.g., Robert Pear, *Defying Senators, Bush Renames 2 Social Security Public Trustees*, N.Y. TIMES, Apr. 20, 2006, at A24, available at 2006 WLNR 6593879.

<sup>14</sup> See, e.g., DUMAS MALONE, *JEFFERSON AND HIS TIME: JEFFERSON THE PRESIDENT: THE FIRST TERM 1801-1805*, at 284-332 (1970) (discussing Louisiana Purchase and the expansion of the Union); DUMAS MALONE, *JEFFERSON AND HIS TIME: JEFFERSON THE PRESIDENT: SECOND TERM 1805-1809*, at 35-44 (1974) (discussing piracy issues); Noah Feldman, *Who Can Check the President?*, N.Y. TIMES, Jan. 8, 2006, § 6 (Magazine), at 52.

<sup>15</sup> See, e.g., Benjamin A. Kleinerman, *Lincoln’s Example: Executive Power and the Survival of Constitutionalism*, 3 PERSP. ON POL. 801, 805-08 (2005); Michael Stokes Paulson, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1264 (2004); see also generally MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (1991).

the way ushered in the modern administrative state.<sup>16</sup> And President Clinton fought “wars” in Kosovo and Somalia.<sup>17</sup>

Yet the fact that the Bush administration’s effort is not unique does not mean that the current debate concerning its assertions of power is merely a regurgitation of arguments from the past. First, the modern presidency is a far more powerful office than the presidency during much of the country’s history. Presidents Jefferson, Lincoln, and Roosevelt simply did not hold in their hands the type of power President Bush possesses. Second, while I have indicated that the assertions of presidential power go beyond the “war on terror,” the ever-present fear of terrorism (whether real, imagined or somewhere in between<sup>18</sup>) has a significant impact on executive power more generally. For example, President Bush’s reservoir of power has been enhanced in the post-9/11 world, making him more powerful in some measure than even his closest contemporary in office, Bill Clinton. Indeed, September 11th has served as a catalyst (or excuse) for arguments in favor of expanding presidential power that might not otherwise have been possible.

In the end, each age is different from others in important and often intangible respects. While one is tempted to equate Franklin Roosevelt’s push to expand presidential power through the New Deal and in World War II or Abraham Lincoln’s efforts in the Civil War with George W. Bush’s actions, such transpositions are artificial at best and dangerous at worst.<sup>19</sup> This is not to say that historical precedents offer

---

<sup>16</sup> See, e.g., GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 73-124 (2001); Feldman, *supra* note 14.

<sup>17</sup> See generally RYAN C. HENDRICKSON, THE CLINTON WARS: THE CONSTITUTION, CONGRESS, AND WAR POWERS (2002).

<sup>18</sup> There has been much debate about whether the current fight against terrorism is deserving of the moniker “war.” See, e.g., BRUCE A. ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 13-38 (2006) [hereinafter ACKERMAN, NEXT ATTACK] (arguing that terrorism is a tactic and that the label “war” is inappropriate); John Yoo, *Enemy Combatants and the Problem of Judicial Competence*, in TERRORISM, THE LAWS OF WAR, AND THE CONSTITUTION: DEBATING THE ENEMY COMBATANT CASES 69, 71-75 (Peter Berkowitz ed., 2005) [hereinafter TERRORISM, THE LAWS OF WAR] (arguing that critics of the use of the term “war” are misguided); see also Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL’Y 149, 153 n.14 (2005) (collecting sources on the debate).

<sup>19</sup> Professor Ackerman has recently made a similar point in the specific context of equating a fight against terrorism with wars in which the survival of the Republic was at stake. See, e.g., ACKERMAN, NEXT ATTACK, *supra* note 18, at 56

nothing in current debates. Rather, one needs to ensure that the past is used as a reference to consider rather than as a shackle to bind.

I wish to be clear about the thesis of this Article. We live in a nation divided deeply along partisan lines.<sup>20</sup> To take just one example, as the *New York Times* recently reported on its front page: “No military conflict in modern times has divided Americans on partisan lines more than the war in Iraq . . . —not even Vietnam.”<sup>21</sup> It seems at times that every aspect of American life is infected with an “us” versus “them” political mentality. As one political scientist commented: “[t]he primary colors of contemporary America seem to be red and blue. On a variety of important political issues, partisan and ideological differences are substantial and profound.”<sup>22</sup> Given this state of affairs, it would be understandable if a reader saw this Article’s title and wrote it off as another installment in the partisan wars. It is not.

Rather, the Article explores the serious question of the role of courts in a time of actual or potential constitutional change. The change we face in our time happens to concern the actions of the federal executive branch under the leadership of a Republican President. But the theoretical underpinning of the approach I describe would apply equally to an attempt by Congress to broaden its powers, or to the actions of a President Hillary Rodham Clinton or a President Barack Obama. I ask, then, that the reader put aside questions of my partisanship—at least for the moment—and judge the theory on its merits. If those of us in the world of legal academia are unable to do so, the nation may be in greater difficulty than is imagined. What is needed instead is a longer-term focus not on *this* President,

---

(contrasting the current global fight against terrorism with the threats to “the political existence of the United States” in World War II and the Civil War).

<sup>20</sup> Simply living in America today bears this statement out. There is also support in the political science literature. See, e.g., Alan Abramowitz & Kyle Saunders, *Why Can't We All Just Get Along? The Reality of a Polarized America*, 3 FORUM 1 (2005), available at <http://www.bepress.com/forum/vol3/iss2/art1>.

<sup>21</sup> Robin Toner & Jim Rutenberg, *Partisan Divide on Iraq Exceeds Split on Vietnam*, N.Y. TIMES, July 30, 2006, at A1; see also David S. Broder & Dan Balz, *How Common Ground of 9/11 Gave Way to Partisan Split*, WASH. POST, July 16, 2006, at A1 (discussing the politicization in America occurring after the September 11th terrorist attacks along a number of dimensions).

<sup>22</sup> James L. Gibson, *The Legitimacy of the United States Supreme Court in a Polarized Polity 1* (June 15, 2006) (unpublished manuscript, on file with Dep’t of Pol. Sci. at Wash. U. in St. Louis), available at <http://ssrn.com/abstract=909162>.

but on the *presidency* as one of many institutions in the constitutional structure.

The jury is still out on the administration's ultimate success in redefining the scope of executive power. In some cases, the courts effectively have supported the administration.<sup>23</sup> In others, the administration has been rebuked.<sup>24</sup> In the great majority of situations, a debate still rages over the propriety of unilateral presidential authority.<sup>25</sup> I will not join the debate about the constitutionality of any of the specific actions taken by the current administration. For present purposes, I assume merely that the administration's positions are pushing the constitutional envelope in terms of presidential power under the Constitution.

My aim is to explore the role of courts in response to such a broad-based and coordinated assertion of envelope-pushing executive power. Of course, one obvious response to such an inquiry is that the judiciary should follow Chief Justice Roberts's comment during his confirmation hearings: judges are umpires who should call balls and strikes.<sup>26</sup> Thus, the judiciary's role is to take each case challenging a given executive action on its own and use standard principles of constitutional and statutory interpretation to resolve the narrow issue presented. As I explain further below, however, such a narrow approach provides insufficient protection for the structural underpinnings of American democracy.

I begin in Part II by laying out a constitutional theory that should guide courts when faced with a broad, constitutionally envelope-pushing assertion of power by one structural part of the American constitutional system. In brief, courts must serve as agents of systemic structural equilibrium.

---

<sup>23</sup> See, e.g., *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 391-92 (2004) (largely rejecting challenges seeking to make public certain records concerning Vice President Cheney's energy task force).

<sup>24</sup> See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (2006) (rejecting claims of unilateral presidential authority to constitute military commissions); *Gonzales v. Oregon*, 126 S. Ct. 904, 925 (2006) (striking down Ashcroft Directive). I discuss both cases below. See *infra* Parts III.A.1 and IV.A.1 (discussing *Hamdan*); Parts III.A.3 and IV.A.2 (discussing *Gonzales*).

<sup>25</sup> I discuss some of these debates in Part III below when considering the various actions of the Bush administration. See *infra* Parts III.A.1-4.

<sup>26</sup> See Vikram Amar & Alan Brownstein, *Why the President's Defense of Executive Power to Wiretap Without Warrants Can't Succeed in the Strict Constructionist Court He Wants*, FINDLAW, Feb. 17, 2006, [http://writ.news.findlaw.com/commentary/20060217\\_brownstein.html](http://writ.news.findlaw.com/commentary/20060217_brownstein.html) (quoting Chief Justice Roberts at his confirmation hearings as saying that "I will remember that it's my job to call balls and strikes, and not to pitch or bat").

The judiciary must ensure that the fundamental structural safeguards built into the fabric of the Constitution are maintained even if a constitutional change in the balance of power is implemented. The way in which equilibrium is re-established will vary depending upon the particular change at issue, but the goal of maintaining the boundaries of the structural safeguards embedded in the Constitution remains constant.

Part II also identifies the fundamental structural principles that should guide courts. The Constitution and the documents surrounding its drafting and ratification reveal three foundational principles: (1) The Constitution is based on maintaining multiple and meaningful centers of political authority situated horizontally and vertically from one another. These power centers—the three coordinate branches of the federal government and the states—must be capable of meaningfully playing their roles in maintaining a separation of governing authority; (2) the People must be allowed to have meaningful participation in the governing process; and (3) whatever power relationships are implemented, the resulting governmental structure must be functional. The goal of Part II is to prepare specifically to address how courts should respond to the Bush administration's assertion of executive authority.

Before one is able to do so, one must get a better understanding of the Bush administration's specific conception of executive authority. Part III is a descriptive exercise devoted to distilling the single dominant theme and three distinct but related sub-attributes of President Bush's constitutional Chief Executive. The dominant and overarching theme of the Bush administration's stance is a strongly unilateral executive who is constitutionally empowered to take a wide array of actions without "interference" from any other power center in American government. The three distinct sub-attributes associated with unilateralism are: (1) the unilateral authority is often exercised in secret, greatly reducing transparency in government (such lack of transparency applies to citizens as well as to other institutions of government); (2) the administration is highly intolerant of criticism and questioning associated with its exercise of power; and (3) the administration is disciplinarian and retributive with respect to those people and entities that do challenge its exercise of authority.

Part IV of the Article turns to the specific question of the courts and President Bush by applying the theory set out in Part II to the description of the Bushian constitutional executive laid out in Part III. In order to do so, I use cases considered by the United States Supreme Court during its October 2005 Term. I consider cases in such divergent areas as the legality of military commissions,<sup>27</sup> federal attempts to interfere with state laws providing a limited right to physician-assisted suicide,<sup>28</sup> partisan redistricting,<sup>29</sup> campaign finance reform,<sup>30</sup> and First Amendment protections for public employees and citizens alike.<sup>31</sup> I explain how these cases, as well as some others, fit into the structural equilibrium approach. In some instances the theory produces the same results as those actually reached, while in other important respects I argue that the Court should have approached matters quite differently in order to act as an agent of structural equilibrium.

Finally, Part V concludes by considering issues on the horizon in which courts will again have the opportunity to respond to the Bush vision of Article II. It is not hyperbole to suggest that what happens in the next few years will decide in many respects the type of government enjoyed by our children and grandchildren. The stakes are unquestionably high.

## II. COURTS AS AGENTS OF STRUCTURAL EQUILIBRIUM

Before it is possible to address how courts should respond specifically to President Bush's assertions of executive authority, one must consider the constitutional landscape. This Part explores the constitutional theory on which my discussion of the Bush administration and this past Term of the Supreme Court is based. I first briefly discuss the legitimacy of constitutional change outside of a formal amendment.<sup>32</sup> Thereafter, I describe how courts should respond to such change.<sup>33</sup>

---

<sup>27</sup> *Hamdan*, 126 S. Ct. at 2759.

<sup>28</sup> *Gonzales*, 126 S. Ct. at 904.

<sup>29</sup> *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2605 (2006).

<sup>30</sup> *Randall v. Sorrell*, 126 S. Ct. 2479, 2485 (2006).

<sup>31</sup> *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1951 (2006); *Hartman v. Moore*, 126 S. Ct. 1695, 1695 (2006).

<sup>32</sup> *See infra* Part II.A.

<sup>33</sup> *See infra* Part II.B.

A. *The Legitimacy of “Extra-Constitutional” Change*

With one exception,<sup>34</sup> the Constitution is not immune from change. Article V sets forth a mechanism by which formal amendments to the Constitution may be adopted and ratified. The process is designed to be difficult and requires coordinated and super-majoritarian action of both Houses of Congress and state legislatures (or ratifying conventions).<sup>35</sup> As a testament to the difficulty of the formal process, there have only been twenty-seven amendments to the Constitution since it was ratified.<sup>36</sup>

If one were limited to the text, in the absence of a formal amendment there could be no constitutional change. Under this view, a judge’s role in assessing the Bush administration’s assertions of executive authority would be to join Chief Justice Roberts and play umpire.<sup>37</sup> Courts would be limited to determining if a given assertion of power was consistent with the Constitution’s un-amended text.

However, powerful arguments have been made supporting the theoretical proposition that legitimate constitutional change is possible in the absence of a formal amendment.<sup>38</sup> At its most basic level, one may argue that the meaning of the Constitution shifts in a legitimate way simply as a result of the interpretation given the text by different members of the Supreme Court. No doubt membership of the Supreme Court matters, even in constitutional cases.<sup>39</sup> But

---

<sup>34</sup> The exception is that a state’s representation in the Senate may not be altered without its consent. U.S. CONST. art. V. The original Constitution precluded an amendment for a certain period of time with respect to the importation of slaves. *Id.*

<sup>35</sup> It is possible under Article V for two-thirds of the states to call for the convening of a Constitutional Convention. *Id.* This mode of amendment has never been utilized.

<sup>36</sup> In contrast, as of 1996, there had been over 5,900 amendments to state constitutions. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 23-24 (1998). And the reality is that this number is far greater because it does not take into account amendments to early versions of state constitutions. *Id.* In this regard, only nineteen states still retain the same constitution as was in place when the state joined the Union. *Id.*

<sup>37</sup> See *supra* note 26 and accompanying text.

<sup>38</sup> See *infra* notes 41-43 and accompanying text.

<sup>39</sup> For example, one well-respected observer and practitioner believes that the replacement of Justice Sandra Day O’Connor with Justice Samuel Alito during the October 2005 Term altered the likely result in at least two constitutional cases. See Posting of Tom Goldstein to SCOTUSblog, <http://www.scotusblog.com/movabletype/archives/2006/06/25-week> (June 27, 2006, 11:20 EST) (arguing that the replacement of O’Connor with Alito altered the results in a First Amendment case, *Garcetti v.*

this fact does not necessarily mean that there has been a constitutional change. The great majority of the Constitution's provisions are not black and white. Instead, they are shades of gray in which "interpretation" better explains differing outcomes than does "extra-constitutional change."

There are, however, more satisfying theories by which legitimate changes in constitutional meaning are accomplished through something less than a formal Article V amendment. Perhaps the most significant of such theories has been advanced by Yale Law School Professor Bruce Ackerman. In two influential—and controversial<sup>40</sup>—works, Professor Ackerman articulated a theory in which "We the People" act to change the higher law of the Constitution without engaging in the constitutionally specified amendment process.<sup>41</sup> The result of such "constitutional moments" is a redefinition of the governing law as if there had been an amendment.<sup>42</sup> Other commentators have also either suggested means by which the Constitution's meaning could legitimately be altered in ways other than formal amendment, or recognized that such transformations appear to have taken place.<sup>43</sup>

---

*Ceballos*, 126 S. Ct. 1951 (2006), and a Fourth Amendment case, *Hudson v. Michigan*, 126 S. Ct. 2159 (2006)).

<sup>40</sup> Some commentators have generally supported Ackerman's approach. See, e.g., Sanford Levinson, *Accounting for Constitutional Change (Or, How Many Times has the United States Constitution Been Amended? (A) <26; (B) 26; (C) >26; (D) All of the Above)*, 8 CONST. COMMENT. 409, 411 n.4 (1991); Mark Tushnet, *The Flag-Burning Episode: An Essay on the Constitution*, 61 U. COLO. L. REV. 39, 48-53 (1990); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1445 (1990). Others have been far more critical. See, e.g., Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 763-92 (1992); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 923-28 (1992) (reviewing BRUCE ACKERMAN, *WE THE PEOPLE* (1991)); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1228-35 (1995).

<sup>41</sup> See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, at 3-33 (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS*, at 3-31 (1998).

<sup>42</sup> See, e.g., ACKERMAN, *FOUNDATIONS*, *supra* note 41, at 3-33 (laying out the basics of his theory).

<sup>43</sup> See, e.g., MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 1-95 (2003) (developing a more evolutionary theory of extra-constitutional change); Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 28 (2005) (discussing impact of social movements on constitutional meaning); Feldman, *supra* note 14 ("Constitutional evolution, like its counterpart in the natural world, has occurred sometimes gradually and sometimes in catastrophic jolts, like those brought about by war or economic crisis."); Stephen M. Griffin, *Constituent Power and Constitutional Change in American Constitutionalism* 19 (Tul. Pub. Law Research Paper No. 06-12, 2006), available at <http://ssrn.com/abstract=928493> (arguing that the Constitution can change outside of

This is not the place to join the debate concerning the legitimacy of extra-constitutional change. For present purposes, I assume two things in this regard. First, the Constitution may be altered in ways not specified in the document. Second, the administration's assertion of executive power at the very least *could* qualify as such a legitimate extra-constitutional change. My concern is what the courts should do in response to such a situation. I consider this question in the abstract in the balance of this Part and then turn to the Bush administration's efforts in particular in Part III.<sup>44</sup>

*B. The Role of Courts in a Time of Extra-Constitutional Change: Agents of Structural Equilibrium*

In this Part, I develop an approach that courts should follow during a time of actual or potential constitutional change. If there is a formal amendment, a court should interpret and enforce the amendment. My focus is on those circumstances discussed in the previous sub-part in which there is an extra-constitutional change. It is in such a situation that the judiciary plays an essential but quite difficult role in the American constitutional order.

In a nutshell, when confronted with extra-constitutional change, courts should act as agents of structural equilibrium. They should evaluate the full scope of the change being advocated, making sure to consider all the attributes of the new constitutional vision. They should then implement the new extra-constitutional order in a manner that best preserves the core structural principles on which the foundation of American government is based. I will refer to these principles, which I describe in this sub-part, as the "foundational principles." Thus, the courts should act in a manner that implements a legitimate extra-constitutional change but only to the extent that the foundational principles are preserved in some form. The precise manner in which they are preserved will vary, but they must remain at the core of the

---

Article V process but disagreeing with Professor Ackerman's focus on specific constitutional moments); Levinson, *supra* note 40 (generally discussing different ways in which constitutional meaning legitimately shifts); James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 292 (1990) (developing a theory of "Republican moments" in which constitutional meaning is altered outside of the amendment process).

<sup>44</sup> See *infra* Part IV (applying the structural equilibrium approach to the Bushian vision of executive power).

constitutional order absent a formal amendment. It falls to the courts to act as the agents of structural equilibrium.<sup>45</sup>

The first step is to identify the foundational principles that courts must enforce. These principles are derived from the Constitution itself as well as matters surrounding its drafting and ratification. There are three such principles. They are broad, allowing courts facing an extra-constitutional change considerable flexibility. In the balance of this sub-part, I describe each foundational principle and highlight some issues courts may face when attempting to preserve that principle in a time of extra-constitutional change.

### 1. Foundational Principle #1: Maintaining Multiple and Meaningful Centers of Political Authority

The centerpiece of the American constitutional order is the existence of multiple centers of political authority that are capable of meaningfully checking the accretion of power in any one governmental entity.<sup>46</sup> These centers are oriented both vertically and horizontally to one another. Thus, we have the concepts of federalism, or the relationship between the states and the federal government as well as the relationship among

---

<sup>45</sup> The structural equilibrium approach I describe is similar in some respects to approaches advocated by other academic commentators. For example, writing in quite different contexts, both Professor Abner Greene and Professor Neil Kinkopf have argued persuasively that when considering aggressive assertions of executive authority, courts should be cognizant of the critical role separation of powers plays in the American constitutional order. *See, e.g.*, Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 123-28 (1994) (arguing that courts should consider structural separation of powers principles in considering the operation of administrative agencies); Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169, 1195 (2006) (arguing that when considering presidential war powers in an era of complex statutory regimes, courts “should proceed from a fulsome understanding of the way in which the Constitution structures government power and of the role that each branch is designed to play within that structure.”). I wholeheartedly agree with the prescriptions of both Professor Greene and Professor Kinkopf. The structural equilibrium approach I discuss here is consistent with, but not identical to their suggestions. In particular, it is both broader and deeper. It is broader because it consciously concerns the full scope of presidential authority, not only one aspect of it such as executive lawmaking or war powers. It is deeper in that it explicitly considers structural principles beyond separation of powers. In the end, however, all three approaches are cut from the same constitutional cloth. *See Griffin, supra* note 43, at 16 (commenting that the Constitution “created institutions and structural relationships intended to last through history”).

<sup>46</sup> While there are many theories about the nature of separation of powers principles, it is common ground that a core constitutional value concerns the division and intertwining of power. *See, e.g.*, Amar & Brownstein, *supra* note 26 (describing diffusing government power as “Constitutional Law 101”); *see generally* HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* (2006).

the states themselves, and separation of powers, which denotes the relationship between and among the three coordinate branches of the federal government. In the balance of this sub-part, I discuss each of these aspects of the first foundational principle.

Before doing so, however, it is worth recalling that this foundational principle is about more than structure. Instead, the principle is in many respects instrumental; it is a means by which citizens' liberty is protected.<sup>47</sup> Thus, when a court acts as an agent of structural equilibrium and enforces this first foundational principle, it is acting in a liberty-protecting manner. There are certainly dangers of which the courts need to be aware (as I discuss in this sub-part), but those dangers should not dissuade courts from taking on such an important liberty-protecting role.

#### *a. The States*

The Constitution itself provides strong evidence of the importance of the first foundational principle as it relates to the states. The federal government the Constitution establishes is one of limited powers.<sup>48</sup> The several states remain as independent sovereigns in many respects.<sup>49</sup> In this way, the states are able to provide some counterbalance to federal power in those areas in which they retain sovereignty,

---

<sup>47</sup> The liberty-protecting function of dividing government power is well-established. It was a centerpiece of the political philosophy of Montesquieu, an important inspiration for the Constitution's drafters. See CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 161-62 (Thomas Nugent trans., G. Bell and Sons, Ltd. 1914) (1752). The Framers arguing in favor of ratifying the Constitution recognized this point. See, e.g., *THE FEDERALIST* NO. 47, at 249 (James Madison) (George W. Carey & James McClellan eds., 2001). Academic commentators generally agree with this goal of separating government power. See, e.g., Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 *AM. U. L. REV.* 1, 12 (2003) (noting that among academic commentators "the dominant view holds that these institutional divisions [of government power] were intended to serve the 'negative' purpose of creating multiple and mutual checks to avoid the tyrannical accumulation of power"); Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 *DUKE L. J.* 449, 451 (1991) ("By simultaneously dividing power among the three branches and institutionalizing methods that allow each branch to check the others, the Constitution reduces the likelihood that one faction or interest group that has managed to obtain control of one branch will be able to implement its political agenda in contravention of the wishes of the people.").

<sup>48</sup> See, e.g., U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

<sup>49</sup> *Id.*

whether that sovereignty is exclusive or concurrent with federal authority.<sup>50</sup> It is true that if the federal government acts pursuant to its enumerated powers, its action will trump those of the states.<sup>51</sup> Nevertheless, the states' continued existence as political entities under the Constitution is important as an organizing principle.

The Framers also recognized the importance of the states as continued centers of political authority.<sup>52</sup> For example, Alexander Hamilton argued that "the state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by [the Constitution], *exclusively* delegated to the United States."<sup>53</sup> Hamilton was specifically discussing the impact of the new federal government's power to tax,<sup>54</sup> but his comment applies more generally to the important functions the states play in the American system of divided power.

When faced with constitutional change, courts should be mindful of the importance of the states in the constitutional order. The states' role may ultimately be irrelevant to a particular change, but it might also be critical. At a minimum, courts must be aware of the importance of the states as

---

<sup>50</sup> The Constitution organizes the federal government by reference to the states. For example, both Houses of Congress are based on the continued political existence of the states. *See, e.g.*, U.S. CONST. art. I, § 2, cls. 1 & 2 (discussing the House of Representatives); *id.* amend. XVII (discussing the Senate). This tie to the states was even more important in the original document because the state legislatures elected senators. *See id.* art. I, § 3, cl. 1. Moreover, the president was to be chosen through an electoral college that was based on the states. *See id.* art. II, § 1 (laying out the requirements of the electoral college). And the Constitution was to be formally amended only upon the ratification of a certain percentage of state legislatures or ratifying conventions. *See id.* art. V.

<sup>51</sup> *See id.* art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

<sup>52</sup> I am not arguing that we should necessarily be bound by a principle merely because the Framers ascribed to it. Rather, I cite to the Framers in order to demonstrate that at the time of the drafting and ratification of the Constitution, certain concepts were understood as forming the foundation of the American constitutional order. Thus, the Framers' understanding reinforces the constitutional text.

<sup>53</sup> THE FEDERALIST NO. 32 (Alexander Hamilton), *supra* note 47, at 155. *See also* THE FEDERALIST NOS. 39, 45, 46 (James Madison) (discussing the importance of states (through their people) in the ratification process and the continued importance of states under the Constitution).

<sup>54</sup> *See generally* THE FEDERALIST NO. 32 (Alexander Hamilton), *supra* note 47.

independent centers of political authority in order to preserve their place in the constitutional order.<sup>55</sup>

*b. The Federal Government*

The maintenance of separate spheres of political authority is most classically seen in the context of separation of powers at the federal level.<sup>56</sup> Madison's famous statement makes clear the importance the Framers placed on this concept when structuring the newly-minted federal government: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."<sup>57</sup> One can point to many other installments in *The Federalist* making the same basic point.<sup>58</sup> And, needless to say, the Constitution's text confirms the point.<sup>59</sup>

---

<sup>55</sup> I discuss an example of how a court could implement this aspect of the first foundational principle below. See *infra* Part IV.A.2.

<sup>56</sup> There has been much debate in the literature as to whether the Court should adopt a functional or formalist approach to separation of powers questions. See, e.g., Greene, *supra* note 45, at 125-26 n.9 (collecting sources in the debate concerning whether the proper separation of powers analysis should focus on the functions of the particular branches of government or on their formal characteristics).

<sup>57</sup> THE FEDERALIST NO. 47 (James Madison), *supra* note 47, at 249.

<sup>58</sup> See, e.g., THE FEDERALIST NO. 8 (Alexander Hamilton), *supra* note 47, at 34 (discussing a fear of an all-powerful executive branch in the context of a standing army), NO. 15, at 73 (Alexander Hamilton) ("Power controled [sic] or abridged is almost always the rival and enemy of that power by which it is controled [sic] or abridged."), NO. 48, at 256 (James Madison) ("It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and completely administered by either of the other departments. It is equally evident, that neither of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers."), NO. 51, at 267-69 (James Madison) (discussing the need to provide incentives for federal branches to check one another). See also GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969) (generally discussing importance of separation of powers principles to Framers as well as the intellectual foundations of the Revolutionary generation); Greene, *supra* note 45, at 142-48 (discussing evidence from Convention deliberations supporting importance of separation of powers).

<sup>59</sup> In general terms, the fundamental importance of separation of powers flows from the basic structuring of the federal government in three coordinate branches under the Constitution. See U.S. CONST. arts. I-III. One can also discern support for foundational principle number one from the various ways in which the powers of the branches are intertwined. A few examples make the point: the President appoints federal judges only with the advice and consent of the Senate, *id.* art. II, § 2, cl. 2; the House of Representatives and the Senate must agree on the content of a bill and such a bill can only become law if presented to and signed by the President, *id.* art. I, § 7, cl. 2; the President may veto or "disapprove" a bill and return it to the legislature which may in turn override the veto. *Id.*

Accordingly, when faced with an extra-constitutional change, courts acting as agents of structural equilibrium must be vigilant to protect the foundational principle concerning the maintenance of competing horizontal centers of political authority. The ways in which the judiciary acts to preserve this foundational principle will vary. Most obviously, perhaps, it will depend on the precise nature of the extra-constitutional change at issue. It is for this reason that it is so important to understand the contours of the Bushian vision of executive authority, to which I turn in the next principal part.<sup>60</sup>

It will also depend on the political climate in which a particular extra-constitutional change takes place. For example, two prominent commentators have recently written about the overriding importance of political parties in the contemporary American constitutional order.<sup>61</sup> Professors Daryl Levinson and Richard Pildes argue that “[i]gnoring the reality of parties and fixating on the paper partitions between the branches”<sup>62</sup> is a dangerous mistake.<sup>63</sup> Assuming that they are correct, their observations concerning the importance of political parties do not mean that the foundational principle I have discussed in this section is irrelevant. Rather, the political reality informs the *manner* in which a court should act to preserve the constitutional principle. That is, when the political branches of government are occupied by members of the same party, a court may need to make more aggressive rulings than it would in a situation of divided government. I return to a specific example below,<sup>64</sup> but for present purposes the important point is that the mere fact that the world has changed—even if dramatically—from the time of the framing does not alter the overarching importance of the foundational principles.

There is a significant danger of which courts must be aware when seeking to preserve this particular foundational principle. Specifically, judges must be vigilant that they do not inadvertently use the power of judicial review in a manner that unnecessarily aggrandizes the judicial branch. *Marbury v. Madison* is shorthand for an awesome power to “say what the

---

<sup>60</sup> See *infra* Part III.

<sup>61</sup> See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2312 (2006).

<sup>62</sup> *Id.* at 2314.

<sup>63</sup> *Id.* at 2314-16.

<sup>64</sup> See *infra* Part IV.B.

law is” despite the actions of the so-called political branches of government.<sup>65</sup> If that power is used reflexively whenever the courts face an extra-constitutional change, there is a real danger that this first foundational principle will be undercut by judicial aggrandizement. This fear does not mean that courts should never exercise a strong version of judicial review. Rather, courts must factor into their response to a given extra-constitutional change the potential danger to separation of powers principles from judicial review itself.

## 2. Foundational Principle #2: Maintaining Meaningful Opportunities for “the People” to be Engaged in Government

The second foundational principle is that “the People” maintain meaningful opportunities to be engaged in government.<sup>66</sup> The Framers made the People’s role in the governing process clear in the Constitution itself. Most fundamentally perhaps, and as the Preamble makes clear, it is “We the People” who took the important step of forming the Constitution.<sup>67</sup> This animating role is confirmed in the Framers’ writings in support of the Constitution.<sup>68</sup> As James

---

<sup>65</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>66</sup> Other writers have argued for the important role of the People in the American constitutional order in a number of ways. I mentioned Professor Ackerman’s theories of the People’s distinctive role in constitutional change above. *See supra* notes 40-42 and accompanying text. Taking the point even further, Dean Larry Kramer has recently argued that the People retain the ultimate power of constitutional interpretation. *See* LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 73 (2004). I take no position here on Dean Kramer’s theory, which has thus far spawned spirited commentary. *See, e.g.*, Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1594 (2005) (book review); Symposium, *Popular Constitutionalism: A Symposium on The People Themselves: Popular Constitutionalism and Judicial Review*, 81 CHI-KENT L. REV. (forthcoming 2006).

<sup>67</sup> *See* U.S. CONST. pmbl. (“We the People of the United States . . .”). In arguing in favor of ratification, some of the Framers indicated that one of the defects of the Articles of Confederation was that it was not ratified by the People. *See* THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 47, at 112.

<sup>68</sup> *See, e.g.*, THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 47, at 1 (“It has been frequently remarked, that it seems to have been reserved to the people of this country to decide, by their conduct and example, the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force.”) (emphasis added), NO. 2, at 5-7 (John Jay) (discussing the role of the People in the ratification process), NO. 37, at 181 (James Madison) (“The genius of republican liberty, seems to demand on one side, not only that all power should be derived from the people; but, that those intrusted with it should be kept in dependence on the people, by a short duration of their appointments.”), NO. 39,

Madison recognized, “[a] dependence on the people is, no doubt, the primary control on the government.”<sup>69</sup> In addition, significant functions of government are entrusted to the People under the Constitution.<sup>70</sup> And, finally, the Tenth Amendment underscores the important role the People retain in a default fashion under the constitutional order.<sup>71</sup>

All of this is not to say that the People were meant to be some kind of supreme authority under the American constitutional system. There are important constitutional devices designed to control the “voice of the People.”<sup>72</sup> In fact, Madison made the People’s limited role clear in *Federalist No. 10*, when discussing the difference between a direct democracy and the type of Republic enshrined in the Constitution.<sup>73</sup> But the fact that the People did not retain unlimited power should not blind one to the important role that the People did have in the governing process. Thus, courts should consider this foundational principle when acting as agents of structural equilibrium in a time of extra-constitutional change.

### 3. Foundational Principle #3: Maintaining an Effective, Functioning Government

The final foundational principle is that whatever governing structure ultimately emerges from a period of extra-constitutional change, it must be capable of effectively functioning. In the very first line of *The Federalist*, Alexander Hamilton makes clear that it was the “insufficiency of the existing federal government” that caused the Framers to draft

---

at 196 (James Madison) (discussing the foundation of the Constitution as being built on the assent of the people of the states), NO. 51, at 270-71 (James Madison) (recognizing the important role of the people in controlling government), NO. 70, at 363 (Alexander Hamilton) (stating that one “ingredient” for the “safety” of the republic was “a due dependence on the people”).

<sup>69</sup> THE FEDERALIST NO. 51 (James Madison), *supra* note 47, at 269.

<sup>70</sup> For example, the People of the States elect members of the House of Representatives. U.S. CONST. art. I, § 2, cl. 1. The People choose the electors to serve in the Electoral College. *See id.* art. II, § 1.

<sup>71</sup> *Id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”) (emphasis added).

<sup>72</sup> For example, Senators were to be elected by the state legislature, *id.* art. I, § 3, cl. 1, and the President was to be selected through the Electoral College system, *id.* art. II, § 1, cls. 2 & 3.

<sup>73</sup> *See* THE FEDERALIST NO. 10 (James Madison), *supra* note 47, at 46-47. Hamilton made a related point later in *The Federalist* when he argued that the Constitution was designed to protect against the influence of factions. *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

the Constitution.<sup>74</sup> It would be counter to this foundational principle if a court faced with an extra-constitutional change ruled in such a fashion that the resulting constitutional structure was incapable of serving as an effective government. As John Jay noted when arguing in favor of ratification of the Constitution, a government is an “indispensable necessity.”<sup>75</sup> Thus, the judiciary must always remain cognizant of the fundamental need to have a functioning governmental structure.<sup>76</sup>

To summarize, when confronted with a legitimate extra-constitutional change, courts should act to preserve as best as possible the three foundational principles described above. They should do so by first evaluating the particular attributes of the extra-constitutional change at issue. They should thereafter engage in constitutional interpretation in a manner that preserves the foundational principles without unnecessarily aggrandizing the power of the judiciary. The next part of this Article lays out the attributes of the assumed extra-constitutional change of the Bush administration regarding executive power.<sup>77</sup> In Part IV, I apply the theory laid

---

<sup>74</sup> THE FEDERALIST NO. 1 (Alexander Hamilton), *supra* note 47, at 1. Many of the early installments in *The Federalist* are focused on the deficiencies in the Articles of Confederation. See, e.g., THE FEDERALIST NO. 2 (John Jay), NOS. 15, 16, 21, 22 (Alexander Hamilton).

<sup>75</sup> THE FEDERALIST NO. 2 (John Jay), *supra* note 47, at 5. This same sentiment is also found elsewhere in *The Federalist*. See, e.g., THE FEDERALIST NO. 1, at 3 (Alexander Hamilton) (“the vigor of government is essential to the security of liberty”), NO. 23, at 112 (Alexander Hamilton) (discussing the “necessity of a constitution, at least equally energetic with the one proposed”), NO. 70, at 362-64 (Alexander Hamilton) (discussing the important elements of executive power necessary in the new federal government), NO. 37, at 181 (James Madison) (“Energy in government, is essential to that security against external and internal danger, and to that prompt and salutary execution of the laws, which enter into the very definition of good government. Stability in government, is essential to national character, and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society.”), NO. 41, at 207-08 (James Madison) (explaining the necessity of vesting certain powers in the new federal government).

<sup>76</sup> This is not to say that the effective functioning government must be the most *efficient* form possible. As Justice Brandeis wrote in dissent many years ago, “[t]he doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power.” *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). Academic commentators have also recognized the competing needs of avoiding tyrannical accumulations of power and ensuring the existence of a functioning government. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2341-44 (2001); Levinson & Pildes, *supra* note 61, at 2337 (collecting sources concerning the proper balance between fear of accumulations of power and the need to maintain a functioning government).

<sup>77</sup> See *infra* Part III.

out here to the particular extra-constitutional change at issue by evaluating several decisions from the October 2005 Term of the United States Supreme Court.<sup>78</sup>

### III. THE NATURE OF BUSHIAN EXECUTIVE AUTHORITY

As described in Part II, in a time of extra-constitutional change courts should act as agents of structural equilibrium. The precise manner in which courts are to do so will depend on the particulars of the given change. Thus, before it is possible to apply the theory to the Bush administration's broad assertions of executive authority, one must have a solid understanding of the attributes of the Bushian vision of the scope of power under Article II of the Constitution. This Part of the Article explores those attributes.

As described in detail in the balance of this Part, the Bushian vision of executive authority has a single core principle with three distinct sub-attributes. Each of these features is discussed separately. The core principle animating the current administration's conception of presidential authority is unilateralism. Under this principle, the President is said to have wide power to undertake action without the oversight of or a grant of authority from the other constitutional centers of political authority. As explained below, this conception of Article II authority explains a wide array of actions of the Bush administration.<sup>79</sup>

While unilateralism is the driving force behind the administration's vision of Article II, there are three distinct sub-themes as well. First, there is a strong current of secrecy running throughout the President's unilateral exercise of authority. The resulting lack of transparency in government strikes at the core of the foundational principles discussed in Part II.<sup>80</sup> Second, the administration is intolerant of criticism of and questioning about its unilateral exercises of power. Such intolerance extends from internal executive branch officials, to other government actors, to the media and the public at large.<sup>81</sup> Finally, the Bush administration is

---

<sup>78</sup> See *infra* Part IV. There is no special reason that I selected the October 2005 Term. Any Term would likely have provided fodder for discussion. In the end, I elected to use the October 2005 Term because it was the most recently completed session of the Court and it included a number of independently significant decisions.

<sup>79</sup> See *infra* Part III.A (discussing unilateralism).

<sup>80</sup> See *infra* Part III.B.1 (discussing secrecy and lack of transparency).

<sup>81</sup> See *infra* Part III.B.2 (discussing intolerance of criticism and questioning).

retributive with respect to those who do not agree with its policies.<sup>82</sup>

Before turning to the specific attributes of the Bushian chief executive, two more general points are worth making. First, the Bush administration's assertions of sweeping executive authority are not limited to the "war on terror" or even foreign affairs more generally. Because terrorism is such a frightening phenomenon and because issues concerning it are so widely discussed, it has been easy to lose sight of the broader issues of constitutional authority that are at stake. In the sections that follow, I provide examples of both terrorism-related and non-terrorism-related matters when describing the central attributes of the Bush vision of Article II power.

Second, what follows in this section is primarily descriptive. Much has been and no doubt will be written about many of the individual matters I discuss. However, my goal is not to evaluate the constitutionality of any given example of the assertion of executive authority. Rather, I focus on the larger picture that is revealed when one considers these individual instances collectively. Further, I assume that, as a whole, the Bushian vision of the scope of executive authority is at the edge of constitutional legitimacy. My ultimate goal, to which I turn in Part IV, is to consider how the theory I described in Part II should be applied to such a constitutionally envelope-pushing assertion of presidential power.

#### A. *Unilateralism*

The core principle underlying the administration's view of executive authority is unilateralism. The President is said to have independent or inherent authority under the Constitution to undertake a wide range of actions.<sup>83</sup> This authority does not

---

<sup>82</sup> See *infra* Part III.B.3 (discussing retributive nature of the Bushian chief executive).

<sup>83</sup> This concept can be seen in statements by the administration. See, e.g., Brief for Respondents at 8, *Hamdan v. Rumsfeld*, No. 05-184 (D.C. Cir. Feb. 23, 2006) [hereinafter Respondents' *Hamdan* Brief] ("[T]he President has the inherent authority to convene military commissions to try and punish captured enemy combatants in wartime—even in the absence of any statutory authorization."); Brief for Respondents at 13-18, *Hamdi v. Rumsfeld*, No. 03-6696 (4th Cir. Mar. 29, 2004) (arguing that the President has inherent authority to detain enemy combatants indefinitely, even if such individuals are United States citizens). This concept can also be seen in statements by academic defenders of broad, inherent presidential power. See, e.g., Paulson, *supra* note 15, at 1258 ("[T]he Constitution either creates or recognizes a *constitutional law of necessity*, and appears to charge *the President* with the primary duty of applying it and judging the degree of necessity in the press of circumstances."); JOHN YOO, THE

require the action or acquiescence of other centers of political authority under the Constitution.<sup>84</sup> Indeed, it appears to be largely immune from even meaningful oversight of such other centers of authority.<sup>85</sup> As this theory was colorfully put by an unidentified Republican lobbyist: “It’s we just want it our way and we don’t want to be bothered by talking to other people about it.”<sup>86</sup>

The constitutionality of such unilateral assertions of power is widely debated, placing the core of the Bushian vision of executive authority at the frontier of constitutional law.<sup>87</sup> At its most general level, however, maintaining that the President has at least some unilateral authority to act is entirely consistent with well-established constitutional law. Most significantly in this regard, over fifty years ago, Justice Robert Jackson articulated his now-famous spectrum of presidential authority.<sup>88</sup> A key attribute of Jackson’s approach is that the

---

POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 143-81 (2005) [hereinafter YOO, WAR AND PEACE].

<sup>84</sup> See, e.g., Respondents’ *Hamdan* Brief, *supra* note 83, at 8.

<sup>85</sup> I explore these themes further in Part III.B.1 (concerning secrecy) and Part III.B.2 (concerning intolerance to criticism and questioning).

<sup>86</sup> Drew, *supra* note 8.

<sup>87</sup> There is some academic support for a wide scope of unilateral executive authority. See generally YOO, WAR AND PEACE, *supra* note 83 (arguing that the Constitution provides the President with significant latitude to act unilaterally in connection with national security matters); Paulson, *supra* note 15 (arguing that the Constitution recognizes a rule of necessity that effectively empowers the national executive to act unilaterally in situations of national peril). There is also a wide chorus of disagreement with the constitutionality of this vision of Article II. See, e.g., PETER IRONS, WAR POWERS: HOW THE IMPERIAL PRESIDENCY HIJACKED THE CONSTITUTION 2 (2005); ANDREW RUDALEVIGE, THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE (2005); Erwin Chemerinsky, *Civil Liberties and the War on Terrorism*, 45 WASHBURN L.J. 1 (2005) [hereinafter Chemerinsky, *Civil Liberties*] (criticizing broad assertions of executive authority in a number of terrorism-related areas).

<sup>88</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring in the judgment and opinion of the Court). The Court has since recognized, in the words of then-Justice Rehnquist, that although it was only a concurrence, the Jackson opinion in *Youngstown* “brings together as much combination of analysis and common sense as there is in this area.” *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981). See also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006) (citing Justice Jackson in *Youngstown* in connection with assessment of President Bush’s authority to constitute military commissions); *id.* at 2800 (Kennedy, J., concurring) (stating that “[t]he proper framework for assessing whether Executive actions are authorized is the three-part scheme used by Justice Jackson in [*Youngstown*]”). During his confirmation hearings, Chief Justice Roberts appeared to agree that Justice Jackson’s *Youngstown* opinion was the most important one from that famous case. See Adam Liptak, *A Quick Focus on the Powers of a President*, N.Y. TIMES, Jan. 10, 2006, at A1, available at 2006 WLNR 502546 (quoting Roberts as testifying that Jackson’s opinion “set the framework for consideration of questions of

President had “independent powers” to act when Congress was silent and even in some cases when it had spoken in a manner inconsistent with the President’s actions.<sup>89</sup>

The remarkable feature of the Bush administration’s unilateralism, then, is not novelty. Instead, what is significant is its scope.<sup>90</sup> As will be apparent from the specific examples considered below, Bushian unilateralism implicates two broad dimensions. First, it applies without regard to the “domestic” or “foreign” nature of the matter at hand. Second, Bushian unilateralism operates with respect to all of the other centers of political authority under the Constitution both vertically and horizontally. Thus, when the courts act in response to the Bush vision of executive authority, these two elements of unilateralism must be taken into account.

Given unilateralism’s central role in the Bush vision of Article II, this Part describes the administration’s unilateral action in some detail. However, the discussion that follows is not intended to comprehensively consider any single issue. Instead, my goal is to provide a broad picture of the scope of executive authority currently being implemented. Taken as a whole, these examples demonstrate the sweep of the Bushian claim to inherent power both in terms of the domestic/foreign distinction as well as with respect to all other constitutional actors.

### 1. Enemy Combatants

Much of the debate of late over the scope of presidential authority unsurprisingly has dealt with terrorism. An important strand in this area concerns the identification and handling of “enemy combatants.”<sup>91</sup> There is much that has

---

executive power in times of war and with respect to foreign affairs since it was decided”).

<sup>89</sup> See, e.g., *Youngstown*, 343 U.S. at 637 (discussing situations in which the President acts (1) “in absence of either a congressional grant or denial of authority” and (2) “incompatibl[y] with the expressed or implied will of Congress”).

<sup>90</sup> See *infra* Part III.B.

<sup>91</sup> The very term “enemy combatant” has been the subject of some dispute. For example, as Justice O’Connor noted, “the Government has never provided any court with the full criteria that it uses in classifying individuals as such.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004). Of course, this reluctance to provide even the most basic information to another branch of government is itself a recurring aspect of the Bushian executive. I return to this facet below. See *infra* Part III.B. For present purposes, I use the definition of “enemy combatant” the Supreme Court cited most recently: “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its

been and will be written concerning the many issues associated with enemy combatants.<sup>92</sup> What I focus on are two illustrations of the strong unilateralism that characterize the Bush view of executive authority: (1) determining who should be deemed enemy combatants; and (2) deciding how such persons should be tried and punished. As described below, taken together, these two illustrations of unilateralism have the effect of restricting the involvement of the two competing branches of the federal government.

Beginning with the designation issue, the administration has consistently sought to reduce or eliminate the role of Article III courts in reviewing the claims of those classified as enemy combatants. For example, President Bush argued strenuously that no federal court had the authority even to entertain writs of habeas corpus filed by non-United States citizens detained at the United States Naval Base in Guantanamo Bay, Cuba.<sup>93</sup> The administration also argued that federal courts lacked authority and competence to review the individual process through which the President determined that a United States citizen captured in a foreign land was an enemy combatant. As described by the Court, the administration argued:

---

coalition partners.” *Hamdan*, 126 S. Ct. at 2761 n.1 (quoting Memorandum from Deputy Sec’y of Def. Paul Wolfowitz to the Sec’y of the Navy (July 7, 2004)).

<sup>92</sup> For a sampling of academic commentary concerning enemy combatant issues, see generally TERRORISM, THE LAWS OF WAR, *supra* note 18; LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM 220-52 (2005); Neal K. Katyal, *Executive and Judicial Overreaction in the Guantanamo Cases*, in 2003-2004 CATO SUPREME COURT REVIEW 49, 55-68 [hereinafter Katyal, *Overreaction*]; Benjamin J. Priester, *Return of the Great Writ: Judicial Review, Due Process, and the Detention of Alleged Terrorists as Enemy Combatants*, 37 RUTGERS L.J. 39, 61-68 (2005); Yung Tin, *The Future Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1061, 1072-82 (2005).

<sup>93</sup> See, e.g., Brief for the Respondents at 13-17, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334). See also Katyal, *Overreaction*, *supra* note 92, at 49 (describing the administration’s position in *Rasul* as believing “that it had the ability to build an offshore facility to evade judicial review, do what it wanted at that facility to detainees under the auspices of the commander-in-chief power, and keep the entire process (including its legal opinions) secret”). Indeed, it seems that at least one Supreme Court Justice believed that it was precisely the executive’s goal to establish a system immune from judicial review. *Rasul*, 542 U.S. at 497-98 (Scalia, J., dissenting) (“Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees.”). The Bush administration’s position, if accepted, would have totally insulated the activities at issue from all judicial oversight because state courts are without power to grant writs of habeas corpus with respect to persons held in federal custody. See, e.g., *Tarble’s Case*, 80 U.S. 397, 411-12 (1871); *Ableman v. Booth*, 62 U.S. 506, 523-24 (1858).

That further factual exploration [of the particularized enemy combatant determination] is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake. Under the Government's most extreme rendition of this argument, "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict" ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme . . . .<sup>94</sup>

The Supreme Court ultimately rejected both of these strong versions of unilateral and insulated exercise of presidential authority.<sup>95</sup> Nevertheless, taken together the administration's positions in *Hamdi* and *Rasul* reflect how executive unilateralism can be directed against the judicial branch.

Bush's unilateralism can also be seen in connection with determining how those designated as enemy combatants were to be tried. This aspect of unilateral action illustrates how the federal legislative branch can also be diminished in the Bushian constitutional landscape.<sup>96</sup> After the terrorist attacks, the President took a number of actions by which he created a system of military commissions to try enemy combatants.<sup>97</sup> The details are not particularly important for present purposes.

---

<sup>94</sup> *Hamdi*, 542 U.S. at 527 (quoting Respondents' Brief).

<sup>95</sup> *See id.* at 509 ("We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."); *Rasul*, 542 U.S. at 485 ("What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand these cases for the District Court to consider in the first instance the merits of petitioners' claims.").

<sup>96</sup> One could also cite the administration's position concerning the President's constitutional authority to detain a United States citizen (whether captured abroad or in the United States), classify the person as an "enemy combatant," and detain him or her. The administration argued in *Hamdi*, concerning a United States citizen detained outside the United States, that "no explicit congressional authorization is required [for such detention], because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution." 542 U.S. at 516. The Court did not address this argument because a plurality concluded that Congress had, in fact, authorized the detention through the Authorization for the Use of Military Force ("AUMF"), 115 Stat. 224, not following 50 U.S.C. § 1541. *Id.* at 517-24. The Fourth Circuit Court of Appeals reached the same conclusion concerning the impact of the AUMF in connection with the detention of an American citizen captured in the United States. *See Padilla v. Hanft*, 423 F.3d 386, 397 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1649 (2006). I return to the *Padilla* litigation below. *See infra* Part IV.A.3.

<sup>97</sup> *See, e.g.*, Mil. Order of Nov. 13, 2001: Detention, Treatment, and the Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

What is critical, however, is that the President sought to “go it alone” by asserting that he had the inherent authority to constitute military commissions as he saw fit to try enemy combatants for offenses the administration itself defined.<sup>98</sup> The actions of the administration in this regard are a prime example of executive unilateralism.<sup>99</sup>

To be sure, the administration also argued that Congress gave the President such power through the broadly worded Authorization for the Use of Military Force (“AUMF”) enacted in the wake of the September 11th attacks.<sup>100</sup> But there is little doubt that the administration sought to use this aspect of the enemy combatant issue as one to aggrandize its power. Indeed, both the Republican Chairman and the Democratic Ranking Member of the Senate Judiciary Committee expressed frustration that the White House “rebuffed” their efforts in 2002 to have Congress specifically enact legislation concerning the use of military commissions to try enemy combatants.<sup>101</sup>

The Supreme Court also ultimately rejected the administration’s position that Congress had authorized the

---

<sup>98</sup> See, e.g., Respondents’ *Hamdan* Brief, *supra* note 83, at 7-8. The scope of the administration’s position in this regard was recognized by media outlets across the ideological spectrum. See, e.g., Jess Bravin, *Justices Bar Guantanamo Tribunals*, WALL ST. J., June 30, 2006, at A1 (“Administration lawyers contended that the constitutional clause designating the president ‘commander in chief of the Army and Navy’ should be read expansively, so that the Executive Branch could take virtually any steps deemed necessary for national security.”); Editorial, *Wanted: A System of Justice; If U.S. Forces Captured Osama Bin Laden Tomorrow, How and Where Would He be Tried?*, WASH. POST, June 21, 2006, at A20 (“The White House wished not merely to conduct trials but also to emphasize the president’s power to do it on his own. Consequently, the executive branch alone has defined the offenses to be tried by commission and it alone has written the trial rules, which have shifted repeatedly. The legality of the system has been in doubt from its inception.”).

<sup>99</sup> Unilateralism is also apparent from certain procedures utilized for the military tribunals which could be “change[d] midtrial, at the whim of the Executive.” *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2797 n. 65 (2006).

<sup>100</sup> See, e.g., Respondents’ *Hamdan* Brief, *supra* note 83, at 16-17. The AUMF provided that the President was authorized to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001).

<sup>101</sup> See, e.g., Kate Zernike & Sheryl Gay Stolberg, *Detainee Rights Create a Divide on Capital Hill*, N.Y. TIMES, July 10, 2006, at A1, available at 2006 WLNR 11849474 (quoting Ranking Member Senator Leahy concerning White House actions in 2002); Kate Zernike, *A Top Senate Republican Is Uncertain on Legislation for Military Tribunals for Terror Suspects*, N.Y. TIMES, July 1, 2006, at A10, available at 2006 WLNR 11388078 (quoting Chairman Senator Specter concerning the same issue).

President's creation of the military commissions at issue.<sup>102</sup> That decision is certainly important for any number of reasons.<sup>103</sup> Critical here, however, is the point that the enemy combatant saga reflects the Bush administration's strong commitment to executive unilateralism.<sup>104</sup>

## 2. "Domestic" or "Terrorist" Surveillance Programs

A second example of executive unilateralism concerns various efforts to collect information at home and abroad related to terrorist threats. These actions include collecting financial information associated with international fund transfers,<sup>105</sup> assembling data from phone companies concerning telephone calls made in the United States (so-called "data-mining"),<sup>106</sup> and eavesdropping on a limited number of telephone calls made to and from this country.<sup>107</sup> There has been much debate concerning the legality of these various intelligence activities.<sup>108</sup> But their general legality is not the issue here.<sup>109</sup>

---

<sup>102</sup> See *Hamdan*, 126 S. Ct. at 2772-98. The Court left unresolved whether the President had inherent authority to constitute military commissions without congressional approval in times of "controlling necessity." *Id.* at 2774.

<sup>103</sup> I return to *Hamdan* below. See *infra* Part IV.A.1.

<sup>104</sup> Another example of such enemy combatant unilateralism concerns the initial decision whether to place detainees into the criminal justice system or keep them in military custody. If the executive branch has the unilateral and unconstrained decision on which path a person will travel, that branch has the authority to determine whether the other branches will be involved at all. A person in a criminal proceeding will be subject to the protections of the judicial branch in connection with an alleged crime defined by statutes Congress has enacted. As the arguments associated with *Hamdan* and *Hamdi/Rasul* illustrate, a person tried in military custody under the strong unilateral conception of executive power would not be subject to judicial review (or at least meaningful review) and would be subject to offenses defined by the executive itself. Litigation concerning Jose Padilla illustrates many of these points. I discuss that situation below. See *infra* Part IV.A.3. For a general discussion of the issue of military detention and prosecutions for terrorism, see Tung Yin, *Coercion and Terrorism Prosecutions in the Shadow of Military Detention*, 2006 BYU L. REV. 1255.

<sup>105</sup> See Risen & Lichtblau, *supra* note 4; Simpson, *supra* note 4.

<sup>106</sup> See Cauley, *supra* note 2.

<sup>107</sup> See Risen & Lichtblau, *supra* note 1.

<sup>108</sup> For a sampling of the debate, see THE FEDERALIST SOCIETY, TERRORIST SURVEILLANCE AND THE CONSTITUTION 32 (2006), available at <http://www.fed-soc.org/pdf/terroristsurveillance.pdf> (discussing warrantless wiretapping and concluding that it is lawful); Editorial, *Abolish FISA*, WALL ST. J., Feb. 9, 2006, at A12 (arguing that the surveillance program is constitutional and that the true issue is that Congress has attempted to impede the President's exercise of his constitutional power); Editorial, *Bank Surveillance*, WASH. POST, June 24, 2006, at A20 (arguing that the administration's gathering of information concerning international wire transfers was lawful); Charlie Savage, *Views Are Mixed on Domestic Spying*, BOSTON GLOBE, Mar. 1, 2006, at A2 (collecting divergent views concerning the legality of warrantless

The various intelligence activities that have come to light in recent months are noteworthy for their common theme of unilateral executive power. Across the board, the President has argued that he has the authority under the Constitution to engage in the various activities at issue. So, for example, when seeking information concerning international financial transactions, administrative subpoenas were used instead of investigative tools requiring judicial oversight.<sup>110</sup> And in connection with the interception of phone calls into and out of the United States, as well as the collection of data concerning calls within the country, the administration has steadfastly asserted that the President has the independent constitutional authority to act.<sup>111</sup> Perhaps a bit hyperbolically in this regard, the District Judge who struck down the National Security Agency's warrantless wiretapping program stated:

---

wiretapping program); Memorandum from the Cong. Res. Serv., Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information (Jan. 5, 2006), available at [http://www.eff.org/Privacy/Surveillance/NSA/nsa\\_research\\_memo.pdf](http://www.eff.org/Privacy/Surveillance/NSA/nsa_research_memo.pdf) (concluding that there is insufficient information available to the public to make a determination as to the legality of the surveillance, but casting some doubt on the lawfulness of the program); Michael C. Dorf, *What Are the "Inherent" Powers of the President? How the Bush Administration Has Mistaken Default Rules for Exclusive Rights*, FINDLAW, Feb. 13, 2006, <http://writ.news.findlaw.com/dorf/20060213.html> (concluding that warrantless wiretapping, at least as currently structured, is unlawful).

<sup>109</sup> As of the writing of this Article, one United States District Court Judge has reached the merits of a lawsuit challenging the legality of the President's warrantless wiretapping program. On August 17, 2006, Judge Anna Diggs Taylor granted plaintiffs in the case before her a preliminary injunction against the continued operation of the program. See *Am. Civil Liberties Union v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006). Judge Taylor concluded that the program violated a host of constitutional and statutory provisions including "the APA [Administrative Procedures Act]; the Separation of Powers doctrine; [and] the First and Fourth Amendments of the United States Constitution." *Id.* at 782. The ultimate impact of this decision remains in doubt. The injunctive order is currently stayed by agreement of the parties pending the government's nearly certain appeal. See Press Release, Dep't of Just., Statement from the Department of Justice on Yesterday's Ruling on the Terrorist Surveillance Program (Aug. 17, 2006), available at [http://www.usdoj.gov/opa/pr/2006/August/06\\_ag\\_550.html](http://www.usdoj.gov/opa/pr/2006/August/06_ag_550.html).

<sup>110</sup> See *Risen & Lichtblau*, *supra* note 4.

<sup>111</sup> To be sure, as with issues concerning enemy combatants, the President has also asserted that the AUMF provides authority for his actions. See, e.g., DEPT OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006), reprinted in 81 IND. L.J. 1374, 1396-1401 (2006) [hereinafter DOJ WHITE PAPER] (arguing that the AUMF authorized the warrantless surveillance at issue); Letter from William E. Moschella, Assistant Att'y Gen., to Chairpeople and Ranking Members of the Intelligence Comms. of the House of Representatives and the Senate (Dec. 22, 2005), reprinted in 81 IND. L.J. 1360, 1361-62 (2006) [hereinafter Moschella Letter] (same). Yet, the "inherent power" arguments are always present. See, e.g., DOJ WHITE PAPER, *supra*, at 1379-90 (arguing that the President has the "inherent authority" to conduct the warrantless surveillance at issue); Moschella Letter, *supra*, at 1360-61 (same).

The Government appears to argue here that, pursuant to the penumbra of Constitutional language in Article II, and particularly because the President is designated Commander in Chief of the Army and Navy, he has been granted the inherent power to violate not only the laws of the Congress but the *First* and *Fourth Amendments of the Constitution*, itself.<sup>112</sup>

Whatever the merits of this description of the breadth of the government's argument, there is no question that the various intelligence collection activities undertaken in the context of the "war on terror" are yet another example of the Bush administration's strong commitment to executive unilateralism.

### 3. The Ashcroft Directive

The Bush administration's executive unilateralism is most apparent in the "war on terror." However, it is by no means so limited. This point is driven home by an action taken by United States Attorney General John Ashcroft less than two months after the September 11th terrorist attacks but which had nothing to do with that event. This sub-part uses that action to further illustrate the scope of the current assertions of executive power with which the courts must deal.

Acting pursuant to a citizen-approved initiative, the Oregon legislature enacted the Death with Dignity Act.<sup>113</sup> That statute allowed a narrow and specifically defined group of citizens to have the assistance of a doctor in ending their lives by prescription of certain highly regulated drugs in amounts sufficient to bring about the patient's death.<sup>114</sup> Over the years since its passage, relatively few people each year have taken advantage of the option made possible by the Act.<sup>115</sup>

On November 9, 2001, Attorney General Ashcroft issued a document entitled *Dispensing of Controlled Substances to Assist Suicide*, which has since come to be known as the

---

<sup>112</sup> *Am. Civil Liberties Union*, 438 F. Supp. 2d at 780.

<sup>113</sup> OR. REV. STAT. ANN. § 127.805 (West 2003).

<sup>114</sup> *Id.*

<sup>115</sup> The Oregon Department of Human Services prepares a report each year detailing the operation of the Death with Dignity Act. The 2005 report states that the number of persons obtaining lethal doses of medication under the Act's terms were: 2005 (64); 2004 (60); 2003 (68); 2002 (58); 2001 (44); 2000 (39); 1999 (33); and 1998 (24). See DEP'T OF HUMAN SERVICES, OFFICE OF DISEASE PREVENTION AND EPIDEMIOLOGY, EIGHTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT (Mar. 9, 2006), available at <http://oregon.gov/DHS/ph/pas/doc/year8.pdf>.

“Ashcroft Directive.”<sup>116</sup> As the Supreme Court later described, the Ashcroft Directive “determines that using controlled substances to assist suicide is not a legitimate medical practice and that dispensing or prescribing them for this purpose is unlawful under” the federal Controlled Substances Act.<sup>117</sup> The Directive maintained that assisted suicide served no “legitimate medical purpose” under the Controlled Substances Act and, therefore, any doctor prescribing drugs under the Oregon statute (as well any pharmacist filling prescriptions) was subject to license revocation.<sup>118</sup> The result, of course, was that the Ashcroft Directive made the Oregon Death with Dignity Act effectively a dead-letter.

The debate concerning physician assisted suicide is wide and deep.<sup>119</sup> One might criticize the federal government for stepping into the debate at all, but that is not the point I wish to make concerning the Ashcroft Directive. The feature of that action that is remarkable here is that the Directive is an entirely domestic example of the Bush Administration’s executive unilateralism. As the Supreme Court ultimately held in striking the Ashcroft Directive down as beyond that executive official’s power:

The Government, in the end, maintains that the prescription requirement delegates to a single Executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality. The text and structure of the [Controlled Substances Act] show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it.<sup>120</sup>

---

<sup>116</sup> 66 Fed. Reg. 56,607 (Nov. 9, 2001) (to be codified at 12 C.F.R. pt. 1306). The document is widely referred to as the “Ashcroft Directive.” See, e.g., Warren Richey & Linda Feldman, *High Court Allows Physician-Assisted Suicide*, CHRISTIAN SCI. MONITOR, Jan. 18, 2006, at 1; Liz Holloran, *Of Life and Death*, U.S. NEWS AND WORLD REPORT, Oct. 10, 2005, at 31; Michael McGough, *Oregon Statute Upheld: The Terminally Ill Can Get Drugs from Doctors to End Lives*, PITT. POST-GAZETTE, Jan. 18, 2006, at A-1; Editorial, *The Right to Die*, N.Y. TIMES, Oct. 5, 2005, at 26.

<sup>117</sup> *Gonzales v. Oregon*, 126 S. Ct. 904, 911 (2006).

<sup>118</sup> 66 Fed. Reg. at 56,608.

<sup>119</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 710-19 (1997) (discussing ethical, moral and legal debates concerning physician-assisted suicide in the United States and elsewhere).

<sup>120</sup> *Gonzales*, 126 S. Ct. at 925. I also discuss this case below. See *infra* Part IV.A.2.

#### 4. Executive Preemption

Preemption is a familiar concept. The Supremacy Clause<sup>121</sup> mandates that federal law will displace inconsistent state law.<sup>122</sup> Thus, when Congress acts pursuant to an enumerated power in a manner inconsistent with state law, the state law loses its force.<sup>123</sup> The same is true, regardless of inconsistency, if Congress expressly states that it intends federal law to displace state law.<sup>124</sup> Preemption can also occur when federal law has occupied the relevant field,<sup>125</sup> or when state law acts as an obstacle to achieving a federal purpose.<sup>126</sup> Common to all of these paths to preemption is congressional intent.<sup>127</sup>

There is much one could debate about preemption. I leave those more general debates aside. Instead, I wish to highlight a species of preemption that is apparently largely divorced from the traditional focus on congressional intent. Specifically, and in keeping with its unilateral exertions of executive authority, the Bush administration has undertaken a number of initiatives that one could term executive preemption. That is, executive agencies have issued regulations and the like purporting to displace state law when it is not clear by any means that Congress intended that such preemption take place.

A prime example of such executive preemption is certain recent action of the Food and Drug Administration (“FDA”). In January 2006, the FDA issued guidelines concerning drug labeling.<sup>128</sup> The preamble to those guidelines stated in part that “FDA approval of labeling . . . preempts conflicting or contrary State law.”<sup>129</sup> Thus, assuming the preemption assertion is upheld, state tort lawsuits concerning failure to warn consumers of dangers of drugs would be displaced by

---

<sup>121</sup> See U.S. CONST. art. IV.

<sup>122</sup> For a general discussion of preemption, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, § 5.2, 392-419 (3d ed. 2006).

<sup>123</sup> See, e.g., *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

<sup>124</sup> See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

<sup>125</sup> See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>126</sup> See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

<sup>127</sup> See, e.g., *Met. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985).

<sup>128</sup> See Requirements on Content and Format of Labeling for Human Prescription Drug Biological Products, 21 C.F.R. §§ 201, 314, 601 (2006); 71 Fed. Reg. 3922, 3934-36 (Jan. 24, 2006).

<sup>129</sup> 71 Fed. Reg. at 3934.

executive agency action so long as a drug manufacturer complied with federal executive agency standards.<sup>130</sup> Similar examples can also be found in actions of a number of other federal agencies including the Consumer Product Safety Commission,<sup>131</sup> the National Highway Traffic Safety Administration,<sup>132</sup> the Office of Thrift Supervision,<sup>133</sup> and the Comptroller of the Currency.<sup>134</sup>

The impact of such executive preemption is two-fold in terms of the foundational principles.<sup>135</sup> First, by acting in such a unilateral manner, the executive branch is usurping and perhaps even defying Congress. In this respect, the maintenance of horizontal centers of political authority is undermined. Second, the immediate impact of executive preemption is a transfer of power from the states. Thus, this unilateral governing action also serves to undermine vertical centers of political authority.

---

<sup>130</sup> Various newspapers reported on the FDA action. *See, e.g.*, Marc Kaufman, *FDA Tries to Limit Drug Suits in State Courts*, WASH. POST, Jan. 19, 2006, at A2; Stephen Labaton, *'Silent Tort Reform' Is Overriding States' Powers*, N.Y. TIMES, Mar. 10, 2006, at C5, available at 2006 WLNR 4023298; Mathews, *supra* note 10.

<sup>131</sup> The Consumer Product Safety Commission adopted a rule preempting state law concerning mattress fire safety. *See* Final Rule: Standard for the Flammability of Mattresses and Mattress Pads, 16 C.F.R. § 1632 (2006). *See also* Labaton, *supra* note 130 (discussing this rule and noting that it "was the first instance in the agency's 33-year history of the commission's voting to limit the ability of consumers to bring cases in state courts").

<sup>132</sup> *See* Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 49 C.F.R. § 571 (2006). *See also* Mathews, *supra* note 10 (discussing this rule).

<sup>133</sup> *See* Labaton, *supra* note 130 (discussing actions of the Office of Thrift Supervision challenging on preemption grounds a law adopted by a Maryland suburb concerning discriminatory lending practices).

<sup>134</sup> *See* Mathews, *supra* note 10 (discussing regulations promulgated by the Comptroller of the Currency concerning state regulation of national banks). I return to this issue briefly in Part V below.

<sup>135</sup> Several academic commentators have also begun to discuss the complex issues involved in executive preemption. *See, e.g.*, Richard A. Epstein, *Why the FDA Must Preempt Tort Litigation: A Critique of Chevron Deference and a Response to Richard Nagareda*, 1 J. TORT LAW, Dec. 2006, available at <http://www.bepress.com/jtl/vol1/iss1/art5>; Richard A. Nagareda, *FDA Preemption: When Tort Law Meets the Administrative State*, 1 J. TORT LAW, Dec. 2006, available at <http://www.bepress.com/jtl/vol1/iss1/art4>; Sharkey, *supra* note 10; David C. Vladeck, *Preemption and Regulatory Failure*, 33 PEPP. L. REV. 95, 122-26 (2005); Mary J. Davis, *Discovering the Boundaries: Federal Preemption of Prescription Drug Labeling Product Liability Actions* (2006) (ExpressO Preprint Series, Working Paper No. 1252), available at <http://law.bepress.com/expresso/eps/1252>.

## B. *The Sub-Attributes of Bushian Unilateralism*

The previous sub-part described the core attribute of the Bushian vision of authority under Article II: unilateralism. The commitment to unilateral power is broad and is not confined to the “war on terror.” Accordingly, a court responding to such an enveloping-pushing interpretation of the Constitution will need to take an equally broad-spectrum view. But before turning to an illustration of how that might be done, this sub-part details the three sub-attributes of the Bush assertion of unilateral executive power: secrecy and a lack of transparency; intolerance to criticism and questioning; and retribution.

### 1. Secrecy and a Lack of Transparency

The first sub-attribute of the Bush administration’s unilateralism is secrecy. In matters both foreign and domestic, the administration often exercises its unilateral authority behind closed doors. Such actions extend to both the People at large as well as other government institutions. This lack of transparency cuts to the heart of all of the foundational principles.<sup>136</sup> It hampers the ability of other political centers of authority to act as meaningful checks on the federal executive branch. It makes it more difficult, if not impossible, for the People to engage in the governing process in a meaningful way. Finally, it makes government *less* efficient in the long-run by undermining political accountability and ultimately leading to unnecessary delay in reaching final, constitutionally acceptable resolutions of issues.<sup>137</sup>

A few examples suffice to show the secrecy with respect to the public. Before doing so, however, it is important to make clear that criticizing the Bush administration’s secrecy is not

---

<sup>136</sup> See *supra* Part II.B (discussing the three foundational principles). It is true that Alexander Hamilton specifically noted the ability of the executive to act in secret as an advantage of the constitutional structure. See THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 47. However, he did so in the context of the overall constitutional separation of powers. See *supra* Part II.B (discussing separation of powers issues generally).

<sup>137</sup> For example, if the Bush administration had not been as secretive about its handling of matters concerning trying enemy combatants, see *supra* Part III.A.1 (discussing enemy combatant issues), it is likely that the President and Congress would have been able to resolve many matters years ago. Instead, as of this writing, the country is still in limbo concerning such basic matters as how we will try the hundreds of people that the United States continues to hold. The one certainty about this set of events is that it is not an effective way to operate a government.

equivalent to a call that all government operations be discussed in public. There are, of course, valid national security concerns requiring stealth by their very nature. But such recognition should not be used as a cover to justify the wide range of secrecy at issue.<sup>138</sup> Thus, the “war on terror” does not support secretly removing decades-old documents from the National Archives,<sup>139</sup> or the reclassification as secret of information such as the number of ballistic missile launchers the United States possessed over thirty years ago.<sup>140</sup> Nor does it support the government’s attempt to obtain twenty years of records from the estate of former investigative reporter Jack Anderson.<sup>141</sup> And terrorism has no application to secrecy shrouding the development of domestic energy policy.<sup>142</sup> In sum, the wide-ranging secrecy of the Bush administration has hampered the ability of the People to carry out their role in the constitutional order.

In addition, this secrecy has extended to the other coordinate branches of the federal government. This phenomenon perhaps is best illustrated by the administration’s approach to providing information to Congress in connection with the various surveillance programs it has implemented in the wake of September 11th.<sup>143</sup> It is true that the

---

<sup>138</sup> Professor Chemerinsky has made a similar point. See Chemerinsky, *Civil Liberties*, *supra* note 87, at 8-14.

<sup>139</sup> See Christopher Lee, *The Amateur Sleuth who Gave the Archives a Red Face*, WASH. POST, June 8, 2006, at A21; Scott Shane, *National Archives Pact Let C.I.A. Withdraw Public Documents*, N.Y. TIMES, Apr. 18, 2006, at A16, available at 2006 WLNR 6449263.

<sup>140</sup> See Christopher Lee, *Cold War Missiles Target of Blackout*, WASH. POST, Aug. 21, 2006, at A1. Needless to say, this type of so-called “silly secrecy” has prompted critical commentary. See, e.g., Editorial, *A Fixation with Secrecy*, N.Y. TIMES, Aug. 28, 2006, at A14, available at 2006 WLNR 14867096.

<sup>141</sup> See Laurie Kellman, *Senate Judiciary Committee Wants Answers About FBI Probe of Columnist Jack Anderson*, ASSOC. PRESS, June 6, 2006, available at <http://senate-judiciary-committee-news.newslib.com/story/6709-3203592/>.

<sup>142</sup> The Supreme Court upheld the secrecy surrounding the Cheney Energy Taskforce. See *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 391 (2004). Whatever the merits of that decision, the structural equilibrium theory outlined in this Article would suggest that the Court should have more actively considered the total nature of the Bush administration’s vision of executive power when ruling on the narrow issue presented. Doing so would likely have led to a different outcome.

<sup>143</sup> I discussed these programs above. See *supra* Part III.A.2. At least one academic commentator has suggested that the government’s secrecy surrounding terrorism issues generally has contributed to the problems it has faced in the courts on its various programs. See Katyal, *Overreaction*, *supra* note 92, at 49. If this is in fact the case, such a “backlash” is consistent with the structural equilibrium approach because it uses a broader view of the executive’s attempts to obtain power in order to answer narrower questions.

administration did not keep all of Congress in the dark concerning the various intelligence gathering programs. But it elected to inform *only* the so-called “Gang of Eight”—the majority and minority leaders in the Senate and House and the Chairpersons and Ranking Members of the House and Senate Intelligence Committees.<sup>144</sup> Such limited notifications are rare, and questionable in the circumstances presented by the intelligence operations at use here.<sup>145</sup> Moreover, it appears that there are additional secret intelligence programs about which the administration has not informed even the Gang of Eight.<sup>146</sup> By depriving Congress of information concerning even the existence of certain programs, or limiting such information to only eight of five hundred thirty-five members, the Executive is effectively able to excise from government one of the constitutionally counterbalancing centers of political authority.<sup>147</sup> Thus, the lack of transparency is an important attribute of the Bush administration’s unilateralism.

---

<sup>144</sup> See Charles Babington, *Congressional Probe of NSA Spying Is in Doubt*, WASH. POST, Feb. 15, 2006, at A3 (reporting that only the gang of eight were briefed on the program before it was made public); Elaine Cassel, *The Congressional Research Service and Constitutional Law Scholars Weigh in on President Bush’s Authorization of Warrantless Surveillance: Why This Controversy Bridges the Partisan Divide, at Least Among Experts*, FINDLAW, Jan. 12, 2006, <http://writ.news.findlaw.com/cassel/20060112.html>; Drew, *supra* note 8 (reporting on limited nature of consultations).

<sup>145</sup> See Memorandum from the Cong. Res. Serv., *Statutory Procedures Under Which Congress Is to Be Informed of U.S. Intelligence Activities, Including Covert Actions*, (Jan. 18, 2006), available at <http://www.epic.org/privacy/terrorism/fisa/crs11806.pdf> (generally describing the statutory requirements concerning congressional notification and raising questions concerning the propriety of the limited notification at issue in the administration’s warrantless wiretapping program).

<sup>146</sup> House Intelligence Committee Chairperson Peter Hoekstra complained to the administration in May of its failure to brief him concerning an as yet undisclosed intelligence operation. See Charles Babington, *Bush Pressed on Reporting Domestic Surveillance*, WASH. POST, July 9, 2006, at A6, available at 2006 WLNR 11806805. The Chairperson had learned of the operation from an informant within the executive branch. See *id.*; Eric Lichtblau & Scott Shane, *Congressman Says Program was Disclosed by Informant*, N.Y. TIMES, July 10, 2006, at A11, available at 2006 WLNR 11849279; Eric Lichtblau & Scott Shane, *Ally Told Bush Project Secrecy Might Be Illegal*, N.Y. TIMES, July 9, 2006, at A11, available at 2006 WLNR 11821894.

<sup>147</sup> Other commentators have made similar points concerning the connection between a lack of transparency and an undermining of political accountability. See, e.g., Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L.J. 1297, 1303 (2006) (noting that secret government decisionmaking creates “a legitimacy gap” concerning the decisions at issue); Heidi Kitrosser, *Presidential Secrecy and the NSA Spying Controversy*, JURIST, Feb. 27, 2006, <http://jurist.law.pitt.edu/forumy/2006/02/presidential-secrecy-and-nsa-spying.php> (“It would be antithetical to this careful system [of checks and balances] were the President permitted to formulate and to execute secret policies that are immune from public and legislative checking.”).

A final example of the lack of transparency associated with the Bushian vision of executive authority—going both to the People and other political centers of authority—concerns Presidential signing statements. While it would appear that signing statements—whether legitimate or not—increase visibility in government, that is not the case with the statements President Bush promulgates. As described in the balance of this sub-part, President Bush’s signing statements actually obscure the basis for his actions.

Signing statements have been used for many years by numerous Presidents to explain their views (both political and legal) on the legislation they have chosen to sign into law.<sup>148</sup> Yet, despite their historical pedigree, there has been much controversy of late concerning President Bush’s particular use of this device. Media reports<sup>149</sup> of the use of signing statements have led to an American Bar Association report critical of the President’s actions.<sup>150</sup> There have also been congressional hearings on the issue.<sup>151</sup> Part of the controversy has focused on the frequency of President Bush’s use of the device. The more substantial questions, however, have centered on the substance of his signing statements. In particular, the President has often used them to simultaneously sign a bill into law while saying that he will not enforce those parts of the law he deems unconstitutional.

The general propriety of signing statements is a difficult question. On one hand, some have argued that they are illegitimate because the President has a constitutional

---

<sup>148</sup> For comprehensive histories of presidential signing statements, see PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* 199-230 (2002); CHRISTOPHER N. MAY, *PRESIDENTIAL DEFIANCE OF “UNCONSTITUTIONAL” LAWS: REVIVING THE ROYAL PREROGATIVE* 71-154 (1998).

<sup>149</sup> See, e.g., Bob Egelko, *How Bush Sidesteps Intent of Congress*, S.F. CHRON., May 7, 2006, at A1, available at 2006 WLNR 7874400; Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1, available at 2006 WLNR 7405669.

<sup>150</sup> See AM. BAR ASS’N, *TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE* (2006). The ABA Report itself has spawned much commentary. See, e.g., Editorial, *Read the Fine Print*, N.Y. TIMES, July 25, 2006, at A18, available at 2006 WLNR 12789590; Editorial, *Review and Outlook: The ABA’s Agenda*, WALL ST. J., July 31, 2006, at A10; Walter Dellinger, Op-Ed., *A Slip of the Pen*, N.Y. TIMES, July 31, 2006, at A17, available at 2006 WLNR 13174656.

<sup>151</sup> The hearings were held before the Senate Committee on the Judiciary on June 27, 2006. *Hearing on the Use of Presidential Signing Statements Before the S. Comm. on the Judiciary*, 109th Cong. (2006), available at <http://judiciary.senate.gov/hearing.cfm?id=1969>. The witness statements can be found at the Committee’s website. *Id.*

obligation to enforce laws.<sup>152</sup> If he deems a law unconstitutional, the Constitution provides for a veto and a corresponding mechanism for such veto to be overridden.<sup>153</sup> By signing a bill into law but saying that some of that law will not be enforced, the President avoids the veto override process.<sup>154</sup>

On the other side of the debate, there are those who argue that signing statements are generally legitimate.<sup>155</sup> For example, one might argue that the President has an obligation to use his independent constitutional judgment when deciding to sign a bill into law because he too takes an oath to support and defend the Constitution.<sup>156</sup> If he elects to sign a bill containing many provisions but believes that one portion of that bill is unconstitutional, he is performing a public service by making this position public. Moreover, signing statements provide courts, other government entities, and the general public with information concerning the President's overall views on the law he has signed. In other words, signing statements, it may be argued, increase transparency in government.

I do not take a position here concerning the merits of the various arguments in favor and against presidential signing statements. The significant feature of the Bush signing statements in particular is that they do not add to transparency in government. Rather, they are a further example of the administration's secrecy. Take for example the President's signing statement in connection with the so-called "McCain Amendment" banning torture and degrading

---

<sup>152</sup> For commentary critical of signing statements, see Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRES. STUD. Q. 515, 516 (2005) [hereinafter Cooper, *Edgar Allan Poe*]; John W. Dean, *The Problem with Presidential Signing Statements: Their Use and Misuse by the Bush Administration*, FINDLAW, Jan. 13, 2006, <http://writ.news.findlaw.com/dean/20060113.html>.

<sup>153</sup> See U.S. CONST. art. I, § 7, cl. 2.

<sup>154</sup> This strand of criticism has been enhanced because President Bush has vetoed only one bill. See Off. of the Clerk, U.S. House of Representatives, *Presidential Vetoes (1789 to Present)*, available at [http://clerk.house.gov/art\\_history/house\\_history/vetoes.html](http://clerk.house.gov/art_history/house_history/vetoes.html) (last visited Aug. 18, 2006). One needs to go back to the early days of the Republic to find a comparable record. The last President who served as long as President Bush and vetoed fewer bills was James Monroe. *Id.*

<sup>155</sup> For commentary generally favorable to the use of signing statements, see Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power* (U. Chi. Pub. Law and Legal Theory, Working Paper No. 133, 2006), available at [http://ssrn.com/abstract\\_id=922400](http://ssrn.com/abstract_id=922400); Douglas W. Kmiec, *It's Not Just Alito's Quandary: Reconciling Executive and Legislative Power*, FINDLAW, Jan. 16, 2006, [http://writ.news.findlaw.com/scripts/commentary/20060116\\_kmiec.html](http://writ.news.findlaw.com/scripts/commentary/20060116_kmiec.html).

<sup>156</sup> See U.S. CONST. art II, § 1, cl. 8.

treatment of prisoners held by the United States.<sup>157</sup> The President signed the bill containing this amendment into law, but he simultaneously issued a statement that read in relevant part as follows:

The executive branch shall construe [the amendment] in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of Congress and the President, evidenced in [the amendment], of protecting the American people from further terrorist attacks.<sup>158</sup>

I confess to having no firm understanding of what is meant by this statement. What exactly does the President mean when he directs the executive branch to construe the law “consistent with the limitations on the judicial power?” What exactly is an interpretation of the law that is “consistent with the constitutional authority of the President to supervise the unitary executive branch?” Far from increasing transparency in government, signing statements such as this one only serve to obscure the President’s position.<sup>159</sup> Thus, even if those who argue in favor of their use are correct concerning the ability of signing statements to enhance transparency in government, the Bush administration’s use of that device has fallen woefully short of the mark.<sup>160</sup> They tend to act more as a marquee

---

<sup>157</sup> The McCain Amendment was included as Title X in Division A of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, H.R. 2863, 109th Cong. (2006).

<sup>158</sup> See President’s Statement on the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and the Pandemic Influenza Act, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005).

<sup>159</sup> Indeed, to the extent such statements are capable of being understood, they appear to mean that the President will enforce the laws only to the extent he deems them constitutional in ways known only to him. In this regard, one can also consider the content of the President’s signing statements as another example of Bushian unilateralism. See *supra* Part III.A (discussing unilateralism).

<sup>160</sup> Other commentators have similarly suggested that the Bush administration’s signing statements are unclear. See, e.g., Cooper, *Edgar Allan Poe*, *supra* note 152, at 527 (“[o]ne of the problems [with the signing statements] is that the language in the statements has often been so broad that it is very difficult for anyone not trained in constitutional and administrative law to understand what is actually intended”); Article II and the Notice Question, <http://www.orinkerr.com/page/4> (June 27, 2006, 12:05 EST) (asking rhetorically “Does anyone actually know what [the McCain Amendment signing statement] means?” and noting that it seems to stand for the proposition that that the administration “won’t disclose precisely what” its views on executive power are); Posting of Laurence Tribe to Balkinization Blog, <http://balkin.blogspot.com> (Aug. 6, 2006, 20:00 EST) (noting that the content of President Bush’s signing statements are “much too protean to represent a useful

example of the first sub-attribute of the Bush administration's unilateral use of power: secrecy.

## 2. Intolerance of Criticism and Questioning

A second sub-attribute of the Bush administration's unilateralism is intolerance to criticism and questioning. This intolerance is widespread and takes many forms. For example, it has recently come to light that student groups opposed to the war in Iraq as well as the military's "don't ask, don't tell" policy have been subject to surveillance.<sup>161</sup> In this same vein, several administration officials have suggested that criticism of President Bush on issues such as terrorism or the war in Iraq was unpatriotic.<sup>162</sup> Indeed, Secretary of Defense Donald Rumsfeld has suggested that critics of the Bush administration are similar to political leaders who failed to confront Hitler in the 1930s.<sup>163</sup> But this general intolerance of criticism and questioning by the public at large may best be seen through the administration's attitude towards the press.<sup>164</sup> Not only has the administration been critical of the press in general, there have even been calls by those close to the administration to criminally prosecute members of the media who have disclosed

---

organizing principle for assessing the undoubtedly dangerous and inflated views of unilateral presidential power that have characterized much of what the Bush administration has done").

<sup>161</sup> See *Quick Takes: Shift Proposed for Upward Bound, Federal Inquiry at Yale, Rules on New Grant Programs, More Surveillance of Student Groups*, INSIDE HIGHER ED, July 5, 2006, <http://insidehighered.com/news/2006/07/05/qt> (reporting on results of Freedom of Information Act requests indicating such surveillance at "universities nationwide").

<sup>162</sup> See, e.g., Charles Babington, *Activists on Right, GOP Lawmakers Divided on Spying: Privacy Concerns, Terror Fight at Odds*, WASH. POST, Feb. 7, 2006, at A4 (quoting Attorney General Gonzales as telling Congress that "[o]ur enemy is listening. And [he] cannot help but wonder if they aren't . . . smiling at the prospect that we might now disclose even more, or perhaps even unilaterally disarm ourselves of a key tool in the war on terror"); Peter Baker, *Bush Sharpens His Attack on Democrats*, WASH. POST, June 29, 2006, at A10 (quoting President Bush as saying that critics of his Iraq policy were "waving the white flag of surrender").

<sup>163</sup> *Donald Rumsfeld Speaks to American Legionnaires in Salt Lake City* (CBS Evening News, Aug. 29, 2006) (reporting that Secretary Rumsfeld compared critics of the Bush administration "to those who tried to appease Hitler before World War II.").

<sup>164</sup> See, e.g., Baker, *supra* note 162 (discussing President Bush's critical attitude towards the press in connection with the disclosure of certain intelligence programs); Risen & Lichtblau, *supra* note 4 (discussing the administration's criticism of The New York Times for running a story concerning government monitoring of certain international financial transactions); Editorial, *U.S. Rule of Law*, MIAMI HERALD, June 15, 2006, at A22 (discussing exclusion of reporters from Guantanamo Bay Naval Station after three detainees committed suicide).

information concerning certain surveillance programs.<sup>165</sup> Taken together, such actions hamper the People's ability to obtain information and play a meaningful role in the governing process.<sup>166</sup>

However, the administration's intolerance is not confined to the general public. It also extends to other branches of the federal government. For example, the administration was reluctant to share information with Congress about the "terrorist surveillance programs" even after those programs had been disclosed.<sup>167</sup> As recently as July 2006, the Republican Chairperson of the House Intelligence Committee publicly complained that his committee had not been briefed concerning a certain still-secret surveillance program.<sup>168</sup> Disclosure to the committee took place only after the Chairperson learned of the program from an informant.<sup>169</sup> And finally, one can find evidence of this resistance to questioning in the President's signing statements discussed

---

<sup>165</sup> For general criticism of the press, see *supra* note 164 and accompanying text. For specific discussion of threats of criminal prosecution, see, for example, Howard Kurtz, *Piling on the New York Times with a Scoop*, WASH. POST, June 28, 2006, at C1 (discussing comments from Republican members of Congress and conservative talk show hosts). The controversy concerning the actions of the press in disclosing certain government programs also led to the preparation of a report by the Congressional Research Service on the issue. See JENNIFER K. ELSEA, PROTECTION OF NATIONAL SECURITY INFORMATION, CONG. RES. SERV. REP. RL33502 (2006) (on file with author), available at <http://www.fas.org/sgp/crs/secretary/RL33502.pdf>.

<sup>166</sup> Both of the examples discussed in the text could as easily have been classified as evidence of the administration's retributive streak, to which I turn in the next sub-part. There is clearly overlap between these two sub-attributes of Bushian executive authority. I elected to discuss these matters here because unlike pure retribution, these examples also illustrate a fundamental fear of opposition.

<sup>167</sup> See, e.g., Charles Babington & Carol D. Leonning, *Senate Rejects Wiretapping Probe*, WASH. POST, Feb. 17, 2006, at A6 (discussing Bush administration efforts to "derail" investigations concerning warrantless wiretapping); Dan Eggen, *Gonzales Defends Surveillance; Senators from Both Parties Challenge Attorney General on Program*, WASH. POST, Feb. 7, 2006, at A1 (noting that while testifying about the warrantless wiretapping program, Attorney General Gonzales "refus[ed] to answer dozens of questions"); Carl Hulse & Jim Rutenberg, *Specter's Uneasy Relationship with White House is Revealed in a Letter to Cheney*, N.Y. TIMES, June 8, 2006, at A16 (discussing White House efforts to keep Congress from investigating the participation of United States telephone companies in the NSA's data-mining operations); Eric Lichtblau, *Panel Rebuffed on Documents on U.S. Spying*, N.Y. TIMES, Feb. 2, 2006, at A1 (discussing the administration's refusal to provide certain documents concerning the warrantless wiretapping program to Senate oversight committees); Eric Lichtblau, *Gonzales Suggests Legal Basis for Domestic Eavesdropping*, N.Y. TIMES, Apr. 7, 2006, at A23 (discussing comments by Republican House Judiciary Committee Chairperson that the administration was "stonewalling" congressional efforts to obtain information on warrantless wiretapping).

<sup>168</sup> See *supra* note 146 (providing citations supporting this assertion).

<sup>169</sup> *Id.*

above.<sup>170</sup> Many of them concern objections even to providing information to Congress in connection with various programs.<sup>171</sup>

The intolerance to criticism and questioning extends into the executive branch itself. For example, when the administration was considering the use of certain interrogation techniques, a senior Department of Defense lawyer expressed concern.<sup>172</sup> Evidently such frank criticism, even behind closed doors, was not appreciated, because the final version of the report was issued without circulating it to in-house lawyers such as the person who complained.<sup>173</sup> He “learned that a final version had been issued only after the Abu Ghraib [Iraqi prison] scandal broke.”<sup>174</sup> In a similar incident, it appears that President Bush effectively ended an internal investigation by the Office of Professional Responsibility in the Department of Justice into the role played by department lawyers in certain NSA surveillance programs when he refused to give security clearances to the investigators.<sup>175</sup>

Such a unilateral, secretive, and overly sensitive Article II Executive imperils two of the foundational principles. First, by limiting access to information by other political centers of

---

<sup>170</sup> See *supra* Part III.B.

<sup>171</sup> See, e.g., President’s Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 425 (Mar. 9, 2006) (“The executive branch shall construe the provisions of [the Act] that call for furnishing information to entities outside the executive branch . . . in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties.”); President’s Statement on Signing the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1800, 1800-01 (Nov. 30, 2005) (“The executive branch shall construe provisions of the [Act] that purport to mandate or regulate submission of information to the Congress, other entities outside the executive branch, or the public, in a manner consistent with the President’s constitutional authority to withhold information that could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties.”); President’s Statement on Signing the Animal Disease Risk Assessment, Prevention, and Control Act of 2001, 1 PUB. PAPERS 575, 575 (May 24, 2001) (“Section 3 of the bill requires the Secretary of Agriculture to submit to certain committees and subcommittees of the Congress a preliminary report concerning [certain matters]. Section 3 will be interpreted in a manner consistent with the constitutional authority of the President to recommend to the consideration of the Congress such measures as the President shall judge necessary and expedient.”).

<sup>172</sup> See Tim Golden, *Senior Lawyer at Pentagon Broke Ranks on Detainees*, N.Y. TIMES, Feb. 20, 2006, at A8.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> See Dan Eggen, *Bush Thwarted Probe into NSA Wiretapping*, WASH. POST, July 19, 2006, at A4.

authority, this aspect of Bush unilateralism impinges on the ability of other political actors to provide a meaningful check on the Executive. How can Congress provide oversight when it is denied information, sometimes even about the existence of a program?<sup>176</sup> Similarly, the People are hampered in their ability to participate in the process because, in its fear of criticism, the administration restricts access to the information necessary for such meaningful participation. Thus, when confronting the broad-based assertions of power currently at play, a court should consider this sub-attribute in addition to the more obvious issues concerning unilateralism or secrecy.

### 3. Retribution

Finally, the Bush administration's conception of executive authority contains important retributive elements. Those who disagree with its positions—whether inside the government or out—are subject to punishment in various forms. The danger of this retributive streak is that it will reduce the willingness of the general public and/or of other political centers of authority to play a meaningful role in the constitutional system. A few examples are sufficient to illustrate this sub-attribute of Bushian executive authority.

Perhaps the most obvious example of retribution is the saga surrounding Ambassador Joseph Wilson and his wife Valerie Plame. As is commonly known now, in his January 2003, State of the Union address, President Bush referred to a purported attempt by al Qaeda to purchase uranium from Niger.<sup>177</sup> Eventually doubt was cast on this assertion in sources including an op-ed piece by former Ambassador Wilson.<sup>178</sup> The Bush administration was not happy about Wilson's public comments and, it appears by all accounts, took steps at the

---

<sup>176</sup> Similarly, how can the internal operations of the various components of the executive branch provide a meaningful internal check on abuse when information is restricted and questioning is discouraged? This point is important because several scholars have recently suggested that an important check on unilateral or excessive presidential power can be found within Article II's various structures. *See, e.g.*, Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2316-18 (2006) [hereinafter Katyal, *Separation of Powers*]; Pillard, *supra* note 147, at 1297.

<sup>177</sup> *See Bush Engulfed in CIA Leak Claims*, CNN.COM, Sept. 30, 2003, <http://cnn.com/2003/ALLPOLITICS/09/29/wilson.cia.intl/index.html> [hereinafter *Bush Engulfed*] (describing background of what was to become the saga concerning the disclosure of Plame's identity).

<sup>178</sup> *See* Joseph C. Wilson, IV, *What I Didn't Find in Africa*, N.Y. TIMES, July 6, 2003, § 4, at 9.

highest levels to punish him.<sup>179</sup> Those efforts allegedly included outing Ambassador Wilson's wife, an agent for the CIA.<sup>180</sup> The truth of what happened concerning Ms. Plame is by no means clear and unfortunately may never be known. What is not in doubt, however, is that the administration was intent on discrediting a critic.

This same retributive tendency can be seen in various actions taken with respect to internal executive branch employees who acted in ways at odds with the administration's views. For example, an employee of a CIA contractor claimed she was fired over a comment made on a blog that waterboarding, a type of interrogation technique, was torture.<sup>181</sup> Similarly, Newsweek magazine has reported that lawyers in the administration who questioned unilateral executive actions "did so at their peril" because they were "ostracized" and "some were denied promotions."<sup>182</sup>

Finally, the press is also included in the retributive efforts of the Bush administration. When faced with leaks of classified information, the Bush administration threatened to prosecute journalists for espionage.<sup>183</sup> In addition, there have been several attempts to obtain reporters' phone records in investigations concerning leaks about secret government operations.<sup>184</sup> The end result of these efforts is that fear of retribution is likely to reduce participation in the political

---

<sup>179</sup> See, e.g., *Bush Engulfed*, *supra* note 177; *CIA Leak Probe Looks at Cheney Writings*, CNN.COM, May 13, 2006, <http://www.cnn.com/2006/LAW/05/13/cia.leak/index.html>. See also Complaint at paras. 18-23, 33-34, *Wilson v. Libby*, No. 06-CV-01258 (D.D.C. filed July 13, 2006), available at <http://www.expose-the-war-profiteers.org/archive/legal/2006/20060713.pdf> [hereinafter *Wilson Complaint*].

<sup>180</sup> See generally *Wilson Complaint*, *supra* note 179, at paras. 34-38.

<sup>181</sup> Mark Mazzetti, *C.I.A. Worker Says Message on Torture Got Her Fired*, N.Y. TIMES, July 22, 2006, at A11.

<sup>182</sup> Daniel Klaidman, Stuart Taylor Jr. & Evan Thomas, *Palace Revolt*, NEWSWEEK, Feb. 6, 2006, at 34.

<sup>183</sup> See, e.g., Adam Liptak, *Justice Dept. is Criticized by Ex-Official on Subpoenas*, N.Y. TIMES, June 1, 2006, at A16 (noting that Attorney General Gonzales "hinted" that the government might decide to prosecute journalists for "publishing classified information"); Walter Pincus, *Senator May Seek Tougher Law on Leaks*, WASH. POST, Feb. 17, 2006, at A4 (discussing attempts to amend federal law to make it easier to prosecute journalists for publishing classified information); Walter Pincus, *Silence Angers Judiciary Panel*, WASH. POST, June 7, 2006, at A5 (discussing testimony of Department of Justice official refusing to rule out prosecution of journalists for publishing classified information).

<sup>184</sup> See, e.g., Drew, *supra* note 8 (describing investigative efforts focused on journalists, including attempts to obtain and review the papers of deceased investigative reporter Jack Anderson).

process that might otherwise act as a counterbalance to an increase in federal executive authority.

This Part has described and illustrated the significant attributes of the Bushian vision of executive power under the Constitution. That vision has at its core a strong commitment to unilateralism. It envisions a president who may act largely on his or her own authority along a broad spectrum of topics. However, the Bushian vision also has three distinct sub-attributes, each of which was described in detail: a commitment to secrecy; intolerance to questioning or criticism; and a tendency to punish those who do engage in questioning or criticism. Part IV applies the structural equilibrium theory set out in Part II to the October 2005 Term of the United States Supreme Court.

#### IV. AN APPLICATION OF THEORY: THE OCTOBER 2005 TERM

Part II argued that courts should act as agents of structural equilibrium when faced with broad constitutionally envelope-pushing extra-constitutional change. Part III described the particular attributes of the Bush administration's envelope-pushing view of the scope of executive authority under Article II. The core principle of that view is executive unilateralism, with sub-themes of a lack of transparency in the exercise of power, intolerance to criticism and questioning, and retribution against internal and external critics. The courts' challenge when responding to this particular extra-constitutional change is to ensure that the actions of another center of political authority—here the federal executive—do not undermine the constitutional foundational principles: (1) maintenance of effective centers of political authority both vertically and horizontally; (2) preservation of a meaningful role for the People in the political process; and (3) ensuring that the resulting constitutional structure of government is capable of functioning.<sup>185</sup>

The key to the successful implementation of the structural equilibrium approach is for the judiciary to take a broad-spectrum approach when confronted with a wide-ranging position of another center of political authority. It does not do for the courts to respond piecemeal to a wide-ranging approach of another constitutional actor because the foundational

---

<sup>185</sup> These three foundational principles are discussed in depth above. See *supra* Part II.B.

principles may be imperiled even if each individual envelope-pushing action is constitutionally appropriate. In other words, the sum of the constitutional change may be greater than its individual elements. Yet, at the same time the courts must be constantly vigilant that they do not use the power of judicial review in such a way that the foundational principles are undermined as a result; the cure should not be worse than the disease.

In this Part, I apply the structural equilibrium approach by evaluating matters the Supreme Court considered during its October 2005 Term. I do not suggest that the Court actually used the approach; in other words, I am not making a descriptive claim. Rather, I use the Term normatively to suggest how the Court should have approached various matters under the structural equilibrium approach given the Bush administration's particular view of Article II authority. In some cases, the actual results the Court reached remain the same, while in others I suggest the results should be different in important respects.

The balance of this Part is divided into three sections. First, I consider cases that directly implicate the first foundational principle dealing with the horizontal and vertical centers of political authority. In this area, the one most obviously implicated in the Bush administration's assertions of executive authority, I suggest that the Court's actual decisions accord well with the structural equilibrium approach.<sup>186</sup> Second, I consider cases that less obviously deal with the Bush administration's particular executive power push. This group of cases, instead, deals with matters that are critical to maintaining a *meaningful* role for the other power centers as well as the People. In this area, some of the Court's results accord with the structural equilibrium theory, while others do not.<sup>187</sup> Finally, I address a series of cases that more directly focus on the Bushian attributes of intolerance and retribution. In this area, I conclude that the Court's decisions were failures under the structural equilibrium theory.<sup>188</sup> And as to each of these matters, it is important to ensure that the third foundational principle is maintained. That is, courts must

---

<sup>186</sup> See *infra* Part IV.A.

<sup>187</sup> See *infra* Part IV.B.

<sup>188</sup> See *infra* Part IV.C.

always be cognizant of the need to maintain a functioning system of constitutional government.

A. *Maintaining Horizontal and Vertical Centers of Political Authority*

The defining foundational principle is the existence and maintenance of independent centers of political authority at the state and federal levels. These vertical and horizontal centers must be meaningfully capable of serving their function of checking the accretion of power in any single center. A court faced with a broad-based attempt by any given center should ensure that this foundational principle is protected.

There are many ways in which the judiciary can fulfill this mission. At times it may be called upon to exercise the strong version of *Marbury v. Madison* in which the power to say “what the law is” is exercised to its fullest.<sup>189</sup> Of course, the danger attendant to this approach is the risk that a court may undermine the foundational principle it seeks to protect by empowering the judicial branch with too much authority. Thus, courts will at times need to use more subtle forms of judicial review to protect the foundational principles most effectively. Two illustrations of such subtle review are channeling and signaling.

When a court uses a channeling form of judicial review it re-directs the matter in question to other centers of political authority. Thus, if Center A takes certain actions that undercut the ability of Center B to participate in constitutional governance, the courts may rule in a manner that channels the dispute back into the constitutional process, so that the other centers of authority have a meaningful opportunity to act. The end result may not be altered, because the originally excluded centers of authority might reach the same conclusion as did the unilaterally operating center. However, that fact should not obscure the importance of the channeling function.<sup>190</sup> It ensures that the first foundational principle is maintained.<sup>191</sup>

---

<sup>189</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). I also discussed *Marbury* earlier. See *supra* Part II.B.1.b.

<sup>190</sup> As some of the examples that follow demonstrate, channeling may also serve to support the other foundational principles. For example, an issue may be channeled to a political center of authority in such a way that the People’s role in the governing process is protected or enhanced. Moreover, the channeling may be structured in order to maintain the ultimate functioning of the government. To the

Signaling operates in a different way. Here, a court resolves a given case without reaching a controversial issue.<sup>192</sup> However, along the way the court provides clues of a sort to the other centers of authority about the issue that was avoided. In this way, the court avoids engaging in the strong version of judicial review but indicates to the other power centers that there could be issues on the horizon if certain conditions arise. Merely by acting in this way, the judiciary may be able to best preserve the foundational principles.

One can see in the October 2005 Term examples of both channeling and signaling in response to the Bush administration's broad assertions of unilateral executive power. I discuss three examples below.

---

extent that a channeling decision would make the government non-functional, the court should not engage in such a process.

<sup>191</sup> As I have explained, my effort in this Article is not descriptive even as to the October 2005 Term and I certainly do not purport to prove that the Court has followed a structural equilibrium approach in other historical eras. However, some recent scholarship has suggested that in times of crisis the Supreme Court has employed an institutional, process-based approach in which it channels decisions concerning the balance between liberty and security into the political process. *See, e.g.*, Lee Epstein, Daniel E. Ho, Gary King & Jeffrey A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 74-77 (2005); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES IN LAW 1, 1-2 (2004), available at <http://www.bepress.com/til/default/vol5/iss1/art1>; Kinkopf, *supra* note 45, at 1181-94; Trevor W. Morrison, Hamdi's *Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411, 411-16 (2006). Such actions would be consistent with the structural equilibrium model to the extent they were taken during a time of actual or potential extra-constitutional change.

<sup>192</sup> For example, a court might interpret a statute to avoid a constitutional question or the court might dismiss a case for lack of standing. This type of approach to judging in which courts employ various elements of the avoidance canon is controversial and has sparked much debate. *See generally* LISA A. KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF THE LAW (2001); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000). The debate over constitutional avoidance principles has also recently expanded to include whether the doctrine has any legitimate application to executive and legislative action. *See generally* William K. Kelly, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001); Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006). My support of a signaling function as discussed in the text suggests that the judicial use of the avoidance canon when combined with signals to other centers of political authority is the best way for courts to proceed *at times*. I discuss one such example in this sub-part. *See infra* Part IV.A.3. At other times, however, maintenance of the foundational principles suggests that the courts not employ the avoidance canon. *See infra* Parts IV.B and IV.C (discussing examples that fall into this category). This area reflects, then, the context-specific nature of the structural equilibrium approach I advocate.

### 1. Horizontal Channeling: *Hamdan v. Rumsfeld*

On the last day on which decisions were announced for the October 2005 Term, the Supreme Court issued its opinion in *Hamdan v. Rumsfeld*.<sup>193</sup> The lasting import of that decision will probably not be known for some time. In this sub-part, I explore the decision not to situate it in constitutional doctrine. Instead, I use the decision as an example of how channeling may be employed as part of the structural equilibrium approach. This discussion may have broader implications, however, because it suggests that *Hamdan* is a more judicially modest decision than many observers believe.

Salim Ahmed Hamdan, a citizen of Yemen, was captured by local militia forces in Afghanistan and, in June 2002, turned over to the United States.<sup>194</sup> He was transported to the United States Naval Base at Guantanamo Bay, Cuba and eventually designated as eligible for trial before a military commission.<sup>195</sup> Thereafter, Hamdan sought a writ of habeas corpus from a federal court arguing that the military commissions as constituted lacked the authority to try him.<sup>196</sup> As described above, the military commissions were almost exclusively of the Bush administration's creation.<sup>197</sup>

Eventually the case reached the Supreme Court. The Court ruled in favor of Hamdan, holding that the military commissions under which he was to be tried were unlawful.<sup>198</sup>

---

<sup>193</sup> 126 S. Ct. 2749 (2006).

<sup>194</sup> *Id.* at 2759.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See *supra* Part III.A.1 (discussing the Bush administration's various unilateral actions concerning enemy combatants).

<sup>198</sup> *Hamdan* is a complex decision with multiple holdings. Indeed, six of the eight participating justices wrote opinions. See *Hamdan*, 126 S. Ct. at 2758 (listing Justices writing opinions). I have in no way sought to discuss these opinions in the depth they deserve. As I explain in the text, I use the decision as an illustration of the structural equilibrium approach. Nevertheless, it is possible to provide the following high-level summary. Five members of the Court (Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer) agreed that: (1) the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2739, did not strip the Court of appellate jurisdiction to consider Hamdan's appeal, *Hamdan*, 126 S. Ct. at 2762-69; (2) the federal courts should not abstain from considering Hamdan's case, *id.* at 2769-72; (3) neither the DTA nor the AUMF expressly authorized the military commission at issue, *id.* at 2772-75; and (4) the military commission at issue was unlawful because its structure and procedures violated both the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions. *Id.* at 2786-98. Four Justices would have held that the conspiracy charge leveled against Hamdan was not an offense triable by a military commission. *Id.* at 2775-86. Justice Kennedy did not find it necessary to reach this issue. *Id.* at 2808-09.

What is critical for purposes of this Article is the *way* in which the Court reached its fundamental conclusion concerning illegality.

When confronted with the serious questions in *Hamdan* going to the very heart of the American constitutional order, the Court could have elected to exercise the strong form of *Marbury's* judicial review. Thus, the Court could have squarely held that the Constitution did not allow the Executive to unilaterally convene military commissions. Such a ruling would have locked in an interpretation of the Constitution that was highly controversial, with the effect that the matter was removed from political debate.<sup>199</sup> This form of decision would, then, have greatly enhanced the power of the judicial branch at the expense of the Article II Executive.

Instead, the Court took a more measured approach that is entirely consistent with the structural equilibrium theory. It channeled debate over the structure of the military commissions into the political process. For example, the Court concluded that Congress had already established the form and fundamental procedures of the type of military commission at issue.<sup>200</sup> Congress could elect to change those procedures if convinced by the President that such a change was necessary.<sup>201</sup>

---

<sup>199</sup> Academic commentators have vigorously debated the President's unilateral authority to constitute military commissions. Some scholars strongly contend that the President lacks such authority. See generally Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1260 (2002) ("The Constitution requires as well that, absent circumstances so exigent as demonstrably to rule out resort to Congress, that lawmaking body and not the Commander in Chief be the authorizing agent and the architect of the tribunals themselves."). Others equally vigorously argue that the President's orders concerning military commissions were constitutional. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249, 252-54 (2002). Two Members of the Court have also strongly intimated that the President has the unilateral constitutional authority to constitute the military commissions at issue in *Hamdan*. See *Hamdan*, 126 S. Ct. at 2826 n.2 (Thomas, J., dissenting, joined by Scalia, J.) ("Although the President very well may have inherent authority to try unlawful combatants for violations of the law of war before military commissions, we need not decide that question because Congress has authorized the President to do so." (citations omitted)). Justice Alito, the other *Hamdan* dissenter, declined to join the portion of Justice Thomas's dissent in which he suggested some support for inherent presidential authority because Justice Alito found it "unnecessary to reach" the issue. *Id.* at 2849-50 (Alito, J., dissenting).

<sup>200</sup> See, e.g., *Hamdan*, 126 S. Ct. at 2787-93. As Justice Stevens put it early in his majority opinion, the authority to constitute military commissions to try offences "can derive only from the powers granted jointly to the President and Congress in time of war." *Id.* at 2773 (citations omitted).

<sup>201</sup> The same can be said with respect to the Court's conclusion that the President's unilaterally constituted military commissions violated the Geneva Conventions. See *id.* at 2793-98. Congress could alter that holding by legislation

This channeling of debate into the political process that the unilateral executive action had avoided was made more explicit in Justice Breyer's concurring opinion. He wrote:

The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check." Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.<sup>202</sup>

One can also see at work in *Hamdan* a concern for another foundational principle, namely that the constitutional structure must be capable of effectively carrying out the responsibilities of government. The Court made clear that its decision was based on the absence of a practical need;<sup>203</sup> in other words, the emergency of September 11th or the exigencies of a battlefield were too far removed from the situation in which the President unilaterally elected to constitute the military commissions at issue. Justice Kennedy spent a good portion of his concurrence making the point that there was no apparent necessity for taking this particular unilateral executive action.<sup>204</sup> The implication, of course, is that in the event of an emergency or in connection with battlefield captures, the President's powers would likely be more expansive. It is true that it was the Court that made this determination concerning non-emergency conditions. However, as discussed in this sub-part, it did so in a modest manner and with due regard for the functionality of government.<sup>205</sup>

---

under the "later-in-time" rule giving later enacted statutes precedence over treaties as the law of the land. See, e.g., *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2689 (2006).

<sup>202</sup> *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring) (citations omitted). Justice Kennedy made a similar point in his concurring opinion. See *id.* at 2799-800 (Kennedy, J., concurring).

<sup>203</sup> See, e.g., *id.* at 2797-98.

<sup>204</sup> See *id.* at 2804-08 (Kennedy, J., concurring).

<sup>205</sup> Of course, exactly how modest the Court was in *Hamdan* is a matter open to debate. For example, Professor Cass Sunstein has recently written that in *Hamdan*, the Court "went well beyond anything [it] has done in the past." Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond* 4 (U. Chi. Pub. Law and Legal Theory, Working Paper No. 134, 2006), available at [http://ssrn.com/abstract\\_id=922406](http://ssrn.com/abstract_id=922406). Nevertheless, Professor Sunstein also identifies as *Hamdan's* central theme a concept entirely consistent with my analysis. He notes that *Hamdan's* core holding "can be captured in a single idea: If the President seeks to depart from standard adjudicative forms through the use of military tribunals, the departure must be authorized by an explicit and focused decision from the national legislature." *Id.* (italics removed).

The end result is that the Court's decision in *Hamdan* is a near-perfect example of the use of the structural equilibrium principle to preserve foundational principles.<sup>206</sup> The Court channeled debate into the constitutionally established political process, avoided aggrandizement of the judicial branch, and respected the need for effective government.<sup>207</sup> Post-*Hamdan* experience suggests that the Court was successful in its efforts. In late 2006, Congress passed and the President signed into law the Military Commissions Act of 2006.<sup>208</sup> This Act cures the separation of powers issues vetted in *Hamdan* through explicit legislative action in place of unilateral executive fiat.<sup>209</sup> Whether or not the commissions authorized in this statute run afoul of other constitutional provisions is a question beyond the scope of this Article. What is certain, however, is that the democracy-deficit infecting the President's unilateral attempt to establish military commissions has been cured.<sup>210</sup>

---

<sup>206</sup> One could also include as horizontal channeling the Court's holding concerning the jurisdiction stripping effect of certain provisions of the DTA. The Court did not address whether such stripping of the Court's appellate jurisdiction would offend the Constitution. *Hamdan*, 126 S. Ct. at 2764. Instead, it held, using certain principles of statutory construction, that the DTA did not in fact strip the Court's appellate jurisdiction. *Id.* at 2764-69. Thus, the Court channeled the issue into the political process in which Congress and the President could enact another provision that clearly indicated an intention to strip the Court of jurisdiction in a later case. In this way the Court preserved the foundational principle concerning separation of powers without making a constitutional ruling that could have led to an unwarranted increase in its own authority at the expense of another horizontal power center.

<sup>207</sup> The channeling aspect of *Hamdan* was recognized in media coverage of the decision. See, e.g., Editorial, *A Victory for Law*, WASH. POST, June 30, 2006, at A26; David S. Broder, *The Court Hands Congress an Opportunity*, WASH. POST, July 6, 2006, at A21; Bravin, *supra* note 98. Of course, there was also disagreement with the assessment that the Court's decision was modest from a separation of powers perspective. See, e.g., Editorial, *After Hamdan*, WALL ST. J., July 3, 2006, at A10 ("The Court's opinion masks its own power grab by asserting that the executive must defer more to Congress in designing military commissions."); Adam Liptak, *The Court Enters the War, Loudly*, N.Y. TIMES, July 2, 2006, § 4, at 1 (quoting law Professor John Yoo as reading *Hamdan* as an illustration of the Court "attempting to suppress creative thinking[,] and as the Court's "declar[ation] that it's going to be very intrusive in the war on terror").

<sup>208</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

<sup>209</sup> See, e.g., *id.* § 3 (explicitly authorizing military commissions); *id.* § 4 (describing military commission authorized under the act including who would be eligible for trial before the commissions as well as the offenses triable).

<sup>210</sup> As of this writing, the Military Commissions Act of 2006 has also had a direct impact on Mr. Hamdan, whose case was the catalyst for congressional action. In December of 2006, United States District Court Judge John Robertson dismissed Mr. Hamdan's petition for habeas corpus based on a provision in the Act that stripped courts of jurisdiction to consider such petitions. See *Hamdan v. Rumsfeld*, No. 04-1519, 2006 U.S. Dist. LEXIS 89933, at \*31 (D.D.C. Dec. 13, 2006). It seems almost certain that this litigation will continue as the constitutionality of the jurisdiction-stripping

Of course, in the long run the success of such channeling efforts at preserving constitutional decision making processes ultimately depends on the ability and willingness of Congress to live up to its constitutional role. It is by no means clear that Congress will do so across the board,<sup>211</sup> but that is a discussion for another day.

## 2. Horizontal *and* Vertical Channeling: *Gonzales v. Oregon*

The October 2005 Term also provides an example of vertical channeling. As discussed above, in November 2001, Attorney General John Ashcroft issued the Ashcroft Directive, making it unlawful under the Controlled Substances Act for doctors to prescribe drugs that could lawfully be prescribed under Oregon law to assist in an ill patient's suicide.<sup>212</sup>

Oregon and several affected individuals sued, claiming that the Ashcroft Directive exceeded the Attorney General's authority. That case eventually reached the Supreme Court, which ruled in favor of Oregon.<sup>213</sup> The Court's opinion is heavily focused on familiar administrative law concepts, such as the deference owed to administrative agency interpretations of statutes.<sup>214</sup> It is certainly important for that reason, as well as for the quite practical impact the decision had on the citizens of Oregon. However, it is also an example of the Court's use of channeling a unilateral executive action back into the political process.

First, the decision is another example of horizontal channeling. The Court's opinion is based on its interpretation of the Controlled Substances Act.<sup>215</sup> Thus, as with much of

---

portion of the Act is considered by the United States Court of Appeals for the District of Columbia Circuit and, perhaps, even by the United States Supreme Court.

<sup>211</sup> Academic commentators have criticized Congress for being too complacent in asserting itself as a political institution capable of checking the executive branch. See, e.g., Katyal, *Separation of Powers*, *supra* note 176, at 2319-22; Levinson & Pildes, *supra* note 61, at 2351-56.

<sup>212</sup> See *supra* Part III.A.3 (discussing the Ashcroft Directive as an example of Bush administration unilateralism).

<sup>213</sup> *Gonzales v. Oregon*, 126 S. Ct. 904, 925-26 (2006).

<sup>214</sup> *Id.* at 916-22 (discussing whether deference to the Attorney General's interpretive rule was appropriate under *Chevron U.S.A. Inc. v. Nat. Res. Def. Counsel, Inc.*, 467 U.S. 837 (1984) or *United States v. Mead Corp.*, 533 U.S. 218 (2001)).

<sup>215</sup> See *id.* at 925 (summarizing the Court's holding by noting that "[t]he text and structure of the [Controlled Substances Act] show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it").

what was discussed concerning *Hamdan*, Congress could change the result in *Gonzales v. Oregon* if it elected to do so.

The decision also reflects a form of channeling to the vertical power centers the states occupy. The Court reinforced the abilities of states to act not just as laboratories—to paraphrase Justice Brandeis<sup>216</sup>—but also as meaningful counterbalances to unilateral action by the federal government or any individual branch. Moreover, the decision supports the foundational principle concerning the People’s power to participate in government. After all, the impetus for the Oregon Death with Dignity Act was a popular referendum.<sup>217</sup> As such, the rejection of unilateral federal executive action not only empowered Oregon the state, it also empowered Oregon’s citizens. In short, *Gonzales v. Oregon* is a decision that fits comfortably within the structural equilibrium approach on a number of levels.

### 3. Horizontal Signaling: *Padilla v. Rumsfeld*

The Supreme Court also utilized signaling during the October 2005 Term in a manner consistent with the structural equilibrium approach. This tactic is apparent in the Court’s action concerning Jose Padilla. Mr. Padilla is a United States citizen who was detained on May 8, 2002, by civilian law enforcement personnel after he deplaned at Chicago’s O’Hare Airport.<sup>218</sup> Padilla was then transported to New York City, where he was held in a law enforcement detention facility and appointed counsel.<sup>219</sup> On June 9, 2002, President Bush designated Mr. Padilla as an enemy combatant and ordered Secretary of Defense Rumsfeld to take him into military custody.<sup>220</sup> The Secretary complied and transferred Mr. Padilla from New York City to a military facility in South Carolina.<sup>221</sup>

---

<sup>216</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>217</sup> *Gonzales*, 126 S. Ct. at 911.

<sup>218</sup> *Padilla v. Rumsfeld*, 542 U.S. 426, 456 (2004) (Stevens, J., dissenting). Padilla’s detention was pursuant to a material witness warrant. *Id.* In other words, he was originally taken into custody because the government had established to a judge’s satisfaction that Padilla’s “testimony . . . [was] material in a criminal proceeding, and . . . that it may become impracticable to secure the presence of the person by subpoena . . .” 18 U.S.C. § 3144 (2000).

<sup>219</sup> *Padilla*, 542 U.S. at 456 (Stevens, J., dissenting).

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 456-57.

There was much litigation concerning Mr. Padilla's detention. The United States Court of Appeals for the Second Circuit ruled in 2003 that Mr. Padilla's petition for a writ of habeas corpus should be granted.<sup>222</sup> The Supreme Court reversed that determination in a 5-4 decision, ultimately concluding that the Southern District of New York was not the proper forum to consider Padilla's petition.<sup>223</sup>

Padilla began his habeas corpus litigation again in the District of South Carolina. That court granted Padilla's petition.<sup>224</sup> The government appealed and the United States Court of Appeals for the Fourth Circuit reversed the district court's granting of the petition.<sup>225</sup> In a strongly pro-executive power decision, the court held that the AUMF authorized the President to detain and hold as an enemy combatant an American citizen captured on American soil.<sup>226</sup> Mr. Padilla sought a writ of certiorari from the Supreme Court.<sup>227</sup>

At this point, things took a rather remarkable turn. While the Supreme Court was considering Padilla's request to hear his appeal, the government filed a motion with the Fourth Circuit to vacate the court's pro-government opinion and to allow it to transfer Mr. Padilla to civilian law enforcement officials in the Southern District of Florida.<sup>228</sup> On the same day that the government made these requests, an indictment of Padilla in the Southern District of Florida was unsealed.<sup>229</sup> That indictment made no mention of the various terrorism-related allegations that purportedly formed the basis of the President's decision to designate Padilla as an enemy combatant in the first place.<sup>230</sup>

In a strongly worded opinion, the Fourth Circuit denied the government's request to transfer Padilla and withdraw the opinion.<sup>231</sup> At the core of the court's concern was the

---

<sup>222</sup> *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004).

<sup>223</sup> *Padilla*, 542 U.S. at 451.

<sup>224</sup> *Padilla v. Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005).

<sup>225</sup> *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

<sup>226</sup> *Id.* at 389.

<sup>227</sup> *See Padilla v. Hanft*, 126 S. Ct. 1649 (2006).

<sup>228</sup> *Padilla v. Hanft*, 432 F.3d 582, 584 (4th Cir. 2005).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> The following is an example of the court's forceful opinion:

[T]he government's actions since this court's decision issued on September 9, culminating in and including its urging that our opinion be withdrawn,

appearance that the government was seeking to avoid Supreme Court review of the Fourth Circuit's decision.<sup>232</sup> The court at least implicitly recognized the government's action as a species of unilateralism.

The Supreme Court once again faced a decision as to how to respond to an action by the executive branch that threatened the foundational principles. The Fourth Circuit decision denying Padilla's petition was favorable to unilateral executive action, yet its decision concerning the government's motion to transfer Padilla was confrontational. The Supreme Court's ultimate resolution of the Padilla quagmire is an excellent example of protecting foundational principles through the modest use of judicial power.

First, the Court reversed the Fourth Circuit's refusal to transfer Padilla to civilian custody.<sup>233</sup> In this way, the Court avoided a needless confrontation with the executive as well as any possibility of aggrandizing the judicial branch. Yet, the Court still needed to address Padilla's pending request that it review the Fourth Circuit's original decision denying his petition for a writ of habeas corpus. The Court denied the writ.<sup>234</sup>

Significantly, however, Justice Kennedy, joined by Chief Justice Roberts and Justice Stevens, issued a rare opinion concurring in the denial of certiorari.<sup>235</sup> This opinion is a classic signaling device. In it, three Justices from across the Court's perceived political spectrum indicated to the executive branch that the judiciary will be monitoring the actions of the

---

together with the timing of these actions in relation both to the period for which Padilla has already been held and to the government's scheduled response to Padilla's certiorari petition in the Supreme Court, have given rise to at least an appearance that the purpose of these actions may be to avoid consideration of our decision by the Supreme Court.

*Id.* at 585.

<sup>232</sup> *Id.*

<sup>233</sup> Hanft v. Padilla, 126 S. Ct. 978 (2006). As of the writing of this Article, it is unclear how Mr. Padilla's case will ultimately be resolved. At an early hearing in the case, United States District Judge Marcia Cooke expressed some initial skepticism about the government's case, calling it "light on facts." See Vanessa Blum, *Judge Orders Details on Padilla*, S. FLA. SUN-SENTINEL, June 21, 2006, available at 2006 WLNR 10684779. Thereafter, Judge Cooke dismissed several of the counts on which Mr. Padilla was indicted. See Omnibus Order at 1, United States v. Padilla, No. 04-CR-60001 (S.D. Fla. Aug. 18, 2006).

<sup>234</sup> Padilla v. Hanft, 126 S. Ct. 1649 (2006).

<sup>235</sup> *Id.* at 1649-50.

executive in the future.<sup>236</sup> Thus, the Court was able to avoid making a strong *Marbury* judicial review decision on a fundamental constitutional question while at the same time taking a modest action designed to preserve a foundational principle. Such signaling is even more effective when combined with the channeling actions I have also discussed.

In sum, the October 2005 Term provides excellent examples of how courts could apply the structural equilibrium approach in the context of the first foundational principle. These examples also demonstrate the ways in which it is possible for a court to preserve foundational principles without undermining the equally important need to maintain a functioning government. But the examples discussed in this sub-part all raised the separation of powers concern explicitly. In order to carry out the role of agents of structural equilibrium, courts must look more broadly than the specific issues presented in individual cases. Again using examples from the October 2005 Term, the following two sub-parts illustrate how this aspect of the approach I advocate would work.

### B. *Strengthening the Political Process*

As described above, the Court's October 2005 Term was illustrative of the successful implementation of the structural equilibrium approach with respect to the maintenance of horizontal and vertical centers of political authority. By and large, the situations in which the Court acted consistently with this principle were obvious in their threat to the constitutional value at stake. In other words, each situation starkly presented a move by the federal executive authority to increase its power. To succeed as an agent of structural equilibrium,

---

<sup>236</sup> See *id.* at 1650 ("Were the Government to seek to change the status or conditions of Padilla's custody, [the district] court would be in a position to rule quickly on any [motion Padilla filed]. In such an event, the District Court, as well as other courts of competent jurisdiction, should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised. Padilla, moreover, retains the option of seeking a writ of habeas corpus in this Court."). In a Findlaw column shortly after the Supreme Court denied review in Padilla's case, Professor Dorf also noted the significance of Justice Kennedy's opinion. See Michael C. Dorf, *The Supreme Court Denies Review in the Case of "Dirty Bomber" Jose Padilla, but an Unusual Troika of Justices, Including the Chief, Issues a Warning to the Government*, FINDLAW, April 12, 2006, <http://writ.news.findlaw.com/dorf/20060412.html>. Of course, not all observers agree that the Court was correct in rejecting Padilla's writ of certiorari. See, e.g., Bruce Ackerman, *The Perils of Judicial Restraint*, SLATE, Apr. 5, 2006, <http://www.slate.com/id/2139371> (criticizing the Court's refusal to take the case).

however, a court must be aware of more than the obvious threats to the foundational principles. The October 2005 Term is less illustrative of this aspect of the structural equilibrium approach. The balance of this part considers the Court's mixed record in the Term concerning preservation of the integrity of the political process. The following sub-part turns to the Court's complete failure to respond to the Bush Administration's particular penchant for secrecy, intolerance of questioning, and retribution.

The Court's efforts to channel disputes into the political branches of government are only a part of what should be done to protect the foundational principles. Unless the Court also protects the process by which those democratic branches are constituted, the channeling will have little practical effect. In other words, the courts also need to preserve the second foundational principle concerning the role of the People in the American constitutional order. Considered on these terms, the October 2005 Term was decidedly mixed. I consider below one decision that is consistent with the structural equilibrium approach and then turn to one that is not.

### 1. Money and Politics: *Randall v. Sorrell*

While we may bemoan the relationship between money and politics, it is quite clear that in today's political system one must raise significant funds to mount a competitive race for most offices of any significance.<sup>237</sup> But with fundraising comes a fear that candidates may be bought by the highest bidder. Thus, there is a tension between the reality that money and politics go together and the public policy-based fear of corruption in the electoral system. One way in which this tension has been made manifest is the enactment of campaign finance laws seeking to limit the impact of money in the process, and the Supreme Court's consequent evaluation of those laws under the First Amendment.<sup>238</sup>

---

<sup>237</sup> See generally Mark C. Alexander, *Let Them Do Their Jobs: The Compelling Government Interest in Protecting the Time of Candidates and Elected Officials*, 37 LOY. U. CHI. L.J. 669 (2006); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999); Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004).

<sup>238</sup> For illustrations of some of the Court's major forays in this area, see generally *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003); *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001); *Nixon v.*

The Court returned to campaign finance laws and the First Amendment in the October 2005 Term in *Randall v. Sorrell*.<sup>239</sup> At issue in *Randall* was Vermont's system regulating both the expenditures of candidates for various statewide offices as well as contributions that could be made to those candidates.<sup>240</sup> The candidate expenditure limits were highly suspect under the seminal campaign finance case *Buckley v. Valeo*.<sup>241</sup> Not particularly surprisingly on this score, the *Randall* Court struck down the Vermont expenditure limits, largely on stare decisis grounds.<sup>242</sup> Importantly, the Court also found that Vermont's contribution limits were unconstitutional.<sup>243</sup> It is on that aspect of the decision that I focus.

In *Buckley*, the Court upheld the federal statute's contribution limits despite recognizing that political contributions, as a generic matter, merit First Amendment protection.<sup>244</sup> After *Buckley*, the Court consistently rejected challenges to contribution limits.<sup>245</sup> In fact, it appears that before *Randall*, the Court had never struck down a campaign finance contribution limit as violative of the First Amendment.<sup>246</sup>

The Court's decision in *Randall* will almost certainly be fodder for much discussion among those commentators expert in election law. I do not intend to engage in a discussion of what the decision may mean in that regard. Rather, my point is that *Randall's* rejection of Vermont's contribution limits is entirely consistent with the structural equilibrium approach.<sup>247</sup>

---

Shrink Mo. Gov't PAC, 528 U.S. 377 (2000); Fed. Election Comm'n v. Mass. Citizens for Life, 479 U.S. 238 (1986); Buckley v. Valeo, 424 U.S. 1 (1976).

<sup>239</sup> 126 S. Ct. 2479 (2006).

<sup>240</sup> See VT. STAT. ANN. tit. 17, §§ 2801-2810 (2002).

<sup>241</sup> See *Buckley*, 424 U.S. at 54-58 (striking down candidate expenditure limitations in the Federal Election Campaign Act of 1971 on First Amendment grounds).

<sup>242</sup> *Randall*, 126 S. Ct. at 2487-91 (announcing the judgment of the Court).

<sup>243</sup> See *id.* at 2491-500.

<sup>244</sup> *Buckley*, 424 U.S. at 19-26.

<sup>245</sup> See, e.g., Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 385-98 (2000); Cal. Med. Ass'n v. Fed. Election Comm'n, 453 U.S. 182, 195-201 (1981).

<sup>246</sup> See, e.g., Posting of Amy Howe to SCOTUSblog, [http://www.scotusblog.com/movabletype/archives/2006/06/todays\\_opinion\\_11.html](http://www.scotusblog.com/movabletype/archives/2006/06/todays_opinion_11.html) (June 26, 2006, 11:44 EST) [hereinafter Howe, *Vermont Cases*] ("The most significant fact about today's decision is the set of reasons the Court gives for holding unconstitutional Vermont's contribution limits. Before today, the Court had never held any such limit on contributions to campaigns to be unconstitutional." (quoting Richard Pildes)).

<sup>247</sup> The Court's rejection of expenditure limits is equally consistent with the approach in terms of preserving the vitality of the electoral process. I focus on the

Having channeled other matters into the political process,<sup>248</sup> one can view *Randall* as an attempt to strengthen that process given the reality of modern American elections. If money is an essential part of running effective political campaigns, then ensuring that citizens and political parties have a meaningful opportunity to engage in such activity is critical to the creation of electoral institutions themselves.<sup>249</sup> Thus, by ensuring that funds will be available to make elections more competitive, *Randall* indirectly reinforces the first foundational principle (concerning the maintenance of independent centers of political authority). Moreover, it directly supports the second foundational principle concerning the role of the People in the governing process by providing for a means of involvement in the process we have today.

Finally, the way in which *Randall* struck down the contribution limits is itself instructive concerning the structural equilibrium approach. The Court might have taken the same approach it took to expenditure limits, which, as described above, essentially foreclosed legislative control. Instead, the Court was far more measured concerning contribution limits. Justice Breyer's plurality opinion articulated a highly fact-dependent approach to judging the constitutionality of contribution limits.<sup>250</sup> Such a ruling means that democratically enacted limitations on contributions may—indeed, almost certainly will—be upheld in the future so long as they provide the means for effective campaigning.<sup>251</sup> In short, the Court's approach in *Randall* was judicially modest in

---

contribution limits because the Court's decision in that regard was (at least arguably) inconsistent with its earlier decisions.

<sup>248</sup> See *supra* Part IV.A.1 (discussing channeling certain matters into the federal political process in *Hamdan v. Rumsfeld*) and Part IV.A.2 (discussing channeling certain matters into the state and federal political processes in *Gonzales v. Oregon*).

<sup>249</sup> Certain prominent academic commentators made a similar point shortly after *Randall* was decided. See Howe, *Vermont Cases*, *supra* note 246 (“[T]he Court in this decision makes as clear as it has in any constitutional decision involving democratic institutions that the Court views itself as having an essential role to play in preserving the structural integrity of the democratic process.”).

<sup>250</sup> See, e.g., *Randall v. Sorrell*, 126 S. Ct. 2479, 2492-99 (2006).

<sup>251</sup> Some of the factors Justice Breyer considered in determining that the Vermont contribution limits were unconstitutional were that: (1) the Vermont limits were so low that they had a disproportionate impact on challengers seeking to oust incumbents, *Randall*, 126 S. Ct. at 2495, 2495-96; (2) the same limits applied equally to political parties and individuals, *id.* at 2496-98; (3) volunteer services (i.e., in kind contributions) were included in the limitations, *id.* at 2498-99; (4) the contribution limits were not inflation adjusted, *id.* at 2499; and (5) a lack of specific state rationales for the particular contribution limit set, *id.* at 2499-500.

context. In that regard, it sufficiently guarded against judicial aggrandizement as is required by the first foundational principle.

2. Politics and Representation: *League of United Latin American Citizens v. Perry*

While the Court's decision in *Randall* is consistent with the structural equilibrium approach in terms of strengthening the political process, the October 2005 Term also illustrates a missed opportunity. In *League of United Latin American Citizens v. Perry*,<sup>252</sup> the Court was called upon to consider whether mid-decade congressional redistricting by the Republican-dominated Texas state government amounted to unconstitutional political or partisan gerrymandering.<sup>253</sup> In a complex set of opinions, the Court held that it did not.<sup>254</sup>

The notion of the political or partisan gerrymander is a difficult one. As the Court recognized in *Perry*, for example, the Constitution contemplates that congressional districting will be accomplished through the actions of the states' political branches along with the equally political federal Congress.<sup>255</sup> At the same time, the Court has also recognized that an effort "to minimize or cancel out the voting strength of racial or political elements of the voting population" is unlawful.<sup>256</sup> Thus, the issue becomes how one determines when there is *too much* politics in an inherently political process.

The Court has struggled with this issue. In 1986, it held that partisan redistricting claims were justiciable, but was unable to articulate a standard by which to judge such claims.<sup>257</sup> Almost two decades later, the Court returned to the issue in *Vieth v. Jubelirer*.<sup>258</sup> In *Vieth*, four justices indicated that they would overrule *Davis v. Bandemer* and hold that claims of partisan gerrymanders were non-justiciable political

---

<sup>252</sup> 126 S. Ct. 2594 (2006).

<sup>253</sup> *Id.* at 2604. The case also involved allegations that certain of the districts drawn in the challenged process were unlawful under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. *Id.* at 2605. The Court concluded that one of the districts did indeed violate the Voting Rights Act. *Id.* My discussion concerns the political gerrymander claim only.

<sup>254</sup> *Id.* at 2607-12.

<sup>255</sup> *Id.* at 2607-09.

<sup>256</sup> *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (emphasis added).

<sup>257</sup> *See Davis v. Bandemer*, 478 U.S. 109, 118-27 (1986).

<sup>258</sup> 541 U.S. 267 (2004).

questions.<sup>259</sup> Justice Kennedy agreed that the claim in *Vieth* was non-justiciable, but he refused to rule out the possibility that a judicially manageable standard by which to judge such claims might be developed in the future.<sup>260</sup>

This was the state of affairs when the Court considered the partisan gerrymander claims in *Perry*. As one commentator noted immediately after the decision, *Perry* ended up as “a case that leaves us where we were.”<sup>261</sup> In that regard, the Court once again—in an opinion by Justice Kennedy—refused to rule out the possibility that some claims of partisan gerrymandering would be justiciable but concluded that the ones these plaintiffs raised were not.<sup>262</sup>

One might say in isolation that *Perry* was unremarkable because it merely left open the door described in *Vieth*.<sup>263</sup> No standard acceptable to the Court was yet articulated and so the Court did not blaze new ground or retreat from statements already made. And in isolation, such a position could be correct. However, in terms of the structural equilibrium theory, the Court should not approach such matters in isolation during a time of extra-constitutional change. Rather, the Court should decide the case with a collective eye on the large change afoot.

In order to act as an agent of structural equilibrium, the Court should have squarely held that claims of partisan gerrymandering were justiciable.<sup>264</sup> In this way, the Court

---

<sup>259</sup> *Id.* at 271-306 (announcing the judgment of the Court).

<sup>260</sup> *Id.* at 306 (Kennedy, J., concurring).

<sup>261</sup> Posting by Karl Blanke to SCOTUSblog, <http://www.scotusblog.com/> (June 28, 2006 17:49 EST) (quoting Daniel H. Lowenstein, Professor of Law at University of California, Los Angeles).

<sup>262</sup> *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2607-12 (2006).

<sup>263</sup> Even seen in this light, the decision sparked critical commentary in the media. See, e.g., Editorial, *A Loss for Competitive Elections*, N.Y. TIMES, June 29, 2006, at A24; Editorial, *Tolerating Texas Rules*, WASH. POST, July 5, 2006, at A12. The same can be said of some early academic reaction. See, e.g., Post by Karl Blanke to SCOTUSblog, <http://www.scotusblog.com> (June 29, 2006 16:24 EST) (“The one clear lesson that we should learn from *LULAC v. Perry* is that the Court has nothing to contribute here.” (quoting Luis Fuentes-Rohwer, Associate Professor of Law at Indiana University, Bloomington)).

<sup>264</sup> I do not address here the standard that the Court should have adopted to judge whether a particular gerrymander is unconstitutionally political. For some academic commentary on this issue, see generally Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751 (2004); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253 (2006); Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L. J. 1021 (2005).

would have taken an important step to protect the functioning of the democratic process into which it would channel other issues more directly implicating the aggrandizement of federal executive power. Such a holding would have signaled to the political branches that the Court would be present to correct any attempt to skew the representative nature of democratic institutions.<sup>265</sup> It is true that the *Perry* Court did not totally foreclose a role for the judiciary in some future case.<sup>266</sup> This still-open-door provides some measure of institutional check, but would be entirely too weak for a Court taking seriously its responsibility to protect the foundational principles in a time of extra-constitutional change.

### C. *Protecting Dissenters and the Press*

As described above, the three sub-attributes of the Bushian vision of executive authority are a commitment to secrecy, an intolerance of questioning, and a pattern of retribution against critics.<sup>267</sup> A court acting as an agent of structural equilibrium would need to consider these attributes as well as the more obvious characteristics of an extra-constitutional change. Thus, when confronted with matters touching on the rights of and protections for dissenters, as well as those implicating the freedom of the press, the judiciary should consider the impact of such decisions on the larger, changing constitutional order. Judged on this basis, the Supreme Court fell woefully short in the October 2005 Term. In this sub-part, I separately address how this is so with respect to both dissenters and the press.

#### 1. Dissenters

Because central parts of the Bush Administration's conception of executive authority concern an aversion to questioning and retribution against questioners, a court should craft rules designed to encourage dissent and protect dissenters.<sup>268</sup> The Supreme Court failed to do so in the October

---

<sup>265</sup> Such a step would have been even more important if one accepts the arguments of Professors Levinson and Pildes concerning the importance of politically divided government. See Levinson & Pildes, *supra* note 61, at 2322, 2327-28.

<sup>266</sup> *Perry*, 126 S. Ct. at 2607, 2612.

<sup>267</sup> See *supra* Part III.B.

<sup>268</sup> As the editorial page of the *New York Times* recently noted, Congress should also take such steps. See Editorial, *Save the Endangered Whistle-Blower*, N.Y.

2005 Term in two important respects, one concerning government employees and the other dealing with ordinary citizens. To be an effective agent of structural equilibrium in the current climate, the Court would need to act substantially differently in this regard.

The first example of the Court's failing is *Garcetti v. Ceballos*.<sup>269</sup> Richard Ceballos was a deputy district attorney for Los Angeles County, California.<sup>270</sup> During 2000, Ceballos became convinced that an affidavit executed by a Los Angeles County Deputy Sheriff in support of a search warrant contained false information.<sup>271</sup> Ceballos raised his concerns in a number of ways within the District Attorney's office.<sup>272</sup> His recommendation that the prosecution be dismissed was eventually rejected.<sup>273</sup>

Ceballos later claimed that after he raised concerns about the affidavit, his supervisors retaliated against him in a variety of ways.<sup>274</sup> Thereafter, he filed a lawsuit against the District Attorney and others, claiming that his First Amendment rights had been violated as a result of the alleged retaliation.<sup>275</sup> At the Supreme Court the central issue was whether a public employee could state a First Amendment retaliation claim for speech made pursuant to his or her job duties.<sup>276</sup> The Court concluded that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."<sup>277</sup>

Whatever could be said in support of the Court's conclusion in *Ceballos*, it is not consistent with providing a check on an executive authority that both resists questions and is prone to retaliate against those who do not toe the official

---

TIMES, Aug. 19, 2006, at A14 ("If ever government whistle-blowers needed protection from official retaliation it is now, in the secrecy-obsessed Bush administration. Federal employees daring to disclose fraud and abuse in their bureaucracies have been under virtual siege, isolated as pariahs and shipped off under gag orders to lesser jobs in far-off places.")

<sup>269</sup> 126 S. Ct. 1951 (2006).

<sup>270</sup> *Id.* at 1955.

<sup>271</sup> *Id.* at 1955-56.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 1956.

<sup>274</sup> *Id.*

<sup>275</sup> *Ceballos*, 126 S. Ct. at 1956.

<sup>276</sup> *Id.* at 1959-60.

<sup>277</sup> *Id.* at 1960.

line. By decreasing the protection afforded to such government employees, the Court actually reinforces these characteristics of executive authority. With employees less able to confidently speak their minds, the executive will likely to be more prone to engage in retaliation for questioning.

Of course, the positive attributes of questioning government action are not restricted to public employees. Citizens also provide benefits, especially in a time of increased government secrecy and resistance to criticism. But ordinary citizens are also subject to retaliation for speaking out in the Bushian conception of executive authority.<sup>278</sup> Accordingly, a court acting as an agent of structural equilibrium should act to protect citizens' rights to speak out without fear of retribution.

The Court faced a case in the October 2005 Term in which it missed an opportunity to act in such a fashion. At issue in *Hartman v. Moore*<sup>279</sup> was a claim that the plaintiff, William Moore, was the subject of a criminal prosecution in retaliation for certain public positions he took.<sup>280</sup> The narrow doctrinal issue in *Hartman* was "whether the complaint states an actionable violation of the First Amendment without alleging an absence of probable cause to support the underlying criminal charge."<sup>281</sup> The Court held that a plaintiff was required to plead and prove the absence of probable cause.<sup>282</sup>

One can defend *Hartman* on the central practical ground the Court discusses, namely the difficulty of proof of causation when there is both a retaliatory motive and probable cause.<sup>283</sup> Mixed motive situations are always difficult. Nevertheless, a court acting as an agent of structural

---

<sup>278</sup> See *supra* Part III.B.3 (discussing in part retaliatory actions against non-governmental actors).

<sup>279</sup> 126 S. Ct. 1695 (2006).

<sup>280</sup> Moore was the owner of a business that manufactured equipment used to automatically read multiple lines of text. *Id.* at 1699. This technology was one way in which mail could be sorted electronically. *Id.* Another possibility was to have sufficient information included on a single line of text (for example, using the nine digit zip code). *Id.* Moore aggressively lobbied Congress to reject the Postal Service's preferred single line approach in favor of the multiple line technology in which he specialized. *Id.* After agreeing to use the multiple line approach, the Postal Service awarded the contract to another bidder. *Id.* at 1699-700. Thereafter, Moore alleged that Postal Inspectors successfully pressured an Assistant United States Attorney to indict Moore on trumped up criminal charges related to his successful lobbying efforts. *Id.* at 1700. The judge dismissed the charges during trial and the civil rights lawsuit followed. *Id.*

<sup>281</sup> *Id.* at 1699.

<sup>282</sup> *Id.* at 1707.

<sup>283</sup> See *id.* at 1702-07.

equilibrium should not focus on such work-a-day matters. Instead, it should focus on the overall structural integrity of the constitutional system. Seen in this light, *Hartman* is a dangerous decision because, in its admittedly small way, it makes retaliation against citizens who speak out more likely by increasing the practical burden on those citizens of mounting an effective legal challenge to the retaliatory action.

## 2. The Press

The Bush administration's resistance to questioning and penchant for secrecy also implicates the way in which a court faced with an extra-constitutional change with such attributes should approach matters concerning the press. When an extra-constitutional change restricts the flow of information, all the foundational principles are threatened. Other institutions of government, as well as ordinary citizens, are deprived of the tools to play their role in the system. The end result is a less efficient government in the long run. Accordingly, when secrecy is the order of the day, democracy comes to depend on the press as a tool by which information can be supplied to relevant institutions.<sup>284</sup> But as with dissenters, the Supreme Court did not fare well in matters involving the press under the structural equilibrium approach in the October 2005 Term.

In June 2006, the Court denied certiorari in two cases related to litigation commenced by Wen Ho Lee against various government officials.<sup>285</sup> Mr. Lee was a scientist employed by the Department of Energy.<sup>286</sup> In the mid-1990s, he came under suspicion for espionage.<sup>287</sup> He was ultimately indicted not for that offense, but rather for mishandling classified computer

---

<sup>284</sup> Professor Deborah Pearlstein recently made a similar point concerning the importance of the press in a civil society. See Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L.J. 1255, 1279-84 (2006). See also Editorial, *An Absence of Trust that Needs Healing*, ST. PETERSBURG TIMES, June 29, 2006, at 12A ("In general, history teaches that democracy is better served by a free press informing citizens about their government than by secrecy.").

<sup>285</sup> See generally *Wen Ho Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 2351 (2006); *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 2373 (2006).

<sup>286</sup> See *Lee*, 413 F.3d at 55.

<sup>287</sup> *Id.*

files.<sup>288</sup> He pled guilty to one such count while fifty-eight other counts were dismissed.<sup>289</sup>

After his guilty plea, Mr. Lee filed suit under the federal Privacy Act claiming that certain government officials had unlawfully disclosed his identity and other information to the news media during the investigation.<sup>290</sup> In connection with those claims, Lee subpoenaed several journalists seeking information concerning the identity of the government officials who provided such information.<sup>291</sup> The subpoenaed journalists refused to testify, were held in contempt, and appealed those contempt citations to the United States Court of Appeals for the District of Columbia Circuit.<sup>292</sup>

The central legal issue in the cases concerned the existence and scope of a constitutional or common law privilege protecting journalists from disclosing their confidential sources.<sup>293</sup> The Court of Appeals upheld the District Court's order.<sup>294</sup> The petitions for writs of certiorari followed.<sup>295</sup>

The journalists' privilege is a highly controversial issue.<sup>296</sup> As the circuit court noted in *Lee* when discussing the potential constitutional issue, "[n]ot only the breadth of this claimed privilege, but its very existence has long been the subject of substantial controversy."<sup>297</sup> Such uncertainty, even about a matter going to the freedom of the press in American society, might be acceptable in times of stable constitutional meaning. However, when the existing constitutional order is threatened by an actual or potential constitutional change with characteristics such as those of our current time, uncertainty

---

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 55-56.

<sup>291</sup> *Id.* at 56.

<sup>292</sup> *Lee*, 413 F.3d at 56-57.

<sup>293</sup> *See id.* at 57.

<sup>294</sup> *Id.* at 64.

<sup>295</sup> *See supra* note 285.

<sup>296</sup> For a sampling of recent academic commentary on the issue, see generally Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97 (2002); Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371 (2003); Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, 14 WM. & MARY BILL RTS. J. 1063 (2006); Geoffrey R. Stone, *Why We Need a Federal Reporter's Privilege*, 34 HOFSTRA L. REV. 39 (2005).

<sup>297</sup> *Lee*, 413 F.3d at 57.

about core protections for the news media can no longer be tolerated. Instead, acting as an agent of structural equilibrium, a court should resolve such uncertainty in a manner that most aggressively protects the role of the press to strengthen the foundational principles. The Court missed such an opportunity when it declined to consider the appeals in *Lee* raising the constitutional or common law pedigree of the journalists' privilege.

## V. CONCLUSION AND A GLIMPSE OF THE ROAD AHEAD

Times change and so does the Constitution. When constitutional change is formalized through an Article V amendment, courts have a constitutional duty to enforce the new constitutional structure or other rule in conformity with the amendment. When the change is an extra-constitutional one, however, courts must ensure that they protect the three foundational principles on which the original constitutional architecture is based.

I have explained the central attributes of the potential constitutional change advocated by the Bush administration. It is wide-ranging and potentially quite dangerous to American fundamental constitutional values. My goal has been to develop the operation of the structural equilibrium theory with the Bushian model as an example. I did so using the Supreme Court's October 2005 Term. As discussed above, with the structural equilibrium model as a baseline, the Court did well as to some matters but was deficient with respect to others.

This effort addressing how the structural equilibrium approach *would* have operated is important in its own right. Without doing so, one would not be in as good a position to evaluate the merits of the approach I advocate. However, the true significance of the approach is forward-looking. I hope that the Court consciously acts on the approach I have suggested here, because the challenges most certainly continue in the future. How will the Court rule on cases raising the continued viability of the "state secrets" privilege?<sup>298</sup> What will

---

<sup>298</sup> A number of lawsuits were filed around the country challenging the administration's warrantless wiretapping and data-mining surveillance programs. *See, e.g.,* ACLU v. Nat'l Sec. Agency/Cent. Sec. Service, 438 F. Supp. 2d 754 (E.D. Mich. 2006); Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006); Terkel v. AT&T, Corp., 441 F. Supp. 2d 899 (N.D. Ill. 2006); Cent. for Const. Rights v. Bush, No. 06-CV-00313 (S.D.N.Y. filed Jan. 17, 2006). The Judicial Panel on Multidistrict Litigation consolidated many of these cases for pre-trial proceedings in the Central District of

the Court decide concerning executive preemption in a case it heard during the October 2006 Term?<sup>299</sup> And what will the Court do when it next confronts the applicability of the *Chevron* doctrine in the context of aggressive administrative agency actions?<sup>300</sup> Each of these issues implicates core elements of the proposed new constitutional order. In each case, the Court will need to decide how to synthesize the new with the old. When it does so, it should consciously act as an agent of constitutional structural equilibrium to preserve the foundational principles in the most effective way possible.

In sum, as Professor Ackerman recently wrote considering executive power and terrorism, “[o]ur great constitutional tradition of checks and balances provides the material we need to withstand the tragic attacks and predictable panics of the twenty-first century.”<sup>301</sup> They also provide the material to weather the more general storm of extra-constitutional change, whether it is instigated by Democrats or by Republicans. Now, the Court needs to act on that constitutional tradition.

---

California. See also Transfer Order, *In re Nat'l Sec. Agency Telecomm. Records Litig.*, MDL No. 1791 (N.D. Cal. Aug. 9, 2006), available at [http://www.jpml.uscourts.gov/pending\\_MDLS/Miscellaneous/MDL-1791/MDL-1791-TransferOrder.pdf](http://www.jpml.uscourts.gov/pending_MDLS/Miscellaneous/MDL-1791/MDL-1791-TransferOrder.pdf).

The possibility of Supreme Court intervention was increased in this area because the district courts to consider the state secrets privilege (i.e., the claim that a lawsuit should be dismissed because mounting a defense would require disclosing confidential information) have split on the issue. See, e.g., *ACLU*, 438 F. Supp. 2d at 758-66 (rejecting the privilege for the warrantless wiretapping claim but accepting it for the data-mining claim); *Hepting*, 439 F. Supp. 2d at 998-99 (rejecting privilege in connection with warrantless wiretapping claim); *Terkel*, 441 F. Supp. 2d at 909-10 (accepting privilege in connection with warrantless wiretapping claim). Of course, all bets may be off if Congress enacts Senate Bill No. 2453, entitled the *National Security Surveillance Act of 2006*, that would, in part, consolidate all such litigation in the secret Foreign Intelligence Surveillance Court. See *National Security Surveillance Act of 2006*, S. 2453, 109th Cong. § 2 (2006).

<sup>299</sup> See *Watters v. Wachovia Bank, N.A.*, 431 F.3d 556 (6th Cir. 2005), cert. granted, 126 S. Ct. 2900 (2006). The issue in the case concerned the scope of the authority of the Comptroller of the Currency to preempt certain state laws regulating subsidiaries of national banks. See *id.*

<sup>300</sup> See *Chevron U.S.A. Inc. v. Nat. Res. Def. Counsel, Inc.*, 467 U.S. 837 (1984). Issues concerning *Chevron* and administrative agencies have received increased scholarly attention of late as administrative agencies have taken more aggressive policy positions. See, e.g., Kinkopf, *supra* note 45, at 1176-95; Levinson & Pildes, *supra* note 61, at 2360-64; Richard W. Murphy, *Judicial Deference, Agency Commitment, and Force of Law*, 66 OHIO ST. L.J. 1013 (2005); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006); Cass R. Sunstein, *Chevron, Step Zero*, 92 VA. L. REV. 187 (2006).

<sup>301</sup> ACKERMAN, NEXT ATTACK, *supra* note 18, at 9.