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Foreword to: War, Terrorism and Torture: Limits on Presidential Power in the 21st Century Symposium

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Foreword

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This symposium issue of the *Indiana Law Journal* examines *War, Terrorism and Torture: Limits on Presidential Power in the 21st Century*. Convened by the American Constitution Society for Law and Policy and the Indiana University School of Law–Bloomington, prominent legal scholars, human rights advocates and government lawyers gathered in Bloomington on October 7, 2005. They considered pressing issues of presidential power abroad and at home, in the contexts of both conventional armed conflicts and the “war on terror.” In the realms of war and national security, what are the limits on presidential power—and the safeguards against abuses of power? Which institutions and sources of law provide effective and appropriate means of constraining overreaching Presidents, preserving the rule of law, and protecting the rights of Americans and all others under United States jurisdiction or control? These questions have special urgency since the terrorist attacks of September 11, 2001 and the Bush administration’s controversial actions and policies in response: military tribunals, enemy combatant designations, domestic warrantless electronic surveillance, and, a particular focus of this symposium, extreme interrogation techniques such as those used at the Abu Ghraib prison in Iraq and the U.S. Naval Base at Guantánamo Bay.

Documents published at the end of the issue provide helpful background on some of these controversies. They also highlight one source of presidential constraint that should come from within the executive branch: high quality, unbiased and candid legal advice from the President’s own legal advisors. In *Principles to Guide the Office of Legal Counsel*,¹ nineteen former executive branch lawyers recommend ten principles, drawn from longstanding bipartisan best practices, to guide legal advice to Presidents on how to meet their constitutional obligation to ensure the legality of executive branch action. As I explain in an introduction to this document, the authors developed the guidelines because of concern about a Bush administration legal analysis of the federal statute that bans torture—and more specifically, because of their desire to promote executive branch adherence to the rule of law and to prevent a recurrence of the deeply flawed, ends-driven approach adopted in that now-withdrawn legal opinion.

This symposium issue ends with four documents, introduced by David Cole and Martin Lederman, concerning the legality of the Bush administration’s program of warrantless domestic electronic surveillance, a secret program initiated after the terrorist attacks of 2001 and first leaked to the public in December 2005.² The Department of Justice “white paper” (notably unsigned by any Department component or official) provides the most comprehensive illustration to date of the Bush administration’s approach to presidential power, including the methods it uses to construe federal statutory constraints as inapplicable to activity the President deems in the interests of national security. Two letters signed by a group of prominent constitutional scholars and former government officials describe why, in their view, the

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1. *Guidelines for the President’s Legal Advisors*, 81 IND. L.J. 1345 (2006).

2. David Cole & Martin S. Lederman, *The National Security Agency’s Domestic Spying Program: Framing the Debate*, 81 IND. L.J. 1355 (2006).

President must comply with the warrant requirements of the Foreign Intelligence Surveillance Act.

Harold Hongju Koh, dean of Yale Law School, delivered the symposium's keynote lecture: *Can the President Be Torturer in Chief?*³ Drawing on his experience as Assistant Secretary of State for Democracy, Human Rights and Labor and as a leading human rights scholar, Koh compares the Bush administration's policies on torture and other cruel, inhuman and degrading treatment—"zero accountability" and inconsistency—with the Clinton administration's approach of unequivocal "zero tolerance." Koh repudiates suggestions that the President possesses constitutional authority to authorize extreme interrogation techniques in the face of federal legislation to the contrary. He urges that "we should resist the claim that a War on Terror permits the commander in chief's power to be expanded into a power to act as torturer in chief."⁴

Along with his discouraging account of utterly ineffective human rights enforcement when viewed from the "horizontal" level of nation-states and intergovernmental organizations, Koh offers some cause for hope. Koh applies a perspective he introduced in his 1998 Addison Harris Lecture, also delivered at Indiana University School of Law-Bloomington:⁵ a less appreciated "vertical" or "transnational" story that he urges should inform our understanding of human rights enforcement. Applied to the torture issue, this more promising vertical story includes a transnational network of numerous human rights nongovernmental organizations and citizens that led, for example, to the enactment of the McCain Amendment's prohibition on the use of cruel, inhuman or degrading treatment against persons in the custody or control of the United States.

Neil Kinkopf opened the symposium with his lead paper, *The Statutory Commander In Chief*,⁶ in which he tackles the centrality of statutes—and more to the point, statutory interpretation—in determining the scope of presidential war powers. The Bush administration has promoted aggressive claims of authority through statutory, as well as constitutional, interpretation, thereby sparking widespread attention to presidential authority in the face of potential congressional constraints. Kinkopf rejects the Bush administration's "exclusivity" approach to the separation of powers, which finds substantial presidential authority beyond congressional control, and offers instead an approach to statutory interpretation grounded in Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube, Co. v. Sawyer* and its emphasis on the shared/reciprocal nature of federal powers.

Kinkopf's version of the reciprocity approach, moreover, takes issue with "the emerging consensus" among leading legal academics (emerging in particular from recent work of Curtis Bradley, Jack Goldsmith and Cass Sunstein), which he describes as a requirement of clear statutory statements of presidential authority in the case of most issues that implicate individual rights, but deference to presidential statutory interpretations where disputes center on questions of constitutional structure. With the reminder that the Framers designed the constitutional framework, including the

3. Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145 (2006).

4. *Id.* at 1167

5. Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999).

6. Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169 (2006).

separation of powers, to protect liberty, Kinkopf flatly rejects the often-proffered rights/structure dichotomy as using inappropriate “loaded dice” that sometimes will over-protect and sometimes under-protect rights. He proposes looking instead to the specifics of the statute and controversy and seeking to effectuate all relevant constitutional values.

In commenting on Kinkopf’s article, Christopher Schroeder⁷ and H. Jefferson Powell⁸ separately offer strong praise, in particular for Kinkopf’s criticism of “loaded dice” statutory interpretation rules. Both then proceed with additional critiques and potential reform that supplement well Kinkopf’s efforts to encourage the proper allocation of federal power. Schroeder endorses Kinkopf’s prescriptions for the courts and support for the reciprocity/shared powers approach. Schroeder cautions, though, that reform of the courts alone cannot remedy the federal power imbalance. He discusses the paucity of judicial precedent rejecting presidential assertions of exclusive authority and then identifies conditions, beyond deferential judicial review, that help maintain “a regime of de facto exclusivity.”⁹ Presidents dominate military and foreign affairs because they possess the means to do so, as well as the intelligence capacity to supply the reasons. Schroeder identifies specific conditions that contribute to imbalance in favor of the presidency: the modern development of an elaborate, largely secret national security bureaucracy, large standing armed services commitments, and a Congress deterred from imposing effective constraints by political incentives, especially incentives in favor of legislative compromise and against the assumption of responsibility (and potential blame) that instead can be left to the President. Schroeder, whose scholarship benefits from his high-level experience in both the executive and legislative branches, concludes with the wise counsel that “the health of the constitutional system”¹⁰ depends on reformation of the political branches, as well as the courts. Multiple lines of further inquiry follow readily from Schroeder’s call for governmental reform.

H. Jefferson Powell’s intriguing essay, too, should inspire scholarship and debate—and that debate likely will be heated, for he advocates a substantial change in executive branch statutory interpretation that could prove enormously consequential. Powell argues that the executive branch should stop its widespread, bipartisan practice of employing an interpretive canon that courts use to resolve constitutional controversies involving statutory ambiguities: the avoidance canon, which is the longstanding rule of construction by which the Court reads statutes, whenever possible, to avoid significant constitutional difficulties. Powell makes a strong case that executive branch lawyers should not rely upon the avoidance canon to interpret statutes and guide executive branch action when the issue involves the allocation of powers between Congress and the President. As Powell explains, courts employ the avoidance canon to uphold statutes and thereby protect congressional decision making and avoid the displacement of legislative choices by judicial decision. But in the hands of the executive, the avoidance canon “loads the dice” in favor of the President by favoring statutory

7. Christopher H. Schroeder, *Loaded Dice and Other Problems: A Further Reflection on the Statutory Commander in Chief*, 81 IND. L.J. 1325 (2006).

8. H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313 (2006).

9. Schroeder, *supra* note 7, at 1325.

10. *Id.* at 1332.

interpretations that maximize presidential discretion at the expense of congressional constraints on presidential power.

Although Powell does not cite specific examples, the Bush administration's controversial interpretations of statutes to maximize presidential power come to mind—for example, President Bush's claim of authority to engage in certain domestic electronic surveillance without complying with the warrant requirements of the Foreign Intelligence Surveillance Act. Powell's proposal merits serious consideration and careful scrutiny. In its favor, it would protect against executive branch abuses of the avoidance canon that effectively nullify congressional constraints on overreaching Presidents. His proposal, though, would entail a radical change. Future work should examine some of the numerous specific contexts in which Presidents over the years actually have relied upon the avoidance canon, and how outcomes and analyses likely would have been altered by the unavailability of the canon. For example (and perhaps weighing in favor of retention of the avoidance canon), without the canon Presidents more often would confront the prospect of enforcing statutes they view as unconstitutional, which in turn might increase the frequency of presidential claims of authority to decline to enforce statutes.¹¹

Saikrishna Prakash's essay, too, invites further scholarship.¹² Indeed, that is Prakash's essential aim. He views the current heated controversy over the legality of the Bush administration's war and anti-terrorism policies as deficient on both sides because it relies too heavily on constitutional text that alone does not detail the scope of presidential and congressional war powers or how the powers interact. Desperately needed, Prakash argues, is difficult historical research into the original meaning of the text. Because he has not conducted the research he views as essential, Prakash does not offer his own legal conclusions (and he describes some commentators who do as seeming to leap to conclusions based on policy preferences). He does, however, sketch four "hypotheses" about the constitutional allocation of presidential and congressional war powers. With care again to caution of the need to measure the hypotheses against the original understanding of the constitutional Framers, Prakash identifies what he describes as the "shared authority thesis" as the most plausible. He observes that both the Bush administration and its critics can be seen as adhering to versions of this "shared authority" approach, and he suggests that the two sides might be less far apart—at least at the level of constitutional theory—than they believe.

Deborah Pearlstein continues the search for lessons learned from the torture scandal, and especially for sources of appropriate and effective constraints on executive abuse.¹³ Pearlstein addresses the torture issue directly, expertly, and at length, drawing on her work as Director of the U.S. Law and Security Program at Human Rights First, a nongovernmental organization prominent in human rights enforcement. She offers a detailed account of how and why the system—including the checks and balances of constitutional democracy—failed to protect against the use of torture and other violations of human rights. The primary causes: vague or unlawful

11. See Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (Winter/Spring 2000).

12. Saikrishna Prakash, *Regulating the Commander in Chief: Some Theories*, 81 IND. L.J. 1319 (2006).

13. Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention and Torture*, 81 IND. L.J. 1255 (2006).

executive branch guidance, inaction by civilian executive authority in the face of unlawful activity, and inadequate resources, training and planning for detention and interrogation operations. Notwithstanding the enactment of the McCain Amendment, Pearlstein finds most promise for future constraints on executive abuse in less classically democratic sources: the professional military and intelligence community, the media, nongovernmental organizations, and the courts.

Cornelia Pillard views the torture scandal as indicative of a more general problem: an executive branch tendency during times of national security crises to view legal constraints as annoying, even harmful, obstacles to effective executive action.¹⁴ One of seven symposium contributors who served in the Department of Justice and signed the *Principles to Guide the Office of Legal Counsel*, Pillard explores reform aimed at promoting executive branch respect for the law, even in trying times. She advocates changes in intra-executive processes and structures that would allow for greater “dissensus” during legal deliberations and decision making: transparency and the corresponding opportunities for external input, consultation with a range of offices within the executive branch, involvement of career (not just political) government lawyers, and designated “watchdog” entities charged with ensuring executive branch legal compliance.

Two final symposium articles examine the fundamental, recurring and momentous issue of war-making authority: does the President possess the constitutional authority to send American troops into war without authorization from Congress? Longtime Congressional Research Service lawyer and leading scholar Louis Fisher makes a strong case for a return to what he views as the correct balance of war-making powers.¹⁵ Recalling that the constitutional text expressly confers on Congress—not the President—the decision to go to war with another country, he recounts presidential actions to the contrary (beginning with President Harry Truman’s introduction of military forces in South Korea) and notes that Presidents of both political parties have transgressed constitutional constraints. Fisher’s comprehensive and enormously useful article also reviews responses from the judiciary, the media, and legal academics on this issue of war-making authority. Fisher particularly confronts the work of John Yoo, a controversial legal scholar who also served in the Department of Justice under President George W. Bush and who is widely credited with being a principal author and architect of some of the Bush administration’s most controversial legal positions.

Fordham Law School dean William Treanor closes the issue with his own good analysis of a variant of Fisher’s question: when is congressional authorization of the use of military force unnecessary and what constitutes authorization? Treanor proceeds to identify deficiencies and gaps in the existing scholarship. To all who would join the debate, he provides helpful counsel regarding not only who may make war and how, but also the entire range of questions that involve the relative war powers of Congress and the President and the role of the courts in policing transgressions.¹⁶ Foremost, he argues, “there is little connection between the issues that scholars debate and the

14. Cornelia Pillard, *Unitariness and Myopia: The Executive Branch, Legal Process, and Torture*, 81 IND. L.J. 1297 (2006).

15. Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199 (2006).

16. William Michael Treanor, *The War Powers Outside the Courts*, 81 IND. L.J. 1333 (2006).

constitutional issues involving war that government officials and political leaders confront,"¹⁷ and he makes a strong plea for consideration of "how political actors should engage in constitutional interpretation."¹⁸ Treanor's suggested reorientation of the scholarly debate provides a fitting close to a symposium in which the contributors—leading constitutional scholars, government lawyers, and human rights advocates—together have created an impressive volume that significantly advances debate on precisely such questions of enormous practical consequence.

17. *Id.* at 1333.

18. *Id.* at 1335.