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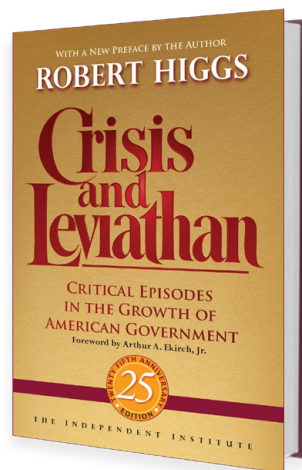
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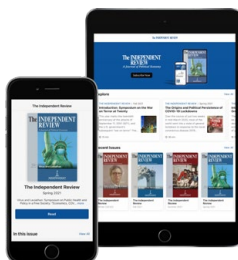
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# Sovereign Impunity

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CHARLOTTE TWIGHT

**T**oday all branches of America’s national government—legislative, executive, and judicial—act with near impunity. Constitutional limits on the government’s power have been eroded, institutional checks and balances rendered largely nugatory. Yet many who value liberty profess optimism. Surely the next Congress, the next president, the next executive agency heads, or the next Supreme Court justices will resurrect firm limits on government power. In private, however, people increasingly acknowledge that the Constitution has been largely nullified as an effective limit on government power. In this article, I sketch the politico-economic landscape of ascendant national government power, examining actions by Congress, the president, and the Supreme Court that exemplify today’s prevailing sovereign impunity. I conclude by assessing certain dynamics of public choice that brought us to this point.

## Congress

Most members of Congress now reflexively claim the power to federalize at will almost any aspect of American life, the Constitution notwithstanding. Congress’s actions regarding the laws described in this section—the Bipartisan Campaign Reform Act, the reauthorization of the USA PATRIOT Act, the alternative minimum tax, and REAL ID legislation—provide a window into the unchecked congressional power now undermining America’s institutional structure and constitutional foundation. These four cases illustrate not only Congress’s willful violation of the Constitution, but also its abiding quest to expand the central government’s power at the expense of individual liberty.

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*The Independent Review*, v. XII, n. 4, Spring 2008, ISSN 1086-1653, Copyright © 2008, pp. 485-517.

## *The Bipartisan Campaign Reform Act: Regulating Political Issue Advertising*

An exceptionally clear example of Congress's deliberate abrogation of the Constitution is its passage of the McCain-Feingold bill in the form of the Bipartisan Campaign Reform Act of 2002 (BCRA, Public Law 107-155, 116 Stat. 81). Although the statute's stated purpose was to amend the 1971 Federal Election Campaign Act (FECA, Public Law 92-225, 86 Stat. 3) to create additional protection against corruption in federal election campaigns, certain BCRA provisions clearly target core political speech.<sup>1</sup> The question is whether the BCRA's expanded regulation of federal election campaigns abridges Americans' freedom of speech and other First Amendment rights by controlling soft-money contributions and previously unregulated expenditures for political issue advertising.<sup>2</sup>

The BCRA's regulation of issue advertising raises these First Amendment questions starkly. Issue ads—created by nonprofit groups such as the American Civil Liberties Union (ACLU) and the National Rifle Association (NRA), as well as by for-profit corporations—do not specifically advocate the election or defeat of a named candidate, but instead focus on a particular political issue. Until the BCRA was enacted, issue ads were not regulated by the Federal Election Commission (FEC) because they did not involve “express advocacy” regarding named candidates. Nonprofit and for-profit corporations therefore could spend their general treasury funds to reach the public with issue ads during the months leading up to a federal election.

The BCRA changed these rules dramatically. Under the rubric of “electioneering communications,” BCRA section 203 sweeps issue advertising by corporations (including nonprofits), labor unions, and national banks into the FEC regulatory regime. Behind a fog of statutory definitions, the BCRA makes it a federal crime for corporations to use their general treasury funds to transmit issue ads and other electioneering communications via broadcast, cable, or satellite within sixty days before a general election or thirty days before a primary election if they “refer to a clearly identified candidate for federal office” and are “targeted to the relevant electorate” (BCRA 2002, §201; 2 USC §434[f][3]), except for certain activities specifically allowed.

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1. FECA limited campaign contributions and expenditures and established reporting requirements overseen by the Federal Election Commission. Federal election-campaign statutes are codified in the *United States Code* (USC), Title 2, §431 ff.

2. With few exceptions, post-BCRA federal statutory law prohibits virtually all contributions and expenditures in federal election campaigns unless they comply with the maximum dollar amounts, reporting, disclosure, and other requirements established by the amended statutory law. See Lott 2006 and Samples 2006, 233–54 regarding the effect of campaign-contribution limits in reducing the competitiveness of political races and entrenching incumbents. *Soft money* denotes funds not regulated by federal election-campaign laws, whereas *hard money* denotes funds regulated by those laws.

One statutory escape route allows business firms and nonprofit organizations to avoid the BCRA prohibition if their issue ads do not “refer to a clearly identified candidate” and thus are not “electioneering communications” at all. This is risky, however. The statutory definition of electioneering communication gives the FEC the power to decide whether or not a communication “refers to” a clearly identified candidate, even if the candidate’s name or image does not appear in the ad. This provision creates grave uncertainties for those running issue ads, given the criminal penalties involved if the FEC disagrees with the organization’s decision. As the NRA pointed out, “An NRA ad, run in New York, that presents a purely intellectual treatment of the Second Amendment without any specific reference to a candidate, in an election where gun control is an issue, could easily be construed as ‘referring’ to a candidate” (Norell 2003, 6). Alternatively, such organizations can finance issue ads with “separate segregated funds” set aside for political purposes. However, a corporation that chooses this approach, in addition to bearing the costs of establishing such accounts and soliciting contributions, must comply with detailed FEC reporting and record-keeping requirements, including mandatory disclosure of donors’ identities.

The BCRA language means that no corporation, not even a nonprofit, can safely—and without costly additional regulatory overhead—use its general treasury funds to broadcast issue ads over the radio and television media through which most voters obtain information in the two months preceding a general federal election. The penalties are severe: any person who “knowingly and willfully” violates any provision of the BCRA regulatory regime is subject to both criminal and civil penalties. For example, a violation involving the “making, receiving, or reporting of any contribution, donation, or expenditure” that has an aggregate value of \$25,000 or more during a calendar year “shall be fined . . . or imprisoned for not more than 5 years, or both.” If the aggregate amount is as little as \$2,000 (but less than \$25,000), the person may be imprisoned for up to a full year (BCRA 2002, §312; 2 USC §437g[d]).

Legislators well understood that the BCRA would silence core political speech, in violation of the First Amendment, at a critical time during federal election cycles. Congress included statutory language explicitly recognizing that its definition of the term *electioneering communication* was likely to be found unconstitutional. The provision stated that if BCRA’s definition of *electioneering communication* “is held to be *constitutionally insufficient* by final judicial decision to support the regulation provided herein, then the term means” something else, and there followed an alternative definition (BCRA 2002, §201[a]; 2 USC §434[f][3][A][ii], emphasis added).

The BCRA contains a great deal more, but the issue ad provisions suffice to demonstrate Congress’s deliberate violation of Americans’ First Amendment rights through this legislation. President George W. Bush’s decision to sign this bill and the Supreme Court’s rulings regarding its constitutionality are discussed in subsequent sections.

### *Reauthorization of the USA PATRIOT Act*

Another challenge to the Constitution emerged shortly after the September 11, 2001, terrorist attacks, when Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Public Law 107-56, 115 Stat. 272). The statute's name, crafted so that its acronym would spell out USA PATRIOT, made it difficult for legislators or the public to oppose it. Most legislators had not even read it before the vote and thus endorsed without scrutiny PATRIOT Act provisions that empowered the government to take actions directly threatening rights secured by the First and Fourth Amendments.

Critics have severely criticized this statute. In the most thorough study to date, Stephen J. Schulhofer, while praising parts of the act as necessary and valuable in preventing terrorism, shows that major government powers created by the act are unwisely crafted (2005, 65, 67, 60–72). He states, “[T]he Patriot Act is pervaded with provisions that respond to legitimate needs by granting powers much broader than necessary” and “is full of provisions that needlessly restrict or eliminate executive branch accountability for its actions” (114, 116). Among the provisions that Schulhofer singles out for criticism are those increasing the government's power to carry out secret searches (delayed-notification or “sneak-and-peek” searches) in domestic law enforcement and secret searches of which the targets are *never* notified in foreign-intelligence investigations (120). Schulhofer also criticizes the government's expanded and ill-supervised power to demand production of documents through national-security letters (NSLs) and its section 215 powers that reach “library and bookstore records as well as the membership lists of religious organizations and political advocacy groups,” while “eliminat[ing] virtually all independent oversight” (124).

Instead of reviewing these much-criticized measures, however, I focus here on a little-known provision added when the PATRIOT Act was modified early in 2006 by the USA PATRIOT Improvement and Reauthorization Act (Public Law 109-177, 120 Stat. 192, hereafter referred to as the “Reauthorization Act”).<sup>3</sup> Under the umbrella of the PATRIOT Act, this new provision extends federal wiretapping authority to situations not involving any national-security issue, clearly illustrating Congress's use of terrorism as a pretext for unrelated expansions of government power (Higgs 1987, 2007).

Consistent with its public face, the Reauthorization Act contains certain measures to enhance congressional oversight of Federal Bureau of Investigation (FBI) and Department of Justice (DOJ) antiterrorism activities, although President Bush used signing statements (discussed later) to negate some of the new provisions. For example, the Reauthorization Act allows recipients to challenge in court NSLs issued by

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3. Another statute also was part of the reauthorization package: *USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006*, Public Law 109-178, 120 Stat. 178.

the DOJ that demand production of tangible things, such as customer records, and compel nondisclosure that a person has received the NSL.<sup>4</sup> However, throughout the act, what one hand gives, the other hand often takes away. For example, the new law requires the reviewing court to treat the avowal or certification of the government official who issued the NSL as *conclusive*, unless made in bad faith, on the key issues that determine whether the court can modify or set aside all or part of an NSL.

The act also has another, less familiar visage. Unknown to most Americans, legislators tucked into it an obscure provision that vastly expanded government power in an area wholly unrelated to countering terrorism. This provision made potential *antitrust law* violations a pretext for government surveillance in situations having no connection to terrorism. It allows government officials to obtain judicial permission to intercept “wire, oral, and electronic communications” if they have probable cause to believe that the intercepts “may” provide information related to a criminal violation of the Sherman Antitrust Act. Because existing law does not clarify what actions will be treated as criminal (versus civil) violations of the Sherman Act, this change makes virtually any business communication potentially subject to secret federal wiretap.

The new wiretap authority appears in section 113(g) of the Reauthorization Act, entitled “Amendment of Predicate Crimes for Authorization for Interception of Wire, Oral, and Electronic Communications.” It adds a new paragraph to Title 18, section 2516 of the *United States Code*, a section of federal criminal law that lists the situations in which the attorney general or his designee may authorize and a federal judge may order the interception of wire, oral, or electronic communications. Under section 2516, interception is permitted “when such interception *may provide* or *has provided* evidence of” the activities in the list (emphasis added). Without requiring any linkage to terrorism, the new paragraph allows such wiretaps if they may provide evidence of “any criminal violation of [Sherman Act] section 1 (relating to illegal restraints of trade or commerce), 2 (relating to illegal monopolizing of trade or commerce), or 3 (relating to illegal restraints of trade or commerce in territories or the District of Columbia) of the Sherman Act (15 U.S.C. 1, 2, 3).”

The Sherman Act casts a very wide net. Because its terms are open ended, and because the wiretap provision (§2516) requires only that the wiretap *may* provide evidence of wrongdoing, almost any firm’s officials can be subjected to such secret wiretaps. Marie Leone, writing for CFO.com, states that “[u]nder the amendments, the DOJ could thus ask a federal judge for permission to wiretap or bug suspected violators of conspiratorial antitrust crimes like price fixing. But corporate directors and officers are likely to be more troubled by prosecutors’ new ability to request wiretaps for such milder suspected antitrust violations as setting up trade monopolies or distribution arrangements that restrain commerce” (2006).

S. M. Oliva, president of the Voluntary Trade Council, calls the provision a

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4. The new law also requires greater specificity in demands for production of tangible things and makes clear that disclosure to one’s attorney is not covered by a nondisclosure mandate.

“craven attack on civil liberties and free markets,” noting that this provision was added to the reauthorization bill “[d]uring closed door meetings last December between House and Senate negotiators” with “[n]o explanation . . . given by congressional negotiators as to why antitrust matters were incorporated into anti-terrorism legislation” (2006). Oliva reports that with no floor debate on the antitrust provision in either the House or the Senate, “[t]he single largest expansion of criminal antitrust law in decades came in under the radar and without a single dissenting voice.” Citing recent Federal Trade Commission and DOJ investigations of possible price fixing between physicians groups and their insurers, she noted that with the new provision, “the DOJ can reclassify these cases as criminal and wiretap your family’s doctor and the administrative consultants that advise them in their dealings with insurers.”

Thus, under the guise of antiterrorism legislation, Congress again enlarged the scope of the government’s power, giving itself license to wiretap and conduct electronic surveillance of American businesses virtually at will.

### *The Alternative Minimum Tax*

While expanding the sphere of government action, Congress also has deliberately embraced taxation by stealth to finance its profligate spending. A prime example is the alternative minimum tax (AMT), passed in 1969 to target 155 extraordinarily rich individuals thought to be avoiding income taxes entirely (Rauch 2006). Despite the AMT’s origins as a tax on the super-rich, millions of middle-class people today are being forced to pay extra income taxes under this law because legislators in 1969—and in each of the *fifteen times* they have altered the AMT legislation since 1969—refused to index for inflation the income thresholds that trigger taxpayers’ potential AMT liability (Esenwein 2006, CRS-2). When nominal incomes rise because of inflation, more people’s incomes exceed the AMT thresholds, thus subjecting them to potential AMT income-tax liability even if their real incomes are unchanged.

Moreover, AMT rules disallow personal exemptions and deductions for state and local taxes, requiring them to be added back into one’s taxable income. Not only does this calculation disproportionately harm large families and those living in high-tax regions, but it further penalizes taxpayers by treating nominal increases in exemptions and deductions as real increases. The Bush administration’s reductions in regular income-tax rates have further increased middle-income people’s exposure to the AMT. When regular income-tax rates fall, more people find that their tax bill under the AMT rules exceeds their regular income-tax calculation, forcing them to pay the higher AMT. Thus, today’s AMT rules partially take back reductions in regular income-tax rates (Esenwein 2005).

As a partial palliative, Congress has gradually raised AMT income thresholds over the years. Such increases, however, have recently been instituted only on a temporary basis, briefly protecting some middle-income individuals from the AMT while stipulating that the income thresholds will revert to previous levels at a stated

date. For example, AMT legislation signed into law on May 17, 2006, through the Tax Increase Prevention and Reconciliation Act of 2005 (Public Law 109-222, 120 Stat. 345) raised the AMT threshold to \$62,550 for joint returns and \$42,500 for single returns, while requiring that these thresholds revert to the lower levels of \$45,000 and \$35,750 on December 31, 2006. This provision's expiration at the end of 2006 exposed an estimated 23 million people to AMT liability in 2007, up from 3.5 million in 2006 (Esenwein 2007, CRS-1). At the last minute, Congress on December 19, 2007, passed another one-year AMT "patch" bill, raising the thresholds slightly above the 2006 levels and again avoiding a more permanent AMT solution.

Congress continues to maintain a death grip on the AMT for one primary reason: as a stealth tax, the AMT shores up legislators' ability to act with impunity in expanding the government. The AMT allows legislators to increase federal tax revenue and expenditure without having to vote for tax increases, causing some observers to regard the AMT as Congress's tacit plan for financing chronic federal overspending. Moreover, by encouraging perception of the AMT as a tax on the rich, Congress dampens political opposition and causes many middle-income people not to realize their vulnerability until they are ensnared in the AMT net.

### *REAL ID: National Identification Cards for Americans*

Congress's drive to expand the government's power was evident again in the May 2005 passage of the REAL ID Act (Public Law 109-13, Division B, 119 Stat. 302). In it, legislators created a nascent national identification-card system, something that most Americans have long opposed. Members of the House of Representatives prevented normal congressional debate on the measure by slipping it into a larger bill regarded as "must-pass" legislation, the 2005 Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief (Public Law 109-13, 119 Stat. 231).

Final fusion of the two measures occurred in the conference committee charged with reconciling the two chambers' different versions of the emergency supplemental appropriations bill—a House bill containing the REAL ID language and a Senate bill without it. Chairman Thad Cochran (R., Miss.) refused to allow conference-committee members to debate or to vote on inclusion of the REAL ID measure in the final version of the bill.<sup>5</sup> As Senator Bill Nelson (D., Fla.) described it, the REAL ID measure "was put in in the dead of night, without the notification that was promised to the minority and without the informing of all the various Senators who were part of the conference committee" (*Cong. Rec.*, Senate, May 10, 2005, S4847). Allowed only an up-or-down decision on a version of the bill that included the REAL ID

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5. For Senator Cochran's assurance to other committee members that they would be allowed to participate in discussion of the REAL ID measure, see *Congressional Record*, Senate, May 10, 2005, S4826, transcript read by Sen. Patty Murray (D., Wash.).



provisions, committee members agreed to the conference report.<sup>6</sup> With no amendments to the conference report permitted on the floor, the Senate subsequently voted 100-0 in favor of the bill, the House 368-58 (Twight 2006).

The new identification cards will be phased in beginning in May 2008 as people renew their state driver's licenses.<sup>7</sup> Once the law is fully implemented, federal agencies, federally regulated firms (banks, for example), and contractors carrying out federal mandates must refuse to accept a state driver's license as identification for any official purpose unless the license conforms to the national government's requirements. Citizens in noncompliant states cannot use their state driver's license to board an airplane, enter a federal office building, carry out banking transactions, or do anything else that the Department of Homeland Security (DHS) secretary deems to be an "official purpose."

DHS draft REAL ID regulations, issued in March 2007, clearly reveal the threat to privacy that this legislation poses. The proposal would mandate use of a PDF-417 2D bar code, capable of carrying vast amounts of encoded data, as the common machine-readable technology standard for the REAL ID cards.<sup>8</sup> However, the proposal would *not* require encryption of the encoded data, making the information in the bar code accessible to anyone with a simple 2D bar-code scanner. Although DHS recognized that the "ability of commercial entities and other non-law enforcement third parties to collect the personal information encoded on the driver's licenses or identification cards raises serious privacy concerns," it concluded that "it would be outside its authority to address this issue within this rulemaking," instead encouraging states to do so (U.S. DHS 2007, 10837). Privacy issues raised by the mandated connectivity between the state and federal databases are equally profound. While expressing sensitivity to these and other privacy issues, DHS stated that "[t]he Act does not include statutory language authorizing DHS to prescribe privacy requirements for the state-controlled databases or data exchange necessary to implement the [REAL ID] Act" (U.S. DHS 2007, 10825 n. 3).

Congressional passage of the REAL ID Act made this emerging national iden-

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6. Nonetheless, five committee members took the unusual step of signing the conference report "with exception for REAL ID," and a sixth signed with his reservation because the "conference did not reconvene" to discuss and vote on the REAL ID measure.

7. The REAL ID Act required the new ID cards to be issued beginning on May 11, 2008. However, in March 2007 the Department of Homeland Security, in its Notice of Proposed Rulemaking (NPRM), proposed to loosen the implementation schedule. The proposed rules would allow any state, until October 1, 2007, to request an extension delaying until January 1, 2010, the date for the state to begin issuing REAL ID-compliant driver's licenses. Because it will take time to implement REAL ID fully, the department's NPRM specified May 11, 2013, as the date after which federal officials will not accept a noncompliant driver's license as identification for any official purpose, such as boarding an airplane (U.S. DHS 2007, 10824, 10851, 10857).

8. The DHS's NPRM stated that "[t]he printed barcode symbol consists of several linear (minimum 3, maximum 90) rows, each of which is like a small linear barcode made up of code words that can carry up to 1.1 kilobytes of machine-readable data in a space no larger than a standard bar code" (U.S. DHS 2007, 10838).

tification-card system a statutory reality, portending unprecedented national-government power to monitor and control Americans' daily lives. Legislators already have sought to make this national ID function more explicit by requiring REAL ID cards as a prerequisite of employment (Cope 2007). Biometric identifiers (e.g., retinal scans or digitized fingerprints) for REAL ID cardholders may be mandated at the discretion of the DHS secretary. One searches the Constitution in vain for congressional authority to take these actions.

For most members of Congress, the Constitution is no longer sacrosanct or even relevant. Day by day they decide with impunity which constitutional principles to uphold and which to violate, leaving judgments about constitutionality to the courts. Much the same can be said about the president.

## The President

Like Congress, President George W. Bush displays a profound disregard of constitutional responsibilities and boundaries. This president, who campaigned for the office as a proponent of limited government, has been vastly more reckless in expanding government power than his predecessor (Bartlett 2006; Healy and Lynch 2006). Using a variety of policies, he continues to assert virtually unlimited executive power. The following actions and initiatives illustrate this drive to expand the government's powers.

### *Vetoes and Presidential Signing Statements*

President Bush did not veto even one bill from January 2001 to July 19, 2006. Whatever Congress passed, he signed into law—including bills that he himself regarded as unconstitutional. In so doing, he repeatedly violated his oath to “preserve, protect and defend the Constitution of the United States” (Art. II, sec. 1). Rather than use his veto power, President Bush expressed his constitutional objections in obscure documents known as “presidential signing statements,” a tactic that is increasingly undermining the Constitution and the rule of law.

President Bush usually has not been so rash as to go on television, declare a measure unconstitutional, promise to veto it, sign it anyway, and then relegate his constitutional objections to a signing statement—although he did precisely that with the BCRA. Instead, he typically has shown a public face supportive of a particular bill and then has relied on signing statements to stretch presidential power vastly beyond legitimate constitutional bounds. With this approach, the president signs a bill into law in front of television news cameras with key legislators at his side. Afterwards, away from the media and members of Congress, he unilaterally declares some of the new law's provisions unconstitutional and states that he will not implement them.

More than any other president, President Bush has used signing statements in a systematic effort to alter substantive law and to expand presidential power. Phillip

Cooper estimates that by the end of Bush's first term in 2004, he had issued 108 signing statements, presenting "505 constitutional challenges to various provisions of legislation adopted by Congress" (2005, 521). More recent estimates identify 750 constitutional challenges contained in Bush's signing statements since he took office (Savage 2006, 1). In Bush's hands, the signing statement has become the functional equivalent of a line-item veto, serving "to effectively nullify a wide range of statutory provisions even as he signed the legislation that contained them into law" and "to significantly reposition and strengthen the powers of the presidency relative to the Congress" (Cooper 2005, 516).<sup>9</sup>

Consider the BCRA. As a candidate, Bush stated on national television in 2000 that he would veto the McCain-Feingold bill because of its unconstitutional provisions that limited political speech during a federal election campaign in violation of the Constitution's First Amendment (Healy and Lynch 2006, 4). Nonetheless, when presented with the bill in 2002, the president signed the measure into law. His beliefs about its unconstitutionality were relegated to a signing statement in which he expressed "serious constitutional concerns" about the law, including First Amendment questions, and noted his "reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to any election" (Bush 2002, 518). Healy and Lynch call Bush's decision to sign this bill "as clear an example of willful violation of the constitutional oath of office as one is likely to find with this president or any other" (2006, 4). After signing this avowedly unconstitutional bill into law, he dismissed his own responsibilities with the statement that "I expect that the courts will resolve these legitimate legal questions as appropriate under the law." (The next section examines the Supreme Court's responses to the BCRA's regulation of issue ads.)

Over time, President Bush has become more aggressive with his signing statements. They have become vehicles for formulaic legal language in which the president has staked out a broad concept of his presidential powers. Cooper found that in Bush's first term, the top four constitutional objections the president cited were his "[p]ower to supervise the unitary executive" (cited eighty-two times); "[e]xclusive power over foreign affairs" (seventy-seven times); "[s]ole control over the authority to make recommendations to Congress" (fifty-four times); and "[a]uthority to determine and impose national security classification and withhold information" (forty-eight times) (2005, 522). Other recurring objections involved Bush's power to "[k]eep secret deliberative processes of the executive branch," his "[c]ommander-in-chief powers," his "[u]nimpeded authority to conduct negotiations for foreign af-

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9. This practice continues despite the Supreme Court's 1998 ruling in *Clinton v. City of New York* (524 U.S. 417) that line-item vetoes are unconstitutional because they violate the Constitution's Presentment Clause and deny Congress the opportunity to exercise its power to override the president's veto by using the procedures set forth in the Constitution.

fairs,” and “[s]eparation-of-powers claims” (Cooper 2005, 522). Moreover, Bush repeatedly used signing statements to interpret as only “advisory” (“precatory”) the provisions by which Congress mandated that he do something, arguing that he might do these things as a matter of “comity,” but could not be required to do them. For example, his signing statement for the Energy and Water Development Appropriations Act of 2006 (Public Law 109-103) said that “[t]he executive branch shall construe sections 101 and 303 of the Act as calling for, but not mandating, consultation with Congress as a precondition to the execution of a law, as is consistent with the Constitution’s provisions concerning the separate powers of the Congress to legislate and the President to execute the laws” (Bush 2005c, 1751). In Cooper’s view, signing statements have become vehicles through which the “administration interpreted its own powers, gave them the widest possible scope, and then interpreted the limitations it found on congressional authority, usually giving legislative powers the narrowest possible reading” (2005, 521).

I have read every signing statement President Bush has issued in his second term, and the formulaic quality of the language that Cooper notes in his study of Bush’s first term continues today. Consider the president’s signing statement accompanying the 2005 USA PATRIOT Reauthorization Act, discussed earlier. In it, Bush stated: “The executive branch shall construe the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch, such as sections 106A and 119, 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” (2006b, 425). Section 106A requires “[a]udit on access to certain business records for foreign intelligence purposes,” and section 119 requires “[a]udit of use of national security letters.” In other words, after signing the Reauthorization Act into law, Bush immediately declared in his signing statement that he would not implement important oversight provisions that were a central motivation for Congress’s passage of the act.

Similarly, when President Bush signed into law H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006 on December 30, 2005, he rejected via signing statement the provisions by which Congress sought to control his handling of detainees. He stated: “The executive branch shall construe Title X in Division A of the Act, relating to detainees, 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 the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks” (2005d, 1918–19, emphasis added). The language of these signing statements has become so polished that many readers may not even notice that Bush is in effect wielding a line-item veto.

Again, upon signing the Department of Homeland Security Appropriations Act of 2006, President Bush issued a statement altering provision after provision of the new law, stating that the provisions would be construed as “advisory rather than mandatory,” construed “in a manner consistent with the President’s exclusive constitutional authority, as head of the unitary executive branch and as Commander in Chief, to classify and control access to national security information” (2005b, 1558). Even when signing a bill dealing with fishery conservation, Bush used similar language, stating that the executive branch “shall construe” certain provisions “in a manner consistent with the President’s constitutional authority to conduct the Nation’s foreign affairs, including the authority . . . to supervise the unitary executive branch” (2007, 31–32). As Cooper states, “[c]ontrol of the unitary executive’ is not empty language, but a serious effort to reinterpret the scope of executive power and the limits to congressional authority” (2005, 531).

Through his expanded use of signing statements, President Bush has garnered political credit for signing bills, while at the same time altering—sometimes gutting—the legislation by broad assertions of presidential authority for which he has not been held fully accountable. With his signing statements and unwillingness to veto unconstitutional bills, as in other arenas, he has violated his oath of office and breached constitutional limits on presidential authority.

### *Warrantless Domestic Electronic Surveillance*

President Bush’s secret authorization of domestic electronic surveillance by the National Security Agency (NSA) without judicial warrants provides further indication of his willingness to ignore constitutional limits on his authority. Through this domestic surveillance program, the president violated the 1978 Foreign Intelligence Surveillance Act (FISA, Public Law 95-511, 92 Stat. 1783), whose purpose is to protect citizens from electronic surveillance not approved by a court. Although his desire to protect Americans from terrorism is laudable, his actions have jeopardized the institutional underpinnings of limited government by violating both the Constitution and FISA’s long-standing statutory restraints.

A threshold issue in determining the legality of the president’s actions is the Constitution’s allocation of relevant authority between the president and Congress. President Bush has claimed an inherent constitutional power as commander in chief to carry out warrantless domestic surveillance, free from congressional restraint, in the name of national security.<sup>10</sup> Yet constitutional scholars have strongly rejected this

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10. Epstein (2006) noted that the Constitution does not even describe the president’s commander-in-chief duties as a “power,” but rather as a function, prescribing that “[t]he President *shall be* Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States” (Art. II, sec. 2, emphasis added). As Epstein stated, this construction contrasts sharply with the Constitution’s explicit use of the word *power* to describe the president’s authority to make treaties with other nations.

argument, citing Congress's concurrent powers (Epstein 2006). In an open letter to Congress published in the *New York Review of Books*, constitutional law scholars concluded that DOJ officials had "fail[ed] to offer a plausible legal defense of the NSA domestic spying program," adding that "the President cannot simply violate criminal laws behind closed doors because he deems them obsolete or impracticable" (Bradley et al. 2006, 8). Because Congress properly exercised its legitimate constitutional authority in passing FISA, these scholars concluded that the president is obligated to comply with the FISA rules.

The president has also claimed that Congress's post-9/11 Authorization for Use of Military Force of 2001 (AUMF, Public Law 107-40, 115 Stat. 224) empowered him to avoid FISA's strictures. The AUMF broadly authorizes the president "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons" (AUMF 2001, sec. 2[a]). However, as Epstein noted, the "AUMF does not contain one word that dislodges FISA, and the law disfavors any 'implied repeal' of major legislation" (2006). Because FISA's provisions dealt explicitly with the president's power to conduct warrantless electronic surveillance of U.S. persons in wartime, allowing the president to conduct such surveillance for just fifteen days before being required to comply with the normal FISA requirements, there is no constitutional basis for their implied repeal (Bradley et al. 2006; Brief of Amicus Curiae Constitutional Scholars 2006; Levy 2006).

FISA was Congress's response to discovery that federal intelligence agencies for years had abused their authority by secretly targeting U.S. citizens, including civil rights activists and Vietnam war protesters, with wiretaps and other forms of electronic surveillance. FISA made it unlawful for federal officials to carry out electronic surveillance of U.S. persons unless the government obtained a court order using procedures that guaranteed judicial oversight.

In establishing statutory controls over such surveillance, FISA made it a crime punishable by as many as five years in prison if a person "engages in electronic surveillance under color of law except as authorized by statute" (FISA 1978, §109[a]; 50 USC §1809[a][1]). Presidential use of electronic surveillance likely to produce information about a U.S. person is unlawful unless the officials obtain a court order through the Foreign Intelligence Surveillance Court created by FISA. To obtain such an order, the applicant must explain in writing, among other things, the factual basis for his or her belief that "the target of the electronic surveillance is a foreign power or an agent of a foreign power" (50 USC §1804 [a][4]). The application must contain certification by the president's designee that "a significant purpose of the surveillance is to obtain foreign intelligence information" that "cannot reasonably be obtained by normal investigative techniques" (50 USC §1804 [a][7]). The act allows the judge to grant the order only if he or she finds "probable cause to believe that the target of the electronic surveillance is a foreign power or an agent of a foreign power,"

specifying also that no U.S. person may be so designated “solely upon the basis of activities protected by the first amendment to the Constitution of the United States” (FISA 1978, §105; 50 USC §1805 [a][3]). Under FISA, the only electronic surveillance that the president can authorize *without* a court order is electronic surveillance “solely directed at” acquiring content “transmitted by means of communications used exclusively between or among foreign powers” or obtaining “technical intelligence, other than the spoken communications of individuals, from property or premises under open and exclusive control of a foreign power.” Even these types of surveillance can proceed without court order only if there is “no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party” (FISA 1978, §102[a][1]; 50 USC §1802 [a][1]). Moreover, mandatory “minimization” procedures designed to curtail the acquisition, retention, and dissemination of nonpublic information about U.S. persons require, among other things, that “no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours [originally 24 hours] unless a court order under [USC] section 1805 [FISA §105] of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person” (FISA 1978, §101[h][4]; 50 USC §1801 [h][4]).

For more than twenty years, FISA protected Americans from electronic surveillance not authorized by a court. Yet, while shielding Americans from abuse of government power, FISA did not deny the federal government access to useful foreign intelligence. Of approximately nineteen thousand applications over twenty-eight years, all but five were approved by the Foreign Intelligence Surveillance Court (Electronic Frontier Foundation 2006; Winkler 2006). In short, FISA provided judicial oversight to protect Americans from abuse of executive power while assuring the executive branch the secrecy it needed when seeking foreign-intelligence information through electronic surveillance.

Beginning in 2002, President Bush chose to bypass this judicial oversight. In an effort to gain information about terrorist activities, he issued secret orders authorizing the NSA to conduct electronic surveillance of people in the United States without seeking court orders and without complying with the FISA procedures. Until the *New York Times* disclosed the program in December 2005, the president’s electronic surveillance program remained secret (Risen and Lichtblau 2005). After initially denying the *Times* report, Bush later acknowledged its accuracy, stating that the government eavesdropping targeted only international phone calls and international e-mail—that is, communications in which one party was outside of the United States (Bush 2005a).

Close on the heels of the first disclosure, *USA Today* reported in May 2006 that the secret electronic surveillance, dubbed the “Terrorist Surveillance Program,” was far broader than the December report had indicated (Cauley 2006). In fact, the president had ordered executive branch officials to induce the major communications

companies to allow the government access to data about the phone calls and e-mails of *every person in the United States*. As Jim Harper noted, “This can no longer be called a ‘terrorist surveillance program’ because the surveillance extends to every American’s phone calling” (2006). AT&T, Verizon, and BellSouth agreed to allow government access; only Qwest refused to do so, resisting strong pressure from government officials. According to Cauley: “NSA representatives pointedly told Qwest that it was the lone holdout among the big telecommunications companies. It also tried appealing to Qwest’s patriotic side: In one meeting, an NSA representative suggested that Qwest’s refusal to contribute to the database could compromise national security, one person recalled. In addition, the agency suggested that Qwest’s foot-dragging might affect its ability to get future classified work with the government” (2006).

To counter public criticism of the program, the president denied “mining or trolling through the personal lives of millions of innocent Americans” (Bush 2006a). He said that the information obtained by the secret electronic surveillance disclosed in May 2006 did not involve eavesdropping on actual conversations of people, but involved only “transactional” data—information about which phone numbers called which other numbers, the length of the calls, and the like. According to the president, the government would not even know the identity of the parties on the calls. Commentators quickly pointed out, however, that with other databases in the government’s possession, it was a simple matter to link a phone number with a named person. Regarding the claim that the NSA was not accessing information that identifies a person, former NSA analyst Ira Winkler responded, “Frankly, you have to be a complete moron to believe that. It is trivial to narrow down access to a phone number to just a few members of a household, if not in fact to exactly one person” (2006). Asking rhetorically, “[S]o what if the NSA isn’t listening to the calls themselves?” Winkler described the information derivable from the raw transactional data: “An intelligence agency doesn’t need to hear your chatter to invade your privacy. By simply tying numbers together—an intelligence discipline of traffic analysis—I assure you I can put together a portrait of your life. I’ll know your friends, your hobbies, where your children go to school, if you’re having an affair, whether you plan to take a trip and even when you’re awake or asleep. Give me a list of whom you’re calling and I can tell most of the critical things I need to know about you.”

Under FISA and other statutes disregarded by President Bush, government acquisition of this sensitive information without a court order was plainly illegal. The Center for Democracy and Technology (2006) explained that this data collection is illegal whether evaluated under FISA, under the relevant statute on collection of “call detail information” applied in criminal cases, under the Electronic Communications Privacy Act, or under Title 47, section 222, of the *United States Code*, which governs telecommunications carriers’ responsibilities to protect “the confidentiality of proprietary information” relating to their customers.

At issue in this context is not the usefulness of the Bush administration’s do-



mestic electronic surveillance programs. Reasonable minds may differ as to the net benefit or harm caused by the government's wholesale domestic surveillance (Friedman 2006). The issue is the president's unwillingness to comply with bills passed by Congress and duly signed into law, and hence his violation of the division of powers established by the Constitution and his own constitutional duty to "take Care that the Laws be faithfully executed" (Art. II, sec. 3). As Richard Epstein stated, "The major danger with presidential surveillance does not lie in this particular overreaching of executive power. It's what comes next. If President Bush can ignore FISA, then he can disregard a congressional prohibition against the use of nuclear force" (2006). When presidents can pick and choose the laws they will obey, the nation is not a constitutional republic characterized by limited government.

If Americans believe that Bush's domestic surveillance programs are useful, the programs must be put into place lawfully—whether through compliance with FISA, changes to existing statutory law, or constitutional amendment. The president, while still claiming inherent power to carry out his domestic electronic surveillance, announced in January 2007 that he would thenceforth seek warrants from the Foreign Intelligence Surveillance Court for the NSA wiretaps (Snow 2007). More recently, the Protect America Act of 2007 (Public Law 110-55, 121 Stat. 551) became law, loosening FISA's strictures. The underlying constitutional issues are being contested in federal court but have not yet reached the Supreme Court.<sup>11</sup>

### *The Security and Prosperity Partnership of North America*

Another instance of apparently extraconstitutional action by the president is his recent implementation of a plan to expand and deepen the integration begun by the North American Free Trade Agreement (NAFTA). But free trade, though still a goal, is no longer the driving impetus. Beginning in 2003, President Bush made formal agreements with Mexico and Canada to work toward transforming the three separate NAFTA nations into something more closely resembling a single nation, partially supplanting U.S. judicial, legislative, and regulatory processes. He did so without notifying the public, without seeking authorizing legislation, and without seeking the Senate's consent to a treaty. He then initiated bureaucratic implementation of these measures, again without public notice or congressional authorization.

The plan is called the Security and Prosperity Partnership of North America (SPP). Under this rubric, Bush is working to eliminate meaningful borders between the United States, Mexico, and Canada. In effect, the initial objective is to create what economists call a common market: regional economic integration involving common external trade policies and free movement of labor and capital among the member

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11. The case is *American Civil Liberties Union, et al. v. National Security Agency* (6th Circuit Court of Appeals, nos. 06-2095/2140 [July 6, 2007]). The District Court held that the warrantless wiretapping program was unconstitutional, but the Court of Appeals dismissed the case on the basis of its determination that the plaintiffs lacked standing to sue.

countries. Besides these features, however, SPP working documents suggest even stronger integration that will involve some degree of trilateral governance of the United States, Mexico, and Canada. Reducing trade barriers is one thing; altering the governance structure of the United States is quite another.

The plan is a matter of public record. On March 23, 2005, leaders of the three nations held a press conference in Waco, Texas, at which they announced their agreement to the SPP. President Bush, Mexican president Vicente Fox, and Canadian prime minister Paul Martin avowed commitment to the SPP. One reporter asked, “Keeping in mind in front of us the European Union, how much is this partnership a first step toward continental integration?” and “If so, how far would you like to go and can you give us some sort of road map, and perhaps give us a distinction between partnership and integration?” Nothing close to an explicit answer was given. Prime Minister Martin said that it was “not a big thing.” President Bush, with regard to “what kind of union might there be,” stated only that “I see one based upon free trade that would then entail commitment to markets and democracy, transparency, rule of law” (Joint Press Conference 2005).

The SPP *Prosperity Agenda* and the *Security Agenda* published by the White House on the same day belied these reassuring words. These documents describe strengthening “regulatory cooperation, including at the onset of the regulatory process” and implementing a “North American traveler security strategy . . . for screening prior to departure from a foreign port and at the first port of entry to North America” (SPP 2005a, 2005d). The national leaders concomitantly charged their ministers with creating an “architecture” to move the SPP forward. Shortly thereafter, President Bush and the other nations’ leaders established “SPP prosperity working groups,” each covering a distinct area, such as financial services, business facilitation, food and agriculture, and health (SPP 2005b).

The Council on Foreign Relations (CFR), a nongovernmental organization, created a task force to study the matter. Its May 2005 report *Building a North American Community: Report of an Independent Task Force* stated that “[t]he Task Force is pleased to provide specific advice on how the partnership [SPP] can be pursued and realized” (CFR 2005, 3). The report continued, “To that end, the Task Force proposes the creation by 2010 of a North American community to enhance security, prosperity, and opportunity. . . . Its boundaries will be defined by a common external tariff and an outer security perimeter within which the movement of people, products, and capital will be legal, orderly, and safe.”

The rest of the document sets forth recommendations, among other things, to “[e]stablish a permanent tribunal for North American dispute resolution,” to “[e]stablish a trinational competition commission . . . [and] a continental anti-trust agency,” to “[d]evelop a North American Border Pass” with biometric identifiers, and to “[a]dopt a North American approach to regulation” (CFR 2005, 8, 22). The push to “harmonize” regulatory policy is a recurrent theme in the report. Recommending that we should “[m]ake a North American standard the *default approach* to new

regulation,” the report gave lip service to national sovereignty while greatly diminishing its scope. It stated that “[e]ach jurisdiction would retain the sovereign right to shape rules within its borders, but in principle, *country-specific regulations should only be adopted when no international or North American approach already exists*, where there are unique national circumstances or priorities, or where there is a well-founded lack of trust in the regulatory practices of the other partners” (26, emphasis added). In addition, it recommended establishment of “[a] North American inter-parliamentary group” in which legislators from all three nations would meet every other year (32). The implications regarding trilateral governance are clear.

One might dismiss the CFR report as a mere recommendation by a nongovernmental organization, yet the president of the United States and the leaders of Mexico and Canada immediately began to implement the core elements of the CFR’s proposals. In June 2005, one month after release of the CFR report, the ministers of the three countries issued the *Report to Leaders* as the heads of state had instructed them to do.<sup>12</sup> The “key themes and initiatives” outlined in it closely paralleled those set forth in the CFR report, recommending, for example, development of a “trilateral Regulatory Cooperation Framework by 2007” (SPP 2005c, 4). Also released with this report was a fifty-five-page “annex” that set forth initiatives and timetables for actions by the “prosperity working groups” that President Bush had created after the SPP’s March 2005 launch.

The key issue regarding the SPP initiative is the role of the U.S. president in orchestrating changes in the fundamental institutional structure of the United States without seeking public approval, congressional approval, or compliance with the U.S. Constitution. We as a nation might decide to follow constitutional procedures and form a treaty with Canada and Mexico to accomplish the results envisioned in the SPP. We might enact legislation to avoid the requirement of two-thirds Senate approval for treaties, as was done with NAFTA. We might have a national debate about it. We might amend the Constitution to give President Bush the extraordinary powers that he is now wielding without benefit of constitutional authority.

Instead of seeking any of those things, however, President Bush proceeded to implement the SPP proposals through the executive bureaucracy. He housed the SPP under the NAFTA authority of the Department of Commerce, where it has been given its own government Web site, [www.SPP.gov](http://www.SPP.gov). Thus, U.S. taxpayers are now unwittingly paying bureaucrats to implement plans for this expanded “partnership” without benefit of legislative or constitutional authority or public approval. As Jerome Corsi stated, “President Bush is proceeding to take the SPP declaration of Waco, Texas—nothing more than a trilateral joint press statement—and utilize that statement as if it were legislation or a treaty authorizing the extensive SPP.gov agreements that are being formed” (Bluey 2006).

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12. The three U.S. ministers were the secretaries of commerce, homeland security, and state.

Executive secrecy surrounding these initiatives has been striking. One of the first to discover and publicize this issue was Jerome Corsi, a writer with a Ph.D. in political science from Harvard University. When he tried to learn the names of the people who were part of the SPP “working groups” and to discover the substance of the memoranda of understanding and agreements already made with Canada and Mexico under the auspices of these working groups, he was denied the information. Writing for *World Net Daily*, Corsi reported on June 13, 2006, that “Geri Word, who heads the SPP office within the NAFTA office of the U.S. Department of Commerce affirmed to [ *World Net Daily* ] last Friday in a telephone interview that the membership of the working groups, as well as their work products, have not been published anywhere, including on the Internet.” Word added that the reason for not publishing them was that “[w]e did not want to get the contact people of the working groups *distracted* by calls from the public” (Corsi 2006, emphasis added). Corsi stated, “If the executive branch has nothing to hide, I would encourage the office of SPP.gov in the Department of Commerce to fulfill promptly my FOIA [Freedom of Information Act] request and release the names, working agendas, and various memoranda of understanding or other trilateral agreements already achieved, but largely unannounced to the American media, the American public, or the U.S. Congress” (Bluey 2006).

Meanwhile, bureaucratic wheels continue to turn, creating a growing paper trail that documents the steps being taken to implement the SPP. The SPP’s prosperity and security priorities have been spelled out in a seventy-seven-page document that lists key milestones and their status (SPP 2006a). The SPP’s new North American Competitiveness Council (NACC) has issued more than fifty recommendations for the member governments—including creation of a North American Regulatory Cooperation Framework “based on the principle that . . . regulatory authorities in all three countries should make every effort to reflect prevailing North American or international standards”—while still insisting that “the recommendations of the NACC do not suggest any measure that would threaten the sovereign power of any of the three countries” (SPP 2007a, 7, 9). Meetings between the heads of state continue to push the SPP agenda (SPP 2006b, 2006c, 2006d, 2007b). Implementation is under way. All this and more is being done by one man without public approval, legislative mandate, or constitutional authority—a man who seeks to impose his decisions on the American public by fiat.

These cases show a president with little respect for restraints on power established by the Constitution. Other examples abound. In their study of George W. Bush’s constitutional record, Healy and Lynch document the president’s violations of citizens’ rights secured under the First and Fourth Amendments, his drive to expand executive power, his disregard for constitutional guarantees of the writ of habeas corpus (Art. I, sec. 9) and trial by jury (Art. III, sec. 2), and his disrespect for constitutional federalism. In each area, Healy and Lynch have found “a ceaseless push for power, unchecked by either the courts or Congress,” a pattern of “disdain for

constitutional limits” (2006, 3). Like Congress, this president regards compliance with the Constitution as largely optional.

## The Supreme Court

The Supreme Court also has freely disregarded constitutional limits on government power, often changing the Constitution’s core meaning with the approval of only five of the nine sitting justices. The following cases highlight the ease with which a bare majority may undermine key constitutional provisions, such as the First Amendment, the Fifth Amendment, and the Interstate Commerce Clause.

### *Eminent Domain: Kelo v. City of New London*

Prior to *Kelo v. City of New London* (125 S.Ct. 2655 [June 23, 2005]), if asked to name countries where governments may seize people’s property at will, few Americans would have named the United States. The Founders understood that freedom from arbitrary government seizure of property was a cornerstone of liberty, and the Fifth Amendment restricted the government’s eminent-domain power by providing that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.” The Court’s *Kelo* decision eviscerated that protection.

U.S. courts and the American public long understood the Takings Clause to prohibit the national government (and state governments through the Fourteenth Amendment) from taking property from one person and giving it to another person without complying with the Fifth Amendment’s public-use and just-compensation prerequisites. The Supreme Court traditionally insisted that “public use” entail either transfer of the condemned property to direct public ownership (for example, military bases or highways) or, in cases of subsequent private ownership, an ongoing legal right for the public to use the condemned property (for example, the property of common carriers, such as railroads, that is open to the public by law).<sup>13</sup> Over time, however, the Court loosened the public-use requirement and occasionally allowed takings to eliminate an existing public harm, even though the condemned property was to be transferred subsequently to different private owners for uses not open to the public. For example, in *Berman v. Parker* (348 U.S. 26 [November 22, 1954]) the Court ruled that the “public purpose” of slum clearance was tantamount to a public use that satisfied the requirements of the Takings Clause.<sup>14</sup>

Even this limitation on government seizure of private property fell with the *Kelo* decision. *Kelo* involved government condemnation of well-kept private properties that

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13. For discussion of the history of judicial reinterpretation of the Takings Clause, see Epstein 1985, Ely 1992, and Bethell 1998.

14. See also *Hawaii Housing Authority v. Midkiff* (467 U.S. 229 [May 30, 1984]).

caused no public harm—no urban blight or other harm that might justify a government taking within the meaning of prior Supreme Court decisions. In *Kelo*, the City of New London, exercising eminent-domain power delegated by the state of Connecticut, condemned a wide swath of private property for the sole purpose of transferring the property to different private owners to redevelop the area into facilities such as restaurants and shopping space that the city planners hoped would increase tax revenues and create jobs.

By a 5-4 vote, the Supreme Court found the *Kelo* condemnations not in violation of the public-use requirement of the Takings Clause, thus sanctioning for the first time a government taking of private property from one individual for transfer to another private individual without even an allegation of an existing public harm. The Court reinterpreted the term *public use* to include any claimed public *purpose*, stating, “because that [redevelopment] plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment” (*Kelo*, 2665).

The dissenting opinions were blunt. Justice Clarence Thomas stated that the Court’s decision “replaces the Public Use Clause with a ‘[P]ublic [P]urpose’ Clause” and that “[i]f such ‘economic development’ takings are for a ‘public use,’ any taking is, and the Court has erased the Public Use Clause from our Constitution” (*Kelo*, Thomas, J., dissenting, 2677–78). Justice Sandra Day O’Connor wrote that owing to this ruling, “[t]he specter of condemnation hangs over all property” because the Court’s decision “holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure.” She added, “[W]ho among us can say she already makes the most productive or attractive possible use of her property?” and concluded that “[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory” (*Kelo*, O’Connor, J., dissenting, 2675–76).

So fell another constitutional limit on government power. The Court’s *Kelo* decision eroded protection against government seizure of private property that the Takings Clause had long guaranteed. Not only did the Court undermine the Fifth Amendment, but it also disregarded Article V’s procedure for constitutional amendment (Twight 2006). Like Congress and the president, the Supreme Court showed its willingness to violate the Constitution at its pleasure.

### ***The Commerce Clause: Gonzales v. Raich***

The Constitution gives Congress power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes” (Commerce Clause, Art. I, sec. 8, cl. 2) and “[t]o make all Laws which shall be necessary and proper for carrying into Execution” the Commerce Clause and other enumerated powers (Art.

I, sec. 8, cl. 18). In *Gonzales v. Raich* (125 S.Ct. 2195 [June 6, 2005]), the Supreme Court issued its broadest interpretation yet of Congress's power to regulate economic activity under the authority of the Commerce Clause. In so doing, the Court allowed the national government to prohibit wholly local noncommercial activities, with no proof that the local activities had any effect on commerce between the states.

The long-accepted meaning of the Commerce Clause was that it created congressional power to regulate *interstate* commerce, not intrastate commerce. The original understanding of the constitutional language was that "commerce" meant trade or exchange, not manufacturing or agriculture; that "among the several states" referred to commerce involving people in two or more states; and that "to regulate" referred to the making of rules governing commerce, but did not include the power to prohibit that commerce. Recent scholarly analysis shows that these interpretations were correct. Based on exhaustive examination of the use of the foregoing terms in the Constitutional Convention, the state ratification debates, the *Federalist Papers*, and the *Pennsylvania Gazette* (published 1720–1800), constitutional scholar Randy Barnett (2001, 2003) has shown that the original public meaning of these terms at the time of the Constitution's drafting and ratification—that is, the understanding on which people agreed to the Constitution—conformed to the straightforward definitions I have stated here.

These interpretations prevailed until the late 1930s and early 1940s, when the Supreme Court began to reinterpret the Commerce Clause in an effort to justify a broader role for the national government in economic activity. In its landmark *Wickard v. Filburn* ruling (317 U.S. 111 [November 9, 1942]), the Court deemed it constitutional under the Commerce Clause for the federal government, in administering the Agricultural Adjustment Act of 1938, to penalize a farmer for growing more than his assigned quota of wheat, even though it was grown for his own family's consumption, was grown within a single state, and would never enter interstate commerce. Upholding the constitutionality of the 1938 act, the Court held that "even if appellee's (Mr. Filburn's) activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a *substantial economic* effect on interstate commerce" (317 U.S. 125, emphasis added). For the first time, intrastate production not directly involving interstate commerce was deemed within the reach of Congress's commerce power.

Until the *Gonzales v. Raich* decision, *Wickard v. Filburn* was regarded as the most expansive Supreme Court interpretation ever of the Commerce Clause power. In *Raich*, the two plaintiffs, Angel Raich and Diane Monson, had used marijuana to treat their serious illnesses in compliance with California's Compassionate Use Act of 1996. This act allowed medical use of marijuana only with a physician's approval; patients were subject to the state's enforcement apparatus, including home visits, designed to prevent marijuana from being used in excess of statutory limits or diverted to the interstate market. Although the state of California regarded the women's use of medical marijuana as legal, federal Drug Enforcement Administration agents

deemed their use in violation of federal Controlled Substances Act provisions that made production or possession of marijuana a federal criminal offense. Accordingly, the agents destroyed all six of Monson's cannabis plants.

When Monson and Raich later sued attorney general Alberto Gonzales, they argued that application of the Controlled Substances Act to them based on in-state activities having no effect on interstate commerce exceeded the federal government's power under the Commerce Clause and violated the Fifth, Ninth, and Tenth Amendments. The Supreme Court, however, relying heavily on *Wickard v. Filburn*, rejected the plaintiffs' Commerce Clause arguments and held that the Controlled Substances Act "is a valid exercise of federal power, even as applied to the troubling facts of this case" (*Raich*, 2201). Although the Court in 1942 had relied on factual evidence that home-grown wheat in the aggregate had a significant effect on the interstate wheat market, whereas in *Raich* no evidence was adduced of any effect of home-grown marijuana on the interstate market, the Court was not swayed. Instead, the justices accepted Congress's mere assertion of an effect on interstate commerce as a valid substitute for objective evidence and thus an acceptable pretext for federal regulation and control of purely local activity.

In so doing, the Court destroyed the only remaining restraint on the national government's ability to use the Commerce Clause to regulate purely local, noncommercial, intrastate activity. In his dissent, Justice Thomas described the Court's decision as, in effect, eliminating the Commerce Clause from the Constitution: "By holding that Congress may regulate activity that is neither interstate nor commerce under the Interstate Commerce Clause, the Court abandons any attempt to enforce the Constitution's limits on federal power" (*Raich*, Thomas, J., dissenting, 2229). He added, "[i]f the Federal Government can regulate growing a half-dozen cannabis plants for personal consumption (not because it is interstate commerce, but because it is inextricably bound up with interstate commerce), then Congress' Article I powers—as expanded by the Necessary and Proper Clause—have no meaningful limits" (2233). Justice O'Connor described the Court's decision in *Gonzales v. Raich* as "tantamount to removing meaningful limits on the Commerce Clause," thus "threaten[ing] to sweep all of productive human activity into federal regulatory reach" (*Raich*, O'Connor, J., dissenting, 2222, 2224).

In *Raich*, the Court chose, as it did in *Kelo*, to rewrite the Constitution from the bench, disregarding prescribed Article V amendment procedures. It again treated compliance with the written Constitution as optional, casting aside constitutional restraints on federal power.

### ***The First Amendment: McConnell v. FEC and FEC v. Wisconsin Right to Life***

Two First Amendment cases further illustrate the Supreme Court's power to reshape Americans' constitutional rights, a power to derogate from—or to honor—the



Constitution's plain meaning. Both cases assessed the constitutionality of the BCRA's restrictions on issue advertising, discussed in previous sections—the first ruling diminishing the First Amendment's reach and the second partially restoring it.

Shocking many observers, the Court in *McConnell v. Federal Election Commission* (540 U.S. 93 [2003]) upheld most of the BCRA against First Amendment challenges, including section 203's "Prohibition of Corporate and Labor Disbursements for Electioneering Communications," the provision regulating independent expenditures on issue ads in the sixty days before a federal election. The Court reached this result by revisiting key parts of its earlier decision in *Buckley v. Valeo* (424 U.S.1 [1976]).

The Court in *Buckley* had examined the constitutionality of provisions of the 1971 FECA, as amended in 1974. Although *Buckley* upheld for the most part the constitutionality of the act's contribution limits, reporting and disclosure requirements, and provisions for public financing of election campaigns, the Court ruled that the act's limits on *expenditures* violated the First Amendment. Noting that "a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates," the Court viewed the limit on independent expenditures, the type of expenditure often used to finance issue ads, as the "most drastic" of the FECA expenditure restrictions (*Buckley*, 39, 58–59). The justices emphasized a distinction between express advocacy and issue discussion, perceiving limits on issue discussion to be the most dangerous. *Buckley v. Valeo* thus came to stand for the idea that although some government regulation of express advocacy was permissible, government regulation of independent issue advocacy was not.

The key FECA provision stated that "[n]o person may make any expenditure . . . relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds \$1,000" (*Buckley*, 39, quoting FECA §608[e][1]). Construing this provision to denote only expenditures that expressly advocated the election or defeat of a candidate for federal office, the Court found the independent expenditure limit to be "unconstitutional under the First Amendment" and held that "[w]hile the independent expenditure ceiling thus fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression" (*Buckley*, 47–48, 51). The ruling allowed independent groups such as the ACLU and NRA to pay for issue ads from their general treasuries without being subject to FECA mandates.

The Supreme Court's decision in *McConnell v. FEC* undercut this freedom of expression. The Court argued that *Buckley v. Valeo*'s treatment of express advocacy was merely a matter of statutory interpretation, not a constitutional requirement. In assessing the BCRA's regulation of issue advertising, the *McConnell* Court rejected plaintiffs' claim that "*Buckley* drew a constitutionally mandated line between express advocacy and so-called issue advocacy, and that speakers possess an inviolable First Amendment right to engage in the latter category of speech" (*McConnell*, 190). The

Court stated that “a plain reading of *Buckley* makes clear that the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command,” adding “[n]or are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy” (*McConnell*, 191–93).

Accordingly, the *McConnell* decision sustained BCRA prohibitions of expenditures for electioneering communications by corporations and unions, whether for express advocacy or issue advocacy purposes. The Court stated that since *Buckley*, “Congress’ power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law,” asserting that the ability to use segregated funds for that purpose provides “a constitutionally sufficient opportunity to engage in express advocacy” (*McConnell*, 203). Satisfied that corporate and labor groups “remain free to organize and administer segregated funds, or PACs [political action committees], for that purpose,” the Court stated that “in the future corporations and unions may finance genuine issue ads during those time-frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund” (*McConnell*, 204, 206).<sup>15</sup>

The dissenting opinions were outspoken about this decision’s implications for First Amendment rights. Calling it a “sad day for freedom of speech,” Justice Antonin Scalia stated that the Court had “smile[d] with favor upon a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government” (*McConnell*, Scalia, J., dissenting, 248). In his view, the BCRA “prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice: national political parties and corporations, both of the commercial and the not-for-profit sort” (*McConnell*, Scalia, J., dissenting, 248). Justice Scalia explained that although the government claimed that its target was the appearance of corruption, “the most passionate floor statements during the debates on this legislation pertained to so-called attack ads, which the Constitution surely protects, but which Members of Congress analogized to ‘crack cocaine,’ . . . ‘drive-by shooting[s],’ . . . and ‘air pollution,’” leading him to conclude that “[t]here is good reason to believe that the ending of negative campaign ads was the principal attraction of the legislation” (260). Citing the Court’s “casual abridgment of free-speech rights,” Justice Scalia wrote that “in the modern world, giving the government power to

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15. To square the BCRA’s prohibition on nonprofit corporations’ use of “general treasury funds to pay for electioneering communications” (*McConnell*, 209) with its earlier ruling in *Federal Election Commission v. Beaumont* (439 U.S. 146 [2003]), the Court read into the BCRA an exemption created by the *Beaumont* case that does not appear in the BCRA. *FEC v. Beaumont* created an exemption for a subcategory called “MCFL organizations” that have three characteristics: (1) the organization “was formed for the express purpose of promoting political ideas, and cannot engage in business activities”; (2) it “has no shareholders or other persons affiliated so as to have a claim on its assets or earnings”; and (3) it “was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities” (*McConnell*, 210–11). The restrictiveness of these characteristics makes the exemption insufficient to protect organizations such as the ACLU and the NRA.

exclude corporations from the political debate enables it effectively to muffle the voices that best represent the most significant segments of the economy and the most passionately held social and political views” (256, 257–58). Justice Thomas stated that “the Court today upholds what can only be described as the most significant abridgment of the freedoms of speech and association since the Civil War,” adding that “[w]ith breathtaking scope, the Bipartisan Campaign Reform Act of 2002 (BCRA) directly targets and constricts core political speech, the ‘primary object of First Amendment protection’” (*McConnell*, Thomas, J., dissenting, 264).

Here the law stood until June 25, 2007, when by a 5-4 decision in *Federal Election Commission v. Wisconsin Right to Life, Inc.* (Slip opinion, No. 06-969, 551 U.S. [2007], hereafter *WRTL II*), the Court restored some of the First Amendment rights undermined by the *McConnell* decision. Wisconsin Right to Life, Inc. (WRTL) is a nonprofit, tax-exempt advocacy organization that actively opposed the Senate’s 2004 use of the filibuster to delay consideration of President Bush’s federal judicial nominees. In support of its grassroots lobbying campaign, WRTL broadcast several advertisements (entitled “Wedding,” “Loan,” and “Waiting”) urging listeners to “Contact Senators Feingold and Kohl and tell them to oppose the filibuster.” Because the two senators were named, and because some of the ads were to be run in the blackout period thirty days before the Wisconsin primary election, WRTL’s ads fell squarely within the prohibitions of BCRA section 203. WRTL therefore filed suit against the FEC, seeking to have BCRA declared unconstitutional as applied to it.

Writing for the majority, Chief Justice John Roberts focused on two key elements that distinguished this case from *McConnell*. First, *McConnell* (2003) examined only the “facial” constitutionality of the BCRA, whereas *WRTL II* (2007) involved the statute’s constitutionality “as applied” to the specific circumstances of the case. In a 2006 decision involving WRTL, the Supreme Court had already held that the *McConnell* decision did not foreclose such “as-applied” challenges to the BCRA (*Wisconsin Right to Life, Inc. v. Federal Election Commission*, 546 U.S. 410, 422–23 [2006], *per curiam*, hereafter *WRTL I*). Thus, WRTL could challenge the constitutionality of section 203 of the BCRA as applied to it despite the *McConnell* Court’s ruling that section 203 was not unconstitutional on its face.

Second, Chief Justice Roberts highlighted a passage in the *McConnell* decision that obliquely suggested that “pure issue ads” in some circumstances might not be subject to BCRA regulation of electioneering communications under section 203. *McConnell* had stated that the argument for shielding issue ads from regulation failed “to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy” (*McConnell*, 206). In *WRTL II*, Justice Roberts interpreted this statement to imply that the ads might *not* be regulated if they were not the functional equivalent of express advocacy. Of course, the *McConnell* Court had also opined, as noted earlier, that pure issue ads were but a small fraction of the ads covered by BCRA section 203 and that genuine issue ads could be broadcast without violating the BCRA if the

organization running the ad avoided naming federal candidates or financed the ads with segregated funds. However, appended to these statements, the *McConnell* Court had inserted a footnote that stated: “As JUSTICE KENNEDY emphasizes in dissent . . . we assume that the interests that justify the regulation of campaign speech *might not apply to the regulation of genuine issue ads*” (*McConnell*, 206, n. 88, emphasis added).

Footnote 88’s explicit statement—combined with the *WRTL II* Court’s inference that issue ads that are *not* the functional equivalent of campaign speech might not satisfy the *McConnell* Court’s standard for BCRA section 203 regulation—undergirded Chief Justice Roberts’s opinion. Finding that *WRTL*’s ads were not the functional equivalent of express advocacy because they could “reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate” and that there was no compelling government interest in regulating issue ads that would satisfy the strict scrutiny test protecting political speech, the Court held that BCRA section 203 was unconstitutional “as applied” to *WRTL*. The Court stated that “[b]ecause *WRTL*’s ads are not express advocacy or its functional equivalent, and because appellants identify no interest sufficiently compelling to justify burdening *WRTL*’s speech, we hold that BCRA §203 is unconstitutional as applied to *WRTL*’s ‘Wedding,’ ‘Loan,’ and ‘Waiting’ ads” (*WRTL II*, 22, 28).

Thus, on June 25, 2007, five Supreme Court Justices breathed a bit of new life into a First Amendment still enmeshed in a web of campaign-finance regulations that limit political speech. Yet a change in one vote would have reversed this fragile 5-4 decision. Constitutional rights continue to hang in the balance, determined by decision makers who may or may not respect the Constitution’s plain language and purpose.

Given the current readiness of the legislative and executive branches to override constitutionally guaranteed rights, the Supreme Court more than ever serves as the final arbiter, with the preservation or loss of fundamental liberties often turning on the vote of a single justice. The *Kelo*, *Raich*, *McConnell*, and *WRTL* cases show the extent to which justices of the Supreme Court, like members of Congress and the president, now treat basic tenets of the Constitution as malleable—rules often twisted or ignored at will without regard to the nation’s founding concepts of individual liberty, limited government, and the rule of law. The question is whether today’s federal leviathan can be tamed.

## Government Power, Public Choice

Economics and public-choice analysis suggest that this leviathan will not be tamed. These disciplines highlight incentives facing today’s political decision makers, whose personal calculus is transparent: most want outcomes that embed the national government ever more deeply in citizens’ lives, and circumstances now permit them to achieve those outcomes with impunity. To the individual decision maker, the expected personal marginal benefit of ignoring the Constitution is usually high, and the

expected marginal cost is low. The logical results are apparent at the highest levels of government. In Congress, senators and representatives often pay little heed to the substance or constitutionality of the measures before them. The Supreme Court routinely reinterprets the Constitution to destroy firm constitutional limits on the national government's power, and the current president, like others before him, is happy to violate the Constitution when it serves his personal interests or political objectives.

The Founders relied on checks and balances inherent in a tripartite government to protect the Constitution. Today, the legislative, executive, and judicial branches have ceased to "check" or "balance" each other reliably. All endorse a flexible constitution able to accommodate outcomes that they find attractive personally, politically, or ideologically. All refuse to use or to require the constitutionally prescribed Article V procedure to amend the Constitution when they or special-interest groups want to change it. As a result, we now have a Constitution whose words bear little resemblance to current practice. Transformed into mere parchment, the Constitution now places few unbreachable limits on the central government's power.

But why are the voters not an effective constitutional check on officeholders? Their ineffectuality is in part a consequence of government failure to follow the constitutionally mandated amendment procedure. Citizens lose much of their power to control changes in the constitutional rules of the game when such changes are engineered by executive, legislative, or judicial fiat instead of by constitutional amendment. In this way the transaction costs of altering the scope of government power have been shifted from those who want to expand that power to those who want to preserve limited government—a phenomenon that for decades has facilitated the expansion of central government power in the United States (Twight 2002).

Nevertheless, today's expanded government power in part simply reflects candidates' and officeholders' incentives to accommodate the voters' policy preferences. Public choice suggests circumstances in which political outcomes reflect the views of the "median voter," and the median voter today clearly does not comprehend or endorse many of the limits on government power written into the Constitution. Most people identify with one of the two dominant political parties, neither of which now upholds the limits on national government power prescribed by the Constitution. In addition, most adults alive today have been swimming in the goldfish bowl of overweening federal power for decades. For most, twelve years of public schooling have reinforced the propriety of this power and obscured the historical, philosophical, moral, and economic rationale for limited government. Both reflecting and further stimulating unfettered expansion of government power, people in all walks of life now seek money or other benefits from the national government and hence from the taxpayers who finance it. To the extent that legislative action that expands government power reflects the median voter's preference, it is thus one side of a reciprocal causality because the median voter's current policy preferences have been conditioned

by the long-standing extraconstitutional expansion of government power documented in this article.

Finally, liberty itself has the defining economic characteristics of a “public good”: its consumption is “nonrival,” and its enjoyment is “nonexcludable.” Just as many people refuse to pay for public radio even though they listen to it daily, so too do they refuse to “pay” for liberty by not making costly efforts to preserve and defend it. When people leave it to others to stop the national government from taking unconstitutional actions that threaten liberty, they are free riding on other people’s efforts to preserve liberty. The difficulty, as with all public goods, is that everyone faces incentives to free ride. If most people free ride, liberty will perish.

No one should be surprised, then, that officeholders at the highest levels of all three branches of the national government now behave with impunity in stretching the Constitution to suit their personal predilections or political objectives. Moreover, public-choice analysis suggests that this sovereign impunity, growing in the fertile soil of a malleable constitution, will continue to flourish.

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