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The Jurisprudence of the Military-Industrial Complex

Ann Scales
Laura Spitz[1]

This is the text of a joint lecture delivered at Seattle University on February 27, 2003, sponsored by the Wismer Center. Given the timing and subject matter of the talk, it is necessarily a snapshot of a particular moment in history, touching on events that will undoubtedly have developed further by the time of publication—for example, the "official war" against Iraq will have started and maybe ended. At the presentation, we took a "tag-team" approach, each talking twice in turn, and we have maintained that format for this publication.

ANN SCALES:

I have long complained—including in a speech at the law school of this university some years ago—about how legal education typically starts in on Day One telling law students how little, really, law can accomplish in the world.[2] Even when I was in law school, that message was terribly disempowering. But today the disempowerment is huge. Law and lawyers seem unable to do anything about the systematic disempowerment of law itself in the name of law, such as in the USA Patriot Act,[3] the Homeland Security Act,[4] or the soon expected Patriot Act II.

Today, though, Laura and I are not going to rehash the specifics of that legislation or any U.N. resolutions. Instead, we are going to talk more broadly, about the relationship between the rule of law and the military-industrial complex.

What is "the rule of law"? The phrase represents a deeply held value that provokes little agreement.[5] I suspect that even the most contentious

jurisprudes, however, would concede two things. First, for a system to count as a genuinely democratic rule of law, the rules have to apply to everybody. Second, there has to be a detached adjudicative process; decisions about the rules cannot be delegated to the very people the law is there to protect us against.

And what is "the military-industrial complex"? The term was introduced into the political vernacular by President Eisenhower in his 1961 farewell speech. Eisenhower described how World War II and the Cold War had compelled the United States, for the first time, to commit to a large standing army and a permanent armaments industry. These developments, Eisenhower thought, had the gravest implications for democracy and survival. Keeping in mind his brilliant military career, recall the most famous sentence of Eisenhower's farewell address: "[W]e must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex."[6]

So, what is the jurisprudence of the military-industrial complex? The short answer is this: the military-industrial complex has arrived at a comfy situation where it is either exempt from the rule of law, or else gets to make every decision that informs what the rule of law would require in a given situation. It is kind of like having your cake and eating it with the Lord.

Eisenhower could have no idea how huge, seamless, and synergistic this complex would become, including not just weapons manufacture, but virtually all relations of law, production, and populations in the world. I am going to take a couple of minutes to spell out how the military side of this complex presently works, erasing boundaries with industrial interests, and indeed, with any other legally recognized interests at all.

First, our nation's history and legitimacy rest upon a separation of military power from democratic governance. For that reason, the armed forces are subject to constitutional constraint.

Second, however, as an aspect of separation of powers, courts try not to interfere in areas of foreign policy and military affairs. Often this is

referred to as the "political question" doctrine, a determination that a matter is beyond the capabilities of judges. The strongest argument for this deference is that the political branches—or the military itself—have superior *expertise* in military matters. That may be true in some situations. I am not sure, for example, the Supreme Court would have been the best crowd to organize the invasion of Normandy. But what we now have is an increasingly *irrational* deference.[7] Consider three cases:

a. In *Korematsu v. United States*,[8] the Supreme Court said the internment of Japanese-Americans at the beginning of 1942 was constitutional, based upon a military assessment of the possibility of espionage in preparation for a Japanese invasion of the United States. It turns out that the information provided by the military to the Supreme Court was falsified.[9] But note two things: (1) the nation was in the midst of a declared world war, and (2) in subsequent less urgent circumstances, *Korematsu* would seem to argue strongly for military justifications to have to be based upon better, more reliable information than was offered there.

b. In the 1981 case of *Rostker v. Goldberg*,[10] the Supreme Court decided that it was constitutional for Congress to exclude women from the peacetime registration of potential draftees, even though both the Department of Defense and the Army Chief of Staff had testified that including women would increase military readiness. But Congress got the benefit of the military deference doctrine as a cover for what I think was a sinister political purpose—to protect the manliness of war—and the Supreme Court felt perfectly free to ignore what those with the real expertise had to say.

c. Most recently, in *Hamdi v. Rumsfeld*,[11] the Fourth Circuit held that a U.S. citizen who had been designated an "enemy combatant"[12] could be detained indefinitely without access to counsel. In this case, however, not only is there no declared war,[13] but also, the only evidence regarding Mr. Hamdi was a two-page affidavit by a Defense

> Department underling, Mr. Mobbs. Mobbs stated that Mr. Hamdi was captured in Afghanistan, and had been affiliated with a Taliban military unit. The government would not disclose the criteria for the "enemy combatant" designation, the statements of Mr. Hamdi that allegedly satisfied those criteria, nor any other bases for the conclusion of Taliban "affiliation."[14] And that is as good as the evidence for life imprisonment without trial has to be. Deference to the military has become abdication.

In other words, what we presently have is *not* civilian government under military control, but something potentially worse, a civilian government ignoring military advice,[15] but using the legal doctrine of military deference for its own imperialist ends.

Third, the gigantic military establishment and permanent arms industry are now in the business of justifying their continued existences. This justification is done primarily, as you know, by retooling for post-Cold War enemies—the so-called "rogue states"—while at the same time creating new ones, for example by arming corrupt regimes in Southeast Asia.[16] I was reminded of this recently when we went to see comedian Kate Clinton. She thought Secretary Powell had taken too much trouble in his presentation attempting to convince the Security Council that Iraq had weapons of mass destruction.[17] Why not, she asked, "just show them the receipts?"

Fourth, we have seen the exercise of extraordinary influence by arms makers on both domestic and foreign policy. For domestic pork barrel and campaign finance reasons, obsolete or unproven weapons systems continue to be funded even when the military does not want them![18] And, just when we thought we had survived the nuclear arms race nightmare, the United States has undertaken to design new kinds of nuclear weapons,[19] even when those designs have little military value.[20] Overseas, limitations on arms sales are being repealed, and arms markets that should not exist are being

constantly expanded[21] for the sake of dumping inventory, even if those weapons are eventually used for "rogue" purposes by rogue states.

This system skews security considerations, and militarizes foreign policy. Force has to be the preferred option because other conduits of policy are not sufficiently well-funded. Plus, those stockpiled weapons have got to be used or sold so that we can build more.

Fifth, enlarging upon this in a document entitled *The National Security Policy of the United States*, we were treated last September to "the Bush doctrine," which for the first time in U.S. history declares a preemptive strike policy. This document states, "America will act against emerging threats before they are fully formed."[22] If they are only emerging and not fully formed, you may wonder, how will we know they are "threats"? Because someone in Washington has that perception, and when the hunch hits, it is the official policy of this country to deploy the military.[23] All options—including the use of nuclear weapons—are always on the table.

Finally, there go the fundamental constitutional distinctions on which the republic's legitimacy relies. Orwell's satire seems too mild. In his *1984*, the slogan was, "War is Peace, Freedom is Slavery, Ignorance is Strength."[24] In this real 2003 world, there are no meaningful distinctions between wartime and peacetime, between war front and home front, between combatant and non-combatant, or between emergency defensive needs and foreign policy generally. We are slaves of fear. Fear makes us give away our freedoms and embrace ignorance as a precondition of continued existence.

But in whose interests? Isn't it possible that this state of "permanent crisis" is just a means to keep us on board? That blaring nationalism is just a distraction, while corporate interests control everything including this fearful consciousness? Remember, we are supposed to be shopping for America!

LAURA SPITZ:

I am going to talk about the connections among business interests and military interests, focusing on the business or industrial aspects of the military-industrial complex. As a paradigm of the military-industrial link, [25] think of Mr. Rumsfeld's recent criticisms of the draft during the Vietnam War. The draft was a bad idea, he said, because many men had to work for the U.S. government at less than their market value.[26] In this statement—which he later regretted—Mr. Rumsfeld let reality get loose: what matters in the Administration's decisions is what the market wants to matter, and who loses are the people the market would willingly let lose.

Also paradigmatic of the link between business and the military is the Bush Administration's National Security Strategy, which, as Ann said, was published in September 2002. In that document, the Administration tries to make the case for the critical importance of global free enterprise to our national *security* by simply making the statement that this is so: "Free markets and free trade are key priorities of our national security strategy."[27] According to the White House, in making these claims America has both morality and history on its side. In fact, the published documents state, "the concept of free trade arose as a moral principle even before it became a pillar of economics,"[28] and, "the lessons of history are clear,"[29] the lesson being that this Administration's version of a free market economy is the best way to promote prosperity and reduce poverty.

In this new vision for national security, lower tax rates in foreign countries are a priority,[30] apparently key to our safety. Why is it a National Security strategy of the United States that foreign countries have lower marginal tax rates? First, apparently this infusion of capital will provide an incentive for people to work in those countries[31] (as if the reason they are presently poor and unemployed is a lack of motivation). Second, poverty and destitution are underlying conditions that terrorists can exploit;[32] therefore, U.S. foreign policies and strategies should be aimed at

diminishing those underlying conditions,[33] and lower tax rates are an effective strategy for that purpose.

This last justification—a concern for underlying conditions—seems disingenuous, particularly as (1) there is no meaningful consideration of other ways that the U.S. might assist in the diminishment of poverty and destitution, and (2) the White House has also stated that terrorist cells are established in very open, liberal, and tolerant societies, like the U.S. and other market-based economies.[34]

It would seem that the real connection among lower foreign tax rates, free trade, and National Security has to do with the legitimation of rampant greed by invocation of patriotism and fear. Lower taxes mean more money for entities with enough capital to invest in foreign countries, such as a future Iraq with a denationalized oil industry. And in order to insulate its foreign economic agenda from review and meaningful criticism, the White House needs to posit its economic foreign policy as a National Security issue. That way, to criticize the statement that the White House's global economic vision is the "single sustainable economic model"[35] is to be a traitor. Economic global power becomes a sovereign imperative, legitimately backed by military force. And as Ann told us, when the White House is making "military" decisions, we can rely on American courts to defer to those decisions.

This is a relatively cozy place to be, a place where the civilian population has no business questioning foreign *economic* policy or the wedding of military, industry, and national destiny. Add to this the fact of the Administration's claim that free trade is actually a moral imperative, that as a matter of National Security the United States will enforce trade agreements, and the Administration has no difficulty breaching other treaties and U.N. resolutions,[36] and one can see that its place is not only cozy, but also lawless.

Though I am not a strong supporter of President Bush, and I would like to blame him for this, he is not the architect of the pro-business elision of

national and international interests. One of the best examples predating him, of course, is the North American Free Trade Agreement (NAFTA), the substance of which is astonishing to the uninitiated.[37]

How does it work? Whole books and courses are devoted to the subject, but I want to make four points for our purposes here. First, while domestic business is ostensibly constrained by existing domestic laws,[38] multinational enterprises are not easily subjected to national policy in an increasingly globalized economy. That problem is hugely exacerbated by NAFTA, because even when domestic law may be potentially enforceable, Canada, the United States, and Mexico are required by NAFTA to enact and interpret domestic laws in the "least trade restrictive" manner.[39]

Second, Chapter 11 of NAFTA provides that private investors may directly sue national governments to enforce NAFTA obligations and to recover damages, including pure economic loss. This is an incredibly powerful and unusual grant of legal standing to non-parties, since NAFTA is actually a contract between nations.[40]

Third, this Administration has made it a part of its National Security Strategy to enforce trade agreements.[41] Presumably, the United States will not invade Canada to enforce NAFTA,[42] but the coupling of this commitment with the threat of military force is obviously meant to provoke fear.

Finally, taken in combination—the restraint on domestic governments from enacting or enforcing laws inconsistent with NAFTA obligations, the grant of standing to investors to sue for lost profits, and the underlying threat of force—the situation operates so that NAFTA actually acts as an insurance policy for corporations doing business among the member states. In many cases domestic legal restraints have become largely symbolic, while taxpayers subsidize and guarantee corporate income levels.

For example, in 1997, Canada banned the importation and transport of MMT,[43] a gasoline additive and dangerous neurotoxin already banned by the United States. The U.S. producer had enjoyed steady sales to Canadian

companies before the ban. Less than a week after the ban was passed, that producer filed a claim under NAFTA against Canada for $250 million in damages. Canada settled the case by repealing its ban on MMT, paying $13 million in damages to the producer and issuing a public statement that MMT poses no health risk.[44]

I want to turn at this point to the domestic protection of business interests in the U.S. (which unsurprisingly fits perfectly with U.S. global economic and military strategies). In the last two decades, we have seen unprecedented deregulation and privatization in the U.S. (and Canada and Mexico). This has been coupled with putting business beyond interrogation by law, much like the military. Where the law does not operate to businesses' advantage, doctrines have been arranged to exempt them from the application of domestic law altogether, so that business drives interpretation and development of jurisprudence in many areas of law.

There are so many examples I cannot possibly list them. You undoubtedly have encountered many. In sex discrimination employment law, for example, we have the "business necessity" and "bona fide occupational qualification" defenses, those masterpieces of majoritarianism that have made it safe for Hooters to serve breasts for lunch.[45] In the airline industry, we have seen deregulation, union-busting, and unprecedented government bailouts. Today, I would like to mention just two other instances, both of which will be familiar to you—tort reform and Enron.

In the last 25 years, tort 'reform' has been astonishing both in substance and momentum.[46] In public discourse, it is now taken for granted that all manner of tort restriction efforts make sense, including all kinds of damages caps,[47] litigation hurdles, and immunities.[48] This acceptability is the triumph of Law and Economics theorists, who have pursued a relentless public relations and public policy campaign to limit the reach of tort law in the service of business interests. One way in which they have done this is to cast—some have said "create"—an insurance crisis[49] as the result of

greedy trial lawyers and out-of-control juries,[50] rather than as the effects of for-profit insurance schemes (or the number of tortfeasors).

However, the Law and Economics view of tort law and tort reforms is not "natural" or "inevitable" but simply well-funded[51] and well-advertised.[52] One such funder is the John M. Olin Foundation, which contributed over $17 million to law schools in 1999 alone[53] (including $6 million to Harvard, $1.25 million to Stanford, $2.5 million to Chicago, and $2 million to Yale[54]). The foundation funds chairs to be filled with like-minded Law and Economics proponents who will teach students, who will go on to be lawyers and teachers and judges, who will theorize cases and interpret the law and teach more students. The foundation also funds conferences in which the judiciary is invited to participate.[55] It is no accident that the bulk of this money is directed to the "big" schools, from which the "important" policy-makers, future law teachers, and judges come. Nice work if you can get it.

With respect to Enron, I do not propose to rehash recent corporate scandals. I simply want to emphasize the point that most of what these companies did was *lawful*. It is an almost perfect example of what happens when decisions are put in the hands of the people from whom the rules were meant to protect us.[56] And meanwhile, the man who used to run Enron's corrupt energy trading division is not only *not* in trouble, he is the Secretary of the Army. And that, incredibly, makes him the man in charge of the Army budget.[57]

ANN SCALES:

What shall we do with this state of affairs? Are we willing to accept that "globalization"—as defined by free marketeers—is a law of nature, like gravity? On the military side of things, are we willing to accept that warfare has so fundamentally changed that no rules apply? Shall we concede that the Critical Legal Scholars were right in the first place: that the

"Rule of Law" was always just a big hoax, a veneer of legitimacy over the exercise of raw power?

We would rather encourage the viewpoint that this state of affairs is a fabulous learning opportunity, and maybe even a watershed moment for the U.S. Constitution. Maybe this is a chance to change all that disempowering orthodoxy about how the law really cannot do much.

One thing lawyers can do, as lawyers have always done, is to keep calling upon the courts to step up to the Constitutional plate. But will the courts do it this time? A case filed in Boston asking the court to declare the pending invasion of Iraq unconstitutional was dismissed recently as a "political question."[58] That didn't take long, but I will bet the judicial struggle is just heating up. [59]

During the Vietnam era, the United States Supreme Court had more than two dozen opportunities to rule on the constitutionality of the conflict.[60] Instead of doing so, the Court routinely denied review where lower courts had refused to rule on grounds of foreign policy and military deference, typically because the Vietnam War presented a so-called "political question."[61] As I have said before, this hands-off approach is based on judges' declarations of their own ignorance and incompetence. Specifically, the political question doctrine is based upon six factors the United States Supreme Court explicated in 1962. The Court stated that judges should refrain from making a decision where there can be said to be:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[62]

A thousand law review articles deconstruct these six factors, and I am not going to do so, nor even take time to show how absolutely circular the doctrine is here. Rather, I am going to translate those factors to show how they can be understood as a declaration of existential angst and means of self-anesthesia in an age of imminent war.

So, you might hear a judge quote from the six-factor "political question" test: "I'm not going to decide this case challenging the constitutionality of war in Iraq because it is 'textually committed to another branch of government,' and there are no 'judicially discoverable and manageable standards' for deciding it." When he says that, you might hear him really saying to himself: *This is freaking me out. There is so much information flying around and somebody is obviously lying. But World War III can't really happen, can it? I need to go to chambers and take a Valium.*

Or, when a judge says, "I'm not going to decide this case because there is a need for 'unquestioning adherence to decisions already made,' and I have to 'show respect for co-ordinate branches,'" you can hear the judge really saying to himself: *Please do not let this have anything to do with me. I will never make it to the Court of Appeals if I'm the one who blows the whistle on these maniacs.*

Or, finally, when a judge says, "I'm not going to decide this case because 'there is a potential for embarrassment to the government,'" perhaps he's really saying: *Well, duh. There is a lot of potential embarrassment for me, too, especially if the President doesn't obey my decision.*

Indeed, in the political question and war powers literature, there is a great deal of concern about enforcement of a judicial order respecting foreign policy or military affairs.[63] There is much to discuss here, including the scope of any remedy ordered. In any case, contrary to the apocryphal story about President Andrew Jackson,[64] no executive yet has refused to comply with an order of the Supreme Court.[65] Moreover, as that Court stated in 1969,[66] possible noncompliance with an order is not a reason for the judiciary to abandon its unique obligation.

MILITARIZATION

And maybe *that* is the meaning of "the rule of law."

I want to be part of a legal system where a judge can look at a challenge to war mongering and say to himself, to the parties, and to the world: *It is my duty to decide this case. I can do so with as much confidence as I have in any other case where fact-finding is difficult. I will uphold my oath of office and I expect the President to uphold his. If the executive branch is acting unconstitutionally, I must order it to desist. That will not be a constitutional crisis. Crisis results when the law is routinely ignored and when that is ratified by judicial silence. The problem is not that I will act, but what inaction might allow to happen. I am entrusted to work with these litigants to make legal sense of this crazy world.*[67]

LAURA SPITZ:

A judge would have to be equally courageous to resist deferring to the interests of big business, as those interests are presently cast. But here is some good news. One day, you will be those judges (and those teachers) (and those lawyers) (and those business people). So we want to end this lecture in what is a hopeful and helpful way, and talk about how we can organize our thoughts and approach our world. We've made a list!

1. Enter the interpretive debate. Keep in mind the great lesson of Legal Realism and the critical legal studies movements of the late 20th century, that representations of social life in rational disciplines such as law or economics are actually contingent and political interpretations.[68] This is a hopeful lesson. It means that we can be part of the interpretive debate. We can be part of creating meanings and making changes.

   So for example, when Mr. Bush, or you, or I, or Judge Posner, or any number of other people, say "market economy" or "free trade" or "globalization" or "just war" or "terrorism," we do not necessarily mean the same things. It may be true that market economies are the best way to promote prosperity and reduce poverty, and I have many

progressive friends who believe that this is so, but what proponents of this particular version of free-market capitalism (or this particular version of war) have done is to slowly drag what should be a vigorous popular debate about those issues onto a stagnant and univocal plane. What we must do in response is explore various meanings of terms—whether the term is "global trade" or "the rule of law"—and provide the arguments for why society *should* understand them in a more complex and more helpful way.

2. Trust your skills. "They" (the drafters of the National Security Strategy, the Law and Economics theorists, the military leaders, the business leaders) are just people, like you and me. Mr. Bush's lawyers went to law school and graduated and are making arguments before courts all over this country about his National Security Strategy and the scope, meaning, and constitutionality of legislation like the Patriot Act or the Homeland Security Act. Trust your skills and yourself to be part of the process. They are not right just because they are on his side.
3. Understand that the Social does not have to be adjunct to the Economic (or the Military). In political and legal history, only recently has the Market played such a large and seemingly inevitable and restrictive role in how we think about social rights.[69] It is even more recent that anyone in the law business claimed to know what economics is, or what economics necessarily means or demands in a given case. But it is actually and obviously *people* who decide the interrelationships among law, politics, and economics. This Administration, as part of its National Security Strategy, has said that as a matter of foreign policy it is necessary to the American vision of the world that other countries must accept this Administration's version of free-market capitalism as "the single sustainable model" for economics and politics.[70] In its "negotiations" for a Free Trade Agreement of the Americas, the U.S. has consistently presented its vision (including lower marginal tax rates) as nonnegotiable. It will not sign a trade agreement without an

agreement for lower tax rates and other economic imperatives. But those connections and lines are drawn as a matter of policy, not nature. Why not instead: we are unable and unwilling to negotiate a free trade agreement in the absence of some agreement about social and political rights, including anti-discrimination rules and environmental protection?

4. We need to be suspicious of:
   (a) This Administration's post-Reagan version of free-market capitalism (as if there were not other versions of capitalism);
   (b) The notion that human rights are inconsistent with business interests;
   (c) The market as a measure for how well we are doing as a society;[71]
   (d) Anyone making a claim to neutrality, reason, or inevitability;
   (e) Deference claims: When courts or government defer to the expertise of corporations or militarism, they are granting "epistemological privilege"[72] to those interests, to both define questions *and* answer them; and
   (f) The oversimplification and classification of issues, particularly when they are used to close conversations. I have read that "NAFTA is not an employment issue." Isn't that rather like saying: "Beautiful breasts are a bona fide occupational qualification?" As a matter of fact, issues are complex and multi-dimensional. Resist attempts to essentialize them in ways that serve one interest over all others.
5. Use your imagination. You have and will continue to acquire the skills and interests necessary to be innovative. Corporations encourage imagination, but they do not have a monopoly on it. General Electric—the company who manufactured half of all the fighter engines used in the first Gulf War,[73] and then conveniently had contracts to assist in the rebuilding of Kuwait when Desert Storm ended[74]—has a corporate slogan: "What if imagination

became reality?"[75] When I read that, I think: "*Exactly*. What if, indeed?"

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[1] Our thanks to Professor Kellye Testy for giving us the opportunity to speak at Seattle University and for her unfailing commitment to social justice. Thank you also to the faculty and audience at Seattle University for their support and comments. One member of the audience in particular—Oakley Ramprashad—gave us love and inspiration.

[2] That lecture is published as Ann C. Scales, *Surviving Legal De-Education: An Outsider's Guide*, 15 VT. L. REV. 139 (1990).

[3] USA Patriot Act of 2001, Pub. L. No. 107-56, § 1, 115 Stat. 272 (2001) (codified as 18 U.S.C. § 1).

[4] Homeland Security Act of 2002, Pub. L. No. 107-296, § 1, 116 Stat. 2135 (2002) (codified as 6 U.S.C. § 101).

[5] There's no right place to begin in the vast "rule of law" literature, but the Hart/Fuller debate, centering as it does on how a legal system might best resist a militarized juggernaut, has particular relevance now. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon Fuller, *Positivism and Fidelity to Law*, 71 HARV. L. REV. 630 (1958). Three recent developments have sparked a resurgence in rule of law thinking: first, capital's need for "emerging markets" to provide superstructural means for contract enforcement; *see* Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFFAIRS, (Mar./Apr. 1998); second, the impeachment of President Clinton; *see* Jessie Allen, *Blind Faith and Reasonable Doubts: Investigating Belief in the Rule of Law—A Reply to Professor Hart*, 12 SEATTLE U. L. REV. 691 (2001); and, third, the decision of the U.S. Supreme Court in Bush v. Gore, 531 U.S. 98 (2000) (per curiam). Among our favorite commentaries on the last topic are Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361 (2001); and Robin West, *Reconstructing the Rule of Law*, 90 GEO. L.J. 215 (2001).

[6] Dwight D. Eisenhower, Farewell Speech (Jan. 17, 1961), *at* http://www.eisenhower.utexas.edu/farewell.htm.

[7] Professor Diane Mazur has shown how, in his long tenure on the Court, Justice Rehnquist has almost single-handedly elevated the doctrine of military deference, which once required a showing of an actual nexus between a challenged policy and military readiness, into a blind abdication to militaristic will. *See* Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701 (2002).

[8] Korematsu v. United States, 323 U.S. 214, 218–20 (1944).

[9] An army historian later discovered that the military knew there was no threat of invasion and had knowingly misinformed the Supreme Court. For a full account, s*ee* PETER IRONS, JUSTICE AT WAR (1983).

[10] Rostker v. Goldberg, 453 U.S. 57 (1981).

[11] Hamdi v. Rumsfeld, 316 F.3d 450, 473 (4th Cir. 2003) (stating that the judiciary will not question governmental allegations that U.S. citizen is an enemy combatant).

[12] Another U.S. citizen, Jose Padilla, was seized at O'Hare Airport for alleged participation in a plot to detonate a radioactive bomb. He is being held indefinitely as an

enemy combatant. A federal district court judge in New York had previously granted him access to counsel, in order to assist him in responding to "gossamer speculation" about the danger he presents, as alleged in declarations by—you guessed it—Mr. Mobbs. Padilla *ex rel*. Newman v. Bush, 233 F. Supp. 2d 564, 603–4 (S.D.N.Y. 2002). The Justice Department has asked for reconsideration of that ruling on the basis that allowing counsel "would threaten permanently to undermine the military's efforts to develop a relationship of trust and dependency that is essential to effective interrogation." The government also claims that interrogations of detained persons had "helped to thwart an estimated 100 or more attacks against the United States and its interests since Sept. 11, 2001." Benjamin Weiser, *U.S. Asks Judge to Deny Terror Suspect Access to Lawyer, Saying it Could Harm Interrogation*, N.Y. TIMES, Jan. 10, 2003, at A11. For an up to date synopsis of legal events since the beginning of the "War on Terrorism," *see* LAWYERS COMM. FOR HUMAN RIGHTS, *A Year of Loss: Reexamining Civil Liberties Since September 11*, *at* http://www.lchr.org/us_law/loss/loss_main.htm.

[13] At least there was no war in a conventional, historical sense of a temporally discrete military response to a national sovereign. In response to the attacks of September 11, 2001, Congress passed the Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). According to this enactment, the President may "use all necessary and appropriate force *against those nations, organizations, or persons he determines* planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." *Id.* at 224 (emphasis added). The courts have not ruled on whether such a boundless delegation to the President can constitute a Congressional declaration of war within the meaning of Article I, Section 8 of the U.S. Constitution. .

[14] The holes in the government's showing are described in detail in the Distict Court's opinion. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2002), *rev'd* 316 F.3d 450 (4th Cir. 2003). As District Judge Doumar stated, "[t]he Mobbs declaration is little more than the government's 'say-so' regarding the validity of Hamdi's classification as an enemy combatant." *Id.* at 535.

[15] Nicholas D. Kristof, *War and Wisdom*, N.Y. TIMES, Feb. 7, 2003, at A25 (noting concern of Generals Norman Schwarzkopf, Anthony Zinni, and Wesley Clark); Doug Thompson, *Role Reversals: Bush Wants War, Pentagon Urges Caution*, CAPITOL HILL BLUE, Jan. 22, 2003, *available at* http://www.capitolhillblue.com/artman/publish/article_1587.shtml.

[16] Thus, the Pentagon has already restored military advantages to Indonesia, though Congress had cut-off military assistance after the East Timor massacres only in 1999. Military-to-military aid hugely overshadows civilian aid in the Philippines and in Thailand, as well as in Indonesia. *See* Joshua Kurlantzick, *Stop Arming Southeast Asia*, NEW REPUBLIC, Jan. 20, 2003 at 16.

[17] On February 5, 2003, United States Secretary of State Colin L. Powell gave an elaborate speech to the United Nations Security Council, replete with charts and a slide show of grainy aerial photographs. *See* Secretary Colin L. Powell, Remarks at the United Nations Security Council (Feb. 5, 2003), *at* www.state.gov/secretary/m/2003/17300.htm.

[18] Leslie Wayne, *So Much for the Plan to Scrap Old Weapons*, N.Y. TIMES, Dec. 22, 2002, § 3 at 1 (focusing on $64 billion re-funding of F/A-22 fighter jet, designed to

engage Soviet planes never produced, and $46 billion V-22 Osprey helijet, despite killing Marines in testing and a decade-long tardiness in development).

[19] Julian Borger, *U.S. Plan for New Nuclear Arsenal*, THE GUARDIAN (London), Feb. 19, 2003, at 1. CIA Director Tenet has recently predicted a new worldwide nuclear arms race, a prediction that has the triple effect of buttressing the preemptive strike doctrine, bolstering the much-ridiculed "Star Wars" missile defense plan, and laying the groundwork for abrogation of the 1968 Nuclear Non-Proliferation Treaty. *See also* Walter Pincus, *CIA Head Predicts Nuclear Race*, WASH. POST, Feb. 12, 2003, at A01; Paul Richter, *The World Showdoen with Iraq*, L.A. TIMES, Jan. 25, 2003, at 1; Edward M. Kennedy, *Our Nuclear Talk Gravely Imperils U.S.*, L.A. TIMES, Jan. 29, 2003, at 13.

[20] The present administration has been looking since early 2001 for a military use for tactical nuclear weapons now being touted as "bunker-busters." However, to reach underground bunkers, such a bomb would have to be detonated at or below the earth's surface, causing damage far in excess of that inflicted at Hiroshima. *See* Michael Levi, *Fallout*, NEW REPUBLIC, Feb. 17, 2003.

[21] Within the last decade, arms manufacturers have systematically gotten Congress to remove restrictions on arms sales to countries with poor human rights records, or countries otherwise previously deemed too dangerous to have such arms. *See* William D. Hartung, *Military-Industrial Complex Revisited: How Weapons Makers Are Shaping U.S. Foreign and Military Policies*, (June 8, 1999), *at* http://www.fpif.org/papers/micr/ index.html. In 2000 alone, defense contractors gave $6.5 million in campaign contributions, and spent $60 million on lobbying. Michelle Ciarrocca, *Post-9/11 Economic Windfalls for Arms Manufacturers,* FOREIGN POLICY IN FOCUS (Sept. 2002), *at* http://www.fpif.org/briefs/vol7/v7n10arms_body.html. Sales to foreign governments are so crucial to the system that U.S. arms makers pay huge "offsets"—legal bribes—to close deals. Leslie Wayne, *A Well-Kept Military Secret*, N.Y. TIMES, Feb. 16, 2003, § 3 at 1.

[22] GEORGE W. BUSH, WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (SEPT. 17, 2002), at vii [hereinafter NATIONAL SECURITY STRATEGY], *available at* http://www.whitehouse.gov/nsc/nss.pdf.

[23] *The New York Times* calls this abandonment of the doctrine of containment for a policy of preemption "the most salient evolution of American foreign policy since the end of the cold war." Todd S. Purdum, *The Brains Behind Bush's War*, N.Y. TIMES, Feb. 1, 2003, at 6.

[24] GEORGE ORWELL, 1984 (Signet Classic 1990) (1949).

[25] Another obvious example of this link is the connections among Halliburton, Vice-President Cheney, the Californian energy "crisis," and U.S. government contracts. Mr. Cheney was the Secretary of Defense March 1989 – January 1993. *See* WHITE HOUSE, *Biography of Vice President Richard B. Cheney*, *at* http://www.whitehouse.gov/ vicepresident/vpbio.html (last visited Apr. 9, 2003). He was then the Chief Executive Officer of Halliburton from 1995 – August 2000. *See* Halliburton, *Dick Cheney Resumes Role as Chairman of Halliburton Company*, Feb. 1, 2000, *at* http://www.halliburton.com/ news/archive/2000/corpnws_020100.jsp. In August 2000, he became Mr. Bush's vice-presidential running mate. *See* HALLIBURTON, *Halliburton Announces Second Quarter Earnings of 17 Cents Per Share*, July 26, 2000, *at* http://www.halliburton.com/news/

archive/2000/corpnws_072600.jsp. And of course, Cheney has been Vice-President since 2001. Keeping that timeline in mind, let us turn to Halliburton. In the aftermath of Operation Desert Storm in Kuwait in 1991, Halliburton was awarded contracts to help bring burning oil wells under control. In addition, Brown & Root Services (a Halliburton business unit) assessed and repaired damaged public buildings in Kuwait. Then, the U.S. Army awarded Halliburton a major contract for worldwide logistics support planning—the *first* such U.S. military contract with a *civilian* group. Halliburton was awarded similar contracts by the Navy. There are innumerable other examples of U.S. military and other government contracts with Halliburton and its affiliates. *See* HALLIBURTON, *Achievements & Landmarks*, *at* http://www.halliburton.com/about/history_achiev.jsp (last visited Apr. 10, 2003). Recently, Halliburton and Cheney have been centers of inquiry into allegations about the manufacturing of an energy crisis in California. Just recently, Halliburton has received government contracts with respect to a post-invasion Iraq. *US Firms Vie to Rebuild Iraq*, BBC NEWS ONLINE, Mar. 10, 2003, *at* http://news.bbc.co.uk/2/hi/business/2837477.stm; Danny Penman, *U.S. Firms Set for Post-War Contracts*, THE GUARDIAN (London), Mar. 11, 2003, *available at* http://www.guardian.co.uk/usa/story/0,12271,911943,00.html.

It is not just Halliburton, of course, that is poised to benefit from a post-conflict Iraq. After we gave this lecture, news agencies reported that the U.S. government invited five companies to compete for rebuilding projects in Iraq after a war "in what would be the biggest rebuilding project since World War II." *US Awards Deals For Post-War Iraq*, BBC NEWS, Mar. 10, 2003, *at* http://news.bbc.co.uk/2/hi/middle_east/2837657.stm. As Penman writes: "It's a sensitive topic because we still haven't gone to war," one industry executive told the Wall Street Journal. "But these companies are really in a position to win something out of this geopolitical situation." Penman, *supra*.

Apparently members of congress are not happy with the Administration's secretiveness about plans for a post-war Iraq. *Senators Bash Pentagon for Postwar Iraq Secrecy*, N.Y. TIMES, Mar. 11, 2003 (on file with Seattle Journal for Social Justice). Also troubling is the fact that the U.S. has decided that it will only award these contracts to U.S. companies. BBC NEWS, *US Firms Vie to Rebuild Ira, supra*. While it is surely true that somebody needs to repair the planned damage, and that the "coalition of the willing" is diminished, the unilateral benefit to U.S. companies belies the purity of the Administration's justifications for the war.

[26] For the original statement and the apology, *see* DEPT. OF DEFENSE, SECRETARY OF DEFENSE STATEMENT ON THE DRAFT, Jan. 21, 2003, *at* http://www.dod.mil/news/Jan2003/b01212003_bt029-03.htm. An eminent military historian has explained the negative tendency since World War II to treat military service largely as an economic problem. ELIOT A. COHEN, CITIZENS AND SOLDIERS: THE DILEMMAS OF MILITARY SERVICE 20 (1985).

[27] NATIONAL SECURITY STRATEGY, *supra* note 22, at 23.

[28] *Id*. at 18.

[29] *Id*. at 17.

[30] *Id.*

[31] *Id.* at 18-9.

[32] Which is connected to security and terrorism, thus: "Poverty does not make poor people into terrorists and murderers. Yet poverty, weak institutions, and corruption can made weak states vulnerable to terrorist networks and drug cartels within their borders." NATIONAL SECURITY STRATEGY, *supra* note 22, at v. *See also*, NATIONAL STRATEGY FOR COMBATING TERRORISM (Feb. 2003), *available at* http://www.whitehouse.gov/news/releases/2003/02/counter_terrorism/counter_terrorism_strategy.pdf:

> These efforts to diminish underlying conditions have material as well as intangible dimensions. Ongoing U.S. efforts to resolve regional disputes, foster economic, social, and political development, *market-based economies*, good governance, and *the rule of law*, while not necessarily focused on combating terrorism, contribute to the campaign by *addressing underlying conditions that terrorists often seek to manipulate for their own advantage*.

Id. at 23 (emphasis added).

[33] *Id.*

[34] That is, one would need to take into account, as President Bush Sr. did in a speech at Tufts University after the date of this lecture, that there is "[A] small fringe element that frankly exist [sic] in every society..." *2003 Issam M. Fares Lecture—Former President George H.W. Bush*, TUFTS E-NEWS, Feb. 26, 2003, *at* http://enews.tufts.edu/stories/030303BushSpeech.htm.

[35] NATIONAL SECURITY STRATEGY, *supra* note 22, at iv.

[36] Professor Michael Ignatieff has recently described this cherry-picking approach to legal obligation as an aspect of empire:

> Being an imperial power, however, is more than being the most powerful nation or just the most hated one. It means enforcing such order as there is in the world and doing so in the American interest. It means laying down the rules America wants (on everything from markets to weapons of mass destruction) while exempting itself from the other rules (the Kyoto Protocol on climate change and the International Criminal Court) that go against its interest.

Michael Ignatieff, *The American Empire*, N.Y. TIMES, Jan. 5, 2003, § 6 (Magazine) at 22.

[37] It may not be surprising that even though NAFTA was not ratified by two-thirds of the Senate as required for treaties under Article II, Section 2 of the U.S. Constitution, the constitutionality of the NAFTA treaty has been held to be a political question inappropriate for judicial review. Made in the USA Foundation v. United States, 242 F.3d 1300, 1302 (11th Cir. 2001).

[38] Such as anti-discrimination laws or environmental protection laws.

[39]

> Article 2018 of NAFTA provides that when a government is not in conformity with NAFTA provisions, the government must either agree not to implement the offending measure (typically a federal law) or agree to remove the offending measure. If the government continues to be in noncompliance, appropriate compensation must be offered or the aggrieved party may suspend benefits until a settlement is reached.

Chantell Taylor, *NAFTA, GATT, and the Current Free Trade System: A Dangerous Double Standard for Workers' Rights*, 28 DENV. J. INT'L L. & POL'Y 401, 413 (2000).

Presumably all human rights and anti-discrimination laws are trade restrictive, and we can expect their further erosion under the present regime.

[40] "Under Article 1116, a claim may be submitted to arbitration if an investor believes that a government has breached an obligation under the NAFTA and that the breach caused the investor to incur a loss or damage as a result." *Id*. at 412.

[41] NATIONAL SECURITY STRATEGY, *supra* note 22, at 19.

[42] They do not have to, of course, since corporations and investors can enforce NAFTA.

[43] Methlcyclopentadienyl manganese tricarbonyl.

[44] This example is taken from Taylor, *supra* note 39, at 413-415. Taylor points out that this is not the only case where a corporation has attempted to use NAFTA as a tool to evade liability in local courts, relying on the government essentially to indemnify them. In another case, a Canadian-based conglomerate, Loewen Group, was the defendant in a Mississippi lawsuit and found liable for fraud and gross business misconduct for its aggressive attempts to ruin a small local funeral home and insurance operator. The jury awarded damages to the plaintiff in the amount of $100 million (compensatory) and $400 million (punitive).

> Rather than appeal, Loewen settled the case for $150 million. Now, Loewen has filed a claim for $725 million against the U.S. government under NAFTA's Chapter 11, claiming that the jury verdict, the punitive damages, and the appeal bond requirement 'violated international legal norms of 'fairness,' discriminated against the Canadian-based corporation and attempted to 'expropriate' or seize Loewen's assets …' in derogation of NAFTA guarantees.

Id. at 414.

[45] The Civil Rights Act of 1964 prohibits sex discrimination in employment, but provides as a defense that sex, i.e. being a man or a woman, could be a "bona fide occupational qualification," (BFOQ) "reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e). When a "facially neutral" employment policy disproportionately effects a protected class, it is a defense that the policy is justified by "business necessity." The business necessity defense was judicially created, but found statutory footing in the Civil Rights Act of 1991, 42 U.S.C. §§ 2000e-2(k)(1)(A)-(B). By virtue of this system, Hooters is legally permitted to hire only women as servers (to be "Hooters Girls"), to demand that they have large breasts, and to require employees to sign an acknowledgment that they will not find the environment "offensive, hostile or unwelcome." *See* Joseph M. Kelly & Adele Sinclair, *Sexual Harassment of Employees by Customers and Other Third Parties: American and British Views*, 31 TEX. TECH. L. REV. 807, 824-825 (2000); *see also* Hooters of America, Inc., *Hooters.com: About Hooters*, *at* http://www.hootersofamerica.com/company/about_hooters (last visited Apr. 10, 2003).

[46] *See* Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1 (2002).

[47] Without appropriate tort remedies, of course, corporations suffer no significant penalty when they choose to enhance their own profits by endangering the consuming public. The whole point of punitive damages, for example, was because actual damages would not be sufficient to punish or deter reprehensible conduct—that is, conduct constituting

an abuse of power or trust, or maliciously motivated. Capping punitive damages is unlikely to deter abuses of power, and arbitrarily caps limit the remedy's efficiency. *Id.* at 54-72.

[48] Consider the immunities for pharmaceutical companies stuck into the Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 1714-17, 116 Stat. 2135 (2002) (codified as 6 U.S.C. § 101). Such special favors created considerable debate, until Republicans agreed that they would cooperate in removing those provisions later. The amendments are pending in the 2003 budget bill. *See Conference Report on H.J. Res. 2, Consolidated Appropriations Resolution, 2003*, 149 Cong. Rec. H707-01 (2003) (statement of Rep. Young); and *see, e.g.,* H.R. 484, 108th Cong. (2003); S. 41 108th Cong. (2003); and S. 105 108th Cong. (2003). Consider also the Communications Decency Act of 1996, Pub. L. No. 104-104, § 501, 110 Stat. 56 (1996) (codified as 47 U.S.C. § 230) (internet Services Providers are insulated from a broad range of torts, including federal immunity from any cause of action that would make them liable for information originating with a third party user of the service, *regardless of the service providers state of mind/knowledge*); the Biomaterials Access Assurance Act of 1998, Pub. L. No. 105-230, § 1, 112 Stat. 1519 (1998) (codified as 21 U.S.C. § 1601) (companies that supply raw materials such as silicone or components for medical implants given federal immunity); Rustad & Koenig, *supra* note 46, at 97-98; and the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 801, 110 Stat. 1321 (1996) (codified as 42 U.S.C. § 1997) ("Places limits on the rights of prisoners to recover for a variety of lawsuits including the unprotected exposure to asbestos hazards"). Rustad & Koenig, *supra* note 46, at 71.

[49] After our lecture, the BBC reported that: "Tumbling insurance shares have been a feature of falling stock markets. As prices fall, these companies' large equity holdings reduce in value, and they are forced to make further sales so they have sufficient cash reserves." Of course, damages caps and litigation roadblocks that make it difficult for victims to make claims are just another way of cutting insurance costs to make up for these losses. BBC NEWS, *UK Shares Hit New Low*, Mar. 11, 2003, *at* http://news.bbc.co.uk/2/hi/business/2837711.stm.

[50] "President Bush is making a renewed push for strict limits on jury awards he blames for skyrocketing premiums." Richard Oppel Jr., *Bush Enters Fray Over Malpractice*, N.Y. TIMES, Jan. 17, 2003, at A24.

[51] Rustad & Koenig, *supra* note 46, at 51.

[52] *See generally* JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGE AMERICA'S SOCIAL AGENDA (1996).

[53] Rustad & Koenig, *supra* note 46, at 74–76.

[54] *Id*.

[55] *Id*. at 54.

[56] *The New York Times* reports that 39% of Americans believe that they are or will be in the richest 1% of the population. David Brooks, *The Triumph of Hope Over Self-Interest*, N.Y. TIMES, Jan. 12, 2003, § 4 at 15. Perhaps executives will continue to walk away with their gigantic profits and we are going to let them because we think it could be us.

[57] The Secretary of the Army is Thomas E. White. *See* Matt Bivens, *Enron: Under Cover of Dark and the War*, DAILY TIMES PAK., Feb. 23, 2003, *at*

http://www.dailytimes.com.pk/default.asp?page=story_20-2-2003_pg4_11; Jason Leopold, *Tom White Played Key Role In Covering Up Enron Losses*, SCOOP, Oct. 8, 2002, *at* http://www.scoop.co.nz/mason/stories/HL0210/S00052.htm; and *Army Secretary's Enron Role Probed*, WASH. POST, Feb. 18, 2002, at A18, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A25816-2002Feb17. *See also* U.S. ARMY, *Official Biography of Thomas E. White*, *at* www.army.mil/leaders/Secarmy/bio.htm (last visited Apr. 10, 2003):

> Secretary White has statutory responsibility for all matters relating to Army manpower, personnel, reserve affairs, installations, environmental issues, weapons systems and equipment acquisition, communications, and financial management. Secretary White is responsible for the department's annual budget of nearly $82 billion.

Id. After we gave this presentation, Secretary White was fired by Mr. Rumsfeld. *See Rumsfeld Set to Change Army Leadership*, N.Y. Times, Apr. 27, 2003, at http://www.nytimes.com/aponline/national/AP-Army

[58] Doe v. Bush, No. 03-1266, 2003 U.S. App. WL 1093975, at *1 (1st Cir. Mar. 12, 2003), *petition denied*, No. 03-1266, 2003 U.S. App. WL 1221158 (1st Cir. Mar. 18, 2003), *available at* http://www.mfso.org/.

[59] We do not think that judicial review is "the answer" by any means, but is only one of many tools that can have positive political consequences. For a wonderful account of usually "losing" efforts to constrain military adventurism by legal means, *see* Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331 (1995).

[60] Four Justices—Douglas, Harlan, Stewart, and Brennan—wanted to hear Vietnam matters, but they were never willing to do so in the same case, so the four votes required to grant *certiorari* were never put together. Rodric B. Schoen, *Strange Silence: Vietnam and the Supreme Court*, 33 WASHBURN L.J. 275, 304 (1994).

[61] The only Supreme Court decision nominally addressing the merits was Atlee v. Richardson, 411 U.S. 911 (1973), *summarily aff'd,* Atlee v. Laird, 339 F.Supp. 1347 (E.D. Pa. 1972), in which a three-judge district court had dismissed a taxpayer class action challenge to the constitutionality of the war as a political question. A summary affirmance, of course, only endorses the lower court result, not the lower court reasoning.

[62] Baker v. Carr, 369 U.S. 186, 217 (1962).

[63] For an introduction to the technical problems, *see* Lobel, *supra* note 59; and *see* Michal R. Belknap, *Constitutional Law as Creative Problem Solving: Could the Warren Court have Ended the Vietnam War?*, 36 CAL. W. L. REV. 99 (1999). Two excellent overviews of constitutional national security problems are JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993); and HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

[64] In Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), the United States Supreme Court ruled that the state of Georgia had no jurisdiction over Cherokee Nation lands. Georgia openly ignored the decision, and President Jackson took no steps to force compliance. According to the story, Jackson said, "John Marshall has made his decision. Now let him enforce it." *See* Joseph Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 525 (1969). However, the Court had not entered a final

order and the President was under no legal obligation. The private party petitioners did not pursue the litigation. ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 210-212 (6th ed. 1983).

[65] Federal courts are not empowered directly to enjoin the President regarding "non-ministerial" executive obligations. Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866). However, in otherwise justiciable causes, courts may enter such orders against other executive officers, effectively forcing the President to comply. Franklin v. Massachusetts, 505 U.S. 788, 802-803 (1992). Thus, even in a wartime context, the Supreme Court ordered the Secretary of Commerce to return steel mills to their owners, after President Harry S. Truman had ordered confiscation to keep the mills from being idled by a strike during the Korean War. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Within half an hour after the Supreme Court announced that decision, President Truman dispatched a letter to the Secretary of Commerce reversing the earlier order of confiscation. *See* STANLEY I. KUTLER, THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON 515 (1990). In addition, of course, courts may compel Presidential compliance with criminal investigations, United States v. Nixon, 418 U.S. 683 (1974), and sitting Presidents may be civilly sued for conduct while out of presidential office. Clinton v. Jones, 520 U.S. 680 (1997).

[66] Powell v. McCormack, 395 U.S. 486, 549 (1969).

[67] This discussion of the political question doctrine is paraphrased from Ann C. Scales, *Militarism, Male Dominance, and Law: Feminist Jurisprudence as Oxymoron?*, 12 HARV. WOMEN'S L.J. 25, 68-70 (1989), which was itself taken from an analysis by Anne E. Simon.

[68] *See* Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985).

[69] *See, e.g.,* Teemu Ruskola, *Family Inc.: What is the Difference Between a 'Family' and a 'Corporation'?*, *in* COMMODIFICATION FUTURES (Martha Ertman & Joan Williams eds., forthcoming); KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 68-76 (1957); MARSHALL SAHLINS, STONE AGE ECONOMICS (1972); and MARCEL MAUSS, THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES 32 (W.D. Halls trans., 1990).

[70] NATIONAL SECURITY STRATEGY, *supra* note 22, at iv.

[71] *See* Martha Albertson Fineman, *Contract and Care,* 76 CHI.-KENT L. REV. 1403, 1436 (2001).

[72] The term "epistemological privilege" is discussed in Ann Scales, *Feminist Legal Method: Not So Scary*, 2 U.C.L.A. WOMEN'S L.J. 1, 23-29 (1992).

[73] As General Electric says about itself:

> Many years of successful GE military engine programs culminated in 1991 when more than half of all the aircraft of the U.S. and other Allied forces in Operation Desert Storm were produced by GE Aircraft Engines. More than 5,000 GE engines were deployed during Desert Storm, powering fighters, tankers, helicopters, transports, and surveillance aircraft, including F-14s, F-16s, F-5s, F-4s, C-5s, KC-135Rs, F-117A Stealth fighters, F-18s, A-10s, S-3s, and Black Hawk and Apache helicopters, both powered by GE's T700 engine.

GENERAL ELECTRIC, GEAE HISTORY, GE AIRCRAFT ENGINES: NINE DECADES THAT CHANGED THE WORLD *at* http://www.geae.com/aboutgeae/history.html#subsection3 (last visited May 2, 2003). *See generally* http://www.ge.com.

[74] *See*, *e.g.,* Press reslease, General Electric, Kuwait Airways Selects GE90-90B to Power New Boeing 777-200 (July 23, 1996), *available at* http://www.geae.com/aboutgeae/presscenter/ge90/ge90_19960723.html (GE and Kuwait Airlines); and http://www.ge.com/gulf/index.htm.

[75] *See* GENERAL ELECTRIC, GE ADVERSTING *at* http://www.ge.com/en/company/companyinfo/ads.htm; http://www.ge.com; and http://www.geimaginationatwork.com/upgrade.html (last visited May 2, 2003). When we visited http://www.nytimes.com during the writing of this presentation, and proceeded to articles in the Business section, we frequently encountered two advertisements flashing in a box at the top of the page. The first began: "WHAT IF IMAGINATION BECAME REALITY;" then it flashed, "AND WORLD CLASS SCIENTISTS COULD PLAY LIKE KIDS?" and then, "THEN YOU WOULD HAVE SOME OF THE COOLEST PRODUCTS EVER;" and finally, "GE: IMAGINATION AT WORK." The second advertisement began: "IMAGINATION MEANS;" then it flashed, "TAKING A POWERFUL IDEA AND GIVING IT A CHANCE TO FLY;" and finally, "GE: IMAGINATION AT WORK."