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Policy Report

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The Imperial Presidency and the War on Terror

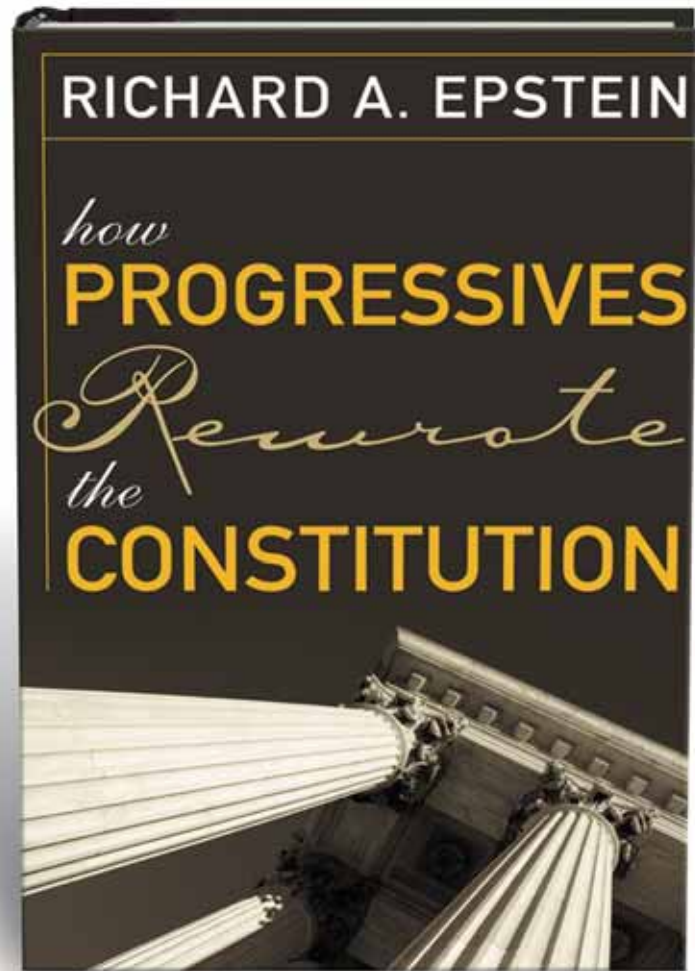
BY GENE HEALY

Trust the president.” That was the Bush administration’s main defense of the president’s bizarre choice of corporate lawyer Harriet Miers for a seat on the Supreme Court. But the administration also had a backup rationale: as D.C.’s *Hill* newspaper reported, in an October 3, 2005, conference call with conservative leaders, Republican National Committee chair Ken Mehlman stressed “the need to confirm a justice who will not interfere with the administration’s management of the war on terrorism.”

It was a bit unsettling to hear that proposition stated so baldly, but no one who has followed the administration’s drive to expand executive power could have been altogether surprised that leaving that power unchecked was a key goal for the Bush team. Since the start of the war on terror, the Bush administration has single-mindedly advanced the view that, in time

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GENE HEALY is senior editor at the Cato Institute. He is the editor of *Go Directly to Jail: The Criminalization of Almost Everything* (Cato Institute, 2004) and the author of studies on presidential war powers and the militarization of law enforcement.



In his new book Richard A. Epstein, professor of law at the University of Chicago and adjunct scholar at the Cato Institute, shows how the Progressives of the early 20th century transformed James Madison’s Constitution into one that accommodated the New Deal and subsequent regulatory and transfer schemes. **MORE ON PAGE 16**



BY WILLIAM A. NISKANEN

Chairman's Message To W: Stop Campaigning and Start Governing

President Bush, last year you proposed an ambitious second-term agenda of important domestic policy initiatives—Social Security choice, tax reform, immigration reform, and tort reform. That agenda will go *nowhere*, however, unless you stop campaigning and start governing, for the political strategy to win elections is very different from that necessary to win congressional approval of major new legislation.

You have demonstrated that a campaign strategy to increase the turnout of Republican voters has been sufficient to win two presidential elections and to increase the Republican margins in Congress with little effort to attract the support of potential swing voters. But that campaign strategy has polarized Congress and is not a sufficient strategy to win congressional approval of major legislation on which the Republican members of Congress are not almost completely united. For that objective, you *must* work with Democratic members of Congress who may agree to negotiate with you on an issue-by-issue basis. Otherwise, your initiatives will be held hostage by any small group of Republican members of Congress who differ with your proposed legislation.

The failure to bring any proposed reform of Social Security to a vote in 2005 is one example of this problem. The 60-day, 60-city tour to promote your Social Security proposal was not even enough to energize a unified Republican approach to this issue, and there was no attempt to reach out to potential Democratic support. Another unfortunate example of this problem was the replacement of your generous approach to undocumented aliens and immigration by a much more hard-line House bill. Much the same happened when a small group of Republicans who do not favor opening ANWR to oil drilling or a small reduction in the *growth* of spending for programs that help the poor blocked the initial House vote to approve a routine budget reconciliation bill, in this case because there was no attempt to enlist the support of fiscal conservatives among the Democrats.

The record indicates that substantial support from both major parties is necessary both to approve and to sustain any major policy reform. The first leading politicians to support the basic structure of the 1986 tax reform, for example, were Sen. Bill Bradley and Rep. Dick Gephardt, and the Reagan administration worked closely with House Ways and Means Committee chairman Dan Rostenkowski for many months to gain and ensure his support. The important 1996 welfare reform

was initiated by Republican members of Congress, gained the support of a substantial number of congressional Democrats, and, ultimately, after two vetoes, was approved by President Clinton. Moreover, the first of these important reforms was approved in a congressional election year and the second in a presidential election year, suggesting that it is not necessary to wait for what may seem to be a less politically sensitive time to address a major reform. In 1998 a number of leading Democrats, including President Clinton, supported some form of Social Security reform, an opportunity that was missed primarily because of the impeachment hearings.

President Bush, you have raised a number of important policy issues and have three years left to serve. In order to gain some initiative on your second-term agenda, I urge you to do the following:

- Reiterate your endorsement of the *general structure* of those reforms that you believe would be most valuable in a major address.
- Invite discussions between members of your administration and both Republican and Democratic members of Congress about each of these proposed reforms *before* you submit proposed legislation to implement them.
- Submit proposed legislation only for those reforms for which there is a prospect of nearly unified support by Republican members of Congress or substantial support by Democratic members.
- Be prepared to be patient and to be gracious, giving public credit to those members of Congress from either party who lead the effort for approval of the legislation that would implement these reforms.
- Consider adding to the White House staff a member or former member of Congress who is knowledgeable about and supports your major policy initiatives. Your current staff has served you well in campaigning but not as well in the politics of governing.

President Bush, you and the nation have a lot at stake in how the issues raised by your second-term initiatives are resolved. For your sake, and ours, stop campaigning and start governing.

“Consider adding to the White House staff a member or former member of Congress who is knowledgeable about and supports your major policy initiatives.”

Cato Takes Ideas of Freedom to Iraqi Kurds

Cato senior fellow Tom G. Palmer, who traveled to Baghdad in 2004 and earlier in 2005, toured the Kurdish region of northern Iraq in November to promote the principles and policies of freedom. He recruited new translators for Cato's ambitious project to make available libertarian ideas and policy recommendations in Arabic and also began a more modest initiative to publish books by Frederic Bastiat and F. A. Hayek in the Kurdish language.

Palmer's trip started in Oman, where he took part in the launch of the Fraser Institute's Economic Freedom

of the Arabic World project. From there he flew to Jordan and then on to Erbil in northern Iraq. In Erbil Palmer met with members of the Iraqi national parliament and the Kurdish regional parliament, gave a public lecture on "The Political Economy of Freedom" at Salahaddin University, met with Minister of Education Abdul-Aziz Tayib and his staff (they had an extensive discussion of private education), and held several meetings with the president and deans of Salahaddin University. Palmer agreed to provide books for the university's library and to assist the university in preparing professors of political science and economics to teach the principles of limited government and the free market,

two topics that have until recently been little known in the region.

In Koya Palmer met with the president and officers of the new University of Koya. Palmer made a commitment to provide books for the new university library and

to help to attract foreign guest lecturers and visiting professors. He then drove to Suleimani and met the next morning with the minister of education for the eastern region of Kurdistan, Dr. Akhtar Najmaddin, and her staff. He gave a well-attended lecture for students and faculty. After meetings with several faculties, he

gave a lecture for civic and political leaders and journalists on the rule of law, legal impartiality, and social and political pluralism.

For both presentations, Palmer's Powerpoint presentations were translated into Kurdish and his remarks were translated by a leading Kurdish journalist, who is now translating Bastiat and Hayek into Kurdish. Both lectures were filmed and shown on television, and Palmer was interviewed by two newspapers, including the leading "Voice of Kurdistan" paper. A major theme of the interviews was the importance of eliminating price controls and freeing prices to "tell the truth." As Palmer remarked afterward, "Iraqis generally understand how price controls cre-

ate shortages, long lines, and corruption. They understand that the real cost of goods and services goes up under price controls, when you add in the waiting time and the bribes that have to be paid. In fact, they get the point better than most Americans do, because they see the bad effects of price controls before their eyes."

Palmer is now working with the Iraqi Institute for Economic Reform on a major public campaign to explain the role of free prices to Iraqis. Gasoline prices are controlled far below the market level, and modest efforts to raise prices led to public disorder, with rioters burning some gas stations. Little effort had been made to explain to the public the benefits of free prices or the enormous costs of subsidized or below-market prices. A campaign is also planned to explain in clear language the costs of continuing the system of foodstuff rationing that is a legacy of the Saddam regime and the international sanctions placed on Iraq. If successful, the campaign, which will use television and radio, essay contests in all regions of Iraq and newspaper articles, may be expanded and applied to other areas of the economy.

Said Palmer: "It is vitally important that freedom be grasped by the people of the Middle East. They are more likely to grasp it themselves if they have access to the tried and true ideas of freedom, and that is what our Lamp of Liberty project and our other initiatives in the Middle East are trying to facilitate. Without economic and personal freedom, the Middle East will suffer indefinitely from tyranny and conflict, which will be truly terrible for the people who live there and bad for the rest of the world. We cannot afford to fail."



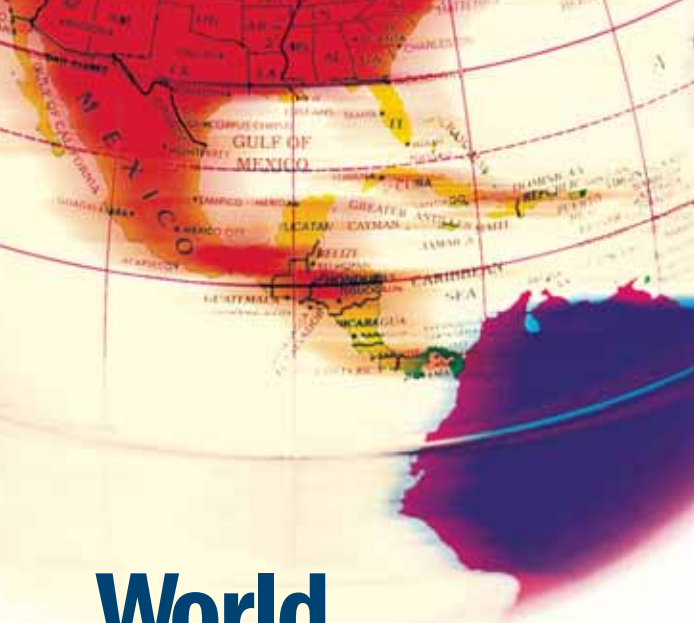
Cato senior fellow Tom G. Palmer speaks on "The Political Economy of Freedom" to faculty and students at Suleimani University in northern Iraq.

Griswold Speaks for Free Trade at the WTO



Center for Trade Policy Studies director Daniel Griswold attended the World Trade Organization's ministerial meeting in Hong Kong December 13-18. Griswold spent his week speaking on behalf of open markets and observing the inner workings of multilateral trade talks. Among the highlights of Griswold's week was speaking at a "Freedom to Trade" rally and media event that highlighted how

free trade has made Hong Kong free and prosperous. Griswold also appeared live on CNN International, Bloomberg TV, and BBC Radio. He distributed 300 copies of Cato studies and penned a daily "Hong Kong Dispatch" for the Cato website (www.freetrade.org). On his last evening in Hong Kong, Griswold mingled with protesters and riot police on the streets near the conference center.



World Freedom Fighters Visit Cato

The Cato Institute has become internationally recognized as a center for the ideas of freedom and limited government. In recent months men and women working for freedom from Japan to Zimbabwe, from Egypt to India to Canada, have visited Cato to discuss their efforts and solicit the assistance of Cato scholars. Some of them are pictured here; some of their talks can be accessed on Cato's website, www.cato.org.



Sabine Herold, who made headlines by leading 80,000 people in a march against French union demands, describes her new group *Liberté Chérie* at the Cato Club 200 Retreat.



Andrei Illarionov, who resigned in December as chief economic adviser to President Vladimir Putin after several years of publicly criticizing Russia's direction, drew a standing-room-only crowd for his Cato speech, "The Rise of the Corporate State in Russia."



At Cato's Forum on "Advancing Economic Freedom in the Middle East," Salem Ben Nasser Al Ismaily, president of the Omani Center for Investment Promotion and Export Development, explains how the presence of oil wealth has decreased incentives to create economic growth.



Donald Tsang, the chief executive of Hong Kong, discusses his government's continuing commitment to economic freedom at a Cato seminar. Tsang's aide and Cato's Ed Crane and Ian Vásquez listen.



Martin Lee, the longtime leader of democratic forces in Hong Kong, came to Cato as part of a U.S. visit warning about China's postponement of promised elections.



David Boaz signs a copy of *Libertarianism: A Primer* for former Malaysian deputy prime minister and economic reformer Anwar Ibrahim, who told a Cato lunch audience that he had first read the book while he spent six years in jail on trumped-up charges.



Dr. Jacques Chaoulli tells a Cato audience how he persuaded the Supreme Court of Canada that it was unconstitutional to deny Canadians the right to purchase health care privately when the national health service couldn't meet their needs.



In October 2005 the *Cato Journal* published "The Loss of Property Rights and the Collapse of Zimbabwe." On November 2 the U.S. Ambassador to Zimbabwe, Christopher Dell, quoted that article in a lecture at a Zimbabwean university. Five days later Zimbabwean ruler Robert Mugabe said that Dell should "go to hell," and the government threatened to expel him. The next day the State Department recalled him to Washington for consultations, and on November 29 he discussed the Zimbabwean crisis and his experiences with an audience at the Cato Institute.

Langone rips Spitzer at New York seminar

Markets for Africa and the Middle East

DECEMBER 5: Rising energy prices have not hindered economic growth in the United States because the Federal Reserve's inflation-fighting credibility is strong, said speakers at a Cato Policy Forum, "Is a New Era in Monetary Policy upon Us?" conducted by the Shadow Open Market Committee. Committee cochair Charles I. Plosser expressed hope that Ben Bernanke will move the Fed in the direction of a transparent inflation-targeting regime. Mickey Levy argued that continued economic growth also requires simplicity and fairness in tax policy. Cochair Anna Schwartz focused on foreign trade, arguing that the United States should unilaterally reduce tariff barriers and subsidies, which would benefit both American consumers and developing countries. Bennett McCallum of Carnegie Mellon University agreed that bilateral trade balancing is inconsistent with free trade and that U.S.-China negotiations should not attempt to artificially balance trade.

DECEMBER 5: Former Malaysian deputy prime minister Anwar Ibrahim spent six years in prison on trumped-up charges after exposing fraud in the Malaysian government. At a luncheon at the Cato Institute, Anwar spoke about the role of Islam in the creation of free societies in nations like Malaysia. Islam, he said, strongly supports free trade, personal responsibility, and property rights, and Muslim voters easily reconcile their support for those values with their religion when given the opportunity to express their views. In Asia today, however, security is used as a pretext for control, and nationalism is used to radicalize religion. Anwar suggested that the best way to create peaceful, free Muslim societies is to allow Muslims—the vast majority of whom are not fundamentalists—to lead the reform of their own religion and shape their countries' futures through robust democracy.

DECEMBER 6: Although poor Africans suffer under the regime of international trade restrictions and price supports, the root causes of African poverty are internal structural problems. At a Cato Policy Forum, "How Much Will Trade Liberalization in Rich Countries

Help Africa?" Marian Tupy of Cato's Project on Global Economic Liberty pointed to corruption, weak property rights, and domestic market restrictions as the most important of the factors that are keeping Africa poor. Africans would gain from lowering barriers to international trade, but they would gain more from reforming their own economies and governments. Julius Coles, president of the international aid group Africare, argued that just as the developed world has benefited from 200



An overflow crowd watches Cato's January 25 Forum on U.S.-China tensions.

years of protectionism of its burgeoning industries, African countries should protect domestic development by liberalizing trade gradually. Correspondent Robert Guest of *The Economist* complained that protectionism in African countries amounts to a subsidy for some industries at the expense of all citizens, which is just another form of corruption.

DECEMBER 7: The confirmation hearings for Supreme Court nominee Samuel Alito are likely to be sidetracked by political issues rather than focused on law, said Cato's vice president for legal affairs Roger Pilon at a Cato Hill Briefing, "What to Look for in the Alito Hearings." Pilon recounted how Progressive Era politics led to a fundamental misunderstanding of the Constitution and the role of the judiciary. The idea of deference to the political branches, he said, is a form of judicial activism because it bases judicial decisions on politics instead of on the law. Judge Alito's opinions on political issues are there-

fore not as important as his understanding of federalism and the proper role of the courts. Although Alito has strongly protected First and Fourth Amendment rights, Pilon cautioned that he may be too quick to defer to the political branches.

DECEMBER 9: Advocates of smaller government expressed a sense of betrayal at the Bush administration's anti-federalist policies and profligate spending at a Cato City Seminar in New York. MSNBC's Tucker Carlson outlined the decline of the Republican Party, predicting that, if Republicans cannot find their conservative roots, taxpayers will eventually vote them out of office. No example better illustrates the inconsistency of big-government conservatism than the president's signing of the campaign finance bill as he was calling it unconstitutional, said Roger Pilon, Cato's vice president for legal affairs. Other examples he gave included the prosecution of medical marijuana users, the explosion of federal education programs, and a general disregard for constitutional discourse. Bruce Bartlett, author of the forthcoming book *Impostor: How George W. Bush Bankrupted America and Betrayed the Reagan Legacy*, spoke about Bush's pushing the Medicare prescription drug benefit and other unconservative laws. In the keynote address, former New York Stock Exchange director Kenneth Langone excoriated New York State's attorney general Eliot Spitzer for creating a situation in which ordinary citizens conducting ordinary business must fear the government. He argued that regardless of party affiliation, citizens should fight big government because it leaves too much room for abuse.

JANUARY 12: What makes some democracies more peaceful than others? At a Book Forum for *Electing to Fight: Why Emerging Democracies Go to War*, authors Edward D. Mansfield and Jack Snyder explained how democratization in countries where stable political institutions are absent can lead to sinister nationalism, ethnic conflict, and warlike behavior toward neighbors. Mansfield presented evidence that incomplete transitions



Cato president Ed Crane listens as former NYSE director Frank Langone excoriates New York attorney general Eliot Spitzer's abuse of power.

to democracy are much more dangerous to peace than other types of transitions. Thomas Carothers of the Carnegie Endowment for International Peace warned that delaying democratization until institutions can develop may mean condemning a nation to remain oppressed for a generation or more. Snyder responded that holding elections too soon may entrench authoritarianism.

JANUARY 18: The Middle East has lagged behind other regions in producing consumer goods. At a Cato Policy Forum on “*Advancing Economic Freedom in the Middle East*,” director of trade policy studies Dan Griswold lamented that some governments in the region support free trade only in oil. Maqbool Ali Sultan, minister of commerce and industry of Oman, projected that the U.S.-Omani Free Trade Agreement would result in greater economic growth for his country just as other Arab free-trade agreements have in the past. Salem Ben Nasser Al Ismaily of the Omani Center for Investment Promotion and Export Development said that despite Arab oil wealth, 20 percent of Arabs live on less than \$2 a day. Arab governments, he argued, must reduce the regulatory burden on businesses, lower taxes, and allow free foreign trade in order to bring their populations out of poverty. Fred McMahon of the Fraser Institute described Oman as a nation on the verge of becoming one of the world’s most dynamic economies thanks to recent moves toward trade liberalization.

JANUARY 19: Benjamin Franklin once wrote, “A virtuous and industrious people may be cheaply governed.” At a Cato Book Forum, Franklin biographer Mark Skousen tackled the question, “*Ben Franklin: Conservative, Libertarian, or Radical Democrat?*” Skousen has compiled an impressive collection of Franklin’s writings about his participation in the Continental Congress, his ambassadorship



Television pundit Tucker Carlson asks a New York City audience, “What went wrong with the Republican Party? They are no longer committed to small government.”

to France, and the drafting of the U.S. Constitution to create *The Completed Autobiography of Benjamin Franklin*. Franklin, he said, eschewed political party labels, but he was in favor of free trade, immigration, freedom of religion, universal suffrage, and women’s rights.

JANUARY 25: The question of Taiwan’s status has been a consistent source of tension between China, which believes Taiwan to be a renegade province of the People’s Republic, and the United States, which has made an implicit pledge to protect Taiwan against coercion by the mainland. At a Cato Book Forum for *America’s Coming War with China: A Collision Course over Taiwan*, Ted Galen Carpenter, Cato’s vice president for defense and foreign policy studies, explained his book’s conclusion that there is great danger of a U.S.-China war unless Washington changes its policy regarding Taiwan. The Brookings Institution’s Richard C. Bush III questioned whether Taiwan would have the resources to defend itself absent U.S. assistance. Clyde Prestowitz of the Economic Strategy Institute argued that Beijing has increasing economic leverage against the United States in any showdown over Taiwan.

JANUARY 26: On January 23, Canada’s Conservative Party won a plurality of seats in the nation’s Parliament. **John Carpay**, executive director of the Canadian Constitution Foundation, spoke at a private lunch at the Cato Institute about what the election results mean for liberty in Canada. Canadian Conservatives, he explained, are more like liberal Democrats than they are like American conservatives. Although the new Parliament may pass modest tax cuts, increase criminal penalties, and reduce corporate welfare, he said, cutbacks to the extensive Canadian welfare state are unlikely.

JANUARY 31: As school choice programs continue to grow across the country, opponents claim that vouchers rob public schools of needed funds. At a Policy Forum on the D.C. voucher program, Susan Aud of the Friedman Foundation and Leon Michos of George Washington University announced their study’s findings that vouchers are successful at “*Spreading Freedom and Saving Money*.” The federal government pays private school tuition in the D.C. program and gives public schools a federal grant, but even without federal money, Aud said, the D.C. public schools would save more than \$250,000. The funding canard suppresses the fact that no city with school choice has ever seen public funding decrease, explained the Friedman Foundation’s Robert Enlow.

“Thus far, President Bush has wielded this extraconstitutional power sparingly, but there’s no guarantee that he—or his successors—will continue to show restraint.”

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of war, the president is the law, and no statute, no constitutional barrier, no coordinate branch of the U.S. government can stand in the president’s way when, by his lights, he is acting to preserve national security. Bush administration officials have argued

- that the president has the inherent constitutional authority to designate American citizens suspected of terrorist activity as “enemy combatants,” strip them of any constitutional protection, and hold them for the duration of the war on terror;
- that the president has the power to ignore validly enacted statutes prohibiting war crimes if he believes those statutes impede his prosecution of the war on terror; and
- that the president has the power to launch invasions of other countries at his discretion, without so much as a by-your-leave to Congress.

In a 1977 interview with David Frost, Richard Nixon described his view of the president’s national security authority: “Well, when the President does it, that means it is not illegal.” In the arguments it has advanced, both publicly and privately, for untrammelled executive power, the Bush administration comes perilously close to that view.

A Presidential Power to Imprison?

In recent months the executive power issue has come to the fore with the revelation that the Bush administration has repeatedly bypassed the Foreign Intelligence Surveillance Act by conducting warrantless surveillance of Americans. President Bush has asserted that he has inherent authority as commander in chief to ignore the statutory framework set up by Congress. Judging by the polls and the press, many Americans find that line of argument alarming.

It’s unclear why it was domestic surveillance that finally drew public attention to the administration’s proclivity for evading the law in the name of national security. The claims the administration has made in the FISA debate are consistent with the view of executive authority that they’ve pressed since 9/11. Nowhere is that clearer than in the case of José Padilla, perhaps the starkest example of the administration’s drive for unchecked presidential power. Padilla, a Brooklyn-born American citizen, was arrested by federal agents at Chicago’s O’Hare Airport in May 2002 and held on a material witness warrant. Two days before a hearing in federal court on the validity of that warrant, the president declared Padilla an “enemy combatant” plotting a “dirty bomb” attack in the United States and ordered him transferred to a naval brig in South Carolina, hundreds of miles away from his lawyer. Padilla was held there for three and a half years without being charged, until his recent transfer to federal prison.

There’s little in Padilla’s background to suggest he’s an innocent man wrongly accused—he’s a violent ex-con with apparent ties to Al Qaeda. But “the innocent have nothing to fear” is cold comfort and poor constitutional argument. The very principle that imprisons the guilty can be used to seize the innocent. And the principle the Bush administration has advanced to justify Padilla’s detention is broad indeed. The

administration has argued in federal court that the power to seize an American citizen on American soil, unilaterally designate him an “enemy combatant,” and hold him for the duration of the war on terrorism is “a basic exercise of [the president’s] authority as Commander in Chief.” The power claimed here amounts to the assertion that the executive branch can serve as judge, jury, and jailer in cases involving terrorist suspects.

That power cannot be found in the Constitution. The Bill of Rights does not come with an asterisk reading “unenforceable during time of war.” As the Supreme Court declared in *Ex Parte Milligan* (1866), rejecting the military trial of a civilian during the Civil War, “The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times.”

Thus far, President Bush has wielded this extraconstitutional power sparingly, but there’s no guarantee that he—or his successors—will continue to show restraint. In fact, in 2002 the administration considered broader use of domestic detention. As *Newsweek* reported in April 2004, Vice President Dick Cheney and Defense Secretary Donald Rumsfeld wanted to invoke the “enemy combatant” concept to hold six Americans from Lackawanna, New York, in a military brig without access to the courts. “They are the enemy, and they’re right here in the country,” Cheney declared, according to an administration official. The administration also considered using the power against other Americans, including a group of suspected terrorists in Portland, Oregon. It was, surprisingly enough, then-attorney general John Ashcroft who spoke up for civil liberties and the rule of law, convincing the administration to pursue the Lackawanna Six through ordinary

“The Constitution’s text, structure, and history will not support anything like the doctrine of presidential absolutism the administration flirts with in the torture memos.”

constitutional processes. The six pleaded guilty and are now in federal prison.

On September 9, 2005, in *Padilla v. Commander C.T. Hanft*, a Fourth Circuit Court of Appeals panel reversed the federal district court that had ordered the government either to charge Padilla with a crime or to release him. The decision, written by Judge J. Michael Luttig, long said to be on the president’s “short list” for the Supreme Court, rests on somewhat narrower grounds than the administration’s claim of an inherent executive power to intern terrorist suspects. Judge Luttig held that the use-of-force resolution Congress passed prior to the war in Afghanistan was broad enough to authorize the seizure and prolonged detention of American citizens here in the United States. Luttig in effect reads the resolution as a standing grant of emergency power to the president for the duration of the war on terror. But if Congress intended to give the president the power to declare an American citizen a constitutional “nonperson” and hold him without charges or a trial, the very least our courts could require is a clear statement from Congress to that effect.

Padilla’s attorneys have appealed to the Supreme Court for a ruling on the merits. Two days before the government’s response was due, the Bush administration announced Padilla’s indictment in civilian court and requested that he be transferred to Florida for trial. Judge Luttig viewed the request as an attempt by the government to avoid Supreme Court review of the case and issued a sharp rebuke. As of this writing, the Supreme Court has not yet announced whether it will take the case. One hopes it will grant review and reject the administration’s contention that ordinary constitutional processes can be suspended at the will of the president. No president should be trusted with a power that vast.

Is the President above the Law?

In the *Padilla* case, the Bush administration has argued that the courts cannot interfere with the president’s decision to imprison terrorist suspects without trial. In a series of internal memoranda written in 2002 and 2003 and publicly revealed in 2004, Bush administration lawyers argue that Congress is similarly powerless to interfere with the president’s authority to order torture of enemy prisoners, if the president decides such action will be useful in prosecuting the war on terror.

Much of the public discussion about those memos has focused on the narrowness of their definition of torture and the question of whether the Geneva Convention covers Al Qaeda and Taliban prisoners. Reasonable people can debate those issues, but what’s most disturbing about the memos is their assertion that the president cannot be restrained by validly enacted laws.

In 1988 the United States signed the United Nations Convention Against Torture; in 1994 the Senate ratified that agreement. Later that year, Congress passed a statute implementing the agreement, a statute that makes acts of torture committed under color of law outside the United States a federal crime. (Acts of torture committed within the United States were already prohibited by federal law.) But according to the Bush administration’s Justice Department, that statute is without effect, should the

president decide it impedes his ability to wage war on terror.

According to the memos, prohibiting torture infringes on the president’s constitutional power as commander in chief. As an August 1, 2002, memo puts it, “Congress can no more interfere with the president’s conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.” The legal reasoning employed in that memo resurfaced in a March 2003 Pentagon memo prepared for Secretary of Defense Donald Rumsfeld, which holds that “any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.”

The Constitution’s text, structure, and history will not support anything like the doctrine of presidential absolutism the administration flirts with in the torture memos. Explaining the commander-in-chief clause in *Federalist* 69, Hamilton noted that the authority it granted “would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy.” Moreover, the Constitution gives Congress powers that bear directly on the issue of military conduct and war crimes, including the power “to define and punish . . . Offences against the Law of Nations”—such as violations of international covenants against torture. And the president, in addition to his oath to uphold the Constitution, is commanded by that document to “take Care that the Laws be faithfully executed.”

Amazingly, the torture memos decline to address—or even to cite—*Youngstown Co. v. Sawyer* (1952), the key Supreme Court case on the relative powers of Congress and

“While repudiating the practice of torture, the Office of Legal Counsel refused to recant its broad assertion of executive authority.”

the executive. In *Youngstown*, popularly known as the *Steel Seizure Case*, the Court struck down President Truman’s executive order seizing the nation’s steel mills, issued to avert a strike in the midst of the Korean War. In his concurrence, Justice Jackson rejected the government’s broad view of the commander-and-chief power and noted that when the president acts in contradiction to the will of Congress, his power is “at its lowest ebb.” As Justice Jackson put it, “No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.”

It’s hard to divine anything in the administration’s legal reasoning that would prohibit the seizure and torture of an American citizen on American soil, if the president concluded such action would be useful in fighting the war on terror. After all, administration officials have argued repeatedly that the United States is as much a combat zone in that war as are the hills of Afghanistan. During oral argument in the *Padilla* case, Judge Luttig told Deputy Solicitor General Paul Clement that accusations that Padilla was an enemy combatant “don’t get you very far, unless you’re prepared to boldly say the United States is a battlefield in the war on terror.” Clement replied, “I can say that, and I can say it boldly.”

In response to public pressure, on December 30, 2004, the Justice Department’s Office of Legal Counsel issued a memorandum superseding the August 2002 memo that generated much of the controversy. While repudiating the practice of torture, the Office of Legal Counsel refused to recant its broad assertion of executive authority. Indeed, given the president’s actions with regard to the McCain amendment to prohibit “cruel, inhuman, and

degrading” treatment of U.S. detainees, that theory of executive power appears to be alive and well. In December 2005, after long threatening to veto the amendment, President Bush, faced with veto-proof majorities in the House and Senate, decided to sign. Yet, in his signing statement, he declared, “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.” Given the president’s capacious view of his own authority, that could well signal an intent to interpret the law out of existence.

Instead of penalizing any of the figures responsible for the torture memos, the president has promoted them. Jay S. Bybee, coauthor of the August 2002 memo, now sits on the Ninth Circuit Court of Appeals. Alberto Gonzales, who ran the Office of Legal Counsel during its elaborate effort to rationalize lawbreaking, is now the nation’s chief law enforcement officer, as attorney general of the United States.

A Presidential Power to Declare War?

As revealed by the torture memos, in the administration’s theory, Congress is powerless to prevent the president

from doing whatever he believes to be necessary to win a war. And, as it turns out, Congress is also powerless to prevent the president from starting a war, if he believes that war is in the national interest. Administration officials have repeatedly advanced the claim that the president’s powers include the power to decide, unilaterally, the question of war or peace.

In testimony given before the Senate Subcommittee on the Constitution in April 2002, an official from the Office of Legal Counsel expressed the administration’s view: “The President has the constitutional authority to introduce the U.S. Armed Forces into hostilities when appropriate, with or without specific congressional authorization.” That is consistent with Vice President Cheney’s long-held view of the president’s powers and consistent with what administration figures were telling the press in the run-up to the congressional debate over war with Iraq.

The administration also had a fallback theory: administration officials argued that the president didn’t need congressional authorization for *this* war with Iraq, because a previous president (George W. Bush’s father) had secured authorization for the *previous* war with Iraq, 11 years earlier. Then–White House counsel Alberto Gonzales argued that the 1991 congressional resolution for the Persian Gulf War, drafted to authorize expulsion of Iraqi forces from Kuwait, still had enough life left in it to authorize a new war aimed at regime change in Iraq. That sort of argument might be appropriate for a trial lawyer zealously pressing his client’s interest, but when it comes to matters of war and peace, the people are entitled to what the Constitution requires: a vote.

In fairness, the administration did eventually secure a use-of-force resolution from

“Bush will not be the last president to wield the broad new powers his administration is forging in the domestic and foreign affairs arenas.”

Congress, all the while denying that any authorization was needed. But, given the administration's broad view of the president's war power taken in conjunction with its arguments in the *Padilla* case and the torture memos, the administration's position can be summed up starkly: When we're at war, anything goes; and the president gets to decide when we're at war.

Reflexive Militarism

The administration's drive for greater presidential power isn't limited to the prosecution of the war on terror. Twice in a matter of weeks last fall, President Bush suggested weakening the Posse Comitatus Act, the longstanding federal statute that restricts the president's ability to use the army to keep order domestically.

On September 15, in the midst of public recriminations over the government's response to Hurricane Katrina, President Bush declared, "It is now clear that a challenge on this scale requires greater federal authority and a broader role for the armed forces" and called upon Congress to give him that authority. Again on October 4, the president raised the possibility of military quarantines in the event of an outbreak of avian flu.

A free society flirts with domestic militarization at its peril. Therefore, one would like to imagine that those proposals had been carefully considered before being brought to public attention. Instead, they appear to have been thrown out carelessly as a way to appear decisive in the wake of a massive government failure.

Nothing about the Katrina fiasco suggests that broad legal changes are necessary. The Posse Comitatus Act does not prevent the army from providing logistic help during a natural disaster. It merely sets a high bar to clear before the president can order the military to play a policing role over the

objection of a sitting state governor. And there should be a high bar. Even the president's brother, Florida governor Jeb Bush, recoiled at the suggestion that the president should automatically be granted military command within any state suffering a severe hurricane.

American law calls for civilian peace officers to keep the peace or, failing that, for National Guard troops under the command of their state governors to do so. With proper planning—and if the federal government stops overtaxing the Guard through deployments overseas—there is no reason why future disasters cannot be handled under current law. Even in the case of Katrina, we've learned that early reports of large-scale violence in the Superdome and elsewhere were largely urban myths. There is no need for a militarized federal war on hurricanes.

Avian flu is also potentially a very serious concern. Yet few public health experts think large-scale military quarantines are a proper or useful response to that concern. Less than a month after President Bush suggested the military option, his Department of Health and Human Services released its 396-page *HHS Pandemic Influenza Plan*, years in the making. The document does not outline a role for the military in enforcing quarantines; instead, it calls for voluntary quarantines, except for "extreme situations . . . [in which] community-level interventions may become necessary." Even then, the report

notes, "measures designed to increase social distance, such as snow days, may be preferred alternatives to quarantine."

The administration's conduct in the wake of Katrina suggests that its reflexive response to any crisis—whether real or hypothetical—is the same: *we need more power*. That is a dangerous reflex.

Don't Trust; Verify

None of this is meant to imply that President Bush is unscrupulous or potentially despotic. Far from it; there's little in his life, his career, or his character to suggest any such thing. A man who didn't decide he wanted to be president until well into his forties certainly is an unlikely tyrant.

But President Bush will not be the last president to wield the broad new powers his administration is forging in the domestic and foreign affairs arenas. The war on Al Qaeda terror will not end with a peace treaty in Paris. Ending the war will take decades, and when victory is achieved, we may not know with any certainty that we've won. The extraconstitutional powers we tolerate now will be available to all future presidents, scrupulous or otherwise. And our entire constitutional system repudiates the notion that electing good men is a sufficient check on abuse of power. As my colleague Bob Levy has noted, conservatives who trust George W. Bush not to abuse the vast authority he claims might not be as comfortable with those powers in the hands of his predecessor or his successor—particularly if his successor has the same last name as his predecessor. In this, as in so much else, Jefferson had it right: "In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution."

*Theory and practice***Peace, Prosperity, and Political Freedom**

What should be done to promote political liberty and economic growth around the world? At several recent Cato events, political scientists and economic experts have debated policies designed to promote democracy, free trade, and secure property rights in countries where those institutions were previously absent. At a January 12 Book Forum for *Electing to Fight: Why Emerging Democracies Go to War*, author Jack Snyder of Columbia University warned that democracy alone is not a guarantee of peace. At a January 18 Forum on “Advancing Economic Freedom in the Middle East,” the Fraser Institute’s Fred McMahon discussed how economic and political freedoms are linked. And at a December 6 Policy Forum for a new study, “How Much Will Trade Liberalization in Rich Countries Help Africa?” correspondent Robert Guest of *The Economist* described Africa’s extreme poverty and the economic barriers that sustain it.

JACK SNYDER: President Bush says that America is safest when democracy is on the march. And President Clinton said that since no two democracies have ever fought a war against each other, promoting transitions to democracy would make the world more peaceful. Over the past year, we have seen plenty of elections in the Middle East. A big social science experiment has been going on there, and the results are starting to come in. Most of them are pretty dismaying.

The candidates who have been doing well in those elections support nuclear proliferation, encourage pushing Israel into the sea, and deny the Holocaust. They often represent ethnic and sectarian communities rather than a broader public interest. In the Palestinian elections, we are expecting Hamas to do well. In Afghanistan, warlords and drug lords prevailed.

I would not want to claim that the elections are the main problem in Iraq, but they

have been polarizing. It is much easier in a nascent democracy to form political parties based on narrow religious sectarian and ethnic interests and longstanding social networks than to create secular networks from scratch. Those networks arise only over time and in a well-developed institutional setting that allows cross-religious, cross-ethnic groups to form.

If the world were populated by mature democratic countries, it would be more peaceful. But the problem is getting from here to there. Countries where democratic systems are weak are more likely to get into wars—both international and civil and ethnic wars—than are other kinds of states.

In the 1990s many such wars occurred. In Yugoslavia, the war broke out about six months after elections were held all around that country. Hundreds of people were killed in Burundi in 1993 when a Hutu defeated the Tutsi military dictatorship in

elections that had been demanded by the international community. In Indonesia, violence broke out literally the day after the East Timor independence referendum was passed. A World War I-style trench war broke out toward the end of the 1990s between Ethiopia, a democratizing country, and neighboring Eritrea, a country that was on the verge of implementing a democratic constitution. India and Pakistan’s Kargil War, in which nuclear threats were made by both democratically elected governments, came after Pakistan amended its constitution to increase democratic control over the military.

The correlation between democratic transition and war goes back to the French Revolution. Weak political institutions create both a motive and an opportunity for elites to promote virulent nationalism. Old elites left over

from an authoritarian regime see that they need to reach out to a mass constituency to retain power in elections. Slobodan Milosevic, to win elections after communism fell in Yugoslavia, encouraged Serb nationalism in order to win the support of a large number of voters. He offered a political doctrine that said the government should rule in the name of the people without the strict democratic procedural controls of accountability to the people.

Sometimes, however, nationalism comes from formerly oppressed groups who are looking for a better deal than they had under the old regime. They organize on the basis of group identity in an attempt to gain power within the new government or to secede and form their own state.

The sooner the elections take place after a conflict or after an authoritarian regime collapses, the weaker the political institutions of the state. And, consequently, the

more likely it will be that the political groups that form will be based on the cultural patterns of the traditional society, ethnic or religious. That is what we've seen happening in Iraq.

What about all the peaceful cases of transition to democracy over the last 20 years in South America, North Eastern Europe, Taiwan, South Korea, even South Africa? Things have been going better in those places than one might have expected. But those countries have certain advantages that helped them make successful transitions to democracy. Per capita income is high, the people are literate, and the skills that allow them to participate in democracy are relatively advanced. Many of those countries had made past attempts at democracy that left an institutional legacy. In South Africa, the authoritarian regime had built up fairly strong state institutions that the new government could put to democratic purposes.

None of those favorable conditions exists in most of the emerging democracies of the Middle East. They are countries with low per capita income and low literacy rates. Some of them are oil economies, which are notoriously hard to mix with democracy. They are multiethnic states. The question of which nationality should get to exercise national self-determination in a state like Iraq remains unsettled.

So what is the prescription for dealing with states that lack the preconditions for successful peaceful transition to democracy? We must get the sequence right. If your job is democracy promotion, start by helping countries build effective state institutions that follow consistent rules and are free from corruption. Develop a legal system in which citizens can get a fair and equitable hearing. Once there is some initial progress in creating the beginnings of a rule-of-law state, move toward the creation of institutions needed for mass political participation: professional and unbiased journalism, strong political parties. And then wind up the process with free and fair, no-holds-barred elections. Don't start the process with the elections; hold the elections after the institutional basis for success has been put in place.

That's not easy to do. But it is the only

way to ensure that countries complete the transition to democracy rather than become unstable, warlike states.



“Weak political institutions create both a motive and an opportunity for elites to promote virulent nationalism.”

FRED McMAHON: Many years ago, Milton Friedman predicted that nations with economic freedom would produce better lives for their citizens. Then the Fraser Institute's executive director challenged him to prove it. That began the Economic Freedom Project headed by Friedman and Mike Walker. Empirical research published in the world's top peer-reviewed journals has proved Friedman's assertion, often in ways he probably did not originally anticipate.

It is absolutely true that citizens of economically free nations enjoy a higher standard of living. If you take the top fifth of the economically freest nations and compare them with the bottom fifth, the standard of living is 10 times higher in the most economically free nations than in the least free nations. Investment in economically free nations is 20 times higher on a per capita basis than it is in the least-free nations. Unemployment in the least-free nations is two and a half times unemployment in the

most-free nations.

Economic freedom, as it also turns out, is absolutely crucial for the development of democracy. If government controls your ability to make a living, to feed and clothe your family, to get a promotion, to choose where you will live, you remain dependent on government and government officials. Centralized economies do not allow the institutions of democracy to develop. But when you liberate people from government dependence, other institutions develop. People are more likely to speak out against the government once they no longer feel constrained by economics.

Now, it is true that sometimes democracy is imposed on nations that are not economically free, but those nations tend to be unstable. Free-market economics is a vital anchor for stable democratic growth. I often have the great pleasure of talking to anti-globalist crowds at universities, and I remind them of their belief that free markets are fundamentally anti-democratic. Everybody in the room nods, because everybody believes that markets are undemocratic. And then I ask them if anyone can name a single stable democracy that does not have a market economy. Then they all begin to look puzzled. The fact is that you need economic freedom for stable democratic development. Economic freedom also promotes peaceful resolution of conflict.

The reasons for that are quite complicated, but one simple explanation is that centralized economies are a zero-sum game. Interest groups—ethnic, religious, and other factions—must compete, often violently, for a slice of a fixed pie, which is doled out by government. Such economies are a recipe for tension, instability, and violence. In an economically free nation, the economy is no longer a zero-sum game. Free markets produce a great deal of growth, and your gain tends to be my gain too. A wealthier consumer or a wealthier supplier is to my benefit. The incentives turn from trying to use political power and force to gain rewards to actually trying to produce better goods and services for people.

As it turns out, economic freedom reduces both internal and external conflict. In a free market, stealing resources from others is no longer the best way to attain wealth.

Wealth is produced by the functioning of a free market and the free decisions of millions of individuals. A conqueror can steal resource wealth. But a conqueror cannot coordinate a free market to his benefit, because that means cutting off the freedom that actually produces the wealth.

Reforming economic policies works. Forty years ago, Taiwan and South Korea were as poor as or even poorer than their neighbors. They were the first in the region to take steps toward freeing their economies and look at trade-driven economic growth. Now they have nearly First World standards of living, while many of their neighbors remain poor and developing. Fortunately, their neighbors have taken some lessons from those countries and are themselves trying to establish free markets. No matter what their current situations, the dynamic of free trade can help burgeoning economies grow strong.

ROBERT GUEST: I have found it difficult over the years to make a Western audience understand the magnitude of the wealth gap between the developed world and Sub-Saharan Africa. You can talk about people living on a dollar a day, but that doesn't mean a lot in a country where a regular guy makes \$40,000 a year. In a recent article, I tried to contrast the life of a poor man in America with that of an upper-middle-class Congolese man.

Enos Banks is a jobless 62 year old living in a trailer in a hollow in the Appalachian Mountains of eastern Kentucky. He draws about \$521 a month in Supplemental Security Income from the government. Dr. Mbwebwe Kabamba is the chief surgeon at the biggest hospital in Kinshasa, the capital of the Democratic Republic of Congo. He makes about \$600 a month, more than half of which he must earn by operating on private patients after hours.

The cost of living in Congo is much lower than in Kentucky. But Dr. Kabamba has to support 12 people in his house, whereas all of Mr. Banks's children and his wife draw their own government benefits. Indeed, his wife lives in the trailer next door, because they figured they could draw more benefits that way.

Dr. Kabamba is considered a rich man

in Congo. He gets begging requests from a whole army of relatives upcountry. Yet he is materially worse off than Mr. Banks, who would be considered the poorest of the poor in America. Dr. Kabamba's home is more crowded. His family fetches water in jars. He eats meat only twice a month and says it is a great luxury. Poor people in America eat twice as much protein as the government thinks is good for them. In Congo, a rich man like Dr. Kabamba worries about the price of bread. Enos Banks, a welfare recipient in Kentucky, worries



Fred McMahon

“Wealth is produced by the functioning of a free market and the free decisions of millions of individuals.”

about the price of car insurance. That is how poor Africa is.

The question is why, and what can be done about it. Sub-Saharan Africa is poor primarily because of political instability and a lack of the policies and institutions, such as private property rights, that are necessary for the market economy to flourish.

Dr. Kabamba knows all about political instability. In the past seven years, his homeland has been ravaged by half a dozen national armies and militias, leaving about three million people dead. For the impact of property rights, look at Zimbabwe. As a

sequel to President Robert Mugabe's illegal seizure of virtually all the commercial farmland in the country, this year he has had all the big shantytowns bulldozed, leaving some 700,000 people homeless. He called it “Operation Drive out Trash,” which gives you an idea of the value he places on the lives and livelihoods of his people. Zimbabwe is, I think, a good illustration of the fact that property rights and human rights are intimately entwined. A leader who is prepared to run Caterpillar tracks over people's houses is prepared also to run them over people.

Good governance is more important than free trade. But free trade should be much easier to establish than the rule of law in a country that has never known it. The problem politically is that the benefits of free trade are widely dispersed, whereas the damage is highly concentrated. America doesn't protect domestic cotton production for fear that an international cotton shortage will damage national security. Cotton subsidies persist because, for a tiny group of Americans who raise cotton, cotton subsidies are the most important political issue. They will lobby hard for those subsidies, and they will vote against anyone who talks about repealing them. For everyone else, it is a very small program that costs only a few dollars a year.

International charities are right to condemn Western protectionism. It is hypocritical for Western politicians to talk about free trade while doing so little to tear down the walls around their farming, textile, and steel industries. But Western politicians are not the only hypocrites. African leaders who call for greater access to global markets while rejecting trade openness at home are also hypocritical. And domestic protectionism is also self-defeating because it makes countries poorer than they would otherwise be.

Acceptance of domestic protectionism or tariffs for a particular industry is a form of corruption. The government is telling one very small group: we are going to give you this enormous benefit that will harm all the other people in the country who want to buy cheap things. But the flow of goods in Africa is hampered not just by such formal trade barriers but by informal ones as well.

I once hitched a ride on a beer truck from the port of Douala, Cameroon, to an

interior town called Bertoua. The distance is equivalent to a trip from New York to Pittsburgh, but it took us about four days because we were stopped 47 times at roadblocks by the police. Every time we were stopped they checked the axles and the tail-lights and tried to find something that we had done wrong so they could start the long, slow process of negotiation about how much the driver was going to have to pay them to be able to move on.

The government has turned a blind eye to this extortion by the police because it does not want to raise police salaries. Instead, the police are given free rein to rob people as they try to move goods around the country. Setting up trade barriers is simply the formal version of highway robbery. Such barriers give particular exporters or local merchants license to rip off their fellow countrymen. And yet, this is the system that Western charities promote when they encourage protectionism for African markets.

I recently received a report from a British charity that suggests that the evil forces of the World Trade Organization are threatening the livelihoods of millions of the world's



Robert Guest

“The problem politically is that the benefits of free trade are widely dispersed, whereas the damage is highly concentrated.”

poorest people by forcing open markets on poor countries. The charity presents anecdotal evidence of this. It says that the removal of tariff barriers on textile exports has forced 20 factories in Nigeria to close, causing a loss of more than 16,000 jobs. That is indeed very bad. But what about the 120 million Nigerians who might possibly want to buy clothes? Does the affordability of those clothes for that much larger and significantly poorer group matter at all?

Among serious economists, the argument about free trade is over. They all know that it creates more winners than losers. But myopia about the consequences of trade protection runs through the whole of the anti-globalization movement. It is not enough for us to know that the protectionists are wrong. We have to convince enough people of that truth so that the world's politicians start to take notice. Africa needs more than free trade. It needs economic freedom of all sorts and the rule of law to underpin that freedom. But winning the war against protectionist delusion would be an excellent start.

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CATO UNIVERSITY

Cornerstone of Liberty: Property Rights in the 21st Century

St. Pete Beach, Florida • Don CeSar Resort
July 26 – 30, 2006
Speakers include Roger Pilon, Tom G. Palmer, Amy Sturgis, Timothy Sandefur, and Scott Bullock.

5th ANNUAL CONSTITUTION DAY CONFERENCE

Washington • Cato Institute • September 14, 2006
Speakers include Judge Danny J. Boggs.

CATO CLUB 200 RETREAT

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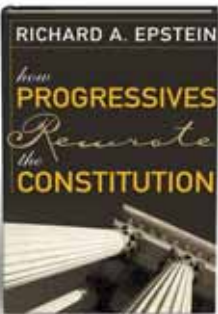
24th ANNUAL MONETARY CONFERENCE

Federal Reserve Policy in the Face of Crises

Washington • Cato Institute • November 16, 2006
Speakers include Robert J. Barro, Jeffrey Frankel, Kristin Forbes, Anna J. Schwartz, and William Poole.

How Progressives Rewrote the Constitution

BY RICHARD A. EPSTEIN



The Progressive Era marked a fundamental shift in the climate of ideas in America. Whereas earlier generations had viewed government warily, as a necessary evil, Progressives of the late 19th and early 20th centuries imagined that government could solve all manner of what they saw as social and economic problems. Their efforts were often frustrated, however, by a Constitution written to limit government and by the willingness of courts to enforce those limits. Things came to a head during the New Deal, especially after Franklin Roosevelt's infamous threat to pack the Supreme Court with six new members. The scheme failed, but the Court got the message and began rewriting the Constitution in a way that enabled the social and economic

planning that was at the heart of the Progressive agenda to flourish. With that "switch in time that saved nine," the Court began laying the foundations for modern constitutional law and for the Leviathan we enjoy today.

The story of that fundamental shift in constitutional thought is told in a new book by University of Chicago law professor and Cato adjunct scholar Richard A. Epstein, *How Progressives Rewrote the Constitution*. It is essential reading for anyone who wants to understand how America moved from a Constitution of limited government to one that is read today as authorizing all but unlimited government, especially as the courts were central to that shift.

Drawing on the new social sciences to buttress their social engineering schemes, Progressives pushed for laws that undercut the Constitution's federalist arrangements and the people's economic liberty. Eventually they were able, without benefit of constitutional amendment, to rewrite the Constitution.

Epstein's book deals a crushing blow to the idea that government intervention was needed to protect disadvantaged groups

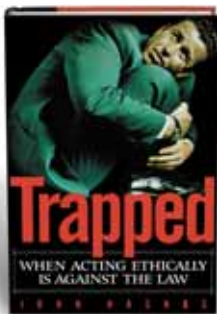
from economic coercion. Child labor was declining in the United States before the New Deal, wages were rising, work hours per week were falling, and life expectancy was steadily improving. Most of the benefits attributed today to government intervention in the labor market were the product of the free market, Epstein argues, and much of the progress the country has experienced since the New Deal has occurred despite intrusive government, not because of it.

Yet the Constitution, and the role of the courts under it, has changed fundamentally. Congress's power today dominates that of the states. And courts routinely defer to legislatures—federal, state, and local—in the regulation of property rights and economic liberty, which are now "second-class rights." The Progressives' vision of an economy managed by the government in the best interests of the people, Epstein shows, has led to the creation of new constitutional law that persists, despite the modern abandonment of the social and economic theories that launched it.

How Progressives Rewrote the Constitution (\$15.95 cloth) is available at major booksellers or from www.catostore.org.

Trapped: When Acting Ethically Is against the Law

BY JOHN HASNAS



When a businessperson goes to jail for white-collar crime, the public assumes that the business must have seriously violated the law and that the executive must have played a significant role in the crime. The federal government isn't in the habit of throwing people in jail for no reason, right?

In recent years, however, the U.S. legal system has seen several high-profile cases in which executives have gone to jail, not because they committed serious crimes that harmed innocent others, but rather because their attempts to act ethically in their business dealings put them in conflict with a

complex web of obscure, incoherent federal regulations. In the course of doing their jobs, executives are faced with impossible choices between violating the law and violating their obligations to their shareholders, customers, employees, partners, and others to whom they have made commitments.

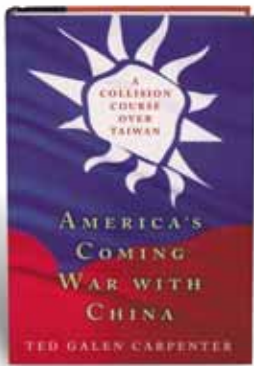
John Hasnas, a professor of business and law at Georgetown University, is troubled by new definitions of white-collar crime that make criminals out of many businesspeople who are trying to be conscientious and honest. In his new book, *Trapped: When Acting Ethically Is against the Law*, Hasnas makes the case that federal business regulations do not target only morally culpable conduct; rather, they enforce arbitrary rules of behavior created by regulators, often punishing behavior that is not morally blameworthy. The book explores the manifold federal laws on money laundering, wire fraud, toxic waste disposal, currency trading, racketeering, obstruction of justice, and thousands of other regulatory infractions that can send a defendant to jail for years.

Behavior that most people would consider highly immoral—divulging confidential information, abandoning colleagues in trouble, ignoring prior obligations to customers and employees—is often required by law, according to Hasnas.

Not only does following the law demand unethical behavior of businesspeople, it also gives them few resources with which to defend themselves from criminal charges. Businesspeople are routinely convicted of violations they never intended to commit of statutes they never knew existed on the basis of evidence that doesn't incriminate them specifically.

Hasnas concludes that criminal law is too blunt an instrument to curb unfair business practices. The federal government must allow honest businesspeople to do business without interference and give them the civil and contract law tools to help them police their less scrupulous colleagues.

Trapped: When Acting Ethically Is against the Law (\$12.95 paper) is available at major booksellers or from www.catostore.org.



America's Coming War with China: A Collision Course over Taiwan

BY TED GALEN CARPENTER

Leaders of the People's Republic of China consider Taiwan a renegade province stolen from their country more than a century ago, and they want it back. The people of Taiwan—most of whom now consider themselves Taiwanese nationals, not Chinese—want recognition of their island's status as an independent nation. The United States seeks good relations with the PRC while protecting Taiwan's security—a policy of “strategic ambiguity.”

Official U.S. policy on Taiwan does not challenge the PRC's view that there is only one China and Taiwan is a part of it. However, the United States also maintains trade relations with Taiwan, sells it arms, and has made an implicit promise to defend it if China attempts to take it back by force. That stance is supposed to prevent war by making China believe that the United States would intervene militarily if it attacked Taiwan while leaving Taiwan to think that the United States might not intercede if it declared independence from China.

Ted Galen Carpenter, Cato's vice president for foreign and defense policy studies, fears that the reverse interpretations are just as likely. In his new book, *America's Coming War with China: A Collision Course over Taiwan*, he vividly depicts scenarios that could lead to war within a decade. Taiwan, thinking that the United States plans to protect it from a Chinese attack, could push the envelope on independence, provoking China to respond militarily. Because Washington has implicitly supported the idea of reunification, China has assumed that its dealings with Taiwan are purely an internal matter and could decide at any time

to forcibly reintegrate the island. Washington's current stance, Carpenter says, is likely to end in a disastrous collision between the United States and China.

The impending confrontation between the PRC and Taiwan is the result of more than a century of complex history. Carpenter's book details how Taiwan became a trophy in the struggles for dominance in East Asia and how regaining the province has become an intense issue of Chinese national pride. As the PRC's economic and military power grows, so does the determination to recover Taiwan. And as China's power grows, the U.S. commitment to defend the island becomes more and more dangerous.

Carpenter recommends that the United States articulate a clearer policy toward Taiwan. The United States must make a clear distinction, he writes, between selling Taiwan the arms it will need to defend itself and using U.S. military power to rescue the island in the event of trouble. Taiwan and China should both bear the full costs of any military and political decisions they make about one another without the promise of U.S. intervention to absorb the diplomatic and material costs. Keeping Taiwan independent is a peripheral, not a vital, American national security interest, Carpenter argues, and is not worth the enormous risk to the United States that would be posed by a conflict with China. He warns that time is running out for Washington to make a badly needed change in policy.

America's Coming War with China: A Collision Course over Taiwan (\$26.95 cloth) is available at major booksellers or from www.catostore.org.



Unintended Consequences in Regulation

In the Winter 2005–2006 issue of *Regulation*, William A. Fischel of Dartmouth College shows how federal and state governments distribute funds so as to encourage cities to—and sometimes demands that they—seize land from private owners for the benefit of other private interests. When a city is offered such a grant from government, Fischel argues, opposing the land grab requires turning down “free” money for the city, an unlikely prospect.

Subscriptions to *Regulation* are \$20.00 per year and can be purchased from the Cato Institute at 800-767-1241 or at the Cato online bookstore at www.catostore.org. *Regulation* articles can be found online at www.regulationmagazine.org.

IN THE WINTER ISSUE OF

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- Does foreign aid help growth and democracy?
- Does gun control reduce crime?
- Do price controls reduce drug prices?

And more on Medicare, Mexico, financial crises, and externalities.

The trouble with nation building

Property Rights: America's First Civil Liberty

In the name of protecting the public interest, the U.S. government is increasingly restricting the rights of property owners to develop their land, run businesses, and use their property as they choose. The Supreme Court's *Kelo* decision has led many property owners to call for legislative limits on government's power to regulate property. In "The Birth of the Property Rights Movement" (Policy Analysis no. 558), George Mason University law professor Steven J. Eagle states that, in order to be successful, this new property rights movement must recognize—as America's Founders recognized—that the enjoyment of all other liberties is contingent on the right to own and control property. Although procedural laws to limit government action have helped property owners in many states protect themselves, Eagle argues that, in order to succeed in the long term, the property rights movement must reacquaint Americans with their heritage of common law and limited government.

The Fiscal Windfall of Vouchers

The Washington, D.C., public school system spends more money per student than

nearly any other school district in the country, and yet more than half of its students fail basic math and reading proficiency tests. "Spreading Freedom and Saving Money: The Fiscal Impact of the D.C. Voucher Program" (White Paper) by Susan L. Aud of the Milton and Rose D. Friedman Foundation and Leon Michos of George Washington University documents how K-12 students who attend private schools with federally funded vouchers achieve more and cost the system less to educate. The authors estimate that a locally funded voucher program would save more than \$258,000, and a universal voucher could save the city up to \$3 million. Expanding the D.C. school voucher program would be good for taxpayers and good for the thousands of D.C. families who deserve to choose the best education possible for their children.

Save the Schoolchildren

The United Nations Millennium Development Goals call for "education for all" by 2015. However, when measuring progress, the UN ignores the many students in poor countries who are attending high-quality

private schools. James Tooley and Pauline Dixon of the University of Newcastle undertook a two-year study of private schools for the poor in India, Ghana, Nigeria, and Kenya. Their paper, "Private Education Is Good for the Poor" (White Paper), reveals that private schools offer better student-teacher ratios, greater teacher commitment, and better facilities than the local public schools; and test scores demonstrate that private school students significantly outperform their public school counterparts. Private schools in poor countries have lower operating costs than government schools, but their growth is hindered by excessive government regulation. Tooley and Dixon argue that private schools are a crucial part of the educational system in poor countries and that if the goal is universal education, governments and the UN must allow private schools to flourish.

Social Security for Children

The U.S. government thinks that Americans aren't saving enough of their income. The proposed solution: start a government-funded savings account for every American child to pay for future education and retire-

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Jagadeesh Gokhale

ment expenses. Cato's Jagadeesh Gokhale and Michael D. Tanner agree that saving money is the key to building wealth, but they argue in "KidSave: Real Problem, Wrong Solution" (Policy Analysis no. 562) that creating a new \$266 billion entitlement program that future generations of taxpayers must fund undermines individual efforts to accumulate assets. This new welfare program for children would distort the labor market, increase the tax burden on nonparents, and further discourage individual private saving. The best way to build wealth and savings for low-income workers, the authors say, is to lower taxes and allow workers to invest their Social Security taxes in inheritable personal accounts.

Economic Meddling Still Doesn't Work



Jerry Taylor

When gasoline prices rise, many consumers demand price controls and caps on oil company profits, believing that government intervention will lower prices. The United States experimented with such interference from 1971 to 1988, and both strategies failed. In "Economic Amnesia: The Case against Oil Price Controls and Windfall Profit Taxes" (Policy Analysis no. 561), Cato scholars Jerry Taylor and Peter Van Doren present updated evidence that such measures discourage investment in new sources of oil, artificially deflating supply. Lower prices at the pump also discourage conservation when supplies are depleted. Oil company profits are not excessively high compared to other industrial profits, and previous attempts to curtail profits have not resulted in lower consumer gas prices. Taylor and Van Doren recommend that recent congressional proposals to regulate oil profits be scrapped to ensure that oil is available when consumers need it.

Team America: World Police

Does nation building support U.S. national

security interests? The State Department Office of the Coordinator for Reconstruction and Stabilization plans to send U.S. personnel to Haiti, Liberia, Sierra Leone, and other failed states to assist in civil administration and police functions. In "Failed States and Flawed Logic: The Case against a Standing Nation-Building Office" (Policy Analysis no. 560), Cato foreign policy scholars Justin Logan and Christopher Preble show that past efforts at democracy building have failed. U.S. personnel are put at risk, resources are wasted, international political capital is expended in nations that are inconsequential to U.S. security interests, and the nations America tries to help are not made better off. Preble and Logan advocate restructuring U.S. security policy so that resources that are needed to fight terrorism are not expended on a nation-building program that will not work.

A Desire Named Streetcar

In some cities, public transportation can be convenient, ecologically sound, and cost effective. But as Cato adjunct scholar Randal O'Toole demonstrates in "A Desire Named Streetcar: How Federal Subsidies Encourage Wasteful Local Transit Systems" (Policy Analysis no. 559), federal subsidies for new rail systems have spurred many cities to ignore their own local needs and build unnecessary and inefficient transit systems. Most of those rail systems, the author notes, are the result of federal lobbying by anti-highway activist groups and the transit and labor unions that benefit from new rail projects. Because decisions made at the federal level bias local judgment, many cities end up supporting expensive, underused rail systems that depend on continuing federal support to stay operational. O'Toole offers several suggestions for reform, up to and including an end to federal mass transit subsidies.

Better Living through Good Government

Advocates of international monetary aid and opponents of globalization commonly claim that trade practices in the United States and other industrialized nations are causing Africa's poverty problem and that they are therefore responsible for solving it. But reducing average applied tariffs in the developed world by 84 percent over the last



Marian Tupy

20 years has not produced corresponding gains in African wealth, partly because African countries continue to maintain high trade barriers against one another. Marian Tupy, assistant director of Cato's Project on Global Economic Liberty, argues in "Trade Liberalization and Poverty Reduction in Sub-Saharan Africa" (Policy Analysis no. 557) that Africa will prosper only if African governments make policy changes that will allow citizens to compete in world markets. Stronger property rights, less corruption, reduced domestic protectionism, and greater political stability are all necessary components of raising standards of living for Africa's poor, says Tupy, who contends that those measures will help African economies more than anything rich countries could do.

Trade Fences Make Bad Neighbors

A recent ruling by the World Trade Organization that U.S. cotton subsidies violate WTO rules has raised questions about the conflicts between the promises the U.S. government has made to farmers and the promises the United States has made to its international trading partners. In "Boxed In: Conflicts between U.S. Farm Policies and WTO Obligations" (Trade Policy Analysis no. 32), University of California-Davis professor of agriculture Daniel A. Sumner calculates total U.S. trade-distorting subsidies at \$29.1 billion in 2000, \$25.3 billion in 2001, and a projected \$26.3 billion in 2006, all clearly violative of the \$19.1 billion cap set by the WTO. U.S. subsidies are depressing world prices for corn, wheat, and rice, significantly harming trading partners who depend on those commodities to fuel economic growth. In order to live up to international obligations, Congress will have to make significant improvements to U.S. agricultural policy when the current farm subsidy package expires in 2007.

All of Cato's studies can be found at www.cato.org.

“To Be Governed...”

GOVERNOR SPENDERLICH REPLACES GOVERNOR SPENDING

Maryland Gov. Robert L. Ehrlich Jr. proposed a \$29.6 billion, surplus-fueled spending plan yesterday . . . that would increase general fund spending by 11.4 percent—the fastest annual growth rate in more than two decades. . . . Ehrlich became Maryland's first Republican governor in a generation in 2002, after campaigning to stop what he called the “scorched-earth spending spree” of his predecessor, Parris N. Glendening (D).

—*Washington Post*, Jan. 18, 2006

THE SPIRIT OF FREEDOM REARS ITS HEAD IN FRANCE

Don't ask [Paris chocolatier Gregory] Renard for any of his chocolate-making secrets, however. He won't even tell the government, which has issued a new decree that chocolatiers must list all ingredients on their boxes and packets of chocolate. Parisian chocolatiers—who have always treated their formulas like state secrets—have declined to comply.

—*Washington Post*, Jan. 16, 2006

IS IT 1999 OR 2006?

“The president of the United States has been breaking the law repeatedly and insistently,” [former vice president Al] Gore said in a speech at Constitution Hall in Washington. “A president who breaks the law is a threat to the very structure of our government.”

—*Washington Post*, Jan. 17, 2006

PAGING GEORGE ORWELL

How to Increase Liberty in America/Ten Suggestions . . .

Robert H. Bork: A Just Censorship
Liberty in America can be enhanced by reinstating, legislatively, restraints upon the

direction of our culture and morality. Censorship as an enhancement of liberty may seem paradoxical.

—*National Review*, Dec. 19, 2005

FRENCH FIREWORKS

Police said the 425 car burnings recorded around the country [on New Year's Eve] were fewer than officials had feared, though the number was higher than the 333 blazes set during the previous New Year's Eve.

—*Washington Post*, Jan. 4, 2006

NO HONOR AMONG THIEVES?

D.C. Council member and former mayor Marion Barry yesterday urged two young men who robbed him at gunpoint Monday night to turn themselves in to police, promising that he would urge authorities not to prosecute them. “I have no animosities,” Barry declared. “I don't even want you prosecuted, really. I love you.” . . . The thieves apparently knew that Barry (D-Ward 8) was a longtime community leader, a fact that he said made the crime “kind of hurt” because he is well respected by so many people in the city. Barry was not injured in the holdup. “There is a sort of an unwritten code in Washington, among the underworld and the hustlers and these other guys, that I am their friend,” Barry said at an afternoon news conference in which he described the robbery in detail. . . . “I was a little hurt that this betrayal did happen.”

—*Washington Post*, Jan. 4, 2006

HOW SMALL WOULD BE SMALL ENOUGH?

Vice President Cheney . . . rushed back to Washington overnight, preparing to cast a tiebreaking vote on budget cuts in the Senate today. . . . The budget legislation would trim federal spending growth

by nearly \$40 billion over the next five years. . . . “We do need to reduce spending, but I cannot accept the priorities in this bill,” said Sen. Susan Collins (R-Maine), in announcing her opposition to it. . . . The bill would make only a dent in the federal deficit, slicing less than one-half of 1 percent from the estimated \$14.3 trillion in federal spending over the next five years.

—*Washington Post*, Dec. 21, 2005

THEIR FUNERALS WERE LESS CROWDED

Stanley Tookie Williams's mourners began arriving hours before his noon funeral, hoping to secure seats inside the church. By 10 a.m., police had blocked the streets surrounding the Bethel A.M.E. church, citing gridlock. By 11, hundreds of mourners formed two snaking lines—one for men, one for women—outside the church, and the 1,500-seat sanctuary was standing room only. . . . A few thousand people made their way through the narrow streets to pay their respects to Williams, who was executed at California's San Quentin State Prison on Dec. 13, 24 years after he was convicted of four murders that he swore he did not commit. . . . Speakers at the four-hour service included civil rights activist Jesse L. Jackson, rapper Snoop Dogg and motivational speaker Tony Robbins. . . . Williams had been convicted of killing Albert Owens, a 7-Eleven clerk; and Yen-I Yang, 76; his wife, Tsai-Shai Chen Yang, 63, and their daughter, Yu-Chi Yang Lin, 43, in two separate robberies.

—*Washington Post*, Dec. 21, 2005

APPARENTLY THEY DO

“People don't elect Republicans to run bloated bureaucracies,” says party chair [Ken] Mehlman.

—*Wall Street Journal*, Dec. 2, 2005

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1000 Massachusetts Ave., N.W.
Washington, D.C. 20001

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