

Cato Institute Policy Analysis No. 271: Dereliction of Duty: The Constitutional Record of President Clinton

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Executive Summary

President Clinton recently put his hand on the Bible and swore an oath to "preserve, protect and defend the Constitution of the United States." He took the same oath in January 1993. As the president embarks on his second term in office, it is an appropriate time to review his record thus far to see how well he has defended our Constitution.

Although President Clinton has expressed support for an "expansive" view of the Constitution and the Bill of Rights, he has actually weakened a number of fundamental guarantees, including those of free speech and the right to trial by jury and that against double jeopardy. He has also supported retroactive taxes, gun control, and warrantless searches and seizures. The president's legal team is constantly pushing for judicial rulings that will sanction expansions of federal power. The Clinton White House has, for example, supported the federalization of health care, crime fighting, environmental protection, and education. Clinton also claims constitutional authority to order military attacks against other countries whenever he deems it appropriate. President Clinton's record is, in a word, deplorable. If constitutional report cards were handed out to presidents, he would receive an F.

It is to be hoped that President Clinton will resolve to be more conscientious about his constitutional responsibilities in his second term. But should his dereliction of duty continue, Congress and the Supreme Court should stand fast against any constitutional transgression. In the present climate, it is vitally important for all Americans to understand that the Constitution is incapable of enforcing itself. That task ultimately rests with the citizenry. If the American people demand adherence to the Constitution, government officials, including President Clinton, will respect the limitations that were wisely placed on their power.

I do solemnly swear that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.

-- Oath of office, taken by William Jefferson Clinton, January 20, 1997.

President Clinton recently put his hand on the Bible and swore an oath to "preserve, protect and defend the Constitution of the United States." He took the same oath when he assumed office in January 1993. As the president embarks on his second term in office, it is an appropriate time to appraise his record thus far to see how well he has defended our Constitution.

Contrary to popular belief, the Supreme Court holds no monopoly on constitutional matters. The Framers of the Constitution created three separate and equal branches of government. Each branch was expected to "check" the others

on the basis of its own understanding of the Constitution. Supreme Court justices are obligated, of course, to void unconstitutional laws and to issue writs of habeas corpus to free illegally detained prisoners. Similarly, legislators are obligated to vote against unconstitutional bills, repeal unconstitutional laws, and scrutinize judicial nominees for the federal bench. And the president is obligated to veto unconstitutional bills, refrain from executing unconstitutional laws signed by previous presidents, and nominate judicial candidates who are committed to the Constitution.

Supreme Court pronouncements about the Constitution are not necessarily binding on the president or legislators. ^[1] As Justice Felix Frankfurter once observed, "The ultimate touchstone of constitutionality is the Constitution itself and not what [the Court] has said about it." ^[2] No one, for example, would dispute the proposition that a legislator can vote against a bill because of perceived constitutional infirmities even if it is clear that the judiciary will uphold the law as constitutional. Similarly, the president can veto bills on the basis of his own constitutional convictions.

Our third president, Thomas Jefferson, acted on his own understanding of the Constitution when, after taking the oath of office, he immediately pardoned all prisoners who had been prosecuted under the Alien and Sedition Act, which he believed was in violation of the First Amendment to the Constitution. When some of his contemporaries criticized him for not deferring to the constitutional opinions of the courts, Jefferson's response was that the three branches were made "co-equal and co-sovereign within themselves." ^[3] Just as the Supreme Court is entitled to make an independent judgment on the merits of a case, so too is the president entitled to make an independent judgment about his official duties. The Framers' design might be faulted by modern political scientists as being a formula for "gridlock," but such criticism would miss the point. The primary purpose of the Constitution is to safeguard the freedom of the American people, not to facilitate the lawmaking process. As Judge Frank Easterbrook noted, "Separation of powers--the inability of any one person or branch to have its way--was thought to be an essential component of a free republic, not a hindrance to good government." ^[4]

Most Americans have become so accustomed to our Bill of Rights and other legal limitations on political power that they do not fully appreciate how fragile our constitutional system really is. The Constitution, it must always be remembered, is incapable of defending itself. There is no constitutional police force that deters potential offenders and brings perpetrators to book. The primary "check" of the citizenry on the unconstitutional conduct of government officials is, of course, the electoral process. But that check is both blunt and attenuated. Moreover, between elections people can lose their liberty, their businesses, and their personal possessions in a short period of time. Indeed, until very recently, a person could be arrested, tried, and executed within a few weeks' time. What assurance does our legal system give to the minority party that it will not be abused by the majority party, which holds the reins of power? What assurance does the minority party have that the president will not use police-state tactics to intimidate his political rivals? Our forefathers grappled with those questions and tried to design legal mechanisms that would guard against those dangers.

An initial safeguard, as just noted, is the electoral process itself. The Framers tried to discourage the election of corrupt and mischievous officials by a series of eligibility requirements and procedural hurdles. Once in office, however, officials are essentially "on their honor" with respect to their constitutional responsibilities. The Framers of the Constitution were keenly aware of that, which is why they required the president-elect to publicly and explicitly bind himself to the Constitution "before he enters on the Execution of his Office." ^[5] The primary purpose of the oath of office is to provide some measure of assurance to the minority party--the party that just did its best to keep the newly elected president away from the levers of power--that the executive power would not be wielded *outside the framework established by the Constitution*. The Constitution expects the chief executive of the nation to effect change cautiously and to respect constitutional procedures and the limitations on his office.

To be sure, the Framers harbored no illusions about the inviolability of the oath of office. Indeed, the fact that they devised many other "checks and balances" in our fundamental legal charter is a clear indication that they feared power would periodically corrupt oath-taking officials in all three branches. The oath of office is, however, the Constitution's first line of defense against encroachment and usurpation.

Although our modern political culture regards the oath of office as little more than a ceremonial exercise, it was taken very seriously by the founding generation and in early treatises on constitutional law. Justice Joseph Story said the oath

of office resulted "from the plain right of society to require some guaranty from every officer, that he will be conscientious in the discharge of his duty." [\[6\]](#) In 1899 law professor John Randolph Tucker wrote, "This [oath] is a very emphatic obligation on the President by positive and negative action to keep the Constitution, in all its integrity, secure from his own violation, and against that of all others in so far as his power can do so; to preserve from his own acts; to protect from outside influence, and to defend against all invasion." [\[7\]](#)

In his first inaugural address, Grover Cleveland observed that if the American people wanted to preserve the Constitution, they had an obligation to keep a close watch on government officials and constantly remind them of their constitutional responsibilities.

He who takes the oath . . . to preserve, protect, and defend the Constitution of the United States only assumes the solemn obligation which every patriotic citizen--on the farm, in the workshop, in the busy marts of trade, and everywhere--should share with him. The Constitution which prescribes his oath, my countrymen, is yours; the government you have chosen him to administer for a time is yours. . . . Every citizen owes to the country a vigilant watch and close scrutiny of its public servants and a fair and reasonable estimate of their fidelity and usefulness. [\[8\]](#)

It is in that spirit that this study will appraise the constitutional record of President Clinton.

The study takes the Clinton administration to task on a whole range of constitutional issues. From free speech and unreasonable searches to double jeopardy, jury trials, the separation of powers, and federalism, executive branch actions are scrutinized. This study is a systematic examination of the legal papers that the Clinton Justice Department has filed in court cases over the past four years. Those official documents, in addition to President Clinton's public statements and public policy initiatives, demonstrate a level of caprice that should disturb people of goodwill from across the political spectrum. The criticism expressed in this study is often harsh, but the evidence is there, as a matter of public record, for all fair-minded people to see--and it paints a disturbing picture of the president's comportment in office.

The Free Speech Clause

The free speech clause of the First Amendment is, without a doubt, the most famous provision of the American Constitution. Its simple, yet profound, command provides: "Congress shall make no law . . . abridging the freedom of speech." The underlying principle of the free speech clause is that "each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." [\[9\]](#) That principle has been recognized as "one of the preeminent rights of Western democratic theory, the touchstone of individual liberty." [\[10\]](#) The invocation of the free speech guarantee, however, is often controversial because it requires the government and the citizenry to tolerate the speech and writings of unpopular, crude, ignorant, and malicious people. Civil libertarians must often remind government officials (and others) that if the First Amendment only protected the expression of popular and agreeable ideas, it would be totally unnecessary since those ideas would never be threatened by our democratic form of government. Our society's commitment to free speech is tested when we encounter the expression of ideas that are disagreeable--or even offensive.

One would think that President Clinton, a former professor of constitutional law, would have a deep appreciation for the principle of freedom of speech, but his official actions in office show just the opposite. The Clinton Justice Department has attempted to censor (a) the rights of peaceful protesters; (b) the views of priests and doctors; (c) radio, television, and the Internet; and (d) truthful advertisements for lawful products.

Censoring Protesters

President Clinton has used the "bully pulpit" of the Oval Office to express his opinion on a whole range of topics--from teenage pregnancy rates and gasoline prices to human rights abuses in China. He can use the power of his office to reverse the policies of past administrations and to initiate new policies. Indeed, that is what the electoral process is all about. At the same time, however, the Constitution protects the rights of those who oppose the president and his policies. As the Supreme Court has noted, "One's right to life, liberty, and property, to free speech, a free press,

freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no election." [\[11\]](#) The oath of office requires the president to effect change cautiously-- so as not to violate the constitutional rights of the minority party, or, for that matter, the rights of a single individual.

Unfortunately, the Clinton administration has repeatedly attempted to use the power of government to suppress dissent. In July 1994, for example, the Department of Housing and Urban Development launched an "investigation" of a married Berkeley couple, Alexandra White and Joseph Deringer. White and Deringer did not want a hotel in their neighborhood to be converted into a homeless shelter, so they organized a fledgling opposition campaign. HUD managers were put off by the citizen resistance to their "fair housing" initiative. The HUD officials threatened White and Deringer with fines in order to set an example for other would-be objectors. [\[12\]](#) According to defense attorney David Bryden, federal investigators asked for every article, flier, and letter to the editor that his clients (White and Deringer) had written. The opinions expressed in those publications were to be used as "evidence" of Fair Housing Act violations. When the incident began to receive national attention, HUD secretary Henry Cisneros tried to quell the controversy over his agency's tactics by pledging to protect the right of every American "to speak freely on issues of public concern." [\[13\]](#) That magnanimous gesture was small comfort to White and Deringer.

The Clinton Justice Department has supported extraordinary measures against abortion protestors. In *Madsen v. Women's Health Center* (1994), Solicitor General Drew Days urged the Supreme Court to uphold the constitutionality of "buffer zones" around abortion clinics in order to keep abortion demonstrators away from clinic staff and potential patients. [\[14\]](#) It is, of course, an important responsibility of government to keep the peace and to protect citizens from criminal behavior. But Days went so far as to defend a judicial injunction that barred protesters from merely displaying "images" that might be "observable" by people within the abortion clinic during prescribed time periods. [\[15\]](#) The Supreme Court upheld the buffer zones but found the most sweeping aspects of the injunction unconstitutional. The blanket prohibition on all "images observable" was ruled a violation of the First Amendment since it "burdened more speech than [was] necessary to achieve the purpose of limiting threats to clinic patients." [\[16\]](#)

Justices Antonin Scalia, Anthony Kennedy, and Clarence Thomas saw constitutional infirmities with the buffer zone concept as well and could not help concluding that the Justice Department was seeking to strip abortion demonstrators of their First Amendment rights. "Anyone . . . familiar with run-of-the-mill labor picketing, not to mention some other social protests, [would] be aghast" at the creation of zones in which "only a particular group, which had broken no law, cannot exercise its rights of speech, assembly and association." [\[17\]](#)

American Civil Liberties Union attorney Robyn Blumner agrees with the *Madsen* dissenters that the Court's ruling on buffer zones marks a serious setback for the First Amendment right of protest. Blumner recognizes that the president's legal team is attempting to send "a censorious message to the activist world: If your protest is too relentless, too provocative, too persuasive, a court will intervene to stop it." [\[18\]](#)

Censoring Priests and Doctors

In the 1992 presidential campaign, Bill Clinton railed against the so-called gag rule, which prohibited abortion counseling by medical personnel in federally funded clinics. After he assumed office, President Clinton fulfilled a campaign promise by rescinding that rule with an executive order. A few years later, however, the Clinton White House signed off on a few gag orders of its own.

In September 1996 the Catholic Church directed its bishops and priests to notify parishioners of the Project Life Postcard Campaign. Parishioners were to be encouraged to write to Congress to urge an override of President Clinton's veto of a legislative ban on "partial-birth" abortion. When the Pentagon learned of that initiative, however, it ordered service chaplains not to push the postcard campaign, since lobbying was not permissible under Defense Department regulations. [\[19\]](#)

Facing a "conscience conflict," the Rev. Vincent Rigdon, an Air Force Reserve chaplain, filed suit in federal district court, contending that the military orders violated his right to free speech and religious liberty. While it is true that

chaplains are government employees, the role of a military chaplain is comparable to that of a public defender. Rigdon argues that the men and women of the military "have a right to a real chaplain, not a tame one, and to real homilies, not censored ones." [\[20\]](#) He has asked the court to void the military order and allow service personnel and their families to receive "uncensored homilies and counseling from their clergy members." The Clinton administration is defending the constitutionality of the Pentagon directive in federal court.

President Clinton also supports a gag order on doctors who believe that drugs like marijuana can alleviate the suffering of some patients. Medical research suggests that marijuana can relieve symptoms associated with glaucoma and AIDS, among other illnesses. In November 1996 the citizens of California and Arizona approved referenda that would allow physicians to recommend marijuana for patients if the physicians deem it appropriate. But Clinton drug czar Gen. Barry McCaffrey has threatened to criminally prosecute any physician who prescribes marijuana for a patient. [\[21\]](#) Under the Clinton policy, doctors must seek the permission of the Drug Enforcement Administration before they can render forthright medical opinions. And the citizens who might benefit from the medicinal use of marijuana face even starker choices: they must forgo the drug and endure the pain and discomfort of their illness, use the drug and risk arrest and a jail sentence, or leave the United States.

Censoring Television and Radio

President Clinton has supported increasing state control over television and radio. The president has been eager to show the American people what an activist government can do for citizens who are tired of gratuitous sex and violence on television. For example, when the White House learned about a computer chip (popularly known as the V-chip) that could block out certain TV channels or programs, the president urged Congress to force the technology on television makers. [\[22\]](#) Congress acceded to the president's request, and the bill was signed into law. The Justice Department will now fine any person or organization that has the temerity to build an "old-fashioned" television set to be sold to buyers who have no interest in electronic censorship.

The Clinton administration has also asserted the power to police the content of television programming. In October 1993 Attorney General Janet Reno defended the constitutionality of legislation that would have regulated the content of television entertainment. Reno warned the television industry that if it did not reduce its "violent" programming, the White House would seek laws to do it for the industry.

When Reno was asked about the constitutionality of a law that would have prohibited "violent" programming during children's hours, she said the law posed no free speech problem. [\[23\]](#) But attorney Floyd Abrams, who specializes in First Amendment issues, pointed out that the White House-backed proposals would inevitably lead to the creation of a national censorship board that would determine such questions as whether the battle scenes in *Star Wars* or *Patton* constituted excessive or gratuitous violence. Abrams called the Clinton effort to reduce programming to that fit for children "censorship, plain and simple." [\[24\]](#)

The Clinton administration has not only tried to wield a veto over TV programming, it has also mandated what America should be watching. In July 1996 the Federal Communications Commission issued a regulation that is forcing television stations to carry a certain quota of state-approved "educational programming" aimed at children. [\[25\]](#) The president backed the idea at a White House "summit" on children's issues.

President Clinton also believes that government must police speech on the radio more aggressively than in years past. Over the last four years, he has repeatedly condemned radio-talk-show hosts for filling the airwaves with "hate" and "indecenty." The Clinton White House has supported FCC efforts to crack down on American broadcasters. The administration maintains that because some parents do not supervise what their children listen to, all material considered "indecent" should be restricted to the hours between midnight and 6 a.m. As for the millions of adults who like to sleep during those hours, the White House response seems to be, "You've had it too good for too long."

When a panel of the U.S. Court of Appeals for the D.C. Circuit struck down the FCC regulations as an abridgment of the free speech clause, the Clinton administration urged that the case be reargued en banc. During reargument, Judge Patricia Wald deplored the president's paternalistic proposal. "You are [trying to be] the national nana. You are not

facilitating parents. You are saying 'We are the people who decide' [what will be listened to]." [\[26\]](#) Unfortunately, the White House ultimately scored a "victory" when Judge Wald and two other judges were overruled by the other judges on the panel. [\[27\]](#)

Censoring the Internet

President Clinton supports federal censorship of the Internet. In February 1996 he signed the Communications Decency Act into law. That act makes it a crime to transmit or allow "indecent" material to be transmitted over computer networks to which minors have access. But since there is no affordable, effective way for nonprofit or low-profit speakers to restrict children's access to such a broad, ill-defined category of material, the CDA has the effect of banning much speech from the Internet. [\[28\]](#) As civil liberties attorney Harvey Silvergate observed, "Overnight, the federal government transformed the newest and freest medium of communication into the most heavily censored." [\[29\]](#)

The Internet is a revolutionary development in communications. It has been described as "the most participatory marketplace of mass speech that [America]--and indeed the world--has yet seen." [\[30\]](#) Forty million people around the world have access to the Internet. And that figure is expected to grow to 200 million by the year 2000. Computer communications networks, including the linked network of networks that constitutes the Internet, "empower anyone, anywhere, to create any kind of content and to distribute it to anyone, anywhere, who seeks it out." [\[31\]](#) Never before has the ordinary citizen had the ability to reach a potential audience of millions of people. But because the sweeping provisions of the CDA add to the speaker's cost, in effort and in money, that law threatens to "chill" public discourse over computer networks.

Recognizing that fact, the ACLU brought a constitutional challenge to the CDA in federal court within hours of its enactment. On June 11, 1996, a three-judge panel unanimously ruled that the CDA violated the free speech clause of the First Amendment.

We have . . . found that there is no effective way for many Internet content providers to limit the effective reach of the C.D.A. to adults because there is no realistic way for many providers to ascertain the age of those accessing their materials. As a consequence, we have found that many speakers who display arguably indecent content on the Internet must choose between silence and the risk of prosecution. Such a choice, forced by Sections 223(a) and (d) of the C.D.A., strikes at the heart of speech of adults as well as minors. [\[32\]](#)

Judge Stewart R. Dalzell, in his separate opinion as a member of the panel, said the CDA was no more acceptable than a "newspaper decency act" or a "novel decency act." [\[33\]](#) Judge Dalzell also pointed out that concerned parents are not without options in the marketplace. Blocking software can be installed on home computers, or families can subscribe to commercial online services that provide parental controls.

The Clinton Justice Department has asked the Supreme Court to overturn the federal district court ruling on the CDA. [\[34\]](#) The president's lawyers are attempting to persuade the courts that the Justice Department can be trusted not to violate the free speech rights of Americans. [\[35\]](#) That argument misses the whole point of our constitutional safeguards. The Framers of the Constitution crafted the Bill of Rights so that Americans would not have to rely on the promises of prosecutors and politicians to respect their rights. [\[36\]](#)

Censoring Advertisements

Judging from his official actions, President Clinton seems to subscribe to the view that commercial advertising falls wholly outside the protection of the First Amendment's free speech clause. [\[37\]](#) Although he has not explicitly challenged Supreme Court holdings on that proposition, Clinton has demonstrated his willingness to push the limits of federal power over commercial marketing.

In August 1995, for example, the president supported sweeping regulations of tobacco products proposed by the Food

and Drug Administration--an agency that had not previously considered tobacco within its purview. [\[38\]](#) Under the administration's proposals, tobacco businesses would be forced to spend their own money on anti-smoking campaigns. Cigarette ads would be limited to black-and-white text in any magazine more than 15 percent of the readership of which is under age 18. T-shirts with company logos would be forbidden, as would brand name sponsorship of sporting and entertainment events. To fully appreciate the breathtaking scope of the power that the president is asserting here, it is important to take a step back from the immediate context of the White House proposal, which is tobacco regulation. Since there is no First Amendment "exception" for tobacco advertisements, the president apparently believes that the federal government can arbitrarily target lawful products and censor the communicative activity of the businesspeople who manufacture those products. To sustain his proposal, therefore, President Clinton presumably would like to see the Supreme Court roll back a series of First Amendment cases that limit the government's power over commercial speech.

President Clinton's legal team has tried mightily--but so far unsuccessfully--to advance the government's censorship powers over business communications. In November 1994, for example, the Coors Brewing Company asked the Supreme Court to recognize its First Amendment right to display truthful and verifiable information about alcohol content on its beer labels. Solicitor General Days urged the Court to uphold the constitutionality of federal labeling restrictions because "consumer preferences might change if . . . brewers were free to market malt beverages on the basis of their alcohol content." [\[39\]](#) The Supreme Court unanimously rebuffed Days's argument. Justice John Paul Stevens noted that the Justice Department was carrying its paternalistic notions of consumer protection too far.

Any [governmental] "interest" in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment; more speech and a better-informed citizenry are among the central goals of the Free Speech Clause. Accordingly, the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good. [\[40\]](#)

In another case, Justice Clarence Thomas also rejected the government's asserted interest in keeping legal users of products and services "ignorant in order to manipulate their choices in the marketplace." [\[41\]](#)

The Clinton White House has rationalized its tobacco regulations on the basis of protecting youngsters from slick and seductive marketing campaigns from Madison Avenue. But Days's strenuous arguments against the simple display of alcohol content on beverage containers are a clear indication that the administration does not want even grownups to make informed choices about their lives because it fears too many will make the "wrong" choice.

Most telling of all was the suggestion by Days that the Supreme Court resolve constitutional doubts in the government's favor: "Any doubt as to whether the labeling restriction . . . comports with the First Amendment should be resolved in favor of the statute's validity." [\[42\]](#) That suggestion to the highest court in the land about a fundamental constitutional guarantee lay bare the true colors of the president's legal team. It was a suggestion that flatly contradicted President Clinton's publicly stated preference for an "expansive view" of the Bill of Rights. [\[43\]](#) And it speaks volumes about the constitutional reading that the Clinton White House actually advocates in constitutional litigation, namely, an expansive view of federal power.

The Ex Post Facto Clause

The Framers of the Constitution detested the idea of retroactive legislation. The Constitution contains two specific prohibitions against ex post facto laws: Article I, section 9, addresses Congress: "No . . . ex post facto Law shall be passed." Article I, section 10, addresses state officials: "No State shall pass any ex post facto Law." The Constitution contains no exception to either prohibition. As Professor William Winslow Crosskey of the University of Chicago once observed, it is evident that ex post facto laws "were thoroughly disapproved by the framers of the Constitution and intended by them to be completely impossible under our system." [\[44\]](#)

Not only has President Clinton failed to defend the prohibition of ex post facto laws; he encouraged the 103rd Congress to violate the prohibition. In the summer of 1993 he urged Congress to levy a retroactive tax on the American people. Under the president's initial budget plan, income, corporate, gift, and estate taxes were to be

increased retroactively to January 1, 1993--20 days before the president assumed office. Never before in American history had a tax been made retroactive to the time of a prior administration.

The retroactive tax plan was bitterly opposed by many in Congress as grossly unfair and unconstitutional. Yet the Clinton administration defended its initiative--pointing out, as if it made a difference, that most Americans would be unaffected by the controversial tax. Vice President Al Gore, for example, displayed a callous disregard for the constitutional rights of a minority when he told a television interviewer, "All of the hoopla and waving of arms about retroactivity is all in behalf of the wealthiest 1 percent of people in this country. Those are the only people affected by retroactivity." [\[45\]](#) Obviously, the constitutionality of a law does not depend on the number of people it affects. The president swears to protect the constitutional rights of *all* Americans--even those who happen to be wealthy.

President Clinton pressed his views on the legality of retroactive taxation on the judiciary as well. When the U.S. Court of Appeals for the Ninth Circuit struck down a 1987 retroactive change in the tax code as unconstitutional, the Clinton administration asked the Supreme Court to reverse the ruling. Instead of defending the *ex post facto* clause against "artful" interpretations, President Clinton's legal team urged the Court to give the legislators great leeway.

In preparing tax legislation, it is not always possible for Congress to foresee all possible applications of proposed statutory language. The possibility of drafting errors is far from negligible in a massive legislative undertaking such as the Tax Reform Act of 1986, a highly complex bill that made extensive revisions in the Internal Revenue Code. [\[46\]](#)

For the taxpayer hit by retroactive tax changes, Clinton expressed little sympathy. The Justice Department's legal brief coldly warned, "The taxpayer must be prepared for such possibilities." [\[47\]](#)

In the landmark case of *McCulloch v. Maryland* (1819), Chief Justice John Marshall issued his famous warning that "the power to tax involves the power to destroy." [\[48\]](#) Instead of shielding the American people from the unconstitutional power to tax retroactively, President Clinton fought for additional power. [\[49\]](#)

The Warrant Clause

The warrant clause of the Fourth Amendment, specifying the conditions that must be met before officials may search a person's home or seize papers and effects, provides: "no [search] Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." The warrant clause protects the citizenry from arbitrary searches by requiring law enforcement personnel to obtain judicial authorization *before* they demand entrance to any person's home. The Supreme Court described the constitutional importance of the warrant application process in *McDonald v. United States* (1948).

The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. [\[50\]](#)

The Clinton administration has repeatedly attempted to play down the significance of the warrant clause. In fact, President Clinton has asserted the power to conduct warrantless searches, warrantless drug testing of public school students, and warrantless wiretapping.

Warrantless "National Security" Searches

The Clinton administration claims that it can bypass the warrant clause for "national security" purposes. In July 1994 Deputy Attorney General Jamie S. Gorelick told the House Select Committee on Intelligence that the president "has

inherent authority to conduct warrantless searches for foreign intelligence purposes." [\[51\]](#) According to Gorelick, the president (or his attorney general) need only satisfy himself that an American is working in conjunction with a foreign power before a search can take place.

The warrant clause was designed to give the American people greater security than that afforded by the mere words of politicians. It requires the attorney general, or others, to make a showing of "probable cause" to a magistrate. The proponents of national security searches are hard-pressed to find any support for their position in the text or history of the Constitution. That is why they argue from the "inherent authority" of the Oval Office--a patently circular argument. The scope of such "authority" is of course unbounded in principle. Yet the Clinton Justice Department has said that the warrant clause is fully applicable to murder suspects but not to persons suspected of violating the export control regulations of the federal government. [\[52\]](#) If the Framers had wanted to insert a national security exception to the warrant clause, they would have done so. They did not.

The Clinton administration's national security exception to the warrant clause is nothing more, of course, than an unsupported assertion of power by executive branch officials. The Nixon administration relied on similar constitutional assertions in the 1970s to rationalize "black bag" break-ins to the quarters of its political opponents. [\[53\]](#) The Clinton White House--even after the Filegate scandal--assures Congress, the media, and the general public that it has no intention of abusing this power.

Attorney General Reno has already signed off on the warrantless search of an American home on the basis of the dubious "inherent authority" theory. [\[54\]](#) The actual number of clandestine "national security" searches conducted since 1993 is known only to the White House and senior Justice Department officials.

Warrantless Searches of Public Housing

In the spring of 1994 the Chicago Public Housing Authority responded to gang violence by conducting warrantless "sweeps" of entire apartment buildings. Closets, desks, dressers, kitchen cabinets, and personal effects were examined regardless of whether the police had probable cause to suspect particular residents of any wrongdoing. Some apartments were searched when the residents were not home. Although such searches were supported by the Clinton administration, Federal District Judge Wayne Anderson declared the Chicago sweeps unconstitutional. [\[55\]](#) Judge Anderson found the government's claim of "exigent circumstances" to be exaggerated since all of the sweeps occurred days after the gang-related shootings. He also noted that even in emergency situations, housing officials needed probable cause in order to search specific apartments. Unlike many governmental officials who fear demagogic criticism for being "soft on crime," Judge Anderson stood up for the Fourth Amendment rights of the tenants, noting that he had "sworn to uphold and defend the Constitution" and that he would not "use the power of [his] office to override it, amend it or subvert it." [\[56\]](#)

The White House response was swift. President Clinton publicly ordered Attorney General Reno and HUD secretary Henry Cisneros to find a way to circumvent Judge Anderson's ruling. One month later the president announced a "constitutionally effective way" of searching public housing units. The Clinton administration would now ask tenants to sign lease provisions that would give government agents the power to search their homes without warrants. [\[57\]](#)

The Clinton plan was roundly criticized by lawyers and columnists for giving short shrift to the constitutional rights of the tenants. [\[58\]](#) A *New York Times* editorial observed that the president had "missed the point" of Judge Anderson's ruling. [\[59\]](#) Harvard law professors Charles Ogletree and Abbe Smith rightly condemned the Clinton proposal as an open invitation to the police to "tear up" the homes of poor people. [\[60\]](#)

Warrantless Drug Testing in Public Schools

The Clinton administration has defended warrantless drug testing programs in the public schools. In March 1995 the Supreme Court heard arguments on whether public school officials could drug test student athletes without a warrant or any articulable suspicion of illegal drug use. The Department of Justice sided with the school authorities, arguing that

the privacy rights of individual students were outweighed by the interest of the school in deterring drug use by the student body generally. [\[61\]](#)

Solicitor General Days, arguing for the government, claimed that the school district "could not effectively educate its students unless it undertook suspicionless drug testing as part of a broader drug-prevention program." [\[62\]](#) Days maintained that the Fourth Amendment's requirement of individualized suspicion would "jeopardize" the school's drug program. Justices Sandra Day O'Connor, John Paul Stevens, and David Souter expressed skepticism about that claim and pointed out that if the Supreme Court followed the Justice Department's reasoning, America's public school students might well end up receiving less constitutional protection under the Fourth Amendment than do convicted criminals under correctional supervision. [\[63\]](#)

The Clinton administration supports warrantless drug tests in other contexts as well. Thus, when Republican presidential candidate Robert Dole said, during the 1996 campaign, that he would subject welfare recipients to warrantless, suspicionless drug tests, President Clinton quickly followed suit with his own approval of such an initiative. [\[64\]](#)

Warrantless Wiretapping

The Supreme Court has recognized that electronic surveillance, such as wiretapping and eavesdropping, impinges on the privacy rights of individuals and organizations and is therefore subject to the Fourth Amendment's warrant clause. [\[65\]](#) President Clinton, however, has asked Congress to pass legislation that would give the Federal Bureau of Investigation the power to use "roving wiretaps" without a court order. [\[66\]](#) The president also fought for sweeping legislation that is forcing the telephone industry to make its network more easily accessible to law enforcement wiretaps. Those initiatives have led ACLU officials to describe the Clinton White House as "the most wiretap-friendly administration in history." [\[67\]](#)

It is unclear why the president made warrantless roving wiretaps a priority matter since judges routinely approve wiretap applications by federal prosecutors. According to a 1995 report by the Administrative Office of U.S. Courts, it had been years since a federal district court turned down a prosecutor's request for a wiretap order. [\[68\]](#) President Clinton is apparently seeking to free his administration from any *potential* judicial interference with its wiretapping plans. There is a problem, of course, with the power that the president desires: it is precisely the sort of unchecked power that the Fourth Amendment's warrant clause was designed to curb. As the Supreme Court noted in *Katz v. United States* (1967), the judicial procedure of antecedent justification before a neutral magistrate is a "constitutional precondition," not only to the search of a home, but also to eavesdropping on private conversations within the home. [\[69\]](#)

President Clinton also lobbied for and signed the Orwellian Communications Assistance for Law Enforcement Act, which is forcing every telephone company in America to retrofit its phone lines and networks so that they will be more accessible to police wiretaps. [\[70\]](#) The cost of that makeover is expected to be several billion dollars. Any communications carrier that fails to meet the technology standards of the attorney general can be fined up to \$10,000 per day. The passage of that law prompted Attorney General Reno to marvel at her newly acquired power: "I don't think J. Edgar Hoover would contemplate what we can do today." [\[71\]](#) That is unfortunately true. In the past, law enforcement had to rely on the goodwill and voluntary cooperation of the American people for investigative assistance. That tradition is giving way to a regime of coercive mandates. [\[72\]](#)

The Takings Clause

The takings clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." While government officials have relentlessly sought to narrow the judicial application of that clause to circumstances in which the state has actually taken title and deed away from the property owner, the Supreme Court has recognized that governmental regulations that leave the title with the owner might also amount to a compensable "taking." Thus, the Court has held that regulations that take all the value from the property by effectively prohibiting

its use amount to a taking of the property. [\[73\]](#)

As the number and scope of federal and state regulations have multiplied over the years, so have the grievances of landowners who point out that their property has been commandeered for various public policy objectives--from the preservation of wetlands and wildlife habitats to the provision of various community amenities. [\[74\]](#) But since few property owners have the financial wherewithal to wage a long legal battle against the federal or state governments, many governmental takings go uncompensated because lawsuits are never filed in the first place. The 104th Congress attempted to redress the imbalance between landowners and regulators by introducing various property rights measures aimed at giving property owners a statutory remedy against overweening federal agencies. [\[75\]](#)

Unfortunately, the move to enact property rights legislation stalled when President Clinton announced that he was unalterably opposed to such measures and would veto any such bill that emerged from Congress. The president characterized the property rights legislation as a "budget buster" that would "benefit wealthy landowners at the expense of ordinary Americans." [\[76\]](#)

It is revealing to consider the president's characterization of takings legislation as a "budget buster" in context. The Clinton White House, after all, has been urging Congress to spend a trillion dollars--over and above current spending levels--during the next several years. Against that background, it is difficult to take the president's expression of concern over spending levels seriously.

But even if the president were a true advocate of spending restraint, his budgetary objection would be irrelevant as a constitutional matter. Since the takings bills were an attempt to vindicate constitutional rights guaranteed under the Fifth Amendment, the president had a duty to *find* room in the federal budget for victims of regulatory overreach. To paraphrase Justice Antonin Scalia, the president and Congress are not at liberty to conduct a cost-benefit analysis of a constitutional guarantee and then adjust the meaning of that guarantee to comport with their findings. [\[77\]](#) Everyone recognizes, for example, that jury trials are more expensive and time-consuming than bench trials, but no one who takes the Constitution seriously would propose the legislative abolition of the jury trial procedure in order to "balance the budget." President Clinton's inability to distinguish the property rights bills in Congress from the vast array of special-interest spending programs (foreign aid, corporate welfare, art subsidies, etc.)--which are not necessitated by the Constitution--should be disturbing to all Americans.

Not only is the president's claim that the takings bills "benefit wealthy Americans" false, but it is important to recall that the Bill of Rights was designed to protect the rights of every individual against the government. No American should be forced to expend exorbitant amounts of money in litigation in order to vindicate his constitutional rights (those rights, after all, were the individual's to begin with). The fact that some individuals and organizations can comfortably absorb those expenses is beside the point. That said, it is not difficult to see that middle-class and poor owners of property would have been the primary beneficiaries of the takings legislation, since they are the least able to afford the attorneys' fees that are necessary to fight a regulatory agency in court.

Finally, as will be argued below, President Clinton's record on behalf of "ordinary Americans" is open to question--at least in the takings context. When a small businesswoman named Florence Dolan took a takings claim to the Supreme Court in March 1994, the Clinton Justice Department filed a legal brief against her.

Dolan wanted to expand her plumbing and electrical supply store in Tigard, Oregon, but the local zoning board refused to issue a permit for the expansion unless she dedicated a 15-foot strip of land to the city to be used for a bicycle pathway. The city also said that Dolan would have to pay for the construction of that pathway.

After several failed attempts to secure a variance from the proposed condition, Dolan sued the city for forcing her to choose between two of her rights: her right to build without giving up her land and her right to compensation if she did give up her land. [\[78\]](#) Dolan's attorney, David Smith, introduced evidence that showed that city planners had contemplated the construction of a citywide floodplain greenway and bicycle-pedestrian pathway. Smith plausibly argued that the city had planned to use its permit and zoning powers to force certain landowners to pay for the public improvements in a piecemeal fashion instead of using funds from the general treasury.

Smith's argument raised a classic takings claim. The Supreme Court has noted that one of the primary purposes of the takings clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." [\[79\]](#)

Solicitor General Days's legal brief to the Supreme Court made two primary arguments: first, that the burden of proof in the takings area ought to be shouldered by property owners, not governmental regulators--and Days maintained that Dolan had not met the requisite burden in the instant case--and second, that cities ought to be given "considerable latitude" when they impose permit conditions. Days urged the Court not to subject governmental conduct in the takings area to the high level of scrutiny that the Court uses in reviewing other claims of constitutional violation. [\[80\]](#)

The Supreme Court rejected both of Days's pleas and then went on to remind the Clinton Justice Department that "the Takings Clause of the Fifth Amendment [is] as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment" [\[81\]](#) and to place the legal burden on the government to justify any conditions it wishes to attach to zoning permits. The Supreme Court sent the case back to the Oregon district court to give the city of Tigard another opportunity to justify the conditions it attached to Dolan's permit.

The Double Jeopardy Clause

The double jeopardy clause provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." As Justice Hugo Black once observed, the underlying principle of the double jeopardy clause was recognized long before the American Revolution.

Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times. Even in the Dark Ages, when so many other principles of justice were lost, the idea that one trial and one punishment were enough remained alive through the canon law and the teachings of early Christian writers. . . . While some writers have explained the opposition to double prosecutions by emphasizing the injustice inherent in two punishments for the same act, and others have stressed the dangers to the innocent from allowing the full power of the state to be brought against them in two trials, the basic and recurring theme has always simply been that it is wrong to "be brought into Danger for the same Offense more than once." Few principles have been more deeply "rooted in the traditions and conscience of our people." [\[82\]](#)

The double jeopardy principle was explicitly incorporated into the Constitution when the Bill of Rights was ratified in 1791.

Although the double jeopardy clause bars federal prosecutors from subjecting any person to multiple prosecutions for the same offense, the Supreme Court opened the door to double jeopardy when it sanctioned separate prosecutions by federal and state officials for the same conduct. The Court announced its "dual sovereign" exception to the prohibition against double jeopardy in *Bartkus v. Illinois* (1959). [\[83\]](#) The sharply divided (five-to-four) decision in *Bartkus* was and remains very controversial. Many legal analysts thought the majority opinion was poorly reasoned. Indeed, 24 states have, on their own initiative, attempted to shore up the double jeopardy principle by prohibiting their prosecuting officials from pursuing any defendant who had already been prosecuted by the federal government. [\[84\]](#)

A president committed to vindicating the double jeopardy principle could close the Supreme Court's "dual sovereignty" loophole with the stroke of a pen by issuing an executive order forbidding U.S. attorneys to pursue individuals who have already been prosecuted by state authorities. To the disappointment of many civil libertarians, President Clinton has expressed no such interest. In fact, the Clinton Justice Department has signed off on several double prosecutions since 1993.

The best known double prosecution in recent years was the federal case that was brought against the Los Angeles police officers who viciously beat Rodney King in 1991. The Bush administration was responsible for convening a federal grand jury in the wake of the state court acquittal, but the trial did not get under way until after President Clinton assumed office. [\[85\]](#) It could have been--and should have been--stopped. [\[86\]](#)

When columnist George Will asked Attorney General Reno about the constitutionality of retrying the Los Angeles police officers, she tried to absolve the Clinton administration of responsibility by invoking the *Bartkus* precedent.

Mr. Will: As you know . . . a lot of civil libertarians, generally, are worried that this second trial constituted double jeopardy, that it violates the principle and the spirit of the principle that you should not be subject to trial twice for the same offense. Can you explain simply to our viewers why this wasn't double jeopardy?

Ms. Reno: This wasn't double jeopardy, because you have two separate sovereigns. We addressed this issue in Miami on a number of occasions where federal authorities followed with a subsequent prosecution. And as the Supreme Court--as case law has evolved in this nation, you had two separate sovereigns, and therefore it is not double jeopardy. [\[87\]](#)

Reno's response, while strictly accurate, obscures the fact that the Justice Department can initiate or decline successive prosecutions at its discretion. There is a critical difference, after all, between permissible action and obligatory action. Indeed, that difference explains why the political branches of our government can be legitimately criticized for constitutional negligence with respect to their failure to desegregate the public school systems before the *Brown* decision was rendered in 1954. The fact that *Plessy v. Ferguson* (1896) had condoned separate but equal facilities did not absolve the other branches of our government of their responsibility to abide by the Constitution. Similarly, Reno cannot excuse the Clinton administration's failure to defend the double jeopardy clause by throwing up her hands with a bland reference to Supreme Court case law.

The Clinton administration has not only embraced the double prosecutions that began under the Bush administration but has initiated a few of its own as well. When Lemrick Nelson was acquitted of murder charges by a jury in state court in October 1992, pressure began to build for a second trial in the federal court system. It was only a pending matter when President Clinton assumed office--a matter that required no action. The attorney general took an interest in the Nelson case, however, and the federal code was combed for possible charges. [\[88\]](#) Like the Los Angeles police officers involved in the King incident, Nelson was ultimately charged with violating the civil rights of the victim. [\[89\]](#) There are probably dozens of unreported double prosecutions being plea bargained in federal courthouses across the United States. [\[90\]](#)

The Clinton Justice Department has also sought to limit the effect of the double jeopardy clause as it relates to civil forfeiture proceedings. When the United States Court of Appeals for the Sixth Circuit told a federal prosecutor that he could not constitutionally seize a drug dealer's home in a civil forfeiture proceeding *and* prosecute the dealer under federal criminal law, the Clinton administration appealed. [\[91\]](#)

Even though there was no evidence that the home had been purchased with drug money, Solicitor General Days filed a legal brief with the Supreme Court that said the civil forfeiture action should not trigger the double jeopardy clause since it could not be fairly characterized as a "punitive" measure. [\[92\]](#) How, one wonders, could the confiscation of someone's home *not* be punitive?

The Second Amendment

The Framers of the Constitution despised the governments of Europe for being "afraid to trust [their own] people with arms." [\[93\]](#) If a government had no designs on the liberties of the people and administered justice in its courtrooms, the Founders thought there was no reason to fear an armed citizenry. Indeed, an armed citizenry would be an effective "check" on the nefarious ambitions of politicians.

The Second Amendment to our Constitution provides: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." One of the most salutary developments in law schools in recent years has been a growing recognition among constitutional theorists that "perhaps the [National Rifle Association] is not wrong, after all, in its general Second Amendment stance." [\[94\]](#) The

idea behind that stance, of course, is that the general purpose of the Second Amendment is to guard the right of the citizenry to keep and bear arms. [\[95\]](#)

The Clinton White House has shown little interest in Second Amendment scholarship. In fact, President Clinton has established himself as the most fervent opponent of gun ownership in presidential history. He lobbied strongly for the passage of the Brady bill and a ban on "assault weapons"--and signed both measures into law. The president has also indicated his desire for a national scheme for licensing all gun owners. Although there are hundreds of federal and state regulations concerning the manufacture and use of firearms, Clinton believes that the right to keep and bear arms must be regulated further because that right has become an instrument for "maintaining madness." [\[96\]](#)

In the 1992 presidential election campaign, Bill Clinton vowed to fight for the passage of the Brady bill. He kept his promise by making that bill a top priority. After a ferocious legislative battle, the Brady bill was signed into law on November 30, 1993. That law requires the purchaser of a handgun to wait five business days before taking possession of the gun. During the five-day waiting period, law enforcement officials are supposed to check the background of the prospective buyer for any criminal record or mental instability. The ostensible purpose of the law is to "keep guns out of the hands of criminals." [\[97\]](#)

To understand the ferocity of the Brady battle, it is important to note that before the Brady law took effect, federal law presumed--as a general proposition--that every American citizen had the right to gun ownership. That right could be overridden, but the government had to have a very good reason to do so. A felony conviction, for example, would have disqualified a person from lawful gun possession. President Clinton and advocates of gun control were anxious to reverse that legal presumption so that it would work against the constitutional right to keep and bear arms. The five-day waiting period was to be the "first step" toward solidifying a new legal presumption against gun ownership. [\[98\]](#)

Gun lobbyists, many lawmakers, and principled defenders of the Constitution were equally determined to protect the Second Amendment against encroachment. They viewed the Brady bill as an unconstitutional "prior restraint" on the right to keep arms. They also feared that the Brady law would open the door to a series of incrementally restrictive gun control measures.

One month after passage of the Brady bill, a new round of calls for government controls was touched off when a deranged man killed five commuters and injured many others on the Long Island Railroad. President Clinton seized the moment with an ambitious gun control initiative. He publicly ordered Attorney General Reno to develop plans for a national licensing system for all American gun owners. [\[99\]](#)

President Clinton's licensing scheme would have crippled the constitutional right to keep and bear arms because it would have forced law-abiding citizens to go hat in hand to the government to get permission to purchase a firearm. Far from defending the Second Amendment rights of the citizenry, the president sought to reduce a constitutional guarantee to an arbitrary dispensation of government. [\[100\]](#) President Clinton clearly hoped that a poll-sensitive Congress would succumb to his far-reaching proposal in the wake of a well-publicized tragedy. Although the president's gambit failed, it was a telling indication of his understanding of federal power and the Second Amendment.

The Jury Trial Clause

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." The Clinton administration's fidelity to the jury trial clause was tested on three occasions--all involving cases before the Supreme Court. Unfortunately, President Clinton's legal team tried to weaken the jury trial guarantee in each case.

Shifting Power from Juries to Judges

The first case was *United States v. Gaudin* (1995). [\[101\]](#) Michael Gaudin was accused of making false statements on Federal Housing Administration loan documents. The issue before the Supreme Court was whether the trial judge gave appropriate legal instructions to the jury. The trial judge told jurors that he had already determined that Gaudin's

statements were "material" and that the only question for the jury to resolve was whether the accused had "knowingly" made false statements.

Gaudin's attorney argued that the materiality issue should have been decided by the jury, not the trial judge. The Sixth Amendment gives the accused the right to demand that a jury find him guilty of all of the elements of the crime with which he is charged. Since materiality was an essential element of the crime with which Gaudin was charged, his right to have that issue resolved by a jury was violated.

Instead of defending the jury trial clause, the Clinton Justice Department urged the Supreme Court to affirm Gaudin's false statement conviction, arguing that historical and legal precedents supported the trial judge's legal instructions. The Supreme Court unanimously rejected the Clinton administration's legal position.

The existence of a unique historical exception to this [constitutional] principle--and an exception that reduces the power of the jury precisely when it is most important, i.e., in a prosecution not for harming another individual, but for offending against the Government itself--would be so extraordinary that the evidence for it would have to be convincing indeed. It is not so. [\[102\]](#)

The Court concluded that the trial judge had violated Gaudin's constitutional right to trial by jury and that the government would have to give him a new trial.

No Jury Trial for "Minor" Offenses

The second case involving the jury trial clause was *Lewis v. United States* (1996). [\[103\]](#) Ray Lewis was a postal employee charged with two counts of obstructing the mail. Each count carried a maximum authorized prison sentence of six months. Lewis requested a jury trial, but federal prosecutors argued that because the crimes with which he was charged were only "petty offenses," he had no constitutional right to trial by jury. The magistrate sided with the prosecutors, and a bench trial was held shortly thereafter. Lewis was found guilty, but he appealed the magistrate's decision denying him a jury trial.

The language of the Sixth Amendment is unambiguous. The accused is guaranteed the right to a jury trial in "all criminal prosecutions." Unfortunately, many years ago government lawyers persuaded a majority of Supreme Court justices that a jury trial was required only for "serious" offenses. According to Supreme Court case law, a "serious" offense is a crime that carries a penalty in excess of six months' imprisonment. Over the years a number of Supreme Court justices have questioned the logic underlying the so-called petty offense doctrine. Justice Hugo Black, for example, found the "petty-serious" distinction to be utterly specious.

The Constitution guarantees a right of trial by jury in two separate places but in neither does it hint of any difference between "petty" offenses and "serious" offenses. . . . Many years ago this Court, without the necessity of amendment pursuant to Article V, decided that "all crimes" did not mean "all crimes" but meant only "all serious crimes." . . . Such constitutional adjudication, whether framed in terms of "fundamental fairness," "balancing," or "shocking the conscience" amounts in every case to little more than judicial mutilation of our written Constitution. [\[104\]](#)

Instead of seizing on Justice Black's clear-eyed analysis of the constitutional text and urging the Supreme Court to correct its past mistake, the Clinton administration defended the petty offense doctrine and asked the Supreme Court to affirm Lewis's conviction. [\[105\]](#)

Overturning Jury Acquittals at Sentencing

The third case involving the jury trial clause was *United States v. Watts* (1997). [\[106\]](#) Vernon Watts was arrested after police detectives discovered cocaine base in his kitchen cabinet and two loaded guns in his bedroom closet. At trial, the jury convicted Watts of drug charges, but acquitted him of "using a firearm" during a drug offense. Despite Watts's acquittal on the weapons charge, the sentencing court announced that Watts had indeed possessed the guns in connection with the drug offense and that his prison sentence would be increased accordingly. Watts promptly

appealed the additional prison time. The Clinton Justice Department defended the controversial sentence before the Ninth Circuit Court of Appeals but lost. The appellate court vacated Watts's sentence, holding that "a sentencing judge may not . . . rely upon facts of which the defendant was acquitted." Undaunted, Clinton's legal team asked the Supreme Court to overturn the Ninth Circuit ruling--and to reinstate Watts's original sentence.

The legal issue in *Watts* had been festering in the federal court system for years. Ever since the Federal Sentencing Guidelines were enacted by Congress in 1984, federal courts have been engaged in "real-offense" sentencing, which basically allows a sentencing judge to consider a broad range of "relevant conduct" on the part of the defendant. As unbelievable as it may seem, our courts have been punishing individuals even after juries have found them not guilty of the conduct for which they are being punished.

The Framers of the Constitution placed the jury at the heart of our criminal justice system. They did so for a very specific reason. The Framers did not want the federal government to have the power to unilaterally brand a citizen a criminal. In America prosecutors must first persuade a jury of laymen that the accused is a criminal who must be punished. The jury's unanimous assent to the government's indictment was to be a prerequisite to punishment.

Real-offense sentencing, however, undermines the constitutional safeguard of trial by jury in at least two ways. First, if prosecutors fail to persuade a jury of a defendant's guilt at trial, they can now ask a judge for a second opinion. That is what the federal prosecutor did in the *Watts* case.

Second, by filing an indictment with a single charge, prosecutors can withhold shaky evidence on some allegations, then introduce it at the sentencing phase. If the government is able to secure a conviction on the charge set forth in the formal indictment, prosecutors can then seek "enhanced penalties" for offenses the jury never heard about. The government has a strong incentive to employ that strategy against defendants because the evidentiary standards before a sentencing judge are well below those required at trial. Prosecutors only have to prove "sentencing factors" by a preponderance of the evidence instead of the traditionally high standard of "beyond a reasonable doubt." And because the Federal Rules of Evidence do not apply at sentencing, federal judges can add years to a defendant's sentence on the basis of flimsy hearsay evidence.

Justice Department officials defend real-offense sentencing by claiming that no person is being punished for conduct of which he has not been convicted; rather some are being punished more severely simply because of the factual circumstances surrounding the crime of which they were convicted. That is a dangerous play on words. For if the connection between trial and sentencing procedures is severed, Congress can simply manipulate the statutory maximum penalties for the thousands of offenses that are criminally prohibited. Such manipulation would effectively obviate the government's burden to prove beyond a reasonable doubt criminal activity before juries. Law professor Elizabeth Lear of the University of Florida observes that "under the current regime of nonconviction offense sentencing, only the judge and the prosecutor need approve the bulk of punishment decisions." Such unbridled governmental power "dislodges the jury from its crucial oversight role in the criminal justice system." [\[107\]](#)

The *Watts* case was a golden opportunity for President Clinton's lawyers to demonstrate the administration's commitment to an "expansive view of the Constitution and the Bill of Rights." [\[108\]](#) Sadly, the Justice Department once again sought the opposite, advocating a narrow reading of the jury trial clause.

The Separation of Powers Principle

One of the most important structural features of the American Constitution is the partition of powers among three separate branches of government: legislative, executive, and judicial. James Madison expressed the sentiment of the founding generation when he wrote that "the preservation of liberty requires that the three great departments of power should be separate and distinct." [\[109\]](#) Every president is responsible for remaining within his sphere of authority and respecting the powers the Constitution vests in the judicial and legislative branches.

President Clinton and the Judiciary

The Framers of the Constitution believed in an independent judiciary. Their colonial experience under English rule

taught them that when the executive power is combined with judicial power, liberty and justice are endangered. One of the grievances set forth in the Declaration of Independence was that King George III had "made Judges dependent on his Will alone, for the Tenure of their Offices." To guard against that potential threat to the impartial administration of justice, the Framers created a court system in which federal judges would enjoy lifetime tenure as long as they remained honest and avoided malfeasance. In the 1992 presidential campaign, Governor Clinton assured the legal community that he appreciated the importance of an independent judiciary in our constitutional framework: "As a lawyer, a former law professor and attorney general of [Arkansas], I have a deep commitment to our legal system and a reverence for the role that federal judges play in our system as interpreters of federal law and protectors of constitutional rights." [\[110\]](#)

A few years later, President Clinton shocked the legal community when he brazenly pressured a federal judge to reverse an evidentiary ruling. In March 1996 Federal District Judge Harold Baer Jr. suppressed incriminating physical evidence and a videotaped confession in a New York City drug bust. That controversial ruling provoked a firestorm of criticism from local and national politicians, including Dole. Dole used the incident to attack the president for appointing "soft-on-crime" judges to the federal bench. Under rising political pressure to distance himself from some of the liberal rulings of his judicial appointees, President Clinton made an extraordinary move. On March 21, 1996, the White House let it be known that if Judge Baer did not reverse his suppression ruling, President Clinton would ask for his resignation. [\[111\]](#)

The president's blatant attempt to intimidate a judge in a pending case sparked its own firestorm of controversy. The chief judge and three senior judges of the United States Court of Appeals for the Second Circuit issued a statement that said calls for the resignation and impeachment of Judge Baer had "done a grave disservice to the principle of an independent judiciary." [\[112\]](#) The White House quickly retreated from its earlier announcement by issuing platitudinous statements about the importance of "judicial independence." [\[113\]](#)

The Baer incident is a telling indication of President Clinton's commitment to an independent judiciary. Like so many of his other purported beliefs, it is evidently subject to raw political calculations.

President Clinton and the Legislature

President Clinton claims the Constitution gives him the unilateral power to attack other countries whenever he deems that course of action appropriate. Over the last four years, he has authorized missile attacks against Iraq, ordered air strikes in Bosnia, and threatened to invade Haiti. In each instance the president claimed that it was unnecessary to seek any constitutional authorization from Congress.

The Framers of the Constitution gave the war power careful consideration. Although in the European countries of the 18th century the war power was commonly vested in monarchs, the Framers made a deliberate decision to leave the war-making power with the national legislature, not the president. [\[114\]](#) Article I of the Constitution states that "Congress shall have the power . . . to declare war." The president was to exercise his article II responsibilities as commander in chief within the framework established by the Constitution. The American executive would *direct* the military operations that the people's representatives in Congress had authorized.

When President Clinton threatened to invade Haiti, 10 prominent legal scholars sent him a letter to remind him of the constitutional boundaries of his office:

The President may not order the United States Armed Forces to make war without first meaningfully consulting with Congress and receiving its affirmative authorization. . . . In our view, those principles, as well as your oath of office, require you to follow President Bush's example in the Persian Gulf War: to seek and obtain Congress's express prior approval before launching a military invasion of Haiti. [\[115\]](#)

President Clinton ignored that letter and came perilously close to commanding U.S. forces to attack the Haitian military. [\[116\]](#)

Haiti was not an isolated incident. The Clinton administration has repeatedly demonstrated its willingness to use military force without congressional authorization. In September 1996, for example, President Clinton ordered a cruise missile attack on Iraq. [\[117\]](#) The president characterized that attack as a "retaliatory strike" because Iraqi forces were engaged in murderous activity in an "exclusion zone" that President Bush had created, on his own authority, in 1991. (Recall that Congress only authorized U.S. military forces to expel the Iraqi military from Kuwait; President Bush created exclusion zones on Iraqi territory for the Kurdish people after the successful conclusion of Operation Desert Storm.)

President Clinton's rationale for his Iraqi missile attack is extremely distressing because it perfectly illustrates the dangerous propensities that the Founders apprehended at the Constitutional Convention. The Framers wanted the legislative branch to have the war power because of the ambitious tendencies of the executive branch. As James Madison noted, "The executive is the branch of power most interested in war, and most prone to it." [\[118\]](#) James Wilson, though an advocate of a strong presidency, approvingly observed that the new constitutional system "will not hurry us into war" since the war-making power "will not be vested in the power of a single man." [\[119\]](#)

Today, the United States military is obviously involved in an open-ended "police action" in the Middle East--and the fateful decision to engage in full-scale war rests with a single person in the American government: Bill Clinton. That is precisely the type of situation that the Constitution was designed to prevent.

Equal Protection of the Law

Most Americans support the propositions that "all persons are created equal" and that individuals ought to be judged according to "the content of their character, not the color of their skin." [\[120\]](#) And those propositions are now a fixture in American law. The equal protection clause of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." While it is an unfortunate part of our history that that provision lay dormant for many decades, Congress did pass the Civil Rights Act of 1964, which brought the promise of equal rights under the law to fruition by giving any victim of state-sponsored discrimination an effective remedy in the federal court system. [\[121\]](#)

Although President Clinton has always campaigned as a moderate Democrat and has expressed opposition to racial quotas and reverse discrimination, his conduct in office tells a different story. The Clinton White House has supported racial preferences in a variety of contexts, including government hiring, contracting, and university admissions.

In September 1994, for example, the Clinton administration raised eyebrows around the country when it switched sides in a discrimination lawsuit that was pending before the Third Circuit Court of Appeals, *Piscataway Township Board of Education v. Taxman*. [\[122\]](#) Sharon Taxman sued the Piscataway Board of Education for illegal discrimination in 1989 when she was fired for the sake of "racial diversity." Taxman had been teaching a business education course at the Piscataway high school for nine years. Because of declining enrollment, the board was forced to eliminate a teaching position. Under union rules, seniority was to be the primary factor in determining who would stay and who would have to go. The board acknowledged that Taxman and a black colleague "were tied in seniority and all other respects." [\[123\]](#) Although similar situations had been previously resolved by drawing lots, the school board decided to retain the black teacher in order to maintain diversity within the business department.

The Bush administration filed legal briefs in the case, agreeing with Taxman that the action by the Piscataway Board of Education was prohibited by federal civil rights laws. The Clinton administration, however, reversed the position of the U.S. government in federal appellate court. Clinton's legal team defended the school authorities, arguing that a broad ban on race-conscious policies would have a "harmful effect upon the ability of employers to voluntarily adopt and implement affirmative action policies." [\[124\]](#)

The Clinton Justice Department also defends racial preferences in government contracting. In 1989 a Colorado-based highway construction company named Adarand Constructors Inc. submitted a bid on a Department of Transportation construction project. Although Adarand submitted the lowest bid of all the competing construction companies, the contract was awarded to a minority-controlled company. The prime contractor admitted that it would have accepted

Adarand's bid had it not been for monetary incentives in federal law that encourage the hiring of businesses controlled by "socially and economically disadvantaged individuals," which were *legally* presumed to be "black Americans, Hispanic Americans, and other minorities." [\[125\]](#) Adarand sued the Department of Transportation for its racially based contracting practices. The *Adarand* case ultimately reached the Supreme Court. President Clinton's legal team defended the government's contracting procedures and said Adarand's constitutional right to equal protection of the law had not been violated. [\[126\]](#)

The Clinton administration believes racial preferences in university admissions are appropriate as well. In March 1996 the Fifth Circuit Court of Appeals struck down the admissions policy of the University of Texas Law School. That policy had been challenged by four white students who were denied admission because of their race. The University of Texas conceded in court papers that its admissions policy was designed to meet an "aspiration" of admitting a class of 10 percent Mexican Americans and 5 percent blacks. The university also conceded that the white students had better academic credentials than some of the minority students who had gained admission but defended the double standard as necessary to attain a desirable racial composition of the student body.

The Fifth Circuit decision jarred the academic world. Many colleges and universities were under the impression that the law permitted racial preferences if the purpose was to enhance diversity. The court, however, unanimously rejected that justification for racial discrimination:

The use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility. [\[127\]](#)

President Clinton's legal team strongly disagreed with the *Hopwood* ruling--and it urged the Supreme Court to reverse the appellate court decision so that colleges and universities could continue to take race into account in admissions decisions. The Supreme Court apparently did not share the alarm expressed by the Justice Department as it declined the government's strenuous plea that it review the case.

The most disturbing aspect of the Clinton civil rights record, however, is the lengths to which the president (and his lawyers) will go to stop policies with which he disagrees. In the *Hopwood* case, the president's legal team struck a "states' rights" posture, expressing alarm at the prospect of federal judges' "second-guessing the wisdom" of policies adopted by state governmental organs (such as a state university law school). [\[128\]](#) But when California citizens voted to forbid state-sponsored racial preferences in public schools, public employment, and public contracting, the president's legal team rushed into court to ask a federal judge to second-guess the wisdom of *that* policy. [\[129\]](#)

The Clinton administration's attack on the California Civil Rights Initiative drew derision from *Legal Times* columnist Stuart Taylor, among others. Taylor opposed the CCRI but was taken aback by the claim that the initiative was a violation of the Constitution. [\[130\]](#) He began his cogent legal analysis by juxtaposing the equal protection clause and the CCRI.

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

--U.S. Constitution, Amendment XIV

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin. . . .

--California Civil Rights Initiative

Taylor proceeded to identify the legal issue before the courts and to assess the persuasiveness of the constitutional argument against the CCRI.

The question presented is whether the second of these two laws violates the first. The question should

answer itself, even for those who think the CCRI is bad policy. The notion that a state violates the 14th Amendment's prohibition of almost all racial discrimination when it prohibits all racial discrimination is absurd on its face. [\[131\]](#)

The Justice Department's legal challenge to the CCRI will in all likelihood fail. The point here, however, is simply to show the president's willingness to use all of the powers (and arguments) at his disposal to perpetuate race-conscious policies in America. The Justice Department's lawsuit is forcing every state and locality to think twice about following California's lead--lest they be sued by the attorney general of the United States. By raising the specter of costly litigation, President Clinton clearly hopes to keep every state and locality in line with his personal belief in racial social engineering.

By his official actions as president, Bill Clinton has once again demonstrated a fundamental misunderstanding of what the Constitution is all about. The equal protection clause and the Civil Rights Act of 1964 were designed to protect individual persons, not certain racial or ethnic groups. And the whole point of those laws is to make race, religion, ethnicity, and gender *irrelevant* factors in governmental decisionmaking. [\[132\]](#) The racial policies of the Clinton administration, however, reflect a different philosophy. As former *New Republic* editor Andrew Sullivan has observed, "The President's heart . . . clearly belongs with those people who look at America and see groups rather than individuals and who see results rather than opportunities." [\[133\]](#) President Clinton has a right to his own opinion, of course, but until he can persuade the citizenry to change the fundamental law of the Constitution, it is his duty to enforce the norms that are embodied in the equal protection clause.

Constitutional Federalism

President Clinton is the first president in American history to deny that the Constitution limits the powers of the federal government. The Clinton White House has sought to federalize health care, crime fighting, environmental protection, and education. It has also tried to thwart any effort to downsize federal agencies and programs. Although the Washington press corps has dutifully scrutinized the fledgling efforts of the 104th Congress to breathe life into the Tenth Amendment of the Constitution, which affirms that the federal government has only limited powers, the president's efforts to expand federal power have received scant attention from a Tenth Amendment perspective. By his official conduct as president, Clinton has made it clear that he believes there is no area of human activity that is beyond the redistributive or regulatory reach of the federal government and that the state governments essentially operate at the sufferance of the national government. Such a view contravenes the text, history, and structure of our Constitution.

A Government of Limited Powers

The Constitution creates a federal government of limited powers. As James Madison noted in Federalist no. 45, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." [\[134\]](#) Most of the federal government's "delegated powers" are specifically set forth in article I, section 8 of the Constitution. The Tenth Amendment was appended to the Constitution to make it clear that the powers not delegated to the federal government "are reserved to the States respectively, or to the people."

Thomas Jefferson considered the Tenth Amendment "the foundation of the Constitution" because it preserved vast areas of life from national politics. Jefferson explained the American conception of federalism this way:

With respect to our State and federal governments, I do not think their relations correctly understood by foreigners. They generally suppose the former subordinate to the latter. But this is not the case. They are co-ordinate departments of one simple and integral whole. To the State governments are reserved all legislation and administration, in affairs which concern their own citizens only, and to the federal government is given whatever concerns foreigners, or the citizens of other States; these functions alone being made federal. The one is domestic, the other the foreign branch of the same government; neither having control over the other, but within its own department. There are one or two exceptions only to this

[\[135\]](#)

partition of power.

Despite that "correct understanding," however, Jefferson recognized that federal officials were subverting the original design by venturing outside their constitutional sphere. "I see . . . the rapid strides with which the federal branch of our government is advancing towards the usurpation of all the rights reserved to the States, and the consolidation in itself of all powers, foreign and domestic." [\[136\]](#) Jefferson did not view that development with indifference; he bitterly condemned it. Since Jefferson's day, American history has recorded dozens of battles in the political arena and the courts between those who would usurp undelegated powers and those who defend the Tenth Amendment and the doctrine of enumerated powers. [\[137\]](#)

Before proceeding to President Clinton's record in this area, it will be useful to make two points about the ongoing debate over constitutional federalism. First, this debate is not about the wisdom or desirability of imposing a federal solution on any particular social problem. The issue is one of constitutional legitimacy, plain and simple. [\[138\]](#) Second, the debate has always been over the scope of a particular delegated power, not over whether the federal government can exercise *undelegated* powers. No one--not even President Clinton--has dared to argue that federal laws can be passed simply to enhance the welfare of the American people. When the subject is constitutional federalism, the debate is always between those who contend that a federal program or law is within the scope of a delegated power and those who maintain that the government is invoking a delegated power as a pretext to usurp powers that were reserved to the states or the people under the Tenth Amendment. [\[139\]](#)

Clinton's Drive for Limitless Federal Power

President Clinton came to Washington claiming an affinity with Thomas Jefferson. In January 1993 Clinton symbolically retraced the journey Jefferson had made to the capital city in 1801 to assume office as the third president of the United States. [\[140\]](#) When the inaugural festivities were over, however, President Clinton proceeded to repudiate Jefferson's constitutional principles by trampling all over the Tenth Amendment.

The top priority of President Clinton's first term was, of course, the federalization of the health care system. If Clinton's plan had been enacted, the federal government would have taken over any state program that did not meet centrally planned goals. [\[141\]](#) The president fought hard for a comprehensive system that would have included every person in America. While almost everyone debated the merits of the Clinton plan on a policy level, David Rivkin, writing in the *Wall Street Journal*, raised a more fundamental question about the president's initiative: "Where, exactly, does the U.S. government get the power to require that every one of its citizens must participate in a government-sponsored health care plan?" [\[142\]](#) Although the question never arose because the Clinton plan was ultimately rejected by Congress, had the plan succeeded, the president's legal team would have been forced to identify one of the federal government's enumerated powers in constitutional litigation. It would become painfully clear later on, however, that Clinton believes that the federal government has "plenary powers." [\[143\]](#)

The Clinton administration removed any doubts about its stance in a landmark case before the Supreme Court, *United States v. Lopez* (1995). [\[144\]](#) A 12th-grade student in San Antonio, Texas, Alphonso Lopez, was discovered carrying a handgun at school. He was arrested under a Texas law prohibiting the possession of firearms on school premises, but federal agents soon took over the case, charging Lopez with violating the Gun-Free School Zones Act of 1990, and he was convicted in federal court. Lopez's attorney argued on appeal that Congress had exceeded its constitutional authority when it passed the school zone law. The Fifth Circuit Court of Appeals agreed with Lopez's attorney, and the conviction was overturned, whereupon Clinton's legal team appealed the Fifth Circuit's ruling to the Supreme Court, which agreed to hear the case.

Solicitor General Days argued that the Gun-Free School Zones Act could be justified under Congress's power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." [\[145\]](#) Days's argument went like this: possession of a gun in a school zone (a) might lead to violent crime, which (b) might threaten the learning process, which (c) might ultimately produce less productive citizens, which (d) might, cumulatively, impair the national economy and interstate commerce.

When Days appeared before the Court for oral argument, the justices pressed him on the implications of his constitutional theory:

QUESTION: General Days, just to understand what we're talking about, do I correctly understand your position to be, your rationale for this--

GENERAL DAYS: Yes.

QUESTION: --that all violent crime, if Congress so desired, could be placed under a Federal wing, could be placed in the Federal court for prosecution, all violent crime, or is there any stopping point? Is there any violent crime that doesn't affect interstate commerce on you[r] rationale?

GENERAL DAYS: Well, Your Honor, I think the answer is that it may be possible for Congress to do that under the commerce power. . . .

QUESTION: [So] there is no question that Congress has the power, in effect, to take over crime, because I--

GENERAL DAYS: I do not--

QUESTION: --presume there's no limitation on your rationale, or on Congress' rationale, that would preclude it from reaching any traditional criminal activity.

GENERAL DAYS: That's correct. [\[146\]](#)

As that exchange makes clear, the stakes in *Lopez* went well beyond the constitutionality of the Gun-Free School Zones Act. The Clinton Justice Department outlined a radically expansive theory of federal power. Solicitor General Days maintained that the federal government could not only fight all types of violent crime but could regulate any activity that might lead to violent crime. Days also argued that Congress's power to regulate commerce included the power to regulate activities related to the "productivity" of individual citizens.

The Supreme Court recoiled from the Clinton administration's position. "If we were to accept [Days's] arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate." [\[147\]](#) Justice Clarence Thomas observed that under Days's theory, the Court would essentially have to turn "the Tenth Amendment on its head" to read that all power that was not expressly *prohibited* by the Constitution was reserved to the federal government. [\[148\]](#)

President Clinton was outraged by the Supreme Court's decision. He ordered Attorney General Reno to find a way to circumvent the *Lopez* ruling. [\[149\]](#) Within weeks a nearly identical law with a thin constitutional veneer was sent to Congress for legislative action. Several months later President Clinton demanded that his school zone bill be included in a year-end appropriations measure. In a stunning act of defiance, Clinton signed the Gun-Free School Zones Act into law again on September 30, 1996. [\[150\]](#) In all likelihood, the Supreme Court will strike the law down again. The point here, once again, is simply to show how committed President Clinton is to his expansive vision of federal power.

The president continues to push his broad reading of the commerce power. That power, he would have us believe, gives the federal government carte blanche to do whatever it wants. Thus, in December 1996, in constitutional litigation before the Supreme Court, Acting Solicitor General Walter Dellinger maintained that the federal government could commandeer state government resources (including employees) to pursue federal objectives. At oral argument, Justice Antonin Scalia observed that under the Clinton administration's theory, the states could be forced "to dance like marionettes on the fingers of the Federal Government." [\[151\]](#)

President Clinton has also backed "anti-terrorism" proposals that would have federalized all violent offenses in America. [\[152\]](#) Although those provisions did not pass Congress, the president has indicated his willingness to

federalize anything that Congress does approve. Clinton has, for example, signed bills that would make it a federal crime to engage in church arson, wife beating, stalking, and female genital cutting. [\[153\]](#) All of that and more is rationalized under Congress's delegated power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Here are a few examples of what the executive branch is pushing in federal court:

- Federal investigators asserted jurisdiction over the arson of the Mt. Zion A.M.E. Church in South Carolina. Because the church received electrical power through a power grid, which is, in turn, attached to an interstate power grid, agents maintain that federal jurisdiction was triggered under the commerce clause. [\[154\]](#)
- The Justice Department maintains that federal jurisdiction can be asserted over a Connecticut man who allegedly beat his wife and destroyed some of her personal possessions. Because violence against women affects job performance, which in turn affects the national economy, which in turn affects interstate commerce, federal jurisdiction was triggered under the commerce clause. [\[155\]](#)
- The U.S. Attorney's Office in Sacramento asserted jurisdiction over a woman who was accused of hiring someone to burn her house down so that she could file a fraudulent insurance claim. Prosecutors maintained that because the woman's home received natural gas from a company that had received a portion of its gas from out-of-state sources, federal jurisdiction was triggered under the commerce clause. [\[156\]](#)
- The Justice Department asserted jurisdiction over a parcel of private property near San Francisco because the occasional rainwater ponds on that property could serve as a potential habitat for migratory birds that fly across state lines. And since migratory birds are "important" articles of interstate and foreign commerce, federal jurisdiction was triggered under the commerce clause. [\[157\]](#)
- The U.S. Attorney's Office in New York asserted jurisdiction over a man accused of plotting a murder over his beeper paging system. Although all of the relevant phone calls were sent from and received in New York, prosecutors maintain that because the beeper emitted signals interstate each time it was used, federal jurisdiction was triggered under the commerce clause. [\[158\]](#)

The constitutional claims in the above cases pose a very stark question: are President Clinton's lawyers defending the Constitution, or are they using the commerce clause as a pretext to pursue objectives that are not entrusted to the federal government by the Constitution? The answer to that question is sadly obvious.

Thomas Jefferson had nothing but contempt for constitutional subterfuge. He decried the arguments of the federal aggrandizers in 1800: "Congress are authorized to defend the nation. Ships are necessary for defense; copper is necessary for ships; mines necessary for copper; a company necessary to work the mines; and who can doubt this reasoning who has ever played at 'This is the house that Jack built'?" [\[159\]](#) Jefferson and many others recognized that the Tenth Amendment was added to the Constitution to protect the states and the people against "constructive" powers: "Our peculiar security is in [our] possession of a written Constitution. Let us not make it a blank paper by construction." [\[160\]](#)

President Clinton has exhibited utter disdain for the Tenth Amendment, for the doctrine of enumerated powers, and for state policies with which he personally disagrees. His repeated attempts to consolidate all power in the federal domain are indefensible.

Conclusion

As his first term of office drew to a close, Bill Clinton proclaimed, "One of my highest goals as President has been . . . to protect and uphold the Constitution." [\[161\]](#) In light of the evidence set forth in this study, it seems obvious that that statement was simply a platitudinous throwaway line that was completely devoid of substance.

Supporters of the Clinton White House can point with pride to a handful of presidential actions in defense of constitutional rights--such as the signing of the Religious Freedom Restoration Act and the Justice Department's lawsuit against the Virginia Military Institute on behalf of gender equality [\[162\]](#)--but those acts were exceptions to the rule. Indeed, some constitutionalists and civil liberties attorneys might very well claim that this study does not go far enough in its criticisms of the Clinton record. [\[163\]](#) Although this study is not an exhaustive account of every

presidential action over the last four years, it does present overwhelming evidence that Clinton has been derelict in his duty to "protect and preserve" our Constitution. If constitutional report cards were handed out to presidents, Bill Clinton would certainly receive an F--an appalling grade for any president--let alone a former professor of constitutional law.

Perhaps Clinton will resolve to be more conscientious about his constitutional responsibilities in his second term. One can only hope that he will. But should his dereliction of duty continue, Congress and the Supreme Court should stand fast against any constitutional transgression.

All three branches of government--executive, legislative, and judicial--should strive to be more conscientious about meeting the responsibilities that have been assigned to them under the Constitution. Constitutional violations are frequently temporary, isolated events. The most serious constitutional violations occur when *all three* branches conspire to expand the bounds of government power. When that happens, it becomes very difficult to right the wrong. Precedents are extremely important. That is why any constitutional transgression by any branch is alarming.

The American people should jealously guard their liberty and hold all government officials accountable when they neglect or disregard the Constitution. Its Framers were keenly aware that the ultimate source of the Constitution's authority is the consent of the people. If the American electorate demands adherence to the Bill of Rights and the other provisions of our Constitution, government officials will respect the constitutional limitations on their power. But, as Judge Learned Hand warned many years ago, "Liberty lies in the hearts of men and women; [if] it dies there, no constitution, no law, no court can save it." [\[164\]](#)

Notes

[1]. See Gary Lawson and Christopher D. Moore, "The Executive Power of Constitutional Interpretation," *Iowa Law Review* 81 (1996): 1267-1330. See also Edwin J. Meese, "The Law of the Constitution," *Tulane Law Review* 61 (1987): 979-90; and Sanford Levinson, "Could Meese Be Right This Time?" *Tulane Law Review* 61 (1987): 1071-78.

[2]. *Graves v. O'Keefe*, 306 U.S. 466, 491-92 (1938). See also Stephen Carter, "The Courts Are Not the Constitution," *Wall Street Journal*, February 7, 1989, p. A24.

[3]. Thomas Jefferson, Letter to William C. Jarvis, September 28, 1820, excerpted in Gerald Gunther, *Constitutional Law*, 12th ed. (Westbury, N.Y.: Foundation Press, 1991), p. 22.

[4]. Frank H. Easterbrook, "Presidential Review," *Case Western Reserve Law Review* 40 (1990): 918. See also John O. McGinnis, "Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon," *Cardozo Law Review* 15 (1993): 375-436; and David P. Currie, "The Constitution in Congress: Substantive Issues in the First Congress," *University of Chicago Law Review* 61 (1994): 775-865.

[5]. Constitution of the United States, article II, § 1, ¶ 8.

[6]. Joseph Story, *Commentaries on the Constitution of the United States* (1833; Durham, N.C.: Carolina Academic Press, 1987), § 969, p. 688.

[7]. John Randolph Tucker, *The Constitution of the United States: A Critical Discussion of Its Genesis, Development, and Interpretation* (Chicago: Callaghan, 1899), vol. 2, p. 715.

[8]. Grover Cleveland, First inaugural address, March 4, 1885, in *The Inaugural Addresses of the Presidents*, ed. John Gabriel Hunt (New York: Gramercy Books, 1995), p. 245.

[9]. *Turner Broadcasting, Inc. v. FCC*, 114 S. Ct. 2445, 2458 (1994).

[10]. John E. Nowak, Ronald D. Rotunda, and J. Nelson Young, *Constitutional Law*, 3d ed. (St. Paul: West, 1986), p.

830. For a fuller discussion of the history and purpose of the free speech clause, see William Van Alstyne, "A Graphic Review of the Free Speech Clause," *California Law Review* 70 (1982): 107-50.

[11]. *Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

[12]. See "U.S. Considers Suing 3 Who Fought a Project for the Homeless," *New York Times*, July 31, 1994, p. 18; and Guy Gugliotta, "ACLU Alleges Free Speech Violations in HUD Probes," *Washington Post*, August 17, 1994, p. A20.

[13]. Quoted in Nat Hentoff, "Watch What You Say," *Washington Post*, February 4, 1996. See also Heather MacDonald, "HUD Continues Its Assault on Free Speech," *Wall Street Journal*, September 14, 1994, p. A19.

[14]. See Brief for the United States, *Madsen v. Women's Health Center*, 114 S. Ct. 2516 (1994).

[15]. *Ibid.* at 29.

[16]. *Madsen* at 2528-29.

[17]. *Ibid.* at 2535 (Scalia, J., dissenting).

[18]. Robyn Blumner, "Abortion Battles Limit Rights for All," *St. Petersburg Times*, October 29, 1995, p. 7D. See also Robyn Blumner, "Anti-Abortion Protestors Treated Unfairly," *St. Petersburg Times*, April 14, 1996, p. 5D.

[19]. See Toni Locy, "Priest Sues Military over Speech Issue," *Washington Post*, September 24, 1996.

[20]. Quoted in Doug Bandow, "Military Yardstick of Religious Freedom?" *Washington Times*, August 14, 1996. In *Rankin v. McPherson*, 483 U.S. 378, 384 (1987), the Supreme Court stated, "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech."

[21]. See "Doctors Given Federal Threat on Marijuana," *New York Times*, December 31, 1996, p. A1; and "A Doctor Is Questioned over Marijuana Law," *New York Times*, February 17, 1997. For some background information on the politicization of medicinal marijuana, see Doug Bandow, "Sometimes Marijuana Is the Best Medicine," *Wall Street Journal*, January 28, 1993, p. A15.

[22]. See Todd S. Purdum, "Clinton Takes on Violence on TV," *New York Times*, July 11, 1995, p. A1. See also Robert Corn-Revere, "'V' Is Not for Voluntary," [Cato Institute Briefing Paper no. 24](#), August 3, 1995.

[23]. See Ellen Edwards, "Reno: Curb TV Violence: Regulation Not Unconstitutional, Panel Told," *Washington Post*, October 21, 1993, p. A1. See also "Janet Reno's Heavy Hand," editorial, *New York Times*, October 22, 1993.

[24]. Floyd Abrams, "Save Free Speech," *New York Times*, November 23, 1993. See also Lawrence J. Siskind, "The Folly and Futility of Censoring Violence," *Legal Times*, November 22, 1993, p. 28.

[25]. See Lawrie Mifflin, "It's Now Law: 3 Hours of Children's TV," *New York Times*, August 9, 1996. See also Robert Corn-Revere, "Regulation in Newspeak: The FCC's Children's Television Rules," [Cato Institute Policy Analysis no. 268](#), February 19, 1997.

[26]. Quoted in "FCC Rules Overprotective, Judge Says," *Chicago Tribune*, October 20, 1994.

[27]. See *Action for Children's Television v. FCC*, 58 F.3d 654 (1995).

[28]. See Solveig Bernstein, "Beyond the Communications Decency Act: Constitutional Lessons of the Internet," [Cato Institute Policy Analysis no. 262](#), November 4, 1996.

[29]. Harvey Silvergate, "Cyber Speech at Risk," *National Law Journal*, March 4, 1996, p. A19.

[30]. *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 881 (1996) (opinion of Dalzell, J.).

[31]. Bernstein, p. 3.

[32]. *American Civil Liberties Union v. Reno* at 855 (internal quotation marks omitted).

[33]. *Ibid.* at 882 (opinion of Dalzell, J.).

[34]. See Linda Greenhouse, "Statute on Internet Draws High Court's Review," *New York Times*, December 7, 1996, p. A1. See also Brief for the United States, *Reno v. American Civil Liberties Union*, Case no. 96-511, January 21, 1997.

[35]. See *American Civil Liberties Union v. Reno* at 857.

[36]. See *United States v. Dotterweich*, 320 U.S. 277, 292-93 (1943) (Murphy, J., dissenting).

[37]. Although the Supreme Court itself adhered to such a view for many years, more and more justices have recognized that speech does not lose its First Amendment protection just because it concerns commercial matters or promotes commercial interests, as in a paid advertisement. The best scholarly work on commercial speech is by Federal Appellate Judge Alex Kozinski and attorney Stuart Banner. See Alex Kozinski and Stuart Banner, "Who's Afraid of Commercial Speech?" *Virginia Law Review* 76 (1990): 627-53; and Alex Kozinski and Stuart Banner, "The Anti-History and Pre-History of Commercial Speech," *Texas Law Review* 71 (1993):747-75.

[38]. See Todd S. Purdum, [Purdum], "Clinton Urges Sweeping Plan to Curb Teen-Age Smoking," *New York Times*, August 11, 1995, p. A1; and John Schwartz and John F. Harris, "Clinton to Sign Plan to Curb Teen Smoking: Order Would Grant Broad Powers to FDA," *Washington Post*, August 22, 1996, p. A1. For a strong constitutional defense of tobacco advertising, see Robert Peck, "Is Cigarette Advertising Protected by the First Amendment? Yes," *Priorities*, Summer 1993, p. 24.

[39]. Brief for the United States at 30, *Rubin v. Coors Brewing Company*, 115 S. Ct. 1585 (1995).

[40]. *Rubin* at 1597 (Stevens, J., concurring).

[41]. *44 Liquormart v. Rhode Island*, 116 S. Ct. 1495, 1515-16 (1996) (Thomas, J., concurring).

[42]. Brief for the United States at 17, *Rubin*. For an excellent article on why both liberals and conservatives should resist that argument, see David M. Burke, "The 'Pre-sumption of Constitutionality' Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty," *Harvard Journal of Law and Public Policy* 18 (1994): 73-173.

[43]. Quoted in Ruth Marcus and Joan Biskupic, "Justice White to Retire after 31 Years," *Washington Post*, March 20, 1993, p. A1. See also Bill Clinton, "Judicial Excellence Safeguards All," *National Law Journal*, November 4, 1996, p. A19 (describing his constitutional philosophy).

[44]. William Crosskey, "The True Meaning of the Constitutional Prohibition of Ex Post Facto Laws," *University of Chicago Law Review* 14 (1946): 539. See also Steve Selinger, "The Case against Civil Ex Post Facto Laws," [Cato Journal 15, nos. 2-3](#) (Fall-Winter 1995-96): 191-213.

[45]. *This Week with David Brinkley*, August 8, 1993, Program no. 615, transcript, p. 6.

[46]. Brief for the United States at 18n. 15, *United States v. Carlton*, 116 S. Ct. 2018 (1994).

[47]. *Ibid.* at 20 (internal quotation marks omitted) (approvingly quoting *Cohan v. Commissioner*, 39 F.2d 540, 545(1930)).

[48]. *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819).

[49]. The Clinton administration may take solace from the fact that the courts have long viewed the ex post facto

clause as applying solely to criminal statutes. There are at least three responses to that observation. First, that fact cannot absolve the president from responsibility for his pernicious proposal. If other presidents have managed to avoid signing retroactive tax increases--and they have--President Clinton could have done so as well. Second, any American taxpayer who refused to pay the Clinton tax would have been exposed to criminal penalties. It is therefore difficult to see how even the narrow judicial reading of the ex post facto clause would not be applicable. Third, there is much evidence that the early Court rulings on the ex post facto clause were incorrect and that that clause actually prohibits criminal and civil laws. See Crosskey; and Selinger. If Clinton's legal team was anxious to protect the civil liberties of the American people, they would have sought out that easily obtainable information and urged the Court to reverse its earlier misguided holdings.

[50]. *McDonald v. United States*, 335 U.S. 451, 455-56 (1948). For a fuller discussion of the Fourth Amendment's warrant clause, see Tracey Maclin, "The Central Meaning of the Fourth Amendment," *William and Mary Law Review* 35 (1993): 197-249; and Phyllis T. Bookspan, "Reworking the Warrant Requirement: Resuscitating the Fourth Amendment," *Vanderbilt Law Review* 44 (1991): 473-530.

[51]. Quoted in R. Jeffrey Smith, "Administration Backing No-Warrant Spy Searches," *Washington Post*, July 15, 1994, p. A19.

[52]. See Kate Martin, Testimony on behalf of the American Civil Liberties Union on Warrantless National Security Physical Searches before the House Permanent Select Committee on Intelligence, July 14, 1994, p. 17.

[53]. See Richard Gid Powers, *Secrecy and Power* (New York: Free Press, 1987), pp. 439-85.

[54]. See Benjamin Wittes, "Aldrich Ames' Legal Legacy: Surveillance Court Gets New Powers," *Legal Times*, November 7, 1994, p. 1.

[55]. See *Pratt v. Chicago Public Housing Authority*, 848 F. Supp. 792 (1994).

[56]. *Ibid.* at 797.

[57]. See Guy Gugliotta, "Clinton Lets Police Raid Projects," *Washington Post*, April 17, 1994, p. A1; and Kevin G. Salwen, "White House Allows Searches without Warrants in Public Housing," *Wall Street Journal*, April 18, 1994.

[58]. See, for example, Clarence Page, "For CHA Residents, a Fight to Keep Their Constitutional Rights," *Chicago Tribune*, April 13, 1994, p. 21; and Cal Thomas, "The Danger in Clinton's Desire to Waive Our Inalienable Rights," *Orlando Sentinel*, April 28, 1994, p. A17.

[59]. See "Gun Sweeps: No Model for Cities," editorial, *New York Times*, April 20, 1994, p. A18.

[60]. Charles Ogletree and Abbe Smith, "Clinton's Plan Is Misguided," *New York Times*, May 7, 1994, p. 23.

[61]. See Brief for the United States, *Veronica School District v. Acton*, 115 S. Ct. 2386 (1995).

[62]. *Ibid.* at 17.

[63]. See *Veronica School District* at 2404 (O'Connor, J., dissenting).

[64]. See Robyn Blumner, "Clinton Showing Disdain for Civil Liberties," *St. Petersburg Times*, June 9, 1996, p. 4D.

[65]. See *Katz v. United States*, 389 U.S. 347 (1967).

[66]. See John F. Harris and John E. Yang, "Anti-Terror Bills Pushed by Clinton," *Washington Post*, July 30, 1996, p. A1.

[67]. ACLU official Laura Murphy quoted in Marcia Coyle, "Clinton, Dole Rate Low on Civil Liberties," *National Law Journal*, October 28, 1996, p. A1. See also Nadine Strossen, "No Safer, But a Little Less Free," *Washington Post*,

September 2, 1996.

[68]. See Jim McGee, "Wiretapping Rises Sharply under Clin-ton," *Washington Post*, July 7, 1996, p. A1.

[69]. Katz at 359.

[70]. See Sabra Chartrand, "Clinton Gets a Wiretapping Bill That Covers New Technologies," *New York Times*, October 9, 1994, p. 27. For a good critique of that measure, see Barry Steinhardt, "New Legislation Authorizes Wholesale Invasion of Privacy," *St. Louis Post-Dispatch*, November 5, 1996, p. 11B.

[71]. Quoted in McGee. See also John Markoff, "F.B.I. Wants Advanced System to Vastly Increase Wiretapping," *New York Times*, November 2, 1996, p. A1.

[72]. See "The Ominous Powers of Federal Law Enforcement," [Cato Handbook for Congress](#) (Washington: Cato Institute, 1997), pp. 235-43.

[73]. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). For a fuller discussion of takings, see Roger Pilon, "Property Rights, Takings, and a Free Society," *Harvard Journal of Law and Public Policy* 6 (1983):165-195.

[74]. See H. Jane Lehman, "Private Property Rights Proponents Gain Ground," *Washington Post*, September 17, 1994, p. E1; and Marianne Lavelle, "The 'Property Rights' Revolt," *National Law Journal*, May 10, 1993, p. 1. See also Jonathan H. Adler, "The Takings Cause," *National Review*, December 19, 1994, pp. 32-36.

[75]. See Kenneth R. Harney, "Senate Bill Would Give Property Owners New Weapons in Battle with Regulators," *Washington Post*, May 13, 1995, p. E1.

[76]. Quoted in "President Vows Veto of Bill to Reimburse Property Owners," *New York Times*, April 23, 1995, p. 24.

[77]. See *Maryland v. Craig*, 497 U.S. 836, 870 (1990) (Scalia, J., dissenting). It must also be recognized that the cost of the property rights bill is a function of the federal government's regulatory activity. If the government simply abated genuine nuisances that threatened the rights of others, the "toll" on the U.S. Treasury would be nothing. See Roger Pilon, "Are Property Rights Opposed to Environmental Protection?" in *The Moral High Ground: An Anthology of Speeches*, ed. Carol W. LaGrasse, Speeches from the First Annual New York State Conference on Private Property Rights, October 14, 1995, Property Rights Foundation of America, Inc., p. 18.

[78]. See Paul M. Barrett, "A Store Owner's Squabble with a City Tests Government's Right to Private Land," *Wall Street Journal*, March 23, 1994, p. B1. See also George F. Will, "Extortionist City Government," *Washington Post*, March 20, 1994, p. C7; and Steven J. Eagle, "Private Property Rights vs. Public Works," *Wall Street Journal*, March 2, 1994, p. A11.

[79]. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

[80]. See Brief for the United States at 25, *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994).

[81]. Dolan at 2320. See also Richard A. Epstein, "The Permit Power Meets the Constitution," *Iowa Law Review* 81 (1995): 407-22; and Timothy Lynch, "Property Rights and 'Rough Proportionality,'" [Regulation](#), no. 3 (1994): 16-18.

[82]. *Bartkus v. Illinois*, 359 U.S. 121, 151-55 (1959) (Black, J., dissenting) (citations omitted).

[83]. *Ibid.*

[84]. See Daniel A. Braun, "Praying to False Sovereigns: The Rule of Successive Prosecutions in the Age of Cooperative Federalism," *American Journal of Criminal Law* 20 (1992): 4, 5n. 15.

[85]. See Philipp M. Gollner, "2d Trial of Officers Stirs Talk Of Jeopardy," *New York Times*, February 19, 1993.

[86]. The federal prosecution was rightly condemned by a broad range of commentators. See William F. Buckley, "The Los Angeles Trial, in a Word, Stinks," *Houston Chronicle*, April 14, 1993, p. 10C; Alan Dershowitz, "Double Jeopardy for L.A. Cops," *San Francisco Examiner*, May 10, 1992; Charlotte Allen, "The King Cops and Double Jeopardy," *Wall Street Journal*, May 20, 1992, p. A17; and Doug Bandow, "The Risks of a Second King Trial," *Chicago Tribune*, June 23, 1992.

[87]. *This Week with David Brinkley*, April 18, 1993, Program no. 599, transcript, p. 4.

[88]. See Jan Hoffman, "A Rarely Used Law from the Civil Rights Era," *New York Times*, January 26, 1994.

[89]. See Joseph P. Fried, "A New Crown Hts. Trial Revisits Brooklyn Night of Murder in '91," *New York Times*, January 17, 1997, p. A1.

[90]. See, for example, *United States v. Robinson*, 42 F.3d 433 (1994); and *United States v. Alvarez*, 928 F. Supp. 734 (1996). Many other cases are under consideration. See, for example, Don Van Natta Jr., "Federal Charges Weighed in Fireman's Death," *New York Times*, July 4, 1996.

[91]. See Brief for the United States, *United States v. Ursery*, 116 S. Ct. 2135 (1996). See also Roger Pilon, "Forfeiting Reason," [Regulation](#), no. 3 (1996): 15-19.

[92]. Brief for the United States, *Ursery*. For another variation of this sort of one-two punch by prosecutors, see *United States v. 152 Char-Nor Manor Blvd., Chestertown, Md.*, 922 F. Supp. 1064 (1996).

[93]. James Madison, Federalist no. 46, in *The Federalist Papers* (New York: New American Library, 1961), p. 299.

[94]. William Van Alstyne, "The Second Amendment and the Personal Right to Arms," *Duke Law Journal* 43 (1994): 1241. See also Sanford Levinson, "The Embarrassing Second Amendment," *Yale Law Journal* 99 (1989): 637-59; Robert J. Cottrol and Raymond T. Diamond, "The Second Amendment: Toward an Afro-Americanist Reconsideration," *Georgetown Law Journal* 80 (1991): 309-61; Glenn Harlan Reynolds, "A Critical Guide to the Second Amendment," *Tennessee Law Review* 62 (1995): 461-512; and Akhil Amar, "The Bill of Rights as a Constitution," *Yale Law Journal* 100 (1990): 1131-1210. Liberals outside the academy have also questioned the conventional wisdom surrounding the Second Amendment. See, for example, Nat Hentoff, "A Second Look at the Second Amendment," *Washington Post*, March 9, 1996, p. A21; and Don B. Kates Jr., "Handgun Prohibition and the Original Meaning of the Second Amendment," *Michigan Law Review* 82 (1983): 204-73.

[95]. For a fuller discussion on the history of the Second Amendment, see Stephen P. Halbrook, "The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment," *Valparaiso Law Review* 26 (1991): 131-207; and Joyce Lee Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition," *Hastings Constitutional Law Quarterly* 10 (1983): 285-314.

[96]. Quoted in Thomas L. Friedman, "Clinton Signs Bill on Guns into Law," *New York Times*, December 1, 1993.

[97]. It is far from clear that the Brady law is working as its proponents advertised it would. A national survey of police chiefs found that 85 percent believed that the law had done next to nothing to prevent criminals from obtaining handguns in their jurisdictions. Criminals just use the local black market. See Clifford Krauss, "Much Ado, Little Done," *New York Times*, November 23, 1993, p. B9; and James Bovard, "Clinton's Gun Hoax," *Wall Street Journal*, September 17, 1996. Even more disturbing, however, is the life-threatening vulnerability that some honest and peaceful citizens must endure during the five-day waiting period. See, for example, Peter Alan Kasler, "A Victim of Gun Control," *New York Times*, July 13, 1991, § 1, p. 21.

[98]. Proponents of gun control openly admitted that that was their strategy. See Stephen Labaton, "Administration Floats Proposal for Licensing All Gun Owners," *New York Times*, December 10, 1993, p. A1. A similar dynamic was at work in the debate over the so-called assault weapons ban. As my colleague William Niskanen observed, "The ban is hotly contended, primarily because its supporters hope and its critics fear that it will serve as a precedent for a broader ban of semiautomatic rifles." William A. Niskanen, "Crime, Police, and Root Causes," [Cato Institute Policy](#)

[Analysis no. 218](#), November 14, 1994, p. 3. For a critical appraisal of President Clinton's proposal, see James Bovard, "The Assault on Assault Weapons," *Wall Street Journal*, January 6, 1994, p. A12; and Eric C. Morgan and David Kopel, "The Assault Weapons Panic," Independence Institute Issue Paper no. 10-93, Golden, Colorado, April 10, 1993.

[99]. See Labaton; and Ann Devroy and Pierre Thomas, "White House Group Studies Broadest Gun Control Plan in Decades," *Washington Post*, December 10, 1993, p. A11.

[100]. Attorney General Reno explained the administration's view at a Justice Department news conference: "I don't think somebody should have a gun unless they can demonstrate that they know how to safely and lawfully use it, that they're capable of safely and lawfully using it, and that they're willing to safely and lawfully use it." Quoted in Labaton. Former White House counsel Lloyd Cutler has called for restricting handgun licenses to "persons who can demonstrate a compelling need--such as police, security guards, and residents of remote unpoliced areas." Lloyd Cutler, "License and Restrict Handguns," *Washington Post*, December 21, 1993, p. A23. For a strong critique of handgun licensing schemes, see Jeff Snyder, "A License to Save Your Life?" *Washington Times*, January 20, 1994.

[101]. *United States v. Gaudin*, 115 S. Ct. 2310 (1995).

[102]. *Ibid.* at 2316. See also Richard Hansen, "A Ray of Hope at the End of a Bleak Term," *Champion*, January-February 1996, pp. 18-22.

[103]. *Lewis v. United States*, 116 S. Ct. 2163 (1996).

[104]. *Baldwin v. United States*, 399 U.S. 66, 74-75 (1970) (Black, J., dissenting). See also Timothy Lynch, "Rethinking the Petty Offense Doctrine," *Kansas Journal of Law and Public Policy* 4 (1994): 7-22; and George Kaye, "Petty Offenders Have No Peers!" *University of Chicago Law Review* 26 (1959): 245-77.

[105]. See Brief for the United States, *Lewis*.

[106]. *United States v. Watts*, 65 U.S.L.W. 3461 (per curiam) (U.S. January 7, 1997).

[107]. Elizabeth Lear, "Is Conviction Irrelevant?" *UCLA Law Review* 40 (1993): 1237.

[108]. Bill Clinton, quoted in Marcus and Biskupic. See also Bill Clinton, "Judiciary Suffers Racial, Sexual Lack of Balance," *National Law Journal*, November 2, 1992, p. 15.

[109]. James Madison, Federalist no. 47, in *The Federalist Papers*, p. 301.

[110]. Clinton, "Judiciary Suffers Racial, Sexual Lack of Balance," p. 15.

[111]. Alison Mitchell, "Clinton Pressing Judge to Relent," *New York Times*, March 22, 1996, p. A1.

[112]. Quoted in Don Van Natta Jr., "Judges Defend a Colleague from Attacks," *New York Times*, March 29, 1996, p. B1.

[113]. Quoted in *ibid.* See also Joan Biskupic, "A Declaration of Independence," *Washington Post*, April 10, 1996, p. A17.

[114]. This was so clear to Thomas Cooley that his well-respected treatise on the Constitution simply and plainly provides: "The power to declare war being confided to the legislature, [the president] has no power to originate it, but he may in advance of its declaration employ the army and navy to suppress insurrection or repel invasion." Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* (Boston: Little, Brown, 1898), p. 114. See also John Hart Ely, "Clinton, Congress and War," *New York Times*, October 23, 1993, p. 21; and Louis Fisher, "Clinton's Not King--War Is for Congress," *National Law Journal*, June 19, 1995, p. A21.

[115]. Quoted in Stuart Taylor, "A Betrayal of the Constitution," *Legal Times*, September 19, 1994, p. 25. For a fuller discussion of the war power under the U.S. Constitution, see Louis Fisher, *Presidential War Power* (Lawrence:

University Press of Kansas, 1995).

[116]. See Thomas Friedman, "Clinton Vows to Fight Congress on His Power to Use the Military," *New York Times*, October 19, 1993, p. A1.

[117]. See Steven Lee Myers, "U.S. Attacks Military Targets in Iraq," *New York Times*, September 3, 1996, p. A1.

[118]. Quoted in Taylor, "A Betrayal of the Constitution."

[119]. Wilson quotes are found in Doug Bandow, "Another Crisis of Presidential War-Making," *Los Angeles Times*, July 7, 1994; and Anthony Lewis, "Not in a Single Man," *New York Times*, September 12, 1994.

[120]. This sentence is, of course, paraphrasing the Declaration of Independence and Martin Luther King's famous "I Have a Dream" speech delivered at the Lincoln Memorial on August 23, 1963.

[121]. It should be noted, however, that the Civil Rights Act of 1964 is flawed in two important respects. First, it has a dubious constitutional grounding. Instead of relying on its power under section 5 of the Fourteenth Amendment, Congress passed the act under its power to regulate commerce "among the several states." See Gunther, pp. 148-49. Second, the act went beyond prohibiting state discrimination and sought to regulate the private conduct of individuals--thereby violating the right of freedom of association. See Roger Pilon, "Discrimination, Affirmative Action, and Freedom: Sorting Out the Issues," *American University Law Review* 45 (1996): 775-90.

[122]. *Piscataway Township Board of Education v. Taxman*, 91 F.3d 1547 (1996).

[123]. Quoted in Pierre Thomas, "Justice Dept. Changes Stance in Bias Suit," *Washington Post*, September 7, 1994.

[124]. Ibid. See also Nat Hentoff, "Fired for Being White," *Washington Post*, October 5, 1996.

[125]. See *Adarand Constructors Inc. v. Pena*, 115 S. Ct. 2097 (1995). See also Clint Bolick, "So Far, Clinton Can't Kick His Quota Addiction," *Wall Street Journal*, June 12, 1996, p. A17.

[126]. See Brief for the United States, *Adarand Constructors Inc. v. Pena*, 115 S. Ct. 2097 (1995).

[127]. *Hopwood v. Texas*, 78 F.3d 932, 945 (1996).

[128]. See Brief for the United States at 20, *Hopwood*, certiorari denied, 64 U.S.L.W. 3868 (U.S. July 1, 1996) (no. 95-1773). See also Joan Biskupic, "Admissions Appeal Stresses States' Rights," *Washington Post*, May 2, 1996, p. A5.

[129]. See Pierre Thomas and William Claiborne, "Administration to Join Fight on California Preferences Law," *Washington Post*, December 21, 1996, p. A3.

[130]. Stuart Taylor Jr., "Why the Courts Will Uphold 209," *Legal Times*, December 9, 1996, p. 21.

[131]. Ibid.

[132]. As the Supreme Court noted in *Washington v. Davis*, 426 U.S. 229, 239 (1976), "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." With respect to the Civil Rights Act of 1964, see *Johnson v. Transportation Agency*, 480 U.S. 616, 657-77 (1987) (opinion of Scalia, J.).

[133]. Andrew Sullivan, "Let Affirmative Action Die," *New York Times*, July 23, 1995. See also Glynn Custred, "Both Parties Lack Principles on Preferences," *Wall Street Journal*, December 2, 1996.

[134]. James Madison, Federalist no. 45, in *The Federalist Papers*, p. 292.

[135]. Thomas Jefferson, Letter to Major John Cartwright, June 5, 1824, in *Jefferson Writings* (New York: Library of

America, 1984), p. 1493. Professor Andrew Kull of Emory University writes, "The text of the Constitution (and everything we know about the circumstances in which it was composed and ratified) makes it clear that the federal government was to exercise its enumerated powers to the exclusion of all others." Andrew Kull, "The Stealth Revolution," *New Republic*, January 22, 1996, pp. 38-41.

[136]. Thomas Jefferson, Letter to William Branch Giles, December 26, 1825, in *Jefferson Writings*, p. 1509.

[137]. See Roger Pilon, "Freedom, Responsibility, and the Constitution: On Recovering Our Founding Principles," *Notre Dame Law Review* 68 (1993): 507-47; and Gary Lawson, "The Rise and Rise of the Administrative State," *Harvard Law Review* 107 (1994): 1231-54.

[138]. As the Supreme Court noted in *United States v. Butler*, 297 U.S. 1, 63 (1936), "The question is not what power the federal government ought to have but what powers in fact have been given by the people." See also the testimony of Cato senior fellow Roger Pilon before the House Subcommittee on Human Resources and Intergovernmental Relations, July 20, 1995, reprinted in Cato Policy Report, November-December 1995.

[139]. Chief Justice John Marshall made this clear in his landmark opinion in *McCulloch* at 405, 423:

This [federal] government is acknowledged by all to be one of enumerated powers. . . . That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. . . . Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the [federal] government; it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land.

Modern treatises on the Constitution continue to acknowledge that federal laws must be rooted in one of the delegated powers. "[The federal government] can only act to effectuate the powers specifically granted to it, rather than acting for the general welfare of the populace." Nowak, Rotunda, and Young, p. 111.

[140]. Sue Anne Pressley and Michele L. Norris, "Clinton Arrives on a Wave of Hope: From Monticello to the Mall, Journey to Washington Is Steeped in Symbolism," *Washington Post*, January 18, 1993, p. A1. See also Ann Devroy, "Jefferson Would Agree U.S. Needs 'Change,' Clinton Says," *Washington Post*, April 14, 1993, p. A6.

[141]. See Dana Priest, "Health Plan Seeks Broad New Powers: Government Could Take Over State Programs," *Washington Post*, September 11, 1993, p. A1.

[142]. David Rivkin Jr., "Health Care Reform v. the Founders," *Wall Street Journal*, September 29, 1993, p. A19.

[143]. In oral argument before the Supreme Court, Solicitor General Drew Days stated, "Congress was legislating for the entire Nation pursuant to its plenary powers under the Constitution." Proceedings before the Supreme Court of the United States, *United States v. Lopez*, Case no. 93-1260, Tuesday, November 8, 1994, official transcript, p. 4.

[144]. *United States v. Lopez*, 115 S. Ct. 1624 (1995). See also Glenn Harlan Reynolds, "Kids, Guns, and the Commerce Clause: Is the Court Ready for Constitutional Government?" [Cato Institute Policy Analysis no. 216](#), October 10, 1994.

[145]. Constitution of the United States, article I, § 8, clause 3. For a fuller discussion of this delegated power, see Richard A. Epstein, "The Proper Scope of the Commerce Power," *Virginia Law Review* 73 (1987): 1387-1455.

[146]. Proceedings before the Supreme Court of the United States, *United States v. Lopez*, Case no. 93-1260, Tuesday, November 8, 1994, official transcript, pp. 10-13. See also Jeff Jacoby, "Are There No Limits to Congressional Power?" *Boston Globe*, November 15, 1994; and Lyle Denniston, "Going Overboard for A Federal Law," *American Lawyer*, January-February, 1995, pp. 94-95, describing Solicitor General Days's "daring claim of power for Congress."

[147]. *Lopez* at 1632. For some good scholarly work on the significance of the *Lopez* ruling, see Richard A. Epstein,

"Constitutional Faith and the Commerce Clause," *Notre Dame Law Review* 71 (1996): 167-91; and Steven Calabresi, "A Government of Limited and Enumerated Powers': In Defense of *United States v. Lopez*," *Michigan Law Review* 94 (1995):752-831.

[148]. *Lopez* at 1645 (Thomas, J., concurring). See also "Remember the 10th Amendment?" editorial, *Washington Post*, November 19, 1994; and Roger Pilon, "It's Not about Guns," *Washington Post*, May 21, 1995.

[149]. See Todd S. Purdum, "Clinton Seeks Way of Avoiding Ruling on School Gun Ban," *New York Times*, April 30, 1995, p. A1; and "Bill Seeks to Revive Gun Ban," *New York Times*, May 7, 1995.

[150]. Public Law 104-208. See also U.S. Congress, *Making Omnibus Consolidated Appropriations for Fiscal Year 1997*, Conference Report 104-863 to accompany H.R. 3610, pp. 380-82.

[151]. Quoted in Linda Greenhouse, "Justices Weigh Rights of States in Gun Control," *New York Times*, December 4, 1996, p. A1. Dellinger made his argument in Brief for the United States, *Printz v. United States*, Case no. 1478, October 10, 1996.

[152]. The Omnibus Counterterrorism Act of 1995, H.R. 896, § 101(c), introduced February 10, 1995, by Rep. Charles Schumer (D-N.Y.), *Congressional Record* 141, no. 27 (1995), H1611. See also Kenneth J. Cooper, "Anti-Terrorism Bill Gets Hung Up: House GOP Conservatives Object to Expansion of Federal Powers," *Washington Post*, August 6, 1995, p. A4.

[153]. See, for example, Celia W. Dugger, "New Law Bans Genital Cutting in United States," *New York Times*, October 12, 1996, p. A1; and Helen Dewar, "Senate Sends Anti-Stalking Measure to President as Part of Defense Authorization," *Washington Post*, September 11, 1996, p. A4.

[154]. See affidavit of Bureau of Alcohol, Tobacco and Firearms agent Scott Etheridge in support of criminal complaint in *United States v. Gary Cox*, Case no. 2:96-267 (May 10, 1996). Obtained from the Office of Public Affairs, U.S. Department of Justice.

[155]. See Brief for the United States, *Doe v. Doe*, 929 F.Supp. 608 (1996) on appeal in the United States Court of Appeals for the Second Circuit. Although this case involved a private plaintiff who sought to avail herself of a civil rights remedy under the Violence Against Women Act of 1994, the Justice Department intervened in the lawsuit when it learned that the defendant was challenging the constitutional authority of Congress to pass such a law. The Department of Justice is seeking to reserve its option under the VAWA to prosecute crimes that are "motivated by the victim's gender." See also *Brzonkala v. Virginia Polytechnic and State University* 935 F. Supp. 779 (1996).

[156]. See *United States v. Pappadopoulos*, 64 F.3d 522 (1995).

[157]. See *Leslie Salt Co. v. United States*, 55 F.3d 1388 (1995) certiorari denied 64 U.S.L.W. 3313 (U.S. October 31, 1995) (no. 95-73). See also the opinion of Justice Clarence Thomas dissenting from the Supreme Court's denial of certiorari, *ibid.* at 3313-14.

[158]. See *United States v. Paredes*, 65 U.S.L.W. 2442 (January 14, 1997).

[159]. Quoted in Charles Warren, *The Supreme Court in United States History* (Boston: Little, Brown, 1922), vol. 1, p. 501.

[160]. Thomas Jefferson, Letter to Wilson Carey Nicholas, September 7, 1803, in *Jefferson Writings*, p. 1139.

[161]. Clinton, "Judicial Excellence Safeguards All," p. A19.

[162]. See Peter Steinfelds, "Clinton Signs Law Protecting Religious Practices," *New York Times*, November 17, 1993, p. A18; and Brief for the United States, *United States v. Virginia*, Case no. 94-1941, 64 U.S.L.W. 4638 (June 26, 1996). It should be noted that if VMI were a *private* institution, there would be no constitutional problem. See Pilon,

"Discrimination, Affirmative Action, and Freedom,"p. 775.

[163]. A number of writers have criticized President Clinton's civil liberties record. See, for example, John Heilemann, "Big Brother Bill," *Wired*, October 1996, p. 53; Nat Hentoff, "First in Damage to Constitutional Liberties," *Washington Post*, November 16, 1996, p. A25; Anthony Lewis, "Clinton's Sorriest Record," *New York Times*, October 14, 1996; Richard Cohen, "Civil Liberties: Campaign Casualty," *Washington Post*, July 11, 1996, p. A25; Jacob Weisberg, "Clinton Turns Yellow," *Slate*, November 1, 1996; and Robyn Blumner, "Clinton Showing Disdain for Civil Liberties," *St. Petersburg Times*, June 9, 1996, p. 4D.

[164]. Learned Hand, "The Spirit of Liberty," Speech delivered in New York, May 21, 1944, in *The Spirit of Liberty: Papers and Addresses of Learned Hand*, 2d ed., ed. Irving Dilliard (New York: Alfred A. Knopf, 1953), pp. 189-90